



Kennedy v. Bremerton School District
597 U.S. ____ (2022)

Executive Summary

On June 27, 2022, the United States Supreme Court issued a 6-3 decision in the case of *Kennedy v. Bremerton School District*, also known as the “coach’s prayer case.” The Court held in favor of the coach finding that the school district violated the coach’s First Amendment Free Exercise and Free Speech rights when it refused to allow him to say a brief, private prayer on the 50-yard line of the school’s football field immediately after a football game. In coming to this conclusion, the Court found that the Establishment Clause of the First Amendment did not provide a basis for the school to suppress the coach’s religious expression when the coach’s prayer was conducted during “a private moment after the game” when other coaches were allowed to call home, chat with attendees, etc.

Background and Facts

From the Majority Opinion:

Joseph Kennedy was a high school football coach who made it a practice to pray after each football game on the football field to give thanks through prayer. While he initially prayed alone, over time, some of the players asked if they could join him and eventually most of the team would join him. They did not join him every time he prayed, but they would from time to time. At some point, Kennedy began to include short motivational speeches with his prayers when others were present. At times, the team would also have pregame or postgame prayers in the locker room that apparently were a tradition from before Kennedy joined the coaching staff. According to Kennedy, he never pressured or encouraged any student to join him in prayer after a game. These prayers took place for over seven years, before the school district became aware of them when an employee from another school commented in favor of the practice to Bremerton’s principal.

Once the school district discovered the practice, Kennedy was given a letter from the superintendent instructing him to avoid any motivational talks with students that included religious references, including prayer. Further, any religious activities he chose

to take part in himself needed to be “nondemonstrative” in order to avoid looking like the school was endorsing the activity thereby violating the Establishment Clause.

After receiving the letter, Kennedy ended the tradition of having locker room prayers and stopped making religious references in his postgame motivational speeches. Kennedy informed school officials by a letter from his counsel that because of his “sincerely-held religious beliefs,” he would continue his postgame personal prayer of thanks on the playing field.

In response, the school district acknowledged that Kennedy had complied with the instructions of the earlier letter, but told him he was forbidden from engaging in any overt religious actions that would make a “reasonable observer” conclude that the school endorsed the action. After receiving this letter, Kennedy said a “brief prayer” after the next football game. No students from Bremerton joined the prayer, but the players from the opposing team and members of the community did participate.

After this game, the district sent Kennedy another letter admitting that none of the students from Bremerton had joined him in prayer and that his prayer had been “fleeting.” However, the district noted a “reasonable observer” could think that his actions were endorsed by the school because they occurred while he was still on duty as part of his employment. The district said Kennedy’s only option was to pray postgame in a location not observable to students or the public.

Kennedy continued to kneel on the playing field after games and pray. Shortly thereafter, Kennedy was put on paid administrative leave and he was not offered a contract for the next season.

From the Dissenting Opinion:

Kennedy was hired on a renewable annual contract with a job description that included duties such as being responsible for student player behavior on and off the field and supervising student activities immediately following the end of a game until the students were allowed to leave. In addition, the district set requirements for how Kennedy interacted with student players and with members of the community, noting he served as a role model and mentor for the former and was constantly being observed by the latter.

Importantly, coaches were required to adhere to the district’s policies and administrative regulations, which included the policy on “Religious-Related Activities and Practices.” That policy provided that “school staff shall neither encourage or [sic] discourage a student from engaging in non-disruptive oral or silent prayer” and that “religious services, programs, or assemblies shall not be conducted in school facilities during school hours or in connection with any school sponsored or school related activity.”

When the district found out about Kennedy's postgame prayer practice, it initiated an inquiry into whether its policy had been violated.

While the Majority Opinion's recitation of facts focused on Kennedy's behavior at three games following the letters sent to Kennedy by the school district, the Dissenting Opinion's recitation of the facts includes descriptions of 1) the prayer practice that led up to the inquiry; 2) the prayers that took place during the inquiry (where Kennedy led a prayer out loud, in front of the school's athletic director, while holding up a player's helmet with the players kneeled all around him); and 3) his actions following the letters that were sent to him (including making media appearances and announcing his plans to pray at the 50-yard line after the homecoming game). In addition, there was evidence that some parents reached out to the school district saying their children only participated in the postgame prayer to avoid being seen as separating themselves from the rest of the team.

Lower Court Rulings

Federal District Court

The District Court found that the "sole reason" the school district suspended Kennedy was its "perceived 'risk of constitutional liability'" under the Establishment Clause for Kennedy's "religious conduct" following the three games that took place after he received the letters from the district. The District Court further found that Kennedy's speech was not private speech but rather government speech since he was hired to play an influential role over the student players. The District Court said even if it was private speech, it was properly suppressed because it would have opened itself up to an Establishment Clause violation if the school district had allowed it. The District Court further concluded that even if the school district's policies were not neutral or generally applicable in restricting Kennedy's free exercise of religion, the school district had a compelling interest in prohibiting his postgame prayers to avoid an Establishment Clause violation.

Ninth Circuit Court of Appeals

The Ninth Circuit agreed with the District Court that Kennedy's speech was not private speech, finding that "his expression on the field—a location that he only had access to because of his employment—during a time when he was generally tasked with communicating with students, was speech as a government employee." The Ninth Circuit went on to say that even if Kennedy's speech was private speech, the school district was justified in its actions since Kennedy's religious actions on the field along with "his pugilistic efforts to generate publicity in order to gain approval of those on-field religious activities" would lead an "objective observer" to conclude that the school district was endorsing his religious activities. The Ninth Circuit further ruled that the

school district had a “compelling state interest to avoid violating the Establishment Clause” and its suspension was narrowly tailored to achieve that end.

Prior Supreme Court Precedent

Prior to the Supreme Court’s decision in *Kennedy*, the Court had set forth several tests for whether an Establishment Clause violation had occurred.

The *Lemon* Test

The oldest and most well-known test is the *Lemon* test which comes from the case of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In this case, the Court found that laws from Rhode Island and Pennsylvania violated the Establishment Clause by providing financial aid to sectarian schools. The *Lemon* test as applied to schools was a three-part analysis:

1. Does the school’s action have a secular purpose?
2. Does it have a principal effect that neither advances nor inhibits religion?
3. Does it foster an excessive government entanglement with religion?

The Endorsement Test

The endorsement test is an analysis of whether a school action amounts to an endorsement of religion. The endorsement test can be seen as a test involving the first two questions in the *Lemon* test—whether the school action has the purpose or effect of advancing or endorsing religion. In the case of *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989), the endorsement test was used to determine that several public religious displays in the City of Pittsburgh violated the Establishment Clause.

The Coercion Test

The coercion test requires a determination of whether a school action directly or indirectly coerces anyone to support or participate in religion or its exercise. In the case of *Lee v. Weisman*, 505 U.S. 577 (1992), the Court found that the Establishment Clause had been violated when a school invited a clergy member to give a graduation invocation. The Court determined that the school applied indirect coercion by requiring students to participate in the prayer as part of the graduation ceremony.

Supreme Court Decision in *Kennedy*

Kennedy's and Bremerton's Arguments

Coach Kennedy argued that the school district violated his First Amendment Free Exercise and Free Speech rights by prohibiting him from saying a brief, private prayer on the 50-yard line of the school football field immediately after a football game. The Bremerton School District argued that it would be violating the Establishment Clause of the First Amendment if it did not prohibit Kennedy's prayer from taking place in plain view of the public.

Supreme Court Analysis and Conclusion

The Supreme Court's majority first determined that Kennedy's Free Exercise rights had been infringed upon by the district pursuant to a policy that was not neutral (because it was specifically directed at religious practice) nor generally applicable (because it prohibits religious conduct while allowing secular conduct). The Court noted that Kennedy was prohibited from saying a brief, private prayer during the same time period when other coaches and school officials were allowed to tend to personal matters such as texting or making calls on their phones and mingling with attendees, thus, making the policy not "generally applicable."

Next, the Court concluded that Kennedy's Free Speech rights had been restricted. In coming to this conclusion, the Court first noted that when an employee speaks as a citizen on a matter of public concern, the First Amendment "may be implicated," which leads to an analysis of whether the employee's speech interests are outweighed by the interest of the government in controlling the speech. With respect to the speech itself, both parties had agreed that Kennedy's speech was on a matter of public concern. However, the parties disagreed on the answer to the question of whether Kennedy offered his prayers in his individual capacity as a private citizen, or did the prayers amount to government speech attributable to the school district? On this question, the Court sided with Kennedy, concluding that Kennedy's speech was his own individual private speech since the speech was not ordinarily within the scope of his employment duties. The Court said "Simply put: Mr. Kennedy's prayers did not 'owe their existence' to Mr. Kennedy's responsibilities as a public employee." The Court again noted the importance of the timing and circumstances of his prayers—at a time when other school officials were allowed to tend to personal matters—in support of this conclusion.

The Court also found that the location of Kennedy's prayers—on the football field or "within the office" environment—was not dispositive of whether the speech was private or government speech. Instead, the Court found that the question was whether he offered the prayers "within the scope of his duties as a coach." Having come to the conclusion that this speech was not part of his duties and thus private speech, the Court

then turned to the question of whether the school district's interests outweighed the "employee's private speech on a matter of public concern."

In finding that the school district did not carry its burden, the Court expressly abandoned the *Lemon* test and the endorsement test. In their place, the Court states that the "Establishment Clause must be interpreted by "reference to historical practices and understandings." The Court followed up by saying that the line drawn by courts and governments between what is permissible and what is not permissible "has to 'accord with history and faithfully reflect the understanding of the Founding Fathers.'"

The Court then addresses the school district's "backup" argument that the school would have been coercing students to pray if it did not restrict Kennedy's religious actions. The Court dismisses this argument by stating that there is no evidence that Kennedy directly coerced students to pray with him and that the school district did not raise any coercion concerns in the letters to Kennedy. The Court conceded that Kennedy's praying on the field would be visible to people on the sidelines, but stated that "learning how to tolerate speech or prayer of all kinds is 'part of learning how to live in a pluralistic society,' a trait of character essential to 'a tolerant citizenry.'"

While the Court further acknowledged that some people may take offense to Kennedy's prayers, it noted that "offense . . . does not equate to coercion." The Court dismissed as hearsay the school district's assertion that some parents told them that their sons had participated in the team prayers only because they did not want to "separate themselves from the team." The Court also dismissed the district's argument that any visible religious conduct by a teacher or coach would be impermissibly coercive given their positions as role models and mentors. The Court interpreted this argument as the district saying that it not only could prohibit demonstrative religious activity, but it must prohibit it. The Court concluded that it was "aware of no historically sound understanding of the Establishment Clause that begins to 'make it necessary for government to be hostile to religion' in this way."

Ultimately, the Court simply concludes that "in no world may a government entity's concerns about phantom constitutional violations justify actual violations of an individual's First Amendment rights."

Justice Alito's and Justice Thomas' Concurrences

Justice Alito and Justice Thomas filed separate concurrences to point out that the Court did not articulate any standard for determining how to evaluate Establishment Clause violations moving forward.

Justice Thomas notes that "the Court refrains from deciding whether or how public employees' rights under the Free Exercise Clause may or may not be different from

those enjoyed by the general public.” He further notes that “the Court also does not decide what burden a government employee must shoulder to justify restricting an employee’s religious expression because the District had no constitutional basis for reprimanding Kennedy under any possibly applicable standard of scrutiny.”

Justice Alito, along the same lines, notes the “Court does not decide what standard applies to such expression under the Free Speech Clause but holds only that retaliation for this expression cannot be justified based on any of the standards discussed.”

How to Apply the Establishment Clause Moving Forward

While the Court does not provide a bright line rule for determining when a school may be violating the Establishment Clause, the Court does make clear what no longer may serve as a basis for such a violation. Moving forward, school systems may no longer rely on the *Lemon* test nor the endorsement test for evaluating how to handle situations in which school employees are exercising their freedom of religion. However, the coercion test is still good law. Thus, situations in which students are a “captive audience” (e.g., in the classroom during class time) may still be regulated.

If a school system wants to review job descriptions to make clear when employees are “on duty” (and, thus, engaged in government speech) versus when they are “off duty,” school systems must be very careful in how they enforce these duties. Under Kennedy, one of the facts the Court cited often was the fact that other employees were allowed to engage in private speech (texts, phone calls, private conversations with attendees) during the same time Kennedy was having his private prayer. Based on the Court’s reasoning, if the school district is going to restrict Kennedy’s private prayer because he is still “on duty,” then other employees must also be restricted from tending to personal matters such as texting, etc.

This case is very fact specific even though the analysis is very broad. Any analysis moving forward will need to depend on the facts of the particular case. It is important to note that this case involved employee discipline. Other situations that arise may be distinguishable if they do not involve employee discipline. In addition, there is a distinction to be made between curricular and extracurricular activities.

Based on the Court’s decision in *Kennedy*, school systems should consult with their attorneys to determine whether any of their policies and procedures need to be amended or revised. In addition, any specific situations that arise will need to be vetted with the school system’s attorney to determine what action to take, if any.

Maryland Law

Maryland law contains some specific provisions involving the right to free exercise.

Under § 10-303 of the Criminal Law Article of the Annotated Code of Maryland, it lists the following as a hate crime:

§ 10-303. Obstructing exercise of religious belief.

A person may not, by force or threat of force, obstruct or attempt to obstruct another in the free exercise of that person's religious beliefs.

In addition, Article 36 of the Maryland Constitution's Declaration of Rights states as follows:

That as it is the duty of every man to worship God in such manner as he thinks most acceptable to Him, all persons are equally entitled to protection in their religious liberty; wherefore, no person ought by any law to be molested in his person or estate, on account of his religious persuasion, or profession, or for his religious practice, unless, under the color of religion, he shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others in their natural, civil or religious rights; nor ought any person to be compelled to frequent, or maintain, or contribute, unless on contract, to maintain, any place of worship, or any ministry; nor shall any person, otherwise competent, be deemed incompetent as a witness, or juror, on account of his religious belief, provided, he believes in the existence of God, and that under His dispensation such person will be held morally accountable for his acts, and be rewarded or punished therefor either in this world or in the world to come.¹

Nothing shall prohibit or require the making reference to belief in, reliance upon, or invoking the aid of God or a Supreme Being in any governmental or public document, proceeding, activity, ceremony, school, institution, or place.

Nothing in this article shall constitute an establishment of religion.

It does not appear that the U.S. Supreme Court's decision in *Kennedy* has any impact on these two provisions.

¹ The Court of Appeals of Maryland ruled the portion of Article 36 that requires a witness or juror must believe in the existence of God to be in violation of the U.S. Constitution and, therefore, is unconstitutional. *Schowgurow v. State*, 240 Md. 121 (1965).

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