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No. 16-35801

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**IN THE**

**SUPREME COURT OF THE UNITED STATES**

FALL 2018

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**JOSPEH A. KENNEDY**

Petitioners,

v.

**BREMERTON SCHOOL DISTRICT**

Respondent.

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ON WRIT OF CERTIORI TO THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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**BRIEF FOR RESPONDENT**

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*Counsel for Respondent*

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**Oral Argument Requested**

# QUESTIONS PRESENTED FOR REVIEW

There are two questions being presented for review. First, whether or not a person acting as public employee has the same First Amendment rights as someone acting as a private citizen. Second, whether a public employee can explicitly express religious views without violating the Establishment Clause of the First Amendment.

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# OPINIONS BELOW

The United States District Court for the Western District of Washington in Tacoma denied Petitioner’s motion for a preliminary injunction.

The opinions of the United States Court of Appeals for the Ninth Circuit is published and can be found at 869 F.3d 813 (2017).

# STATEMENT OF JURISDICTION

Pursuant to Rule 2(a) of the Dean Fred F. Herzog Moot Court Competition, the Jurisdictional Statement has been waived.

# CONSTITUTIONAL AND STATUTORY PROVISIONS

**U.S. CONT. amend. I.:**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

**42 U.S.C. §1983:**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

# STATEMENT OF THE CASE

## STATEMENT OF THE FACTS

Joseph A. Kennedy was employed as an assistant football coach by the Bremerton School District at Bremerton High School from 2008 until 2015. Kennedy v. Bremerton Sch. Dist., 869 F.3d 813, 5 (9th Cir. 2017). During his employment, Kennedy worked under contracts that were one year in length. The contract stated that “that BSD ‘entrusted’ Kennedy ‘to be a coach, mentor and role model for the student athletes.’ Kennedy further agreed to ‘exhibit sportsmanlike conduct at all times,’ and acknowledged that, as a football coach, he was ‘constantly being observed by others.’” *Id.* Kennedy is a man of Christian faith and would lead student athletes as well as other coaches in prayer in the locker room before games. *Id.* Kennedy would also pray at the middle of the field after games, dating back to when he first got hired. *Id* at 6. He would do so while still in BHS apparel. *Id.* Kennedy initially started doing these post game prayers by himself, but they evolved in to group prayers, and then evolved to a point where they were accompanied by speeches and players raising their helmet while Kennedy led the prayers. *Id.*

The School District was informed of Kennedy’s prayers in September of 2015. *Id* at 7. The District has a “Religious-Related Activities and Practices” policy that states: “[s]chool staff shall neither encourage nor discourage a student from engaging in non-disruptive oral or

silent prayer or any other form of devotional activity.” *Id.* Aaron Leavell , Super Intendent of the School district, sent a letter to Kennedy explaining that his prayers were “problematic” but also explained that Kennedy could continue his motivational talks, as long they were nonreligious. *Id*  at 7-8. Leavell also stated in his September letter to Kennedy that he was welcome to engage in religious activity as long as it was kept separate from student activities and it did not interfere with his work. *Id* at 8.

Kennedy complied with Leavell’s letter for a couple of weeks until October 14, 2015, on which he sent the School District a letter that requested he be allowed to continue his prayers under the Civil Rights Act of 1964. Kennedy argued that his post game prayers occurred after his coaching duties had ended, because his responsibilities ended when the game ended. He argued that his prayers did not exclude anyone because they did not reference a specific religion. After the game on October 16, Kennedy once again prayed at the fifty-yard line and was joined by members of the general public and members of the opposing team. *Id* at 10. This became widely publicized. *Id.*

On October 23 2015, Leavell sent Kennedy another letter informing him that although his “efforts to comply with the September 17 directives” were appreciated, his behavior was still not appropriate because although “the District does not prohibit prayer or other religious exercise by employees while on the job,” it cannot interfere with one’s job or lead to a perception that the district is endorsing a religion. *Id* at 11*.* While Kennedy would pray after games had concluded, the District claims that does not mean his job responsibilities had also concluded, because is is typical that “paid assistant coaches in District athletic programs are responsible for supervision of students not only prior to and during the course of games, but also during the activities following games and until players are released to their parents or otherwise allowed to leave.” *Id.* Kennedy’s head coach concluded that this was the way it has been for the past ten years. *Id.*  The District went on to elaborate that when Kennedy engaged in prayer after the game October 16, he was “still on duty for the District. [He was] at the event, and on the field, under the game lights, in BHS-logoed attire, in front of an audience of event attendees, solely by virtue of [his] employment by the District” and that the “field is not an open forum to which members of the public are invited following completion of games; but even if it were, [he] continued to have job responsibilities, including the supervision of players.” *Id* at 11-12. The District was sure to clarify that it respected Kennedy’s religious beliefs and that it was happy to accommodate his religious beliefs, but his religious exercises were taking away from his work. *Id.* The District went as far as to say that Kennedy could continue his exercise of praying on the field, as long as he waited for the stadium to empty. *Id.*

Kennedy’s legal responded to the District “by informing the media that the only acceptable outcome would be for the District to permit “Kennedy to pray on the fifty-yard line immediately after games.” *Id* at 13. The District then notified Kennedy that he would be placed on paid Administrative leave for violating the District’s instructions. *Id.* Kennedy then shows up to the game on October 30 as a member of the public and prayed in the bleachers while wearing BHS apparel. *Id.* This drew a large amount of public attention, including camera crews from news stations. While Kennedy was on paid administrative leave, the BHS players did not continue with on field prayer. *Id* at 14.

At the end of 2015 football season, “the athletic director recommended that Kennedy not be rehired” due to his failure to follow district policy.” *Id* at 15. Kennedy also chose not to reapply for a coaching position for the 2016 season. Kennedy filed his action in the Western District of Washington of August 9, 2016. *Id* at 15. He claims that his First Amendment rights, as well as as his rights under Title VII of the Civil Rights act of 1964 were violated. *Id. “*Kennedy sought an injunction ordering BSD to (1) cease discriminating against him in violation of the First Amendment, (2) reinstate him as a BHS football coach, and (3) allow him to kneel and pray on the fifty-yard line immediately after BHS football games.” *Id.*

# 

# COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

Kennedy filed a complaint against Bremerton School District (BSD) on August 9, 2016 alleging violations of 42 U.S.C. § 1983 and 42 U.S.C. §2000e. Kennedy then filed a preliminary injunction under the argument that that his religious demonstrations were protected under the First Amendment. Kennedy was seeking that the school district would allow him to continue his religious expression on the football field after games.

BSD then filed a response to Kennedy on August 30, 2016 and requested that the court dismiss Kennedy’s complaint. The United States District Court for the Western District of Washington denied Kennedy’s motion for preliminary injunction on September 19, 2016.

Kennedy then filed an appeal of the lower courts dismissal of the preliminary injunction to the United States Court of Appeals for the Ninth Circuit. The Court of Appeals affirmed the decision of the district court because Kennedy’s conduct would have violated the Establishment Clause of the First Amendment.

# SUMMARY OF ARGUMENT

Public school teachers forgo some of their rights while they are acting within the scope of their employment. While acting within the scope of their job, they do not have the same rights that they would while acting as a private American citizen. This includes but is not limited to, First Amendment Rights.

A public school district has the right to protect themselves from Establishment Clause violations. This includes the right to terminate and or not renew the contracts of its employees, if its employees publicly express religion in a way that is inappropriate under the establishment clause.

# ARGUMENT

**A PUBLIC EMPLOYEE IS DOES NOT HAVE THE SAME RIGHTS AS A PRIVATE CITIZEN WHILE ACTING UNDER THE SCOPE OF THEIR EMPLOYMENT AND A SCHOOL DISTRICT HAS A RIGHT TO PROTECT ITSELF FROM VIOLATIONS OF THE ESTABLISHMENT CLAUSE**

## Kennedy’s First Amendment Rights Were Not Violated Because He Was Speaking as a Public Employee

Kennedy cannot succeed on a First Amendment claim because he was speaking as a public employee when he made his religious demonstrations, and should not be granted with a preliminary injunction.

This court has held that

when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

*Connick v. Myers*, 461 U.S. 138, 147, 103 S. Ct. 1684, 1690 (1983). The matters on which Kennedy was “speaking” on were in no way a matter of public concern. They were spoken as an employee of BSD and reflected nothing but his own personal interests and opinions.

*Borden v. Sch. Dist. of Tp. of E. Brunswick* is a case from the United States Court of Appeals for the Third Circuit which uses the test that this court laid out in *Connick*. *Id*, *Borden v. Sch. Dist.*, 523 F.3d 153 (3d Cir. 2008). Like Kennedy, the plaintiff in *Borden* was a high school football coach that that sued a school district with allegations his rights were violated because the school district’s policies would not let him pray with his players at team meals and at games. *Id.* Here the court cited the test used in *Connick* and found that Borden’s speech was not a matter of public concern because it related only to Borden’s personal interest. *Id* at 168. The court in *Borden* goes on to elaborate that Borden wishes to par take in this religious speech in order to benefit his team, but “the content of his message, however, is not a matter of public concern” and that Borden’s prayers not shed any light on “any matter with regard to EBHS's operations that would be important to the public because his silent acts do not touch upon the way in which a government institution is discharging its responsibilities.” *Id* at 170.

The facts in *Borden* are very similar to the facts in the case at bar. Both the plaintiff in *Borden* and Kennedy are football coaches that were told by their respective school districts that they needed to stop praying at their team’s games. The ruling in the case at bar should be the same as that in *Borden.* Just as the plaintiff’s speech in *Borden,* Kennedy’s prayers were intended to benefit only his team and were not a matter of public concern, and should therefore not be protected under the first amendment using the test in *Connick.* *Id, Myers*, 461 U.S. 138 (1983).

*Peloza v. Capistrano Unified Sch. Dist*. is a case from the Ninth Circuit court of Appeals. *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517 (9th Cir. 1994). In *Peloza*, the plaintiff was a biology teacher who was suing the school district because he was forced to teach evolutionism, and he alleged that “evolutionism is a religious belief system.” *Id.* at 3. Peloza also alleged that he was forbidden to discuss religious matters with students regardless if it was in class or out of class, and that he was dismissed because he refused to teach evolutionism. *Id* at 4. The court here found that when Peloza is at the high school, he “is not just any ordinary citizen. He is a teacher. He is one of those especially respected persons chosen to teach in the high school's classroom.” *Id* at 15.

The court’s ruling in *Peloza* applies to the case at bar. While Kennedy is not a teacher per say, the logic that the court applies to teachers in Peloza applies to coaches as well. Kennedy claims that once a game ends, his duty as a coach are no longer present, and he should be able to express whatever religion he pleases as a private citizen. However this is not correct. Just as the plaintiff in *Peloza* was not, Kennedy is not an ordinary citizen when at the school at which he works. *Id.* He is a person that holds a large amount of influence over students and as long he is at his place of employment, he should not be treated as a private citizen in regards to First Amendment Rights, but rather as a public employee.

*Grossman v. S. Shore Pub. Sch. Dist*. is a case from the United States Court of Appeals for the Seventh Circuit. *Grossman v. S. Shore Pub. Sch. Dist.*, 507 F.3d 1097 (7th Cir. 2007). The plaintiff in *Grossman* was a guidance counselor at a K-12 school that let her religion interfere with her work. The plaintiff did so by disposing of literature that contained information about contraceptives as well as asking students to pray with her. *Id* at 2. Plaintiff alleged that she was terminated because of her religious beliefs. The court ruled that this was incorrect and that parents entrust public schools to educate their children, not to indoctrinate their children with religious beliefs. *Id.* The court also stated that teachers may not use the First Amendment as a shield to protect themselves from their actions that may exceed their job description. *Id* at 7*.*

The court’s ruling in *Grossman* is relevant to the case at bar. By inserting prayer in to his post-game routine, Kennedy let religion in to his work place where it did not belong, just as the plaintiff in Grossman did. *Id* at 2. While Kennedy did not ask students to pray with him like the plaintiff in Grossman did, it is likely that students look up to him and could be easily influenced by his actions, so his prayers after games were nevertheless inappropriate. Kennedy’s job as a football coach is to coach football, and that has nothing to do with religion. His religion has no place in his work place and the First Amendment does not allow him to adjust the scope of his job responsibilities to make religion fit in to his employment.

## BSD’s Conduct was Justified in Order to Avoid Violating the Establishment Clause

Had the Bremerton School District not intervened to put an end to Kennedy’s behavior, the District would have been found to be violating the Establishment Clause of the First Amendment, and therefore the District’s conduct was justified.

This court has ruled that the Establishment Clause is violated “In cases involving state participation in a religious activity, one of the relevant questions is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308, 120 S. Ct. 2266, 2278 (2000).

The respondents in *Santa Fe Indep. Sch. Dist.* were students with in the school district that alleged that the District allowed students to read Christian invocations and benedictions from the stage at graduation ceremonies, and to deliver overtly Christian prayers over the public address system at home football games.” *Id* at 295. These ceremonies would often display the school name and mascot on banners and flags. *Id* at 308. The court here looked at the factors listed in the rule above, and ruled that “an objective Santa Fe High School student will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval.” *Id*. This was due to religious messages being played over the school intercom as well as delivered at school sanctioned events. *Id* at 307-308.

The fact pattern in the case at bar is similar to that of *Santa Fe Indep. Sch. Dist.* Kennedy’s religious expressions were delivered at school sanctioned events and while wearing apparel with the school’s name and or logo on it. Using the test from *Santa Fe Indep. Sch. Dist,* and objective student at BHSwould perceive the religious messages delivered by Kennedy as being endorsed by the school, as Kennedy would often pray at school sanctioned events (football games) while wearing BHS apparel. *R. 98.*  For this reason, BSD’s conduct was justified in order to avoid violating the Establishment Clause.

In *Borden* the United States Court of Appeals for the Third Circuit ruled that a football coach that worked for a public school district was in violation of the Establishment clause, using the test from *Santa Fe Fe Indep. Sch. Dist. v. Doe.* The court in *Borden* stated that because the coach organized “prayers for the pre-meal grace at the team dinner; he had a chaplain say a prayer and then selected seniors to say the prayer.” and “Borden led prayers himself -- on at least three occasions for the pre-meal grace, and before each game for twenty-three years for the locker room prayer.” *Borden* 523 F.3d at 57. The court made sure to point out that it was not a matter of whether or not the coach intended to endorse a religion, but rather “whether a reasonable observer would perceive his actions as endorsing religion” by the school and or government. *Id* at 60. The court added that “Without Borden's twenty-three years of organizing, participating in, and leading prayer with his team, this conclusion would not be so clear as it presently is.” *Id* at 61.

` Kennedy’s circumstances are similar to that of the coach in *Borden*. Kennedy’s “motivational speeches” would often turn in to prayers, or at the bare minimum religiously motivated talks. *R.* 100. Kennedy also said the team would engage in prayer as a “matter of school tradition.” *Id.* Kennedy also admitted that he would often wear BHS apparel while coaching games. *R. 98.* Kennedy also says that he started “privately expressing” his religion on the public football field since he got hired at BHS in 2008. While Kennedy may not have been praying after games for twenty-three years like the coach in *Borden,* roughly seven years is still a substantial length of time. Seven years of praying before games is long enough to establish prayer as part of the culture and tradition of the BHS football program, just as the court ruled that it was in *Borden.*

In *Peloza* the United States Court of Appeals for the Ninth Circuithas ruled that a teacher is not allowed “to discuss his religious beliefs with students during school time on school grounds would violate the Establishment Clause of the First Amendment” and that if a teacher were permitted “to discuss his religious beliefs with students during school time on school grounds” it would violate the Establishment Clause of the First Amendment.” *Capistrano Unified Sch. Dist.*, 37 F.3d 517 at 522. The court in *Peloza* also found that because a teacher is in a position of power relative to the students, “His expressions of opinion are all the more believable because he is a teacher. The likelihood of high school students equating his views with those of the school is substantial.” *Id.*

. The ruling from *Peloza* can be applied to the case at bar. *Id.* While Kennedy did not “discuss” his religious beliefs with student per say, he did explicitly express them in their presence. These expressions did occur during “school time” and “school grounds” as it was school sanctioned event on school grounds. Therefore, the logic that court used in *Peloza* should be applied to the case at bar. And while Kennedy is not a teacher at BHS, the position of coach holds the same amount of power and influence to students as a teacher does. When students see a football coach wearing school apparel, praying at a school event, “the likelihood of high school students equating his views with those of the school is substantial.” *Id.*

When the above factors are combined, it is likely that an objective observer would think that this expression of religion was in fact associated with the school. Therefore, BSD was justified in its conduct to avoid violating the Establishment Clause of the First Amendment.

## As a Matter of Public Policy, Religion Does not Have a Place in Public Schools

Public schools should not have their employees or their curriculum reflect the belief of any religion. The United States of America is a diverse country with citizens that have a very wide variety of cultures and beliefs. According to the Pew Research Center, nearly a third of United States citizens do not identify as Christian, and the seventy percent that do are broken up in to many groups. This means that when religion makes it way in to public schools, it is going to exclude more people than it will include. The education system is crucial to shaping the young minds of America, and it crucial that every student feels comfortable and included while at school. Therefore, as a matter of public policy, religion of any kind does not have a place in American public schools.

# CONCLUSION

We ask the Court to affirm the decision the Ninth Circuit and that Joseph A. Kennedy is not entitled to preliminary injunction.

Respectfully Submitted,

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Counsel for Respondent,

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