No.16-35801

IN THE

Supreme Court of the United States

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JOSEPH A. KENNEDY

*Petitioner,*

V.

BREMERTON SCHOOL DISTRICT,

*Respondent,*

**\_\_\_\_\_\_\_\_\_\_\_\_**

On a Writ of Certiorari

to the United States Court of Appeals

for the Ninth Circuit

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**BRIEF FOR THE RESPONDENT**

186R

Counsel for Respondent

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**Oral Argument Requested**

**QUESTION PRESENTED**

Whether a public-school teacher or coach is permitted to impose their religious beliefs on students while conducting their official duties?

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THE RESPONDENT DID NOT VIOLATE MR. KENNEDY’S CONSTITUTIONAL RIGHTS UNDER THE FIRST AMENDMENT WHEN REFRAINING HIM FROM PRAYING IN THE PRESENCE OF STUDENTS.

1. Respondent as a Matter of Law is Entitled to Dictate What Speech a Football Coach is able to Make While Engaged in His Official Duties Among the Presence of Students.……
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OPINIONS BELOW

The U.S. District Court for Western District of Washington denied petitioners motion for a preliminary injunction after holding oral arguments. Petitioner filed an appeal with the United State Court of Appeals for the Ninth Circuit based on the denial of their motion for preliminary injunction and they reaffirmed the denial.

STATEMENT OF JURISDICTION

The requirement of a formal statement of jurisdiction has been waived pursuant to the rules and procedures for the 2018 Fall Hertzog Competition.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The adjudication of this case involves application of the First Amendment to the United States Constitution.. The relevant texts of the constitutional provisions and statutes are attached in Appendices.

**Statement of the Case**

Respondent has twice defended and prevailed over petitioner in his quest to impose his will on the school district and by extension to the students he was charged with safe guarding. Petitioners motion for preliminary injunction was denied by the United States District Court for Western District of Washington. Petitioner appealed this denial and the decision was affirmed by the United States Court of Appeals for the Ninth Circuit stating that Bremerton could satisfy the fourth *Eng* factor and that it would violate the establishment clause to allow Petitioner to continue with his conduct. The Supreme Court has granted cert to answer the question whether school teachers and coaches retain any First Amendment rights when at work and “in general presence of” students.

Respondent Bremerton School District is a high school located in Kitsap County, Washington across the Puget sound from Seattle. Respondent serves nearly six thousand students, employs over three hundred teachers, and four hundred support staff. All are considered family and enjoy a wide variety of religious diversity including but not limited to Islam, Judaism, Buddhism, and Hinduism. R. 5 Petitioner Joseph Kennedy was a respected and well liked assistant football coach employed by the school district. This controversy arose when Petitioner co-opted the football program and the school to espouse his religious beliefs which culminated in his termination for failure to adhere to the district’s reasonable policy in regard to employee’s rights to exercise their religion while performing their official duties. Petitioner was employed by respondent since 2008 as an assistant football coach. Since the beginning of Petitioner’s employment, he has engaged in a quiet moment of thanks at the end of each game. Eventually he was joined by players from his team and eventually by players from other teams.

While Petitioner is correct that no party had complained of his conduct, regardless the school district cannot sit idly by while the rights of others were being violated even if they suffered silently. On September 17, 2015 Superintendent Aaron Leavell sent Petitioner a letter based on the information gathered from an employee from another school district that offered to compliment Petitioners ability to bring together students from opposing teams. R. 10. Although the initial letter conceded many of issues such as Petitioner had never actively encouraged or required participation in his post-game prayer. Respondent maintains that nonetheless by the very virtue of his role as a coach, players will feel compelled to engage in the activity. This is evidenced by Respondents temporary ceasing his activities after receiving the initial letter also seeing a stop in players praying at the fifty-yard line. This once again occurred after he was placed on administrative leave. Petitioner did make a good faith effort to comply with Respondents directives and ceased his activities during the September 18, 2015 game. This arrangement came to an end when Petitioner had his attorney send a letter to Superintendent Aaron Leavell requesting an accommodation to affirm his right to pray at the fifty-yard line after the conclusion of the games.

Rather than make a good faith effort and see how Respondent would react to this latest development, Petitioner took it upon themselves to resume their original inappropriate conduct of holding large public prayers at the end of the October 16, 2015 game. R. 102. This display went far from the silent prayer Petitioner describes he is entitled to participate in. Members of the public and the media joined in the prayer led by Petitioner. Following this failure to adhere to BDS policy and repeated disdain for the good faith efforts made by the administration to accommodate, Petitioner was informed he was to cease and desist his conduct. During one of the most important games associated with the football season the Varsity football game held on October 23, 2015 once again saw Petitioner disregard clear directives given by BDS. Respondent was given no choice but to place Respondent on administrative leave on October 28, 2015 and issue a question & answer publication to explain the situation to the public. R. 103. Given the outright refusal to comply with lawful procedures issued by BDS, Petitioner was given a negative employment review on November 15, 2015 and was not recommended for retention for the following year. Petitioner filed suit seeking a preliminary injunction in the district court which was denied and appealed the denial which was affirmed by the appellate court. We find ourselves in front of the Supreme Court to answer the question “Whether a public-school teacher or coach is permitted to impose their religious beliefs while students are present?”

SUMMARY OF THE ARGUMENT

Respondent, Bremerton School District respectfully ask this court to reaffirm the two prior judgements denying Petitioner a preliminary injunction. As a matter of law Petitioner cannot circumvent the establishment clause by asserting a First Amendment claim. The bill of rights was never intended to be used as a cudgel but rather a buckler to defend from overt government actions dedicated to silencing dissidences. This Court should find that when a coach is acting under the banner of a state actor such as the school district that his First Amendment rights are seriously curtailed while in the presence of students. That under 42 U.S.C § 1983 Petitioner Kennedy suffered no injury and is not entitled to such an extreme remedy such as a preliminary injunction.

Furthermore, we ask this Court to rule in our favor to send a clear message that coaches are subject to some limitations to their First Amendment based on the presence of young and impressionable minds. Without such limitations confusion is likely to arise when conducting themselves in front of their charges and that the casual observer would not be able to differentiate when one was speaking as a private citizen rather than as a mouthpiece for the school district.

**ARGUMENT**

**As A Matter of Law Petitioner Must Lose As His Speech Is Not Protected.**

The question of what First Amendment rights a teacher or coach possesses if any when in the presence of students is a matter of law. As such the appropriate standard of review is de novo and no deference should to be given to the lower courts. “The Tenth Circuit of Appeals reviewed determination of absolute immunity *de novo*.” *Scott v. Hern*, 216 F.3d 897, 908 (10th Cir. 2000). *Perez v. Ellington*, 421 F.3d 1128, 1133 (10th Cir. 2005)

Petitioner for all intents and purposes becomes a mouthpiece for school district when fulfilling his role as an assistant football coach. The arguments presented by Petitioner ignore several legitimate concerns that Respondent has painstakingly attempted to communicate in all the letters sent to Petitioner prior to this controversy arising. Respondent recognizes and concedes that it is imperative to safeguard the First Amendment. “The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. "By limiting the power of the States to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling.” *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) We also concede that Petitioner does not merely lose his rights for being on school grounds. “First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969) Despite these major concessions Respondent still believes Petitioner should not be allowed to co-opt their speech with his own personal message.

Justice Blacks dissent in *Tinker* gives us some insight into just why Petitioner should be refrained from advocating his brand of religion at the conclusion of the football games. “The truth is that a teacher of kindergarten, grammar school, or high school pupils no more carries into a school with him a complete right to freedom of speech and expression than an anti-Catholic or anti-Semite carries with him a complete freedom of speech and religion into a Catholic church or Jewish synagogue. Nor does a person carry with him into the United States Senate or House, or into the Supreme Court, or any other court, a complete constitutional right to go into those places contrary to their rules and speak his mind on any subject he pleases. It is a myth to say that any person has a constitutional right to say what he pleases, where he pleases, and when he pleases. Our Court has decided precisely the opposite. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 521-22 (1969) (Black, H., dissenting)Petitioner by the very nature of his employment becomes an extension of the school district and it does not comport with the law as we recognize it to have his speech supersede his employers right to dictate curriculum and other instance of speech to have a stable learning environment.

This Court has recognized several times that a school is a unique environment that requires the state and its officials to give special attention to the maintenance of discipline. *Id*. at 507 ("[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."). The Supreme Court held that for a school to prohibit speech, it must be able to show that the speech will "materially and substantially disrupt the work and discipline of the school.” *Id*. at 513 Respondents speech is guilty of disrupting not only his own personal work duties but also interfering with the football program as a whole. This is evidenced by large crowds of people joining Petitioner in his allegedly private moment of prayer and has seen other groups wanting to use the stadium for their own purposes. See Exhibit 1 R. 122 and Exhibit 3 R. 126. In *Lee* the 4th Circuit of Appeals dealt with the controversy of a teacher displaying religious banners in their classroom and the principal removing the offending material after receiving complaints.  It is settled that "the state, as an employer, undoubtedly possesses greater authority to restrict the speech of its employees than it has as sovereign to restrict the speech of the citizenry as a whole." *Urofsky v. Gilmore*, 216 F.3d 401, 406 (4th Cir. 2000) (en banc); *see also Pickering v. Bd. of Educ.*, 391 U.S. S. Ct. 1731, (1968) ("[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.")

While Petitioner is a coach he still occupies the same sphere of that a teacher would including teaching a particular curriculum. “Of additional importance, the enhanced right of a school board to regulate the speech of its teachers in classroom settings is supported by the Supreme Court's explicit recognition that First Amendment free speech rights in a school environment are not "automatically coextensive with the rights of adults in other settings." *Lee v. York County School Division*, 484 F.3d 687, 695 (4th Cir. 2007) Although coaches provide more than academic knowledge to their students, it is not a court's obligation to determine which messages of social or moral values are appropriate in a sports program. “Instead, it is the school board, whose responsibility includes the well-being of the students, that must make such determinations. Our conclusion on this point is entirely consistent with the "oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local officials, and not of federal judges."  *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 273 (1988) We ask the court to give BDS the same consideration and not allow Petitioner to usurp the lawful authority it has in dictating how employees of BDS can conduct themselves in the presence of students.

Respondent is also keenly aware that school teachers and coaches are afforded the same protections that an ordinary citizen would be when commenting on matters of public concern. “The Supreme Court has indicated, in more general terms, that statements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors.” *Pickering v. Board of Education*, 391 U.S. 563, 574 (1968) (School teacher was fired for writing a letter to newspaper that was critical of the way the board of education had allocated funds and the actual need to raise more funds) The instant case before us is distinguishable by several circumstances.

Petitioner never critiqued or raised concern about the old written policy. Exhibit A Pg. 24-26 Rather it was his misunderstandings that gave rise to the need to amend the policy and give clear written instruction. Exhibit B Pg. 28-30 Respondent tried to clarify its concerns of establishment clause violations and made several good faith efforts to accommodate Petitioner. “The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause, which guarantees at a minimum that a government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which "establishes a [state] religion or religious faith, or tends to do so." *Lee v. Weisman*, 505 U.S. 577, 580 (1992) This principal has been applied to the nearly exact same circumstances that gave rise to this controversy. (Schools are not permitted to allow student led prayers to be broadcast over the public announcement system even at “optional” extracurriculars such as football games) *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000) Petitioner seems to want to enjoy a position of leadership amongst the student body but shirk the responsibility that comes with it. While it is true there was no overt coercion Petitioner ignores just how compelling it can be to see a role model conduct themselves in a certain manner. “The District's argument also minimizes the immense social pressure, or truly genuine desire, felt by many students to be involved in the extracurricular event that is American high school football.” *Id.* at 294 This compulsion is evident by the fact that students stopped praying at half time when Petitioner voluntarily ceased his actions in response to the initial letter sent by the Superintendent and once again none of the students engaging in prayer when he was suspended from his duties. Petitioner points to his past accolades of being very influential on the team in terms of motivation and being responsible for bring not only them together as a team but also influencing the community. It is a reasonable inference that such influence would play a large role whether a student chose to participate in a public display of prayer. While not as pervasive as having a Christian invocation being blasted over the louder speakers as in *Santa Fe*, having Petitioner stand at the fifty-yard line dressed head to toe in the team colors is just as obtuse for different reasons. The only conclusion a reasonable observer could infer from watching the spectacle that has become Coach Kennedy’s private moment of prayer is that Respondent is advocating a Christian religion over others.

Petitioner alleges that others have conducted themselves in the same manner without repercussions. Official Complaint R. 10 (Coach Boynton utters a Buddhist chant at the fifty yard line post-game as well) This argument is not persuasive as having multiple employee’s violating the establishment clause supports Respondents need to change and clarify the school policy in regards to prayer in the presence of students. “Under *Lemon,* a government practice is constitutional if (1) it has a secular purpose, (2) its primary effect neither advances nor inhibits religion, and (3) it does not excessively entangle government with religion.  *Doe v. Duncanville Independent School District*, 70 F.3d 402, 405 (5th Cir. 1995) Petitioner is under the impression that it is his specific religious expression that is being singled out as impermissible. That is far from the case. *See Bishop v. Aronov,* 926 F.2d 1066, 1073 (11th Cir.1991) ("a teacher's religious speech can be taken as directly and deliberately representative of the school") Both of the actions by Petitioner and Coach Boynton signaled an inappropriate endorsement of religion. Unfortunately for Petitioner he drew unnecessary attention to himself and the school with his antics involving the media. Petitioner basically complains of several self-inflicted injuries. This extends to his negative employment review and subsequent termination. Petitioner blatantly disregarded legitimate concerns expressed by Respondent on the amount of liability he was exposing the school to by his continued public prayers. Petitioner conflates the issue of him being fired for his religious expression with the simple fact that he was being insubordinate. Were this any other employment arena there would be no question as to whether an employer could fire their employee for repeatedly failing to follow lawful instructions. Given all these considerations we respectfully ask this Court to find that Petitioners speech is not protected under the First Amendment.

**Policy Reasons For Not Recognizing Petitioners Speech As Protected:**

While maintaining and protecting each individual’s right is of paramount importance, it is imperative that the Supreme Court does not allow the buckler the first amendment provides to our citizens to become a sword used to injure officials attempting to do their duties “The right to swing my fist ends where the other man’s nose begins.” Zechariah Chafee, Jr, *Freedom of Speech in War Time*: Vol. 32 No. 8 Harv. Law. Rev, pg. 941-942 (1919) Petitioner is not the aggrieved party in this controversy. The Constitution was never intended to be weaponized against the very government that is tasked with ensuring those rights are protected “Every citizen has an equal right to use his mental endowments, as well as his property, in any harmless occupation or manner; but he has no right to use them so as to injure his fellow-citizens or to endanger the vital interests of society. Immunity in the mischievous use is as inconsistent with civil liberty as prohibition of the harmless use. . . . The liberty protected is not the right to perpetrate acts of licentiousness, or any act inconsistent with the peace or safety of the State. Freedom of speech and press does not include the abuse of the power of tongue or pen, any more than freedom of other action includes an injurious use of one's occupation, business, or property." *Id.* Petitioner seeks to ask the court to usurp the rightful power of the school board has in ensuring all members of its community have their rights respected and the ability to create policies to achieve that goal. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) (Shifting burden to the state actor to prove a teacher would have been terminated for his inappropriate behavior with students rather than sharing a dress code with a radio station) Similarly in the instant case before us we have a lawful religious expression coupled with legitimate grounds for termination. If Respondent were to be held to this but/for Cause test expressed in *Mt. Healthy* they would unequivocally be able to prove that it was Petitioners unwilling to follow directions not his prayer that warranted him being fired.

We are not asking the Court to strip Petitioner and other school teachers of their rights. Respondent understands just how paramount religious expression is to the citizens of this country. “Accordingly, a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.” *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) Respondent welcomed discussion about the situation and Petitioner at first was more than willing to express his concerns and understood our position as well. This situation is not novel, and the Court has ruled that School Districts have every right to protect the rights of their students over an individual right to religious freedom in a school setting. “Third Circuit has held that a teacher's in-class conduct is not protected speech.” *Bradley v. Pittsburgh Bd. of Educ.,* 910 F.2d 1172, 1176 (3d Cir. 1990) (Football Coach conceded that the silent acts of bowing his head and taking a knee are tools that he uses to teach his players respect and good moral character. Thus, by his own admission, his coaching methods are pedagogic). *Borden v. School District*, 523 F.3d 153, 172 (3d Cir. 2008) The same admission has been made by Petitioner, that one of his main duties was to instill good moral character and respect into his players. Here his goals are in sync with the school district and this is evidenced by the years of rehiring. The relationship of being an agent and proxy for the school served to benefit them both. It is when these competing interests came to a head that the employer should enjoy a greater latitude in what speech it should engage in.

We respectfully ask the Court to imagine what damage it might do if curtails the ability of Respondent to dictate to its employees what conduct or speech is appropriate. A hypothetical that is closely related would be what if a biology teacher chose to teach intelligent design (that man was created by a deity in a specific manner) rather than adhere to the widely accepted theory of evolution due to their closely held religious beliefs. It is intolerable that students who do not adhere to the same beliefs to be subjected to these teachings. Or what would the Courts say to a holocaust denier teaching their particular beliefs during a world history class. Respondent has a legitimate need to able to dictate what curriculum it teaches. There are a number of appropriate forums to address any concerns had about a curriculum. Unfortunately failing to adhere to an established policy is not one them and the Court should not be swayed by such grand standing by Petitioner.

**CONCLUSION**

We ask the Supreme Court of the United States to affirm the Ninth Circuit Court of Appeals and find that Petitioner’s speech is afforded limited protection when in the presence of students.

**Appendix A**

**CERTIFICATE**

I, 186R, certify that the brief submitted in the Dean Fred F. Herzog Moot Court Competition as brief number 186R represents my work product. No other person has contributed to the ideas, research, or represents my work product. I have not discussed the contents of this brief with anyone. I submit this certificate with the knowledge that any false statement shall subject me to discipline.

Date: October 21, 2018

APPENDIX B

UNITED STATES CONSTITUTIONAL PROVISIONS INVOLVED

U.S Const. 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 redress of grievances.