

IN THE UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

C.A. No. 16-35801

Joseph A. Kennedy,

Plaintiff-Appellant,

v.

Bremerton School District,

Defendant-Appellee.

AMICUS CURIAE BRIEF OF GARFIELD HIGH SCHOOL COACHES
KELLEN ALLEY AND JOSEPH THOMAS IN SUPPORT OF
REVERSAL

Appeal from the Judgment of the United States District Court for the
Western District of Washington (Tacoma)
Case No. 3:16-cv-05694-RBL

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I. STATEMENT OF IDENTITY OF AMICUS CURIAE.

Kellen Alley and Joseph Thomas (“Coach Alley” and “Coach Thomas”) are high school football coaches who currently work at Garfield High School in Seattle, Washington. Their interest in this matter stems from the fact that they are similarly situated to the Appellant, Coach Kennedy, in employment status. And like Coach Kennedy, Coaches Alley and Thomas have also exercised their First Amendment rights by engaging in expressive conduct while “on the job” as football coaches. It is important to Coaches Alley and Thomas that this Court continue to affirm that public employees—including football coaches—receive First Amendment protection for their private expression.

In addition, Coach Alley is a former student, football player, and football coach at Bremerton High School. He therefore remains interested in the manner in which Bremerton School District manages the BHS football program.

Pursuant to FRAP 29(a) counsel for Coach Alley and Coach Thomas has received the consent of Appellant and Respondent to allow the filing of this brief.

II. FRAP 29(c)(5) STATEMENT.

This brief is not drafted by any counsel for any party, and no party to this matter or other person has contributed any money intended to fund preparation of submission of this brief.

III. ARGUMENT.

At Garfield High School in Seattle, Washington, Coach Thomas is the Head Football Coach. Coach Alley is an assistant Football Coach at Garfield High School. During the 2016 football season, specifically prior to their September 16, 2016 game against West Seattle High School, the entire Garfield High School Football Team knelt to the ground during the playing of the Star-Spangled Banner. Coach Thomas and Coach Alley, along with all other coaches, joined their players in kneeling.

This has been the Garfield team's procedure in every game since. This action was done to call attention to racially-based social injustices in the United States. Coach Thomas was quoted in the Seattle Times as follows:

Everybody wants to talk about how this is disrespectful to the American flag. That's a smokescreen. How about we talk about the issues people are kneeling and fighting for?¹

Coach Thomas has said that this action is a continuation of a philosophy taught in his program at Garfield.² He explained as follows:

You have to talk with kids about the social injustices that are going on because they're dealing with it regardless. Let's just talk about it. How are you killing these African American males on camera and we can't even get a day in court...are you kidding me? When is enough, enough?

¹ Jayda Evans, GARFIELD FOOTBALL TEAM TAKES KNEE DURING NATIONAL ANTHEM PRIOR TO GAME FRIDAY NIGHT SEATTLE TIMES (2016), <http://www.seattletimes.com/sports/high-school/garfield-football-team-takes-knee-prior-to-game-friday-night/> (last visited Nov 3, 2016).

² *Id.*

But if you look at history, nothing changes in history until you're willing to sacrifice.³

Nothing about Coach Alley's or Coach Thomas's "ordinary job duties" relates to their expressive conduct before or after football games. *Lane v. Franks*, 134 S. Ct. 2369, 2378 (2014). Accordingly, that conduct is speech "as a citizen," which "lies at the heart of the First Amendment." *Id.*

To date, the Seattle School District, which operates Garfield High School and is the employer for both Coach Thomas and Coach Alley, has not taken any action to stop or prevent the coaches from participating in this action with their students, or to attempt to limit the coaches' ability to speak regarding this issue.

However, seeing the decision of the District Court that has restricted Appellant Coach Kennedy's rights to express himself on the football field has raised considerable concerns for Coach Thomas and Coach Alley about whether the Seattle School District could prohibit the coaches from participating in this expression or punish them if they refused to comply.

The Court's ruling cited the fact that Coach Kennedy was dressed in school colors and was "under the lights" at a high school football game as justification for its holding that Coach Kennedy spoke as a public employee rather than a private

³ *Id.*

citizen, and thus was subject to adverse employment action. ER43-44. This is of particular concern to Coach Thomas and Coach Alley.

Right now, Coach Thomas and Coach Alley enjoy the support of their school's principal for their actions.⁴ However, whether or not the governmental entity approves of the expression should not determine whether a person has the right to express their personal opinion on an issue, and whether the Constitution protects such expression.

Football coaches are people. While they understand that there can be limitations on what they can and cannot do when they work for public schools, before and after the game, they should be free to express themselves as private individuals. Wearing school colors or being on the field does not rob a person of his or her right to engage in private expression under the First Amendment, whether that expression be based on social injustice or religion.

IV. CONCLUSION

For the reasons set forth above, Coaches Alley and Thomas urge this Court to reverse the decision of the District Court and hold that football coaches have the right to private expression even when on the field after games and in school colors.

⁴ Jayda Evans, GARFIELD FOOTBALL TEAM WILL CONTINUE TO KNEEL DURING ANTHEM, SEEKS MEETINGS WITH POLICE, COMMUNITY LEADERS SEATTLE TIMES (2016), <http://www.seattletimes.com/sports/high-school/garfield-football-team-will-continue-to-kneel-during-anthem-seeks-meetings-with-police-community-leaders/> (last visited Nov 3, 2016).

RESPECTFULLY SUBMITTED this 7th day of November, 2016.

ROMERO PARK P.S.

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V. CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P.

32(a)(7)(B) because: this brief contains 5,270 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

RESPECTFULLY SUBMITTED this 7th day of November, 2016.

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CERTIFICATE OF SERVICE RE: AMICUS CURIAE BRIEF OF
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THOMAS IN SUPPORT OF REVERSAL

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I, Samantha Prendergast, am a citizen of the United States and a resident of the State of Washington, over the age of eighteen (18) years, and not a party to the above-entitled action. I hereby Declare, under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. On Monday, November 7, 2016, I caused one copy of the following:
 - A. Amicus Curiae Brief of Garfield High School Coaches Kellen Alley and Joseph Thomas in Support of Reversal; and
 - B. This Certificate of Service.

to be sent via ECF for delivery and addressed to:

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RESPECTFULLY SUBMITTED this 7th day of November, 2016.

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