Appendix E

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
WASHINGTON, AT TACOMA**

No. 16-cv-05694

JOSEPH A. KENNEDY,
Plaintiff,
v.
BREMERTON SCHOOL DISTRICT,
Defendant.

Summary Judgment Hearing

February 12, 2020

Before: LEIGHTON, Ronald B.,
District Judge.

THE CLERK: This is Kennedy versus Bremerton School District, Cause No. C16-5694-RBL.

Counsel, please make an appearance.

MR. ANDERSON: Good morning, Your Honor. Devin Anderson from Kirkland & Ellis, on behalf of plaintiff, joined by my colleague Bill Lane, also Jeff Helsdon, co-counsel, and Hiram Sasser, co-counsel.

THE COURT: Good morning.

MR. TIERNEY: Good morning, Your Honor. Michael Tierney appearing for the Bremerton School District, accompanied by Jeffrey Ganson, the general counsel for the District, and Superintendent Aaron Leavell.

THE COURT: Good morning, all.

This is the day scheduled for oral argument on competing motions for summary judgment. The defendant's motion was filled first, but on the same day. If you guys have agreed on an order, somebody has their Power Point on, so plaintiff wants to go first?

MR. ANDERSON: We'll have plaintiff go first, and we'll give the District their time.

THE COURT: We'll do this in the round, row the boat, you know, you have done that before, so just come back and forth until you say what you need to say.

You might focus on, at some point in your argument, Justice Alito's comments about drawing distinctions about the conduct that resulted in dismissal.

I didn't write an opinion, but I thought I made it very clear that I thought Mr. Kennedy was on duty with all of the ruffles and flourishes of coachdom, and he was responsible and still within his job responsibilities to take care of administrative issues that he had, and it would be very different if he went across the street to a park and prayed, read the Bible, students came with him, wanted to be with him and all that. It would have been a different situation. I thought that was all very clear to the Ninth Circuit and clear to the Supreme Court.

As trial judges, we are loathe to find facts, make findings in preliminary proceedings for injunctive relief and/or summary judgment. That is my concern a little bit on your arguments.

Mr. Anderson, you're up.

MR. ANDERSON: Thank you, Your Honor. Appreciate the opportunity to be heard today.

As Your Honor has seen, we prepared a document to go through. I have a hard copy, if Your Honor would prefer a hard copy; otherwise, we are happy to click through.

THE COURT: I would like a hard copy.

MR. ANDERSON: May I approach?

THE COURT: You bet.

MR. ANDERSON: I have a separate handout just of the timeline that we are going to be using. I think the timeline will help inform some of these questions. It is a printout of the slide.

Again, Your Honor, appreciate the opportunity to be heard this morning. Devin Anderson for Coach Kennedy.

I want to address and start where Your Honor left off with what Justice Alito said. I think he was—the Supreme Court obviously did not take the case. They thought there was still some factual development that needs to happen. What we have seen is discovery has shown—really, there are two central facts that I think have to be taken into account on which the issues in this case turn.

Fact No. 1 is: What was the conduct that is actually at issue here? Discovery has shown that the

conduct at issue, the practice that Coach Kennedy engaged in, sought to engage in, the practice for which he was ultimately placed on administrative leave, was to take a knee at the end of the football game to say a silent, personal prayer. It is not about prayer with students. It is a silent, personal prayer—and, in fact, that's how the District itself describes it—that lasted about 15 seconds. We will show a couple of stills.

We did submit the video. There is actually videos of the two games that immediately preceded his termination, which I think helps the Court get a sense for what the practice is at issue. It is a brief, 15-second prayer at the conclusion of the game as the players—they do their post-game handshake, they each go off, they do the fight songs, the coaches are milling about, that's when he was taking a knee. That's the activity at issue. That's the first key fact.

The second key fact—and I think this is where Justice Alito got a little bit—thought it wasn't asserted, was why the District took the action it did.

Discovery here has been—has clarified that. As we will see, the District suspended Coach Kennedy based solely—again, this word "solely," that is not my word, that is the District's word—solely on its view that allowing Coach Kennedy to do this conduct, the 15-second prayer, would violate the establishment clause.

Those are the two key facts: What did he do, and why did the District take the action.

On those two key facts, I think these constitutional issues turn, which is Issue No. 1, when Coach Kennedy took that knee and did his silent

prayer of thanksgiving, was he speaking as a public employee or private citizen?

Our argument is he spoke as a private citizen.

The second one is the establishment clause question. Does it violate the establishment clause for the District to allow Coach Kennedy to engage in this activity? We would submit the answer is no.

Long ago, the Supreme Court emphasized in the *Tinker* case that school employees do not shed the constitutional right to freedom of speech at the schoolhouse gate.

We respectfully submit that the District's position that anything a public employee does while technically on the clock and visible to others is unprotected speech, is directly contrary to *Tinker*'s direction here.

I think what I want to do is go through the timeline here, Your Honor. I appreciate the indulgence to walk through this because I think this will help crystalize the facts that I think are undisputed on which the Court can make the legal determinations it has to make.

The timeline is critical to understanding the two key facts, what he did and why the District took its action. For years prior to this 2015 football season, starting when Coach Kennedy became a coach in 2008 or 2009, he, compelled by his religious belief, engaged in this prayer of thanksgiving following football games. Over time, students noticed it and asked if they can join. He said, "It is a free country. You can do what you want."

From 2008 to about 2015, it was off and on, sometimes he would do it by himself, he testified, and sometimes other students would come with him. It wasn't a regular practice.

Anyway, the District apparently didn't know about this—that's what they have claimed—until the September 11th game, which is the—one of the first home games versus Klahowya.

THE COURT: Try Puyallup.

MR. ANDERSON: I am from Arizona.

THE COURT: I wanted to introduce you and welcome you to the Northwest.

MR. ANDERSON: I appreciate that. I really do.

That's when the District learned about this. Over the course of the week after this game, the District issues a letter on September 17th, where the District gave Coach Kennedy some very specific directives.

There are two key points. We are on slide 5. No. 1, the District recognized Coach Kennedy's action was voluntary. He wasn't requiring student participation. It gave a clear directive: You can't have students with you when you pray.

We have culled out from Exhibit 3 what the directive was. I think there are three or four components here that I want to highlight.

Directive No. 1 is: You and District staff are free to engage in religious activity, including prayer, so long as it does not interfere with your job duties.

The record shows in this case that a 15-second prayer, just as if he was to kneel down and tie his shoe,

doesn't distract him from his job duties. The District testified to that. That is beyond dispute.

The second direction: It has to be physically separate. One of the problems with the prior practice is students would come around him as he was praying. District said: Don't do that anymore. Coach Kennedy never did.

Third, students may not be allowed to join. Again, that was the third directive: No more prayer with students.

Fourth directive was: If it is demonstrative activity, you can't be doing it at the same time students are doing it. In other words, if the students are praying, you can't kind of pray also on your own. It needs to be separate.

That was the directive. That's the directive Coach Kennedy understood.

The next game was the September 18th home game. This is the day after the District provided the direction. At that game—this is the only game, Your Honor, in the 2015 season at which Coach Kennedy did not pray immediately after the game. He was still digesting the letter that he got from the District. He did not engage in a prayer right after the game.

What happened is, as he was driving home, as he was driving home, he felt, in his own words, dirty. He felt like he had committed the sin of ingratitude because he had not expressed his prayer of thanksgiving after the game. He actually turned around, he drove back, went to the stadium and prayed. The problem was his religious beliefs required

him to pray immediately after the game. That had—too much time had elapsed.

What happens is for the next five games after this one, he resumes the practice he had been doing years before of a silent, personal prayer. He waited until the students had separated and were starting to go do their fight song, post-game tradition, and he engaged in that activity. Nobody noticed.

The District submitted affidavits saying they actually didn't know he was engaged in this prayer activity, which we think actually proves our point, especially when we talk about what a reasonable observer would see from the establishment clause perspective. Nobody notices.

What happened then is on October 14th, Coach Kennedy sends a letter. He wants to be open with the District. He sends a letter from his attorneys to the District—we are at slide 9—reiterating saying, look, what I want to do, what I have been doing, is a private, personal prayer. That is what I want to do.

Then we come to the next game, the Centralia game. This was a home game on October 16, two days after Coach Kennedy sends the letter.

THE COURT: Centralia.

MR. ANDERSON: You keep correcting me, Your Honor. I deserve it.

THE COURT: Everybody needs to be humble. That is why you are here.

MR. ANDERSON: I appreciate that.

THE COURT: And me, too.

MR. ANDERSON: This is the picture Your Honor has seen before. This got a lot of air time at the PI hearing.

This is the Centralia game. What happened here is Coach knelt to say a prayer. Nobody from the Bremerton School District, but the opposing team from a different district spontaneously joined him because of the media coverage that ensued over this week. That's where this picture comes from. Two critical facts about this. Number one, this game has never been cited as the reason for the District's action. This game is not why the District took its action, as we'll see as we look at the exhibits in evidence.

In fact, if we go to the next slide, we have the contemporaneous emails from Dr. Leavell, the superintendent, immediately following this game to state officials. You see here Dr. Leavell says, "The coach moved on from leading prayer with kids—" everybody knew this was not about leading prayer with kids—"to taking a silent prayer at the 50-yard line." Bill Keim, from the Department of Education, responds, "Seems like it may be a moot issue. I assume the use of silent prayer changes the equation of it." Dr. Leavell says, "Yes, it does."

THE COURT: It moves out of evangelism to a thoughtful prayer of thanks.

MR. ANDERSON: Personal, right? A silent, personal prayer rather than sort of a team activity, which is different than the cases that the District brings in like the *Doe* case from the Fifth Circuit or the *Borden* case where you had coaches engaging with or leading student prayer.

If we go to the next slide, another contemporaneous email. "The issue is quickly changing as it shifted from leading prayer with student athletes to a coach's right to conduct a personal, private prayer on the 50-yard line." The reason for the 50-yard line is that's where he is after they finish the post-game shake. We have all seen those lines, the lines cross, people peel off, coaches are talking to each other. That's where Coach Kennedy is when he takes his knee.

Even the District recognizes, this is not about student prayer. This is not the situation anymore. It is a personal, silent prayer.

The next game, the District sends a second letter. We talked to Your Honor about the September 17th letter, "Don't pray with students. You can pray on your own, but you can't do it around students. You can't be demonstrative if the students are being demonstrative as well."

Now we get a second letter, the October 23rd letter, where the District again reiterated, "It looks like you are trying to do what we told you to do. In general, I believe you have attempted to comply with the guidelines." He is not praying with students.

Then they give him a new direction. This is a different directive than what was in the September 17th letter. "While on duty for the District as assistant coach, you may not engage in demonstrative religious activity, readily observable, if not intended to be observed, by students and the attending public. This is a different directive. You can't do demonstrative religious activity if people can see you.

Now Coach Kennedy has this different directive. Now he faces the next game, that day, October 23rd, against North Mason. This is an away game.

If we go to the next slide, we pulled out a still from a video clip we submitted into evidence. Your Honor, if I may approach the video screen. This one, unfortunately, is a little grainy. We put in a red arrow so you can see where Coach Kennedy is.

I think this captures what the post-game situation is like following a football game. You have players starting to head to the sidelines. You have coaches milling about. In the middle of all this, you see Coach Kennedy taking a knee. He could just as easily be checking the turf, he could be tying his shoe. He happens to be engaged in a personal prayer.

If we go to the next slide, again, the District recognized this is now becoming a closer call. Another contemporaneous email from Dr. Leavell saying, "His actions Friday," again, Friday being the North Mason game, "yet again moved closer to what we want, but are still unconstitutional."

That Monday—we have Friday is the varsity game versus North Mason. The next game is Monday, October 26th, is a home game versus North Mason. It is a junior varsity game where Coach Kennedy is the head coach of the junior varsity team. We have a still on that one, which is slide 21.

Again, you see the players are starting to separate. Coach Kennedy is taking a knee. This is a higher resolution. You can see him a bit better. You have other coaches milling about during this time period.

These two games, the two North Mason games are the basis for the District's action. How do we know this? The District sent a letter two days later. This is the official letter placing Coach Kennedy on administrative leave.

Let's go to slide 22. You will see there that the District cites those two games, October 23rd and October 26th, in their view, because Coach Kennedy was on duty. In other words, he is on the clock, right? He is still at work in the same way that somebody might be at work if they are still in the building while during working hours. He was still on duty. He kneeled and prayed while his players—players weren't with him. Players were engaged in other post-game traditions.

Those are the two games that are at issue. The two stills we saw are the two pieces of conduct at issue.

The District was also crystal clear why it took its action. If we go to the next slide. I asked Dr. Leavell, "Is it your testimony today that consistent with the representations made here to the government that the District's course of action in this matter has been driven solely by concern that Mr. Kennedy's conduct might violate the constitutional rights of students and others, right, by creating this establishment clause issue?" The answer was, "Yes." "Is it a true, accurate, complete description of all the bases?" "Yes."

That's the same thing the District told the public, as reflected in slide 24. It is the same representation the District made to the federal government in slide 25.

I think the confusion that Justice Alito had has been cleared up. This isn't a question of was he failing

to supervise during the 15 seconds. No. The District was very clear why it took its action, because we might get sued for the establishment clause. That's the District's position. That tees up the question for the Court. It is not a factual issue. The question is: Is that right? Was the District correct when it took that position?

That leads us to the free speech claims at issue, which is the *Eng* test. There is no dispute that we are in *Eng* land.

Eng has five factors, but I think—although the District has taken inconsistent positions in its two briefs, I think we are only fighting about two of these factors. No. 1 was on the matter of public concern. No dispute that religious speech is on that subject. That's what the Ninth Circuit Johnson case says.

Here we are at *Eng* Factor 2: In what capacity was Coach Kennedy speaking when he engaged in his demonstrative religious conduct at the conclusion of the games? That is a practical—the Ninth Circuit in its opinion in this very case said that's a practical, fact-intensive inquiry. It doesn't depend on root job descriptions. You have to look at what does this person do.

Under *Lane vs Franks*, the question is whether the speech at issue is ordinarily within the scope of the employee's job duties. So as a coach, I think if you look at it in that way, no, right? Praying—saying your own silent prayer is not within the scope of what a coach normally does.

What this Court looked at, and what the Ninth Circuit looked at at the early preliminary injunction phase is, well, look, a coach is a role model, right? The

coach is visible. The young men on the team are looking up to the coach. There is no dispute about that. That's precisely why Coach Kennedy wants to do what he does. He recognizes that, and frankly everybody who worked with him recognize—

THE COURT: It is subtly coercive. That's the Rubicon that we wrestle with is, is that coercive.

MR. ANDERSON: I think that comes in at *Eng* Factor 4, right? That coercion right is the establishment clause. I think the question right now is when he knelt to say a silent, personal prayer, in what capacity is he speaking?

The question under *Lane* is not was he officially on the clock or not. Otherwise, that would mean, contrary to *Tinker*, any time you show up for work as a public employee, you don't—your speech is unprotected. That's not the law.

I think that is what Justice Alito is highlighting. We can't read job duties so broad that any time a public employee is visible to somebody else, that that means they cannot—their speech is unprotected no matter what. That would prohibit bowing your head, folding your arms, saying a prayer for a meal if you happened to be in the school cafeteria and students see you.

And to come to the coercion point that Your Honor hit, I think what we know from the timeline—this is why I spent so much time on the timeline—there is no coercion involved here because there aren't students involved. Coach Kennedy never directed his prayers, as of September 17th, once he got the direction, to students anymore. This is about his own personal, private speech.

In fact, the District's own witnesses—if we go to slide 28, the District's own witnesses confirmed that coaches can engage in a variety of personal activity that lasts 15, 30 seconds following a game, and that doesn't pose any issue.

I asked Dr. Leavell if somebody tied their shoe, would that be an issue. Of course not. I asked Assistant Head Coach Boynton, what if somebody was talking to somebody in the stand—if we can go to the next slide. As an assistant head coach, sitting in your bird's eye view, if you saw an assistant coach was talking to parents, family, friends for 15 or 30 seconds, would you think they were somehow not doing what they were supposed to be doing? No. Everybody knows what the aftermath of a football game is. Kissing girlfriends, family members, giving high fives. This is not a captive audience situation. Right? This is not *Lee vs Weisman* or the *Santa Fe* case where you have a graduation ceremony, captive audience, you have a public announcement system through which you are communicating on behalf of the school. This is him, on his own, and as those pictures show, everybody is milling about, and a reasonable observer would look at him and say, is he tying his shoe, is he checking the turf and so forth.

The rule cannot be just because he's a coach, and because he's on the clock, his speech is unprotected. That's what Justice Alito—if we go to slide 30. That's what Justice Alito cautioned against. He thought the Ninth Circuit was straying into a view that public school teachers and coaches can be fired if they engage in any expression that the school does not like while they are on duty. We have to be careful to not say they

are on duty all the time; otherwise, we are contradicting what *Tinker* said 50 years ago.

As I was talking about, the speech was not directed at others. If we go to slide 31. It is the District's own description of the speech at issue. It is not directed to students. It is not directed at others. It is a silent, personal, private prayer. Those are the District's words, not mine.

The presence of others is irrelevant to Kennedy. Coach Kennedy testified—also, the whole personal thing, it also relates to the way people were using the word "public" and "prayer." It was, "Am I doing this as a school person like"—or, "Am I doing this as me? It is just between me and God. It is not the school doing it and the team doing it." That's his testimony. The legal determination ultimately is up to this Court. His testimony is the presence of people is not part of his sincere religious beliefs. His sincere religious belief is it is a silent prayer, he does it after the game, he does it on the field where the contest was fought.

That leads us to *Eng* Factor 4 where we are talking about the establishment clause. When we get to *Eng* Factor 4, the burden is on the School District. It bears a particularly heavy burden here because of the breadth of the rule it wants, which is if he is visible, if any public employee is visible to students or the public while on the clock, they cannot engage in demonstrative religious activity.

The establishment clause issue is the only justification on which the Court needs to rule, whether the District is right or wrong, and under the Ninth Circuit's *Hill* case, the District has to show there was an actual establishment clause violation.

The District says, well, the fear of a potential establishment clause lawsuit is sufficient. That's not the law. That's not what *Hill* says, that's not what *Good News Club* says. You need to have an actual establishment clause violation. That makes sense because you can always come up with some litigant who could stitch together some potential allegations and say, well, that person could come up with an establishment clause lawsuit. The District needs to be right. That creates the right balance between the constitutional rights of the employee and the constitutional obligations of the District.

The test at issue comes from the *Santa Fe* case—*Santa Fe* and *Lee vs Weisman* are the two Supreme Court cases that deal with prayer in the context of public schools. They look at coercion. Right? Supreme Court evaluates whether school prayer has the improper effect of coercing those present to participate in an act of religious worship.

Go to the next slide. This is the conduct at issue. Not students around him. Presence or absence of students is irrelevant to Coach Kennedy.

I think as a matter of law, when a coach kneels for a 15-second silent, personal, private prayer, as everybody else is milling about following the post-game, there is no coercive effect. There is no captive audience. Nobody—after receiving the direction from the District, no Bremerton School District students participated in any prayers with Coach Kennedy ever again. This is not the *Borden* case, it is not the *Doe* case.

I want to also make sure I touch on the free exercise claim that we have, which is separate from

the free speech claim. Let's go ahead and jump to slide 40.

Under the free exercise clause, and specifically under the Supreme Court's *Church of the Lukumi* case, you can't have a policy—we have *Employment Division vs Smith*, which says a neutral policy of general applicability is fine. What you can't have is a policy that specifically targets speech because it is religious.

We would submit that is exactly what happened here. The District's policy towards Coach Kennedy is he could not engage in demonstrative religious activity in front of students. That's precisely the type of religion-specific policy that *Church of Lukumi* said is not constitutional.

No question they suspended Coach Kennedy because his conduct was religious. Had he talked to an opposing coach about a recent presidential debate or election, some other type of expression, he would not have been suspended. It was specifically because of the religious content of his speech that he was targeted. As a result, we are in *Church of the Lukumi* land, and the District has to satisfy strict scrutiny.

Ultimately, that analysis will collapse into the establishment clause analysis because the District will say, well, look, the interest that we are trying to vindicate under strict scrutiny is avoiding the establishment clause violation. For all the reasons I have talked about, and I won't go over again, that is incorrect.

Finally, Your Honor, and I will make sure to give time to my opponent, we have Title VII claims. Those claims raise similar issues. We have the disparate

impact claim where Coach Kennedy has to show he belonged to a protected class; not in dispute. That he was qualified; not in dispute. Third, that he was subjected to an adverse employment action. Again, not in dispute. Four, similarly situated individuals were treated more favorably.

The evidence shows the District did not target coaches who engaged in non-religious forms of expression following football games, whether it is talking to somebody else about any topic. There was testimony that there was an assistant football coach who did a Buddhist chant once. Wasn't as demonstrative as kneeling down, but he did it. He was not subjected to adverse action.

The second Title VII claim is the failure to accommodate claim. The reasons here ultimately are going to collapse. The District never offered an accommodation that would satisfy Coach Kennedy's—or, eliminate the religious conflict between what Coach Kennedy was doing.

Third, there is a retaliation claim based on the District's action once Coach Kennedy asserted his constitutional rights in the October 14th letter.

With that, Your Honor, I will take a seat.

THE COURT: Thank you, Mr. Anderson.

Mr. Tierney, good to see you again.

MR. TIERNEY: Good to see you. I don't hear that often.

THE COURT: We're a kinder, gentler group.

MR. TIERNEY: What I would like to do, Your Honor, is pull back a little bit and emphasize an

overriding principle here, that we aren't deciding this case on the basis of overriding principles or broad rules or a one-size-fits-all test. If there is anything we learn from free speech and free exercise cases, it is that every case is decided on its particular facts.

I think that addresses Judge Alito's concerns. I think he was talking about the implications of some of the language in the Ninth Circuit opinion as to how it might be applied in other situations. Nowhere does he say that the Ninth Circuit failed to address this case on the specific facts of the speech.

THE COURT: I commented last time that on religious freedom cases, I prepare oral argument, write the decision, and burn all the stuff because you cannot keep the forms, the cookie cutters that you think might come in handy as you go. You have to start all over with the particular facts and circumstances.

MR. TIERNEY: I agree. I think that is what we need to do here. I'll be addressing, you know, what is the broad implication if this rule is applied in somebody's lunchroom or some other place. This is a case limited to the facts here.

I want to go out of order and move to the end of when we are talking about the speech in question, talking about the activities that took place, what do we end up with? What are the actual facts taking place at the end?

Now, I would like to turn the document camera on.

THE CLERK: It is on.

MR. TIERNEY: We saw a slide at the start of Mr. Kennedy's last prayer, the last game that he is

playing. That is just as he is starting to kneel down, and there are other people coming to join him. Counsel described it as other coaches milling around. In fact, there weren't other coaches milling around. There we go.

That was the first step in—that you saw before of Mr. Kennedy starting to kneel. This is what the prayer itself looked like as it was being performed.

Mr. Kennedy was joined by this other group of people. The facts of the last prayer that took place is a prayer circle at mid-field. It is interesting who these people are. This man in the trench coach with the "No. 2" on his back is a state representative.

THE COURT: Jesse Young.

MR. TIERNEY: Jesse young. Next to him with the "No. 3" is another state representative. We have two government officials praying at mid-field with the coach. There is two students there. We have heard discussion about Mr. Kennedy didn't want to pray with students. In fact, that was the heart of the letter that he wrote was that he be given permission to pray with students. That's the only position he ever communicated to the District. That is the position that his representatives made clear was the only position he was presenting. They turned down every opportunity to negotiate with the District or join in some form of looking for an accommodation. Mr. Kennedy admitted that in his deposition. We cited all that.

The position he took is entirely set forth in the letter of October, I think it was the 14th, October 14th letter.

This is what we are analyzing in the issues in this case. This is the instance of speech.

THE COURT: Is this in the declarations?

MR. TIERNEY: Yes.

THE COURT: I have seen so many—

MR. TIERNEY: It is attached in our exhibits, Your Honor. I have also cited the testimony of Mr. Kennedy where he is identifying these various people, some at least he said he didn't know. He agrees there appears to be two school-aged children there. This person No. 9 is taping or videoing the event.

This is—to back up a little bit, this is after a game. The context, the event that is happening, we are not talking about a casual, something at practice, something at some other situation. For these players, there is only about ten of these events a year. This is a big moment. There is a context that is attached to this demonstration that is taking place here. That carries meaning. It is a communication to the people around. That is not something that can be denied seriously, with a straight face.

This is a big moment for the kids. It is a big moment for the parents in the stands at games. The testimony from Mr. Barton was there is sometimes as many as a thousand people at a game, certainly hundreds. There is only a few of these events per year. There is band members, cheerleaders, everybody around.

If you look at that video of this, what takes place after this is, as his team comes back out onto the field, he addresses the team, the state legislators address

the team. That is part of the context of the communication that is taking place.

It is more than just a 15-second private, personal, unobservable prayer by Mr. Kennedy. It is a staged demonstration. However laudable, it is still a communication to everybody around about what the coach values, about what is taking place with the people that are going to address the team. It is a message to the players. It is a message to the people in the stands. This is what we analyzed in this case. This is certainly what the history was leading up to is this, that these—we have a picture I submitted in our materials of the prayer practice before of the students kneeling around Mr. Kennedy, him holding up two helmets, praying, delivering this prayer in a standing position in that situation. This all carries a context. It all carries communication to the people around.

I know that is at the end. I think it is important to point out where this goes.

The comments, the argument from the plaintiffs is that this is all about the establishment clause in the School District's mind, the School District's position. But that isn't what was said. What was said was the constitutional rights of students and others.

In a letter from Mr. Ganson early on in the matter, he pointed out that the Washington Constitution imposes stricter requirements than the Federal Constitution. There is the issue of the establishment clause under the Washington Constitution.

There is also concerns expressed, and I will pull out some of those materials and show you, about the forum rules, the forum access rules for the District,

and that this was not an open forum. This was not a platform for private speech.

The District's concern is that by allowing Mr. Kennedy to present his speech at this center stage, that it had to open a forum for anybody else to present their speech. There could be, in that instance, no distinctions drawn between the kind of speech that was allowed. The District can't discriminate on a content basis if it has an open, public forum. It can't say, well, Mr. Kennedy is allowed to pray, but we are not going to let somebody else conduct a religious ceremony.

THE COURT: We had a forum issue with the Department of Ecology. They allowed employees with particular interests to use their lobby and atrium in their building for promotion, charitable activities, and there were some labor meetings where their representative counsel was with them and there was an attempt by those who were trying to communicate with them about their right to opt out of union membership. That is perhaps at the Ninth Circuit now.

I felt like they didn't—there was a clear distinction, a purpose, and the antis would be outside in front of the place handing out their literature and the like.

It is a complex issue about what is a private forum, what is an open forum, and what is a melded forum situation.

MR. TIERNEY: Indeed. It is a thicket for a public agency to enter into, if it wants to try to limit a forum and/or somehow police a partly open forum.

We cite the *DiLoreto* case where the Ninth Circuit upheld a school district's decision to not want to enter that thicket and closing a forum completely just to avoid having to make those sorts of decisions. That involved posting advertisements on baseball field fences that included the Ten Commandments, and rather than have to deal with that, the school district said, fine, we won't have advertising on the fences, and that was an acceptable response.

In this case, we could easily imagine if somebody wants to say, well, the field afterward is an open, public forum, so I get to do whatever speech I want.

Would this case be decided differently if, instead of going out and saying a prayer, Mr. Kennedy held up somebody's campaign banner at the close, "vote for Clinton," "vote for Trump" at the end. Would there be any problem with the District saying, no, we don't want that?

I think that also goes to the question of whether this is directed at religion. The District didn't close the forum only for religious expression. It closed the forum for anybody's expression. It doesn't allow anybody else to go out there and conduct a social protest, burn a flag, support this cause or that cause.

Having pointed that out, I am going to—

THE COURT: It is important, at the end of the day, you have to pick your cabin, what this case is about and what it is not about.

Mr. Anderson says it is about the establishment clause.

MR. TIERNEY: It is about constitutional rights, and constitutional rights include the establishment

clause. They include the rights of others to have access to an open, public forum. There is really two kinds of rights there. I don't think—I don't agree that we necessarily have to choose between those. I think they were both concerns of the School District's.

It is expressed in the letters, when Mr. Kennedy was put on administrative leave and the District sent out a communication to the public, one of the things that was asked by the District in its Q and A—and it responded—"Is the District allowing other groups to use the football field for religious activities?" "During and after games until attendees leave, the field and stadium are exclusively in use by the District for District-sponsored events. The football field is not a public forum when it is used for a District-sponsored event." That was on the District's mind back then. Partly, it is an establishment clause issue. Factually, historically, that is also a piece of the District's mind.

Here is another internal communication by the District. Again, this—

THE COURT: I have seen this.

MR. TIERNEY: 64.21, the District is saying, this issue of equity is exactly the door we were worried about opening to all groups with Joe establishing his ritual of prayer after games. That is a piece of this case.

We have an establishment clause analysis to do, but we also have a public forum analysis to do.

Since I am on the public forum topic, there is no case that allows—no authority that allows a school district employee to determine the content of a school district event. That is in the hands of the district. The

district can say, this is the play we are going to put on. This is who is going to sing at the pep rally. This is how we are going to conduct our post-game ceremonies.

The District wanted, for safety reasons—and having been a lacrosse coach and seeing it happen, we might want to eliminate the handshake line. I saw a couple of handshake lines go bad in my time. It is up to the District to make those determinations. It is up to the District to decide who is going—what song the band is going to play at halftime. It is up to the District to decide whether it is going to present a prayer as part of its closing ceremonies. That is not something the District surrenders just by hiring somebody and giving them a position as an assistant coach. It doesn't say, okay, now you get to determine what we do on the football field as part of our closing ceremonies.

The District—this is part of what was involved in the discussions about: Are you on duty, off duty, is the event still going on. The District's direction to Mr. Kennedy was that yes, this is still an event going on. You are still part of the District. You are still subject to our directions. We don't want this to be part of the event.

There is no authority that allows Mr. Kennedy to say no, I am going to speak what I am going to speak at halftime—not halftime, but at the closing ceremony. I am going to hold up a campaign sign, say a prayer, or do whatever. Certainly, there is no authority that says, I am going to invite people out onto the field to pray in the middle of the field with me and address the team afterward. There is simply no authority for that.

That is what we are analyzing here in this case.

One thing that was left out. Sorry I was shuffling. I was cutting a couple things out of the binder. The timeline here leaves out the first letter from the District, which is October 16th. That is Document 71-15. I think looking at that document will tell us—this is the District's first response once it hears from Mr. Kennedy.

Just to back up. The District had its first exchange with Mr. Kennedy. It issued written directions. As I put in our briefing materials, the next thing it knows, it sees a news report that says Mr. Kennedy has returned to the field after the game and prayed an hour later. District thinks things are fine. Doesn't have anybody else monitoring him after that, and then gets this letter on October 14th that says—well, it says what it says.

Then the District responds to that, which isn't shown on the timeline. The response is addressing some of the points I am talking about. You are on—at the event on the field under the game lights solely by virtue of your employment. The field is not an open forum to which members of the public are invited.

I want to make sure I have the right date on this, Your Honor. This is the October 23rd letter. Sorry.

THE COURT: Let me see if I can pull it up.

MR. TIERNEY: No matter how much you rehearse this.

THE COURT: I don't have a letter of October 16th in the file. I had a verdict last night at 5:00. We have the day.

MR. TIERNEY: It is underneath an email. This is document 71-15. It starts with an email. This is what is attached underneath the email.

I am looking on this point in the middle here where it states, "After all, the District activity is not merely an athletic contest. The event encompasses all the pregame preparation and post-game activities attendant to which and are, as much as the game itself, reasons for District athletic programs." The District is pointing out to Mr. Kennedy the importance of the post-game ceremonies.

Then it goes on, on the next page, to distinguish that period of time from later when he is no longer on duty, he is free to engage in such activities as he chooses so long as they are otherwise consistent with the District policies regarding private use of District facilities.

In the first written response to Mr. Kennedy's letter, the District points out that he has to obey the District rules for access to District facilities for his speech. It is specifically—it goes on in the paragraph to acknowledge, we know, we saw the reports that you are going back to the field and praying after games. We have no problem with that practice. That is the paragraph, and it continues on.

In this case, from the beginning there was concerns about the impact on District policies of allowing—of opening the post-game ceremonies to—as a forum for private speech. For that reason, Mr. Kennedy doesn't gain anything in that argument by saying whether he is speaking as a public employee or private citizen. If he is speaking as a public employee, he doesn't have free speech rights under the *Pickering*

test. If he is not speaking as a public employee, he doesn't have access to the field and he is violating the District's rules on that basis.

I won't go through the others. In each of the letters after, it mentions to him the field is not an open, public forum. That is important on its own. It is also important as to how that colors the establishment clause issue.

The establishment clause issue turns on endorsement by the government. That is one of the tests. We cite three different tests in the coercion test and the *Lemon* test.

The endorsement test, the effect, the aura of endorsement grows even stronger in a situation where the District is allowing its property to be used only by one employee, and only for a religious expression, and only at the center stage of the post-game ceremonies in one of the big events of the year, and nobody else is allowed to use the field for any reason. That adds to the aura of endorsement.

When you add to it that it is a prior circle attended by two elected politicians who are allowed access as well, that adds to the issue of endorsement.

I won't pull it up, but the first picture from the Centralia game where Mr. Kennedy is in the field, the person right next to him again in the tan trench coat is Representative Jesse Young. Anybody with knowledge of the situation, anybody who had been following it, would see and would be aware of that history. That is one of the aspects for a test under the endorsement test is what is being communicated, if you have an awareness of the history of the situation, that Mr. Young has been out there praying with Mr.

Kennedy on the field and supporting him in his efforts through that. That, again, however laudable that might be, however proper the message might be for a person to receive, for a young athlete to receive, it is still an endorsement by the government of that message of religion in a situation where it should be neutral.

I think I have basically covered what I have to say. In the process, I wanted to point out, and I think I did, that there are other aspects to the facts, not that we are disputing the facts—

THE COURT: Are there any disputed facts?

MR. TIERNEY: I don't think there are any disputed facts. I think there is a question of whether everything is material, certainly. They are not contending that the District knew that Mr. Kennedy was doing some prayers while the District thought he wasn't praying anymore. The District quit monitoring him.

They are not disputing that he returned to the field or that that was published in the paper. I don't believe there is really any dispute about those things.

THE COURT: Of what significance is the fact that Mr. Kennedy did not reapply?

MR. TIERNEY: I understand the argument that he is saying that it would have been futile for me to reapply. It was clear that I wouldn't have gotten the job if I did.

I couldn't concede that for purposes of argument in saying that's fine, you can sue for them sending you that message or making it clear by the context that you wouldn't be rehired, but you can't sue them for

failing to rehire you if you didn't apply. I mean, you have to do something to trip the wire for that argument. The District didn't get an application from him, had four positions to fill and filled them with people who had applied. It didn't fail to rehire him.

It may seem like a small step, but it is the kind of thing that legal tests sometimes turn on where we have to do things to trigger a situation. I think that is the significance of it. I don't think it is a monumental point in the case because I believe the District's actions were justified in setting that requirement. I think that is the effect of it.

THE COURT: With regard to asserted remedies, is that an issue at this time?

MR. TIERNEY: I think it would be if we were at a remedy phase. Yeah, it would definitely. I don't think there is misconduct by the District to remedy there. It may be a technical point.

THE COURT: I am just trying to cover the waterfront of what—is this a two-step dance, one-step dance. It has already been one step. We are at two. All right.

Thank you, Mr. Tierney.

THE COURT: Mr. Anderson.

MR. ANDERSON: Thank you, Your Honor. Let me start where the Court left off on the question of reapplication. The law is clear under the *Dahlia vs Rodriguez* case, a placement on suspension is sufficient injury for 1983 purposes. There is still a live claim. We had testimony from the athletic director, from the head football coach that unless and until the directive was either rescinded by the District or Coach

Kennedy would agree to comply with the directive, he would not be rehired. To the extent we need to get to a remedy phase, and what that remedy—if it is rescission of the directive, or mandatory reinstatement, we can get to that at a separate phase.

I want to emphasize there is no significance to the legal issues of the case, of the fact he did not formally do a reapplication. There was no need to engage in a futile act of doing that.

I want to turn to the forum, this late-breaking forum argument from the District. I think it is somewhat remarkable that the District has moved away from the establishment clause, establishment clause, establishment clause and now is making all the argument about forum access.

THE COURT: If they can build a corral small enough that it weighs heavily on their side, it is a win-win. They say this promotes and endorses the establishment clause, and that was covered extensively in their brief, and if he is—if he is a private citizen, he is not entitled to go onto the 50-yard line and pray.

MR. ANDERSON: But it is a lose-lose for public employees under that. That violates *Tinker*. Under the District's argument, they are saying, we want to maintain the school as a non-public forum, is I think what their argument is. *Tinker* says under that rationale, then we are violating *Tinker* because public employees could never engage in any religious activity so long as they are in view of somebody. They can't have it both ways.

The exhibit—Mr. Tierney did not read this portion of this exhibit. If we put back up this October 16th letter, I drew an arrow to it.

There is a District policy regarding the private use of District facilities—which do not prohibit religious activities. The fact that—the—I think the confusion is the forum analysis actually doesn't come into play under *Pickering*. If you look at the *Johnson* case, *Johnson* was a case you might remember with the school teacher, math teacher who had the posters—

THE COURT: Right.

MR. ANDERSON:—in his room that highlighted God. One country under God, one nation under God, and highlighted those. The court there said no, no, we don't do a forum analysis. The plaintiff there had argued, well, semi public, different categories of forums. The Ninth Circuit said no, the forum analysis is not the right analysis for the *Pickering* claims by public employees. That makes sense, because otherwise the government employer could always say, it is a non-public forum, so you cannot engage in any private religious expression, even if it is—there is no impetus of coercion, no indicia of endorsement.

THE COURT: How do you say "Poway"?

MR. ANDERSON: I am not going to fall into that trap.

The forum analysis, number one, that's not the reason the District took the action. This is something that has come up as litigation has gone on, and frankly, is a sign the District has lost some confidence in the establishment clause issue.

I think—but more fundamentally, as I said, if you look at *Johnson vs Poway*, the Ninth Circuit said we don't do a forum analysis in the *Pickering* context. That makes sense because otherwise you start to run into *Tinker*.

I wanted to make sure I hit that forum point.

Also a reference to the Washington State Constitution, and that potentially being more broad. Again, all the cases that are cited—go back—the Court can go back and look at the letters. They are all federal establishment clause cases. That was the impetus of the District's position. Not until the litigation, have they started to reference more directly the Washington State Constitution.

Let's not forget, we are talking about Coach Kennedy's federal constitutional rights. Under the supremacy clause, the Washington State Constitution could not trump Coach Kennedy's federal constitutional rights in all events.

I don't think the—I don't think the District can run away from the foundational question here which is: Does the private, 15-second prayer, is that speech by a private employee—a private citizen, is he speaking as a private citizen at that moment? Again, *Tinker* and *Pickering* are clear that you can't just forbid, just because they happen to still be on the clock in the formal sense of "at work," that doesn't mean they are now stripped of their First Amendment rights.

For those reasons, Your Honor, we would ask that summary judgment be granted on the constitutional and Title VII claims.

THE COURT: Mr. Tierney, anything you want to add?

MR. TIERNEY: *Berry vs Department of Social Services* explains the circumstances under which forum analysis applies to a freedom of religion, free speech claim. It not employed there. It is not employed in the broad sense of just saying everything is a forum. When there is an issue of whether the government entity is imposing a non-public or limited public forum on a government space, it does apply. That is in the *Berry* case, Ninth Circuit case.

THE COURT: Anything, Mr. Anderson?

MR. ANDERSON: No, Your Honor. *Berry* is distinguishable. The Court can read that and figure it out.

THE COURT: Thank you very much for your scholarship, advocacy, and also for the litigants. You all are without guile. You are doing what you perceive to be the right thing to do for the right reasons. It is a first class lesson in civics, the Constitution, and we have to live it out now.

I am the low rung on the ladder. I am sure that the ladder will be climbed. I will get you my written decision within—well, very soon.

Have a great weekend. Thanks again. Court will be at recess.

* * *

s/Angela Nicolavo
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COURT REPORTER