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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Coach Warns Justices Of 'Misdirection' In Religious Bias Case

By **Abby Wargo**

Law360 (December 22, 2021, 3:14 PM EST) -- A high school football coach pressed the U.S. Supreme Court to take up his case claiming he was discriminated against for leading prayers after games, saying the school district he's accusing of religious bias is using "misdirection" to keep its win intact.



Former football coach Joseph Kennedy says his case is strictly about his First Amendment right to pray quietly by himself. (AP Photo/J. Scott Applewhite)

Joseph Kennedy, who **filed a petition for high court review in September**, lodged a brief Tuesday responding to the Bremerton School District's opposition to his bid for certiorari.

The school argued that Kennedy was delivering religious motivational speeches to students by engaging in post-game prayer, but his reply says the school district's efforts to shut down his case are a "study in misdirection."

According to Kennedy, his First Amendment right to religious expression is squarely at issue in his appeal.

"Whatever other conduct may have predated this litigation without drawing a contemporaneous objection, this lawsuit has always concerned only whether a public-school employee has a constitutional right to engage in brief, quiet prayer by himself," Tuesday's brief said.

Kennedy claimed his prayers did not occur within the scope of his duties as an assistant coach, as they occurred after the games had ended. He argued that his roles as a coach and teacher don't cancel out his constitutional rights.

But the school district said Kennedy had rejected their efforts to come up with alternatives to his post-game prayer ritual before they eventually pulled him off the sidelines. His prayers, which involved spectators, were neither quiet nor private, the district contended.

Kennedy's cert petition came after the **Ninth Circuit ruled** that his religious expression, performed in his capacity as a school employee, was government speech and not protected by the First Amendment.

Kennedy's petition has received support from over two dozen states, conservative groups such as the Alliance Defending Freedom and Advancing American Freedom, former professional football players and groups of current state legislators and U.S. Congress members.

Four conservative Supreme Court justices — Samuel Alito, Clarence Thomas, Neil Gorsuch and Brett Kavanaugh — **expressed interest in hearing the case** in 2019 after Kennedy had unsuccessfully petitioned for a review of a trial court order's denial of an injunction that would have reinstated him and allowed him to continue his prayers in front of students.

The justices were critical of the Ninth Circuit's ruling on the injunction but held off on hearing the case, saying there were certain constitutional questions that first needed to be answered.

Kennedy originally sued the district in 2016 in Washington state federal court claiming his First Amendment rights were violated after he lost his job for continuing the post-game prayer rituals.

Bremerton School District was protecting students' religious freedom by barring Kennedy from coercing them into prayer, said Richard Katskee of Americans United for Separation of Church and State, an attorney for the school district.

"This case is not about a school employee praying silently as a private religious devotion. Rather, this case is about the impressionable students who felt pressured to participate repeatedly in very public religious rites," he told Law360 Wednesday.

Counsel for Kennedy was not immediately available for comment.

Kennedy is represented by Paul Clement, Erin Murphy, Devin Anderson, Andrew Lawrence and Mariel Brookins of Kirkland & Ellis LLP; Kelly Shackelford, Jeffrey Mateer, Hiram Sasser, Michael Berry and Stephanie Taub of the First Liberty Institute; Anthony J. Ferate of Spencer Fane LLP; and Jeffrey Paul Helsdon of Helsdon Law Firm PLLC.

The Bremerton School District is represented by Richard Katskee and Bradley Girard of Americans United for Separation of Church and State and by Michael Tierney of Tierney Correa & Zeinemann PC.

The case is Joseph A. Kennedy v. Bremerton School District, case number 21-418, in the Supreme Court of the United States.

– Additional reporting by Vin Gurrieri and Alexis Shanes. Editing by Roy LeBlanc.

Update: This story has been updated with a comment from the school district's counsel.