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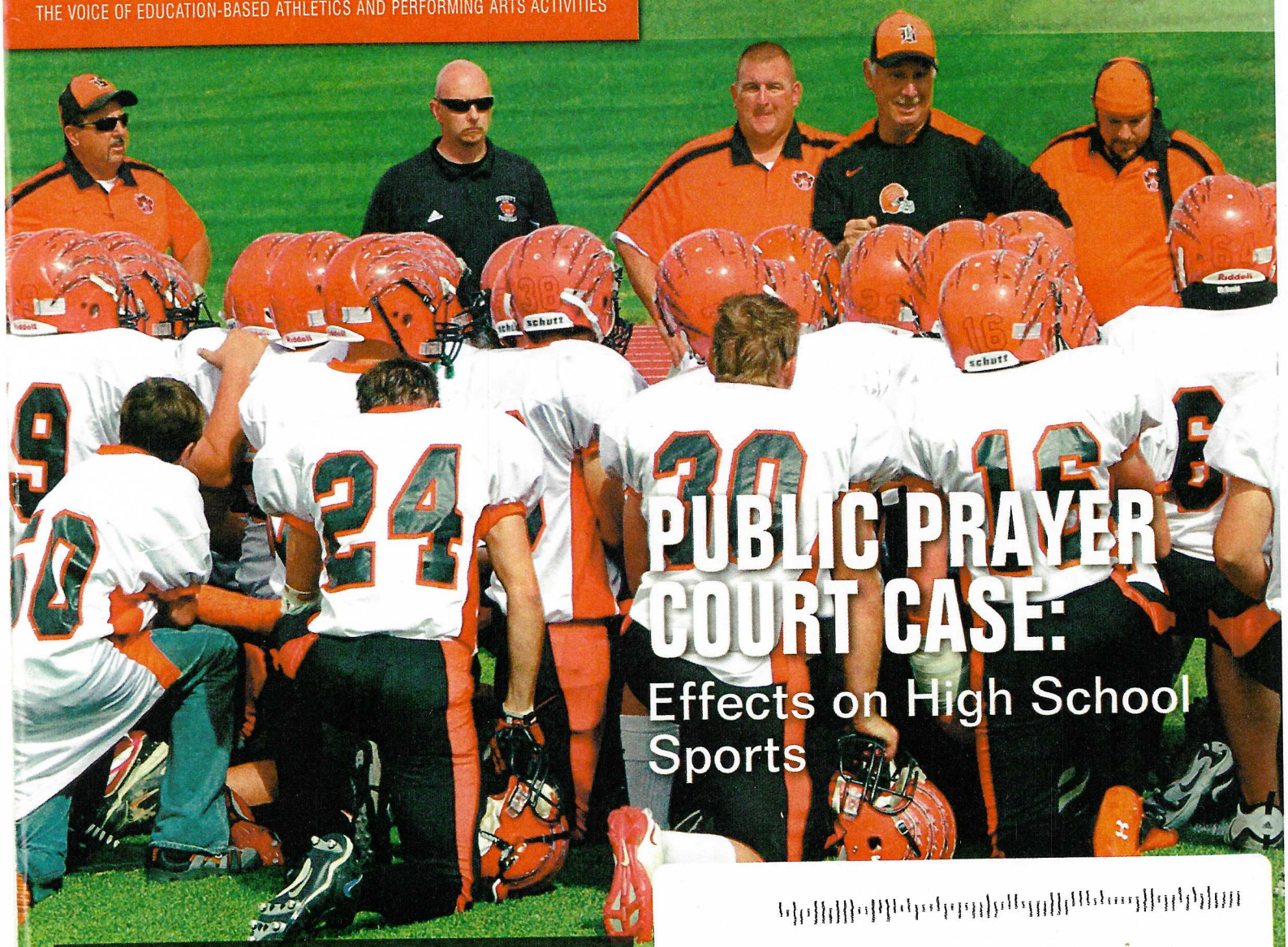

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Supreme Court Reaches Decision in Case Involving Public Prayer

By John E. Johnson, J.D.

In June, the United States Supreme Court reached a decision in the case related to a football coach praying after a game – a case that has generated national interest of leaders in high school athletics.

Joseph Kennedy, a high school football coach, engaged in prayer with a number of students during and after school football games. His employer, the Bremerton (Washington) School District, in two letters sent to him in September and October of 2015, asked that he discontinue the practice in order to protect the school from a lawsuit based on violation of the Establishment Clause.

The district ultimately disciplined Coach Kennedy after three games in which he did "....pray[ed] quietly without his students...." contrary to the instructions provided to him by the district. In forbidding Kennedy's prayers, the district sought to restrict his actions because of their religious character. Kennedy claimed that the timing and circumstances of his prayers – during the postgame period when coaches were free to attend briefly to personal matters and students were engaged in other activities – confirmed that he did not offer his prayers while acting within the scope of his duties as a coach.

Ultimately, the district placed Kennedy on paid leave after the last game of the season for not following the directives of the

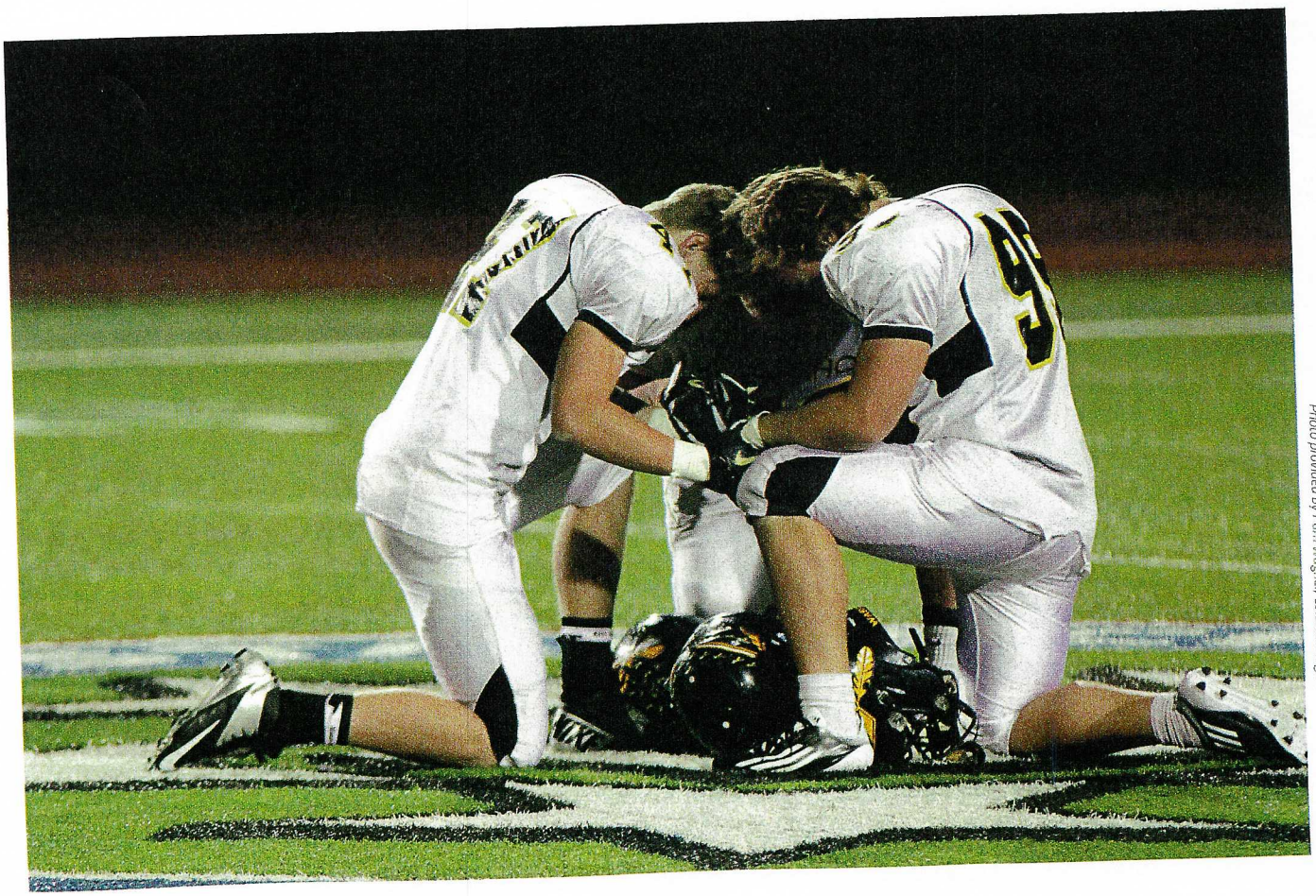

Photo provided by Pam Wagner, Colorado High School Activities Association.

Bremerton School District as articulated in the letters to him. In response, Kennedy sued the school district for violating his rights under the First Amendment and Title VII of the Civil Rights Act of 1964.

Kennedy asked the district court to determine that 1) his prayer as a public school employee during school sports activities was protected speech, and 2) if it was, could the public school employer prohibit it to avoid violating the Establishment Clause? The district court determined and held that because the school district suspended him solely because of the risk of constitutional liability associated with his religious conduct, its actions were justified. Kennedy appealed, and the U.S. Court of Appeals for the Ninth Circuit affirmed.

On June 27, 2022, the United States Supreme Court reversed the Ninth Circuit.

The Essence of the Dispute

Presumptively, the government cannot establish any religion – in *Bremerton vs. Kennedy,* the government is exercising action through the conduct of Coach Kennedy – nor can the government ban a person's free exercise of religion, including the exercise by agents of government like coaches and teachers. These concepts have existed together for years, certainly since the 1964 case of *Tinker v. Des Moines School District*, which reminds us that the First Amendment's protections extend to "teachers and students," neither of whom "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Since Tinker, conflict in this legal area has occurred from time to time, and when there is an apparent conflict, the Supreme Court steps in as it did in *Kennedy v. Bremerton.*

The government cannot force, coerce or compel public school employees, including teachers and coaches, from practicing their religion, including prayer or practice anytime the government wants. Also, public school employees, including teachers and coaches, are agents of the government, and as such are subject to the "no establishment" clause – they cannot force, coerce, compel any student under their influence, while in the scope of employment, to pray or otherwise practice or participate in a religious activity.

The case law that has developed on this historical conflict essentially holds that when a student is coerced into religious activity, by an agent of the government such as a coach or teacher, that coercive conduct violates the "no establishment" clause and is, therefore, unconstitutional.

Protection of Religious Practice

Kennedy v. Bremerton provides guidance to determine whether an individual's religious practice (as done by Coach Kennedy) is public or private. A two-step evaluation is needed to determine if prayer by a public-school employee while "on the clock" is protected Constitutional activity.

Step 1 asks whether the person is speaking in an "official duty" role. If the answer is yes, the district then can presumptively control and discipline that speech because it is governmental speech, but must go to Step 2 for further evaluation to see if the employee can overcome this presumption.

Step 2 is an analysis of the speech and its consequences – is the speech private or said within the scope of duties? If it is private, it cannot be regulated; if it is within the scope of the duties of employment, it can be controlled or disciplined. The Step 2 analysis is "....a delicate balancing of the competing interests surrounding the speech and its consequences."

At this second step, courts are to consider whether an employee's personal speech interests are outweighed by "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

The Supreme Court in Kennedy felt it was clear that Coach Kennedy proved his speech was not coercive and was, in fact, private speech. Key to this determination is the following language:

"During the postgame period when these prayers occurred, coaches were free to attend briefly to personal matters – everything from checking sports scores on their phones to greeting friends and family in the stands. Mr. Kennedy's actual job description left time for a private moment after the game to call home, check a text, socialize, or engage in any manner of secular activities. Others working for the District were free to engage briefly in personal speech and activity. That Mr. Kennedy chose to use the same time to pray does not transform his speech into government speech." (Kennedy, pgs. 18-19)

The main takeaways of *Kennedy v. Bremerton* are:

- A governmental employee cannot coerce prayer;
- Governmental employees can pray so long as they are not avoiding their other post-game responsibilities;
- Personal prayer is permitted;
- No school employee can require student attendance or participation;
- There can be no coercion of students to participate; and
- Prayer must be done at a time when the coach does not have specific post-game duties and when the post-game time is generally open for all.

Kennedy v. Bremerton does not represent a huge shift in the law, but does represent a need for further clarification for leaders in high school athletics.

The Impact on Athletic Directors

First, athletic directors need to understand district policy and rules about public displays of prayer. Everything must conform to the district directives.

Second, take an approach of advising inquiring staff what they can do as opposed to what they can't do. No one likes to be told "no" and most coaches are much more inclined to be responsive if they are told "yes." Upon such an inquiry, seek to understand how the person would like to practice religion through prayer. Make sure you endorse the right of your coach to pray and advise as to how and when prayer is appropriate.

Third, think strategically and be proactive. Develop an awareness of staff for whom prayer is important to advise them how their practice of prayer around the athletes should be considered. As an agenda item at your coaches meetings, provide reminders about the legal limitations of prayer. Have a communication plan in place to address urgent concerns of coaches. Generally, coaches simply want to understand the limitations and are not inclined to push any boundaries set by the district.

Fourth, contemplate how to manage fans at the end of the

games if prayer in this context becomes an issue. Consider redefining end-of-game duties for coaches to not leave time for all the after-game activities. There may be a concern that some coaches think that they now have a lot of leeway with regard to prayer or other religious practices before or after games, and that simply is not the case.

Following are two important takeaways for high school athletic directors:

1. First Amendment cases are extremely fact-specific and so the decisions are narrow. It is dangerous to assume that similar conduct by a coach or public school employee would be permissible and problem-free; and
2. Respect personal religious beliefs and practices (in accordance with the Free Exercise Clause), and also respect the importance of no endorsement of religion occurring on school property or at school events. Consider emphasizing that a school district's Board policies prohibiting endorsement are still valid and applicable.

Typically, the source of the issues with these types of circumstances is rarely a school principal or athletic director prohibiting or punishing a school employee for engaging in a religious practice at work. More common is that problems occur when a student or parent is offended because they feel that a school employee has stepped over the line with religion or a religious practice.

Ultimately, *Kennedy v. Bremerton* should not alter one's view on the issue of school employees engaging in prayer at work. If a coach wants to pray privately before or after a game, allow the coach to do so as long as students or parents are not included or cause a disruption. A school district can control the location and time of the prayer if it becomes necessary to ensure compliance with the Establishment Clause. If an employee's prayer becomes disruptive, then a school district could consider time and place restrictions.

The bottom line is that this case provides further clarification to existing Constitutional interpretations. As previously mentioned, these cases are extremely fact-specific, so the basis the Supreme Court used in *Kennedy v. Bremerton* is guidance for the next big conflict; but with different facts, the determination very well could be different.

Note: Thanks to Rachel England, general counsel for the Shawnee Mission School District in Overland Park, Kansas, for assistance with this article. **HST**

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John E. Johnson, J.D., recently retired after 18 years as athletic director at Shawnee Mission South High School in Overland Park, Kansas, and 31 years overall in education. He was an attorney for a number of years prior to entering education and has a law degree from Washburn University in Topeka, Kansas. He is a member of the *High School Today* Publications Committee.