



Supreme Court Midterm for Local Governments 2021-22

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The State and Local Legal Center (SLLC) files Supreme Court amicus curiae briefs on behalf of the Big Seven national organizations representing state and local governments.

*Indicates a case where the SLLC has or likely will file an *amicus* brief.

The Supreme Court's docket is full for the 2021-22 term. The SLLC [Supreme Court Preview for Local Governments](#) summarizes a number of important cases for local governments the Supreme Court agreed to hear this term as of July 2021—including a gun case, two First Amendment cases, and a case involving whether emotional distress damages are available under a number of federal anti-discrimination statutes. This article summarizes three more interesting cases for local governments to be decided this term—including two more First Amendment cases.

The issue the Supreme Court will decide in [Shurtleff v. City of Boston](#)* is whether flying a flag on a flagpole owned by a government entity is government speech. If it is, Boston may refuse to fly a Christian flag.

Boston owns and manages three flagpoles in an area in front of City Hall. Boston flies the United States and the POW/MIA flag on one flagpole, the Commonwealth of Massachusetts flag on another flagpole, and its own flag on a third flagpole. Third parties may request to fly their flag instead of the city's flag in connection with an event taking place within the immediate area of the flagpoles.

Camp Constitution asked the city to fly its Christian flag while it held an event near the flag. The city refused its request to avoid government establishment of religion.

The First Circuit held that flying a third-party flag on a city hall flag pole is government speech meaning the city didn't have to fly the Christian flag.

According to the First Circuit, in two previous cases the Supreme Court has developed a three-part test for determining when speech is government speech. The Court looks at the history of governmental use, whether the message conveyed would be ascribed to the government, and whether the government "effectively controlled" the message because it exercised "final approval authority over their selection."

Regarding the history of governments using flags, the First Circuit stated "that a government flies a flag as a 'symbolic act' and signal of a greater message to the public is indisputable."

The First Circuit also concluded that an observer would likely attribute the message of a third-party flag on the city's third flagpole to the city.

Finally, the First Circuit had no difficulty concluding the city controlled the flags. "Interested persons and organizations must apply to the City for a permit before they can raise a flag on this flagpole."

In [*Kennedy v. Bremerton School District*](#),* the Court will decide whether the First Amendment protects a high school football coach who, joined by students, prayed after football games.

According to Joseph Kennedy, his religious beliefs required him to pray at the end of each game. Students eventually joined him as he kneeled and prayed for about 30 seconds at the 50-yard line.

When the school district found out, the superintendent directed Kennedy not to pray with students. After widely publicizing his plan, Kennedy announced he would pray after a particular game even if students joined him. He was ultimately put on administrative leave and didn't apply to coach the next fall.

The Ninth Circuit held that Kennedy had no First Amendment free speech right to pray because he was speaking as a "government employee" rather than as a "private citizen." And even if he was speaking as a private citizen the Ninth Circuit held the district could prevent him from praying because of Establishment Clause concerns.

The Ninth Circuit concluded Kennedy was speaking as a public employee when he prayed because he "was one of those especially respected persons chosen to teach on the field, in the locker room, and at the stadium. He was clothed with the mantle of one who imparts knowledge and wisdom. Like others in this position, expression was Kennedy's stock in trade. Thus, his expression on the field—a location that he only had access to because of his employment—during a time when he was generally tasked with communicating with students, was speech as a government employee."

The Ninth Circuit also held that even if Kennedy's speech was private, avoiding violating the Establishment Clause was an "adequate justification for treating Kennedy differently from other members of the general public." Per the Ninth Circuit an objective observer would know "Kennedy actively sought support from the community in a manner that encouraged individuals to rush the field to join him and resulted in a conspicuous prayer circle that included students." "Viewing this scene, an objective observer could reach *no other conclusion* than [the school district] endorsed Kennedy's religious activity by not stopping the practice."

The question in *Vega v. Tekoh** is whether a police officer can be sued for money damages for failing to provide a *Miranda* warning.

Terrance Tekoh was tried for unlawful sexual penetration. At trial he introduced evidence that his confession was coerced. A jury found him not guilty.

Tekoh then sued the officer who questioned him, Deputy Carlos Vega, under 42 U.S.C. Section 1983 claiming Vega violated his Fifth Amendment right against self-incrimination by not advising him of his *Miranda* rights.

The Ninth Circuit held Tekoh could bring a Section 1983 case. According to the Ninth Circuit, following *Miranda* there was much debate over whether *Miranda* warnings were "constitutionally required."

In *Dickerson v. United States* (2000), the Supreme Court held that Congress could not overrule *Miranda* via a federal statute that provided confessions were admissible as long as they were voluntarily made, regardless of whether the *Miranda* warning had been provided. *Miranda*, the Supreme Court reasoned, was "a constitutional decision." According to the Ninth Circuit, the Supreme Court has subsequently "muddied" the waters since *Dickerson*. But since *Dickerson* less than five Justices have said money damages aren't available for *Miranda* violations.

Conclusion

Interestingly, all three cases present issues which could arise at any local government on any day. Local governments engage in government speech constantly. Local governments, like all employers, want to stop employees from engaging in a variety of activities while at work. And every time a police officer interacts with someone, he or she must decide whether to recite *Miranda*. The Court will issue opinions in all of these cases by the end of June 2022.