Supreme Court 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 filed an *amicus* brief.

The U.S. Supreme Court's 2021-22 docket, which included abortion and guns, was historic. These most significant cases of the term impact local governments but will likely have a greater impact on states and ordinary Americans. This article summarizes four local government cases all of which will impact the day-to-day operations of local governments. All, remarkably, involve the First Amendment.

In *Kennedy v. Bremerton School District** the U.S. Supreme Court held 6-3 that the First Amendment protects an assistant football coach who "knelt at midfield after games to offer a quiet prayer of thanks." The Supreme Court also overruled *Lemon v. Kurtzman* (1971).

Public school coach Joseph Kennedy had a long history of praying alone and with students at midfield after football games and praying with students in the locker room pregame and postgame. When directed to, Kennedy stopped the latter practice. But he told the district he felt "compelled" to continue offering a "post-

game personal prayer" midfield. The district placed Kennedy on leave for praying on the field after three particular games.

Justice Gorsuch, writing for the Court, concluded Kennedy was able to make the initial showing that the school district violated his free exercise of religion and free speech rights by not allowing him pray on the field after games.

Regarding Kennedy's Free Exercise Clause claim, the Court concluded the school district burdened his sincere religious practice pursuant to a policy that is neither "neutral" nor "generally applicable." The district's actions weren't neutral because "[b]y its own admission, the District sought to restrict Mr. Kennedy's actions at least in part because of their religious character." The district's actions weren't "generally appliable" either the Court concluded. While the district stated it refused to rehire Kennedy because he "failed to supervise student-athletes after games," the district "permitted other members of the coaching staff to forgo supervising students briefly after the game to do things like visit with friends or take personal phone calls."

Regarding Kennedy's Free Speech Clause claim, the Court first had to decide whether Kennedy was speaking as a government employee (who isn't protected by the First Amendment) or as a citizen (who receives some First Amendment protection). The Court determined Kennedy was acting as a citizen. "When Mr. Kennedy uttered the three prayers that resulted in his suspension, he was not engaged in speech 'ordinarily within the scope' of his duties as a coach." "He was not instructing players, discussing strategy, encouraging better on-field performance, or engaged in any other speech the District paid him to produce as a coach."

The district explained it suspended Kennedy because it was concerned a "reasonable observer" would conclude it was endorsing religion by allowing him to pray on the field after games. In response the Court overturned the so-called *Lemon* test.

Lemon "called for an examination of a law's purposes, effects, and potential for entanglement with religion. In time, the approach also came to involve

estimations about whether a 'reasonable observer' would consider the government's challenged action an 'endorsement" of religion.'" In its place the Court stated it has adopted a view of the Establishment Clause that "accor[ds] with history and faithfully reflec[ts] the understanding of the Founding Fathers."

The Court also found insufficient evidence students were coerced to pray.

In *City of Austin, Texas v. Reagan National Advertising** the Court held 6-3 that strict (fatal) scrutiny doesn't apply to Austin allowing on-premises but not off-premises signs to be digitized.

Austin's sign code prohibits any new off-premises signs but has grandfathered such existing signs. On-premises signs, but not off-premises signs, may be digitized.

Reagan National Advertising argued that this distinction violates the First Amendment's Free Speech Clause. Per *Reed v. Town of Gilbert* (2015), a regulation of speech is content based, meaning strict scrutiny applies, if the regulation "applies to particular speech because of the topic discussed or the idea or message expressed."

According to the Fifth Circuit because the City's on-/off premises distinction required a reader to determine "who is the speaker and what is the speaker saying," the distinction was content based. According to the U.S. Supreme Court the lower court's interpretation of *Reed* was "too extreme."

In *Reed*, the Town of Gilbert's sign code "applied distinct size, placement, and time restrictions to 23 different categories of signs." For example, ideological signs were treated better than political signs and temporary directional signs were most restricted. The Court reasoned these categories were content based because Gilbert "single[d] out specific subject matter for differential treatment, even if it [did] not target viewpoints within that subject matter."

Justice Sotomayor, writing for the Court, opined: "Unlike the sign code at issue in *Reed* . . . the City's provisions at issue here do not single out any topic or subject matter for differential treatment." "A given sign is treated differently based solely

on whether it is located on the same premises as the thing being discussed or not. The message on the sign matters only to the extent that it informs the sign's relative location."

In *Shurtleff v. City of Boston** the Court held unanimously that Boston's refusal to fly a Christian flag on a flagpole outside city hall violated the First Amendment.

On the plaza, near Boston City Hall entrance, stands three 83-foot flagpoles. Boston flies the American flag on one (along with a banner honoring prisoners of war and soldiers missing in action) and the Commonwealth of Massachusetts flag on the other. On the third it usually flies Boston's flag.

Since 2005 Boston has allowed third parties to fly flags during events held in the plaza. Most flags are of other countries, marking the national holidays of Bostonians' many countries of origin. Third-party flags have also been flown for Pride Week, emergency medical service workers, and a community bank. When Camp Constitution asked to fly a Christian flag Boston refused, for the first time ever, citing Establishment Clause concerns. The flag has a red cross on a blue field against a white background.

Camp Constitution sued arguing that Boston opens its flagpole for citizens to express their views in which case it can't refuse to fly Camp Constitution's flag based on its (religious) viewpoint. Boston argued it "reserved the pole to fly flags that communicate governmental messages" and was "free to choose the flags it flies without the constraints of the First Amendment's Free Speech Clause."

The Supreme Court held that Boston's flag-raising program doesn't constitutes government speech, meaning the First Amendment applies and it couldn't reject Camp Constitution's flag based on its viewpoint.

Justice Breyer, writing for the majority, conducting a "holistic inquiry" which considered "the history of the expression at issue; the public's likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression."

According to the Court the "general history" of flying flags "particularly at the seat of government" favors Boston. But "even if the public would ordinarily associate a flag's message with Boston, that is not necessarily true for the flags at issue here" where "Boston allowed its flag to be lowered and other flags to be raised with some regularity."

While neither of these two factors resolved the case, Boston's record of not "actively control[ling] these flag raisings and shap[ing] the messages the flags sent" was "the most salient feature of this case." Boston had "no written policies or clear internal guidance—about what flags groups could fly and what those flags would communicate."

In a unanimous opinion in *Houston Community College v. Wilson*, the Court held that when a government board censures a member it doesn't violate the First Amendment.

As Justice Gorsuch describes David Wilson's tenure on the Houston Community College board was "stormy." He accused the board of violating its bylaws and ethics rules in the media, he hired a private investigator to determine whether another board member lived in the district which elected her, and he repeatedly sued the board.

The board censured him stating his conduct was "not consistent with the best interests of the College" and "not only inappropriate, but reprehensible."

The Court held that Wilson has no actionable First Amendment free speech claim arising from the Board's purely verbal censure. It noted that "elected bodies in this country have long exercised the power to censure their members. In fact, no one before us has cited any evidence suggesting that a purely verbal censure analogous to Mr. Wilson's has ever been widely considered offensive to the First Amendment."

Conclusion

The most significant doctrinal change from any of these cases is the overruling of *Lemon*. Every time a local government faces an issue involving Establishment

Clause concerns it now has to apply the Court's new historical test. The Court has offered little guidance as to how this test is to be applied and no guidance as to the status of all the precedent which relied in whole or in part on *Lemon*.