The Supreme Court addressed the intersection of the First Amendment’s Establishment and Free Speech clauses as they relate to a public employee’s personal religious expression when done in the public eye. In a 6-to-3 decision, it held that public employers are not required to suppress employees’ religious expressions where the expression is not within the employee’s scope of employment, there is no evidence the employee was coercing others to join the expression and the public employer tolerates similar secular speech. The case is *Kennedy v. Bremerton School District*.

The case involved a former high school football coach who was suspended (and ultimately his contract was not renewed) for participating in three postgame prayers...
on the field. His players did not join in the prayers (though members of the public and opposing team did), and, at the times the coach engaged in the prayers, other coaches were permitted to engage in private secular actions, such as checking their phones or visiting with family and friends. The coach had previously ended the practice of team-wide, pregame prayers.

Importantly, the majority stated that courts no longer use the three-part test outlined in Lemon v. Kurtzman for evaluating Establishment Clause issues, and instead look to “historical practices and understandings.” For public employers—local, state and federal—the Court’s holding could make the choice to discipline or terminate an employee for religious exercise or speech feel precarious.

Elizabeth Berg contributed to this article.

© Polsinelli PC, Polsinelli LLP in California

National Law Review, Volume XII, Number 188