Find attached a transcript about how *Kennedy* and, potentially, *Garcetti* may inform the *Garnier* case. We hope that–even in the density–you'll see the thinking/questioning process that marked our symposium.

Presentation Overview: *Kennedy* Test and Social Media Cases

"Thank you. So my presentation focuses like Kevin said on how this case relates to a decision that the Supreme Court issued just last year in *Kennedy vs. Bremerton School District,* and it explores why *Kennedy* requires a duties or authority test in the case of *O'Connor-Radcliffe vs. Garnier*. In *Kennedy*, a public high school football coach engaged in a private prayer at midfield at the end of several games, and his employment was subsequently terminated by the Bremerton School District, which feared that his actions violated the Establishment Clause. The key threshold question for the Court was whether or not Coach Kennedy's prayers constituted state action. If they did then disciplining him may have been required by the Establishment Clause, but if they did not, and his termination likely violated the Free Exercise Clause because the Constitution does not normally permit the state to punish private religious conduct. In deciding this question, the Court relied heavily on its ruling in *Garcetti vs. Ceballos* which held that a public employee gauges in state action when he acts quote pursuant to his official duties, and moreover, it is vital that the activity at issue be quote commissioned or created by the government.

Turning to the facts at issue, the Court held that Coach Kennedy's prayers did not constitute state action because they were not ordinarily within the scope of his duties as a coach. More specifically, he did not speak pursuant to government policy; he was not seeking to convey a government-created message, he was not instructing players discussing strategy, encouraging better onfield performance, or engaged in any other speech the District paid him to produce as a coach. Simply put. Mr. Kennedy's prayers did not owe their existence to Mr. Kennedy's responsibilities as a public employee. The Court then went on to note that Coach Kennedy's prayers occurred during a brief interval at the end of each game when public employees, including coaches, were permitted to attend to personal matters, confirming the point that he was not acting pursuant to his official functions. Justice Gorsuch concluded by warning of attempts to decree excessively broad job descriptions to deprive government employees of their constitutional rights. Conversely, the 9th Circuit in Garnier did not engage in the same minute inquiry, in fact, using a different test altogether, holding that whenever there is a quote, substantial nexus end between a public employee given conduct and his official duties, that conduct may qualify as state action.

But this directly contradicts Justice Gorsuch's careful reasoning in Kennedy. In that case. Coach Kennedy's private prayers undoubtedly possess a substantial nexus to his official duties. After

all, his prayers often occurred within minutes of instructing players and discussing strategy, and they were performed at midfield in full view of his team and fellow employees. But this nexus or connection did not convert Coach Kennedy's private conduct into state action. Because his decision to pray at midfield at least particular times was not part of his duties or authority as a coach, it remained constitutionally protected private conduct.

The court should reverse the decision of the lower court and apply the *Kennedy* test for three reasons. First, the Kennedy decision itself requires this result, it announced a broad rule for deciding state action under the Constitution. Second, this test is consistent with America's constitutional structure, including our tradition's emphasis on judicial restraint, federalism, and the separation of powers because it provides clear standards for federal courts to use as opposed to creating subjective inquiries which might lead judges to engage in policymaking. And third, this test is consistent with the original meaning of Section 1983, which limits its claims to defendants who are acting quote under color of late."

Q&A:

"So what do you think is the strongest argument against your position under the *Kennedy* test?"

"I think the strongest argument against my position is that there are serious differences. Perhaps I'm not saying this is true, but you can make the argument. There are serious differences between a coach playing, praying at midfield, and the real world, and as Maxwell said, with someone operating a social media account, because social media is such a new kind of situation, it might be difficult to apply the same rigid formula that was applied in Kennedy, and so the court should look to broader issues."

"Next, I'm sorry if I could interrupt for a moment. So maybe you're right. But I'm wondering whether the formula is really as rigid as you describe it. Right, what's under *Kennedy's* own formula? How could somebody argue that even if the *Kennedy* formula was supposed to be applied, that in fact those accounts should be viewed to state action?"

"So I would have two responses to that professor. My first response would be, even if that were true, it would still require the court to remand the case to the 9th Circuit to conduct the case under the proper standards because they use the wrong test."

"Not necessarily, the court is free to apply what it thinks the right test it for in the first instance."

“That's fair, professor. I would also say that I think you could still come to that conclusion because simply the fact that you discussed your profession on your social media account does not by itself fall within your official duties. For example. I can imagine, like Coach Kennedy, discussing what his plays might be at the next game at a local diner or something like that. He's discussing those things in public, but those aren't part of his official duties as a coach. So I think simply, the fact that they discuss their profession on their social media accounts and maybe even included government information, does not by itself convert those accounts.”

“Got it. Well, I think implicitly, in what you were saying you—you answered my question, which is that if the Kennedy test is applied here, you know it—At least the other side could easily argue that even though it was missing, say, the physical proximity or the temporal proximity to do that you mentioned was President Kennedy. All sorts of things are present In *Kennedy,* the whole point is he wasn't talking to his to his students. They were all off elsewhere. Whereas here the government official is talking to everybody including all the voters right. Also, the coach was engaged in something that is quintessentially seen as being on a private topic he wasn't talking about football, and the court stressed that the court stressed this was about his own religious beliefs, not about his job duties. Whereas here, the government official is talking about his job duties now, to be sure—The speech may not be a necessary requirement of it, but it sounds like there's a possible nexus there. It may just be a different nexus. The nexus may not be a temporal, but it may be a subject matter nexus. So given that I wonder, I wonder why appealing to the *Kennedy* test really reaches the result that you describe.”

“So I would have two responses to that. Sir, first, I'm not necessarily advocating that the *Kennedy* test in both of these cases would mandate this. I'm simply saying the Kennedy test should be the standard that's used to begin with, not just a general substantial nexus test. But even if that were not the case, even if I do think the Kennedy test—at least in the Garnier case could lead to the opposite results—I think here's why like you mentioned. You mentioned in the Kennedy test the points that they stress. They also specifically stress the timing that this speech occurred, and it was at a time when, even though he was in full view of all of his players, even though many of his fellow employees could hear him doing so, it was at a time when all public employees were free to engage in private conduct. And I think, given the fact that these posts occurred when public employees were off the job, they were created on their own time. Simply, the fact that they included information about their jobs does not by itself convert those accounts into state action. Although I could be wrong, sir, and I will definitely do more research on that issue and think about that.

“I appreciate. I appreciate your arguments, maybe you're right. Maybe that's more important. I had in mind things like, for example, the court stressing he was not instructing

players, discussing strategy, encouraging better on-field performance, or engaged in other speech. The district paid him to produce. Whereas, you know, the government officials here often did talk about their jobs, but I mean you may be right that they should that they should still prevail. It's just that it sounded from that—Your argument was: We apply the *Kennedy* test and the *Kennedy* test, you say was rigid and it clearly reaches a particular result. I think that's overstating the clarity of the Kennedy test or the clarity of it as applied to something like this, which is pretty far removed from the fact."

"Another thing I may also be a little bit confused on, sir, is perhaps I misunderstood the 9th Circuit's test because, for example, I thought that the 9th Circuit's test would almost by definition, lead to the opposite result in *Kennedy.* Because I thought, well if it's occurring at almost the exact same time as instructing players, etc. there would be a substantial nexus there. But from what you're saying, it's possible even under the 9th Circuit standard, Coach Kennedy would have also prevailed, right?"

"The business of government and that part of the job of government officials is to explain the business of government to the public. Under that test, *Kennedy* still prevails because Kennedy was emphatically not talking about the business of government."

"Let me try a different question when you are a government employee. Sometimes you have a lot of duties, sometimes a lot of responsibilities isn't one of the duties of being a public official to communicate with your constituents? Isn't that part of their job? So even if they're using social media at a conventions and aren't they simply doing their job, isn't that part of what they have to do? In some cases? Yes, that would be true, like, for example, yes. In many cases, it is a responsibility. It's part of your duty as a government official. For example. I think one example brought up was. If, say, you are a school principal, and there's whether that's going to cause a disruption in the educational calendar. You have a duty to share that information with parents. So that's certainly an example where sharing information with the public would be a part of your official duties. And if you're that principal, them block, you know, parents who annoy him from his social media and they won't learn about weather, road closures."

"It's a very difficult question. I would agree, professor. The key question would be whether or not like you said, it's occurring as a part of his official duties or not because if it's occurring as a part of his official duties, the key point is that it's flowing from state law, and whenever the state officially engages in action through a statute or through a law or through official policy, it cannot then exclude people from hearing that information simply based on their viewpoint. So I admit it's a very difficult question. But I ultimately think that if you're deciding between different standards, one substantial nexus and one is authorities or duties, I think like, for example, with your hypothetical. sir. I think we can immediately discern right there. The question is whether or

not it's an official duty or not. Was this part of his responsibility as an employee? We can immediately apply that test and get a reasonable result. Though a substantial nexus, the problem is that it invites a large amount of other considerations that do not fit neatly into that test, and when you're deciding things as crucial as who might win the next election because their social media account as a candidate was altered by a federal court order. I think the court needs to have a clear standard that lower courts can apply and that public officials can adhere to."

"I mean, it's, it's not that the content of the posts would be altered by a court order. It's just that the comments could not be deleted. How would is that really likely to affect the next election?"

"I would say yes, it might not alter the outcome of the next election in some cases. But the key point is that if it's state action, then it invites extensive federal judicial scrutiny in a First Amendment case, and federal employees are not just federal. Public employees, in general, have a First Amendment right to comment about their professions, including online, and by saying that every single time a public employee mentions what they do for a living on a social media account, that might invite a federal lawsuit if they then exercise their account to block somebody, then it could chill a speech by discouraging them from operating that social media account in the first place, and that would have a detrimental effect on democracy more broadly."

"No justice raised *Kennedy* at either of the oral arguments. Do you have a reason to think why they wouldn't have if it is so helpful to the case?"

"I'm not entirely sure—although two things I do remember that the Solicitor General or not the Deputy Solicitor General in *Garnier* did raise it—although on a different point, so they were certainly aware of it in the litigation. And then also the petitioner I believe in *Garnier* also raised it in their brief, so I think the justices are certainly aware of it and I hope they take that into account in their decision. It could be possibly because Kennedy, at least the way it portrayed itself was not announcing a new rule—It was simply applying preexisting standards like in *Ceballo*. So perhaps they didn't feel a need to specifically mention Kennedy. But I'm not sure."

"And then I had a brief question for you. So you mentioned getting to the original meeting of Section 1983 and the sort pardon me the original meaning of color of law in that statute. And so the plaintiffs in the case have sort of proposed that that that means a pretense of duty or authority, and not necessarily the duty or authority itself, and cited some Civil War era history to corroborate that, what's your response to that? And do you think that the historical record bears out more of a pretensive duty of authority reading, or a just plain duty authority reading?"

“Great question. I do think it leans more toward a plain duty or authority, reading, for example, my research on this. I looked at the amicus brief filed by Tennessee in this case, and they went back and extensively looked at quotes from the Founding Era—of Section 1983, where numerous members of Congress kept emphasizing that it only applied the state action flowing from either law, policy, or custom. So I do think it flows from actually being an official duty to your authority, not simply something that looks like a duty to or authority. There are a couple of reasons why I think they made that distinction.

First of all, an official duty or authority of the state usually involves some power of coercion. In other words, if someone does not listen to a command you're uttering while you're exercising an official duty or authority, then if they refuse, you can enforce that through state law. And second of all, very often, whenever you're exercising an official duty or authority, you're doing so with official state resources. So your actions are supported by taxpayers. And so that's why Congress was far more sensitive to actually making sure there was an official duty or authority because that's where it's most serious. When a constitutional violation occurs, not simply something that looks like it, but something that actually is like. For example. I remember one example in the oral argument that was brought up was a sheriff's deputy running down the street to pick up his kid from school and he happened to still be wearing his uniform. Now that someone might interpret that as being an official action—a police officer running them down the street, he must be in pursuit of someone. But what it looks like doesn't matter. What matters is that he was off duty. He could not order anyone to do anything. He was not using official state resources to do anything, and as a result, the government was not behind him. And the Constitution draws a clear distinction between coercive power and simply a private citizen performing a private function.”