*Talking Points*

Suggested points that the student attorneys can use and/or modify for their oral arguments.  
*Texas v. Johnson***Applied to the First Amendment and Taking a Knee at a High School Football Game**

**Judge: Here is the issue before us today. Is a state law that prohibits taking a knee or otherwise protesting during the national anthem a violation of the First Amendment?**

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| **Judge: We will start with Issue #1. Because the students are bringing this appeal, their attorney will go first.**  **Is a state law that prohibits taking a knee or otherwise protesting during the national anthem a violation of the First Amendment?**  **Counsel for the students, please proceed.** | **Judge: Now we will hear from the counsel for the State of Ohio on Issue #1.**  **Is a state law that prohibits taking a knee or otherwise protesting during the national anthem a violation of the First Amendment?**  **Counsel for the State of Ohio may proceed.** |
| **Student’s Attorney #1** | **State of Ohio’s Attorney #1** |
| **YES**   * The Supreme Court has recognized that the First Amendment protects certain forms of symbolic speech. * Taking a knee during the national anthem is symbolic speech. It is a peaceful form of symbolic speech that does not threaten the safety or property of others. * The government cannot prohibit this action without infringing upon free speech rights.   **The Judge has the option of asking questions before moving on.** | **NO**   * The Supreme Court has interpreted the First Amendment to grant a higher level of protection to speech than it grants to conduct. Not all conduct is considered a form of speech. Kneeling is an action. It is conduct. * The First Amendment does protect symbolic speech, but some actions do not always rise to the level of symbolic speech that warrants First Amendment protection. Kneeling during the national anthem is not symbolic speech protected by the Constitution. * The American flag is a symbol of national unity and the American way of life. Taking a knee can be considered an attack on American values and the military fighting to protect them. * The government has a legitimate interest in regulating the protection of the flag because the flag is an embodiment of the nation.   **The Judge has the option of asking a question before moving on.** |
| **Judge: We turn our attention now to**  **Issue #2**  **Is any action taken in response to the American flag considered expression worthy of protection under the First Amendment?**  **Counsel for the students, please proceed.** | **Judge: Issue #2 for the State of Ohio is the same:**  **Is any action taken in response to the American flag considered expression worthy of protection under the First Amendment?  Counsel for the State of Ohio, please go ahead.** |
| **Student’s Attorney #2** | **State of Ohio’s Attorney #2** |
| **YES**   * Political symbols and statements are protected under the First Amendment. It follows that actions taken to comment on the political symbol of the American flag, such as kneeling during the national anthem, should be considered freedom of expression protected under the First Amendment. * The American flag is a political symbol. Kneeling during the national anthem is political symbolism that is protected under the First Amendment. * Because the flag represents political ideas and ideals, conduct that is a commentary on those political ideals – and how the nation is living them out – is nothing more than a political viewpoint, protected under the First Amendment.   **The Judge has the option of asking questions before moving on.** | **NO**   * Conduct that involves, or is directed toward, the American flag is often expressive, but that doesn’t automatically make it political speech. * The context of the conduct must be considered. Kneeling during the national anthem might be a political statement, but it might not be. The statement may be a tool of commercial interests, like selling a certain brand of shoes worn by the protesters. * The broader context of such expression must be considered before declaring that Tiana’s conduct warrants First Amendment protection   **The Judge has the option of asking questions before moving on.** |
| **Judge: We turn our attention now to**  **Issue #3**  **Should taking a knee be protected as symbolic speech under the First Amendment?**  **Counsel for the students may proceed.** | **Judge: Issue #3 for the State of Ohio is the same:**  **Should taking a knee be protected as symbolic speech under the First Amendment?**  **Counsel for the State of Ohio may proceed.** |
| **Student’s Attorney #3** | **State of Ohio’s Attorney #3** |
| **YES**   * The First Amendment protects even speech that some find abhorrent. That protection applies to speech even when it is regarded by some as disrespectful to the American flag and what it represents. * When Tiana Johnson took a knee, she was making a political statement about her opposition to racism. She took a knee, which is a respectful posture, to honor the values represented by the flag, including the right to protest and to call attention to America’s problems. * Political speech has always had the highest level of protection. If taking a knee during the national anthem is prohibited, other forms of political expression are put at risk. That would undermine the very values for which the flag is raised.   **The Judge has the option of asking questions before moving on.** | **NO**   * Even though the First Amendment protects symbolic speech, an exception should be made to prohibit taking a knee during the national anthem. * The flag is a symbol of national unity that represents the ideals for which the United States stands. Taking a knee undermines that unity and dishonors military personnel who fought and died for the flag and what it represents. * Taking a knee is an insult to the troops that threatens morale and unit cohesion in the military. * The protection of the concepts embodied in the flag are a compelling governmental interest that justifies legal consequences for disrespecting the flag by taking a knee during the anthem.   **The Judge has the option of asking questions before closing out the oral arguments so that jury deliberations may begin. The Judge turns the program over to the facilitator to guide the jury deliberations.** |