Maryland Law Review

Volume 82 | Issue 4 Article 5

Kennedy v. Bremerton School District: Throwing a Red Flag for the Public-Employee Speech Arena to Challenge the Court's Hail Mary

Isabella Henry

NOTE

KENNEDY V. BREMERTON SCHOOL DISTRICT: THROWING A RED FLAG FOR THE PUBLIC-EMPLOYEE SPEECH ARENA TO CHALLENGE THE COURT'S HAIL MARY

ISABELLA HENRY*

Is a public-school football coach permitted to engage in audible prayer at the fifty-yard line immediately after school sponsored games while on the clock and surrounded by impressionable students? Where is the line drawn between public-employee speech that authorizes government regulation and citizen speech on a matter of public concern that necessitates constitutional protection? Apparently, the line is up for interpretation.

In *Kennedy v. Bremerton School District*,[1] the Supreme Court of the United States considered whether a public-school employee's prayer at the close of a school sponsored event is constitutionally protected speech, and if so, whether the government is authorized to prohibit such conduct to avoid an Establishment Clause violation.[2] In a 6-3 decision, the Court held that the Constitution neither requires nor permits the government to suppress an employee's "private"[3] religious speech.[4] Rather, the First Amendment's Free Speech and Free Exercise Clauses as incorporated by the Due Process Clause of the Fourteenth Amendment protect public employees from government "reprisal."[5] Accordingly, the Court reversed the Ninth Circuit judgment and deemed Petitioner Joseph Kennedy to be entitled to summary judgment on

* The author is immensely grateful to the editors of the *Maryland Law Review* for their hard work and support throughout the publication of this Note. The author would like to thank her Maryland Carey and UMD College Park friends for always cheering her on. The author specially thanks her mom and sister, Dr. Olga Cabello Henry and Paola Nuñez-Henry, Esq., and her partner, Robert Rybski, for their unwavering love, support, and guidance while at Maryland Carey. This Note is dedicated in loving memory of my dad, Dr. Philip Henry, who inspired my pursuit of a career in service to others. The author hopes that this Note will provide a perspective of respect and acceptance for the fundamental rights and faiths of all United States citizens.

1. 142 S. Ct. 2407 (2022).
2. *Id.* at 2421, 2423–32; *see* U.S. CONST. amend. I.
3. *Kennedy*, 142 S. Ct. at 2429.
4. *Id.* at 2433.
5. *Id.*; *see* U.S. CONST. amends. I, XIV, § 2.

his First and Fourteenth Amendment claims against Bremerton School District (the "District").[6]

While *Kennedy* produces numerous First Amendment issues that are worthy of discussion, this Note will focus on Coach Kennedy's free speech claim and the ambiguity that surrounds public-school employees' speech protections. The Court's holding is erroneous because it distorted precedent and misconstrued the facts of the case to improperly reduce Kennedy's overt, demonstrative prayer to "private," constitutionally protected speech.[7] In doing so, the Court disregarded its longstanding recognition of the heightened constitutional concerns within primary and secondary public schools.[8] Even under the majority's narrow view of the facts, the Court should have recognized the clear indications that the District's interests in avoiding workplace disruption and an Establishment Clause violation outweighed Kennedy's speech interests.[9] Further, as the dissenting and concurring opinions properly noted, the Court failed to provide an applicable standard for employee-speech challenges that involve a brief pause in job responsibilities.[10] Consequently, the Court effectively reduced the public-employee speech framework to an arbitrary analysis that neither lower courts nor school administrators can employ with the consistency that the Constitution demands.[11] Thus, *Kennedy* threatens to further confuse First Amendment jurisprudence in the public-school context.[12]

I. THE CASE

In 2015, Petitioner Joseph Kennedy ("Kennedy"), an assistant high school football coach in Bremerton School District (the "District"), lost his job.[13] For seven years, after each football game, Kennedy engaged in audible prayers while knelt at midfield—at first alone, until players and members of opposing teams joined him at the fifty-yard line.[14] This habitual prayer practice evolved out of other religious exercises that the coach engaged, and involved students in, from the start of his employment in 2008.[15] In particular,

6. *Kennedy*, 142 S. Ct. at 2433.
7. *See infra* Section IV.A.
8. *See infra* Section IV.A.
9. *See infra* Section IV.B.
10. *See infra* Section IV.C.
11. *See infra* Section IV.C.
12. *See infra* Section IV.D.
13. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2415–16 (2022).
14. *Id.* at 2416 (citing Kennedy v. Bremerton Sch. Dist., 991 F.3d 1004, 1010 (9th Cir. 2021)); *accord id.* at 2435–36 (Sotomayor, J., dissenting) ("Kennedy recounted that he initially prayed alone and that he never asked any student to join him. Over time, however, a majority of the team came to join him, with the numbers varying from game to game.").
15. *Id.*

Kennedy led pregame and postgame prayers in the locker room and "overtly religious" motivational speeches after games, in which he held up student-players' helmets as they knelt around him on the field with bowed heads.[16]

In September 2015, the school became aware of Kennedy's religious activity after an opposing school's football coach informed the District's superintendent.[17] The District asked Kennedy in a letter to stop any religious practice that involved students because his activities violated the District's policy on religion,[18] and created the viable risk of an Establishment Clause violation.[19] In response, Kennedy hired counsel, spoke out against the District on social media, and contacted various media outlets to publicize his plans to pray at the upcoming homecoming game.[20] After the *Seattle Times* published an article about Kennedy's plans to defy the District,[21] and a local television broadcast covered the story, the District began to receive many threatening emails, letters, and calls from concerned parents, community members, religious groups, and Satanists.[22]

On October 14, 2015, through counsel, Kennedy notified the District that he felt compelled to continue to offer personal prayers at midfield.[23] On October 16, the day of the school's homecoming game, the District reiterated to Kennedy that he may pray privately but may not engage in "any overt

16. *Id.* at 2436 (quoting Joint Appendix at 40, *Kennedy*, 142 S. Ct. 2407 (2022) (No. 21-418)); *cf. id.* at 2416 (majority opinion) (citing Joint Appendix, *supra*, at 170) (the practice of locker-room prayers predated Kennedy).

17. *Id.*; *id.* at 2435 (Sotomayor, J., dissenting).

18. *See id.* ("[T]he District's policy on 'Religious-Related Activities and Practices' provided that . . . '[r]eligious services, programs or assemblies shall not be conducted in school facilities during school hours or in connection with any school sponsored or school related activity.'" (quoting Joint Appendix, *supra* note 16, at 26–28)).

19. *Id.* at 2417 (majority opinion).

20. *Id.* at 2438 n.2 (Sotomayor, J., dissenting) (criticizing the majority's description of the facts, specifically the Court's statement that the October game "spurred media coverage" when Kennedy actually sought out this media attention by posting about his disagreement with the District on Facebook and making several media appearances prior to the homecoming game (citing Kennedy v. Bremerton Sch. Dist., 443 F. Supp. 3d 1223, 1230 (W.D. Wash. 2020))).

21. *See* Mike Carter, *Bremerton Football Coach Vows to Pray After Game Despite District Order*, SEATTLE TIMES (Feb. 4, 2016, 4:59 PM), https://www.seattletimes.com/seattle-news/education/bremerton-football-coach-vows-to-pray-after-game-despite-district-order/ (stating that Kennedy "agree[d]" that his postgame locker room prayers embraced a "captive audience"). Kennedy ceased the locker room prayers in compliance with the District's request in its September 17 letter. *Kennedy*, 142 U.S. at 2147 (majority opinion) (citing Joint Appendix, *supra* note 16, at 40–41, 77, 170–72); *see also supra* text accompanying note 18.

22. *Kennedy*, 142 S. Ct. at 2437–38 (Sotomayor, J., dissenting). For example, "the District received calls from Satanists who 'intended to conduct ceremonies on the field after football games if others were allowed to.'" *Id.* at 2438 (quoting Joint Appendix, *supra* note 16, at 181).

23. *Id.* at 2417 (majority opinion) (quoting Joint Appendix, *supra* note 16, at 62–63, 172); *id.* at 2437 (Sotomayor, J., dissenting).

actions" that might suggest that the school endorsed religion.[24] Rather than comply, Kennedy prayed at the fifty-yard line after the game.[25] Though Bremerton students did not join Kennedy, they stood nearby and watched while players from the opposing team and community members—who jumped fences and knocked over bandmembers to swarm the field—did.[26] To prevent similar disruption at future games, the District was forced to recruit Bremerton Police to secure the field, hang no trespass signs that prohibited public field access, and issue public announcements and robocalls to parents to ease widespread concerns among the diverse community.[27]

On October 23, 2015, the District again asked Kennedy to pray privately and offered to work with him to develop an accommodation that would allow for religious exercises after, or even while, he fulfilled his coaching responsibilities.[28] Kennedy refused to respond and continued to offer demonstrative prayers at midfield following two subsequent football games.[29] On October 28, 2015, the District placed Kennedy on paid administrative leave for repeated defiance of its directives, which prevented Kennedy from fulfilling his job duty to supervise players after games.[30] The District later declined to renew his contract for the following season consistent with the recommendation of the school's head football coach.[31]

---

24. *Id.* at 2417 (majority opinion) (quoting Joint Appendix, *supra* note 16, at 81). *But see id.* at 2436–38 (Sotomayor, J., dissenting) (detailing the District's efforts to reach a mutually agreeable solution with Kennedy that would allow him to engage in his desired prayers absent school disruption or the risk of an Establishment Clause violation).

25. *Id.* at 2418 (majority opinion) (citing Joint Appendix, *supra* note 16, at 90); *id.* at 2438 (Sotomayor, J., dissenting).

26. *Id.* (providing images of the large crowd that surrounded Kennedy following the October 16 homecoming game).

27. *Id.*; *see also* Brief for Religious and Denominational Organizations and Bremerton-Area Clergy as Amici Curiae Supporting Respondent, at 4, *Kennedy*, 142 S. Ct. 2407 (2022) (No. 21-418) (noting that while Christians of many denominations call Kitsap County, Washington home, the county is also home to individuals who practice non-majoritarian religions—Bahá'ís, Buddhists, Muslims, Jews, Hindus, Sikhs, Zoroastrians—and to non-religious individuals).

28. *Kennedy*, 142 S. Ct. at 2438–39.

29. *See id.* at 2439 (noting that Kennedy ignored numerous offers to discuss accommodations and instead solely communicated his defiance through the media and his midfield prayers at the October 23 and October 26 games).

30. *Id.* at 2418–19 (majority opinion); *see also id.* at 2435 (Sotomayor, J., dissenting) (providing that Kennedy's job description included responsibilities for game preparation, oversight, and transportation, and notably, explicitly required him to supervise "player behavior both on and off the field" during the postgame period at issue and "until the students were released to their parents or otherwise allowed to leave" (quoting Joint Appendix, *supra* note 16, at 32–34, 36, 133)); *id.* (explaining that the District required all coaches, including Kennedy, "to 'exhibit sportsmanlike conduct at all times,' 'utilize positive motivational strategies to encourage athletic performance,' and serve as a 'mentor and role model for the student athletes'" (quoting Joint Appendix, *supra* note 16, at 56)).

31. *See id.* at 2439–40 (explaining that the head coach recommended that Kennedy not be rehired in his annual contract renewal review "because he 'failed to follow district policy,'

On August 9, 2016, Kennedy sued the school in the United States District Court for the Western District of Washington.[32] Kennedy claimed the school violated his constitutional rights under the Free Speech and Free Exercise Clauses and sought injunctive relief for the school to reinstate him.[33] The district court denied the motion, and the United States Court of Appeals for the Ninth Circuit affirmed.[34] In 2019, Kennedy sought certiorari from the Supreme Court, and the Court denied his petition.[35]

On remand, the parties filed cross-motions for summary judgment and the trial court granted summary judgment to the school.[36] The court reasoned that the District properly restricted Kennedy's disruptive, demonstrative religious conduct at the October 16, 23, and 26 games because allowing these postgame prayers to continue "would have violated the Establishment Clause."[37] The court rejected Kennedy's free speech claim because he spoke "in his capacity as a government employee and unprotected by the First Amendment," and even if his "speech qualified as private speech . . . the District properly suppressed it."[38] The court also dismissed his free exercise claim because irrespective of whether the school applied its policy neutrally or in a generally applicable manner, it "had a compelling interest in prohibiting his postgame prayers."[39] The Ninth Circuit affirmed the lower court's decision and later denied Kennedy's petition to rehear the case en

'demonstrated a lack of cooperation with administration,' 'contributed to negative relations between parents, students, community members, coaches, and the school district,' and 'failed to supervise student-athletes after games due to his interactions with media and community' members" (quoting Joint Appendix, *supra* note 16, at 114)). The head coach later resigned after eleven years of employment with Bremerton High School due to safety concerns that resulted from Kennedy's conduct. *See id.* at 2440 (stating that the head coach expressed "fears that he or his staff would be shot from the crowd or otherwise attacked because of the turmoil created by Kennedy's media appearances," and furthermore, that "[t]hree of five other assistant coaches did not reapply").

32. *Id.* at 2419 (majority opinion) (citing Joint Appendix, *supra* note 16, at 145, 160–64).

33. *Id.* at 2440 (Sotomayor, J., dissenting) (citing Kennedy v. Bremerton Sch. Dist., 443 F. Supp. 3d 1223, 1237 (W.D. Wash. 2020)).

34. *Id.*

35. *Id.* at 2419 (majority opinion) (citing Kennedy v. Bremerton Sch. Dist., 869 F.3d 813, 831 (9th Cir. 2017), *cert. denied*, 139 S. Ct. 634 (2019)). Justice Alito, joined by three other Justices, stressed that the Court's denial of certiorari did not indicate the Court's agreement with the lower courts' decisions. *Id.* (citing *Kennedy*, 139 S. Ct. at 636 (Alito, J., concurring)).

36. *Kennedy*, 142 S. Ct. at 2420.

37. *Id.* (quoting *Kennedy*, 443 F. Supp. 3d at 1240).

38. *Id.* (citing *Kennedy*, 443 F. Supp. 3d at 1237); *id.* at 2440 (Sotomayor, J., dissenting) (providing that the court dismissed Kennedy's assertion that he prayed "silently and alone," at midfield and placed weight on his repeated denial of "an accommodation permitting him to pray . . . after the stadium had emptied," which suggested that it was "essential that his speech be delivered in the presence of students and spectators" (quoting *Kennedy*, 869 F.3d at 825)).

39. *Id.* at 2420 (majority opinion) (quoting *Kennedy*, 443 F. Supp. 3d at 1240). The lower court reasoned that the school had a compelling interest in prohibiting Kennedy's midfield prayers because his behavior created the viable risk of an Establishment Clause violation. *Id.*; *see supra* text accompanying note 37.

banc over the dissents of eleven judges.[40] In 2022, the Supreme Court granted certiorari to decide whether the Free Exercise and Free Speech Clauses of the First Amendment protect a public employee engaged in private religious observance from government reprisal pursuant to concerns under the Amendment's Establishment Clause.[41]

II. LEGAL BACKGROUND

At the core of our country's constitutional framework lies the fundamental protections set forth in the First Amendment.[42] The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech."[43] Collectively, the Amendment's first two clauses, the Establishment and Free Exercise Clauses (the "Religious Clauses"), guarantee religious freedom.[44] Next, the Free Speech Clause affords citizens the fundamental right to freedom of speech.[45] As a whole, the Amendment embodies the core American principle of a free nation.[46] But what do these clauses mean for government employees? Are government employers permitted to restrict their employees' expressions to avoid an Establishment Clause violation? If so, where is the line drawn for

40. *Kennedy*, 142 S. Ct. at 2420 (citing Kennedy v. Bremerton Sch. Dist., 991 F.3d 1004, 1015 (9th Cir. 2021), *reh'g en banc denied* 4 F.4th 910, 911 (9th Cir. 2021)).

41. *Id.* at 2421, *cert. granted*, 142 S. Ct. 857 (2022). Notably, the Supreme Court became receptive to hear the case only after the conservative dominant Court took control and Kennedy amended his petition to include a free speech claim per Justice Alito's suggestion. *See supra* note 35 and accompanying text.

42. *See* Thomas v. Collins, 323 U.S. 516, 530 (1945) (emphasizing "the preferred place given in our [constitutional] scheme to the great, the indispensable democratic freedoms secured by the First Amendment").

43. U.S. CONST. amend. I.

44. U.S. CONST. amend. I, cl. 1–2. The Free Exercise Clause protects citizens' individual religious expressions, while the Establishment Clause prohibits the government from supporting or endorsing any particular religion. *See* Lee v. Weisman, 505 U.S. 577, 589 (1992) ("The First Amendment's Religious Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State."); Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 217 (1963) (Rutledge, J., dissenting) (explaining that the First Amendment went beyond a separation of church and state, its purpose "was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion" (quoting Everson v. Bd. of Ed., 330 U.S. 1, 31–32 (1947))).

45. U.S. CONST. amend. I, cl. 3; *see also* United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938) (expressing the notion that certain constitutional liberties, like the freedom of speech, deserve more vigilant judicial protection against the political process); Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943) (acknowledging that the "freedom of speech . . . [maintains] a preferred position" in our constitutional framework); Shelton v. Tucker, 364 U.S. 479, 486 (1960) (highlighting that "free speech, lies at the foundation of a free society").

46. *See supra* notes 44, 45.

constitutionally protected citizen speech? The complexity involved in answering these questions has plagued First Amendment jurisprudence for over seventy years.[47]

After the Fourteenth Amendment extended First Amendment protections to the states, religious freedom and free speech challenges from government employees slowly followed.[48] It was not until the mid-nineteenth century that First Amendment litigation spiked in the employee-speech arena.[49] The Supreme Court's ample First Amendment precedent underscores the significant constitutional challenges that arise for government employees, particularly in public schools where First Amendment concerns are heightened.[50]

This Note will focus primarily on the relationship between the Free Speech Clause and government employment and will also address how the Religious Clauses factor into the employee-speech analysis in the public-school context. First, Section II.A introduces the interplay between the Free Speech Clause and government employment and details the evolution of the current *Pickering-Garcetti* framework that courts employ to analyze public-employee speech challenges.[51] Next, Section II.B assesses the inherent tension between the Religious Clauses and the heightened Establishment Clause concerns that plague primary and secondary public schools.[52]

A. The Complex Interplay Between Free Speech & Government Employment

Prior to incorporation of the First Amendment, "the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment."[53] At the time, this view prevailed even where employment conditions otherwise infringed upon a public employee's

47. *Cf. infra* note 48.

48. For challenges that involved the Religious Clauses, see, for example, Engel v. Vitale, 370 U.S. 421, 422–24 (1962) (school district policy required a daily, state-composed prayer in schools); *Schempp*, 374 U.S. at 205 (state law mandated daily recitation of ten biblical verses in schools); *Lee*, 505 U.S. at 580 (religious speaker led school-sponsored graduation ceremony). For challenges that implicated the Free Speech Clause, see, for example, Pickering v. Bd. of Educ. Twp. High Sch. Dist. 205, Will Cnty., Ill., 391 U.S. 563, 564 (1968) (schoolteacher criticized school district's funding policies in letter to local newspaper); Connick v. Myers, 461 U.S. 138, 140 (1983) (government employer suppressed its employee's internal office questionnaire).

49. *See supra* note 48.

50. *See* Edwards v. Aguillard, 482 U.S. 578, 583–84 (1987) ("The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools.").

51. *See infra* Section II.A.

52. *See infra* Section II.B.

53. *Connick*, 461 U.S. at 143.

constitutional rights.[54] However, freedom of speech quickly became "the matrix, the indispensable condition, of nearly every other form of freedom" that characterizes our democratic nation.[55] Today, the Court engages the two-part *Pickering* test and its progeny in its assessment of public employee speech challenges.[56]

This Section introduces the interplay between the Free Speech Clause and government employment. First, Section II.A.1 describes *Pickering v. Board of Education*,[57] the Court's seminal public employee speech case. Next, Section II.A.2 details the significance of its progeny. Section II.A.3 discusses the addition of the *Garcetti v. Ceballos*[58] job-duty inquiry to the analysis. Finally, Section II.A.4 summarizes the current framework used to evaluate public employee speech challenges and the ambiguity that plagues First Amendment jurisprudence.

1. The Foundation of the Public Employee Speech Framework

To address the complex interplay between free speech rights and government employment, the Court in *Pickering* drew a sharp distinction between citizen speech and government speech.[59] The Court reasoned that while public employees do not "relinquish the First Amendment rights they would otherwise enjoy as citizens" when they accept government employment,[60] statements that are detrimental to the public employer are not afforded protection because "the State has interests as an employer in regulating the speech of its employees."[61] In other words, when a government employee speaks in their official job capacity, that speech is representative of the government and may be regulated.[62] Conversely, when a public employee speaks "as a citizen, in commenting upon matters of public concern," that speech may *not* be regulated absent a compelling government

54. *Id.*

55. Palko v. Connecticut, 302 U.S. 319, 327 (1937).

56. *Pickering*, 391 U.S. at 568 (supplying the two-part test generally applied in government employee free speech challenges).

57. 391 U.S. 563 (1968).

58. 547 U.S. 410 (2006).

59. *Pickering*, 391 U.S. at 568.

60. *Id.* (citing Wieman v. Updegraff, 344 U.S. 183, 194 (1952)); *see also* Shelton v. Tucker, 364 U.S. 479, 488 (1960) (noting that "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle [employees'] fundamental personal liberties when the end can be more narrowly achieved"); Keyishian v. Bd. of Regents of the Univ. of the State of N.Y., 385 U.S. 589, 602 (1967) (even where valid, the government cannot fulfill its purpose at the expense of school employees' individual freedoms); *accord.* Rankin v. McPherson, 483 U.S. 378, 384 (1987); United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 466 (1995).

61. *Pickering*, 391 U.S. at 568.

62. *Id.*

interest, even where the speech is critical of the government.[63] For example, in the public-school context, this has meant that the school may regulate speech that is shown to have either "impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the school[] generally."[64] However, given "the enormous variety of fact situations" in which public-employee speech cases arise, the Court did not "deem it either appropriate or feasible to attempt to lay down a general standard."[65]

Instead, the Court provided "some of the general lines along which an analysis of the controlling interests should run."[66] Thus, *Pickering* instructs courts to engage in a balancing test, in which the government employer's interests are weighed against the interests of the employee.[67] At the first step, courts must determine whether the employee's speech addressed a matter of public concern.[68] If the answer is no, the speech is not afforded First Amendment protection.[69] If the answer is yes, the employee *might* retain speech protections, and the court must proceed to the second step.[70] At the second step, courts must balance the government's interests in avoiding workplace disruption against the employee's speech interests.[71]

2. Refining the Two-Part Pickering *Test*

A year later, in *Givhan v. Western Line Consolidated School District*,[72] the unanimous Court sought to clarify what qualified as citizen speech on a matter of public importance under *Pickering*, and simultaneously, supply a more workable test.[73] *Givhan* involved a schoolteacher who lost her job after she expressed concerns about the school's racial discrimination to the school's principal in a private meeting.[74] The Court held that public employees' free speech protections are not forfeited solely because the employee spoke behind closed doors—the private nature of the speech is

63. *Id.*
64. *Id.* at 572–73.
65. *Id.* at 569.
66. *Id.*
67. *See id.* at 568 ("The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.").
68. *Id.* at 573.
69. *Id.*
70. *Id.*
71. *See supra* note 67.
72. 439 U.S. 410 (1979).
73. *Id.* at 414–15.
74. *Id.* at 411–12.

merely a factor, among others, to be weighed.[75] Thus, the Court in *Givhan* refused to confine *Pickering* to employee speech directed toward the public.[76] Notably, *Givhan* provided that the analysis must account for the manner, time, and place of the speech.[77]

Four years later, in *Connick v. Myers*,[78] the Court reaffirmed that analysis of the content, form, and context of public employees' speech "as revealed by the whole record" is necessary given the wide range of potential public-employee speech challenges.[79] Unfortunately, the Court again gave no indication of the weight each factor carried or how these factors should be applied.[80] The Court also implied that an employer's disciplinary action may be preemptive to prevent reasonably anticipated disruption and recognized additional considerations that may favor the employer's interest under the *Pickering* balancing test.[81]

3. The Development of the Garcetti *Job Duty Inquiry*

In *Garcetti v. Ceballos*, the Court provided the most concrete guidance to date in the public employee speech arena—a bright line rule to determine the scope of government speech.[82] *Garcetti* involved a deputy district

75. *Id.* at 415.

76. *Id.* at 415–16.

77. *See id.* at 415 n.4 ("Private expression . . . may in some situations bring additional factors to the *Pickering* calculus. . . . [T]he employing agency's institutional efficiency may be threatened not only by the content of the employee's message but also by the manner, time, and place in which it is delivered.").

78. 461 U.S. 138 (1983).

79. *See id.* at 147–48 ("Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record."); *see also* Pennekamp v. Florida, 328 U.S. 331, 335 (1946) ("[W]e are compelled to examine for ourselves the statements in issue and the circumstances under which they [are] made to see whether or not they . . . are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." (footnote omitted)).

80. *See Connick*, 461 U.S. at 147–48 (leaving lower courts to determine how each factor should be applied); *accord id.* at 167 (Brennan, J., dissenting) (criticizing the majority for its conclusion that the lower court "failed to give adequate weight to the context" and "disruptive potential" of the speech even though the lower court "explicitly recognized" and considered the speech's context).

81. *See id.* at 151–52 (majority opinion) ("When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate. . . . [W]e do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 52 n.12 (1983))); *see also id.* at 153 ("[T]he fact that Myers [the employee], unlike Pickering, exercised her rights to speech at the office supports Connick's [the employer's] fears that the functioning of his office was endangered.").

82. Garcetti v. Ceballos, 547 U.S. 410, 421–22 (2006); *cf. id.* at 427 (Souter, J., dissenting) ("The notion that there is a categorical difference between speaking as a citizen and speaking in the course of one's employment is quite wrong.").

attorney who criticized his public employer in an internal office memo.[83] The Court determined that the employee's speech constituted government speech because writing the memorandum fell within his official job duties, and therefore, his speech did not maintain First Amendment protections, because "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen."[84]

However, the Court emphasized that employers may only restrict a citizen's speech on a matter of public concern to the extent "necessary for their employers to operate efficiently and effectively."[85] Unsurprisingly, *Garcetti* raised many unanswered questions about the scope of an employee's job duties, and again deprived lower courts of necessary guidance.[86] Notably, the Court deliberately declined to address whether *Garcetti* extended to the educational environment, but acknowledged that "expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence."[87]

4. The Current Framework for Evaluating Public-Employee Speech

Most recently, in *Lane v. Franks*,[88] the Court clarified that "[t]he critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties."[89] With this view, the Court deemed the employees' truthful testimony, given under oath and pursuant to a subpoena, "speech as a citizen for First Amendment purposes."[90] In doing so, the Court distinguished between speech made pursuant to official job duties from "speech that simply relates to public employment or concerns information learned in the course of public employment."[91] The Court

83. *Id.* at 413–15.

84. *Id.* at 421–22; *cf.* Rosenberger v. Rector, 515 U.S. 819, 833 (1995) ("[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes." (citing Rust v. Sullivan, 500 U.S. 173, 194 (1991))).

85. *Garcetti*, 547 U.S. at 419.

86. *Id.* at 418 ("[C]onducting these inquiries sometimes has proved difficult. This is the necessary product of 'the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors . . . to furnish grounds for dismissal.'" (quoting Pickering v. Bd. of Educ., 391 U.S. 563, 569 (1968))).

87. *Id.* at 425.

88. 573 U.S. 228 (2014).

89. *Id.* at 238, 240; *cf. Garcetti*, 547 U.S. at 421 ("The significant point is that the memo was written pursuant to Ceballos' official duties.").

90. *Lane*, 573 U.S. at 238.

91. *See id.* at 239–40 (citing *Garcetti*, 547 U.S. at 421) (pointing out that *Garcetti* said nothing about speech merely related to employment, and further refining the *Garcetti* job duty inquiry and limiting the scope of speech subject to employer control).

reasoned that although the employees sworn testimony touched on information he acquired on the job, it fell "outside the scope of his ordinary job duties."[92] In discussing balancing the competing interests, the *Lane* Court emphasized that "[t]he importance of public employee speech is especially evident in the context of . . . a public corruption scandal."[93] Thus, the Court once again affirmed that the content and context of an employees' speech must be considered.[94]

Today, a few key principles dictate the public employee speech arena. First, the purpose of limiting the government's ability to restrict its employees' speech is to "ensure that citizens are not deprived of fundamental rights by virtue of working for the government."[95] Yet, at the same time, when one accepts public employment, "the citizen by necessity must accept certain limitations on his or her freedom."[96] This is because "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions" to efficiently and effectively provide public services.[97] In other words, government employers need the ability to regulate employee speech because government employees *are* the government.[98]

B. The Heightened Establishment Clause Concerns in Public Schools

The Court has long recognized that First Amendment concerns are heightened in the context of primary and secondary public schools.[99] This is in part because in addition to balancing the interests of the public-employee versus the public-employer, the public-school context also implicates the

92. *Id.* at 238.

93. *Id.* at 240.

94. *Id.*; *see supra* note 79 and accompanying text.

95. Connick v. Myers, 461 U.S. 138, 147 (1983).; *see also* Pickering v. Bd. of Educ., 391 U.S. 563, 572 (1968) ("Teachers are . . . the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.").

96. *Garcetti*, 547 U.S. at 418 (citing Waters v. Churchill, 511 U.S. 661, 671 (1994) (plurality opinion)) ("[T]he government as employer indeed has far broader powers than does the government as sovereign.")); *see also id.* ("The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." (citing *Pickering*, 391 U.S. at 568)).

97. *Id.* at 418–19 (citing *Connick*, 461 U.S. at 143) ("[G]overnment offices could not function if every employment decision became a constitutional matter.")).

98. *See id.* at 422 (explaining that government speech must be regulated to preserve "consistency and clarity" because "[o]fficial communications have official consequences").

99. *See* Shelton v. Tucker, 364 U.S. 479, 487 (1960) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.").

fundamental rights of students and their parents.[100] Thus, public-school employees' speech should be evaluated with regard to the rights of these players.

This Section assesses the heightened Establishment Clause concerns in public schools. Section II.B.1 introduces the tension between the Religious Clauses. Section II.B.2 details the Court's landmark *School Prayer Cases*.[101] Section II.B.3 discusses the controversial Establishment Clause test that the Court supplied in *Lemon v. Kurtzman*.[102] Finally, Section II.B.4 describes the shift toward a coercion lens for evaluating Establishment Clause cases in public schools.

1. The Inherent Tension Between the Religious Clauses

The inherent tension between the Religious Clauses is unmistakably heightened in the context of government employees because their First Amendment rights cannot be easily squared with their responsibility to remain a neutral representative of the government.[103] At one end, the Court has warned that the government cannot use "its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals."[104] Yet it has also made clear that school employees do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[105] This has meant that the government may only regulate employee speech and expressions in certain situations.[106] As a result, from the 1930s to the 1960s, the Supreme Court sought to clarify what government actions impermissibly promoted religion in violation of the Establishment Clause.[107]

---

100. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 233 (1972) (determining that no compelling government interest required Amish children to attend school past age fourteen because the Free Exercise Clause guarantees parents the right to raise their children in their chosen religion). The government cannot question the sincerity of a citizen's religious beliefs. *See* Braunfeld v. Brown, 366 U.S. 599, 603 (1961) ("The freedom to hold religious beliefs and opinions is absolute." (first citing Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); and then citing Reynolds v. United States, 98 U.S. 145, 166 (1879))).

101. Engel v. Vitale, 370 U.S. 421 (1962); Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203 (1963).

102. 403 U.S. 602 (1971).

103. *See generally* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

104. Illinois *ex rel.* McCollum v. Bd. of Educ. of Sch. Dist. No. 71, 333 U.S. 203, 211 (1948).

105. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

106. *McCollum*, 333 U.S. at 211. The complexity of the relationship between the Religious Clauses led to a lack of consensus on the breadth of their application. *See infra* note 126.

107. *Cf.* Everson v. Board of Educ. of Ewing Twp., 330 U.S. 1, 17 (1947) (concluding in a 5-4 vote that a New Jersey law, which authorized local school boards to reimburse families for transportation expenses to private Catholic schools, did not violate the Establishment Clause); *McCollum*, 333 U.S. at 231 (declaring in an 8-1 decision that optional "released time" programs administered through the force of the public school, which allowed school classrooms to be used for religious instruction, are unconstitutional). *But see* Zorach v. Clauson, 343 U.S. 306, 314 (1952)

2. The Court's Early School Prayer Cases *Laid the Foundation for Establishment Clause Jurisprudence*

At the start of the 1960s, the Court's landmark *School Prayer Cases* imparted the bedrock principle that the government may not support or promote religion in public schools.[108] Together, *Engel v. Vitale*[109] and *School District of Abington Township, Pennsylvania v. Schempp*[110] laid the foundation for the Court's future Establishment Clause cases.[111] In *Engel*, the Court declared a voluntary state prayer exercise to be "wholly inconsistent with the Establishment Clause" because states could not sponsor, promote, or require religious exercise in schools.[112] The Court determined that the purpose of the Establishment Clause—to protect minority beliefs from state-sponsored religion—meant that government endorsement of any particular faith is inappropriate because Americans adhere to a wide variety of beliefs.[113] Accordingly, the Court concluded that although students were not obliged to participate, the public school's policy, which mandated a daily, non-denominational prayer, violated the Establishment Clause.[114]

A year later, in *Schempp*, the Court declared two Pennsylvania and Maryland laws, which required the school day to begin with a recession of ten Biblical verses and the Lord's Prayer, respectively, to be constitutionally impermissible.[115] The Court reiterated that state required religious exercises violated "the command of the First Amendment that the Government

(citing *McCollum*, 333 U.S. at 231) (finding a similar release time program to that at issue in *McCollum* to be constitutional because "[t]he constitutional standard is the separation of Church and State. . . . [which] . . . like many problems in constitutional law, is one of degree").

108. The *School Prayer Cases* clarified that religion should be suppressed in schools for the precise reason that the First Amendment was ratified. *See Engel*, 370 U.S. at 429 ("The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say . . . ."); *accord Schempp*, 374 U.S. at 226 (providing that "[t]he very purpose of a Bill of Rights was to" protect individuals who practice non-majoritarian religions from the "reach of majorities and [government] officials" (quoting West Virginia Bd. of Educ. v. Barnette, 319 U. S. 624, 638 (1943))).

109. 370 U.S. 421 (1962).

110. 374 U.S. 203 (1963).

111. *See* Lee v. Weisman, 505 U.S. 577, 592 (1992) ("Our decisions in *Engel v. Vitale* and *School Dist. of Abington* recognize, among other things, that prayer exercises in public schools carry a particular risk of indirect coercion." (citations omitted)).

112. *Engel*, 370 U.S. at 424, 433–35.

113. *Id.* at 428–30; *see also supra* note 108. Throughout American history, wars, persecutions, and other destructive measures often resulted when the government involved itself in religious affairs. *Engel*, 370 U.S. at 432–33.

114. *Id.* at 430. Notably, *Engel* authorized courts to find an Establishment Clause violation where a voluntary, nonsectarian religious exercise in a public school compromised government neutrality toward religion. *Id.*

115. *Schempp*, 374 U.S. at 224–25.

maintain strict neutrality, neither aiding nor opposing religion."[116] *Schempp* provided a test that asked: "[W]hat are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds" the neutrality that the Establishment Clause demands.[117] Importantly, these early *School Prayer Cases* came to stand for the notion that prayer and other religious activities generally maintain no place in public schools.[118] This evolved to also include "sponsorship, financial support, and active involvement of the sovereign in religious activity."[119]

3. The Lemon *Test Expanded the Scope of Establishment Clause Violations*

Nine years later, in *Lemon v. Kurtzman*, the Court ruled that Pennsylvania and Rhode Island statutes, which provided taxpayer-funded aid to religious schools, violated the Establishment Clause.[120] Under *Lemon*, the law or practice will pass constitutional muster if it: (1) has a "secular . . . purpose,"[121] (2) has a "principal or primary effect . . . that neither advances nor inhibits religion,"[122] or (3) avoids "an excessive government entanglement with religion."[123] *Lemon* expanded upon the two-prong test provided in *Schempp*, and required the government to also avoid *entanglement* with religion to maintain neutrality.[124] Over time, *Lemon* also came to include a reasonable observer test that asked if an objective observer would view the religious law, policy, or activity to convey government endorsement of religion.[125] Thus, *Lemon* widened the scope of Establishment Clause violations, and shifted the focus on neutrality in *Engel* and *Schempp*,

116. *Id.* at 225.

117. *Id.* at 222.

118. Lee v. Weisman, 505 U.S. 577, 592 (1992); *see supra* note 111.

119. Walz v. Tax Comm'n of the City of N.Y., 397 U.S. 664, 668 (1970) (noting that the Framers believed that such activities connoted "establishment" of religion).

120. *Lemon*, 403 U.S. at 625.

121. *Id.* at 612.

122. *Id.* (citing Bd. of Educ. v. Allen, 392 U. S. 236, 243 (1968)).

123. *Id.* at 612–13 (quoting *Walz*, 397 U.S. at 674).

124. *Id.*

125. *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000) ("Regardless of the listener's support for, or objection to, the message, an objective Santa Fe High School student will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval"); *see also* Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring in judgment) ("The relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the [practice], would perceive it as a state endorsement of prayer in public schools." (citing Bose Corp. v. Consumers Union of the U.S., 466 U.S. 485, 517 n.1 (Rehnquist, J., dissenting)); Lynch v. Donnelly, 465 U.S. 668, 693 (O'Connor, J., concurring) ("[W]hether a government activity communicates endorsement of religion is not a question of simple historical fact.").

toward endorsement. This spurred copious debate within the Establishment Clause arena over the appropriate test for courts to employ.[126]

4. The Significance of Coercion in Public Schools

In *Lee v. Weisman*,[127] the Court reiterated that "the government may not coerce anyone to support or participate in religion" or otherwise act to establish a state religion.[128] The Court held that a public high school violated the Establishment Clause after a rabbi delivered a prayer at a school sponsored graduation ceremony.[129] Importantly, the *Lee* Court recognized that government coercion need not be explicit—while students had not been required to attend the ceremony or join in prayer, there remained "heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."[130] In other words, students possessed "no real alternative" that would allow them "to avoid the fact or appearance of participation" in the religious activity.[131] *Lee* reinforced that the "preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere," which has the "freedom to pursue that mission."[132]

Most recently, in *Santa Fe Independent School District v. Doe*,[133] the Court relied on *Lee* and found an Establishment Clause violation where a student council chaplain delivered a prayer over the public address system before each varsity football game.[134] Though students were not required to attend games, "cheerleaders, members of the band, and, of course, the team members" were obligated to be present.[135] Thus, even if student attendance was "purely voluntary," an "improper effect of coercing those present" existed.[136] The Court concluded that "[t]he delivery of such a message—over the school's public address system, by a speaker representing the student

126. *Compare* Lee v. Weisman, 505 U.S. 577, 587 (1992), with *id.* at 602–03 (Blackmun, J., concurring), and *id.* at 644 (Scalia, J., dissenting) (illustrating that the Justices starkly disagreed about what test to apply, and ultimately relied upon the concept of coercion instead of *Lemon*). In recent years, the Court has repeatedly criticized, modified, and declined to apply the *Lemon* test, and has instead employed other tests, which has further undermined *Lemon*'s effectiveness. *Cf. id.*

127. 505 U.S. 577 (1992).

128. *Id.* at 587 (majority opinion).

129. *Id.* at 599.

130. *Id.* at 592.

131. *Id.* at 588; *see also* Wallace v. Jaffree, 472 U.S. 38, 40 (1985) (holding that an Alabama statute that prescribed a one-minute period of silence in all public schools "for meditation or voluntary prayer" at the start of each day, violated the Establishment Clause); *see supra* note 125.

132. *Lee*, 505 U.S. at 589.

133. 530 U.S. 290 (2000).

134. *Id.* at 294, 309–10.

135. *Id.* at 311.

136. *Id.* at 312, 316–17.

body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer—is not properly characterized as 'private' speech."[137] Rather, such demonstrative speech constituted government speech, and necessitated regulation under the Establishment Clause.[138] The Court's refusal to adopt *Lemon* in *Lee* and its subsequent reliance on *Lee* in *Santa Fe* represented a shift toward evaluation of Establishment Clause violations through a coercion lens.[139]

III. THE COURT'S REASONING

In *Kennedy v. Bremerton School District*, the Supreme Court addressed whether a public school employee's prayer during a school sponsored event is constitutionally protected speech, and if so, whether the government may prohibit such conduct to avoid an Establishment Clause violation.[140] In a 6-3 opinion authored by Justice Gorsuch, the Court held that the Constitution neither commands nor authorizes the government to suppress an individual's "private"[141] religious observance.[142] Rather, the First Amendment's Free Exercise and Free Speech Clauses, as incorporated by the Due Process Clause of the Fourteenth Amendment, protect an individual from government "reprisal."[143] Accordingly, the Court reversed the Ninth Circuit judgement and deemed Kennedy to be entitled to summary judgement on his First Amendment claims because: (1) the District improperly restricted Kennedy's sincere religious expressions pursuant to a policy that was not neutral or generally applicable; and (2) Kennedy's speech qualified as citizen speech on a matter of public concern, and his interest outweighed the District's.[144]

First, the Court concluded that the District violated Kennedy's free exercise rights because it restricted his "sincere religious practice" based on its religious character, and pursuant to a policy that was neither "neutral" nor

137. *Id.* at 310.

138. *Id.* at 315–17.

139. *E.g.*, Lee v. Weisman, 505 U.S. 577, 586–87 (1992); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 301–02, 305, 309–12, 316–17 (2000); *see also Santa Fe*, 530 U.S. at 320 (Rehnquist, C.J., dissenting) (stating that the Court "relie[d] heavily" on *Lee* instead of applying the *Lemon* test). *But see Santa Fe*, 530 U.S. at 314 (majority opinion) (citing Lemon v. Kurtzman, 403 U.S. 602, 612 (1971)) (relying in part on *Lemon* for the proposition that the Court may look to the government's purpose).

140. *Kennedy*, 142 S. Ct. at 2421, 2423–32.

141. *Id.* at 2429.

142. *Id.* at 2433. Justice Gorsuch delivered the opinion of the Court, in which Chief Justice Roberts and Justices Thomas, Alito, and Barrett joined, and in which Justice Kavanaugh joined, except as to Part III–B. Justices Thomas and Alito filed separate concurring opinions. Justice Sotomayor filed a dissenting opinion, in which Justices Breyer and Kagan joined.

143. *Id.*; *see* U.S. CONST. amends. I, XIV, § 2.

144. *Id.* at 2425, 2429, 2432–33.

"generally applicable."[145] The Court reasoned that the school did not apply its policy evenhandedly because coaches were otherwise able to "forgo supervising students [to] . . . visit with friends or take personal phone calls" during the brief post-game period.[146] The Court also interpreted this flexibility to mean that although Kennedy prayed on the job, at a school sponsored event, held on school property, in the presence of students and members of the community, he did not offer the prayers "'within the scope' of his duties as a coach."[147] The Court concluded that Kennedy's speech qualified as private speech on a matter of public concern, which triggered free speech protections.[148] Accordingly, the Court found that under either a free exercise or free speech lens, Kennedy had met his initial burden.[149]

Next, the Court addressed which test should be applied to evaluate whether the school's interests outweighed Kennedy's private speech rights.[150] Kennedy sought a strict scrutiny analysis under the Free Exercise or Free Speech Clauses,[151] while the school advocated for the *Pickering-Garcetti* framework that is typically applied in the government-employee context.[152] The Court concluded that it need not resolve this issue because under either test, the school would not prevail since its sole justification for restricting Kennedy's religious practice was to avoid an Establishment Clause violation, which the Court already negated.[153]

The Court rejected the school's endorsement arguments and disclaimed "*Lemon* and its endorsement test offshoot."[154] In the majority's view, the lower courts had "overlooked" that the Supreme Court had "long ago abandoned" the "abstract" and "ahistorical" *Lemon* test.[155] Instead, the Court

145. *Id.* at 2422 (quoting Emp. Div., Dep't Hum. Res. Or. v. Smith, 494 U.S. 872, 879–81 (1990)).

146. *Id.* at 2423.

147. *Id.* at 2424 (quoting Lane v. Franks, 573 U.S. 228, 240 (2014)).

148. *Id.*

149. *Id.* at 2426; *see also id.* at 2425 ("Of course, acknowledging that Mr. Kennedy's prayers represented his own private speech does not end the matter . . . a second step remains where the government may seek to prove that its interests as employer outweigh even an employee's private speech on a matter of public concern." (citing *Lane*, 573 U.S. at 236)).

150. *Id.* at 2426.

151. *Id.*; *see also id.* at 2422 (explaining that the school "can satisfy 'strict scrutiny' by demonstrating its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest" (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993))).

152. *Id.* at 2426; *see also supra* Section II.A (detailing the *Pickering-Garcetti* framework).

153. *Kennedy*, 142 S. Ct. at 2426. The Court's determination that Kennedy spoke privately negated any Establishment Clause violation. *Id.*

154. *Id.* at 2427.

155. *Id.* (citing Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2080 (2019) (plurality opinion)) (noting that the *Lemon* Court's attempt to provide a universal Establishment Clause test failed); Town of Greece v. Galloway, 572 U.S. 565, 575–77 (2014).

instructed that the Establishment Clause must be interpreted with "reference to historical practices and understandings,"[156] through "[a]n analysis focused on original meaning and history."[157]

While the Court acknowledged coercion to be "among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment," it found none in this case.[158] The majority deemed evidence from prior instances where Kennedy prayed with students irrelevant because the school's disciplinary action focused on the three October games at which Kennedy "did not seek to direct any prayers to students."[159] The Court reasoned that unlike the speech in *Santa Fe Independent School District v. Doe*, Coach Kennedy's prayers "were not publicly broadcast[ed] or recited to a captive audience," and students were not "expected to participate."[160] Further, the Court broadly asserted that schools cannot require teachers to "eschew any visible religious expression," because that would impermissibly "preference secular activity." [161] Justices Thomas and Alito both joined the majority, but each wrote separate concurrences to note that the Court failed to resolve questions about how free exercise and free speech issues differ for government employees.[162]

In dissent, Justice Sotomayor, joined by Justices Breyer and Kagan, argued that Kennedy's conduct violated the Establishment Clause based on both endorsement and coercion grounds.[163] In the dissent's view, the majority "misconstrue[d] the facts" to depict Kennedy's prayers as "private and quiet" when his prayers actually caused "severe disruption to school events."[164] The

156. *Kennedy*, 142 S. Ct. at 2428 (quoting *Galloway*, 572 U.S. at 576).

157. *Id.* (internal citations omitted).

158. *Id.* at 2429.

159. *Id.* The Court solely reviewed the three October prayers because "[t]he District disciplined [Kennedy] *only* for his decision to persist in praying quietly without his players after three games in October 2015." *Id.* at 2422; *see also id.* at 2452 (Sotomayor, J., dissenting) (criticizing the majority for its narrow view of the record).

160. *Id.* at 2432 (majority opinion).

161. *Id.* at 2431; *accord id.* at 2430 ("[L]earning how to tolerate speech or prayer of all kinds is 'part of learning how to live in a pluralistic society.'" (quoting Lee v. Weisman, 505 U.S. 577, 590 (1992))).

162. *See id.* at 2433 (Thomas, J., concurring) (noting that the Court failed to decide whether government employees retain distinct free exercise rights from the general public, or the burden that a government employer must bear to justify its restriction of employee expressions); *id.* at 2433–34 (Alito, J., concurring) (highlighting that the Court did not decide a standard to evaluate public employee speech that resembles Kennedy's—speech delivered "at work but during a time when a brief lull in [job] duties" allowed for other private activities—and instead, ruled "only that retaliation for this expression cannot be justified based on any of the standards discussed").

163. *Id.* at 2442–44 (Sotomayor, J., dissenting).

164. *Id.* at 2434; *see also id.* at 2441–42 ("Properly understood, this case is not about the limits on an individual's ability to engage in private prayer at work. This case is about whether a school district is required to allow one of its employees to incorporate a public, communicative display of the employee's personal religious beliefs into a school event, where that display is recognizable as

dissent criticized the majority for its blatant disregard of the Court's *School Prayer Cases* that raised "precisely the same concerns."[165] Justice Sotomayor stressed that the Court's precedent clearly established that the government must remain neutral about religion in schools, particularly because schoolchildren are more susceptible to coercion.[166]

Next, the dissent criticized the majority's assertion that the Court had "long ago abandoned *Lemon*."[167] The dissent noted that *American Legion v. American Humanist Ass'n*[168] only limited *Lemon v. Kurtzman*'s applicability to certain contexts, and other decisions merely "not applying" the test did not amount to an "implicit overruling."[169] Finally, the dissent questioned the practical value of the Court's new "history-and-tradition test," because it offered "essentially no guidance for school administrators," or any other government employer.[170]

IV. ANALYSIS

In *Kennedy v. Bremerton School District*, the Supreme Court, in a 6-3 decision, ruled that Coach Kennedy engaged in "private,"[171] constitutionally protected speech when he prayed at the fifty-yard line following school-sponsored football games.[172] Accordingly, the Court held that the government cannot suppress a public employee's "private" religious speech to avoid an Establishment Clause violation.[173] Rather, the Free Speech and Free Exercise Clauses of the First Amendment, as incorporated by the Due Process Clause of the Fourteenth Amendment, protect public employees from government retaliation.[174]

The Court erred because it distorted precedent and misconstrued the facts of the case to improperly portray Kennedy's demonstrative prayers as "private," constitutionally protected speech.[175] The Court's opinion blatantly

part of a longstanding practice of the employee ministering religion to students as the public watched."). In the dissent's view, Kennedy's three October prayers required reference to their full history and context—Kennedy's seven-year practice. *Id.* at 2444.

165. *Id.* at 2451.

166. *Id.* at 2442.

167. *Id.* at 2449 (citing *id.* at 2427 (majority opinion)).

168. 139 S. Ct. 2067 (2019).

169. *Kennedy*, 142 S. Ct. at 2449 n.6 (Sotomayor, J., dissenting) (citing *American Legion*, 139 S. Ct. at 2083). Justice Sotomayor emphasized the importance of "the purposes and effects of a government action" in analyzing Establishment Clause violations in public schools. *Id.* at 2450.

170. *Id.* ("The Court reserves any meaningful explanation of its history-and-tradition test for another day, content for now to disguise it as established law and move on.").

171. *Id.* at 2429 (majority opinion).

172. *Id.* at 2423–25.

173. *Id.* at 2432–33.

174. *Id.*; *see* U.S. CONST. amends. I, XIV, § 2.

175. *See infra* Section IV.A.

disrupted its longstanding commitment to evade the heightened First Amendment concerns within primary and secondary public schools.[176] Even if the majority's incorrect view could be justified, the Court failed to recognize that the District's interests in avoiding school disruption and an Establishment Clause violation outweighed Kennedy's speech interests.[177] Further, the Court declined to provide an applicable standard to balance the interests of public-employees versus public-employers.[178] Thus, the Court reduced the government speech framework to an arbitrary analysis and once again deprived lower courts and school administrators of guidance needed to ascertain protected public-employee speech.[179] Consequently, *Kennedy* threatens to further confuse First Amendment jurisprudence in the public school arena.[180]

Section IV.A discusses the Court's improper reduction of Kennedy's demonstrative prayer to constitutionally protected, "private" speech. Section IV.B evaluates the Court's disregard of clear indications that the District's interest outweighed Kennedy's in the second step of its *Pickering v. Board of Education* analysis. Section IV.C addresses the dire need for guidance in the arena of public school employee free speech challenges. Finally, Section IV.D provides some key points that school administrators and courts should keep in mind prior to regulating in-school employee speech in the wake of *Kennedy*.

A. The Court Improperly Reduced Kennedy's Demonstrative Prayer to Private, Constitutionally Protected Speech

Kennedy required the Court to face a "far from novel" tension under exceptionally novel circumstances.[181] While the Court's First Amendment jurisprudence is rich with speech challenges between the government and its employees, prior to this case, the Court never ruled on the constitutionality of speech comparable to Kennedy's—speech expressed while at work but during a brief lull in job duties.[182] Not to mention the additional constitutional challenges that the religious content of the speech and the school setting

176. *See infra* Section IV.A.

177. *See infra* Section IV.B.

178. *See infra* Section IV.C.

179. *See infra* Section IV.C.

180. *See infra* Section IV.D.

181. *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2445 (2022) (Sotomayor, J., dissenting) ("The particular tensions at issue in this case, between the speech interests of the government and its employees and between public institutions' religious neutrality and private individuals' religious exercise, are far from novel."); *see supra* note 162.

182. *See Kennedy*, 142 S. Ct. at 2433 (Alito, J., concurring) ("The expression at issue in this case is unlike that in any of our prior cases involving the free-speech rights of public employees.").

added.[183] Faced with these complex factual circumstances, the Court selectively applied precedent and misconstrued the facts of the case to improperly reduce Kennedy's demonstrative, religious speech to a citizen's private speech upon a matter of public concern.[184]

First, the Court selectively applied certain "lessons" from *Garcetti v. Ceballos* and *Lane v. Franks* to reason that Kennedy's prayers qualified as private speech because the prayers were not made "pursuant to [his] official duties," and did not "ow[e their] existence" to the District.[185] This reasoning is erroneous.[186] In reality, as Justice Sotomayor emphasized, the District was neither required nor able to permit Kennedy's speech under the Establishment Clause because Kennedy spoke in his official job capacity.[187] Contrary to the majority's distorted view, "[t]he timing and circumstances of Mr. Kennedy's prayers confirm [this] point."[188]

Under a proper view of the facts, there is simply nothing "private" about Kennedy's audible prayers—he spoke on the clock, while earning pay, in uniform, at school sponsored games, on government property accessible only to authorized personnel, and with an audience of hundreds of students, parents, and community members—some of whom joined him.[189] Moreover, Kennedy's media escapade and refusal to pray anywhere but midfield or to discuss accommodations with the District suggested that he intentionally directed his prayer towards students and others with whom he interacted in his official coaching capacity, which is indicative of government speech.[190] Irrespective of whether the game buzzer signaled the end of the fourth quarter, game-related events, like shaking hands with the opposing team, and Coach Kennedy's job responsibilities, like supervising players post-game, persisted.[191] For these reasons, Kennedy's speech did "owe its existence" to

183. *See supra* Section II.B; *see also supra* notes 77, 79 (the Court's precedents required that the speech be evaluated with reference to its context, content, and form).

184. *Kennedy*, 142 S. Ct. at 2434, 2450 (Sotomayor, J., dissenting); *see supra* note 164 and accompanying text.

185. *Id.* at 2424 (quoting Garcetti v. Ceballos, 547 U.S. 410, 421 (1992)); *see supra* note 89 and accompanying text.

186. *See Kennedy*, 142 S. Ct. at 2434 (Sotomayor, J., dissenting) ("To the degree the Court portrays petitioner Joseph Kennedy's prayers as private and quiet, it misconstrues the facts.").

187. *Id.* at 2441–42.

188. *Id.* at 2425 (majority opinion).

189. *See supra* note 164 and accompanying text; *see also supra* note 81 (the fact that the speech occurred in the employment setting supports an employer's belief that a viable threat to employer operations existed).

190. *Kennedy*, 142 S. Ct. at 2443–44; *see supra* note 38.

191. *See id.* at 2443 ("Kennedy spoke from the playing field, which was accessible only to students and school employees, not to the general public. . . . Kennedy's postgame responsibilities were what placed Kennedy on the 50-yard line in the first place; that was, after all, where he met the opposing team to shake hands after the game.").

the school, and pursuant to the Establishment Clause, the District was not only authorized to, but required to, suppress it.[192]

Second, the Court disregarded its longstanding recognition of the need to treat religious speech in schools differently due to the heightened constitutional concerns of government endorsement and student coercion.[193] Since the early *School Prayer Cases*, the Court has consistently upheld the notion that public-school officials are constitutionally barred from subjecting students to any particular faith.[194] Under *Engel v. Vitale*, school employees cannot lead prayers in school because official-led prayers impermissibly infringe upon "the core of our constitutional protections for the religious liberty of students and their parents" under the First Amendment's Religious Clauses.[195] Yet the Court conveniently failed to mention that every Court of Appeals and Supreme Court case "that involved prayer at public-school sporting events led or sponsored by public-school officials came out . . . in favor of the school districts' authority, and duty, to regulate the conduct to ensure that students are not pressured to participate in religious exercises contrary to their beliefs."[196]

In doing so, the Court wrongly distinguished Kennedy's speech from the speech in *Santa Fe Independent School District v. Doe* because Kennedy's prayers "were not publicly broadcast or recited to a captive audience," and students were not "expected to participate."[197] This distorted the clear intent of *Santa Fe*.[198] Rather than take issue with the public address system, the Court should have placed equal weight on each aspect of the speech in *Santa Fe*. Here, as in *Santa Fe*, although the school did not require student attendance at games, cheerleaders, bandmembers, and student

192. *See supra* note 84 and accompanying text; *accord* Lee v. Weisman, 505 U.S. 577, 587 (1992) (noting that a school official's choice to integrate a prayer is "attributable to the State").

193. *See* VALERIE C. BRANNON, CONG. RSCH. SERV., KENNEDY V. BREMERTON SCHOOL DISTRICT: SCHOOL PRAYER AND THE ESTABLISHMENT CLAUSE 5 (2022), https://crsreports.congress.gov/product/pdf/LSB/LSB10780 ("The majority announced a clear break with earlier Establishment Clause precedent, both by finding a school prayer practice constitutional for the first time and by expressly announcing for the first time that the Court had broadly abandoned the *Lemon* test in all contexts."); *see supra* Section II.B; *supra* note 99 and accompanying text.

194. *See supra* notes 108, 111, 118, 192.

195. *Kennedy*, 142 S. Ct. at 2434 (Sotomayor, J., dissenting); *see supra* note 100 and accompanying text.

196. Brief for Respondent at 33–34, *Kennedy*, 142 S. Ct. 2407 (2022) (No. 21–418) (first citing Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 301 (2000); then citing Borden v. Sch. Dist. of Twp. of E. Brunswick, 523 F.3d 153, 174 (3rd Cir. 2008); then citing Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402, 406 & n.4 (5th Cir. 1995); and then citing Jager v. Douglas Cnty. Sch. Dist., 862 F.2d 824, 831 (11th Cir. 1989)); *see also* BRANNON, *supra* note 193.

197. *Kennedy*, 142 S. Ct. at 2432.

198. *Id.*; *see supra* text accompanying note 139.

athletes were obligated to be present.[199] Thus, an improper coercive pressure existed, even if each student decided to attend on their own fruition.[200] In other words, Kennedy's actions placed impressionable student players in an impossible position—forced to either join in or be viewed as an outsider by peers and school authorities.[201] This second class treatment of citizens is precisely what the Framers sought to curtail when they adopted the Establishment Clause.[202] Further, Kennedy's post-game prayer tradition signaled approval from the administration because it was "clothed in the traditional indicia of school sporting events."[203] Thus, the Court erred because, like in *Santa Fe*, the delivery of religious speech at a school sponsored event, "by a speaker representing the student body" and school administration is not private speech.[204]

It is undisputed that school employees maintain First Amendment protections while at work.[205] The government's ability to restrict public employees' speech must be limited to "ensure that citizens are not deprived of fundamental rights by virtue of working for the government."[206] Importantly, the District never denied Coach Kennedy his fundamental right to pray while on the job under any circumstance.[207] Instead, the District asked that Kennedy refrain from overt, demonstrative prayer at the close of a school-sponsored event, while on school premises, and in the company of students and members of the public.[208] In its letters to Kennedy, the District reiterated its willingness to further discuss accommodations with Kennedy and stated that "all District staff are free to engage in religious activity, including prayer, so long as it does not interfere with job responsibilities."[209] Requests of this nature are reasonable and common among public schools

199. *Compare Kennedy*, 142 S. Ct. at 2431–32 (quoting Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 311 (2000)), *with id.* at 2451–52 (Sotomayor, J., dissenting) (quoting *Santa Fe*, 530 U.S. at 311–12).

200. *See supra* notes 135, 136 and accompanying text; *see also infra* notes 239–240.

201. *See supra* notes 130, 131, 196 and accompanying text.

202. *See supra* note 132.

203. *Santa Fe*, 530 U.S. at 308.

204. *Id.* at 309–10; *see supra* notes 189, 192.

205. *See supra* text accompanying note 60. Schoolteachers and coaches are citizens whose rights do not disappear after the first morning bell. *See supra* note 105.

206. Connick v. Myers, 461 U.S. 138, 147 (1983); *see supra* notes 95–98 and accompanying text.

207. *See supra* notes 18, 19, 28, 29 and accompanying text. *Kennedy*, 142 S. Ct. at 2439, 2446, 2453.

208. *See supra* notes 26–29; *see also supra* notes 189, 192 and accompanying text.

209. *Kennedy*, 142 S. Ct. at 2436 (Sotomayor, J., dissenting) (quoting Joint Appendix, *supra* note 16, at 45); *see supra* text accompanying note 84.

across the country and the language that the District used directly reflects First Amendment jurisprudence.[210]

Thus, the majority's distorted view of the facts led to the Court's incorrect conclusion that Kennedy's fundamental right had been infringed upon.[211] In reality, the Court's opinion only infringed upon the fundamental rights of students in K-12 schools across the country and their parents.[212] As Justice Sotomayor properly noted, *Kennedy* did an immense "disservice to schools and the young citizens they serve, as well as to our Nation's longstanding commitment to the separation of church and state" because it placed the religious rights of government employees above all else, including the rights of students and their parents as further discussed in Section IV.B.[213] This expansion of public employees' religious freedom reflects the Court's personal views on religion.[214]

B. The Court Disregarded Clear Indications that the District's Interest Outweighed Kennedy's Interest

Even if the majority's view of Kennedy's speech as private could be justified, "the District's responsibilities under the Establishment Clause provided 'adequate justification' for restricting" his habitual prayer practice.[215] Unlike in *Lane*, it cannot be said that "the employer's side of the *Pickering* scale is entirely empty" here because Kennedy's conduct: (1) created severe disruption for the school; (2) impeded his ability to fulfill his

---

210. *See Kennedy*, 142 S. Ct. at 2448 n.5 (Sotomayor, J., dissenting) (explaining that "compromise and accommodation is not unique to the public-employer context where Establishment Clause concerns arise"). The language that the District used in its letters to Kennedy clearly reflected the language that the Court used in *Pickering*, and thus, corroborated that the school's only motive was to avoid a constitutional violation—not to restrict all in-school religious activity. *See supra* text accompanying notes 65–66, 85.

211. *Kennedy*, 142 S. Ct. at 2434; *see supra* text accompanying notes 45, 95.

212. *Kennedy*, 142 S. Ct. at 2446–47.

213. *Id.*; *see infra* notes 232–239 and accompanying text.

214. *See* Pamela Paul, Opinion, *In the Face of Fact, the Supreme Court Chose Faith*, N.Y. TIMES (July 17, 2022), https://www.nytimes.com/2022/07/17/opinion/kennedy-bremerton-supreme-court.html ("Naming the single worst decision of the Supreme Court's disgraceful 2021–22 term is a tough call. But the one that best captures the majority's brazen efforts to inflict its political and religious agenda on the rest of the country may well be Kennedy v. Bremerton School District."); *accord* Amy Howe, *Justices Side With Coach Who Prayed on the Field With Students*, SCOTUSBLOG (Jun. 27, 2022 11:24 AM), https://www.scotusblog.com/2022/06/justices-side-with-high-school-football-coach-who-prayed-on-the-field-with-students/ (noting that just a week prior to the Court's decision in Kennedy, the same conservative majority made another "major ruling on religion in schools"); Andrew Koppelman, *With Conservative Supreme Court, Religion Always Wins*, HILL (Nov. 5, 2022, 8:00 AM), https://thehill.com/opinion/judiciary/3720145-with-conservative-supreme-court-religion-always-wins/ (describing the Court's originalist approach in interpreting the Establishment Clause); *see also supra* note 41.

215. *Kennedy*, 142 S. Ct. at 2445 (Sotomayor, J., dissenting) (citing Garcetti v. Ceballos, 547 U.S. 410, 418 (2006)).

job responsibilities; and (3) his authoritative and influential role validated the school's Establishment Clause concerns.[216] Any sincere "attempt to engage in 'a delicate balancing of the competing interests surrounding the speech and its consequences,'" would have acknowledged that the State's interest outweighed Kennedy's for several reasons.[217]

First, Kennedy's prayer not only "ha[d] some potential to affect the [employer's] operations," but in fact did.[218] Kennedy's conduct unmistakably interfered with the school's operations because it resulted in the administration receiving threats from Satanists, crowds knocking over student-players and bandmembers as they swarmed the field to surround Kennedy, the head football coach and three assistant coaches resigning due to safety concerns, and it required the school to post no trespass signs around the field and increase police presence during games.[219] Nonetheless, the majority ignored these clear indications of disruption to school sponsored events because the District did not explicitly cite them "as grounds for suspending him."[220] This blatantly contradicted First Amendment jurisprudence.[221] Rather than isolate the three October prayers, the Court should have afforded further review to Kennedy's seven-year long tradition in the public school setting because the "Court's precedents . . . do not permit isolating government actions from their context."[222]

Second, Kennedy's habitual prayer practice impeded his ability to fulfill his written job responsibilities, which as the dissenters appropriately noted, specifically required him to supervise players after games "both on and off the field."[223] Justice Gorsuch repeatedly noted that the school allowed coaches to text friends during this lull in job duties after games.[224] Is audible prayer at the fifty-yard line an analogous form of speech? [225] If not, what are the differences, and do they matter?[226] Significantly, unlike Kennedy's audible prayers, the content of a coach's personal text message likely remains private and is not directed toward, or at least observable by, impressionable

216. Lane v. Franks, 573 U.S. 228, 242 (2014).

217. *See Kennedy*, 142 S. Ct. at 2423 (majority opinion) (emphasizing "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees" (quoting Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968))); *see also supra* notes 67, 77.

218. *Garcetti*, 547 U.S. at 418.

219. *See supra* note 27 and accompanying text; *see also supra* note 31.

220. *Kennedy*, 142 S. Ct. at 2434 (Sotomayor, J., dissenting).

221. *See supra* text accompanying note 79.

222. *Kennedy*, 142 S. Ct. at 2444 (Sotomayor, J., dissenting); *see supra* note 88.

223. *Id.* at 2435 (quoting Joint Appendix, *supra* note 16, at 32–34, 36); *see supra* note 30.

224. *Kennedy*, 142 S. Ct. at 2425 (majority opinion).

225. HOWARD GILLMAN, MARK A. GRABER & KEITH E. WHITTINGTON, AMERICAN CONSTITUTIONALISM, VOLUME II: RIGHTS AND LIBERTIES (4th ed. forthcoming Aug. 2024).

226. *Id.*

students who view their coaches in an authoritative light.[227] Although both forms of speech temporarily take a coach's attention away from their official responsibilities, private text messages simply do not pose the same risk to efficient employer operations and the free exercise rights of students and parents.[228] Thus, the Court should have recognized that irrespective of whether the school permitted other personal activities, it cannot be said that the District had a similar interest in restricting coaches' personal texts or phone calls during this brief post-game period.[229] Moreover, even if Kennedy's written job duties are unconvincing in the threshold government versus private speech inquiry, an employee's proper performance of their official responsibilities, or lack thereof, undoubtedly impacts the efficiency of employer operations and requires consideration in the *Pickering* balancing.

Third, the District unmistakably possessed "adequate justification" to treat Kennedy differently than other members of the public because his influential and authoritative role meant that his actions carried inherent Establishment Clause concerns.[230] The Court should have recognized that the conflicting constitutional rights at play in the public school setting necessitated greater weight in its *Pickering* balancing.[231] A parent's fundamental right to raise their children as they see fit is violated where religion is forced onto students because parents "entrust public schools with the education of their children" with the expectation that the school will not use its influence to promote religious views that contradict their family's private beliefs.[232] The Court has previously recognized that public-school employees' "effort[s] to monitor prayer will be perceived by the students as inducing a participation they might otherwise reject."[233] It has also acknowledged that the culture of American high-school football places student-players under "immense social pressure" because the eyes of players' peers, superiors, parents, and members of the community—all of whom hope

227. *See Kennedy*, 142 S. Ct. at 2430 (suggesting that Coach Kennedy possessed "'enormous' authority and influence" over student-players, which may have influenced their decisions to join him in prayer (quoting Brief for Respondent at 37, *Kennedy*, 142 S. Ct. 2407 (2022) (No. 21–418))).

228. *See id.* at 2445 n.3 (Sotomayor, J., dissenting) ("These truly private, informal communications bear little resemblance, however, to what Kennedy did. Kennedy explicitly sought to make his demonstrative prayer a permanent ritual of the postgame events, at the physical center of those events, where he was present by virtue of his job responsibilities, and after years of giving prayer-filled motivational speeches to students at the same relative time and location.").

229. *Id.*

230. *See supra* note 96.

231. *See supra* note 100.

232. *Kennedy*, 142 S. Ct. at 2442 (Sotomayor, J., dissenting) (citing Edwards v. Aguillard, 482 U.S. 578, 583–84 (1987)).

233. Lee v. Weisman, 505 U.S. 577, 590 (1992); *see supra* text accompanying notes 130, 131.

they perform well—are on them.[234] Moreover, high-school football players often seek scholarships that are contingent on scouts' observation of their abilities and playing time is a decision left to the coach.[235] Put simply, the relationships student-players build with their high-school coaches could impact the trajectory of their sporting career, and ultimately, their future.[236]

The authority Kennedy wielded, coupled with his religious exercises, placed coercive pressures onto Bremerton football players. As the dissent noted, the fact that players slowly joined Kennedy evidenced the precise "social pressure that makes the Establishment Clause vital in the high school context."[237] Furthermore, an atheist player reported that he felt "'uncomfortable and unsafe' during a chaotic scene in which over 500 people stormed the field to join in Kennedy's prayers," and stated that this not only burdened his free exercise rights, but also "his love for football, lasting friendships with his teammates and the respect he otherwise earned from his coaches."[238] The Court should have considered the reports from Bremerton

234. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 311 (2000); *see also Kennedy*, 142 S. Ct. at 2443 ("[S]ome students reported joining Kennedy's prayer because they felt social pressure to follow their coach and teammates.").

235. *Kennedy*, 142 S. Ct. at 2433. An analogous coercive pressure is also seen in classrooms where students strive to receive good grades from teachers. *Id.* Arguably, the influence that coaches wield over students is even stronger than that of teachers because coaches interact with students outside school hours and school premises and typically maintain relationships with students throughout high school unlike student-teacher relationships that change each academic year or semester. *Cf.* James Gels, *The Importance of a Strong Coach-Athlete Relationship*, NAT'L FED. OF STATE HIGH SCH. ASS'NS (Sept. 18, 2017), https://www.nfhs.org/articles/the-importance-of-a-strong-coach-athlete-relationship/ (describing the intimate coach-athlete relationship and influential role high-school coaches play in the future of student-players); *see* Linda Flanagan, *How Effective Sports Coaches Help Students Feel Understood at School*, KQED: MIND SHIFT (Jan. 28, 2019), https://www.kqed.org/mindshift/52828/how-effective-sports-coaches-help-students-feel-understood-at-school (reporting that a high school athlete who graduated thirteen years ago remembers her in-field experiences with "several coaches" but none of her teachers).

236. *E.g.*, *How to Get Recruited for Football When Most Interest Is on the Top 200 Players*, NCSA COLL. RECRUITING, https://www.ncsasports.org/football/how-to-get-recruited (last visited May 10, 2023) ("Get your current coach involved to help build relationships with college coaches and evaluate your skill set."). Further, a high-school coach's positive recommendation letter or relationship with a prospective college coach can carry great weight in the recruitment process. Sanjay Kirpalani, *How High School Football Coaches Help Their Players Get Recruited*, BLEACHER REP. (July 5, 2013), https://bleacherreport.com/articles/1694591-how-high-school-football-coaches-help-their-players-get-recruited; Kyle Winters, *5 Ways Your High School Coach Can Help Get You Recruited*, USA TODAY (Oct. 11, 2018, 8:59 AM), https://usatodayhss.com/2018/5-ways-your-high-school-coach-can-help-you-get-recruited.

237. *Id.* at 2441 (quoting Kennedy v. Bremerton Sch. Dist., 443 F. Supp. 3d 1223, 1239 (W.D. Wash. 2020)).

238. *See* Paul, *supra* note 214; *see also ACLU Comment on Supreme Court Decision in* Kennedy v. Bremerton School District, ACLU (June 27, 2022), https://www.aclu.org/press-releases/aclu-comment-supreme-court-decision-kennedy-v-bremerton-school-district ("It is disappointing that today's decision erodes protections for public school students to learn and grow free of coercion. Kitsap County is a religiously diverse community and students reported they felt coerced to pray. One player explained he participated against his own beliefs for the fear of losing playing time if he

football players that illustrated the pressure they felt to join Coach Kennedy in prayer or lose playing time.[239] Instead, the Court deliberately operated under its narrow view of the facts and refused to consider clear evidence of coercion that resulted from Kennedy's behavior to arrive at a conclusion consistent with the conservative Court's view on religion.[240]

C. The Court Failed to Recognize the Dire Need for Further Guidance Regarding Public School Employees' Free Speech Challenges

The Court's analysis implied that a schoolteacher is permitted to engage in free expression, while on the clock, in the classroom, in the presence of students, if not acting "within the scope" of his job duties, but gives no indication of where the line is to be drawn.[241] The lack of direction in this arena is not novel.[242] The Court itself recognized this deficiency among free speech jurisprudence in *Garcetti*, but dismissed its importance because it found the "overarching objectives" of First Amendment jurisprudence to be appropriate given the wide range of potential government employee speech claims.[243] Although "[t]he Court's overarching objectives" are "evident," they certainly are not sufficient. [244] The Court should have recognized that: (1) the arbitrariness of the job duty inquiry and (2) the discrepancies among the approaches that the Circuit Courts employ, necessitated further direction in the public-employee speech arena.

In *Kennedy*, the Court failed to recognize that the "lessons" it relied on from *Lane* and *Garcetti* are ill equipped to address the heightened constitutional concerns within public schools.[245] The Court itself acknowledged this in *Garcetti*.[246] Nonetheless, the majority merely reiterated that the *Garcetti* job-duty inquiry must be engaged with "practical[ly]," because "focus on the terms of some formal and capacious written job description" would enable government employers to use unfairly broad job descriptions to inhibit employee speech protections.[247] The Court further

declined. This decision strains the separation of church and state—a bedrock principle of our democracy—and potentially harms our youth.").

239. *Kennedy*, 142 S. Ct. at 2440–41 (Sotomayor, J., dissenting) (citing Kennedy v. Bremerton Sch. Dist., 443 F. Supp. 3d 1223, 1239 (W.D. Wash. 2020)).

240. *Id.* at 2441. This comports with the Court's trend toward promotion of privacy and religion in schools at the expense of students and parents free exercise rights and in opposition to the Religious Clauses. *E.g.*, Carson *ex rel.* O.C. v. Makin, 142 S. Ct. 1987, 1998 (2022); *see also* Paul, *supra* note 214.

241. *Kennedy*, 142 S. Ct. at 2424.

242. *See supra* notes 66, 81 and accompanying text.

243. Garcetti v. Ceballos, 547 U.S. 410, 418 (2006); *see supra* text accompanying supra note 64.

244. *Garcetti*, 547 U.S. at 418; *see supra* note 86.

245. *Kennedy*, 142 S. Ct. at 2424.

246. *See supra* note 87.

247. *Kennedy*, 142 S. Ct. at 2424 (quoting *Garcetti*, 547 U.S. at 424).

restated that *Lane* distinguished speech related to public employment from speech made pursuant to employment responsibilities.[248] The Court improperly deemed these "lessons" to be a sufficient measure of the initial step of the *Pickering-Garcetti* framework that asks whether a government employee's speech is private speech on a matter of public concern.[249] The Court should have read *Garcetti* and *Lane* to be helpful, not all encompassing, because while it is sensible to avoid confining an employee's job duties solely to mechanical or rigid written job descriptions, in the wake of *Kennedy*, it is far from clear what is "practical."[250] Consequently, the parameters of private time are vague, and it is near-impossible to determine the scope of government speech.

For example, imagine a scenario where a teacher writes a bible verse on the in-classroom white board immediately before class while students are otherwise occupied unpacking their belongings and conversing with one another.[251] On one hand, like in *Kennedy*, this hypothetical speech occurred in the location where the employee's job functions are primarily carried out—the classroom setting for a schoolteacher is comparable to the field setting for Coach Kennedy.[252] Further, like in *Kennedy*, the expression is visible to students who are required to be present, but are otherwise occupied.[253] Importantly, like in *Kennedy*, the employee is not yet engaged in official responsibilities during this temporary lull in job duties.[254] On the other hand, this hypothetical speech is written, unlike Kennedy's audible spoken words, and is not associated with a school sponsored event like a football game.[255] Is this constitutionally protected speech? Does it matter if the speech is erased before class begins? Or that it is written instead of audible? Or that it included religious content?

An additional issue with the *Garcetti* inquiry is that religious speech will invariably never be attributable to government employment unless blatantly incorporated into school curricula. Aside from prayer incorporated into classroom curricula, it is difficult to imagine any religious expression more related to an employee's job duties than Coach Kennedy's audible religious prayers at midfield, while on the clock, in the presence of students, immediately following a school-sponsored event, during which time his

248. *Id.* (citing Lane v. Franks, 573 U.S. 228, 239–40 (2014)).

249. *Id.* at 2424.

250. *Garcetti*, 547 U.S. at 424.

251. Transcript of Oral Argument at 8–14, *Kennedy*, 142 S. Ct. 2407 (2022) (No. 21-418). At Oral Argument, Justice Sotomayor posed a series of similar hypotheticals to the counsel for Bremerton School District. *Id.*

252. *Kennedy*, 142 S. Ct. at 2425.

253. *Id.* at 2424–26.

254. *See supra* note 146 and accompanying text.

255. *Kennedy*, 142 S. Ct. at 2416.

formal written job duties required him to supervise players.[256] Thus, *Kennedy* effectively rendered the first step of the two-part *Pickering* analysis to be meaningless where the content of the speech is religious because religion is inherently a matter of public concern and in-school religious speech that is expressed during a brief pause in job duties will likely never be attributed to government employment.[257]

The sheer number of public employee speech challenges and the discrepancies between the Court's application of *Pickering* and its progeny in *Kennedy* and lower court opinions, confirms the need for further guidance in this arena.[258] Significantly, all Circuit Courts that have employed the *Pickering-Garcetti* framework have generally afforded greater weight to the government employer's interests than the majority did in *Kennedy*.[259] Thus, the Court's opinion essentially implied that the majority of lower courts have misunderstood First Amendment jurisprudence. However, even if we accept this idea that the trend among lower courts toward limiting government employees' free speech rights is improper, the Court should have realized that this discrepancy, at best, illustrates a need for further guidance. After all, if experienced judges misapplied the Court's free speech precedent, how can school employees and administrators be expected to comport their behavior with the First Amendment?

D. The Court's Holding Threatens to Further Confuse First Amendment Jurisprudence

Despite the dire need for a standard to address the complex relationship between free speech rights and government employment in public schools, the Court deliberately declined to provide one.[260] Justice Alito who joined the majority, wrote his own concurrence solely to emphasize this failure.[261] Specifically, he noted that "[t]he Court does not decide what standard applies to" speech that public employees express while at work during brief lulls in their job duties, but "holds only that retaliation for this expression cannot be justified based on any of the standards discussed."[262] Thus, *Kennedy* threatens

256. *See supra* note 189 and accompanying text.

257. *See supra* note 191.

258. *E.g.*, Weintraub v. Bd. of Educ. of the City Sch. Dist. of the City of N.Y., 593 F.3d 196 (2d Cir. 2010).

259. *See supra* text accompanying note 196.

260. *See Kennedy*, 142 S. Ct. at 2434 (Alito, J., concurring).

261. *Id.*

262. *Id.*

to further confuse First Amendment jurisprudence in the public school context.[263]

Absent concrete guidance on the extent of public employee speech protections, it remains to be seen how lower courts will grapple with the addition of *Kennedy* to the Court's First Amendment precedents.[264] As the majority properly noted, its precedent has never "mean[t] the speech rights of public school employees are so boundless that they may deliver any message to anyone anytime they wish."[265] So what do the Court's precedents mean? Unfortunately, there is no clear answer to the endless questions that plague First Amendment jurisprudence.[266] Nonetheless, the following key points from *Kennedy* may be useful to courts, judges, school administrators, and school employees in evaluating public-employee speech claims.

First, while it is undisputed, it is worth reiterating that not all in-classroom speech—or in-field speech—is government speech.[267] Since Kennedy spoke privately while on the field during his primary work hours, it follows that classrooms, lunchrooms, hallways, faculty areas, and outdoor spaces on school property are also likely appropriate locations for similar types of speech during work hours.[268] Second, an employee may take a brief detour from their job responsibilities to pray privately where other private activities are permitted.[269] Further, the employee need not seek an alternative location solely because students are present—*Kennedy* suggests a broad definition of "private" expression that does not hinge on whether students or the public are merely *exposed* to the religious activity.[270] Nonetheless, it may be helpful for schools to consider what times of day might allow for such detours. For example, *Kennedy* suggests that private expressions are fair game before the first bell, during lunch time, and while on break in the teacher's lounge or walking the school halls.[271] However, the Court's

263. *See id.* at 2453 (Sotomayor, J., dissenting) ("[T]he Court sets us further down a perilous path in forcing States to entangle themselves with religion, with all of our rights hanging in the balance.").

264. *See supra* note 86; *see infra* note 266.

265. *See Kennedy*, 142 S. Ct. at 2423; *accord supra* notes 84, 85 and accompanying text.

266. *Kennedy*, 142 S. Ct. at 2450 (Sotomayor, J., dissenting) ("Today's opinion provides little in the way of answers; the Court simply sets the stage for future legal changes that will inevitably follow the Court's choice today to upset longstanding rules.").

267. *See supra* text accompanying notes 14, 95, 268.

268. *See Kennedy*, 142 S. Ct. at 2425 (confirming that the classroom and cafeteria are locations where employees should be able to engage in religious expressions such as "wearing a headscarf" or "praying").

269. *See id.* (suggesting that public employees may briefly pause their job duties to engage in religious exercises whenever their job descriptions "le[ave] time for a private moment" that would allow for secular activities).

270. *Id.*

271. *Id.* (confirming that the classroom and cafeteria are locations where employees should be able to engage in religious expressions such as "wearing a headscarf" or "praying").

emphasis on the fact that Kennedy prayed after the school sponsored game ended raises the unanswered question of whether half-time prayers—or prayers in-between class periods—differ from expressions outside the event—or outside the first and last class bell.[272] School administrators and courts should be particularly cautious in the determination of private time in which an employee may speak freely absent evidence of disruption or coercion.[273]

Third, evidence of student coercion or school disruption may still alter an employees' ability to assert free speech protections.[274] While *Kennedy* affirmed that student coercion remains unconstitutional, it declined to address whether *Lee* and *Santa Fe*'s implicit coercion holdings remain good law.[275] Instead, the Court noted that its members "have sometimes disagreed on what exactly qualifies as impermissible coercion in light of the original meaning of the Establishment Clause."[276] Thus, until the Supreme Court rules otherwise, courts may continue to find situations like that in *Lee* and *Santa Fe* to be unconstitutional, and may assume that the Court found no coercion here due to its narrow view of the facts.[277] However, fourth, a school must cite such evidence of prior behavior or incidence in any responsive disciplinary action to ensure its review.[278] This means that schools should explicitly articulate any reports of student coercion or disruptive events to avoid situations like in *Kennedy*, where the Court deliberately isolated the three October prayers that the District cited in its dismissal and disregarded ample evidence of coercion from Kennedy's seven-year practice of incorporating religious content into school sporting events.[279] In other words, schools must carefully attribute disciplinary action to the specific impact that the employees' speech has on employer operations or students.

Fifth, schools must not favor one religion over another.[280] This should seem intuitive because it is undisputed and well established under the law.[281]

---

272. *Id.* at 2418.

273. For a helpful resource to determine the scope of government speech, see ACLU D.C., FEDERAL EMPLOYEE SPEECH & THE FIRST AMENDMENT: A KNOW-YOUR-RIGHTS GUIDE (2022), https://www.acludc.org/sites/default/files/field_documents/free_speech_fed_employees_kyr.pdf.

274. *See supra* text accompanying notes 96–98, 128; *see also supra* text accompanying note 130 (coercion need not be explicit); BRANNON, *supra* note 193, at 6 (explaining that *Kennedy* retained coercion as "an appropriate factor to consider" in evaluating Establishment Clause challenges).

275. *Kennedy*, 142 S. Ct. at 2429.

276. *Id.*

277. *See supra* note 164; *see also* BRANNON, *supra* note 193, at 6 ("Future Establishment Clause cases will likely litigate these open questions about what types of coercion run afoul of historical understandings of the Establishment Clause.").

278. *See supra* notes 158, 159 and accompanying text.

279. *See supra* text accompanying notes 220–222.

280. *See supra* note 44 and accompanying text.

281. *See supra* text accompanying notes 114–116, 118.

Yet *Kennedy* threatens to unfairly burden employees who practice non-majoritarian religions or who engage in more prominent religious exercises at work.[282] For example, imagine a Muslim schoolteacher engaged in Duhur—the second of five daily Islamic prayers—in a classroom.[283] Are religious exercises involving full body movement more disruptive than a simple kneel? Now imagine a Jewish coach reciting the Blessing of the Food in Hebrew after finishing lunch in the cafeteria.[284] Are audible prayers in another language more distracting to students than prayers in English? If these hypothetical questions feel uncomfortable, that is because they should never be posed—it is unconstitutional to afford citizens different protections based on their sincerely held religious beliefs.[285] Yet *Kennedy* poses a risk to school administrators who are tasked with determinations about what actions are so disruptive to school operations that they necessitate restrictions.[286] Thus, schools should be mindful of the vast array of religious practices across the different faiths in the communities that they serve and should avoid any policy or determination that would unfairly favor one religion over another.

Sixth, any requirement that students participate in religious exercise may still be subject to discipline.[287] For example, an employee may not read the Torah over the school address system during school hours because education is compulsory at the primary and secondary level—this would constitute required participation and an employees' announcement over the school's address system would undoubtedly be government speech.[288] The Court's emphasis on the fact that Kennedy did not require or invite student

282. *See* Ira C. Lupu & Robert W. Tuttle, *Kennedy v. Bremerton School District – A Sledgehammer to the Bedrock of Nonestablishment*, AM CONST. SOC'Y: EXPERT FORUM (June 28, 2022), https://www.acslaw.org/expertforum/kennedy-v-bremerton-school-district-a-sledgehammer-to-the-bedrock-of-nonestablishment (stating that following *Kennedy*, "there is every reason to expect that Christian prayer will dominate the scene" and that "[p]rayer by Jews, Muslims, and others is more likely to roil the school's fabric of cooperation and more likely to invite complaints by parents – not about prayer per se, but about the exposure of their children to prayer by 'others'").

283. *See* Nancy Yang, *What is Salat? Daily Prayer in Islam*, MINN. PUB. RADIO NEWS (Feb. 1, 2016, 6:00 AM),
https://www.mprnews.org/story/2016/02/01/explaining-daily-prayer-in-islam (explaining that the Islamic faith worships at five time of the day, and that the second prayer that occurs around mid-day, Durham, requires Muslim schoolteachers to have a clean space to pray while at work).

284. *See* 1 MAX WEINREICH, HISTORY OF THE YIDDISH LANGUAGE 410–12, A449 app. (2008); *Jewish Prayers: Grace After Meals*, JEWISH VIRTUAL LIB., https://www.jewishvirtuallibrary.org/grace-after-meals (last visited Apr. 27, 2023) (detailing Birkat Hamazon, a set of Hebrew blessings from the Torah that are recited after consuming meals with bread in the Jewish religion—often called "the Blessing of the Food" and translated in English to "the Grace After Meals").

285. *See supra* note 100.

286. *See supra* notes 67, 81.

287. *See supra* note 132 and accompanying text.

288. *See supra* text accompanying note 137; *supra* note 192.

participation confirms this point and suggests that such behavior would likely weigh in favor of the school.[289]

Seventh, the school also must not discourage student participation.[290] This is consistent with First Amendment jurisprudence because such action would infringe upon the fundamental rights of students and their parents as previously discussed in Section III.B.[291] However, following *Kennedy*, the inability to prevent student participation might now also extend to situations in which a student voluntarily joins an employee engaged in a private religious exercise.[292] For example, if a student overheard a teacher's recitation of the Lord's Prayer in the hallway and voluntarily joined in, absent evidence of coercion or disruption, under the Court's application of the Religious Clauses in *Kennedy*, the school cannot ask either the student or the teacher to cease such activity because this hypothetical speech would be private.[293] In sum, following *Kennedy*, courts and schools should pay *close* attention to the facts and circumstances surrounding an employee's speech before taking action.

CONCLUSION

In *Kennedy v. Bremerton School District*, the Supreme Court addressed whether a public school employee's demonstrative prayer, immediately following a school sponsored event is constitutionally protected speech, and if so, whether the government may restrict such activity to avoid an Establishment Clause violation.[294] In a 6-3 decision, the Court ruled that the Constitution neither requires nor permits the government to suppress an employee's "private"[295] religious speech because the First Amendment's Free Speech and Free Exercise Clauses as incorporated by the Fourteenth Amendment protect public employees from government reprisal.[296] The Court's holding is erroneous because it distorted precedent, misconstrued the facts, and disregarded the heightened First Amendment challenges in public

289. *See supra* note 14.

290. *See supra* note 14.

291. *See supra* notes 100, 195, 232–239 and accompanying text.

292. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2429 (2022).

293. *See supra* text accompanying note 132; *cf.* Lupu & Tuttle, *supra* note 282 (asserting that this same logic may invite opt-in religious exercises in public schools that resemble opt-in programs currently in place for recitation of the Pledge of Allegiance). The concerns that the ACS raised are precisely what the early *School Prayer Cases* and the Establishment Clause aimed to prevent. Lupu & Tuttle, *supra* note 282; *see supra* note 108.

294. *Kennedy*, 142 S. Ct. at 2421, 2423–33; *see* U.S. CONST. amend. I.

295. *Kennedy*, 142 S. Ct. at 2429.

296. *Id.* at 2432–33; *see* U.S. CONST. amends. I, XIV, § 2.

schools to improperly reduce Joseph Kennedy's demonstrative prayer to "private," constitutionally protected speech.[297]

The Court should have acknowledged that the District's interests outweighed Kennedy's due to the disruptive and coercive impact of his conduct.[298] Instead, the Court failed to provide an applicable standard to determine when a public school employee's free speech interests outweigh their government employer's and reduced the public-employee speech framework to an arbitrary analysis.[299] Thus, *Kennedy* threatens to further confuse First Amendment jurisprudence in the public-school context.[300] Consequently, lower courts and school administrators are advised to proceed with caution in the wake of *Kennedy* and carefully consider the conflicting rights of all players before taking disciplinary action.[301]

297. *See supra* Section IV.A.

298. *See supra* Section IV.B.

299. *See supra* Section IV.C.

300. *See supra* Section IV.D.

301. *See supra* Section IV.D. Over fifty cases have cited to *Kennedy* since the Court issued its opinion in late June 2022, many of which already begin to reflect how expansive public school employees' speech rights will be in the wake of *Kennedy*. *See, e.g.*, Beathard v. Lyons, No. 1:21-cv-01352-JES-JEH, 2022 U.S. Dist. LEXIS 143514, at *9 (C.D. Ill. Aug. 11, 2022) (finding that a football coach's "speech" fell outside his official job duties when he replaced a locker room sign despite student complaints because the employee "was not paid by the University to decorate his door or to use is [sic] to promote a particular viewpoint, he was employed to coach football").