Free Expression, Free Discourse:

KENNEDY V. BREMERTON SCH. DIST. and its Impact on Free Speech

I. INTRODUCTION:

When the Pilgrims set sail to undertake the perilous journey for the United States, they did so, arguably in large part, with the intention of finding a land in which they could practice their religion free from persecution. This country was founded on the basis of this freedom, now understood through the lens of our, over two-hundred-year-old, Constitution's First Amendment[i]. Despite this and the long-standing history in this country that individual people have the right to practice their religion freely and openly, it has not always been so simple to make sense of free expression and its relation to the establishment clause[ii].

Included in the First Amendment are a modicum of rights, pertinent to this case note are the free speech, free exercise, and establishment clauses, quoted below. Both the free speech and free exercise clause can be interpreted, and this case note will argue should be interpreted, to provide individual citizens with the right to practice their religion freely, despite their employer. Additionally, the establishment clause prohibits the government from creating a state-sponsored religion, to avoid government infringement on personal religious practices.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ."[iii]

It was perhaps both foreshadowing and intuitive to include the idea of separation of religion from state acts, as it is fundamentally true that a country with freedom of religion cannot have, or be perceived to have, a state sponsored religion[iv]. Indeed, the establishment clause is largely seen to prevent the government from sponsoring, financially supporting, or having active involvement within a religion[v]. There is a thin line between the necessity of free speech to include religious expression for all citizens, including government employees, and the establishment clause[vi]. This line has been drawn by courts, somewhat arbitrarily, based on surrounding facts of each situation to determine if the speech should be considered public or private[vii].

In *Kennedy*[viii], this question is raised by a high school football coach who prayed independently on the field after each game[ix]. The Supreme Court of the United States has heard oral arguments on this appeal of the twice decided Ninth Circuit and is in a particularly pivotal position to answer this question definitively. The surrounding facts of this case seemingly differ greatly from previous decisions within this realm.

This case note will argue that the establishment clause does not allow for government employers to take away the right of their employees to practice their religion individually during their employment. It will be argued that the plaintiff's, Coach Kennedy's, actions were not state sponsored religious activities in violation of the establishment clause. Rather, the plaintiff is a citizen of the country driven by devotion to give thanks through prayer. Acts of private religious devotion, even if they should inspire others to join in, are not coercive, but a hallmark of the religious freedom which inspired the founding of the United States.

II. BACKGROUND:

The Supreme Court will be ruling in *Kennedy* again, in what will be considered *Kennedy II*, the initial Supreme Court ruling will be called *Kennedy I*. As stated above, the road between free expression and the establishment clause is an area of law that is yet to be clearly decided. The history in this area of law is intricately tied to the very founding of the Nation. This section will discuss the important history and background pertinent to the plaintiff's claims and the Ninth Circuit Court of Appeals' decision in *Kennedy II*. In order to properly analyze the issues at hand it is important to understand the history of speech and expression regulation within government organizations, such as, in this case, public schools. The history of free expression will be discussed in Subsection A. Subsection B will discuss the history of religious expression specifically. Subsection C will discuss the surrounding facts and issues set forth in *Kennedy II*.

A. History of Free speech in public schools

The petitioner's brief[x] lays out quite a bit of case history which could be viewed in a light favorable to the plaintiff's position. For instance, it was ruled in *Pickering*[xi]. that it is possible to interpret speech by a government employee made in public as private speech. The Supreme Court ruled in *Tinker*[xii], a cornerstone case for free speech and expression, that school children, and even teachers within reason, were able to carry out free speech in public schools, as constitutional rights are not shed at the door to government institutions. Then it was ruled in *Lane*[xiii] that public speech by government employees should be viewed as to whether or not it is within the realm of the ordinary duties of that role.

The respondent's brief points out that it was ruled in *Garcetti*[xiv], contrary to *Pickering*, and utilized by the Ninth Circuit in its decision, that any public speech by a government employee could be considered private if it should fall reasonably within the official duties. Following that train of thought, the defendant school district also argued the precedent in *Mergens*[xv], that although high school students have a heightened maturity to make independent decisions, a school district may be held accountable for any public speech by their teachers. The district argued that any possibility for an objective observer to witness public religious expression as the district's endorsement is a good enough reason to quelch free speech by its employees[xvi].

B. History of Free Exercise in Public Schools

The Supreme Court in *Santa Fe*[xvii] held that a history of establishment clause violations may be reviewed to determine that a policy to allow students to elect a student representative in order to recite a prayer before student events over a sound system was unconstitutional. It was held by the Supreme Court in *Lemon*[xviii] that state funding for religious schools was a violation of the establishment clause as it constituted excessive government entanglement with religion. In *Lee*[xix],

the Supreme Court held that a public school inviting a clergyman to pray during graduation ceremonies also violated the establishment clause and was unnecessary government entanglement with religion. Further, the defendant school district argued that in every case in which prayer in school had been called into question, in *Santa Fe, Borden, Duncanville,* and *Jager*, for instance, it had been ruled unconstitutional[xx].

C. History of The Plaintiff, Coach Kennedy, and the Bremerton school district

The plaintiff was employed by the defendant school district as assistant head coach for the varsity team and head coach for the junior varsity football teams between 2008 and 2015[xxi]. The plaintiff prayed after each game unimpaired for his first seven seasons[xxii]. In September 2015, the district claims it first heard of the plaintiff's praying from a rival coach, during which time they wrote to the plaintiff requesting he stop[xxiii]. Following this letter, the plaintiff didn't pray after the first game, but he was driven to such discomfort that he turned around long after the game to return to the field and pray[xxiv]. Following that incident, the plaintiff returned to praying immediately after the games[xxv].

The school district was aware he continued the practice and that their request that the praying stop garnered media attention[xxvi]. There was an event in October 2015 when there was a highly publicized game, in which even extra security could not keep the public off the field, intent on praying with the plaintiff to signify support, where possible trampling injuries may have occurred, and there was the possibility of injury to the players[xxvii]. The plaintiff was placed on administrative leave soon after[xxviii].

III. Subject Opinion: *Kennedy v. Bremerton Sch. Dist.*

This section will analyze the basis of this note, the decision of the United States Court of Appeals for the Ninth Circuit in *Kennedy v. Bremerton Sch. Dist.*[xxix]. The focus of the analysis of

this note is the First Amendment, the free speech, free expression, and establishment clauses, and the Ninth Circuit's treatment of this claim. It is important to review the federal circuit's opinion displaying that religious expression by a government employee which could reasonably be viewed by third parties as public speech[xxx], rather than private, would be government entanglement with religion and a violation of the establishment clause intended to separate church and state.

The plaintiff originally moved for a preliminary injunction against the district to allow for prayer after games[xxxi], even though Coach Kennedy did not reapply for the position for the next season[xxxii], but it was denied initially and on appeal. Next, the Ninth Circuit granted de novo review of the summary judgement in favor of the defendant school district, in a light most favorable to the plaintiff[xxxiii]. The court placed special emphasis on determining whether the plaintiff's prayers were public or private speech in order to determine if there was an establishment clause violation[xxxiv].

The court's analysis to determine if the plaintiff's prayers were public or private speech utilized the balancing test set forth in *Pickering*[xxxv]: (1) whether the plaintiff spoke on a matter of public concern; (2) whether the plaintiff spoke as a private citizen; (3) whether protected speech was a substantial or motivating factor in an adverse employment action; (4) whether the state had an adequate justification for treating the employee differently from other members of the general public; and (5) whether the state would have taken adverse employment action even absent of the protected speech. Through this test the court determined the second and fourth elements were in question[xxxvi] and that both favored the defendant. Next, the court followed *Good News Club*[xxxvii] precedent to argue that state's interest in avoiding establishment clause violations is compelling to justify content-based discrimination of government employees. It was held that the plaintiff's

speech was public, and, therefore, unprotected, rendering adequate justification for the district's arguably discriminatory actions[xxxviii].

The Ninth Circuit looked to the precedent set in *Lee*[xxxix] to conclude that due to the establishment clause, public schools should not convey or attempt to convey a message of any particular religion. Then the precedent in *Santa Fe*[xl] was reviewed for its conclusion that in order to determine if there had been a violation of the establishment clause, courts must look to the surrounding circumstances, such as how an objective observer would view the plaintiff's actions. Also per *Santa Fe*, the court reviewed whether coercion was an aspect of the religious expression, as at least one player noted fear of negative playing time should they not join the prayer with other players who wish to join[xli].

The precedent set forth in *Garcetti*[xlii] which states that when public employees are not speaking as citizens, but pursuant to official duties, their communications are under employer purview. Perhaps the district's most powerful argument is that the media attention surrounding the plaintiff's continued praying, following the letter from the district requesting the activity cease, seemingly made the private prayers more similar to public speech[xliii]. Media attention, threats to colleagues, and potential danger to minors in the school are all reasonably compelling to the Ninth Circuit. It could be argued, these events need not have occurred except for the district's actions to break up private acts of devotion following seven years of unfettered praying.

iv. The Court's Conclusion

The Supreme Court , in *Kennedy I*, affirmed the Ninth Circuit and ruled in favor of the school district and against the plaintiff being allowed to pray on the field following football games[xliv]. The Ninth Circuit handed down the same decision in *Kennedy* II. The court analyzed both the establishment and free expression clauses of the First Amendment in relation to the

plaintiff's claims. It was determined that violation of the establishment clause should take precedence over the free speech clause[xlv], after an analysis of establishment clause precedent cases, which the court concluded displayed the plaintiff's actions were public and under the purview of a state position's duties.

The court determined, per *Garcetti,* that the plaintiff's job description was too general to decide with certainty that the praying would fall directly within the duties of coaching, but the timing of the prayers were[xlvi]. A coach was considered, by the court, to be on duty until the children players were released to their families from the locker room[xlvii]. This conclusion meant that the establishment clause would be violated, as a government employee would be conducting religious exercise publicly while under their official duties[xlviii].

The Court emphasized the importance of considering the coercive effects religious expression in public by a public employee as laid out in *Lee* and *Good News Club,* when determining if there have been establishment clause violations[xlix]. The defendant school district argued, and the Ninth Circuit agreed, that compelling proof of coercion could act as grounds for barring speech in state institutions[l]. As any possible coercion by a public employee expressing religion publicly could be viewed as government endorsement of said religion[li].

III. ANALYSIS

This section will attempt to demonstrate that the Ninth Circuit erred in holding that the plaintiff praying after football games would be an establishment clause violation due to the fact that an objective observer might view the praying as supported by the defendant school district. Subsection A will lay out arguments in relation to the fact that the establishment clause was not violated by the plaintiff's praying on the field at the conclusion of a game. Subsection B will explain why the plaintiff was exercising private free speech and is therefore protected free

expression under the constitution. Finally, Subsection C will discuss the potential negative downstream effects should the Supreme Court yet again affirm the Ninth Circuit in *Kennedy II*.

A. Establishment Clause Not Violated in Kennedy

The Ninth Circuit failed to properly take into account that the precedent cases which it cited in relation to the establishment clause all deal with quite different circumstances. The court reasoned that the plaintiff carried the burden of proof for the second element of the *Pickering* balance test, to prove that the prayer was private, not public speech[lii]. The plaintiff proves this through the fact that there is no evidence which demonstrates the coercion of others to join. After each game, he quietly went to the center of the field and prayed alone. This does not change because sometimes others may have joined upon their own accord[liii].

As stated above and per *Lemon*, the government cannot be seen to sponsor, financially support, or actively engage in a religion, should it wish to remain compliant with the establishment clause[liv]. None of these factors are present in *Kennedy*. The religious expression did occur on government property, but much as it was held in *Tinker*, constitutionally protected free expression can occur on public property free from sponsorship of that institution, so long as it isn't illegal[lv]. Although the plaintiff is employed by a government institution, the quick prayer after the game could not be reasonably viewed as financial support of religion. Finally, there appears to be no evidence of the defendant public school district actively engaging in the plaintiff's private religious expression. The prayers were not played over public access systems as in *Santa Fe*[lvi], printed in programs as in *Lee*[lvii], or even within earshot of any potential objective observer, given the noise and hustle surrounding the conclusion of football games[lviii].

The plaintiff was praying as a private citizen. Although still officially on duty until the players are released to their families, after each game there are various activities such as singing

the fight song and boisterous celebrations[lix]. It is not unreasonable that during this time of transition an employee may privately partake in a quick expression of religion without rousing suspicion from the crowd, likely more distracted by all of the noise and movement, of government-endorsed religious expression.

B. KENNEDY'S FREE SPEECH ENCOMPASSES FREE RELIGIOUS EXPRESS

The Ninth Circuit concedes that a teacher praying over their lunch is perfectly fine under the First Amendment[lx], because it is unlikely to be perceived as endorsement of religion by the district. This is quite true, because such an act is quick, private, and not abnormal, just as the plaintiff's praying was quick, private, and it is not abnormal for a religious person to wish to give thanks through a devotional. If a teacher can pray in a lunchroom with students present, why can't a coach pray on a football field? In neither scenario should the question of coercion or establishment clause violation be brought up, so long as it is, as described, quick and private. If another person requests to join in the prayer in the lunchroom does that make it a public prayer endorsed by the district? Likely not, if, as in *Kennedy*, the participants are independently willing.

Private moments may occur in public quite often and is never cause for concern so long as it isn't obscene. Much as people aren't likely to call attention to someone crying quietly on a public bus across from them, people are unlikely to call attention to a devote person quietly praying. In both scenarios a sympathetic person may offer to help or join, respectively, but in neither scenario is coercion present. This is reasonably evidenced by the fact no one called attention to the plaintiff's praying for seven years[lxi].

In each of the cases laid out in the Background section above, there were public displays of religious expression which were intended to be publicly shared, clearly putting them within the realm of control by a government employer. The plaintiff in *Kennedy,* a football coach, did not

pray with a microphone before the game[lxii], as in *Santa Fe*[lxiii]. The plaintiff also didn't pray with a microphone after the game[lxiv]. The prayer was personal, and swift, although the exact length of the prayers varies in the briefs of both petitioner and respondent, it was fairly understood to normally be under a minute[lxv].

There is no evidence that participation by other players or coaches was encouraged by the plaintiff, even given the occasional speech after the prayer presented with religious tones and a helmet raised[lxvi]. If someone is so moved to join in with someone else's devotional, during a game, over lunch, or otherwise, that does not mean that the original devoted party forced their participation. Much as clapping after a performance isn't forced by the first person to clap as the rest of the crowd joins in.

On that same note, and as for coercion, it could both be conceded that coaches hold an important and influential position at the same time as pointing out that there is no evidence of the plaintiff coercing, encouraging, or so much as mentioning the possibility of joining in the private prayers with the players. Further, any mention of coercion from the players didn't come to light for seven years[lxvii]. After seven years of uninterrupted praying, when the defendant school district claims to have first learned of the practice, only then is there any evidence of any players feeling coerced[lxviii].

Kennedy is a case of a coach, who just so happened to be employed by a public school, praying privately to give thanks after each game. These prayers were private speech which occasionally inspired others to join, through no action of the plaintiff. Free speech and its importance to protecting religious freedom is as old as the founding of the Nation[lxix]. To regulate religious expression as benign as a coach praying on a field immediately after a game whilst all of the post-game hullaballoo ensues would be a direct attack on the very principles of the Nation.

C. FREE EXPRESSION AND FREE DISCOURSE MUST REMAIN IN THE UNITED STATES

The ultimate question to be answered is whether or not this religious expression could be considered government sanctioned. The respondent argued, and the court agrees, that prayer, immediately after the game, in the center of the field, could be construed by an observer to be the school district's endorsement of prayer[lxx], which would certainly be a violation of the establishment clause. In this case, however, and with these facts, that does not follow. Although the plaintiff was praying in public on government property, it was not a prayer which was broadcast nor was participation required, let alone requested, simply politely obliged[lxxi].

It appears form the record as though the plaintiff is a devote Christian who sees fit to pray and give thanks after football games. There is no evidence that the plaintiff ever broadcast this prayer, as was done in *Lee*[lxxii] and *Santa Fe*[lxxiii]. There is little, if any, evidence of students feeling pressure, on the part of the plaintiff, to join. Although coach's hold influential positions, it is unreasonable to hold someone accountable should someone else feel independently obligated to follow in with a prayer they do not feel comfortable joining.

It is most important when discussing free speech and its run-in with the establishment clause to look towards the Nation's history. It is clear from the First Amendment, quoted in the Introduction section above, that both free speech and no establishment of a state sponsored religion were hugely important to the founding of the United States. They were included in direct succession within the all-important First Amendment. They were likely so important for equal and opposite reasons. Both are required to create a Nation truly free from religious persecution, but the establishment clause should not be given precedence unless the speech is clearly construed as government sanctioned speech.

In *Kennedy*, although the plaintiff is a public employee, the religious expression in question was intended to be private. There were no indications of sponsorship from the school district, other than that employment. The prayers were reasonable, private, and quick. To rule against this type of expression would forever change the landscape of a Nation founded on the principle of religious expression free from persecution.

V. CONCLUSION

The Ninth Circuit in *Kennedy II* approached a novel problem incorporating inappropriate precedent. The crossroads of free speech, free expression, and separation of church and state is unclear, the court approached the complaint through this precedent which did not properly consider the surrounding facts and important history of the Nation. The court utilized framework created by courts dealing in publicly broadcast displays of religious expression, rather than look reasonably at the situation at hand. Ultimately, this decision has the possibility to destroy protection of free speech and its necessary relation to free religious expression. One can only hope that the Supreme Court will look more carefully to the surrounding circumstances, see this claim as unique, and rule in a novel manner to this all-important question: Does the establishment clause allow for the squashing of free expression and discourse when that expression is separate from state actions, reasonably private, and free from coercion?

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[i] Lemon v. Kurtzman, 91 S. Ct. 2105 (1971).

[ii] Good News Club v. Milford Central School, 533 U.S. 98, 121 S. Ct. 2093 (2001).

[iii] U.S. Const. amend. I.

[iv] *Lemon*, 91 S. Ct. at 2125.

[v] *Id.* at 2112 (quoting Walz v. Tax Commission, 397 U.S. 664, 668 (1970)).

[vi] Brief for Petitioner at 24, Kennedy v. Bremerton Sch. Dist., No. 21-418 (U.S. filed Sep. 14, 2021) (quoting Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995) (plurality op.)). "in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince.".

[vii] Santa Fe v. Doe, 120 S. Ct. 2266 (2000).

[viii] Brief for Petitioner at 1.

[ix] Kennedy v. Bremerton Sch. Dist., 991 F.3d 1004 (9th Cir. 2021).

[x] Brief for Petitioner at 26.

[xi] *Id.* at 28 (quoting Pickering v. Bd. of Educ., 391 U.S. 563, 88 S. Ct. 1731 (1968)).

[xii] Brief for Petitioner at 1 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969)).

[xiii] *Id.* at 26 (quoting Lane v. Franks, 573 U.S. 228, 240 (2014)).

[xiv] Brief for Respondent at 18 (citing Garcetti v. Ceballos, 547 U.S. 410, 126 S. Ct. 1951 (2006)).

[xv] *Id.* at 39 (citing Board of Educ. v. Mergens, 496 U.S. 226, 250-251 (1990) (plurality op.)).

[xvi] *Id.* at 10.

[xvii] *Santa Fe*, 120 S. Ct.. at 2285.

[xviii] *Lemon*, 91 S. Ct. 2126.

[xix] Lee v. Weisman, 112 S. Ct. 2649 (1992).

[xx] Brief for Respondent at 40 (citing *Santa Fe*, 530 U.S. at 316; Borden v. School Dist., 523 F.3d 153, 175 (3d Cir. 2008); Doe v. Duncanville Indep. Sch. Dist., 994 F.2d 160, 166 (5th Cir. 1993); Jager v. Douglas Cnty. Sch. Dist., 862 F.2d 824, 830-831 (11th Cir. 1989)).

[xxi] Brief for Petitioner at 4, Kennedy v. Bremerton Sch. Dist., No. 21-418 (U.S. filed Sep. 14, 2021).

[xxii] *Id.* at 5-6.

[xxiii] Brief for Respondent at 4, Kennedy v. Bremerton Sch. Dist., No. 21-418 (U.S. filed Sep. 14, 2021).

[xxiv] Brief for Petitioner at 8.

[xxv] *Id.* at 8-10.

[xxvi] Brief for Respondent at 6-10.

[xxvii] *Id.*

[xxviii] *Id.* at 11.

[xxix] Kennedy v. Bremerton Sch. Dist., 991 F.3d 1004 (9th Cir. 2021).

[xxx] *Id.* at 1023.

[xxxi] Brief for Petitioner at 14.

[xxxii] Brief for Respondent at 14.

[xxxiii] *Kennedy*, 991 F.3d at 1004, 1014.

[xxxiv] *Id.* at 1011.

[xxxv] *Id.* at 1014 (citing Pickering v. Bd. of Educ., 391 U.S. 563, 88 S. Ct. 1731 (1968)).

[xxxvi] *Id.*

[xxxvii] *Kennedy*, 991 F.3d at 1016 (citing Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001)).

[xxxviii] *Id.*

[xxxix] *Id.* at 1017 (citing Lee v. Weisman, 505 U.S. 577, 112 S. Ct. 2649 (1992)).

[xl] *Id.* at 1016 (citing Santa Fe v. Doe, 530 U.S. 290, 120 S. Ct. 2266 (2000)).

[xli] Brief for Respondent at 13.

[xlii] *Kennedy*. 991 F.3d at 1015 (citing Garcetti v. Ceballos, 547 U.S. 410, 126 S. Ct. 1951 (2006)).

[xliii] Brief for Respondent at 31.

[xliv] *Kennedy*, 991 F.3d at 1022.

[xlv] *Id.* at 1018.

[xlvi] *Id.* at 1015.

[xlvii] *Id.*

[xlviii] Kennedy, 991 F.3d at 1021.

[xlix] *Id.* at 1016.

[l] Brief for Respondent at 40.

[li] *Kennedy*, 991 F.3d at 1018.

[lii] *Id.* at 1014.

[liii] *Id.* at 1010.

[liv] *Lemon*, 91 S. Ct. at 2125.

[lv] Brief for Petitioner at 45 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969)).

[lvi] *Santa Fe*, 120 S. Ct. at 2271.

[lvii] *Lee*, 112 S. Ct. at 2650.

[lviii] Brief for Petitioner at 29.

[lix] *Id.*

[lx] *Id.* at 1025.

[lxi] *Id.* at 1010.

[lxii] *Id.* at 1023.

[lxiii] Santa Fe v. Doe, 120 S. Ct. 2266, 2271 (2000).

[lxiv] *Kennedy*, 991 F.3d at 1023.

[lxv] *Id.* at 1010.

[lxvi] *Id.*

[lxvii] *Id.*

[lxviii] *Id.* at 1012.

[lxix] Brief for Petitioner at 24 (quoting Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995) (plurality op.)).

[lxx] *Kennedy*, 991 F.3d at 1023.

[lxxi] *Id.* at 1010.

[lxxii] *Lee*, 112 S. Ct. at 2650.

[lxxiii] *Santa Fe*, 120 S. Ct. at 2271.