Marquette Sports Law Review

Volume 31
Issue 2 *Spring*

Article 7

2021

A Coach's Fight to Pray: A Public High School Coach's Case Involving The First Amendment

Alex R. Utrup

COMMENTS

A COACH'S FIGHT TO PRAY: A PUBLIC HIGH SCHOOL COACH'S CASE INVOLVING THE FIRST AMENDMENT

ALEX R. UTRUP*

INTRODUCTION

If you have played a sport at any level, some of the most memorable people in your life may be a coach. Coaches can be influential in a person's development in a sport or in life, as valuable life lessons can be taught each and every day. In fact, Baltimore Ravens head coach, John Harbaugh, said that "many mothers look to the coaches of their son's football team as the last best hope to show their son what it means to become a man — a real man[.]"[1] From personal experience, my coaches from grade school to college made various levels of impact on me and helped shape my personal development. Not only did I learn different aspects of the sports my coaches taught, but I also was taught how to be responsible, how to be accountable, how to respond to adversity, and how to be a leader amongst other things. It is safe to say that a coach's conduct is always monitored by players and can leave a great impact on the lives of players.

Freedom of speech, freedom of exercise, and Establishment Clause issues can arise when coaches pray at schools or games. I attended a private high school and it was normal for our coaches to lead prayer before and after games on the baseball field. We played mostly public-school teams and were typically

* Alex is a J.D. Candidate at Marquette University Law School, a candidate for the National Sports Law Institute's Sports Law Certificate, and the Executive Editor of the *Marquette Sports Law Review*. 2019-2020 member of the *Marquette Sports Law Review*. 2018 graduate of Hastings College with a B.A. in Marketing and Recreation & Sport Management. Alex would like to thank his family and friends for their continued support throughout his academic career.

1. Avery Stone, *John Harbaugh: 'The Game of Football Is Under Attack'*, USA TODAY SPORTS (April 23, 2015), https://ftw.usatoday.com/2015/04/john-harbaugh-baltimore-ravens-why-football-matters.

the only team to pray before and after the games. Today, determining whether prayers can be offered before, during, or after games in public schools is an intriguing topic. To this date, the U.S. Supreme Court, appellate courts, and district courts have decided cases arising from the issue of prayer in public schools with some specifically regarding coaches' prayer.

At present, courts have given great deference to public schools to avoid Establishment Clause violations even when a coach's free speech or free exercise is infringed.[2] Courts have held that coaches' free speech and free exercise rights can be broadly constrained as long as they are on duty.[3] However, in *Kennedy v. Bremerton School District*, the Ninth Circuit Court of Appeals made the inference that, even while off duty, a teacher or coach cannot engage in any outward manifestation of religious faith.[4] In January 2019, the Supreme Court denied review of this case for unresolved factual questions but left open the possibility for future claims to be heard either by the plaintiff or other public-school teachers or coaches.[5]

This Comment will first review the First Amendment in Part I, including the Establishment Clause, freedom of speech, and freedom of exercise. Part II will discuss the relevant case law involving the Establishment Clause in the context of public high school and high school sports. Next, Part III will look at Joe Kennedy's lawsuit where his prayer resulted in a suspension from his duties and no retention the following year. Lastly, Part IV will analyze Kennedy's claim and future First Amendment claims from coaches or teachers.

I. FIRST AMENDMENT

In 1789, the First Amendment to the United States Constitution was introduced in the Bill of Rights to Congress and was later ratified by the states in 1791.[6] The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."[7]

---

2. *See* MATTHEW J. MITTEN ET AL., SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS 25 (5th ed. 2019).

3. Joshua Dunn, *Supreme Court Denies Review but Offers Roadmap for High School Coach Who Prayed*, EDUC. NEXT (Jan. 30, 2019), https://www.educationnext. org/supreme-court-denies-review-offers-roadmap-high-school-coach-prayed/.

4. Kennedy v. Bremerton Sch. Dist., 869 F.3d 813 (9th Cir. 2017).

5. Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634, 635 (2019) (Alito, J., concurring in judgment); Dunn, *supra* note 3.

6. *First Amendment*, HIST. (Dec. 4, 2017), https://www.history.com/topics/united-states-constitution/first-amendment.

7. U.S. CONST. amend. I.

Originally, the First Amendment applied to the U.S. government but not to state and local governments.[8] State governments had their own constitutions which included their own bill of rights that were enforced only by the state courts.[9] However, the introduction of the Fourteenth Amendment and the Due Process Clause in 1868 extended the scope of the First Amendment to include all state and local governments.[10] Consequently, the First Amendment now applies to all actions taken by federal, state, and local governments.[11]

In order to bring a First Amendment claim, one must be deprived of a First Amendment right as a result of a state action.[12] A state action includes any entity or person acting on behalf of the government.[13] Public schools and its employees are considered state actors because public schools are operated by state government entities; thus, public schools cannot infringe on any students', teachers', or other employees' federal constitution rights.[14]

The First Amendment provides several rights, one of which in the Establishment Clause.[15] The Establishment Clause states "Congress shall make no law respecting an establishment of religion."[16] As a result, it requires that a state and a church be separated, which reflects Thomas Jefferson's belief that a "wall of separation" should exist between church and state.[17] Thus, the Establishment Clause prohibits public schools from conveying or attempting to show that one religion or set of beliefs are favored over other religions or beliefs.[18]

Other rights provided by the First Amendment are freedom of speech and freedom of exercise. Freedom of speech rights grant people the right to say or do what they like without government interference or regulation.[19] Similarly, the Free Exercise Clause allows a person to practice their religion without the government interference.[20] However, even though public employees, such as

8. Eugene Volokh, *First Amendment*, BRITANNICA (Sept. 21, 2010), https://www. britannic a.com/topic/First-Amendment.

9. *Id.*

10. *Id.*

11. *Id.*

12. MITTEN, *supra* note 2.

13. *See* Amy Howe, *Opinion Analysis: Court Holds That First Amendment Does Not Apply to Private Operator of Public-Access Channels*, SCOTUSBLOG (June 17, 2019), https://www.scotusblog.com/2 019/06/opinion-analysis-court-holds-that-first-amendment-does-not-apply-to-private-operator-of-public-access-channels/.

14. MITTEN, *supra* note 2, at 26.

15. *See First Amendment*, CORNELL L. SCH., https://www.law.corne ll.edu/wex /first_amendment (last visited Mar. 9, 2020).

16. U.S. CONST. amend. I.

17. Rebecca A. Valk, *Good News Club v. Milford Central School: A Critical Analysis of the Establishment Clause as Applied to Public Education*, 17 ST. JOHN'S J.L. COMM. 347, 355 (2003).

18. Kennedy v. Bremerton Sch. Dist., 869 F.3d 813, 831–32 (9th Cir. 2017) (quoting Lee v. Weisman, 505 U.S. 577, 604-05 (1992)).

19. *First Amendment*, *supra* note 15.

20. *Id.*

coaches, have constitutional rights to free speech and free exercise, there are several restrictions to their rights when at work.[21]

II. PRAYER IN PUBLIC SCHOOLS

A. General Background of Prayer in Public Schools

Before the 1960s, prayer in public schools received few legal challenges, and it was quite normal for there to be prayer in schools, even teacher led prayers.[22] However, in the 1960s, school prayer was challenged and resulted in the Supreme Court hearing several cases concerning school prayer.[23] In 1962, the Court heard *Engel v. Vitale*, a landmark case involving prayer in public schools.[24]

In *Engel*, the school district ordered the principal to require a prayer to be said out loud in front of a teacher in each classroom.[25] The prayer was said each day and it read "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."[26] Once this prayer was adopted by the school district, parents of ten students brought a claim challenging the constitutionality of the prayer.[27] The claim alleged that the prayer was against the parents' and their children's' beliefs, religions, or religious practices.[28]

The Supreme Court determined that the recital of the prayer was inconsistent with the Establishment Clause.[29] Further, the Court discussed Thomas Jefferson's belief of separation between church and state and reasoned that at the time the Constitution was adopted there was a known danger of a union between church and state since many of the early colonists came to America from England to seek religious freedom.[30] Accordingly, the First Amendment was "to stand as a guarantee" that the Government could not control, support, or influence what prayers the American people can say.[31]

---

21. *See generally* Alison E. Price, *Understanding the Free Speech Rights of Public School Coaches*, 18 SETON HALL J. SPORTS & ENT. L. 209 (2008).

22. Derrick Meador, *What Does the Law Say About Prayer in School?*, THOUGHTCO (Mar. 29, 2019), https://www.thoughtco.com/the-law-and-prayer-in-school-3194664.

23. *Id.*

24. Engel v. Vitale, 370 U.S. 421 (1962); *see generally* Meador, *supra* note 22 (discussing cases involving prayer and religion in public schools).

25. *Engel*, 370 U.S. at 422.

26. *Id.*

27. *Id.* at 423.

28. *Id.*

29. *Id.* at 425.

30. *Id.* at 429.

31. *Id.* at 429.

A year after *Engel*, the Supreme Court heard another case involving state action that required schools to start school days off with a Bible reading.[32] In *School District of Abington Township v. Schempp*, a Pennsylvania statute required public schools to read ten verses from the Bible at the beginning of each school day, but children could be excused with written consent from a parent.[33] Additionally, under review was a rule adopted by the Board of School Commissioners of Baltimore City, which was similar to the Pennsylvania statute.[34] The Court concluded that both the statute and rule were religious exercises in public schools, and as a result, infringed on the children's rights.[35]

Engel and *Schempp* required public schools to ultimately remain unbiased on religious matters in order to comply with the First Amendment's Establishment Clause.[36] Similarly, the Supreme Court struck down an Alabama statute in *Wallace v. Jaffree*.[37] The Alabama statute allowed for public school teachers to hold a one-minute period of silence at the beginning of each day "for meditation or voluntary prayer."[38] Based on the findings of the lower courts, the Supreme Court concluded that the moment of silence "was intended to convey a message of state approval of prayer activities in the public schools"[39] and found the statute to be a violation of the First Amendment's Establishment Clause.[40]

In 1995, the United States Secretary of Education, Richard Riley, released a set of guidelines that were sent to every school superintendent across the country.[41] These guidelines were released to give clarity to religious expression in public schools.[42] Today, the guidelines still apply and were updated in 1996 and 1998.[43]

The set of guidelines mentions "that students may pray in a nondisruptive manner during the school day when they are not engaged in school activities or instructions."[44] However, the set of guidelines reiterates that public "schools may not endorse any religious activity or doctrine, nor may they coerce participation in religious activity."[45] School administrators, teachers, and

32. Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 205 (1963).
33. *Id.*
34. *Id.* at 211.
35. *Id.* at 224.
36. Sean Price, *Religion in the Locker Room*, TEACHING TOLERANCE, Spring 2013, at 36-37.
37. *See* Wallace v. Jaffree, 472 U.S. 38 (1985).
38. *Id.* at n. 25 (citing Jaffree v. James, 554 F.Supp. 1130, 1132 (SD Ala. 1983)); *Id.* at 40.
39. *Id.* at 61.
40. *Id.*
41. DEP'T OF EDUC., RELIGIOUS EXPRESSION IN PUBLIC SCHOOLS: A STATEMENT OF PRINCIPLES 1 (1998); *see also* Meador, *supra* note 22.
42. Meador, *supra* note 22.
43. DEP'T OF EDUC., *supra* note 41; *see also* Meador, *supra* note 22.
44. DEP'T. OF EDUC., *supra* note 41, at 3.
45. *Id.*

coaches are also mentioned in the set of guidelines.[46] These employees are reminded that they cannot organize or encourage prayer exercises in the classroom, and that teachers and coaches cannot participate or lead the religious activities of students.[47]

In 2000, the Supreme Court heard a case involving prayers at a public high school's varsity football games.[48] In *Santa Fe Independent School District v. Doe*, two sets of current and former students along with their mothers challenged the student-led prayers.[49] The school district argued that the prayer or message was not public speech but was private student speech that is protected by the Free Speech and Free Exercise Clauses.[50] Nevertheless, the Court was not persuaded by the school district's argument because it determined that the pregame invocations should not be regarded as private speech.[51] The Court found that the student-led, student-initiated prayers at the varsity football games violated the Establishment Clause.[52]

As shown in *Santa Fe*, prayer has made a place in public high school athletics. This next section will further explore various Court of Appeals cases that involve a coach or teacher whose prayer or religious activity was challenged for violating the Establishment Clause.

B. Cases Involving Religious Practices of a Coach or Teacher

Typically, in a situation where a coach is praying with his or her team, a four-step process takes place that results in the prayer stopping or the coach receiving some form of discipline.[53] First, a local resident from the area surrounding the school witnesses the coach praying.[54] The local resident then complains to an outside organization, such as The Freedom From Religion Foundation,[55] which is an organization dedicated to protecting "the constitutional principle of the separation of state and church."[56] Second, the organization that received the complaint must decide if it will pursue it.[57] Not every complaint from a local resident is taken up because a clear Constitutional

46. *Id.*
47. *See id.*
48. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 294 (2000); *see* Price, *supra* note 36.
49. *Santa Fe*, 530 U.S. at 294.
50. *Id.* at 302.
51. *Id.* at 302–03.
52. *Id.* at 301.
53. *See* Bob Cook, *The Four-Step Process of How School Coaches Get Banned from Praying with Their Teams*, FORBES (Dec. 23, 2018), https://www.forbes.com/s ites/bobcook/2018/12/23/the-four-step-process-of-how-school-coaches-get-banned-from-praying-with-their-teams/#6f54f897415b.
54. *Id.*
55. *Id.*
56. *About FFRF FAQ*, FREEDOM FROM RELIGION FOUND., https://ffrf.org/fa q/item/14999-what-is-the-foundations-purpose (last visited Jan. 27, 2020).
57. Cook, *supra* note 53.

right must be violated in order for an organization to pursue further.[58] If the organization decides to take action, the third step will be for the organization to send a letter to the school district explaining the Constitutional right violation.[59] The fourth step is for the school to investigate the violation and stop the coach from praying with his or her team.[60] Not all cases arise from this four-step process but *Kennedy* does.[61] Other cases involving a coach or teacher praying or practicing other religious activities are outlined in the paragraphs below.

A case arising from the Third Circuit Court of Appeals, *Borden v. School District*, involved a high school football coach praying.[62] During his time as a coach, he would participate in two separate prayer activities: (1) during team dinner before games and (2) leading prayer in the locker room before games.[63] During the 2003 to 2005 seasons, the coach would lead the first pre-game dinner prayer and would ask players to say prayers for the remaining pre-game dinners.[64] Furthermore, the coach would always lead the team in prayer in the locker room.[65] However, once the superintendent of the school district found out, she sent the coach a memorandum with attached guidelines about leading prayer.[66] The coach cooperated with the memorandum and stopped leading the team prayers.[67] Prior to the 2006 season, the coach asked the captains of the team to get the team's opinion on whether to continue the tradition of both prayers.[68] The players decided to keep the tradition alive by having players lead the pre-game prayers.[69] The coach brought this suit so he could engage in two silent acts during the team's prayers: (1) bowing his head during grace and (2) taking a knee with his team in the locker room.[70]

The Third Circuit found that the policy sent by the superintendent is the law on how school officials should conduct themselves, so the school district did not violate the Establishment Clause.[71] Additionally, the court concluded the coach's silent acts would violate the Establishment Clause.[72] The court held that a reasonable observer would conclude that the coach was endorsing religion when bowing his head and kneeling with his team while they prayed.[73]

58. *Id.*
59. *Id.*
60. *See id.*
61. *See generally* Kennedy v. Bremerton Sch. Dist., 869 F.3d 813 (9th Cir. 2017).
62. Borden v. Sch. Dist., 523 F.3d 153, 158 (3rd Cir. 2008).
63. *Id.* at 159.
64. *Id.*
65. *Id.*
66. *Id.* at 160.
67. *Id.* at 161.
68. *Id.* at 162.
69. *Id.*
70. *Id.* at 163.
71. *Id.* at 174.
72. *Id.* at 179.
73. *Id.* at 178–79.

Next, the Fifth Circuit Court of Appeals heard *Doe v. Duncanville Independent School District,*[74] a case with a similar fact pattern to *Borden v. School District*. There, a girls' basketball coach would either participate in or initiate prayer during practice, before and after games, and on the school bus traveling to games.[75] The prayers from the coach were amongst the public school's religious activities that were challenged by a player on the girls' basketball team and her father.[76] The Fifth Circuit upheld the district court's holding that enjoined the school district's employees from participating or supervising student-initiated prayers.[77] The court reasoned that the "prayers take place during school-controlled, curriculum-related activities that members of the basketball team are required to attend," and since coaches are at the games, they are "representatives of the school and their actions are representative of [the school district] policies."[78]

Lastly, in 2011, the Ninth Circuit Court of Appeals heard *Johnson v. Poway Unified School District*.[79] In *Johnson*, a public-school math teacher had two large banners hanging up in his classroom that referenced a religious message.[80] The school board ordered the teacher to take the banners down.[81] He complied, but then filed suit claiming his First and Fourteenth Amendment rights were violated.[82] Regarding his First Amendment claim, one issue that the Ninth Circuit focused on was whether the teacher spoke as a private or public citizen when he hung up his banners in the classroom.[83] To help determine if the teacher spoke as a public employee or a private citizen, the Ninth Circuit provided several guideposts.[84] Teachers are acting as such "when [1] at school or a school function, [2] in the general presence of students, and [3] in a capacity one might reasonably view as official."[85] In sum, the court determined that the teacher spoke as a public employee, therefore his First Amendment claim failed.[86]

III. JOE KENNEDY'S FIGHT FOR HIS RIGHT TO PRAY

From 2008 to 2015, Joe Kennedy, a practicing Christian, was an assistant football coach for Bremerton High School located in Kitsap County,

74. Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402 (5th Cir. 1995).
75. *Id.* at 404.
76. *Id.* at 406.
77. *Id.*
78. *Id.*
79. Johnson v. Poway Unified Sch. Dist., 658 F.3d 954 (9th Cir. 2011).
80. *Id.* at 958.
81. *Id.* at 959.
82. *Id.*
83. *Id.* at 966.
84. *See id.* at 968.
85. Kennedy v. Bremerton Sch. Dist., 869 F.3d 813, 824 (9th Cir. 2017) (quoting *Johnson*, 658 F.3d at 968).
86. *Johnson*, 658 F.3d at 970.

Washington.[87] During that time, Kennedy led prayer before and after games in the locker room, and he also prayed on the fifty-yard line after the teams shook hands.[88] Sometimes Kennedy's prayers on the fifty-yard line were joined by players from both teams and transitioned into motivational speeches containing religious content from Kennedy.[89] These prayers were the first step of the four-step process to end school-sponsored prayers. Following the prayers, the Bremerton School District received a complaint.[90] The superintendent informed Kennedy that his "practices were 'problematic' under the Establishment Clause."[91] Several weeks following the letter, Kennedy gave a non-religious motivational speech to his players after the game and then waited until everyone left to pray on the field.[92]

Kennedy responded to the superintendent's letter asking for a religious exemption under the Civil Rights Act of 1964.[93] Soon after his request, he returned to his practice of praying on the fifty-yard line immediately after the game.[94] After a few letters were sent by the superintendent explaining that his practices could not continue, Kennedy still prayed on the fifty-yard line.[95] Eventually, the district placed Kennedy on paid administrative leave, but he was allowed to attend the football games as a member of the public.[96] Kennedy attended the games and was often seen praying in the bleachers while wearing Bremerton High School apparel.[97] At the end of the year, Kennedy's contract expired, and the school district did not rehire him.[98]

A. Ninth Circuit Court of Appeals

As a result of not being rehired, Kennedy filed suit in the Western District of Washington asserting that his rights were violated under the First Amendment and the Civil Rights Act of 1964.[99] Moving for a preliminary injunction, Kennedy argued he was retaliated against by the Bremerton School District for

87. Maura Dolan, *Football Coach's On-field Prayer Not Protected by Constitution, Appeals Court Rules*, L.A. TIMES (Aug. 23, 2017), https://www.latimes.com/nation/la-na-football-coach-prayer-20170823-story.html.

88. *Id.*

89. Jonathan Stempel, *Washington Football Coach Cannot Pray After Games: U.S. Appeals Court*, REUTERS (Aug. 23, 2017), https://www.reuters.com/article/us-washington-coach/washington-football-coach-cannot-pray-after-games-u-s-appeals-court-idUSKCN1B32B1.

90. *Kennedy*, 869 F.3d at 816.

91. *Id.* at 817.

92. *Id.*

93. Stempel, *supra* note 89.

94. *Id.*

95. *Kennedy*, 869 F.3d at 819.

96. *Id.* at 820.

97. *Id.*

98. Stempel, *supra* note 89.

99. *Kennedy*, 869 F.3d at 820.

exercising his First Amendment right to free speech.[100] However, the district court denied the preliminary injunction, and Kennedy appealed to the Ninth Circuit Court of Appeals arguing that "the district court erred by concluding that he was not likely to succeed on the merits of his claim that [Bremerton School District] placed him on paid administrative leave in retaliation for exercising his First Amendment right to free speech."[101]

1. The First Amendment Retaliation Claim Factors at Issue in Kennedy's Case

Kennedy's First Amendment retaliation claim is governed by the framework laid out by the U.S. Supreme Court in *Pickering v. Board of Education.*[102] The Ninth Circuit applied the *Pickering* framework to another case, *Eng v. Cooley*, which provides the framework that Kennedy would need to show to succeed on his First Amendment retaliation claim.[103] The factors that must be met are:

> (1) whether the plaintiff spoke on a matter of public concern; (2) whether the plaintiff spoke as a private citizen or public employee; (3) whether the plaintiff's protected speech was a substantial or motivating factor in the 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 the adverse employment action even absent the protected speech.[104]

In this case, the second and fourth factors were at issue.[105] The second factor is crucial to analyze because public employees retain the right to speak as a citizen in certain circumstances of public concern, therefore, public employees do not lose all their First Amendment rights.[106]

The Supreme Court has provided a foundation for whether a public employee speaks as a private or public citizen.[107] In *Pickering*, a teacher wrote a letter criticizing the school board and superintendent for a proposed tax

100. *Id.* at 821.
101. *Id.* at 821–22.
102. Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, 391 U.S. 563 (1968); Austin Brackett, *Kennedy v. Bremerton School District: The Ninth Circuit Takes a Stand Against a High School Coach's Post Game Prayers*, SPORTS L. J. 217, 219 (2018).
103. Brackett, *supra* note 102, at 220.
104. Eng v. Cooley, 552 F.3d 1062, 1070 (9th Cir. 2009).
105. *Kennedy*, 869 F.3d at 822.
106. *Id.*; Garcetti v. Ceballos, 547 U.S. 410, 417 (2006).
107. *Kennedy*, 869 F.3d at 822.

increase and sent the letter to the local newspaper.[108] The teacher was later fired for writing and publishing the letter since it was "detrimental to the efficient operation and administration of the schools of the district."[109] The Supreme Court found that the teacher spoke as a private individual, and therefore his free speech rights were violated.[110] In coming to its conclusion, the Court concluded that the teacher's statements in the letter were not directed towards anyone that he was normally in contact with, nor did the letter affect the performance of his duties as a teacher and it did not interfere with the operation of the school.[111] Since the school had no greater interest in limiting the teacher's speech than that of a person of the general public, the teacher spoke as a private citizen.[112]

The Supreme Court further clarified this inquiry in *Garcetti v. Ceballos*.[113] In *Garcetti*, the Court determined that if public employees make statements consistent with their job duties, they are not speaking as private citizens, and thus are subject to employer discipline.[114] Additionally, employers cannot create excessively broad job descriptions.[115] When looking at job descriptions, it is a practical inquiry because many formal job descriptions barely represent the actual duties that the employee is expected to perform.[116]

As a result of *Pickering* and *Garcetti*, a two-part inquiry of fact and law must be conducted in order to determine whether Kennedy spoke as a private citizen.[117] First, the court must make a determination regarding Kennedy's scope and content of his job responsibilities using the facts; second, the court must determine the constitutional significance of those facts.[118]

2. Applying Factor's to Kennedy's Case

In the first inquiry of Kennedy's job responsibilities, the court concluded that Kennedy's job was "multi-faceted" because his job included teaching football and serving as a role model to his players.[119] Further, Kennedy had the responsibility of communicating the school district's perspective on appropriate behavior by setting an example through his own conduct when in the presence of students and fans.[120]

---

108. Pickering v. Bd. Of Educ. of Twp. High Sch. Dist. 205, 391 U.S. 563, 564 (1968).
109. *Id.*
110. *Id.* at 574.
111. *Kennedy*, 869 F.3d at 823 (citing *Pickering*, 391 U.S. at 569–70, 572–73).
112. *Id.* (citing *Pickering*, 391 U.S. at 573).
113. *Kennedy*, 869 F.3d at 823.
114. *Id.*; Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).
115. *Kennedy*, 869 F.3d at 823; *Garcetti*, 547 U.S. at 424–25.
116. *Kennedy*, 869 F.3d at 823; *Garcetti*, 547 U.S. at 424–25.
117. *See Kennedy*, 869 F.3d at 823.
118. *Id.* (citing Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 966 (9th Cir. 2011)).
119. *Kennedy*, 869 F.3d at 827; Freeland Cooper, Foreman LLP, *9th Circuit Says School District Can Prohibit Coach's After-Game Prayers*, 27 NO. 24 CAL. EMP. L. LETTER 10 (2017).
120. *Kennedy*, 869 F.3d at 827; Freeland Cooper, *supra* note 119.

After determining Kennedy's job responsibilities based on the facts, the court applied the constitutional significance of his duties. First, the court found that Kennedy easily satisfied the guideposts that were established in *Johnson*[121] because Kennedy acted as a coach when he was "[1] at school or a school function, [2] in the general presence of students, [3] in a capacity one might reasonably view as official."[122] Additionally, the court reasoned that Kennedy spoke as a public citizen if his speech "owes its existence" to his position.[123] Kennedy had access to pray on the fifty-yard line because he was a coach, whereas a regular citizen would not have had access.[124]

3. Ninth Circuit Comparing *Kennedy* to Other Circuits

In addition to looking at *Johnson* to help determine whether Kennedy spoke as a private or public citizen, the court also compared other Court of Appeals cases to *Kennedy*.[125] First, the Third Circuit concluded that the coach in *Borden* would speak pursuant to his official duties if he would bow his head during the team dinner prayer or kneel during the student-initiated pre-game prayer in the locker room; this is similar to Kennedy's actions.[126] Next, in a Sixth Circuit case, the court explained that the school board hires the teacher's speech when he is teaching and thus can regulate what is said or expressed.[127] Applying the Sixth Circuit's rationale to *Kennedy*, the Ninth Circuit found that at games where Kennedy was an assistant coach he taught through his own conduct, and therefore he was doing a duty he was hired to do by the school board.[128] This means that the school can regulate his speech.[129]

The Seventh Circuit held that when an employee speaks at a session or time that is a part of his job duties, that teacher is speaking as an employee and not a private citizen.[130] Consequently, the Ninth Circuit found that because Kennedy spoke on the field at a time where he was coaching and in a manner that was in his job description, he did so as a public employee.[131] Lastly, the Ninth Circuit compared Kennedy to *Duncanville Independent School District* from the Fifth

121. Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 966 (9th Cir. 2011).

122. *Kennedy*, 869 F.3d at 827 (quoting *Johnson*, 658 F.3d at 968).

123. *Id.* at 828; Freeland Cooper, *supra* note 119.

124. *Kennedy*, 869 F.3d at 828.

125. *Id.* at 828–29.

126. *Id.* at 828 (citing Borden v. Sch. Dist., 523 F.3d 153, 178-79 (3rd Cir. 2008)).

127. Evans-Marshall v. Bd. of Educ. of the Tipp City Exempted Vill. Sch. Dist., 624 F.3d 332, 340 (6th Cir. 2010) (involving a high school teacher whose teaching contract was not renewed after assigning three novels and showing a PG-13 adaption of Romeo and Juliet during class that received complaints from parents).

128. *Kennedy*, 869 F.3d at 829.

129. *Id.*

130. Mayer v. Monroe Cty. Comm. Sch. Corp., 474 F.3d 477, 479 (7th Cir. 2006) (finding that a teacher spoke as an employee rather than a private citizen when she answered a student's question by taking a political stance during a current-events session in class).

131. *Kennedy*, 869 F.3d at 829.

Circuit Court of Appeals.[132] The Fifth Circuit reasoned that the coaches were present to represent their school and the coaches' actions were representative of the school's policies.[133] The Ninth Circuit similarly said that Kennedy performed the task that he was hired to do which was demonstrative communication with students and spectators after the football games, and thus spoke as a public employee.[134]

Overall, the Ninth Circuit held that Kennedy spoke as a public citizen when he prayed on the fifty-yard line immediately after games in the "view of students and parents."[135] Furthermore, the court found that his speech was not solely directed to God, but in part, it was directed to students and parents.[136] Kennedy could not prove a likelihood of success on the merits of his First Amendment retaliation claim since Kennedy spoke as a public employee instead as a private citizen, the second *Eng* factor, and as a result the majority declined to analyze the fourth *Eng* factor, which was whether the Bremerton School District's actions were justified in restricting Kennedy's speech to avoid an Establishment Clause violation.[137]

B. U.S. Supreme Court's Denial of Review

In January 2019, the U.S. Supreme Court denied certiorari review of the Ninth Circuit's holding in *Kennedy v. Bremerton*.[138] However, along with the denial, Justice Alito, joined by Justices Thomas, Gorsuch, and Kavanaugh, wrote a concurrence that may provide some guidance for future challenges.[139] In the concurrence, Alito explains that important unresolved factual questions make it difficult for the Court to decide Kennedy's free speech question; thus, review was denied.[140]

The first part of the concurrence discusses the questions that were not inquired into by the lower courts. Alito notes that the key question is whether Kennedy was able to show that he will likely prevail on his claim that his termination violated his free speech rights.[141] To answer that question it is necessary to find what he is likely to prove regarding the reasoning behind the

132. *Id.* (citing Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402 (5th Cir. 1995)).
133. *Kennedy*, 869 F.3d at 829 (citing *Duncanville Indep. Sch. Dist*., 70 F.3d at 406).
134. *Id*.
135. *Id.* at 825.
136. *Id.*
137. *Id.* at 822.
138. Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634 (2019) (Alito, J., concurring).
139. Bob Cook, *US Supreme Court Is Hinting Public School Coaches Won't Have to Leave Religion on the Sidelines*, FORBES (Feb. 22, 2019), https://www.forbes.com/si tes/bobcook/2019/02/22/us-supreme-court-is-hinting-public-school-coaches-wont-have-to-leave-religion-on-the-sidelines/#3dab8f0818ff.
140. *Kennedy*, 139 S. Ct. at 635 (Alito, J., concurring).
141. *Id.*

school's action.[142] According to Alito, the district court failed to answer this question.[143] For example, if Kennedy was fired for neglecting his job responsibilities, then his free speech claim would most likely fail.[144] Furthermore, the Ninth Circuit erred on this issue because the court looked to Kennedy's activities when he was first employed and as a private citizen, such as when he was suspended and prayed in the stands at a game.[145]

The second part provides reasoning to why the Ninth Circuit's understanding of the free speech rights of public-school teachers is concerning. This reasoning may need to be reviewed in future cases.[146] Alito states that the Supreme Court has never read *Garcetti* to extend that far to the what the Ninth Circuit held.[147] Alito points out that the Ninth Circuit seems to suggest that teachers or coaches can be fired if the school does not like any expression they make while on duty.[148] Furthermore, according to Justice Alito the Ninth Circuit indicates that coaches and teachers are on duty from the time "they report for work to . . . [the time] they depart, provided that they are within the eyesight of students."[149] However, the concurring Justices emphasize that in *Garcetti* the Court states that public employers cannot create broad job descriptions in order for speech to constitute public speech, and if the Ninth Circuit continues to use its interpretation then review may be necessary.[150]

According to the concurring Justices, the most concerning part in the Ninth Circuit decision is that the opinion could be read in a way "that a coach's duty to serve as a good role model requires the coach to refrain from any manifestation of religious faith—even when the coach is plainly not on duty."[151] The Ninth Circuit determined that Kennedy's job responsibilities included being a role model to his players,[152] but then the court criticized his prayers in the stands because the court thought he was signaling a message about his values to his players.[153] However, Kennedy was already suspended and was attending the game as a fan.[154] As Alito explains, the suggestion that the Ninth Circuit makes "that even while off duty, a teacher or coach cannot engage in any outward manifestation of religious faith is remarkable."[155] To end the concurrence, Alito notes that while the Court denied certiorari on the Free Speech claim Kennedy

142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* at 636.
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.* at 637.
152. *Kennedy*, 869 F.3d at 827.
153. *Id.* At 826..
154. *Kennedy*, 139 S. Ct. at 637 (Alito, J., concurring).
155. *Id.*

still has claims under the Free Exercise Clause and Title VII of the Civil Rights Act of 1964.[156]

IV. ANALYSIS

As displayed in the above cases, the Establishment Clause will generally restrict coaches or teachers from praying or participating in other religious activities when they are working. As a result, this restrains teachers' freedom of speech and freedom of exercise rights. After analysis of the Ninth Circuit's decision in *Kennedy*, it appears that the Ninth Circuit expanded the scope of the Establishment Clause too far in concluding that Kennedy spoke as a public citizen instead of a private citizen at certain points during his prayer. The holding drew attention from four justices on the Supreme Court even though the Court declined to review the case.[157]

The first issue in the Ninth Circuit's reasoning in its decision, as mentioned by Alito in his concurrence, is that the Ninth Circuit suggests that a teacher or coach could be fired if the school does not like the expression the teacher or coach made while on duty.[158] The Ninth Circuit also states that as long as teachers and coaches are in eyesight of students, they are on duty from the time they arrive to the time they depart.[159] The second issue from the Ninth Circuit case arises from the court's discussion of Kennedy praying in the stands when he was not in his capacity as a coach.[160] Alito mentions that this implies that even off duty, teachers and coaches cannot make any religious expression when students are present.[161]

The two issues from the Ninth Circuit holding give no protection to teachers' or coaches' freedom of speech and freedom of exercise rights granted by the First Amendment. In the paragraphs below, I will set out two hypothetical situations and first apply the Ninth Circuit's application of the second *Eng* factor that it used in *Kennedy*. Second, I will put my perspective on how the Supreme Court should resolve the issues between coaches' freedom of speech, freedom of exercise, and the Establishment Clause. Applying the issues to two hypotheticals will show the concern that was created by the Ninth Circuit.

In the first hypothetical, a public high school teacher bowed her head at her desk and silently said a prayer in her empty classroom before lunch. The door was open, and a student saw this religious expression and reported it to the school's principal. In fear of violating the Establishment Clause, the school spoke to the teacher, but the teacher told the school she would continue to

156. *Id.*
157. *Id.* at 635.
158. *Id.* at 636.
159. *Id.*
160. *Id.* at 637.
161. *Id.*

privately pray before lunches in her classroom. The school decided not to renew her teaching contract at the end of the year and the prayers before lunch were a reason behind the nonrenewal.

One of the factors that the teacher would have to show to win on a First Amendment retaliation claim is that she spoke as a private citizen instead of a public employee, the second *Eng* factor. Looking at her job duties to help determine the second *Eng* factor, it is reasonable to determine that she had similar duties to Kennedy, such as teaching her class and serving as a role model to her students. She may also have the responsibility of communicating the school district's perspective on appropriate behavior by setting an example through her own conduct when in the presence of students, similar to what the Ninth Circuit stated about Kennedy's duty.[162] Her conduct will certainly hit the guideposts established in *Johnson* that were relied on in *Kennedy*.[163] These guidelines state teachers are acting like teachers "when at school or a school function, in the general presence of students, in a capacity one might reasonably view as official."[164] Using the Ninth Circuit's reasoning, the school would have a right to not renew her contract because the teacher was in eyesight of a student at school, therefore she was on duty expressing a religious activity.

In the second hypothetical, a public high school baseball coach attended the high school soccer team's game as a fan. This is similar to Kennedy attending his school's football game in the bleachers. During the soccer game, students, parents, and players saw the baseball coach bow his head while saying a silent prayer. This was brought to the school superintendent's attention, and he told the coach that he acts as a role model to his players and could no longer pray in the stands. The coach was later placed on paid administrative leave for a month.

Like the first hypothetical, the coach's duties are important to look at to help determine whether the coach was acting as a private citizen or public employee. It has been well-determined that a coach's duties include being a good role model to his players, even the Ninth Circuit said that about Kennedy's job duties.[165] The act of prayer could signal to his players the importance of religion, and thus a public school coach would be endorsing a religion while off duty in the stands. A court applying the Ninth Circuit decision in *Kennedy* could read the opinion in a way "that a coach's duty to serve as a good role model requires the coach to refrain from any manifestation of religious faith—even when the coach is plainly not on duty."[166] Therefore, a court could conclude that the baseball coach ran afoul of the Establishment Clause.

---

162. *See Kennedy*, 869 F.3d at 827; *see also* Freeland Cooper, *supra* note 119.
163. *See supra* Part III (A)(2).
164. Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 968 (9th Cir. 2011).
165. *See Kennedy*, 869 F.3d at 827.
166. *Kennedy*, 139 S. Ct. at 637 (Alito, J., concurring).

Applying *Kennedy* to those hypotheticals, it appears that the Ninth Circuit restricts teachers' and coaches' free speech and freedom of exercise rights to the extent that they cannot make any religious expression, such as praying during school or at school events. Whether *Kennedy* makes it back to the Supreme Court or the Supreme Court hears a future case involving a coach or teacher praying, the Supreme Court should resolve the issue and establish a clear line of permissible religious activity. A clear line would make it easier to comply with the Establishment Clause for school administrators, teachers, and coaches.

Additionally, the Supreme Court establishing a clear line would help clear remaining issues from the Ninth Circuit and the concurrence to the denial of certiorari written by Justice Alito. A suggested clear line would be that while on-duty teachers and coaches may participate in private and quiet prayer, off-duty teachers and coaches may participate in religious activities of their choosing. Because the Ninth Circuit looked at Kennedy's off-duty activities, it would be beneficial to incorporate the off-duty portion even though it should be easily protected by the First Amendment. By establishing a clear line, this will hold the Establishment Clause true to its original interpretation while affording protection to public school teachers' and coaches' First Amendment rights.

By applying my clear line to the two hypotheticals, both the teacher and coach would have their First Amendment rights protected. First, the teacher would be allowed to say prayer before her lunches because she was privately and quietly praying at her desk. Although a student saw her praying, this would not violate the Establishment Clause because the prayer was not meant to persuade or endorse a religion to a student. Second, the baseball coach would be allowed to say his prayer in the stands of a soccer game because he is off-duty. Despite his duty to serve as a role model to his players, the coach is attending as a fan and a part of the general public; therefore, his prayer does not violate the Establishment Clause.

CONCLUSION

A coach can be one of the most memorable and influential people in a student's life. Students are constantly monitoring and observing coaches' conduct, and thus, it is important that public school coaches are not endorsing a religion or set of beliefs while on duty considering the Establishment Clause. As shown, coaches' freedom of speech and freedom of exercise rights are impacted, and in most circumstances, restricted to comply with the Establishment Clause. However, in Joe Kennedy's case, the Ninth Circuit pushed compliance with the Clause too far. If the U.S. Supreme Court decides to hear a future case on coaches' or teachers' freedom of speech or freedom of exercise, it could expand teachers' and coaches' rights in public schools.