TEACHER PRAYER IN PUBLIC SCHOOLS

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When American citizens elect to work in government positions, they relinquish certain free speech rights granted by the First Amendment. In Garcetti v. Ceballos*, the U.S. Supreme Court ruled that when public employees make statements pursuant to their government job duties, they do not speak as citizens for First Amendment purposes. As such, they are not constitutionally insulated from employer discipline. Determining whether public employees speak as a result of, or in accordance with, their official responsibilities can be difficult, and one government job has proven more challenging than most: the public school teacher. In 2021, the Ninth Circuit held in* Kennedy v. Bremerton *that a high school football coach's official duty was to serve as a role model to his students, such that any speech he made in that capacity, including his personal religious prayer, was not entitled to First Amendment protection. The Ninth Circuit, in its efforts to shield students from religious conduct, has left little protection for public school employees to engage in any type of private speech at school.*

This Note argues that the Ninth Circuit's broad interpretation of a coach's official duties improperly expands Garcetti*'s scope and extinguishes the freedom for public school employees to engage in private religious expression at school. This Note reasons that teachers and coaches do not always speak pursuant to their job duties when they engage in speech in front of students, and it urges the Supreme Court to carve out a private prayer exception that requires the government to justify disciplinary action by demonstrating a compelling state interest. This Note simultaneously recognizes that safeguards are necessary to protect students' free exercise rights. When a public school's instructional employee places undue pressure on students to engage in religious activity, this Note contends that the*

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prevention of this coercive Establishment Clause violation can serve as one such compelling interest, overriding a teacher's right to pray.

INTRODUCTION

> [T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.[1]

In 2015, Joseph Kennedy, a high school football coach, was suspended after praying on the fifty-yard line following his team's games.[2] In 2021, the Ninth Circuit held that his prayer was not protected speech under the First Amendment.[3] The court found that Kennedy spoke pursuant to his job as a coach when he engaged in personal prayer in earshot of surrounding players, and was therefore not entitled to private speech protection under the First

1. Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990).
2. *See* Kennedy v. Bremerton Sch. Dist. (*Kennedy III*), 991 F.3d 1004, 1013 (9th Cir.), *reh'g denied*, 4 F.4th 910 (9th Cir. 2021) (en banc), *cert. granted*, 142 S. Ct. 857 (2022) (mem.).
3. *See id.* at 1015.

Amendment's Free Speech and Free Exercise Clauses.[4] The Ninth Circuit further held that even if his speech was private expression, the school's fear of a potential Establishment Clause[5] violation justified suspending Kennedy from his job.[6]

Kennedy's prayer rights intersect three labyrinthine clauses of the First Amendment: the Establishment Clause, the Free Exercise Clause, and the Free Speech Clause. As an initial matter, religious expression in public schools naturally implicates the Establishment Clause,[7] which prevents the government—and government employees—from carrying out conduct that could have the effect of establishing a state religion.[8] Since 1962, the U.S. Supreme Court has consistently declared that *state-sponsored* prayer in schools is unconstitutional, finding in *Engel v. Vitale*[9] that opening class with a recitation of prayer was equivalent to establishing a state religion.[10]

In the following two decades, the Court created and applied analytical frameworks to assess the constitutionality of religious conduct in schools.[11] These tests focus on whether the school places undue pressure on students to engage in religious activity, whether that religious activity has a primary secular purpose, and whether the school's actions signify an endorsement of religious views by the State.[12] Establishment Clause jurisprudence hinges on the actions of the *school*; the Court has yet to confront an Establishment Clause case hinging on the religious prayer of an individual school *employee*.[13] Because previous Supreme Court litigants raised Establishment Clause challenges to school-sponsored prayer—rather than asserting free exercise and free speech violations like Kennedy did—the full implication of school prayer cases on individual First Amendment rights remains unexplored.[14]

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4. U.S CONST. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion]; or abridging the freedom of speech . . . ."); *see also Kennedy III*, 991 F.3d at 1015.

5. U.S CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . .").

6. *See Kennedy III*, 991 F.3d at 1016.

7. Charles J. Russo & Allan G. Osborne, Commentary, *Prayer and Public School Employees: To Pray or Not to Pray?*, 391 EDUC. L. REP. 407, 424 (2021).

8. *See, e.g.*, Engel v. Vitale, 370 U.S. 421, 435 (1962) ("[E]ach separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance.").

9. 370 U.S. 421 (1962).

10. *See id.* at 436.

11. *See* Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 225 (1963); Erwin Chemerinsky, *The Story of* Santa Fe Independent School District v. Doe*: God and Football in Texas*, *in* EDUCATION LAW STORIES 319, 319–20 (Michael A. Olivas & Ronna Greff Schneider eds., 2007).

12. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 299 (2000); Lee v. Weisman, 505 U.S. 577, 587–88 (1992).

13. *See infra* Part I.A.1.

14. *See, e.g.*, *Lee*, 505 U.S. at 587 ("We can decide the case without reconsidering the general constitutional framework by which public schools' efforts to accommodate religion are measured.").

While the Constitution forbids the establishment of state religion, it fiercely protects the free speech and free exercise rights of American citizens.[15] This delicate balance extends to the school setting as well—with additional limitations.[16] Schools have discretion to impose reasonable regulations on speech, so long as those regulations do not target the viewpoint of that speech.[17] However, the Supreme Court has stressed that secondary schools are critical to furthering intellectual debate and contributing to the marketplace of ideas.[18] It has therefore sought to amply protect nonreligious and religious speech alike.[19] Though most Supreme Court litigation has focused on the free speech rights of *students*, the Court has indicated that these same protections and exceptions extend to teachers.[20]

Moreover, teachers, by virtue of their government employment, relinquish some additional First Amendment rights.[21] When public employees are fired or otherwise disciplined for speech made pursuant to their job responsibilities, they are not entitled to free speech protection under the First Amendment.[22] Constitutionally, such speech is considered state speech rather than private speech.[23] Determining whether a public employee's speech is private or public is especially challenging in the school setting.[24] Teachers have broad responsibilities, including choosing curricula, running classroom debates, and serving as role models for students.[25] The Supreme Court has not addressed whether all public school employees' speech is regulable as within the scope of their job responsibilities.[26] Consequently, circuit courts are divided on the question.[27] The first step in determining

15. *See* U.S CONST. amend. I. The Free Exercise and Free Speech Clauses were incorporated through the Fourteenth Amendment and subsequently applied to the states. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); Gitlow v. New York, 268 U.S. 652, 666 (1925).

16. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969); Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968); *see also* Schenck v. United States, 249 U.S. 47, 52 (1919) (finding that the most stringent free speech protection "does not even protect a man from an injunction against uttering words that may have all the effect of force"); Erwin Chemerinsky, *The Supreme Court and Public Schools*, 117 MICH. L. REV. 1107, 1109 (2019). The First Amendment generally prevents the government from proscribing speech or expressive conduct because of its disapproval of the ideas being expressed. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

17. *See* Randy J. Sutton, Annotation, *Application of First Amendment in School Context—Supreme Court Cases*, 57 A.L.R. Fed. 2d 1, § 2 (2011). However, schools can restrict speech that is lewd, vulgar, offensive, elicits drug use, or causes a substantial disruption. *See* Paul Forster, Note, *Teaching in a Democracy: Why the* Garcetti *Rule Should Apply to Teaching in Public Schools*, 46 GONZ. L. REV. 687, 691 (2011).

18. *See, e.g.*, *Tinker*, 393 U.S. at 506.

19. *See, e.g.*, Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990).

20. *See Tinker*, 393 U.S. at 506.

21. *See Pickering*, 391 U.S. at 568.

22. Garcetti v. Ceballos, 547 U.S. 410, 424 (2006).

23. *See id.*

24. *See* Mark Strasser, Pickering*,* Garcetti*, & Academic Freedom*, 83 BROOK. L. REV. 579, 606, 609–10 (2018).

25. *See infra* Part.II.B.2.

26. *See infra* Part II.B.2.

27. *See infra* Part II.B.1.

whether teachers and coaches have the right to engage in religious expression in front of their students is to establish whether public school employees have private speech rights at school.[28]

This Note assesses whether the prayer of a public school instructional employee, made on school premises, is private speech protected by the First Amendment, and if so, whether the Establishment Clause can nevertheless override that constitutional protection. It analyzes the circuit courts' application of free speech protections for public school employees and examines the Establishment Clause implications of employee prayer. This Note argues that teachers do not always speak pursuant to their job duties when they engage in religious speech in front of students. It posits that personal prayer should be granted special protection requiring the government to justify disciplinary action by demonstrating a compelling state interest. Moreover, this Note reasons that an Establishment Clause violation can serve as a compelling governmental interest only if there is a valid concern that the employee prayer places undue pressure on students to engage in religious activity.

This Note proceeds in three parts. Part I discusses the Supreme Court's Establishment Clause, Free Exercise Clause, and Free Speech Clause jurisprudence regarding prayer and religious speech in secondary schools. Part II introduces the diminished free speech rights of government employees under *Garcetti v. Ceballos*[29] and examines the challenges that occur when public school employees engage in private speech. It then lays out the landscape of circuit court cases involving employee-initiated religious expression, particularly as applied in *Kennedy v. Bremerton School District*.[30] Part III proposes an exception to *Garcetti* for public school employees' extracurricular speech that grants First Amendment protection to private speech and prayer. To account for the competing Establishment Clause concerns, this Note maintains that a public school employee's free speech rights may be overridden if the employee is a state actor who psychologically coerces students into participating in religious practice.

I. THE RELIGION CLAUSES AND FREE SPEECH IN SCHOOL

This part introduces the three distinct First Amendment clauses that intersect in public school religious speech and prayer cases. Part I.A.

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28. *See, e.g.*, *Kennedy III*, 991 F.3d 1004, 1014 (9th Cir. 2021), *cert. granted*, 142 S. Ct. 857 (2022) (mem.).

29. 547 U.S. 410 (2006).

30. *Kennedy III*, 991 F.3d 1004. The Supreme Court recently granted certiorari on this case and scheduled oral arguments for spring 2022. Harper Neidig, *Supreme Court Agrees to Hear Case on HS Coach's Suspension Over On-Field Prayers*, THE HILL (Jan. 14, 2022, 5:30 PM), https://thehill.com/regulation/court-battles/589849-supreme-court-agrees-to-hear-case-on-hs-coachs-suspension-over-on?amp [https://perma.cc/KM6Y-3986]; *see also* Amy Howe, *Court Will Take Up Five New Cases, Including Lawsuit from Football Coach Who Wanted to Pray on Field*, SCOTUSBLOG (Jan. 14, 2022, 8:08 PM), https://www.scotusblog.com/2022/01/court-will-take-up-five-new-cases-including-lawsuit-from-football-coach-who-wanted-to-pray-on-the-field/ [https://perma.cc/6FPK-KAXM].

describes public school prayer cases and their treatment under the Establishment and Free Exercise Clauses (collectively, "Religion Clauses"). Part I.B. provides an overview of free speech jurisprudence in public schools.

A. Public School Prayer and the Religion Clauses

The First Amendment reflects the framers' expectation that the government should neither compel nor punish religious practice.[31] The Religion Clauses together serve many vital purposes, including protecting freedom of religious belief, preventing state coercion to engage in religious activity, and forbidding sectarian discrimination.[32] However, an inherent tension persists between the clauses.[33] The Establishment Clause primarily serves to treat every citizen equally, while the Free Exercise Clause primarily promotes religious liberty.[34] Nowhere has this tension between the separation of church and state and the accommodation of the free exercise of religion been more apparent than in American public schools.[35] Expectedly, the Supreme Court has long grappled with striking the appropriate balance for religious expression in the public school setting.[36] Part I.A.1 discusses how the Court has assessed the effect of the Establishment Clause on prayer in public school, and Part I.A.2 discusses the relevant consequences of the Free Exercise Clause's application to such conduct.

1. Public School Prayer and the Establishment Clause

Because public schools are run by the State, they must adhere to the Establishment Clause's prohibitions.[37] The Establishment Clause[38] prevents the government—and government employees—from carrying out conduct that could have the ultimate effect of establishing a state religion.[39] This

31. *See* U.S CONST. amend. I.

32. *See* Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 567 (1991).

33. *See* Sarah M. Isgur, Note, *"Play in the Joints": The Struggle to Define Permissive Accommodation Under the First Amendment*, 31 HARV. J.L. & PUB. POL'Y 371, 371–72 (2008).

34. *See* Lupu, *supra* note 32, at 568 ("The prohibition on laws respecting establishment is primarily an equal liberty provision; only secondarily is it concerned with religious liberty.").

35. *See* Theresa Lynn Sidebotham, *Expression of Religion in Public Schools*, 40 COLO. LAW. 47, 47 (2011) (citing Roberts v. Madigan, 921 F.2d 1047, 1053 (10th Cir. 1990)).

36. *See* Brett Geier & Ann E. Blankenship-Knox, *When Speech Is Your Stock in Trade: What* Kennedy v. Bremerton School District *Reveals About the Future of Employee Speech and Religion Jurisprudence*, 42 CAMPBELL L. REV. 31, 76 (2020) ("Balancing when and how religion . . . may be expressed in public schools by both students and employees has proved challenging for the . . . Court.").

37. *See* Engel v. Vitale, 370 U.S. 421, 425, 430 (1962).

38. U.S CONST. amend. I.

39. *See, e.g.*, *Engel*, 370 U.S. at 435. States are subject to the Establishment Clause's protections through the clause's incorporation through the Fourteenth Amendment. *See* Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947).

conduct can range from displaying a crèche in a town square[40] to sponsoring prayer in schools.[41]

The Supreme Court first considered the constitutionality of state-led prayer in public schools in 1962.[42] In *Engel v. Vitale*,[43] a New York state official directed school principals to lead prayers in class at the start of each school day, a routine that one school adopted into its official policy.[44] The Court, in its 6–1 decision, found that New York's state prayer program, despite its allowance for students to opt out of praying, effectively established religion in violation of the Establishment Clause.[45] A year later in *School District of Abington Township v. Schempp*,[46] the Court reviewed a Pennsylvania law that required school administrators to read verses from the Bible at the opening of each school day.[47] This statute permitted parents to excuse their students from joining the recitation of the prayer.[48] The Court nonetheless affirmed that reading these prayers compelled students to practice religion, in violation of their free exercise rights and the Establishment Clause.[49] The Court underscored in *Engel* and *Schempp* that, because the prayer exercises occurred during instructional time and in front of students who were required to attend school, they were curricular, *coercive* activities.[50] This concept of psychological coercion predated the more utilitarian frameworks that were developed in later Establishment cases, and it has remained a dormant standard in school prayer cases.[51]

Ten years later, the Supreme Court developed the *Lemon* test, the first formal standard for assessing Establishment Clause violations.[52] In *Lemon*

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40. *See* County of Allegheny v. ACLU, 492 U.S. 573, 579 (1989).

41. *See Engel*, 370 U.S at 435; Charles J. Russo, *Prayer at Public School Graduation Ceremonies: An Exercise in Futility or a Teachable Moment?*, 1999 BYU EDUC. & L.J. 1, 6.

42. *See Engel*, 370 at 424.

43. 370 U.S. 421 (1962).

44. *See id.* at 423 ("These state officials composed the prayer which they recommended and published as a part of their 'Statement on Moral and Spiritual Training in the Schools,' saying: 'We believe that this Statement will be subscribed to by all men and women of good will, and we call upon all of them to aid in giving life to our program.'"). The prayer that students had to recite was as follows: "Almighty God, we acknowledge our dependence upon Thee, and we beg thy blessings upon us, our parents, our teachers and our Country." *Id.* at 422.

45. *See id.* at 430.

46. 374 U.S. 203 (1963).

47. *See id.* at 205.

48. *See id.* at 224–25 (noting that these prayers are not "mitigated by the fact that individual students may absent themselves upon parental request, for that fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause").

49. *See id.* at 224.

50. *See* Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 701 (1992) ("[O]rganized school prayer inculcates even as it accommodates, making it impossible to distinguish 'independent religious choice' from conformity to authority."); *see also Schempp*, 374 U.S. at 221. *Engel* and *Schempp* made the first references to psychological coercion, which Justice Anthony Kennedy later picked up on in *Lee v. Weisman*, 505 U.S. 577 (1992). *See infra* note 79 and accompanying text.

51. *See* Abner S. Greene, *The Pledge of Allegiance Problem*, 64 FORDHAM L. REV. 451, 456, 458 (1995).

52. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

v. Kurtzman,[53] the Court evaluated the constitutionality of state statutes that provided funding for books, supplies, and teacher salaries at private parochial schools.[54] The Court articulated three ways in which the state may violate the Establishment Clause: (1) if the state action lacks a secular purpose, (2) if the primary effect of the state action either advances or inhibits religion, (3) if the state action amounts to excessive entanglement with religion.[55] While the *Lemon* test was the first fixed standard of modern Establishment Clause jurisprudence, the Court has moved away from the framework over time, significantly in Establishment Clause cases not involving state funding.[56] Some Justices have considered the test wholly inadequate[57] or have tinkered with its application.[58]

Justice Sandra Day O'Connor sought to correct some of the pitfalls of the *Lemon* test and articulated a new standard in *Lynch v. Donnelly*[59]—the endorsement test.[60] The test looks at whether a government action or practice is perceived by the public as an endorsement of religion.[61] In retaining some of the language from *Lemon*, Justice O'Connor additionally asked whether the government "intend[ed] to convey a message of endorsement or disapproval of religion."[62] Though Justice O'Connor's endorsement test has been primarily used to assess cases involving religious symbols,[63] the Court partially employed her framework when deciding another school prayer case a year after *Lynch*.[64]

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53. 403 U.S. 602 (1971).

54. *Id.* at 609–11.

55. *See id.* at 615, 623; *see also* Agostini v. Felton, 521 U.S. 203, 218 (1997).

56. *See* Ronna Greff Schneider, *Getting Help with Their Homework: Schools, Lower Courts, and the Supreme Court Justices Look for Answers Under the Establishment Clause*, 53 ADMIN. L. REV. 943, 948–52 (2001); Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2265 (2020) (Thomas, J., concurring).

57. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 110 (1985) (Rehnquist, J., dissenting) ("[T]he *Lemon* test has no more grounding in the history of the First Amendment than does the wall theory upon which it rests. . . . The three-part test has simply not provided adequate standards for deciding Establishment Clause cases . . . ."); *see also* William P. Marshall, *"We Know It When We See It": The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 518 (1986); Jesse Choper, *The Establishment Clause and Aid to Parochial Schools—An Update*, 75 S. CAL. L. REV. 495, 496 (1986).

58. *See* Schneider, *supra* note 56, at 948–52. The Supreme Court has at times combined the last two elements to make a "purpose" prong and "effects" prong. *See id.* at 950 ("Interestingly, . . . the Court . . . transformed the three prong *Lemon* test into a two prong test by eliminating excessive entanglement as an independent factor . . . .").

59. 465 U.S. 668 (1984).

60. *See id.* at 687 (O'Connor, J., concurring); *see also Jaffree*, 472 U.S. at 69 (O'Connor, J., concurring).

61. *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

62. *Id.* at 690.

63. *See* David L. Hudson Jr., *Endorsement Test*, *First Amendment Encyclopedia*, https://www.mtsu.edu/first-amendment/article/833/endorsement-test [https://perma.cc/9GLS-WD5B] (last visited Mar. 4, 2022); *see also* B.J. Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 MICH. L. REV. 491, 492 (2005).

64. *Jaffree*, 472 U.S. at 51 ("The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" (quoting Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943))).

In *Wallace v. Jaffree*,[65] the Court declared unconstitutional an Alabama statute that authorized a daily period of silence for meditation or voluntary prayer.[66] The Court incorporated components of *Lemon* along with the endorsement principle that Justice O'Connor had proposed the year prior, finding that the statute endorsed religion because it lacked a clear secular purpose.[67] In *Jaffree*, Justice O'Connor wrote a concurring opinion, noting that nothing in the Constitution or the Court's jurisprudence prohibited public school *students* from *voluntarily* praying during school.[68] She concluded that the Alabama statute, as applied, attempted to convey a message that religion or a specific religious belief is favored.[69]

The Supreme Court justices have disagreed on how the government should apply the principle of neutrality toward religion,[70] holding disparate beliefs on the instances in which government may accommodate religion.[71] In his separate opinion in *County of Allegheny v. American Civil Liberties Union*,[72] a case involving religious symbols, Justice Anthony Kennedy proposed the coercion test that had been previously introduced in *Engel*.[73] He wrote that the Establishment Clause gave latitude to the government to acknowledge and accommodate the role of religion in the state,[74] and articulated two principles limiting the government's ability to accommodate religion: "[The action] may not coerce anyone to . . . participate in religion or its exercise; and it may not . . . give direct benefits to religion in such a degree that that it in fact 'establishes a [state] religion or religious faith, or tends to do so.'"[75] The use of coercion as an official element of an Establishment Clause analysis raised questions among the justices.[76] The majority found that coercion alone would be sufficient but not necessary for finding a valid Establishment Clause violation.[77]

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65. 472 U.S. 38 (1985).

66. *See id.* at 61.

67. *See id.* at 56.

68. *See id.* at 67 (O'Connor, J., concurring).

69. The Court performed a textual analysis and examined the statute's legislative history to determine that the Alabama legislators solely intended to promote religious prayer in school. *See id.* at 58–59.

70. *See id.* at 82. Some justices have pointed out that the Court has not applied the principle of neutrality consistently. *See* Thomas B. Colby, *A Constitutional Hierarchy of Religions?: Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause*, 100 NW. U. L. REV. 1097, 1122 (2006).

71. *See Jaffree*, 472 U.S. at 98 (Rehnquist, J., dissenting).

72. 492 U.S. 573 (1989).

73. Justice Kennedy concurred with the judgment in part and dissented in part. *See id.* at 655–79 (Kennedy, J., concurring).

74. *Id.* at 656–59.

75. *Id.* at 659 (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)).

76. 1 RONNA GREFF SCHNEIDER, EDUCATION LAW: FIRST AMENDMENT, DUE PROCESS AND DISCRIMINATION LITIGATION § 1:3 (2019).

77. *County of Allegheny*, 492 U.S. at 627–28. Justice Kennedy opined that the use of endorsement was an unwelcome addition to the Court's Establishment Clause jurisprudence. *See id.* at 668.

In *Lee v. Weisman*,[78] the Court used psychological coercion as a factor when it returned to considering the constitutionality of school prayer.[79] In *Lee*, a school principal invited clergymen to deliver nonsectarian prayers as invocations and benedictions at a middle school graduation.[80] The Court clarified in *Lee* that prayer and religious exercise in public schools should be subject to a unique constitutional analysis.[81] Relevant to that analysis is whether students are compelled to exercise religion at school, which the Court found happened in *Lee*.[82]

The Court warned against the undue pressure that a clergy invocation could place on students to engage in prayer.[83] The majority found that the public peer pressure to maintain respectful silence during a clergy invocation at a school ceremony could be as "palpable" as legal compulsion.[84] It additionally asserted that respectful silence of the audience members while observing prayer during a school ceremony is distinct from legislative meetings, where prayer is permissible, due to the high degree of control that the school exhibits over students.[85] The principal's actions induced students to conform to and participate in religious exercise, which the Court found constitutionally impermissible.[86]

Justice Antonin Scalia dissented in *Lee* and objected to the majority's reasoning on two grounds.[87] First, he maintained that school prayer is akin to legislative prayer and that these types of prayer are consistent with constitutional history and tradition and therefore should apply to public school noncurricular ceremonies as well.[88] Second, he reasoned that the majority created a psychological coercion component that was inconsistent with the Court's Establishment Clause jurisprudence.[89] Justice Scalia pointed out that while school prayer can be distinct from other types of

78. 505 U.S. 577 (1992).

79. *See id.* at 592; *see also* Greene, *supra* note 51, at 451–52.

80. *See Lee*, 505 U.S. at 582–83. In *Lee*, there was no legislation or written school policy at issue—only the actions of the school principal were at issue. He chose the religious participant, decided that an invocation should be delivered and distributed guidelines to the clergymen prior to the ceremony. The Court found, through his actions, that the school's "involvement" served as a choice attributable to the State, akin to a state statute providing for prayer recitation in schools. *Id.* at 580, 586–87.

81. *See id.* at 585, 597.

82. *See id.*

83. *See id.* at 592 (noting that what could "begin as [the government's] tolerant expression of religious views may end in a policy to indoctrinate and coerce").

84. *See id.* at 593.

85. *See id.* at 597 ("[W]e cannot accept the parallel relied upon by petitioners and the United States between the facts of *Marsh* and the case now before us. Our decisions . . . require us to distinguish the public school context.").

86. *Id.* at 599. Justice Harry Blackmun's concurrence emphasized that while coercion is sufficient for finding an Establishment Clause violation, it is not necessary. *See id.* at 604 (Blackmun, J., concurring).

87. *See id.* at 632–38 (Scalia, J., dissenting). The Court was largely divided along ideological lines. *See* Chemerinsky, *supra* note 16, at 1111.

88. *See Lee*, 505 U.S. at 632–35.

89. *See id.* at 636 ("The Court's argument that state officials have 'coerced' students to take part in the invocation and benediction at graduation ceremonies is, not to put too fine a point on it, incoherent.").

government prayer, the analytical difference was attributable to the legal coercion for students to attend school or participate in school instruction, not the age of the students.[90] He asserted that school graduation was not a curricular activity and that these students were not susceptible to the same type of coercive pressures at graduation that are present in teacher instruction.[91] He noted that compulsory attendance created legitimate psychological coercion and that compulsory attendance, which was not present in the graduation setting, was a necessary component of a violation.[92] Second, Justice Scalia articulated that sitting in silence during an invocation could not be equated with joining in prayer, and even if there were pressure to stand, it would not amount to religious participation.[93]

Despite Justice Scalia's lamenting, eight years later, the Supreme Court doubled down on its reasoning from *Lee*.[94] In 2000, in *Santa Fe Independent School District v. Doe*,[95] the Court found that a high school policy permitting students to vote on whether to have students lead invocations prior to football games and to determine who the spokesperson should be was unconstitutional.[96] The principal issue in *Santa Fe* was whether the student messages qualified as private speech or state speech.[97] Despite the fact that students, rather than school officials or clergymen, were delivering prayers, the Court found that because the invocations were authorized by school policy, were presented at school-sponsored events, and were subject to particular content regulations, the messages were government speech.[98] The Court affirmed that a majority election of the student speaker did not protect minority views and could further intensify the potential for offense.[99]

In assessing the Establishment Clause violation, the Court first considered the perceived and actual endorsement of religion by the school.[100] Echoing

90. *See id.* at 643 ("*Engel*'s suggestion that the school prayer program at issue there—which permitted students 'to remain silent or be excused from the room'—involved 'indirect coercive pressure,' should be understood against this backdrop of legal coercion." (quoting Engel v. Vitale, 370 U.S. 421, 430–31 (1962))).

91. *See id.*

92. *See id.*; *see also* Suzanna Sherry, Lee v. Weisman*: Paradox Redux*, 1992 SUP. CT. REV. 123, 129.

93. *Lee*, 505 U.S. at 637 (Scalia, J., dissenting).

94. *See* Michael McConnell & Marci A. Hamilton, *Common Interpretation: The Establishment Clause*, NAT'L CONST. CTR., https://constitutioncenter.org/interactive-constitution/interpretation/amendment-i/interps/264 [https://perma.cc/45CS-Z6RN] (last visited Mar. 4, 2022).

95. 530 U.S. 290 (2000).

96. *See id.* at 298, 317.

97. *See id.* at 302.

98. *See id.* at 304; *see also id.* at 310 ("The delivery . . . over the school's public address system, by a speaker representing the student 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."). The Court dismissed a claim that the school had opened a limited public forum: the statement's content was regulated, and only two students had access to the platform to deliver the invocation, which had to be deemed appropriate under the school district's policy. *See id.* at 304; *infra* note 139 and accompanying text.

99. *See id.* at 304–05.

100. *See id.* at 305.

Lee, the majority found that the degree of school involvement in the student election demonstrated that the prayers were attributable to the school as state action.[101] The majority also noted that the school endorsed the message because it was broadcast over the school's audio system to a large audience at the game, where players and students in the stands donned the school's name and mascot.[102] Because these actions were attributable to the State, the school was not insulated from the coercive effect of the final message.[103] The Court found that the policy's text asking for an "invocation" to "solemnize the event" was religious and lacked an overriding secular purpose.[104] Ultimately, the Court found that *the school* violated *Lemon*'s first prong because its primary purpose in creating the policy was not secular.[105]

The majority additionally evaluated the coercive quality of the prayers.[106] The Court dismissed the school's argument that, regardless of the election, there was no pressure to attend the football games in the same way that there was to attend the graduation in *Lee*.[107] Although students attend by their own volition, the Court reasoned that peer pressure to attend high school football games equivalently coerced students to participate in religious worship.[108]

Chief Justice William Rehnquist, joined by Justices Scalia and Thomas, dissented from the majority's finding in *Santa Fe* that the student prayers were state speech.[109] The dissent stressed that the students' control over the content of the speech rendered it private.[110] Chief Justice Rehnquist reasoned that the prayer before the football game was student-initiated and could not implicate the endorsement test.[111] While private student speech may endorse religion, only government speech may create an Establishment Clause violation.[112] This divide marked the last time that the Supreme Court assessed prayer in public schools.

Even with robust school prayer jurisprudence, the Supreme Court has grappled with finding a cohesive standard to assess Establishment Clause violations.[113] As demonstrated above, the various tests have sparked debate

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101. *See id.*

102. *See id.* at 308.

103. *See id.* at 310; *see also* Lee v. Weisman, 505 U.S. 577, 586–87, 644 (1992); County of Allegheny v. ACLU, 492 U.S. 573, 627–28, 668 (1989).

104. *See Santa Fe*, 530 U.S. at 306.

105. *See id.* at 309.

106. *See id.* at 310.

107. *See id.* at 311.

108. *See id.* at 312 ("For many others, however, the choice between attending these games and avoiding personally offensive religious rituals is in no practical sense an easy one.").

109. *See id.* at 321 (Rehnquist, C.J., dissenting).

110. *See id.* at 324.

111. *See id.*

112. *See id.*; *see also* Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990).

113. *See, e.g.*, Town of Greece v. Galloway, 572 U.S. 565, 610 (2014) (Thomas, J., dissenting) ("Thus, to the extent coercion is relevant to the Establishment Clause analysis, it is actual legal coercion that counts—not the 'subtle coercive pressures' allegedly felt by respondents in this case . . . ." (quoting Lee v. Weisman, 505 U.S. 577, 588 (1992))); Santa Fe, 530 U.S. at 325 (Rehnquist, C.J., dissenting); *see also* Valerie Strauss, *The Truth About*

and incited controversy among the presiding justices,[114] partially due to the different types of cases that have circulated through the Court's Establishment Clause jurisprudence. Psychological coercion served as a critical factor in cases involving state sponsorship of prayer, as demonstrated above in *Engel*, *Schempp*, *Lee*, and *Santa Fe*.[115] The secular purpose prong of the *Lemon* test was critical in *Jaffree* and *Santa Fe* to the assessment of the constitutionality of the school's *written* policy and the state's legislation.[116] The endorsement test proved pivotal in cases involving religious symbols, though its existence as a modified *Lemon* standard gave life to its use in *Santa Fe*.[117] These various standards—of coercion, endorsement, and elements of *Lemon*—overlap and have been used interchangeably by circuit courts in cases involving public school prayer and speech.[118]

2. Public School Prayer and the Free Exercise Clause

The Establishment Clause faces additional challenges when balanced against its sister clause,[119] the Free Exercise Clause, which protects the exercise of religion from government interference.[120] From 1963 until 1990, the Supreme Court held that when a neutral and generally applicable law jeopardizes a citizen's ability to adhere to her religious beliefs, the Free Exercise Clause compels the government to grant exemptions to accommodate the citizen, unless the government can demonstrate a narrowly tailored compelling interest.[121] Then, in 1990, the Court repudiated its exemption jurisprudence and held in *Employment Division, Department of Human Resources of Oregon v. Smith*[122] that the right to freely exercise religion does not relieve an individual from complying with valid neutral and generally applicable laws, even if those laws are contrary to that individual's

School Prayer, WASH. POST (Dec. 24, 2011), https://www.washingtonpost.com/blogs/answer-sheet/post/the-truth-about-school-prayer/2011/12/23/gIQAHHJoEP_blog.html [https://perma.cc/62J5-R974].

114. Lee v. Weisman, 505 U.S. 577, 644 (1992) (Scalia, J., dissenting) ("Unfortunately, however, the Court has replaced *Lemon* with its psycho-coercion test, which suffers the double disability of having no roots whatever in our people's historic practice, and being as infinitely expandable as the reasons for psychotherapy itself.").

115. *See supra* text accompanying notes 50–51, 83–86, 106–08.

116. *See supra* text accompanying notes 67, 103–05.

117. *See supra* text accompanying notes 61–62, 67, 103.

118. *See* Schneider, *supra* note 56, at 948–52; *see also infra* Part II.B.3.

119. *See* Sherry, *supra* note 92, at 125.

120. *See id.* at 129.

121. *See id.* at 125 (first citing Sherbert v. Verner, 374 U.S. 398 (1963); then citing Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707 (1981); and then citing Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987)); *see also* Michael A. Helfand, *Religious Institutionalism, Implied Consent, and the Value of Voluntarism*, 88 S. CAL. L. REV. 539, 557–58 (2015) ("[B]oth the *Sherbet* [sic] and *Yoder* courts afforded broad protection to religiously motivated conduct against the substantial burdens imposed by otherwise valid laws . . . .").

122. 494 U.S. 872 (1990).

religious practice, so long as the laws do not violate other constitutional protections.[123]

In the free exercise cases following *Smith*, the Court clarified that the government may not impose regulations or engage in practices that demonstrate hostility toward religion.[124] The Free Exercise Clause bars even "subtle departures from neutrality" on matters of religion.[125] When evaluating whether the government action targets religion, the Court has considered factors such as historical background, events leading to the action or policy, and statements made by state officials.[126]

The implication of school prayer cases on accommodating the free exercise of religion has not garnered much judicial action in the Supreme Court.[127] The Court in *Lee* lightly discussed this balance, proclaiming that the governmental accommodation of free exercise "does not supersede fundamental limitations imposed by the Establishment Clause."[128] The Court noted that the Free Exercise Clause "embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment."[129] Demonstrating this idea in *Santa Fe*, where the Court interchangeably considered student prayer to be both government speech and state-directed religious exercise, the Court demonstrated that an Establishment Clause violation can occasionally serve to override both claims.[130]

Although the precise constitutional balance between accommodating religious *exercise* and preventing the establishment of religion remains somewhat unsettled,[131] the intersection between free *speech* and the Establishment Clause in schools has been subject to thorough Supreme Court review.

B. Free Speech in Public Schools

The First Amendment forbids the government from curtailing the freedom of speech.[132] The Supreme Court has long held that students and teachers do

123. *See id.* at 888–90. Justice Scalia elucidated a hybrid rights theory, which would warrant strict scrutiny review when government action infringes on an individual's free exercise rights along with other constitutional rights, including free speech. *See id.* at 882–83.

124. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534 (1993).

125. *Id.* at 534; *see also* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1731 (2018).

126. *See, e.g.*, *Masterpiece Cakeshop*, 138 S. Ct. at 1731.

127. *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 587 (1992) ("We can decide the case without reconsidering the general constitutional framework by which public schools' efforts to accommodate religion are measured.").

128. *Id.* at 587.

129. *Id.* at 591.

130. *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 299, 301, 307 n.21 (2000).

131. Justice William J. Brennan, Jr. indicated in a plurality opinion that a religion-only benefit is an Establishment Clause violation but that accommodating religion by lifting a burden on free exercise does not typically violate the Establishment Clause. *See* Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 9–10 (1989).

132. U.S. CONST. amend I.

not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[133] While free and open debate is necessary to the functioning of our constitutional system,[134] religious speech in public schools reveals a tension between protecting free speech and preventing the establishment of religion.[135] The Supreme Court has ruled that religious speech and nonreligious speech in schools enjoy equal First Amendment protection and has found free speech violations when schools treat religious speech as subordinate to nonreligious speech.[136] However, a valid Establishment Clause violation can serve to override free speech rights; determining whether allocating funds to religious groups, providing space for religious activity, or endorsing religious speech can amount to an Establishment Clause violation at school requires a case-by-case factual analysis.[137]

For the government to justify prohibiting speech or expression at school,[138] the school must show that its exclusionary action was caused "by something more than a mere desire to avoid the innate discomfort that accompanies an unpopular viewpoint."[139] Because schools contribute to the "marketplace of ideas," the Supreme Court has recognized that public college campuses and high schools share many characteristics with a public forum or a limited public forum.[140] The Court has therefore held that denying students or adult citizens[141] their First Amendment free speech rights must withstand the appropriate level of scrutiny.[142]

When schools create a forum that is generally open for use by student groups but that excludes speech on the basis of religious content, the schools' actions must withstand strict scrutiny review through the school's

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

134. *See generally* Amanda Harmon Cooley, *Inculcating Suppression*, 107 GEO. L.J. 365, 371 (2019).

135. *See* Bd. of Educ. v. Mergens, 496 U.S. 291, 263–64 (1990) (Marshall, J., concurring).

136. *See id.* at 234–35 (majority opinion); *see also* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 110 (2001); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 841 (1995); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993); Widmar v. Vincent, 454 U.S. 263, 269 (1980).

137. *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 597 (1992) ("Our Establishment Clause jurisprudence remains a delicate and fact-sensitive one."); *Widmar*, 454 U.S. at 271.

138. The Court recently held that schools could additionally apply some restrictions to student speech made off campus. *See* Mahanoy Area Sch. Dist. v. Levy, 141 S. Ct. 2038, 2045 (2021) ("The school's regulatory interests remain significant in some off-campus circumstances.").

139. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969). *See generally* Lyrissa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 1981–85 (2011) (explaining that a public forum is "public property which the state has opened for use by the public as a place for expressive activity" and a limited public forum is "'created' by the government, but only 'for a limited purpose such as use by certain groups, . . . or for discussion of certain subjects'" (alteration in original) (quoting Perry Educ. Ass'n v. Perry Loc. Educ. Ass'n, 460 U.S. 37, 45, 46 n.7 (1983))).

140. *See, e.g.*, *Widmar*, 454 U.S. at 267 n.5.

141. *See, e.g.*, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394–95 (1993) (holding that a church enjoyed free speech rights when using public school facilities after hours to screen a parenting video without running afoul of the Establishment Clause).

142. *See Widmar*, 454 U.S. at 268.

demonstration of a compelling state interest that is narrowly tailored to achieve that end.[143] In *Widmar v. Vincent*,[144] members of a religious group at a public university challenged a school policy that excluded religious groups from using the university's facilities for group meetings.[145] The Court held that the school policy discriminated against religious speech.[146] The majority found that the school's stated compelling governmental interest in maintaining the strict separation of church and state was insufficient to justify this content-based speech discrimination because allowing equal access to school facilities would not violate the Establishment Clause.[147] The Court held that while it was highly possible that religion could benefit from an open-forum policy, the religious group would only enjoy "incidental" benefits, a result that does not run up against *Lemon*'s second prong prohibiting the "primary advancement" of religion.[148] An open forum in a public university does not equate with state approval of religious practices, the Court maintained, and the forum was available to both nonreligious and religious speakers alike.[149]

The Court applied similar reasoning to religious speech and associational rights in public secondary schools. In *Board of Education of the Westside Community Schools v. Mergens*,[150] a public high school denied a student's request to form a Christian club that would enjoy the same privileges as other student groups, such as meeting on premises during after-school hours.[151] Students and parents sued the school, alleging that district authorities violated the Equal Access Act.[152] The Court held that denying official recognition of the Christian club and equal access to the school's limited public forum, including the school newspaper and public address system, amounted to content-based discrimination, contravening the Equal Access Act.[153]

While the Court reached a consensus that the school violated the Equal Access Act, the Court did not take a similar position regarding the question of whether the Act violated the Establishment Clause.[154] Applying the reasoning from *Widmar*, Justice O'Connor, delivering the Court's plurality opinion, concluded that the Equal Access Act's open-forum policy had a

143. *See id.* at 270.
144. 454 U.S. 263 (1980).
145. *See id.* at 270.
146. *See id.* at 271.
147. *See id.*
148. *See id.* at 275–76.
149. *See id.* at 277.
150. 496 U.S. 226 (1990).
151. *See id.* at 232–33.
152. *See* 496 U.S. at 233. The Equal Access Act, 20 U.S.C. §§ 4071–4074, forbids federally funded public high schools from denying equal access to students who want to conduct a meeting within a school's limited public forum, based on the religious, political, philosophical, or other content of the speech. 20 U.S.C. § 4071. It found that a limited open forum in schools exists whenever a school allowed at least one extracurricular group to meet on school premises during noninstructional time. *See id.*
153. *Mergens*, 496 U.S. at 246–47.
154. *See id.* at 247.

secular purpose and avoided entanglement with religion.[155] Despite the high school's argument that an objective observer would perceive the Christian club as showing official school support for religion,[156] Justice O'Connor noted that "secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis."[157] As such, the plurality reasoned that secondary school students are capable of distinguishing between a state policy allowing student-initiated religion and school sponsorship of religion and thus concluded that the risk of endorsement was unfounded.[158] Further, while the plurality conceded that there *could* be student peer pressure, Justice O'Connor noted that the risk of endorsement or coercion for students to engage in religious practice, without a formal classroom setting, was unfounded.[159]

Justice Kennedy concurred in the judgment but opined that the coercion test should be used in place of the endorsement test, concluding that coercion was not present.[160] Justice Thurgood Marshall also concurred in the judgment but conversely cautioned that the Equal Access Act could trigger serious Establishment Clause concerns because the secondary school presented a different forum than the public university did in *Widmar*.[161] However, Justice Marshall was careful to note that this difference did not lie in the fact that high school students may be less capable of perceiving endorsement; rather, "the school's behavior, not the purported immaturity of high school students, [was] dispositive."[162] To address this concern, Justice Marshall advocated for the school to affirmatively disclaim any endorsement of the Christian club or clarify that clubs are not instrumental to the school's overall mission.[163]

Additionally, when outside religious groups use school facilities after school hours, the Supreme Court has granted free speech protection.[164] The Court has cautioned that denying access to public school spaces due to religious viewpoints on otherwise permissible subjects violates the Free Exercise Clause. Further, the Court has stressed that outside, nonstudent

155. *See id.* at 248–49. The Supreme Court stated that permitting a religious group to meet pursuant to the Equal Access Act would *avoid* entanglement because greater entanglement would occur if the school had to enforce the exclusion of religious worship or speech. *See id.* at 248–53.

156. *See id.* at 249. The high school was concerned that compulsory attendance at school and the age of students would advance religion. The school argued that officially recognizing a Christian club would effectively incorporate religion into the school's official platform and endorse participation in the club. *See id.* at 247–49.

157. *Id.* at 250.

158. *See id.* at 250–51.

159. *Id.* at 251.

160. *See id.* at 261 (Kennedy, J., concurring). Justice Kennedy noted that "the line between voluntary and coerced participation may be difficult to draw." *Id.* at 261–62.

161. *See id.* at 264–65 (Marshall, J., concurring).

162. *Id.* at 267.

163. *See id.* at 270.

164. *See, e.g.*, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 393–94 (1993).

groups' use of facilities after the school day does not run afoul of the Establishment Clause.[165]

Five years later, the Court extended its public spaces rationale to school funding in the seminal case *Rosenberger v. Rector*[166] and held that a public university's denial of funding to a Christian magazine due to the content of the magazine imposed a financial burden on free speech and amounted to viewpoint discrimination.[167] The Court held that even when the school creates its own limited public forum, it must respect the lawful boundaries that the forum has set.[168] Thus, viewpoint discrimination is presumptively impermissible when committed against speech that otherwise falls within the limits of the forum.[169] While the university argued that it had discriminated against the magazine based on its religious *subject matter*, the Court found that the "[u]niversity [did] not exclude religion as a subject matter but select[ed] for disfavored treatment those student journalistic efforts with religious editorial viewpoints."[170] The majority also affirmed that no Establishment Clause violation existed because the funding program was neutral toward religion and did not foster any mistaken impression that the student club spoke for the university.[171]

These First Amendment cases demonstrate that when the government sets up a forum for speech, whether it physically provides a space or funds a program, it may not discriminate based on viewpoint. All the preceding cases deem the exclusion of religious speakers to amount to viewpoint discrimination. Further, these cases found that no Establishment Clause violation resulted from including religious speakers because the government was not endorsing any one specific speech within the forum. Whether those same principles extend to religious speech by teachers in school is examined further in Part II.

II. PUBLIC SCHOOL EMPLOYEE SPEECH AND THE ESTABLISHMENT CLAUSE

Part II focuses on how courts have grappled with the question of whether teachers, coaches, and other public secondary school employees are entitled to pray in view of students at school. Part II.A will introduce *Kennedy v. Bremerton School District*, a case involving a high school football coach who was fired after praying at the fifty-yard line after home games. Part II.B will assess the free speech rights of public school employees. It will explore how

165. *See id.* at 394–95; *see also* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 114–15 (2001).

166. 515 U.S. 819 (1995).

167. *See id.* at 831.

168. *See id.* at 829–30.

169. *See id.*

170. *Id.* at 831. The Court acknowledged that the line between viewpoint and subject matter discrimination can be difficult to draw but rebutted the dissent's assertion that because the school had discriminated against an entire class of viewpoints, no viewpoint discrimination occurred. *See id.* at 831–32. The majority noted that the debate in a marketplace of ideas is still skewed if multiple voices are silenced. *See id.*

171. *Id.* at 838–42.

Garcetti v. Ceballos,[172] which held that public employees do not speak as citizens for First Amendment purposes when making statements pursuant to their official duties, applies to teachers and coaches. Part II.C will address how circuit courts have used a potential Establishment Clause violation to override a school employee's free speech rights when assuming that the speech is protected.

A. Introduction to Kennedy v. Bremerton School District

The Supreme Court has yet to consider a case in which a public school employee has engaged in self-initiated prayer at school; even in circuit courts, there is a dearth of such decisions.[173] The few cases that have arisen have generally resulted in schools succeeding in their claims that disciplining public employees for engaging in prayer in the school setting or prohibiting government prayer altogether is constitutionally permissible.[174]

A case from the Ninth Circuit, which the Supreme Court will hear on April 25, 2022, examines the issue at hand.[175] In *Kennedy v. Bremerton School District*, a high school football coach, Joseph Kennedy, brought a First Amendment suit[176] against his school district for suspending him after he engaged in prayer after football games.[177]

Beginning in 2008, Kennedy kneeled and prayed aloud at the fifty-yard line immediately following games.[178] Over the course of seven years, players increasingly joined as he delivered audible prayers.[179] As more players gathered around Kennedy, he began to also deliver motivational speeches with religious messages and occasionally engaged in pregame prayers in the locker room.[180] The school district had not received complaints from players or parents, but in 2015, a school district official expressed disapproval to Kennedy, and the superintendent sent Kennedy a letter detailing the school policy that "school staff shall neither encourage or discourage a student from engaging in . . . prayer."[181] After receiving the letter, Kennedy stopped conducting pregame prayers in the locker room and leading motivational religious speeches but continued to pray on the field

172. 547 U.S. 410 (2006).

173. *See* Russo & Osborne, *supra* note 7, at 403.

174. *See infra* Part II.C.

175. *Kennedy III*, 991 F.3d 1004 (9th Cir. 2021), *cert. granted*, 142 S. Ct. 857 (2022) (mem.); *No. 21-418*, U.S. SUP. CT., https://www.supremecourt.gov/docket/docketfiles/html/public/21-418.html [https://perma.cc/Z4F5-CDUP] (last visited Mar. 20, 2022).

176. Kennedy also brought a Title VII claim, which is beyond the scope of this Note.

177. *See* Kennedy v. Bremerton Sch. Dist. (*Kennedy I*), 869 F.3d 813, 815 (9th Cir. 2017), *cert. denied*, 139 S. Ct. 634 (2019) (mem.).

178. *See id.* at 816.

179. *See id.*; *see also* Brett A. Geier & Ann E. Blankenship, *Praying for Touchdowns: Contemporary Law and Legislation for Prayer in Public School Athletics*, 15 FIRST AMEND. L. REV. 381, 415 (2017).

180. This practice—of players themselves praying in the locker room before games—predated Kennedy's tenure at the school. *Kennedy I*, 869 F.3d at 816–18.

181. *Id.* at 817.

immediately following games.[182] After back-and-forth correspondence between Kennedy and the district, the district delivered a new policy that prohibited public employees from engaging in "demonstrative religious activity . . . readily observable to (if not intended to be observed by) students and the attending public."[183] Kennedy refused to stop praying at the fifty-yard line, and the district suspended him.[184] There was substantial media attention surrounding Kennedy's initial discipline, follow-up letters, and suspension.[185]

In 2017, the Ninth Circuit affirmed the district court's denial of Kennedy's motion for a preliminary injunction and held that Kennedy could not demonstrate a likelihood of success on the merits of his First Amendment claim.[186] Kennedy petitioned the Supreme Court to review his case in 2019, but the Court denied certiorari.[187] However, Justice Alito wrote a concurring six-page statement, joined by Justices Thomas, Gorsuch, and Kavanaugh, expressing his opinion that the Ninth Circuit's "understanding of the free speech rights of public school teachers is troubling."[188] On remand, the district court resolved a previous factual dispute regarding Kennedy's dismissal and confirmed that he had been suspended due to his prayers at the fifty-yard line.[189] On appeal, the Ninth Circuit, affirming the district court's decision and denying a petition for rehearing en banc, doubled down on its original reasoning.[190] Instead of heeding Justice Alito's opinion, the Ninth Circuit held that Kennedy's prayer was not protected speech under the First Amendment.[191] As the case awaits review by the Supreme Court, the dispute over whether Kennedy's prayer is entitled to First Amendment protection remains unresolved.[192]

B. Public School Employees' Right to Free Speech

While the Ninth Circuit's conception of schoolteachers' rights may indeed be "troubling," the issue of teacher prayer in schools admittedly merges three abstruse clauses of the First Amendment. First, teachers are government employees and consequently do not enjoy absolute free speech rights for

182. *See id.*
183. *Id.* at 819.
184. *See id.* at 819–20.
185. *See id.* at 818; Jason Hanna & Steve Almasy, *Washington High School Football Coach Placed on Leave for Praying at the Field*, CNN (Oct. 30, 2015, 7:16 AM), https://www.cnn.com/2015/10/29/us/washington-football-coach-joe-kennedy-prays/index.html [https://perma.cc/9S4C-YY68].
186. *See Kennedy I*, 869 F.3d at 831.
187. Kennedy v. Bremerton Sch. Dist. (*Kennedy II*), 139 S. Ct. 634 (2019) (statement of Alito, J.).
188. *Id.* at 4.
189. Kennedy v. Bremerton Sch. Dist., 443 F. Supp. 3d 1223, 1231 (W.D. Wash. 2020), *aff'd*, 991 F.3d 1004 (9th Cir.), *reh'g denied*, 4 F.4th 910 (9th Cir. 2021) (en banc) (mem.), *cert. granted*, 142 S. Ct. 857 (2022) (mem.).
190. *Kennedy III*, 991 F.3d 1004 (9th Cir.), *reh'g denied*, 4 F.4th 910 (9th Cir. 2021) (en banc) (mem.), *cert. granted*, 142 S. Ct. 857 (2022) (mem.).
191. *See id.* at 1015.
192. *Id.* at 1010.

speech they engage in pursuant to their job.[193] Second, prayer, as religious speech, implicates free exercise concerns.[194] Finally, the presence of students "differentiates the education context from the broader sphere of public employment,"[195] in part due to heightened Establishment Clause concerns. Qualifying whether a teacher's speech is private or attributable to their government employer is vital[196] because the Establishment Clause places limitations on *government* speech that "establishes a religion . . . or tends to do so."[197]

Part II.B.1. will introduce the reduced First Amendment rights that government employees retain at work under *Garcetti v. Ceballos*. Part II.B.2 will discuss whether, and Part II.B.3 will discuss to what extent, public school teachers and coaches retain First Amendment free speech rights during the school day, in part by exploring the landscape of lower court opinions.

1. Abridged Free Speech Rights for Government Employees

The Supreme Court has held that citizens must accept certain limitations to their rights when undertaking government employment.[198] Public employers are entitled to a certain level of control over their employees' actions to conduct efficient public service.[199] Moreover, because government employees "occupy trusted positions in society," their speech is capable of defying and undermining the government's objective.[200] Yet, citizens who are government employees are nonetheless citizens,[201] and they are entitled to First Amendment liberties in their capacity as such.[202]

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193. *See* Schenck v. United States, 249 U.S. 47, 52 (1919). *See generally* Amanda Harmon Cooley, *Controlling Students and Teachers: The Increasing Constriction of Constitutional Rights in Public Education*, 66 BAYLOR L. REV. 235, 264–66 (2014).

194. As demonstrated in Part I, however, courts more often consider prayer as implicating free speech rights rather than free exercise rights. *See supra* Part I.A.2.

195. Recent Case, Evans-Marshall v. Board of Education*, 624 F.3d 332 (6th Cir. 2010)*, 124 HARV. L. REV. 2107, 2111 (2011).

196. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 321 (2000) (Rehnquist, C.J., dissenting); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 834 (1995); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988); *see also* Abner S. Greene, *The Concept of the Speech Platform:* Walker v. Texas Division, 68 ALA. L. REV. 337, 350 (2016) ("[A]rguably the state has an interest—pursuant to what we might call Establishment Clause values rather than an Establishment Clause rule—in avoiding possible association with or advancement of religious doctrine."); Abner S. Greene, *(Mis)Attribution*, 87 DENV. U. L. REV. 833, 835, 839 (2010); Caroline Mala Corbin, *Government Employee Religion*, 49 ARIZ. ST. L.J. 1193, 1207 (2017); *supra* Part I.A.

197. Lynch v. Donnelly, 465 U.S. 668, 678 (1984).

198. *See, e.g.*, Waters v. Churchill, 511 U.S. 661, 671–72 (1994).

199. *See* Garcetti v. Ceballos, 547 U.S. 410, 418–19 (2006); *see also* Connick v. Myers, 461 U.S. 138, 143 (1983).

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

201. *See id.*

202. *See id.* ("The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens."); *see also* Perry v. Sindermann, 408 U.S. 593, 597 (1972).

In 1968, the Court held in *Pickering v. Board of Education*[203] that teachers do not relinquish their free speech rights when they comment on matters of public interest.[204] In *Pickering*, a public school teacher was fired after writing a letter to her local newspaper criticizing her board of education's tax proposals.[205] The Court was tasked with deciding whether the First Amendment protected her right to write the letter.[206] The Court created a balancing test to determine whether public employees can assert the same First Amendment rights afforded to private citizens.[207] In applying this test, the Court found that school funding was a matter of legitimate public interest, such that teachers, who are especially informed on the matter, should be able to speak freely on the matter without fear of retaliation.[208] The Court balanced this right against the interest of the state as an employer.[209] The Court concluded that the school board's interest in limiting a teacher's opportunity to contribute to public discourse is not significantly greater than its interest in limiting a similar contribution from a member of the general public; therefore, the school's actions were unconstitutional.[210] This inquiry, balancing the rights of the employee with the interests of the government, has been dubbed the "*Pickering* balancing test."[211]

In *Connick v. Myers*,[212] the Court held that a public employee must be speaking on matters of public concern for their speech to warrant First Amendment protection.[213] Matters of public concern fairly relate to issues "of political, social, or other concern to the community."[214] Together, the Court's decisions in *Connick* and *Pickering* created a two-pronged inquiry to assess whether public employees have speech rights.[215] First, the Court must determine that public employees are speaking as citizens on a matter of public concern for their speech to warrant First Amendment protection.[216] If so, the Court then proceeds to the second prong—the *Pickering* balancing test—to determine whether the employer's interest in disciplining the speech outweighs the speech rights of that employee.[217]

In 2006, the Supreme Court transformed the first prong from whether the employee is speaking *as a citizen* on a matter of public concern, to whether

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203. 391 U.S. 563 (1968).
204. *See id.* at 568, 574; *see also Garcetti*, 547 U.S. at 418; *cf.* Connick v. Myers, 461 U.S. 138, 143 (1983).
205. *See Pickering*, 391 U.S. at 565–66.
206. *See id.* at 568.
207. *See* Joseph O. Oluwole, *The* Pickering *Balancing Test and Public Employment-Free Speech Jurisprudence: The Approaches of Federal Circuit Courts of Appeals*, 46 DUQ. L. REV. 133, 139 (2008).
208. *See id.* at 572.
209. *See* Oluwole, *supra* note 207, at 139.
210. *See id.*
211. Garcetti v. Ceballos, 547 U.S. 410, 445 (2006) (Breyer, J., dissenting).
212. 461 U.S. 138 (1983).
213. *See id.* at 146.
214. *Id.*
215. *See Garcetti*, 547 U.S. at 418; *Connick*, 461 U.S. at 143–44.
216. *See Garcetti*, 547 U.S. at 418; *cf. Connick*, 461 U.S. at 140.
217. *Garcetti*, 547 U.S. at 418; Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

the employee is not speaking *pursuant to official job duties* on a matter of public concern. In *Garcetti v. Ceballos*,[218] the Court considered whether a district attorney's written memo concerning governmental misconduct was protected speech under the First Amendment.[219] The Court, using the *Pickering* balancing test, found that when an employee's speech is made pursuant to official responsibilities, the First Amendment does not prohibit disciplinary repercussions.[220] The majority concluded that in this setting, public employees are not speaking as private citizens for First Amendment purposes, regardless of whether that speech discusses a matter of public concern.[221] The Court noted that the lower court relied solely on whether the memo involved a matter of public concern and failed to consider whether the district attorney was speaking as a *citizen* when he wrote the memo.[222]

The Court in *Garcetti* acknowledged two important points. First, because both parties in the case stipulated that Ceballos was writing the memo pursuant to his employment duties, the Court did not articulate an analytical framework for determining how courts should decide what type of conduct falls within the scope of employment duties.[223] The Court only specified that government employers could not create overly broad responsibilities to blanket all conduct that could arise on the job.[224] Second, the majority, in response to Justice David Souter's dissent, noted that this decision may not apply in the same manner to cases involving scholarship or teaching because faculty and institutions have unique academic freedom.[225]

The Court has since clarified that "the critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties."[226] While the Court has not specified whether teachers in secondary schools are subject to the *Garcetti* framework for all speech they make at school, the Court has affirmed that "teachers [do not] shed their constitutional rights . . . at the schoolhouse gate."[227] Whether faculty and similar school employees are

218. 547 U.S. 410 (2006).
219. *See id.* at 413–15.
220. *See id.* at 424.
221. *See id.* at 421.
222. *Id.* at 416 ("The Court of Appeals determined that Ceballos' memo, which recited what he thought to be governmental misconduct, was 'inherently a matter of public concern.' The court did not, however, consider whether the speech was made in Ceballos' capacity as a citizen." (quoting Garcetti v. Ceballos, 361 F.3d 1168, 1174 (2004))).
223. *See id.* at 425; *see also* Stone T. Hendrickson, Note, *Salvaging* Garcetti*: How a Procedural Change Could Save Public-Employee Speech*, 71 ALA. L. REV. 291, 303 (2019).
224. *Garcetti*, 547 U.S. at 424.
225. *See id.* at 425. Justice David Souter recognized that the majority's decision could "imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to . . . official duties.'" *Id.* at 438 (Souter, J., dissenting) (citing Grutter v. Bollinger, 539 U.S. 306, 392 (2003)). Academic freedom protects an individual's scholarship, research, and instruction from interference by the school institution. *See, e.g.,* William W. Pendleton, *The Freedom to Teach, in* ACADEMIC FREEDOM: AN EVERYDAY CONCERN 11, 11–12 (Ernst Benjamin et al. eds., 1994).
226. Lane v. Franks, 573 U.S. 228, 240 (2014).
227. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

entitled to free speech protections during the school day remains undecided.[228] The next section discusses the circuit courts' application of *Garcetti* to public school employees.

2. *Garcetti*'s Application to Public School Employees

As discussed above, the Supreme Court has not yet revisited *Garcetti*'s application to speech by public *school* employees.[229] The Court's statement in *Garcetti* that "expression related to . . . classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence"[230] has sparked disagreement among circuit courts over how to assess employee speech rights in secondary schools.[231]

While most circuits have held that *Garcetti*'s inquiry remains the threshold question for whether public secondary school employees may bring a retaliatory First Amendment claim,[232] the Second, Third, and Fourth Circuits have not extended *Garcetti*'s prong to public secondary school teachers, noting the Supreme Court's unresolved statement regarding the case's application to classroom instruction.[233] These courts instead engaged in a *Pickering* balancing test, applied their own precedent to determine whether that speech is protected by the First Amendment, or dismissed the claims on other grounds entirely.[234] These circuits, however, have used an inquiry similar to *Garcetti*'s while declining to apply it, asking whether teacher

228. Pat Fackrell, Note, Demers v. Austin*: The Ninth Circuit Resolves the Public Employee Speech Doctrine's Uncertain Application to Academic Speech*, 51 IDAHO L. REV. 513, 521–522 (2015).

229. *See* Forster, *supra* note 17, at 696.

230. Garcetti v. Ceballos, 547 U.S. 410, 425 (2006). The Court further stated that "we need not . . . decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to . . . teaching." *Id.*

231. *See* Strasser, *supra* note 24, at 595.

232. *See, e.g.*, Brown v. Chi. Bd. of Educ., 824 F.3d 713, 715 (7th Cir. 2016); Mpoy v. Rhee, 758 F.3d 285, 289–90 (D.C. Cir. 2014); Evans-Marshall v. Bd. of Educ., 624 F.3d 332, 340–41 (6th Cir. 2010); Anderson v. Douglas Cnty. Sch. Dist. 0001, 342 F. App'x 223, 224 (8th Cir. 2009); Brammer-Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192, 1202 (10th Cir. 2007); Williams v. Dall. Indep. Sch. Dist., 480 F.3d 689, 692 (5th Cir. 2007); Gilder-Lucas v. Elmore Cnty. Bd. of Educ., 186 F. App'x 885, 886 (11th Cir. 2006); Cooley, *supra* note 193, at 265.

233. *See* Lee-Walker v. N.Y.C. Dep't of Educ., 712 F. App'x 43, 45 (2d Cir. 2017) ("Because we decide the claims against the individual defendants on the basis of qualified immunity, we need not reach the issue of whether *Garcetti* in fact applies to speech made by educators as a constitutional matter."); Borden v. Sch. Dist. of E. Brunswick, 523 F.3d 153, 171 n.13 (3d Cir. 2008) ("[T]he Court expressly stated that it left the determination of whether this analysis would apply in the educational context for another day. . . . [But] [i]f *Garcetti* applied . . . , Borden's speech would not be protected . . . ."); Lee v. York Cnty. Sch. Div., 484 F.3d 687, 695 n.11 (4th Cir. 2007) ("The Court explicitly did not decide whether this analysis would apply in the same manner to a case involving speech related to teaching. Thus, we continue to apply the *Pickering-Connick* standard . . . ." (citations omitted)).

234. *See Lee-Walker*, 712 F. App'x at 45; *Borden*, 523 F.3d at 171 n.13; *York*, 484 F.3d at 695 n.11.

speech was made pursuant to official duties or was otherwise made on the job.[235]

The Sixth and Seventh Circuits applied *Garcetti* but dismissed the academic freedom argument that the majority excerpted and that Justice Souter promulgated, finding that the "concept . . . does not readily apply to in-class curricular speech at the high school level."[236] These circuits held that secondary school teacher speech is subject to the *Garcetti* framework because the Supreme Court had not intended to protect *high school* employees.[237] These two circuits found that teacher curricular speech, especially in the high school classroom, was not entitled to First Amendment protection because a teacher's primary duty is to instruct students.[238] This rejection of the academic freedom argument has been met with criticism.[239]

Outside the classroom setting, the Fifth, Eighth, Tenth, Eleventh, and D.C. Circuits have found that *Garcetti* is also the appropriate threshold standard to determine whether public school employees were speaking pursuant to their duties.[240] In these cases, public school employees engaged in noncurricular correspondence with their employers, where, for example, they expressed disapproval with a certain policy or practice employed by their school district and were subsequently disciplined.[241] Though the Court in *Garcetti* notedly refused to "articulate a comprehensive framework for defining the scope of an employee's duties . . . where there is . . . serious . . . debate,"[242] these circuits were at times tasked with doing just that.[243]

The dispute that remained for the Ninth Circuit's consideration in *Kennedy*, then, was first whether *Garcetti* applies to speech made by secondary school employees while on the job.[244] The Ninth Circuit, in statements from its order denying a petition for rehearing en banc, fiercely debated *Garcetti*'s warning that government employers may not restrict free

235. *See York*, 484 F.3d at 695, 697.

236. *Evans-Marshall*, 624 F.3d at 343; *see* Mayer v. Monroe Cnty. Cmty. Sch. Corp., 474 F.3d 477, 480 (7th Cir. 2007).

237. *See Evans-Marshall*, 624 F.3d at 343–44; *Mayer*, 474 F.3d at 480; Recent Case, *supra* note 195, at 2109–10.

238. *See Evans-Marshall*, 624 F.3d at 340–41; *Lee*, 484 F.3d at 687, 694 n.11.

239. Recent Case, *supra* note 195, at 2114.

240. *See generally* Mpoy v. Rhee, 758 F.3d 285 (D.C. Cir. 2014); Anderson v. Douglas Cnty. Sch. Dist. 0001, 342 F. App'x 223 (8th Cir. 2009); Brammer-Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192 (10th Cir. 2007); Williams v. Dall. Indep. Sch. Dist., 480 F.3d 689 (5th Cir. 2007); Gilder-Lucas v. Elmore Cnty. Bd. of Educ., 186 F. App'x 885 (11th Cir. 2006).

241. These cases did not involve speech made in front of, or to, students. *See generally Mpoy*, 758 F.3d 285; *Anderson*, 342 F. App'x 223; *Brammer-Hoelter*, 492 F.3d 1192; *Williams*, 480 F.3d 689; *Gilder-Lucas*, 186 F. App'x 885.

242. Garcetti v. Ceballos, 547 U.S. 410, 424 (2006).

243. *See generally Mpoy*, 758 F.3d 285; *Anderson*, 342 F. App'x 223; *Brammer-Hoelter*, 492 F.3d 1192; *Williams*, 480 F.3d 689; *Gilder-Lucas*, 186 F. App'x 885; *see also* Johnson v. Poway Unified Sch. Dist., 658 F.3d 954 (9th Cir. 2011).

244. *See Kennedy I*, 869 F.3d 813, 827 (9th Cir. 2017), *cert. denied*, 139 S. Ct. 634 (2019) (mem.).

speech rights by "creating excessively broad job descriptions."[245] The court ultimately held that Kennedy spoke as a public employee rather than as a private citizen.[246] Invoking *Garcetti* and the circuit's own First Amendment precedent,[247] the court found that Kennedy's prayers were made pursuant to his job duties, which entailed both serving as a role model and teaching.[248]

3. Which Speech Activities Qualify as "On the Job"?

To determine whether public school employees are speaking as private citizens or public officials, it is critical to assess the scope of their employment duties at school.[249] Because both parties in *Garcetti* stipulated that writing memos was one of the district attorney's official duties, the Supreme Court explicitly noted that it would not speculate on or create a framework for courts to use to determine what speech falls within official duties.[250] The Court, however, emphasized that assessing which tasks fall within the scope of official duties is a practical inquiry.[251] The majority noted that a formal list of employment responsibilities would not be necessary or sufficient to show that a type of speech is within the scope of that employee's duties under the First Amendment.[252]

A public school teacher and coach's duties can be broad and multifaceted. In circumstances where secondary school employees have spoken out in *nonclassroom* settings, out of eyesight or earshot of students, circuits have diverged over whether certain noncurricular speech is nonetheless made pursuant to employment duties.[253] For example, the Fifth Circuit held that an athletic director, who was fired after sending a memo that questioned funding allocations within the school, was speaking in the course of his employment and thus was not protected by the First Amendment.[254] The Eleventh Circuit similarly applied *Garcetti* in rejecting a school employee's

245. *See id.* at 823 (quoting *Garcetti*, 547 U.S. at 424); Kennedy v. Bremerton Sch. Dist. (*Kennedy IV*), 4 F.4th 910, 915–20 (9th Cir. 2021) (Smith, J., concurring in denial of rehearing en banc).

246. *See Kennedy I*, 869 F.3d at 827. Whether *Garcetti* should apply to secondary public school employees on principles of academic freedom is beyond the scope of this Note.

247. The Ninth Circuit assesses First Amendment retaliation claims under *Eng v. Cooley*, 552 F.3d 1062 (9th Cir. 2009), which clarified the *Garcetti* standard. *Eng* provides five factors that a plaintiff must demonstrate to bring a successful claim: (1) the employee spoke on a matter of public concern, (2) the employee spoke as a citizen instead of an employee, (3) the speech was the motivating factor for the disciplinary employment action, (4) the State was justified for treating the employee differently than other members of the public, and (5) the State would have taken that action even if that speech was unprotected. *Kennedy I*, 869 F.3d at 822 (citing *Eng*, 552 F.3d at 1070–72).

248. *Kennedy III*, 991 F.3d 1004, 1023 (9th Cir. 2021) (Christen, J., concurring), *cert. granted*, 142 S. Ct. 857 (2022) (mem.); *Kennedy II*, 139 S. Ct. 634 (2019) (statement of Alito, J.); Petition for Writ of Certiorari at 22–23, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 857 (2022) (No. 21-418), 2021 WL 4220933, at *22–23.

249. *See, e.g.*, *Kennedy III*, 991 F.3d at 1016 (majority opinion).

250. *See* Garcetti v. Ceballos, 547 U.S. 410, 424 (2006).

251. *See id.*

252. *Id.* at 425.

253. Brammer-Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192, 1204 (10th Cir. 2007).

254. Williams v. Dall. Indep. Sch. Dist., 480 F.3d 689, 693 (5th Cir. 2007).

First Amendment speech claim when she was fired after inadequately filling out her school district's questionnaire as part of her job as a cheerleading coach.[255] The Tenth Circuit, however, found that teachers' speech at board meetings, while tangentially related to their employment, was not made pursuant to their official duties as specified in *Garcetti* and therefore was entitled to First Amendment protection.[256] The Third Circuit similarly found that a teacher's out-of-class conduct, including advocating for a certain teaching style, was protected but that her in-class speech was not.[257]

In the classroom, however, the majority of circuit courts have agreed that teachers are not entitled to First Amendment protection for their speech. Teachers and coaches have a unique role as compared to other government employees because they are tasked with the responsibility of educating students.[258] In the classroom, circuit courts have found that a teacher's curricular speech is not private speech because teachers are hired for the purpose of teaching curriculum to students.[259] Courts have specified that teachers are not protected under the First Amendment from retaliatory dismissal for expressing a political viewpoint during class discussions or for selecting unpopular materials for students to read.[260] As Judge Jeffrey Sutton of the Sixth Circuit affirmed, "[T]he essence of a teacher's role is to prepare students for their place in society as responsible citizens."[261]

Whether that essence carries over outside the classroom remains at issue in *Kennedy*.[262] The Ninth Circuit has twice now found that Kennedy's job as a high school football coach "involved modeling good behavior while acting in an official capacity in the presence of students and spectators."[263] The court held that when Kennedy took a knee and prayed immediately following football games, he was still acting pursuant to his "responsibility

255. Gilder-Lucas v. Elmore Cnty. Bd. of Educ., 186 F. App'x 885, 886 (11th Cir. 2006).

256. *Brammer-Hoelter*, 492 F.3d at 1203–04. The Tenth Circuit stated: "Although the record indicates that Plaintiffs were encouraged to present their views to improve the [school] and did so in the form of complaints and grievances to the Board, we cannot deem such a generalized grievance policy to be an official duty without eviscerating *Garcetti*." *Id*. at 1204.

257. *See* Bradley v. Pittsburgh Bd. of Educ., 910 F.2d 1172, 1176 (3d Cir. 1990).

258. Geier & Blankenship-Knox, *supra* note 36, at 32 ("In addition to the duties associated with training a team for athletic competition, coaches, like teachers, are hired to communicate with players and spectators both verbally and demonstratively.").

259. *See* Evans-Marshall v. Bd. of Educ., 624 F.3d 332, 339 (6th Cir. 2010). The Sixth Circuit held that a teacher's curricular speech delivered in the classroom, including the selection of classroom materials, was made pursuant to the teacher's official duties. *See id.* The Seventh Circuit held in 2007 that a teacher was not entitled to First Amendment protection for taking a political viewpoint in classroom instruction. *See* Mayer v. Monroe Cnty. Cmty. Sch. Corp., 474 F.3d 477, 480 (7th Cir. 2007). The majority noted that the teacher's current events lesson was part of the teacher's assigned classroom duties and that *Garcetti* directly applied. *See id.*

260. *See supra* note 253 and accompanying text.

261. *Evans-Marshall*, 624 F.3d at 339 (alteration in original) (quoting Hardy v. Jefferson Cmty. Coll., 260 F.3d 671, 679 (6th Cir. 2001)).

262. *See* Petition for Writ of Certiorari at 1, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 857 (2022) (No. 21-418), 2021 WL 4220933, at *1.

263. *Kennedy I*, 869 F.3d 813, 826 (9th Cir. 2017), *cert. denied*, 139 S. Ct. 634 (2019) (mem.).

to serve as a role model and moral exemplar."[264] Thus, the Court held that Kennedy was acting *pursuant to his duties* as a coach when kneeling to pray.[265]

Justice Alito and the dissenting Ninth Circuit judges objected to this broad interpretation of Kennedy's employment duties.[266] They pointed out that *Garcetti* warned against the idea that employers could restrict an employee's First Amendment rights by creating "excessively broad job descriptions."[267] Justice Alito stated that the Ninth Circuit's decision

> appears to regard teachers and coaches as being on duty at all times from the moment they report for work to the moment they depart, provided that they are within the eyesight of students. Under this interpretation of *Garcetti*, if teachers are visible to a student while eating lunch, they can be ordered not to engage in any "demonstrative" conduct of a religious nature, such as folding their hands or bowing their heads in prayer.[268]

The Ninth Circuit, when rehearing this case in 2021, rejected Justice Alito's assertion that their prior opinion would suggest that a teacher praying before meals would constitute government employee speech.[269] The court distinguished the instant case from *Garcetti* by noting that Kennedy himself acknowledged that he was a role model to his students.[270] The dissenting judges argued that the majority did not adequately lay out how to distinguish between a coach serving as a role model on the field following games and a teacher serving as a role model while sitting in the cafeteria.[271] The dissent urged that if Kennedy was considered to be on duty at all times at school, by virtue of serving as a leader to his players, then teachers could never engage in private expression, particularly private religious expression, at school.[272]

The Ninth Circuit ultimately concluded that Kennedy's postgame prayer was speech made pursuant to his job responsibilities.[273] Though the court determined that Kennedy did not speak as a private citizen when he delivered prayers following games, the court still assessed whether the speech would survive the *Pickering* balancing test if his prayer did indeed warrant First Amendment protection.[274] In *Kennedy*, the majority determined that the

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264. *Id.*

265. *Kennedy IV*, 4 F.4th 910, 915 (9th Cir. 2021) (Smith, J., concurring in the denial of rehearing en banc).

266. *Kennedy II*, 139 S. Ct. 634, 636 (2019) (statement of Alito, J.).

267. Garcetti v. Ceballos, 547 U.S. 410, 424 (2006).

268. *Kennedy II*, 139 S. Ct. at 636 (statement of Alito, J.).

269. *Kennedy III*, 991 F.3d 1004, 1015 (9th Cir. 2021), *cert. granted*, 142 S. Ct. 857 (2022) (mem.).

270. *Id.*

271. *Id.* at 1015–16; *Kennedy IV*, 4 F.4th 910, 915 (9th Cir. 2021) (Smith, J., concurring in denial of rehearing en banc).

272. *See id.* at 930 (O'Scannlain, J., statement regarding denial of rehearing en banc); *see also* Larry D. Spurgeon, *The Endangered Citizen Servant:* Garcetti *Versus the Public Interest and Academic Freedom*, 39 J. COLL. & U.L. 405, 433, 454 (2013).

273. *See Kennedy III*, 991 F.3d at 1023.

274. *See id.* at 1016–17. Both parties stipulated that Kennedy spoke on a matter of public concern when he prayed, thereby rendering the first prong of *Pickering* satisfied. *See Kennedy I*, 869 F.3d 813, 822 (9th Cir. 2017), *cert. denied*, 139 S. Ct. 634 (2019) (mem.). The

school's interest in avoiding an Establishment Clause violation outweighed Kennedy's interest in praying, even if that speech could be considered private.[275] This reasoning sparked debate among the Ninth Circuit judges regarding when the Establishment Clause can serve to override a public school employee's First Amendment protection.[276]

C. The Establishment Clause and Overriding Public Employees' First Amendment Rights Under Pickering

As stated above, after finding that an employee's speech is entitled to First Amendment protection, courts conduct the *Pickering* balancing test to determine whether the school's interest outweighs the employee's right.[277] For religious speech in public schools, circuit courts have primarily considered the countervailing governmental interest to be the potential Establishment Clause violation. Most circuits that have conducted the balancing test have found in favor of the public school.[278]

Circuit courts have been particularly diligent in precluding any type of employee-directed religious exercise in the school setting, with many reasoning that this conduct signifies the school's endorsement of religion. For example, in *Warnock v. Archer*,[279] from the Eighth Circuit, an art *teacher* brought an Establishment Clause claim against his school district for requiring him to attend training meetings that included prayer.[280] The district's superintendent conducted prayers at these required meetings, and when the art teacher requested him to stop, he refused.[281] The Eighth Circuit held that the prayers could signify the school's endorsement of religion and that the Constitution forbids the government from "conveying the message that it decisively endorses a particular religious position."[282] Because this claim was brought by a teacher and not by a student, the court rejected the psychological coercion argument, reasoning that an adult man would be unlikely to succumb to religious indoctrination.[283] Instead, the Court held that the prayers at issue could not be considered private speech by the school

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Ninth Circuit's precedent had previously established that religious speech by teachers was "unquestionably of inherent public concern." *Id.* at 824 (citing Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 966 (9th Cir. 2011)). The Third Circuit has disagreed, holding that prayer is not a matter of public concern and explaining that a coach's prayer, including kneeling and bowing his head, did not constitute a policy statement, did not shed light on school practices, and did not expose unfavorable matters in which the school was engaged. *See* Borden v. Sch. Dist. of E. Brunswick, 523 F.3d 153, 170 (3d Cir. 2008).

275. *Kennedy IV*, 4 F.4th at 921 (Smith, J., concurring in the denial of rehearing en banc).

276. *See id.* at 911–12.

277. *See supra* text accompanying notes 216–17; *see, e.g.*, *Kennedy IV*, 4 F.4th at 921 (Smith, J., concurring in the denial of rehearing en banc).

278. *See infra* text accompanying notes 281–97.

279. 380 F.3d 1076 (8th Cir. 2004).

280. *Id.* at 1079.

281. *See id.*

282. *See id.* at 1080.

283. *See id.* at 1080–81.

official, as they were not sporadic and were conducted by the school official leading the mandatory meeting.[284]

The Fifth and Third Circuits have also used the Establishment Clause to justify overriding employees' free speech rights.[285] In *Doe v. Duncanville*,[286] a Fifth Circuit case from 1995, the court found that a high school basketball coach's initiation of and participation in prayers with students was unconstitutional.[287] There, a student sued her school district for allowing coaches to initiate prayers at school games and practices.[288] The district court issued a preliminary injunction forbidding the school district from permitting employees to "lead, encourag[e], promot[e] or participat[e] in prayers with or among students during curricular or extracurricular activities."[289] The school district appealed the decision, arguing that a prohibition on employee participation in religious prayer would violate their free speech and free exercise rights.[290] The Fifth Circuit nonetheless affirmed the district court's decision, holding that public school employees could neither participate in nor supervise student prayers before games.[291] The court did not conduct the *Pickering* balancing test to assess the coach's free speech argument.[292]

The Fifth Circuit also categorically rejected the coach's free exercise claim, asserting that the Establishment Clause limits free exercise and free speech rights.[293] While the Fifth Circuit proclaimed that "modern Establishment Clause jurisprudence is rife with confusion," it laid out the *Lemon*, endorsement, and coercion tests to assess the school's practices.[294] As applied to employee participation in prayer, the court reasoned that because the prayers took place during school-controlled activities that members of the basketball team were required to attend, the prayers would violate the endorsement test.[295] Further, the court stated that the school

284. *See id.* at 1081.

285. *See* Borden v. Sch. Dist. of E. Brunswick, 523 F.3d 153, 161 (3d Cir. 2008); Doe v. Duncanville, 70 F.3d 402, 404 (5th Cir. 1995).

286. 70 F.3d 402 (5th Cir. 1995).

287. *Id.* at 404; *Borden*, 523 F.3d at 167. This case predated *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000).

288. *Duncanville*, 70 F.3d at 404. Notably, these facts are distinguishable from the facts in *Kennedy* because a *student* brought an Establishment Clause claim, whereas Kennedy initially asserted that *his* free speech and free exercise rights were violated. *See Kennedy I*, 869 F.3d 813, 820–21 (9th Cir. 2017), *cert. denied*, 139 S. Ct. 634 (2019) (mem.).

289. *Duncanville*, 70 F.3d at 405.

290. *See id.*

291. *See id.*

292. *See id.* at 406.

293. *See id.* at 405–06. The Fifth Circuit did not conduct a thorough analysis of the employees' free exercise rights and instead pulled language from *Lee*, stating that "the principle that the government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." *Id.* (quoting Lee v. Weisman, 505 U.S. 577, 586–87 (1992)).

294. *See id.* at 405; *see supra* Part I.A (discussing the various Establishment Clause tests employed by the Supreme Court).

295. *See Duncanville*, 70 F.3d at 406.

representatives' participation in religion was an improper entanglement with religion under *Lemon*.[296]

In *Borden v. School District of East Brunswick*,[297] the Third Circuit assessed a school policy that allowed student-initiated prayer and prohibited school representatives from joining in.[298] A football coach challenged the school's policy as a violation of his free speech rights.[299] The Third Circuit found that the policy was constitutional and, further, that the coach's acts of bowing his head and taking a knee did not trigger his First Amendment rights.[300] The court then reasoned that the coach violated the Establishment Clause when he joined his team as they prayed.[301] The Third Circuit took a restrictive approach for evaluating religious endorsement in the school setting, finding that "[g]enerally, if a school official is engaging in student prayer to the extent that they are leading it, initiating it, or requiring it, the school official, and thus the school district, is violating the Establishment Clause."[302]

The court explicitly chose not to engage in a *Lemon* analysis or a coercion analysis because it found that the coach's behavior failed the endorsement test.[303] The Court engaged in extensive factual review to demonstrate that the coach was heavily involved in the organization, planning, and leading of pregame prayers for his team, including activities like selecting a chaplain for pregame dinners.[304] The Third Circuit did not, however, distinguish between the *coach* endorsing religion and the *school district* endorsing religion, despite the fact that the school district had asked him to discontinue his prayer activities.[305] The Third Circuit held that, as a school official, the coach was not constitutionally permitted to endorse religion.[306] The court qualified this finding by stating that if a coach had never engaged in or organized prayer for his team, but instead were to bow his head and take a knee while the team prayed on its own accord, the conclusion would be much less clear.[307]

In *Kennedy*, the Ninth Circuit panel similarly found that, "[t]o answer [the] question [of whether an Establishment Clause violation existed], [the court] must examine whether a reasonable observer, aware of the history of Kennedy's religious activity, and his solicitation of community and national support for his actions, would perceive [the school's] allowance of

296. *See id.*
297. 523 F.3d 153 (3d Cir. 2008).
298. *See id.* at 159.
299. *See id.* at 158.
300. *See id.* at 171.
301. *See id.* at 161.
302. *Id.* at 166.
303. *See id.* at 175; *see also* Geier & Blankenship-Knox, *supra* note 179, at 413.
304. *See Borden*, 523 F.3d at 177.
305. *See id.* at 177–78.
306. *See id.*
307. *See id.* at 178.

Kennedy's conduct as an endorsement of religion."[308] The panel concluded that regardless of whether Kennedy could assert a valid First Amendment free speech claim, his prayer in front of students would implicate the Establishment Clause because his prayer would have been construed as the district's endorsement of religion.[309]

However, in the denial of a petition for rehearing en banc, the dissenting judges stated that justifying discrimination against Kennedy by the *potential* of an Establishment Clause violation was incorrect.[310] Judge Diarmuid O'Scannlain reasoned that the school could not have endorsed religion because reasonable observers at Kennedy's games were aware that the school did not condone, much less endorse, his prayers.[311] Other judges condemned the endorsement test and argued that the majority's conclusion erroneously extended Supreme Court precedent.[312]

Because Kennedy worked as a public employee, Judge O'Scannlain reasoned that the Establishment Clause's limitations on *state action* should not apply.[313] First, Judge O'Scannlain argued that the school could not have endorsed religion because the Ninth Circuit assumed arguendo that Kennedy was speaking as a private citizen.[314] As a private citizen, he maintained, it would be impossible for Kennedy's actions to constitute the endorsement of religion since private speech would foreclose *Santa Fe*'s application to the case at hand.[315] He argued that the panel lacked a single Supreme Court case that "supports its implicit assumption that a private individual can commit an Establishment Clause violation."[316]

Second, Judge O'Scannlain maintained that the case did not comprise the same types of "institutional entanglements with religion—often described as 'coercive'—which may give rise to an Establishment Clause violation."[317] The judge argued that the panel's opinion was devoid of factors that logically linked this case to the Supreme Court's *Lee* and *Santa Fe* decisions, like "[a] school policy, [a] degree of control over employee speech, neutrality toward religion, or [a] possibility of coercion."[318] The judge reasoned that this alleged Establishment Clause violation could not serve as the compelling

308. *Kennedy III*, 991 F.3d 1004, 1009 (9th Cir. 2021), *cert. granted*, 142 S. Ct. 857 (2022) (mem.).

309. *See id.* at 1011.

310. *Kennedy IV*, 4 F.4th 910, 945 (9th Cir. 2021) (Ikuta, J., dissenting from denial of rehearing en banc) ("The majority's holding . . . signals that public employers who merely fail to act with sufficient force to squelch an employee's publicly observable religious activity may be liable for such a claim.").

311. *Id*. at 944; *see also* Joanne C. Brant, Engel*: Divisiveness or Coercion—A Response to Professor Marshall*, 46 CAP. U. L. REV. 373, 383 (2018) ("In any event, the district court applied the endorsement test, and it produced a harsh and bitterly-resented outcome.").

312. *Kennedy IV*, 4 F.4th at 945–46 (Nelson, J., dissenting from denial of rehearing en banc).

313. *See id.* at 941 (O'Scannlain, J., statement regarding denial of rehearing en banc).

314. *See id.* at 941–42.

315. *Id.* at 941.

316. *Id.*

317. *Id.* at 940.

318. *Id.* at 941.

state interest to justify restricting Kennedy's private prayer.[319] Judge Nelson, also dissenting, stated, "Nothing here suggests coercion."[320] Judge Nelson argued that the record did not demonstrate that student participation in the prayer was mandatory or that Kennedy disfavored players who did not participate.[321] He reasoned that despite one player fearing mistreatment, the "single statement from one player experiencing 'subtle pressure' is hardly enough."[322]

Finally, Judge O'Scannlain lamented the panel's conclusion that the district's only option was to suspend Kennedy.[323] He argued that the school could have disclaimed Kennedy's speech to dispel any mistaken inference of endorsement.[324] Essentially, he determined that under strict scrutiny review, suspending Kennedy was not the least restrictive means the school could have taken.[325]

III. CARVING OUT AN EXCEPTION FOR TEACHER PRAYER

If the Ninth Circuit's decision stands, public school employees who pray silently may not be entitled to First Amendment protection.[326] This conception of *Garcetti* runs up against core First Amendment principles. Though teachers and coaches are entrusted with the role of molding adolescents into productive citizens, this Note argues that the teacher's *job* does not include being a role model in every act of speech. Teachers speak in a variety of ways in various settings throughout the school day; some of that speech is instructional, but some of that speech is the teacher's own private speech. As such, this Note reasons that *Garcetti* should be interpreted to permit public school employees to engage in private religious speech at school. Affording these rights upholds vital free speech and free exercise protections.

Part III.A argues that religious prayer is private speech and should not fall within the scope of a teacher's employment duties. Part III.B maintains, however, that if a teacher's or coach's religious expression amounts to an Establishment Clause violation, that teacher or coach may be justifiably subject to discipline. This Note reasons that an Establishment Clause violation arises if the employee's speech psychologically coerces students to engage in religious participation.[327]

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319. *See id.* at 942.
320. *Id.* at 948 (Nelson, J., dissenting from denial of rehearing en banc).
321. *Id.*
322. *Id.* at 948. ("The Establishment Clause was designed to keep government out of personal religious exercise, not purge religion from the public square.").
323. *Id.* at 942 (O'Scannlain, J., statement regarding denial of rehearing en banc).
324. *Id.* at 942–43.
325. *Id.*
326. *See supra* note 268 and accompanying text.
327. This Note admits that a *school* may violate the Establishment Clause by affirmatively endorsing religion; however, simply allowing a public employee to continue praying would not appear to a reasonable observer that the school is endorsing that employee's religion.

A. Limiting Garcetti*'s Scope for Public School Employees*

When employees speak as private citizens on matters of public concern,[328] the Supreme Court stressed that it is critical to promote both individual and societal interests.[329] The First Amendment implicates more than just the speaker; the public also has an interest in hearing government employees' contribution to civic discussion.[330] This is precisely why the First Amendment was created: to encourage diverse and vibrant dialogue on matters that affect the public without fear of repercussion from the government.[331] The Supreme Court in *Garcetti* recognized the duality between a public employer's need to perform essential government functions while simultaneously operating under the constraints of the First Amendment.[332]

This Note acknowledges that *Garcetti* should still serve as the appropriate framework for determining whether speech by public school employees is protected by the First Amendment but urges courts to heed its limitations.[333] *Garcetti* expressly cautioned against creating excessively broad employment duties to blanket all speech that employees make on the job.[334] Yet, the Ninth Circuit's decision in *Kennedy* leaves little room for teachers to engage in any type of private speech on school premises. While teachers do often serve as moral exemplars to their students, their official job does not include serving as role models in their every statement. Broadly interpreting *Garcetti* otherwise enables employers to fire their public school employees for speech and prayer made occasionally as private citizens in a place where occasional private discourse can be the most valuable.[335] If all speech that teachers engage in "between the first and last bell of the school day" is considered the school's speech, regardless of whether that speech is instructional or noninstructional, teachers, as citizens, have little First Amendment rights left.[336] This is particularly troublesome for private religious expression, which implicates free exercise rights, as well as free speech rights.[337]

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328. This Note assumes that religious expression is a matter of public concern. *See supra* note 274 and accompanying text; *see also* Nichol v. ARIN Intermediate Unit 28, 268 F. Supp. 2d 536, 559 (W.D. Pa. 2003); Corbin, *supra* note 196, at 1218.

329. Garcetti v. Ceballos, 547 U.S. 410, 420 (2006).

330. *Id.*; *see* Pickering v. Bd. of Educ., 391 U.S 563, 573 (1968).

331. *Garcetti*, 547 U.S. at 420; San Diego v. Roe, 543 U.S. 77, 82 (2004).

332. *See* Rankin v. McPherson, 483 U.S. 378, 384 (1987).

333. *See supra* text accompanying notes 223–24. Though the Supreme Court left the question of academic freedom open, circuit courts have found that an exception typically pertains to university faculty and is beyond the scope of this Note. *See* Michael W. McConnell, *Religious Participation in Public Programs—Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 187 (1992) ("Nor should a college professor be forbidden to discuss his religious beliefs in class or in after-class meetings, when other members of the faculty are free to discuss their personal and professional opinions."); *supra* notes 225, 261 and accompanying text.

334. *See supra* note 224 and accompanying text.

335. *Kennedy III*, 991 F.3d 1004, 1015–16 (9th Cir. 2021), *cert. granted*, 142 S. Ct. 857 (2022) (mem.).

336. *Kennedy IV*, 4 F.4th 910, 935 (9th Cir. 2021) (O'Scannlain, J., statement regarding denial of rehearing en banc).

337. *See supra* Part I.A.2.

This Note proposes that a public school employee should be able to engage in a brief, quiet prayer, on physical school premises, within students' view. Whether the content of the religious speech is otherwise problematic or constitutionally impermissible is a separate inquiry.[338] *Garcetti* proposes a content inquiry, which turns on whether an employee's *speech* is *made* pursuant to job duties, not whether that employee is simply working when she engages in speech.[339] In *Garcetti*, the district attorney's memo "owe[d] its existence to a public employee's professional responsibilities."[340] But government employment is not a precursor to prayer. A teacher's or coach's prayer has little to do with the job of teaching or coaching; it is a practice that many citizens engage in across the country.

Even when generally tasked with teaching students or delivering game plays on the field, a public school instructional employee who engages in a brief personal prayer is not instructing students as an *employee*; she is speaking as a *citizen*.[341] The crux of protecting this speech right lies in the fact that this type of prayer is not intended to be formally or informally instructional. Furthermore, because it embraces an individual's free speech right, religious prayer deserves treatment equal to nonreligious speech.[342] Just as a secular teacher may demonstratively observe a moment of reflection, a religious teacher may engage in brief, quiet prayer. The U.S. Department of Education's guidance on constitutionally protected prayer supports such reasoning: "Teachers also may take part in religious activities such as prayer even during their workday at a time when it is permissible to engage in other private conduct such as making a personal telephone call."[343] Recognizing and allowing a free speech carveout would still only result in incidental benefits to employees and would not violate the prohibition against the "primary advancement" of religion, as urged by the Supreme Court in *Widmar*.[344]

The Ninth Circuit attempted to make a distinction in *Kennedy* by indicating that a teacher's "off-duty" religious expression could be protected.[345] However, the Ninth Circuit's interpretation that Kennedy's duty as a coach was to "impart[] knowledge and wisdom" would render all speech he makes

338. For example, if that speech is lewd, vulgar, or offensive; elicits drug use; or causes a substantial disruption, it would not deserve First Amendment protection. *See, e.g.*, Forster, *supra* note 17, at 691. This Note does not address this separate inquiry.

339. *See supra* text accompanying notes 219–21.

340. *See Garcetti*, 547 U.S. at 421.

341. *See supra* notes 313–15 and accompanying text.

342. *See supra* notes 133–38 and accompanying text. Arguably, due to its unique implications for being religious speech, prayer could warrant an additional Free Exercise carveout from *Garcetti*.

343. Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools, 85 Fed. Reg. 3257, 3267 (Jan. 21, 2020) (to be codified at 34 C.F.R. ch. 1) [hereinafter *Protected Prayer Guidance*].

344. *Widmar v. Vincent*, 454 U.S. 263, 275–76 (1980). See *supra* notes 147–49 and accompanying text for an elaboration of this *Lemon* prong.

345. *Kennedy III*, 991 F.3d 1004, 1016 (9th Cir. 2021), *cert. granted*, 142 S. Ct. 857 (2022) (mem.).

as falling within the scope of that 'duty' and be subject to discipline.[346] This Note argues that the scope of a teacher's duties must be interpreted more narrowly, in line with *Garcetti*, to allow teachers the right to engage in a brief prayer, even when generally tasked with other responsibilities. This formulation would allow teachers or coaches, like Kennedy, to assert a valid First Amendment claim when they engage in religious prayer in front of their students.

Importantly, this Note proposes a critical distinction in its interpretation of *Garcetti*. If a teacher or coach is legitimately tasked with improving player morale or guiding students through college decisions, for example, and religious prayer becomes speech made on the job, that employee can be subject to discipline without First Amendment protection. This is because the *speech* in question is no longer a private prayer; instead, the employee is speaking to students with the primary purpose of doing her job, a task she is completing pursuant to her official responsibility. This Note argues that this exception should be a limited and fact-dependent one; those tasks—improving player morale or guiding a student through a rocky admissions process—must be prescribed or, at a minimum, commonly understood as part of the teacher's job responsibility.[347]

This is a delicate distinction in the school context due to the multifaceted responsibilities enjoyed by our nation's public school employees.[348] For teachers and coaches, aiding students in their journey through adolescence implicates their interests both as a teacher and as a citizen.[349] The speech they engage in does not only "owe its existence to [their] professional responsibilities," for when they give advice or moral guidance, they often are doing so in a *civilian* capacity as well.[350] Teachers and coaches, particularly in secondary schools, play a vital role in students' lives.[351] Students often defer to a teacher's advice or follow their coach's example, sometimes with more vigor than they would their own parents.[352] However, this fact cannot override the employee's First Amendment protections. Permitting teachers

346. *Id.* at 1015.

347. For example, in *Borden*, the coach conceded that organizing prayers and bowing his head were tools that he used "to teach his players respect and good moral character." Borden v. Sch. Dist. of E. Brunswick, 523 F.3d 153, 172 (3d Cir. 2008). This could warrant discipline because "his coaching methods are pedagogic." *Id.*

348. *See* Spurgeon, *supra* note 272, at 414 ("The mandate [from *Garcetti*] to lower courts is to determine if the speech could have been made by a citizen outside of public employment.").

349. *See* Garcetti v. Ceballos, 547 U.S. 410, 432 (2006) (Souter, J., dissenting) ("Indeed, the very idea of categorically separating the citizen's interest from the employee's interest ignores the fact that the ranks of public service include those who share the poet's 'object . . . to unite [m]y avocation and my vocation.'" (quoting ROBERT FROST, TWO TRAMPS IN MUD TIME, *in* COLLECTED POEMS, PROSE, & PLAYS 251, 252 (Richard Poirier & Mark Richardson eds., 1995))).

350. *See Kennedy IV*, 4 F.4th. 910, 937 (9th Cir. 2021) (O'Scannlain, J., statement regarding denial of rehearing en banc) (quoting *Garcetti*, 547 U.S. at 421).

351. *See* David Blazar & Matthew A. Kraft, *Teacher and Teaching Effects on Students' Attitudes and Behaviors*, 39 EDUC. EVALUATION & POL'Y ANALYSIS 146, 163 (2017).

352. *See* Geier & Blankenship-Knox, *supra* note 36, at 77.

and coaches to engage in private speech or religious expression in front of students safeguards a unique freedom that deserves "vigilant protection" in American schools.[353] *Garcetti* should be read to allow teachers such First Amendment protection when they engage in private religious expression in front of their students.

In Kennedy's case, his initial motivational speeches to players, which included religious expression and prayer, fell within the scope of his job duties.[354] He delivered those speeches for the purpose of leading his students to triumph in games, a task prescribed to him as a coach.[355] The school district asked him to cease mentions of religion in these motivational speeches, and he obeyed.[356] Had the district's suspension been due to this continued conduct, Kennedy's speech would not warrant First Amendment protection. However, Kennedy also engaged in brief prayers following the game, which he conducted quickly "after the customary handshake with the opposing team."[357] These prayers that Kennedy expressed, uttered in the same timespan as "making a personal telephone call,"[358] ultimately resulted in his suspension.[359] These prayers warrant free speech and free exercise protection because Kennedy prayed primarily for his own private religious expression, not to lead players to victory.[360] Kennedy's brief religious expression is not the school district's speech and, as such, should be entitled to First Amendment protection. Even though Bremerton's football players may see Kennedy as a role model in this setting, he is not engaging in instruction with this prayer.

While a teacher's or coach's prayer should warrant protection under the First Amendment, this Note argues that a compelling governmental interest can still serve to override a free speech claim under *Pickering*.[361] A school district can therefore cite an Establishment Clause concern as their compelling governmental interest, so long as that concern is valid.

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353. *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960)).

354. *See Kennedy III*, 991 F.3d 1004, 1024 (9th Cir. 2021) (Christen, J., concurring), *cert. granted*, 142 S. Ct. 857 (2022) (mem.).

355. *See id.* at 1023–25.

356. *See id.* at 1111–12.

357. *See* Reply Brief of Petitioner at 6, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 857 (2022) (No. 21-418), 2021 WL 6118271, at *6.

358. *Protected Prayer Guidance*, *supra* note 343.

359. *Kennedy III*, 991 F.3d at 1013.

360. *Id.* at 1010; Reply Brief for Petitioner at 4, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 857 (2022) (No. 21-418), 2021 WL 6118271, at *4.

361. *See* Lee v. Weisman, 505 U.S. 577, 591 (1992) ("The Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment, but the Establishment Clause is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions."); *supra* Part I.B.

B. Interpreting the Establishment Clause to Override a Public School Employee's Right to Pray

Even with First Amendment protection, a government employer can justify overriding that employee's rights under *Pickering* if its interests outweigh the interests of the teachers.[362] Because both the free speech and free exercise rights of the employee are challenged, this part will argue that the state must demonstrate a compelling governmental interest.[363] This Note proposes that the courts' inquiry as to whether private speech implicates the Establishment Clause should turn on whether (1) a state actor engaged in the prayer and (2) students were psychologically coerced into engaging in religious activity.[364] The first factor is readily satisfied by any instructional employee or school official employed by an American public school.[365] The second requires a case-specific, fact-dependent analysis. This Note further argues that when a school incorrectly cites an Establishment Clause concern as grounds for disciplinary action where no violation exists, that employee's speech is entitled to free speech and free exercise protection from an otherwise school-deferential *Garcetti* application.

The use of psychological coercion as the decisive second factor allows ample space for teachers and coaches to engage in personal prayer at lunch, before class, or on school grounds, while disallowing them to lead or coerce students in prayer. The psychological coercion standard from *Engel* and *Schempp* that resurfaced in *Lee* and *Santa Fe* fundamentally looks to whether the religious practice created an undue pressure for students to participate in religious activity.[366] Factors from the Supreme Court's analysis in *Lee* and *Santa Fe*—including, most importantly, the compulsory nature of attendance, the level of school involvement, the identity of the person delivering the prayer, and which activities that person elicits from students—can aid that inquiry.[367] This psychological coercion can be intentional or in effect. For example, a teacher who audibly engages in prayer at the front of

362. *See supra* Part II.B.1.

363. *Pickering* does not require courts to conduct strict scrutiny review under the balancing test, but this Note reasons that this type of review may be warranted when an employee's free speech and free exercise rights are implicated. The assessment of the types of disciplinary action that would qualify as the "least restrictive means" of achieving a compelling governmental interest is beyond the scope of this Note; however, the panel in *Kennedy* lightly discussed this. *See Kennedy IV*, 4 F.4th 910, 925 (9th Cir. 2021) (Smith, J., concurring in denial of rehearing en banc), *cert. granted*, 142 S. Ct. 857 (2022) (mem.).

364. As noted above, a school district could affirmatively endorse religion in violation of the Establishment Clause. This assessment would turn on a fact-intensive approach. This Note maintains that, in *Kennedy*, the school district could not have endorsed religion simply by allowing Kennedy to continue the prayer in question.

365. *See, e.g.*, Veronia Sch. Dist. 47J v. Acton, 515 U.S. 646, 654 (1995); New Jersey v. T.L.O., 469 U.S. 325, 336 (1985) (explaining that "school authorities are state actors for purposes of the constitutional guarantees of freedom of expression and due process"). This Note stipulates that teachers and coaches are school authorities but distinguishes these types of public school employees from those employed in noninstructional capacities, like sanitation workers, lunch administrators, or security guards.

366. *See supra* text accompanying notes 115–17.

367. *See supra* text accompanying notes 83–86.

his class may implicate Establishment Clause concerns if he asks students to join their hands in prayer, recites that prayer during curricular instruction, is a member of the clergy, or engages in prayer for an extended amount of time.[368] Conversely, this Note reasons that a teacher who briefly engages in prayer at her desk, without eliciting participation from students or eating up class time, would not psychologically coerce religious participation and would not implicate the Establishment Clause. This Note's formulation—which, to find an Establishment Clause violation, requires a determination that a state actor's prayer psychologically coerced student religious participation—protects the fundamental rights of both students *and* instructional school employees.[369]

Some may reason that psychological coercion is too high a bar to safeguard religious liberty in our nation's schools, but this Note maintains that relying on the endorsement test alone is incorrect in this type of Establishment Clause case.[370] As Justice O'Connor points out in *Santa Fe*, private religious speech cannot endorse religion because endorsing religion requires the religious activity to originate from state action.[371] A school that simply allows a teacher's personal prayer is not endorsing that religion because that prayer is private speech.[372] In *Santa Fe*, the written school policy creating election procedures for selecting pregame invocations was blatant state action.[373] In *Lee*, the level of school involvement in selecting clergymen to deliver prayers was critical but not dispositive, but the *coercive* nature of those prayers and the obligatory attendance of students was.[374] A state statute legislating prayer recitation into public school instruction is not equivalent to private religious expression, the latter of which the Supreme Court has historically allowed on school premises.[375] As the Court noted in *Mergens*, secondary school students are more than capable of understanding the difference between a high school permitting private religious speech and sponsoring religious practice.[376]

In applying this coercion standard to the *Kennedy* case, this Note maintains that Kennedy's personal prayers evolved into psychologically coercive religious speech, in derogation of the Establishment Clause. Because Kennedy is a salaried high school football coach, he is a state actor during

368. *See supra* notes 83–108 and accompanying text.

369. Of course, legal coercion would also violate the Establishment Clause, if, for example, a teacher threatens to lower a student's grade unless the student prays.

370. *See supra* note 115–18 and accompanying text.

371. *See* Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 779 (1995) (O'Connor, J., concurring in part and concurring in the judgment) ("[A]n Establishment Clause violation must be moored in government action."); *supra* notes 97–99, 109–12 and accompanying text.

372. *See supra* notes 314–15 and accompanying text.

373. *See supra* note 98 and accompanying text.

374. *See supra* text accompanying notes 81–83.

375. *See supra* Part I.B.

376. *See supra* notes 153, 155–56 and accompanying text.

the school day on school premises,[377] regardless of whether he engaged in private speech. Having passed this Note's threshold requirement, his speech must be assessed for its coercive quality. First, it should be determined whether student attendance during these postgame prayers was obligatory.[378] Unlike in *Santa Fe*, where the general student body was not strictly required to attend the football games, the football players in *Kennedy do* have an obligation to attend the game and any pregame meetings.[379] More specifically, the football players, upon joining the team, must attend practice, team meetings, and mid-game huddles, to name a few.[380] When Kennedy delivered his pregame prayers and motivational speeches, the coercion inherent in compulsory attendance was present. However, these actions were not at issue.

When Kennedy engaged in *postgame* private prayer, obligatory attendance was less clear-cut. Originally, students requested to join Kennedy as he prayed.[381] The Supreme Court in *Jaffree* noted that nothing prohibits students from voluntarily praying during school hours.[382] However, over the course of several years, Kennedy increasingly invited student players and members of the opposing team to join him in prayer immediately after games.[383] Kennedy's invitation, which resulted in large huddles of students gathering around him, could render a single student's participation involuntary.[384] Though Kennedy's postgame prayers did not mandate attendance from the players, they eventually obligated players, through peer pressure, to at least respectfully participate, which the Supreme Court has found to be coercive.[385] *Lee*'s majority noted that even sitting in silence during a clergy invocation can signify participation in a religious practice, lending support for the conclusion that Kennedy's prayers coerced student participation in his religion.[386]

Accommodationist judges and scholars may argue that standing in silence is not the correct formulation of psychological coercion and that this type of respectful observance does not infringe on the free exercise rights of students.[387] However, students here did more than stand; they kneeled and

377. *Kennedy III*, 991 F.3d 1004, 1010–11 (9th Cir. 2021), *cert. granted*, 142 S. Ct. 857 (2022) (mem.).

378. *See supra* note 90 and accompanying text.

379. *See supra* note 107 and accompanying text; *Kennedy III*, 991 F.3d at 1011.

380. *See Kennedy III*, 991 F.3d at 1011.

381. *Id.* at 1010.

382. *See* Wallace v. Jaffree, 472 U.S. 38, 56 (1985); *supra* note 68 and accompanying text.

383. *See supra* notes 178–79 and accompanying text.

384. Pictures demonstrate that Kennedy kneeled, with his head down and with swaths of his high school football team closely bowed together. *See Kennedy III*, 991 F.3d 1004, 1019 (9th Cir. 2021), *cert. granted*, 142 S. Ct. 857 (2022) (mem.).

385. *See supra* notes 107–08 and accompanying text.

386. *See supra* notes 84–86 and accompanying text.

387. *See supra* note 90 and accompanying text. If a teacher engaged in philosophical secular meditation that students felt compelled to engage in, students could assert that their right to free *speech* is violated, but this analysis is beyond the scope of this Note. The Court has not resolved whether psychological coercion stretches to this same setting. *But see* Lee v. Weisman, 505 U.S. 577, 637 (1992) (Scalia, J., dissenting).

bowed alongside Kennedy as he prayed out loud.[388] Even Justice Scalia in his *Lee* dissent indicated that a school that coerces students to bow their heads or place their hands in a prayer position could psychologically coerce religious participation.[389] Some may argue that Kennedy did not ask his students to bow their heads or utter prayers alongside him; however, after his history of leading motivational religious prayers and encouraging students to join him, he has, in effect, inculcated student participation.[390] The Third Circuit in *Borden* specifically considered a coach's own history with initiating prayer to conclude that the prayer was coercive.[391] Tellingly, when Kennedy did not attend a few games, students did not self-initiate prayer.[392] In fact, one student indicated that he felt he would not get playing time equal to other students' playing time if he did not join in prayer.[393] Kennedy exhibited a high degree of control over students, and in demonstratively praying after delivering religious motivational messages, he coerced religious participation.

This is a careful inquiry, however. Had Kennedy briefly prayed by himself at the fifty-yard line, either during or following the games, his actions likely would not rise to a valid Establishment Clause concern. Even in *Kennedy*, no student or parent legally challenged Kennedy's behavior or actions. For the school to preemptively suspend him without this type of complaint warrants a close review of both Kennedy's and the school's actions.[394]

Finally, the school's reasoning for suspending Kennedy was incorrect because the alleged endorsement violation was facially insufficient. This Note reasons that, without affirmative school action, an individual state actor who engages in prayer without a psychologically coercive aspect could not violate the Establishment Clause. As Judge O'Scannlain noted, the issue in *Kennedy* is not that the school district allowed the prayer to continue.[395] The school's public opposition to Kennedy's prayer could not signal that it endorsed his religious practice or favored religion generally.[396] Even if the school district had ceased to publicly oppose his prayer, Kennedy's religious speeches would still have to coerce players into religious participation for

388. *Kennedy III*, 991 F.3d at 1012–13.

389. *Lee*, 505 U.S. at 637 (Scalia, J., dissenting).

390. *See Kennedy III*, 991 F.3d at 1010–12; McConnell, *supra* note 50, at 701.

391. *See supra* text accompanying notes 304–06.

392. *See Kennedy III*, 991 F.3d at 1013.

393. *See id.* at 1011. Some scholars would argue that one student's complaint is insufficient to support the finding of an Establishment Clause violation, but this Note's formulation does not turn on that one student. *See* Patrick M. Garry, *Distorting the Establishment Clause into an Individual Dissenter's Right*, 7 CHARLESTON L. REV. 661, 674 (2013); *see also Kennedy IV*, 4 F.4th 910, 948 (9th Cir. 2021) (Nelson, J., dissenting from denial of rehearing en banc) ("Though one player expressed fear of mistreatment, there was no hint of actual evidence that Coach Kennedy ever disfavored players based on their religious participation.").

394. *But see* Borden v. Sch. Dist. of E. Brunswick, 523 F.3d 153, 181 (3d Cir. 2008) ("Another troubling consideration . . . is that a non-religious student or one who adheres to a minority religion might feel subtle (albeit unintentional) coercion to participate in the ritual despite disagreement or discomfort with it.").

395. *See supra* note 315 and accompanying text.

396. *See supra* note 311 and accompanying text.

there to be a valid Establishment Clause concern. Ultimately, both Bremerton School District and the Ninth Circuit incorrectly relied on the endorsement test to determine whether Kennedy's prayer violated the Establishment Clause.

CONCLUSION

Teachers and coaches are deserving of First Amendment protection. Broadly interpreting a public school employee's duties to encompass all potential speech they make while at school undermines the limitations the Supreme Court imposed in *Garcetti*. Granting free speech and free exercise protection to instructional employees who engage in private religious prayer safeguards their fundamental rights and does so without infringing upon the rights of students. This Note does not advocate for teachers to enjoy religious free reign. Instead, this Note strikes an appropriate balance and recognizes that the Establishment Clause is a vital and necessary protection that can serve to override those free speech and free exercise rights. However, this balancing of the Establishment Clause with the Free Speech and Free Exercise Clauses must be carefully and precisely executed to maintain the integrity of the First Amendment.