

# *Kennedy v. Bremerton School District:* A Fumble the Supreme Court Needs to Recover.

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“People who work together will win, whether it be against complex  
football defenses, or the problems of modern society.”

-Vince Lombardi (1913-1970)

*Many people support one or the other: freedom of religion or freedom from religion. Current Supreme Court case law favors the protection of students’ rights under the Establishment Clause. However, First Amendment free speech rights for public officials do not enjoy the same protection. Previous notes seek to affirm the constitutionality of restricting the speech of public officials in deference to the Establishment Clause. This Note differs from those, however, by acknowledging the prominent role that the Establishment Clause plays in protecting student rights, but also advocating for greater First Amendment protection for public officials.*

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1. Third-year law student at Northern Illinois University. Lord, may I boast only in Christ’s death and resurrection.

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## INTRODUCTION

Football is an American pastime that some people might call a religious experience. A congregation gathers together to worship God.<sup>2</sup> Fans gather together each week in reverence for their team. Believers in Christ clothe themselves with the full armor of God to enable them to pursue holiness.<sup>3</sup> Players put on armor to help them as they pursue victory. After a

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2. “And let us consider how to stir up one another to love and good works, not neglecting to meet together, as is the habit of some, but encouraging one another, and all the more as you see the Day drawing near.” *Hebrews* 10:24-25;

For by the grace given to me I say to everyone among you not to think of himself more highly than he ought to think, but to think with sober judgment, each according to the measure of faith that God has assigned. For as in one body we have many members, and the members do not all have the same function, so we, though many, are one body in Christ, and individually members one of another.

*Romans* 12:3-5.

3.

Finally, be strong in the Lord and in the strength of his might. Put on the whole armor of God, that you may be able to stand against the schemes of the devil. For we do not wrestle against flesh and blood, but against the rulers, against the authorities, against the cosmic powers over this present darkness, against the spiritual forces of evil in the heavenly places. Therefore

game, a coach might walk onto the field of play, perhaps to the fifty-yard line, to take a knee and give thanks to God for the courage and fortitude of each team. But if he coaches at a public school in the jurisdiction of the Ninth Circuit Court of Appeals, he must learn to jettison his Christian faith.

In *Kennedy v. Bremerton School District*, a recent ruling by the Ninth Circuit Court of Appeals, the court held that a high school football coach speaks as a public employee and not a private citizen when he prays on the fifty-yard line immediately after games.<sup>4</sup> Prayer in public schools under the guise of the authority of the State is typically held unconstitutional,<sup>5</sup> however, as a practical matter, this specific holding allows for a restriction on a public employee's First Amendment right to free speech.<sup>6</sup> This Note will analyze the current Supreme Court case law that governs the issue of prayer by public employees.<sup>7</sup> This Note will demonstrate that current Supreme Court case law favors the ruling set out by the Ninth Circuit. It provides an analysis as to why public employees should be afforded more First Amendment protection than is currently provided by the Supreme Court.<sup>8</sup> It offers a solution to this problem by outlining a balancing test that the Supreme Court should use to analyze this issue.<sup>9</sup>

#### I. OVERVIEW OF *KENNEDY V. BREMERTON SCHOOL DISTRICT*

In order to further understand the court's justification for its holding in *Kennedy*, it is imperative to review the facts of the case. Joseph Kennedy was the head coach of the junior varsity football team and an assistant coach of the varsity team at Bremerton High School (BHS) in the state of Washington from 2008 to 2015.<sup>10</sup> Kennedy is a Christian and his religious convictions compel him to thank God for his players' accomplishments on the football field at the end of each game.<sup>11</sup> He says that he feels like God is calling him to "take a knee at the [fifty]-yard line and offer a brief, quiet prayer of thanksgiving for player safety, sportsmanship, and spirited com-

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take up the whole armor of God, that you may be able to withstand in the evil day, and having done all, to stand firm.

*Ephesians* 6:10-13.

4. *Kennedy v. Bremerton Sch. Dist.*, 869 F.3d 813 (9th Cir. 2017).
5. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Engel v. Vitale*, 370 U.S. 421 (1962).
6. *Kennedy*, 869 F.3d at 813.
7. *See discussion infra* Section II.
8. *See discussion infra* Section IV.
9. *See discussion infra* Sections IV.A, IV.B.
10. *Kennedy*, 869 F.3d at 815.
11. *Id.* at 816.

petition.”<sup>12</sup> Kennedy started praying on the field immediately following football games when he first began coaching at Bremerton High School.<sup>13</sup> Initially, he prayed alone, but then players began to join him, and eventually the majority of the team would join Kennedy in prayer.<sup>14</sup> Kennedy’s prayers would typically last for about thirty seconds.<sup>15</sup>

Officials in the Bremerton School District (BSD) took issue with Kennedy’s conduct.<sup>16</sup> They were concerned that his actions violated the Establishment Clause.<sup>17</sup> The School District told Kennedy that staff may not take action that a reasonable observer would perceive to be an endorsement of religious activity.<sup>18</sup> After several attempts by the Bremerton School District to prevent Kennedy from engaging in demonstrative religious activity, the School District placed him on paid administrative leave.<sup>19</sup> However, the Bremerton School District Superintendent did acknowledge that Kennedy’s practices were “well-intentioned and that Kennedy had ‘not actively encouraged, or required, [student] participation.’”<sup>20</sup> It was Kennedy’s view that,

[d]espite [his] full “compli[ance]” with BSD’s “directives not to intentionally involve students in his on-duty religious activities,” BSD changed the rules. Instead of abiding by its written policies – and its prior instructions to Coach Kennedy – BSD issued a sweeping new directive that prohibited on-duty BHS employees from engaging in any “*demonstrative religious activity*” that is “readily observable to ... students and the attending public.”<sup>21</sup>

Kennedy filed suit on August 9, 2016.<sup>22</sup> He sought to enjoin the School District from discriminating against him in violation of his First Amendment rights. He also alleged that he had been retaliated against for practicing his religious beliefs, which resulted in his removal as football coach.<sup>23</sup>

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12. *Id.*

13. *Id.*

14. *Id.*

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

16. *Id.* at 817.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Kennedy*, 869 F.3d at 817.

21. Brief of Appellant at 1-2, *Kennedy v. Bremerton Sch. Dist.*, 869 F.3d 813 (2017) (No. 16-35801), 2016 WL 6611220, at \*1-2.

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

23. *Id.* at 821.

The Ninth Circuit analyzed Kennedy's retaliation claim under a five-step test outlined in *Eng v. Cooley*.<sup>24</sup> The *Eng* test requires that a party seeking relief on a retaliation claim must show that he spoke on a matter of public concern, that he spoke as a private citizen and not a public employee, and that the speech at issue was a substantial or motivating factor in the adverse employment action.<sup>25</sup> Once a party makes that showing, the burden is on the State to show that it had adequate justification for discharging the employee or that it would have taken the same action even without the protected speech.<sup>26</sup>

The court determined that the speech was indeed a matter of public concern, that the speech at issue was a motivating factor in the adverse employment action, and that the State would have not taken the same adverse employment action absent the protected speech.<sup>27</sup> Therefore, the court only considered whether Kennedy spoke as a public employee and not whether Bremerton School District's actions were adequately justified.<sup>28</sup>

The court found that Kennedy was indeed acting as a public employee, so they did not analyze the justification of the School District's actions.<sup>29</sup> The court found that he was acting as a public employee for two reasons.<sup>30</sup> First, the religious activity took place immediately following games and while in view of students and parents.<sup>31</sup> Second, the religious activity was not in the ordinary scope of his duties as an assistant football coach.<sup>32</sup> The court found that Kennedy's job description was "to be a coach, mentor and role model for the student athletes" and that his role was similar to the role of a teacher.<sup>33</sup> The Ninth Circuit affirmed the ruling of the district court

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24. *Eng v. Cooley*, 552 F.3d 1062 (9th Cir. 2009).

25. *Id.*

26. *Id.* at 1071.

27.

Here, the parties do not contest that Kennedy spoke on a matter of public concern (*Eng* factor one), that the relevant speech was a substantial or motivating factor in the District's decision to place Kennedy on leave (*Eng* factor three), and that the District would not have taken the adverse employment action in the absence of the relevant speech (*Eng* factor five). Thus, we need [to] consider only whether Kennedy spoke as a private citizen or a public employee (*Eng* factor two), and whether BSD's conduct was adequately justified by its need to avoid an Establishment Clause violation (*Eng* factor four).

*Kennedy v. Bremerton Sch. Dist.*, 869 F.3d 813, 822 (9th Cir. 2017).

28. *Id.*

29. *Id.*

30. *Id.* at 825.

31. *Id.*

32. *Kennedy*, 869 F.3d at 813.

33. *Id.* at 815.

finding Kennedy was acting as a public employee when he prayed on the fifty-yard line immediately following games, thereby denying his injunctive request for relief.<sup>34</sup>

## II. ANALYSIS OF RELEVANT SUPREME COURT CASE LAW REGARDING PRAYER IN PUBLIC SCHOOLS

A landmark 1962 Supreme Court case involving prayer in public schools is *Engel v. Vitale*.<sup>35</sup> In *Engel*, a New York school district implemented a policy that required students to recite a specific prayer at the beginning of each school day.<sup>36</sup> This policy was implemented after New York instituted a state prayer program, which directed a school district's principal to cause the prayer to be recited.<sup>37</sup> A group of parents challenged the constitutionality of the policy on the basis that it violated the Establishment Clause.<sup>38</sup> The Court in *Engel* held that it is a violation of the separation of church and state to allow a public-school system to implement a policy requiring students to recite a prayer.<sup>39</sup> They found that "each 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."<sup>40</sup>

In *Engel*, the Court opined about the ability of the State to coerce individuals to observe certain religious practices.<sup>41</sup> The State argued that the statute did not violate the Establishment Clause because the prayer was nondenominational and because it allowed students to remain silent or leave the room while the prayer was being recited.<sup>42</sup> The Court found that the adoption of the state law that established the prayer be recited was enough to violate the Establishment Clause, even though the laws did not directly coerce individuals, because "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."<sup>43</sup>

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34. *Id.* at 827.

35. *Engel v. Vitale*, 370 U.S. 421 (1962).

36. *Id.* at 423.

37. *Id.* at 422-23.

38. *Id.* at 423.

39. *Id.* at 425.

40. *Engel*, 370 U.S. at 435.

41. *Id.* at 430.

42. *Id.*

43. *Id.* at 431.

A little more than twenty years later, the Supreme Court heard a similar case, *Wallace v. Jaffree*.<sup>44</sup> In *Wallace*, a group of parents challenged the constitutionality of an Alabama state statute that authorized a one-minute period of silence for all students in public school.<sup>45</sup> The statute specifically designated the time for “meditation or voluntary prayer.”<sup>46</sup> The parents argued that the statute violated the Establishment Clause because it was a means by which the State was trying to advance religion and because the statute did not have a secular legislative purpose.<sup>47</sup> The Court held that the statute was a violation of the Establishment Clause because it was “not consistent with the established principle that the government must pursue a course of complete neutrality toward religion.”<sup>48</sup>

The Court referenced a three-part test in construing the Establishment Clause: (1) whether the statute has a secular legislative purpose, (2) whether its primary effect is one that advances or inhibits religion,<sup>49</sup> and (3) whether the statute fosters “an excessive government entanglement with religion.”<sup>50</sup> Because the Court found that there was not a secular legislative purpose, it did not inquire into the second and third criteria.<sup>51</sup> In order to decide whether or not there was a secular legislative purpose for the enactment of the statute, the Court asked “whether government’s actual purpose is to endorse or disapprove of religion.”<sup>52</sup> Through *Wallace v. Jaffree*, the Court solidified the bright-line rule that if a state takes action with the intent to endorse or disapprove of religion, the state violates the Establishment Clause.<sup>53</sup> This bright-line rule helped pave the way for the Ninth Circuit’s ruling in *Kennedy v. Bremerton School District*.<sup>54</sup>

In 1992, the Supreme Court decided the issue of whether school officials are permitted to include prayers in invocation and benediction ceremonies.<sup>55</sup> In *Lee v. Weisman*, a public-school student and her parent sought an injunction to prevent her public school from including a prayer at her graduation ceremony.<sup>56</sup> The Court held that school officials are not allowed to recruit clergy to offer prayers at a public-school graduation ceremony.<sup>57</sup>

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44. *Wallace v. Jaffree*, 472 U.S. 38 (1985).

45. *Id.*

46. *Id.* at 40.

47. *Id.* at 42.

48. *Id.* at 60.

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

50. *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970).

51. *Wallace*, 472 U.S. at 56.

52. *Id.*

53. *Id.* at 61.

54. *Kennedy v. Bremerton Sch. Dist.*, 869 F.3d 813, 813 (2017).

55. *Lee v. Weisman*, 505 U.S. 577 (1992).

56. *Id.* at 577.

57. *Id.*

The Court found that allowing this behavior would be to allow the school to coerce students to participate in religion.<sup>58</sup> It found that since high school students are impressionable and subject to societal pressure, they are more susceptible to being coerced by their advisers.<sup>59</sup> In finding the prayer improper, the Court said, “the State has in every practical sense compelled attendance and participation in an explicit religious exercise at an event of singular importance to every student, one the objecting student had no real alternative to avoid.”<sup>60</sup> In its analysis, the Court looked to the degree of the school’s involvement in the graduation prayer in deciding that the State violated the Establishment Clause.<sup>61</sup>

In *Santa Fe Independent School District v. Doe*, the Supreme Court held that allowing a public school to authorize students to lead and participate in prayer over the intercom prior to football games was a violation of the Establishment Clause.<sup>62</sup> The Court found that this activity by the school was impermissibly coercive and that prayer by the students in this way was not considered private speech.<sup>63</sup> At Santa Fe High School, it was the practice of the student council chaplain to direct a prayer over the school intercom before each home varsity football game.<sup>64</sup> While the initial lawsuit filed by students and their parents against the school was pending, the school district implemented a different policy that allowed students to vote in an election to determine whether the prayers at issue should be delivered at the football games.<sup>65</sup> The policy allowed a student to engage in “nonsectarian, nonproselytizing prayer” over the intercom before games.<sup>66</sup>

The Court found that the speech at issue was not private speech because although the prayers were delivered by students, the prayers were given by a student who represented the student body at a school event on school property.<sup>67</sup> Further, the student was under the supervision of public employee faculty members.<sup>68</sup> The Court also found that this type of speech is coercive because it requires students to choose between going to the football games and avoiding the games so that they are not offended by the religious activity of their peers.<sup>69</sup> A reasonable student would likely expect that they have the right to attend and enjoy a high school football game, as

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58. *Id.*

59. *Id.* at 578.

60. *Lee*, 505 U.S. at 598.

61. *Id.*

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

63. *Id.*

64. *Id.* at 294.

65. *Id.*

66. *Id.*

67. *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 290.

68. *Id.*

69. *Id.*

that experience is a social convention rooted in tradition. For this reason, the Court found that students' rights under the Establishment Clause should be protected at events such as these.<sup>70</sup> Finally, the Court held that when the State takes affirmative action to sponsor specific religious practices (like it did in *Santa Fe*), it is violative of the Establishment Clause.<sup>71</sup>

The Supreme Court's rulings regarding prayer in public schools favors the ruling by the Ninth Circuit in *Kennedy v. Bremerton School District*.<sup>72</sup> The Supreme Court has consistently upheld limitations that the Establishment Clause imposes on government.<sup>73</sup> However, this has led the Court to offer more protection for an individual's right to not be coerced into supporting religion or its exercise and less protection of an individual's right to exercise that religion. The Supreme Court has held that the litmus test for violating the Establishment Clause is whether an objective observer would perceive one's religious expression to be a "State endorsement of prayer in public schools."<sup>74</sup> Kennedy's right to freedom of speech under the First Amendment was limited because an objective observer would not view his prayer on the fifty-yard line as a state endorsement of prayer and religion.<sup>75</sup>

In his appellate brief, Kennedy argued that no other federal court had taken such an extreme view of the Establishment Clause.<sup>76</sup> He surely will not be the only public employee affected by this expansive ruling. Kennedy argued in his brief to the Ninth Circuit: "[t]he district court's holding would convert *any* religious expression, however fleeting—silently praying over lunch in the cafeteria, making the sign of the cross, wearing a yarmulke or headscarf—into an unconstitutional state endorsement of religion."<sup>77</sup> In regard to the exercise of their religion in the workplace, public employees should be offered more First Amendment protection.

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70. *Id.* at 312.

71. *Id.* at 313.

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

73. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Engel v. Vitale*, 370 U.S. 421 (1962).

74. *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 308.

75. *Kennedy*, 869 F.3d at 813.

76. Brief of Appellant at 15, *Kennedy v. Bremerton Sch. Dist.*, 869 F.3d 813 (2017) (No. 16-35801), 2016 WL 6611220, at \*15.

77. *Id.*

### III. ANALYSIS OF RELEVANT FEDERAL APPELLATE COURT CASE LAW REGARDING PRAYER IN PUBLIC SCHOOL

#### A. RELEVANT CASE SUMMARIES

The Ninth Circuit Court of Appeals is not the first appellate court that was faced with the task of interpreting what level of First Amendment protection the Constitution guarantees for public school coaches.<sup>78</sup> However, the Ninth Circuit was the first federal court to apply such an expansive reading of the Establishment Clause in the context of a public-school coach practicing his freedom of religion rights under the First Amendment.<sup>79</sup> While two other cases, one out of the Fifth Circuit<sup>80</sup> and one out of the Third Circuit,<sup>81</sup> had holdings similar to *Kennedy*, these cases did not go as far as *Kennedy*.

In *Doe v. Duncanville Independent School District*, the Fifth Circuit Court of Appeals held that a public-school coach was not allowed to sponsor prayers at the end of games and at practices.<sup>82</sup> Coach Smith coached girls' basketball at a junior high school in the Duncanville Independent School District.<sup>83</sup> She typically led the team in the recitation of the Lord's Prayer at the beginning or end of practice.<sup>84</sup> Eventually, the Lord's Prayer was recited at center court at the end of games.<sup>85</sup> Coaches would stand over the girls with their heads bowed.<sup>86</sup> Jane Doe, a twelve-year-old girl on Coach Smith's basketball team, "participated out of a desire not to create dissension."<sup>87</sup> She told her father that she preferred not to participate in the prayers.<sup>88</sup> Jane and her father filed a complaint against the school district alleging that the school's practice of allowing the coach to lead the team in prayers at practice and at the end of games violated the Establishment Clause of the First Amendment.<sup>89</sup>

The Fifth Circuit Court of Appeals relied on *Lee v. Weisman*<sup>90</sup> when it decided that Coach Smith violated the Establishment Clause because her

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78. See generally *Borden v. Sch. Dist. of Twp. of E. Brunswick*, 523 F.3d 153 (3d Cir. 2008); *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160 (5th Cir. 1993).

79. *Kennedy*, 869 F.3d at 813.

80. *Duncanville Indep. Sch. Dist.*, 994 F.2d 160.

81. *Borden*, 523 F.3d 153.

82. *Duncanville Indep. Sch. Dist.*, 994 F.2d at 160.

83. *Id.* at 161.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Duncanville Indep. Sch. Dist.*, 994 F.2d at 160.

88. *Id.*

89. *Id.*

90. *Lee v. Weisman*, 505 U.S. 577, 577 (1992).

involvement “[would] be perceived by the students as inducing a participation they might otherwise reject.”<sup>91</sup> The court held that because Coach Smith led the students in the recitation of the prayer and stood over them with her head bowed while they recited the prayer at the end of games, she “just as surely chose and ‘composed’ the prayer here as did the school officials in *Lee*.”<sup>92</sup>

In *Borden v. School District of the Township of East Brunswick*, the court held that a high school football coach was in violation of the Establishment Clause when he bowed his head and took a knee while his team engaged in prayer.<sup>93</sup> The court also held that the coach was not addressing a matter of public concern.<sup>94</sup> East Brunswick School District had a policy that prohibited faculty from participating in student-initiated prayer.<sup>95</sup> Marcus Borden, the head football coach at East Brunswick High School, brought suit on the grounds that the policy was unconstitutional because it violated his right to freedom of speech under the First Amendment.<sup>96</sup> Borden wanted to engage in the practice of bowing his head during his team’s pre-game meal prayers and he also wanted to take a knee with his team during their locker room prayers.<sup>97</sup>

Borden argued that the school district’s policy prohibiting him from participating in student-initiated prayer infringed on his right to freedom of speech.<sup>98</sup> In response, the court held that Borden’s conduct was not a matter of public concern and, thus, his conduct did not invoke the protection of his right, as a public employee, to freedom of speech.<sup>99</sup> Further, the court held that Borden’s conduct of engaging in the practice of bowing his head and taking a knee with his team during student-initiated prayer violated the Establishment Clause.<sup>100</sup> In making its decision, the court relied on the fact that the two activities at which the student prayers were taking place (the locker room preparations and the pre-game meals) were school-sponsored events.<sup>101</sup> The court found that Borden’s involvement in the prayers was as a leader, organizer, and a participant; therefore, an objective observer would assume that Borden’s actions constituted an endorsement of religion.<sup>102</sup>

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91. *Duncanville Indep. Sch. Dist.*, 994 F.2d at 165 (citing *Lee*, 505 U.S. 577).

92. *Id.*

93. *Borden v. Sch. Dist. of Twp. of E. Brunswick*, 523 F.3d 153 (3d Cir. 2008).

94. *Id.* at 170.

95. *Id.* at 159.

96. *Id.*

97. *Id.*

98. *Borden*, 523 F.3d 153.

99. *Id.* at 159.

100. *Id.*

101. *Id.* at 176.

102. *Id.* at 178.

## B. ANALYSIS AND COMPARISON TO THE KENNEDY CASE

The *Doe* case is similar to the *Kennedy* case, but the Ninth Circuit in *Kennedy* interpreted the Establishment Clause too broadly such that it eviscerates First Amendment protection for public employees.<sup>103</sup> In *Doe v. Duncanville Independent School District*, Coach Smith was leading her team in the recitation of the Lord's Prayer at the end of games and at practice.<sup>104</sup> This outright endorsement of religion<sup>105</sup> is different than Kennedy's practice of engaging in silent prayer on the fifty-yard line after games.<sup>106</sup> In *Doe*, Coach Smith led the students in the prayer or stood over them while they bowed their heads and engaged in religious practices.<sup>107</sup> The court found that it was an endorsement as if she had chosen and composed the prayer herself.<sup>108</sup>

Using the Establishment Clause to keep a public-school coach from engaging in silent prayer on the fifty-yard line, like the Ninth Circuit did in the *Kennedy* case,<sup>109</sup> means a court would have to interpret the Clause much more broadly than the court did in *Doe*.<sup>110</sup> Unlike the *Doe* case, where the court considered the coach's religious conduct an endorsement because she led the students in prayer and stood over them while they engaged in the religious practice,<sup>111</sup> a silent prayer on the fifty-yard line after a game has ended is not religious conduct to the same degree because it does not involve students. As long as public employees like Kennedy<sup>112</sup> refrain from leading their students in prayer, they should be able to silently practice their religion without it being considered an endorsement by the school district.

The *Kennedy* Court also interpreted the Establishment Clause more broadly than the court in *Borden*.<sup>113</sup> Borden's involvement in the pre-game meal prayers and the locker room prayers<sup>114</sup> was different than Kennedy's conduct of engaging in a silent prayer on the fifty-yard line after football games.<sup>115</sup> The two reasons that the court in *Borden* ruled his conduct was an

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

104. *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160 (5th Cir. 1993).

105. *Id.*

106. *Kennedy*, 869 F.3d 813.

107. *Duncanville Indep. Sch. Dist.*, 994 F.2d 160.

108. *Id.*

109. *Kennedy*, 869 F.3d at 813.

110. *Duncanville Indep. Sch. Dist.*, 994 F.2d 160.

111. *Id.*

112. *Kennedy*, 869 F.3d 813.

113. *Borden v. Sch. Dist. of Twp. of E. Brunswick*, 523 F.3d 153 (3d Cir. 2008).

114. *Id.*

115. *Kennedy*, 869 F.3d at 813.

endorsement of religion were: (1) that Borden was involved in student-initiated prayer as a leader, organizer, and participant, and (2) that the pre-game meal prayers and the locker room prayers were school sponsored events.<sup>116</sup> Kennedy's conduct is different than Borden's conduct because Borden participated in student-initiated prayer,<sup>117</sup> and Kennedy engaged in a silent prayer for his individual purpose.<sup>118</sup> Further, the court in *Borden* held that Borden's involvement was as a leader, organizer, and participant,<sup>119</sup> and Kennedy's conduct of engaging in a silent prayer on the fifty-yard line involves no leadership over students.<sup>120</sup>

One might argue that the *Borden* case and the *Kennedy* case are similar because they both involve coaches engaging in religious conduct at school sponsored events.<sup>121</sup> However, as discussed further in the hereinafter set forth balancing test, the nature of the school sponsored event is important to consider.<sup>122</sup> While the activities in *Borden* and *Kennedy* are both school sponsored, the activities in *Borden* involve much more coercion than did Kennedy's.<sup>123</sup> Borden engaged in religious conduct at an event that is at the core of his players' experience as student athletes because even if the student athletes are not required to be at events like locker-room gatherings or pre-game meals, those activities are social conventions that the students should feel welcome to participate in without being subjected to proselytizing religious conduct that is potentially offensive to them.<sup>124</sup>

While a football game is indeed a social convention entangled in a student's school experience,<sup>125</sup> Kennedy engaged in religious conduct by himself, silently, after the game was over.<sup>126</sup> The occasion of silently praying by oneself is not a *social* convention, much less a social convention that a student should reasonably expect to be free to participate in without being subject to witnessing religious conduct that is offensive to them.

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116. *Borden*, 523 F.3d 153.

117. *Id.*

118. *Kennedy*, 869 F.3d at 813.

119. *Borden*, 523 F.3d 153.

120. *Kennedy*, 869 F.3d at 813.

121. *Id.*; *Borden*, 523 F.3d 153.

122. See discussion *infra* Section IV.A.

123. *Kennedy*, 869 F.3d at 813; *Borden*, 523 F.3d 153.

124. *Borden*, 523 F.3d 153.

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

126. *Kennedy*, 869 F.3d at 813.

#### IV. PUBLIC EMPLOYEES SHOULD BE OFFERED MORE FIRST AMENDMENT PROTECTION THROUGH A BALANCING TEST

The direction that the Supreme Court is heading suggests that Kennedy is unlikely to succeed on the merits of his retaliation claim.<sup>127</sup> However, the Supreme Court should ensure that First Amendment protection is mandated for public employees and, specifically, for Kennedy. *Kennedy* takes the Establishment Clause too far, at the expense of public employees. By upholding *Kennedy*, the Supreme Court will grant an impermissible infringement on public employees' practice of their religion.<sup>128</sup>

*Kennedy* limits free speech much more than what the Constitution mandates. The practical impact of this decision is that public employees will be severely limited in how, when, and where they practice their religion. Without some type of restriction on the ability of the Establishment Clause to favor the rights of public school students at the expense of public employees, the court is essentially ruling that, at least while public employees are clothed with state authority, the State may properly impose a non-religious neutral system of belief. The main contention in the overall analysis of this case is whether a public employee's actions regarding the practice of their religion will unduly influence a student by endorsing religion.<sup>129</sup>

This Note argues that through its restriction on religious activity, instead of permitting the reasonable exercise of one's chosen religion, the State is doing just what the court's interpretation of the Establishment Clause has sought to prevent. The court seeks to protect the students from school officials who endorse a certain belief system,<sup>130</sup> but by limiting, if not eliminating, religious beliefs, the court is engaging in the type of activity it wants to preclude from happening.

Instead of the outright denial of any sort of religious expression while one is exercising his duties as a public official, there should be a balancing test that reasonably considers the rights of the student to protection from a public official's endorsement of religion and the rights of the public official to freely practice his religion. The Ninth Circuit swings the balance too far in favor of the student and this is to the detriment of public officials. The Supreme Court should seize the opportunity to offer greater protection for public officials, and, in particular, for Kennedy.

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127. See generally *Santa Fe Indep. Sch. Dist.*, 530 U.S. 290; *Lee v. Weisman*, 505 U.S. 577 (1992); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Engel v. Vitale*, 370 U.S. 421 (1962).

128. See *Kennedy*, 869 F.3d at 813.

129. See *id.*

130. *Id.*

The Ninth Circuit oversimplifies the concerns at issue in the *Kennedy* case. The court failed to consider the practical effects that its ruling would have on public employees of various religious backgrounds, as outlined in the analysis of the practical impact section located below.<sup>131</sup> The court treated the right of public employees to First Amendment protection regarding their religious freedoms and the right of students to not be encouraged or coerced to engage in religious practices to be mutually exclusive.<sup>132</sup> In all practicality, the protections of the Constitution are not so black and white. There needs to be room for public employees to engage in the practice of their religion, even while acting in their public employee capacity.<sup>133</sup> Thus, the following balancing test is suggested:

A. BALANCING TEST FACTOR ONE: THE NATURE OF THE ACTION

The first factor that should be considered by the Court is the nature of the action by the public employee. In each of the four landmark religious freedom cases discussed above, the Court considered the nature of the occasion at which one's exercise of their religion was at issue.<sup>134</sup> The Religion Clause of the First Amendment provides that the government cannot make any law respecting the establishment of religion or prohibiting the free exercise thereof.<sup>135</sup> But this religious liberty is limited when the State "affirmatively sponsors the particular religious practice of prayer."<sup>136</sup>

In *Lee*, the Court looked to the nature of the event where the exercise of religious practice was taking place.<sup>137</sup> The Court considered the student's desire to be a part of the experience.<sup>138</sup> Further, the Court stressed the idea that "adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social conven-

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131. *Id.*

132. *Id.*

133. *Kennedy*, 869 F.3d at 813.

134. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000) (holding that the nature of a high school football game provides that it is an event where students should not have to choose "between attending these games and avoiding personally offensive religious rituals"); *Lee v. Weisman*, 505 U.S. 577 (1992) (holding that the nature of a graduation ceremony provides that it is an event for which students have a strong incentive to attend); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (holding that the nature of a daily period of silence for meditation or voluntary prayer is a practice that is not consistent with the principle that government should remain neutral toward religion); *Engel v. Vitale*, 370 U.S. 421 (1962) (holding that the nature of the use of the public school system to encourage the recitation of prayer is inconsistent with the Establishment Clause).

135. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993).

136. *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 313.

137. *Lee*, 505 U.S. at 593.

138. *Id.*

tion.”<sup>139</sup> In *Lee*, the social convention at issue was a high school graduation ceremony.<sup>140</sup> In *Santa Fe*, the social convention was a high school football game.<sup>141</sup> The principle behind this notion is that students should not have to choose between attending these social conventions and subjecting themselves to religious conduct that is offensive to them.<sup>142</sup> In *Santa Fe*, the Court found that the delivery of a prayer to those present before the start of the high school football game coerces those present to engage in an act of religious worship.<sup>143</sup>

The exercise of religious conduct by a public official or endorsed by a public official at a social convention of the nature described above should be held unconstitutional. The nature of the social conventions described above are critically entangled in the student experience such that students should be offered considerable protection from the infringement of their rights under the Establishment Clause.<sup>144</sup> However, when the nature of the social convention is much less involved in the student experience, public officials should be afforded greater protection in the exercise of their religious practices.

The *Kennedy* case provides a valuable opportunity for the Court to outline the varying degrees to which religious conduct by public officials may influence students. In *Kennedy*, one might argue that the nature of the social convention is a high school football game, like in the *Santa Fe* case.<sup>145</sup> However, unlike *Santa Fe*, where the students at the game were involuntarily subjected to listening to a prayer before the start of the game,<sup>146</sup> students at Bremerton High School were not involuntarily coerced to listen to Kennedy’s prayers on the fifty-yard line for merely attending or participating in the high school football game.<sup>147</sup> Merely taking a knee on the fifty-yard line after a football game has ended and engaging in silent prayer is unlikely to coerce any students participating in or present at the game to engage in that same religious activity. The social convention has been terminated at that point. The coach is no longer teaching or coaching. He has shed his indicia of state sponsored authority. What if he prayed in the parking lot when he arrived at his car to leave the premises? What if he prayed when all of the students had left the field and the stands? These examples all stand for the proposition that state authority had concluded.

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139. *Id.*

140. *Id.*

141. *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 290.

142. *See id.*

143. *Id.* at 312.

144. *See Lee*, 505 U.S. at 593.

145. *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 290.

146. *Id.*

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

In *Kennedy*, the Ninth Circuit held that “[p]ractically speaking, Kennedy’s job as a football coach was also akin to being a teacher.”<sup>148</sup> The court is correct. This situation is comparable to a schoolteacher engaging in silent prayer before a meal where she is acting as a lunch monitor. Like a football coach, she is an on-duty, public official who is engaging in religious conduct. However, the nature of Kennedy’s religious conduct is not such that a reasonable student should feel coerced to join in the religious exercise.

The Supreme Court should find that the rule from the *Wallace* case is applicable to this case. However, while the bright-line rule from *Wallace v. Jaffree* is precedent and could be relied upon by the Court in its analysis of the *Kennedy* case,<sup>149</sup> relying on that case in deciding the *Kennedy* case would severely limit the right to freedom of speech for public employees. The bright-line rule from *Wallace* is that if the State’s purpose is to endorse religion, then the State’s actions violate the Establishment Clause.<sup>150</sup> Applying this rule to the *Kennedy* case would take the *Wallace* decision too far. In *Wallace*, the State enacted a statute that was motivated by a non-secular purpose,<sup>151</sup> while in *Kennedy*, there was no statute involved.<sup>152</sup> In *Kennedy*, the action was after the social convention was terminated.<sup>153</sup>

Instead of using the reasoning from the *Wallace* case,<sup>154</sup> the Court should use the analysis from *Lee v. Weisman*<sup>155</sup> to offer more protection to Kennedy and other public officials. In *Lee*, the court looked to the degree of school involvement in deciding whether or not there was a violation of the Establishment Clause.<sup>156</sup> The *Lee* decision used an analysis based on the *degree* of involvement; this supports the idea that a balancing test would be appropriate in the *Kennedy* case and others like it because analysis based on degree is essentially a balancing test.<sup>157</sup>

Further, in considering the nature of the action by the public employee, it is helpful to look to whether or not there is a captive audience, such as there would be in a classroom or at a graduation ceremony.<sup>158</sup> In the Supreme Court cases outlined above regarding First Amendment free speech rights, there were always captive audiences that were being subjected to

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148. *Id.* at 826.

149. *Wallace v. Jaffree*, 472 U.S. 38 (1985).

150. *Id.* at 57.

151. *Id.* at 56.

152. *Kennedy*, 869 F.3d at 813.

153. *Id.*

154. *Id.*

155. *Lee v. Weisman*, 505 U.S. 577 (1992).

156. *Id.*

157. *Id.*

158. Brief of Appellant at 15, *Kennedy v. Bremerton Sch. Dist.*, 869 F.3d 813 (9th Cir. 2017) (No. 16-35801), 2016 WL 6611220, at \*15.

religious endorsement by a public official.<sup>159</sup> In *Kennedy*, the students were not subjected to the endorsement of the religious conduct because they were not a captive audience.<sup>160</sup> Rather, Kennedy was simply engaging in a brief, fifteen to twenty second silent prayer on the fifty-yard line after a game was concluded and after his state sponsored duties were over.<sup>161</sup> Kennedy's conduct was not meant for a captive audience such that the students were forced to watch or take part in the religious conduct with him.<sup>162</sup> It is hardly the case that a reasonable student observer would view Kennedy's action "as a state endorsement of prayer in public schools."<sup>163</sup>

It would be reasonable for the Court to develop a balancing test involving an analysis of the nature of the social convention as outlined above, because it allows for the protection of students from being coerced to engage in religious activity in situations where they reasonably should expect not to be coerced. However, this part of the balancing test also leaves room for the Court to establish certain protections for public officials where their actions are of such little influence on students, that the practical effect of the prohibition of certain religious conduct would unreasonably infringe on the public officials' rights to freedom of speech.

B. BALANCING TEST FACTOR TWO: INDIVIDUAL PURPOSE V. INTENT TO COERCE

The second factor that should be considered by the Court is whether the public official is participating in religious conduct merely for their sole satisfaction or whether they are participating with an intent to coerce students to engage in religious conduct as well. In *Santa Fe*, the Court made clear that the purpose of the Religion Clauses of the First Amendment "is to secure religious liberty."<sup>164</sup> It held that religious liberty is protected unless the state "affirmatively sponsors the particular religious practice of pray-

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159. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (holding that students were subjected to religious endorsement by a public official at a high school football game); *Lee*, 505 U.S. 577 (holding that students were subjected to endorsement by a public official at a graduation ceremony); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (holding that students were subjected to endorsement by a public official in a classroom setting); *Engel v. Vitale*, 370 U.S. 421 (1962) (holding that students were subjected to endorsement by a public official in a classroom setting where the expression was conveyed over a loud speaker).

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

161. *Id.*

162. *Id.*

163. *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 308.

164. *Id.* (citing *Engel*, 370 U.S. 421).

er.”<sup>165</sup> The Court has held that the State affirmatively sponsors certain religious practices in each of the landmark cases discussed above.<sup>166</sup>

In *Engel v. Vitale*, the Court held that the State affirmatively sponsors a religious practice if the State establishes a law requiring the recitation of a certain prayer at the start of the school day.<sup>167</sup> In *Wallace v. Jaffree*, the Court held that the State affirmatively sponsors a religious practice if the State authorizes a period of silence for meditation or voluntary prayer.<sup>168</sup> In *Lee v. Weisman*, the Court held that the State affirmatively sponsors a religious practice when the State invites an individual to offer prayers at a graduation ceremony.<sup>169</sup> In *Santa Fe Independent School District v. Doe*, the Court held that the State affirmatively sponsors a religious practice when the State participates in the selection of a student speaker to engage in prayer at high school football games.<sup>170</sup>

In each of these cases, it is clear that the State made an affirmative decision to coerce students to participate in the religious practice.<sup>171</sup> The State, acting through public officials, should have come to the reasonable conclusion that the students involved would see their actions as an endorsement of religion in violation of the Establishment Clause. None of these cases involved a public official merely engaging in religious conduct for his sole satisfaction, but rather, they went much further than that.<sup>172</sup> There must be a legal analysis outlined by the Court that considers the intent of the public official involved in the religious conduct at issue. There is simply too much of a distinction between State sponsored prayer, for example, and a public official engaging in a silent prayer for the sake of honoring God.

In *Wallace*, the Court held that one of the relevant questions regarding State participation in religious conduct is “whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools.”<sup>173</sup> A reasonable observer, who might witness Kennedy take a knee and engage in silent prayer on the fifty-yard line after games, would arguably perceive Kennedy’s conduct as carrying out his personal religious beliefs. However, it is unlikely that a reasonable person would believe that Kennedy’s actions are attributable to the school district by which he is employed, just as it is

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165. *Id.* at 313.

166. *See id.* at 290; *Lee v. Weisman*, 505 U.S. 577 (1992); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Engel v. Vitale*, 370 U.S. 421 (1962).

167. *Engel*, 370 U.S. 421.

168. *Wallace*, 472 U.S. at 41.

169. *Lee*, 505 U.S. 577.

170. *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 306.

171. *See id.* at 290; *Lee*, 505 U.S. 577; *Wallace*, 472 U.S. 38; *Engel*, 370 U.S. 421.

172. *See Santa Fe Indep. Sch. Dist.*, 530 U.S. 290.

173. *Wallace*, 472 U.S. at 73, 76.

unlikely that a reasonable person would believe that a schoolteacher's silent prayer before her school lunch is in any way reflective of the school district's endorsement of religion.

In the *Santa Fe* case, the Court found that "members of the listening audience must perceive the pregame message as a public expression of the views of the majority of the student body delivered with the approval of the school administration."<sup>174</sup> In regard to the *Kennedy* case, if one considers only Kennedy's exercise of a silent prayer on the fifty-yard line following games, one can conclude that Kennedy's actions, though they were surely noticed by others, were isolated from others such that they were not forced to participate or engage in the conduct with him in any way.<sup>175</sup> In the *Kennedy* case, though he is a public official, an objective observer would arguably assume that he was practicing his religion for his sole satisfaction, without an intent to coerce others to engage in his practice as well.<sup>176</sup>

An objective observer would not believe that the school has endorsed its approval merely because Kennedy is praying after a game. In the *Santa Fe* case, the Court found that there was affirmative action by the State because the school participated in the practice of religious conduct by offering students an opportunity to elect a certain student to lead the school in prayer before football games.<sup>177</sup> In the *Kennedy* case, there was not approval, support, or endorsement of Kennedy's conduct.<sup>178</sup>

The isolated actions of one public official is hardly an endorsement or an attempt to coerce others to engage in religious conduct. Whether the religious action can be observed by students or not is irrelevant, as long as the public official engaging in the religious conduct in no way involves or attempts to involve the students. However, as the religious conduct being engaged in by public officials begins to involve students, the balance starts to shift.

When Kennedy engaged in silent prayer on the fifty-yard line immediately following games, his conduct was indeed observable to students at Bremerton School District, as well as their parents, and others who attended the game.<sup>179</sup> This conduct, in its own right, did not in any way involve the students.<sup>180</sup> The Ninth Circuit based part of its reasoning on the idea that part of Kennedy's job description was "to be a coach, mentor and role model for the student athletes."<sup>181</sup> They found that his job involved "modeling

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174. *Santa Fe Indep. Sch. Dist.*, 530 U.S. 290.

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

176. *Id.*

177. *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 290.

178. *Kennedy*, 869 F.3d at 813.

179. *Id.*

180. *Id.*

181. *Id.* at 825.

good behavior while acting in an official capacity in the presence of students and spectators.”<sup>182</sup>

The Ninth Circuit held that because Kennedy’s religious conduct took place while he was working in his official capacity as a public official and in the presence of students, his conduct was an endorsement by the State of its religious beliefs.<sup>183</sup> This reasoning and analysis by the Ninth Circuit is simply not applicable in *Kennedy*. In regard to his role as a mentor and role model for the students,<sup>184</sup> whether Kennedy is working in his official capacity or not has no practical effect whatsoever on the students when it is done outside the social convention.

In its opinion, the Ninth Circuit addresses the fact that Kennedy acknowledged that as a football coach, he was “constantly being observed by others.”<sup>185</sup> The Ninth Circuit even went so far as to say that, Kennedy’s “media appearances and prayer in the BHS bleachers (while wearing BHS apparel and surrounded by others) signal his intent to send a message to students and parents about appropriate behavior and what he values as a coach.”<sup>186</sup> By acknowledging that Kennedy is being constantly observed by others and that Kennedy conveys his values to students who witness his religious conduct, even when he is not acting in his role as a public official, the Ninth Circuit essentially voids the distinction that it is trying to create.

Ultimately, the outcome of *Kennedy v. Bremerton School District* was decided in favor of the school district because Kennedy was acting as a public employee when he prayed on the fifty-yard line immediately after football games such that his conduct was an endorsement of religion to the students.<sup>187</sup> But the Ninth Circuit also says that Kennedy’s conduct conveys his values to his students even when he is not acting in his official capacity as a public official.<sup>188</sup> Kennedy’s practice of engaging in silent prayer on the football field immediately following games has no greater effect on his students than when they see him engage in prayer at any other public establishment.

#### V. ANALYSIS OF THE PRACTICAL IMPACT OF THE *KENNEDY* DECISION IN LIGHT OF THE PROPOSED BALANCING TEST

In his brief to the Ninth Circuit, Kennedy sheds some light on what the practical impact of its holding will likely be: “[t]he district court’s holding

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182. *Id.* at 826.

183. *Kennedy*, 869 F.3d at 826.

184. *Id.* at 813.

185. *Id.* at 816.

186. *Id.* at 826.

187. *Id.* at 822.

188. *See Kennedy*, 869 F.3d at 826.

would convert *any* religious expression, however fleeting – silently praying over lunch in the cafeteria, making the sign of the cross, wearing a yarmulke or headscarf – into an unconstitutional state endorsement of religion.”<sup>189</sup> And while the prevailing law regarding prayer in public schools<sup>190</sup> “belies any notion that these may trump schoolchildren’s Establishment Clause rights,”<sup>191</sup> the Court has also held that “public employees do not surrender all their First Amendment rights by reason of their employment.”<sup>192</sup>

Throughout his time as a coach at Bremerton High School, Kennedy engaged in varying degrees of religious conduct.<sup>193</sup> For a time, prior to most games, Kennedy would lead players and coaches in a locker-room prayer.<sup>194</sup> He would participate in locker-room prayers after the games as well.<sup>195</sup> Kennedy would also pray a brief, thirty-second prayer on the fifty-yard line at the end of most games.<sup>196</sup> At first, Kennedy performed his post-game fifty-yard line prayers alone.<sup>197</sup> But part way through his first season, some of Kennedy’s players asked him if they could join in the conduct.<sup>198</sup> He told them that they could do whatever they wanted because it was a free country.<sup>199</sup> Kennedy’s post-game fifty-yard line prayers eventually turned into short motivational speeches that contained religious content and prayers.<sup>200</sup> Students, coaches, and people in attendance at the game were invited to attend Kennedy’s post-game speeches.<sup>201</sup>

The practical impact of the *Kennedy* decision is that public officials will not be able to practice their religion while they are on the job.<sup>202</sup> The court took issue with Kennedy’s silent, fifty-yard line prayers – although that conduct was hardly to the same degree of endorsing religion as was his other religious conduct (such as his locker room prayers and post-game speeches) and arguably is not violative of the Constitution.<sup>203</sup>

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189. Brief of Appellant at 15, *Kennedy v. Bremerton Sch. Dist.*, 869 F.3d 813 (9th Cir. 2017) (No. 16-35801), 2016 WL 6611220, at \*15.

190. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Engel v. Vitale*, 370 U.S. 421 (1962).

191. *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 166 (5th Cir. 1993).

192. *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006).

193. *Kennedy*, 869 F.3d at 813.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at 816.

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

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* at 813.

203. *Kennedy*, 869 F.3d at 813.

Under the test that the Ninth Circuit Court of Appeals articulated, any of the religious conduct that Kennedy engaged in, as referenced above, would be considered an endorsement and thus would not be protected by the First Amendment.<sup>204</sup> Alternatively, under the balancing test proposed in this Note, some of Kennedy's conduct would be protected while other conduct would still be considered an endorsement of religion.<sup>205</sup> Under the balancing test proposed in this Note, a court would likely find that Kennedy's conduct of engaging in a silent prayer on the fifty-yard line after a football game is conduct that is protected by the First Amendment because the social convention was severed, just like a court would likely find that a schoolteacher engaging in a silent prayer before a meal where she is acting as a lunch monitor is conduct protected by the First Amendment.<sup>206</sup> The practical impact of this proposed balancing test, in contrast to the ruling in *Kennedy*,<sup>207</sup> is that there would still be some First Amendment protection for public officials to engage in religious conduct, while still offering substantial protection for students. This test would allow the Court to ensure that "public employees do not surrender all their First Amendment rights by reason of their employment,"<sup>208</sup> while still protecting students' rights under the Establishment Clause.<sup>209</sup>

#### CONCLUSION

The Ninth Circuit's decision in *Kennedy v. Bremerton School District* allows for an untethered restriction on a public officials' First Amendment right to free speech. The current Supreme Court case law might favor the ruling by the Ninth Circuit,<sup>210</sup> but the practical implications of this holding should give the Court pause. The practical implications of the ruling by the Ninth Circuit show that the trajectory of the current Supreme Court case law regarding the protection of the free speech rights of public employees versus the protection of students under the Establishment Clause needs to be reconsidered. The *Kennedy* decision is yet another example of how current circuits (like the Third and Fifth Circuits discussed above)<sup>211</sup> are effec-

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204. *Id.*

205. See discussion *supra* Section IV.

206. See discussion *supra* Section IV.

207. *Kennedy*, 869 F.3d at 813.

208. *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006).

209. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000).

210. See *Santa Fe Indep. Sch. Dist.*, 530 U.S. 290; *Lee v. Weisman*, 505 U.S. 577 (1992); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Engel v. Vitale*, 370 U.S. 421 (1962).

211. See discussion *supra* Section III.

tuating current Supreme Court decisions in such a way that severely limits the protection of public officials' rights to free speech.<sup>212</sup>

*Kennedy* holds public employees cannot engage in religious activity while acting in their public capacity. That is not practical because it offers almost no protection for public employees.<sup>213</sup> The balancing test outlined above would enable a court to weigh the extent and degree to which a public official's religious activity violates the Establishment Clause, while also giving effect to a public official's right to practice his religion. First, the Court should look to the nature of the action by the public employee.<sup>214</sup> Second, the Court should consider whether the public official is participating in religious conduct for his sole satisfaction or whether he is participating with intent to coerce students, either explicitly or implicitly to engage in religious conduct as well.<sup>215</sup>

Prevailing law needs to be reconsidered in an attempt to find a more equitable balance between the rights of public officials to their freedom of speech and the rights of students under the Establishment Clause. The Supreme Court has a valuable opportunity, through the *Kennedy* case, to offer more protections to public officials, because *Kennedy* engaged in religious conduct at such varying degrees.<sup>216</sup> By hearing this case, the Court would be able to consider the various degrees of religious conduct that might be engaged in by public officials such that they might create a balancing test that affords public officials the opportunity to practice their beliefs without using their position to impermissibly establish a religious environment in a public school setting.

#### POST-SCRIPT

Since the composition of this Note in January 2018, *Kennedy* petitioned the Supreme Court for a writ of certiorari based on his claim that Bremerton School District violated his right to freedom of speech by prohibiting him from praying silently on the fifty-yard line after football games.<sup>217</sup> The Supreme Court denied the petition for a writ of certiorari.<sup>218</sup> In his statement respecting the denial of certiorari, Justice Alito, with whom Justice Thomas, Justice Gorsuch, and Justice Kavanaugh joined, stated that the Court's denial of certiorari does not necessarily mean that the Court

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212. *Kennedy*, 869 F.3d at 813.

213. *Id.*

214. *See* discussion *supra* Section IV.A.

215. *See* discussion *supra* Section IV.B.

216. *Kennedy*, 869 F.3d at 813.

217. *Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634 (2019).

218. *Id.*

agrees with the *Kennedy* decision as it stands.<sup>219</sup> Justice Alito stated “important unresolved factual questions would make it very difficult if not impossible at this stage to decide the free speech question that the petition asks us to review.”<sup>220</sup> Important factual questions are unresolved because the District Court failed to make any clear finding about whether Kennedy would be able to prove that the termination of his employment violated his free speech rights.<sup>221</sup> The district court did not make a clear finding about the basis of the school district’s termination of Kennedy’s employment, more specifically, whether the school district justified his termination because he neglected his duties as a football coach or because he engaged in prayer-related activities.<sup>222</sup> Justice Alito stated that instead, the court “melded the two distinct justifications” by failing to make specific factual findings supporting the existence of either justification.<sup>223</sup> Justice Alito stated that the Ninth Circuit muddled the record even more because not only did it fail to identify a clear justification for Kennedy’s loss of employment, it also enumerated Kennedy’s past prayer-related activities.<sup>224</sup>

Justice Alito stated, “the Ninth Circuit’s understanding of free speech rights of public school teachers is troubling and may justify review in the future” and “[i]f the Ninth Circuit continues to apply its interpretation of *Garcetti* in future cases involving school teachers or coaches, review by this Court may be appropriate.”<sup>225</sup> In *Garcetti v. Ceballos*, the Court held that a deputy district attorney’s speech was not protected by the First Amendment when he wrote a memorandum in which he recommended dismissal of a § 1983 case brought against the district attorney’s office.<sup>226</sup> Attorney Ceballos recommended dismissal based on purported governmental misconduct, and Ceballos’ employment was subsequently terminated.<sup>227</sup> Ceballos alleged that his employment should not have been terminated because he was engaging in protected speech.<sup>228</sup> The Court held his speech was not protected because he was making a statement pursuant to his official duties and was not speaking as a citizen for First Amendment purposes.<sup>229</sup> In his statement regarding the denial of certiorari in the *Kennedy* case, Justice Alito said that the Court has never applied such an expansive reading of the

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219. *Id.*

220. *Id.*

221. *Id.*

222. *Kennedy*, 139 S. Ct. at 634.

223. *Id.* at 636.

224. *Id.*

225. *Id.*

226. *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

227. *Id.*

228. *Id.*

229. *Id.*

*Garcetti* case and he admonished the Ninth Circuit that applying its expansive reading of *Garcetti* to future cases may invite review by the Court.<sup>230</sup>

The Court's admonishment to the Court of Appeals raises an interesting question: is the Court ready to weigh in on a case of this type? If the lower courts had made a factual finding that Kennedy had been terminated because of his exercise of religion, it is likely that the Supreme Court would have granted certiorari. The Court clearly stated that the Court of Appeals misread and misapplied its ruling in *Garcetti*,<sup>231</sup> and, therefore, one could infer that it would have granted certiorari but for the procedural defects created by the lower courts.

The balancing test proposed in this Note is an appropriate Constitutional methodology for the Court to consider. It is unlikely that the Court would impose a proverbial bright line test because of the subjective nature of the issue considered in cases like *Kennedy*<sup>232</sup> and *Garcetti*;<sup>233</sup> the balancing test proposed in this Note would provide an appropriate Constitutional analysis.

Public employees are not reposed with state authority on a continuous basis. High school students are empowered to decide whether they want to participate in certain activities, including whether they want to participate in those activities mentally or physically; students make these decisions every school day. With respect to a coach's exercise of religion, the Ninth Circuit seems to believe that the coach becomes clothed with powers that yield results that are against a student's will. The parochialism of the lower courts' reasoning and conclusion is unfortunate and not grounded in reality. A coach is not establishing or advocating for a state sponsored religion merely because he engages in silent prayer at the fifty-yard line by himself after football games. The Supreme Court seems to intimate that it agrees.

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230. *Id.*

231. *Garcetti*, 547 U.S. at 410.

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

233. *Garcetti*, 547 U.S. at 410.