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## When Speech Is Your Stock in Trade: What Kennedy v. Bremerton School District Reveals about the Future of Employee Speech and Religion Jurisprudence

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# When Speech is Your Stock in Trade: What *Kennedy v. Bremerton School District* Reveals About the Future of Employee Speech and Religion Jurisprudence

DR. BRETT GEIER\* & ANN E. BLANKENSHIP-KNOX\*

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## INTRODUCTION

Coaches play an important role in establishing a nondiscriminatory environment in public-school athletics, both on and off the field. 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. Coaches are expected to not only teach sports techniques, but also teach character, leadership, sportsmanship, and other positive character traits. In *Kennedy v. Bremerton School District*,<sup>1</sup> courts from the district level to the Supreme Court have considered how Coach Joe Kennedy's role as a coach factored into his right to pray on the 50-yard line directly following his team's high school football games.

This Article reviews *Kennedy v. Bremerton School District*, from its inception through its current status, including the significance of Justice Alito's concurring opinion issued in conjunction with the United States Supreme Court's denial of Coach Kennedy's Petition for Writ of Certiorari.<sup>2</sup> After discussing the underlying facts, Part I provides an overview and analysis of the district and circuit courts' rulings focusing particularly on the relationship between employee speech and the First Amendment religion clauses. Part II discusses the implications of Justice Alito's concurring opinion in denying Coach Kennedy's petition. And finally, Part III discusses the future of religious speech jurisprudence for public school employees, now that Justices Gorsuch and Kavanaugh are on the Supreme Court bench.

### I. THE NINTH CIRCUIT: COACH KENNEDY AS A PUBLIC EMPLOYEE UNDER THE *ENG* FACTORS

Both the Ninth Circuit and the Supreme Court's opinions in *Kennedy v. Bremerton* are important to review to fully understand how this case, or a similar case, may open the door for a significant change in speech and

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

2. *Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634 (2019) (Alito, J., concurring in denial of cert.). In his statement supporting the denial of Coach Kennedy's petition, Justice Alito was joined by Justices Thomas, Gorsuch, and Kavanaugh. *See id.*

religion jurisprudence. The Ninth Circuit's opinion,<sup>3</sup> outlined below, provides Justice Alito with a springboard for criticizing current caselaw on public employee religious speech generally.<sup>4</sup> Considering the two courts' decisions concurrently highlights how much the Supreme Court may shift its position on religion and speech in the coming terms.

#### *A. Factual Background and the District Court's Decision*

The Bremerton School District ("BSD") is a public-school district located in Kitsap County, Washington, just across the Puget Sound from Seattle. With over 5,000 students, BSD educates students from religiously diverse backgrounds.<sup>5</sup> Coach Kennedy joined the coaching staff for the Bremerton High School ("BHS") football team as an assistant coach for the varsity football team and as head coach for the junior varsity team in 2008.<sup>6</sup> During his first season, Coach Kennedy began a practice of going to the 50-yard line at the conclusion of each game, taking a knee, bowing his head, and quietly praying a "prayer of thanksgiving for player safety and sportsmanship that last[ed] approximately 15–30 seconds."<sup>7</sup> Coach Kennedy was inspired to engage in this post-game prayer after watching the Christian football film *Facing the Giants*.<sup>8</sup> Though Coach Kennedy began the post-game prayer ritual silently and independently, over time other coaches and players began to join him.<sup>9</sup> By the 2009 season, Coach Kennedy started giving short motivational speeches before his then-audible post-game prayers to a small crowd of coaches and players from BHS and sometimes players from the opposing team.<sup>10</sup>

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

4. *Kennedy*, 139 S. Ct. at 635.

5. *Kennedy*, 869 F.3d at 815. Students and families in BSD are reportedly members of the following faiths: Christianity, Judaism, Islam, Bahá'í, Buddhism, Hinduism, and Zoroastrianism. *Id.*

6. *Id.*

7. Joseph A. Kennedy, EEOC Intake Questionnaire, add. at question 5, <https://perma.cc/ZZV5-VWH4>. Note that we rely heavily on Coach Kennedy's own EEOC Complaint so as to present the facts most favorable to Coach Kennedy and thus avoid any appearance of bias. For the purposes of this Article, we give deference to the facts as presented by Coach Kennedy and his legal team, in part because they have made their official record of events available to the public; additionally, given the nature of this study, we want to present facts and legal arguments in as neutral a manner as possible.

8. Lindsay McCane, *Bremerton Football Coach Joe Kennedy Defies Orders, Prays on Field*, INQUISITOR (Oct. 20, 2015), <https://perma.cc/BP5F-RGDJ>.

9. *Kennedy*, *supra* note 7, at add., question 5.

10. *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).

At the beginning of the 2015 football season, a school district official witnessed Coach Kennedy's post-game ritual from the stands.<sup>11</sup> In response, on September 17, 2015, the BSD Superintendent sent a letter to BHS parents, faculty, and staff regarding prayer at athletic events.<sup>12</sup> In the letter, the Superintendent supported motivational talks "focusing on appropriate themes such as unity, teamwork, responsibility, safety, and endeavor," but noted that coaches and other district employees should not engage in religious expression, including prayer, with or in front of students.<sup>13</sup> He went on to assure the community that students' right to free expression of religious beliefs would be protected so long as it did not interfere with the athletic event and was "entirely and genuinely student-initiated."<sup>14</sup> Citing school board policy, the Superintendent closed by reminding the community that "the District is bound by . . . federal precedents."<sup>15</sup>

In response to the letter, Coach Kennedy stopped praying after games for four weeks.<sup>16</sup> His attorneys sent a letter to BSD officials dated October 14, 2015, informing them that Coach Kennedy would resume the post-game prayers following the October 16, 2015 homecoming game.<sup>17</sup> BSD did not respond to the letter, and Coach Kennedy made a highly-publicized return to his post-game prayers on October 16 in violation of the district policy and the September 17 directive.<sup>18</sup>

On October 23, 2015, the BSD Superintendent sent Coach Kennedy a follow-up letter indicating that the District could provide Coach Kennedy with accommodations allowing him to engage in post-game prayer, but that any such religious expressions or activities could not be readily observable by students and/or the public.<sup>19</sup> After receiving this letter, Coach Kennedy continued to lead post-game prayers following the October 23 varsity football game and the October 26 junior varsity football game, while on duty as a district employee.<sup>20</sup> On October 28, 2015, Coach Kennedy was placed on paid administrative leave, and chose not to participate in the annual evaluation process at the conclusion of the 2015 season.<sup>21</sup> In his absence, Coach

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11. See Kennedy, *supra* note 7, at exhibit B.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at add., question 5.

17. *Id.* at exhibit C, page 6.

18. *Id.* at exhibit D.

19. *Id.* at exhibit D, page 3.

20. *Id.* at exhibit E.

21. Kennedy v. Bremerton Sch. Dist., 869 F.3d 813, 819–20 (9th Cir. 2017), *cert. denied*, 139 S. Ct. 634 (2019). Coach Kennedy had previously participated in the review

Kennedy's supervisors completed their evaluation, which included a recommendation that Coach Kennedy not be rehired because he "failed to follow district policy" and "failed to supervise student-athletes after games due to his interaction with [the] media and [the] community."<sup>22</sup> The head coach of the BHS varsity football team chose not to return for the 2016–17 season; consequently, the District allowed the one-year contracts for all six of the assistant coaches to expire and opened up all seven positions for new applicants.<sup>23</sup> Coach Kennedy did not apply for a coaching position at BHS for the 2016–17 school year.<sup>24</sup>

Represented by attorneys from the First Liberty Institute, Coach Kennedy filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), claiming that BSD violated his First Amendment right to free exercise.<sup>25</sup> Before a resolution to the EEOC complaint was reached, on August 9, 2016, Coach Kennedy filed suit against BSD "to vindicate his constitutional and civil rights to act in accordance with his sincerely held religious beliefs by offering a brief, private prayer of thanksgiving at the conclusion of BHS football games."<sup>26</sup> In the Complaint, he alleged that BSD violated his rights to free speech and free exercise of religion,<sup>27</sup> stating,

[o]n its face, BSD's policy would prohibit all on-duty school employees, while in view of any student or member of the community, from making the sign of the cross, praying towards Mecca, or wearing a yarmulke, headscarf, or a cross. After all, each of those actions is "demonstrative" religious expression and would be interpreted as such.<sup>28</sup>

Coach Kennedy sought injunctive relief, requesting an order to require "BSD to (1) cease discriminating against him in violation of the First Amendment, (2) reinstate him as a BHS football coach, and (3) allow him

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process and had generally received positive evaluations. *Id.* at 820. In this District, every employee was evaluated annually, and they were invited to participate in that evaluation process. *See id.* While employee participation was encouraged, employees ultimately decided if they wanted to participate. *See id.*

22. *Id.* (alteration in original) (internal quotation marks omitted).

23. *Id.*

24. *Id.*

25. Geier & Blankenship, *supra* note 10, at 417.

26. *Id.* at 418 (internal quotation marks omitted).

27. Complaint at 3, Kennedy v. Bremerton Sch. Dist., No. 3:16-cv-05694 (W.D. Wash. Aug. 9, 2016).

28. *Id.* Note that lower courts have upheld state statutes prohibiting teacher's religious expression, including religious dress, while teaching. *See generally* United States v. Bd. of Educ., 911 F.2d 882 (3rd Cir. 1990); Cooper v. Eugene Sch. Dist. No. 4J, 723 P.2d 298 (Or. 1986).

to kneel and pray on the fifty-yard line immediately after BHS football games.”<sup>29</sup> The United States District Court for the Western District of Washington denied Coach Kennedy’s request for a preliminary injunction and concluded that he was unlikely to be successful in his First Amendment retaliation claim based on an application of a five-prong framework laid out in *Eng v. Cooley*.<sup>30</sup> Specifically, the court concluded that Coach Kennedy was speaking as a public employee, not a private individual, when he conducted his post-game prayers and that the District was justified in its attempts to avoid violating the Establishment Clause.<sup>31</sup> Coach Kennedy appealed the decision to the Ninth Circuit Court of Appeals.<sup>32</sup>

### B. *The Ninth Circuit’s Rationale*

The Ninth Circuit reviewed the district court’s application of the five-part framework for First Amendment retaliation cases set forth in *Eng v. Cooley* de novo.<sup>33</sup> To succeed in his retaliation claim under the *Eng* framework,<sup>34</sup> Coach Kennedy would have to show that “(1) he spoke on a matter of public concern, (2) he spoke as a private citizen rather than a public employee, and (3) the relevant speech was a substantial or motivating factor in the adverse employment action.”<sup>35</sup> If Coach Kennedy could establish the first three prongs, then the State would have to demonstrate that “(4) it had an adequate justification for treating [Coach] Kennedy differently from other members of the general public, or (5) it would have taken the adverse employment action even absent protected speech.”<sup>36</sup>

29. *Kennedy*, 869 F.3d at 821.

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

31. *Kennedy*, 869 F.3d at 822–25.

32. Notice of Appeal at 2, *Kennedy v. Bremerton Sch. Dist.*, No. 3:16-cv-05694 (W.D. Wash. Oct. 3, 2016). In his request for a preliminary injunction, Coach Kennedy sought a court order requiring BSD to “cease its discrimination against him on the basis of his brief, private religious expression.” *Id.*

33. *Kennedy*, 869 F.3d at 821; see *Eng*, 552 F.3d at 1070–72 (9th Cir. 2009). The Court of Appeals reviewed the District Court opinion for abuse of discretion. See *Harris v. Bd. of Supervisors*, 366 F.3d 754, 760 (9th Cir. 2004). “The district court necessarily abuses its discretion when it bases its decision on an erroneous legal standard or on clearly erroneous findings of fact.” *Id.* (internal quotation marks omitted). Since all parties appeared to have agreed on the basic facts of the case, the Court of Appeals focused on the underlying issues of law de novo. *Kennedy*, 869 F.3d at 822.

34. In order to succeed, “all the factors are necessary, in the sense that failure to meet any one of them is fatal to the plaintiff’s case.” *Dahlia v. Rodriguez*, 735 F.3d 1060, 1067 n.4 (9th Cir. 2013) (en banc).

35. *Kennedy*, 869 F.3d at 822.

36. *Id.*

The parties agreed on three of the five parts of the framework: that Coach Kennedy spoke on a matter of public concern (*Eng* factor one), that his speech was the motivating factor in its decision for the adverse employment action (placing Coach Kennedy on leave) (*Eng* factor three), and that BSD would not have placed Coach Kennedy on leave had he not engaged in the speech (*Eng* factor five).<sup>37</sup> Therefore, the court only had to consider the second and fourth *Eng* factors.<sup>38</sup>

*1. Eng Factor Two: Speaking as a Private Citizen or Public Employee*

In analyzing whether Coach Kennedy spoke as a private citizen or an employee, the Ninth Circuit relied heavily on the holdings in *Garcetti v Ceballos*,<sup>39</sup> *Pickering v. Board of Education of Township High School District 205*,<sup>40</sup> and *Johnson v. Poway Unified School District*.<sup>41</sup> Public employees exist in a tenuous place between public and private. In *Garcetti*, the Ninth Circuit emphasized that “public employees do not surrender all their First Amendment rights by reason of their employment,”<sup>42</sup> but rather they retain individual rights “in certain circumstances[] to speak as a citizen addressing matters of public concern.”<sup>43</sup> The *Garcetti* court went on to note, “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”<sup>44</sup>

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37. *Id.*

38. *Id.*

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

40. *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

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

42. *Garcetti*, 547 U.S. at 417. The *Garcetti* Court expanded upon the Court’s ruling in *Pickering*, in which the Court held that a school district violated a teacher’s First Amendment right to free speech when it fired the teacher for writing a letter to the editor of a local newspaper criticizing the school board’s handling of a funding issue. *Pickering*, 391 U.S. at 564–65. The *Pickering* Court concluded that Pickering’s letter constituted speech made by a private citizen, not as an employee of the school district because it had not “impeded [his] proper performance of his daily duties in the classroom” or “interfered with the regular operation of the schools generally.” *Id.* at 572–73. The Court found that the school had no greater interest in controlling Pickering’s speech than it did controlling similar speech made by any other citizen; therefore, the speech could not legally serve as the basis for Pickering’s termination. *Id.* at 574.

43. *Garcetti*, 547 U.S. at 417.

44. *Id.* at 421.

Whether a speaker acted as a public employee or a private citizen in a First Amendment retaliation claim is a mixed question of law and fact.<sup>45</sup> In *Kennedy*, the Ninth Circuit focused its analysis on two main issues: (1) the scope of the speaker's job; and (2) the nature of the speaker's work.<sup>46</sup>

A factual determination must first be made as to the scope and content of a plaintiff speaker's job responsibilities.<sup>47</sup> The court may consider both formal and informal evidence of the scope of the speaker's job responsibilities.<sup>48</sup> While formal job descriptions and where the speech took place may be helpful, they are not dispositive in determining the legal nature of the speech in question.<sup>49</sup> The *Garcetti* Court instructs that it is necessary to look beyond formal job requirements and focus on the duties actually performed:

The proper inquiry is a practical one. Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes.<sup>50</sup>

In addition to the scope of the job duties, a court may also need to consider the nature of the work itself. In *Johnson*, the Ninth Circuit Court of Appeals reviewed a retaliation case brought by a public-school teacher, Bradley Johnson, who decorated his classroom with two large banners conveying religious messages.<sup>51</sup> The court determined that while the content

45. *Posey v. Lake Pend Oreille Sch. Dist.*, No. 84, 546 F.3d 1121, 1129 (9th Cir. 2008).

46. *Kennedy v. Bremerton Sch. Dist.*, 869 F.3d 813, 822 (9th Cir. 2017), *cert denied*, 139 S. Ct. 634 (2019).

47. *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 966 (9th Cir. 2008). Despite Coach Kennedy's insistence, the circuit court held the trial court did not apply a "bright-line temporal test" to the speech of on-the-job public employees. *Kennedy*, 869 F.3d at 829. The court determined Kennedy's status as a speaker for purposes of the *Eng* framework based on the "totality of the circumstances." *Id.*

48. *See Johnson*, 658 F.3d at 966.

49. *See Dahlia v. Rodriguez*, 735 F.3d 1060, 1069 (9th Cir. 2013) (en banc) (noting "that various easy heuristics are insufficient for determining whether an employee spoke pursuant to his professional duties").

50. *Garcetti v. Ceballos*, 547 U.S. 410, 424–25. The second *Eng* factor "requires a practical, fact-specific inquiry, and [] courts may not rely solely on a generic job description." *Kennedy*, 869 F.3d at 825 n.7.

51. *Johnson*, 658 F.3d at 965. Both banners measured approximately 2 feet by 7 feet. *Id.* at 958. The first banner read "IN GOD WE TRUST," "ONE NATION UNDER GOD," "GOD BLESS AMERICA," and "GOD SHED HIS GRACE ON THEE." *Id.* (internal quotation marks omitted). The second banner read "All men are created equal, they are endowed by their CREATOR." *Id.* (internal quotation marks omitted). The school had a long-

of the speech was unarguably a matter of public concern, Johnson's speech was still that of a public employee and not of a private citizen because of the nature of his job as an educator.<sup>52</sup> In examining the nature of the teaching profession, the court found that "[e]xpression is a teacher's stock in trade, the commodity [he] sells to [his] employer in exchange for a salary."<sup>53</sup> Therefore, the *Johnson* court concluded that it was irrelevant that the content of the banners was outside of the bounds of Johnson's curriculum.<sup>54</sup> As a teacher, his professional speech could extend outside of the classroom and outside of the "narrow topic of curricular instruction."<sup>55</sup>

The *Johnson* court also considered whether speech at issue was made possible by the nature of Johnson's position or if it could have been made in the same manner by any non-employee citizen.<sup>56</sup> The court concluded that the answer was clear; Johnson's speech was only possible because he was a teacher as "[a]n ordinary citizen could not have walked into Johnson's classroom and decorated the walls as he or she saw fit, anymore than an ordinary citizen could demand that students remain in their seats and listen to whatever idiosyncratic perspective or sectarian viewpoints he or she wished to share."<sup>57</sup> It further noted, "Johnson took advantage of his position to press his particular views upon the impressionable and 'captive' minds before him."<sup>58</sup> Applying the standard set forth in *Pickering*,<sup>59</sup> the *Johnson* court held, "because of the position of trust and authority [teachers] hold and the impressionable young minds with which they interact, teachers necessarily act as teachers . . . when [1] at school or a school function, [2] in

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standing policy allowing teachers to decorate their classrooms subject to specific limitations. *Id.* at 967. The court determined that the particular religious speech did not fall "squarely within the scope of his position" as a math teacher. *Id.* However, it went on to note that "as a practical matter, we think it beyond possibility for fairminded [sic] dispute that the scope and content of [Johnson's] job responsibilities did not include speaking to his class in his classroom during class hours." *Id.* (alternation in original) (emphasis omitted) (internal quotation marks omitted).

52. *Id.* at 967.

53. *Id.* (first alteration in original) (internal quotation marks omitted).

54. *Id.* at 967 n.13.

55. *Id.* at 967–68. Because the banners were a form of communication to his students, the court concluded that it was "beyond possibility for a fairminded [sic] dispute that the scope and job content of [Johnson's] job responsibilities did not include speaking to his class in his classroom during class hours." *Id.* at 967 (alternation in original) (internal quotation marks omitted).

56. *Id.*

57. *Id.* at 968.

58. *Id.*

59. *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

the general presence of students, [or] [3] in a capacity one might reasonably view as official.”<sup>60</sup>

In *Kennedy*, the Ninth Circuit considered both the scope of Coach Kennedy’s job and the nature of his work—applying these principles to Coach Kennedy’s 50-yard line prayer, the court concluded that he “spoke as a public employee, and not as a private citizen.”<sup>61</sup> The court first noted that the speech at issue was conducted directly after football games, on the 50-yard line, in front of all of the students and parents.<sup>62</sup> When offered accommodations to either pray directly following the game in the privacy of the locker room, or on the 50-yard line after the stadium was empty of students and their parents, Coach Kennedy refused, implying that “it is essential that his speech be delivered in the presence of students and spectators.”<sup>63</sup> The court also found significance in the fact that the 50-yard line prayer was “directed at least in part to the students and surrounding spectators; it is not solely speech directed to God.”<sup>64</sup> Therefore, the court concluded that the essential question in the case was “whether this demonstrative communication to students and spectators is itself ordinarily within the scope of [Coach Kennedy’s] duties.”<sup>65</sup> To answer this question, the court had to determine the nature and scope of Coach Kennedy’s job duties and the constitutional significance of Coach Kennedy’s speech given those job duties.

As a coach, Kennedy’s job was “multi-faceted.”<sup>66</sup> In addition to his responsibilities supervising students on the field and in the locker room, teaching the fundamental techniques of football, and caring for his players’ safety, Coach Kennedy also had a duty to serve as a role model for students.<sup>67</sup> His employment contract required that he endeavor to create strong student-athletes, but perhaps more importantly, “good human beings.”<sup>68</sup> Coach Kennedy was expected to communicate a positive message through his speech and through his own conduct.<sup>69</sup> Through his actions and court

60. *Johnson*, 658 F.3d at 968.

61. *Kennedy v. Bremerton Sch. Dist.*, 869 F.3d 813, 825 (9th Cir. 2017), *cert denied*, 139 S. Ct. 634 (2019).

62. *Id.*

63. *Id.*

64. *Id.* (emphasis omitted).

65. *Id.* (internal quotation marks omitted).

66. *Id.* at 827.

67. *Id.* at 825. The court noted that Coach Kennedy engaged in all of these activities “on school property, wearing BHS-logged attire, while on duty as a supervisor, and in the most prominent position on the field, where he knew it would be inevitable that students, parents, fans, and occasionally the media, would observe his behavior.” *Id.* at 827.

68. *Id.* at 825–26 (internal quotation marks omitted).

69. *Id.* at 826.

filings, the Ninth Circuit Court of Appeals concluded that Coach Kennedy “understood that demonstrative communication fell within the compass of his professional obligations.”<sup>70</sup> As such, his role as a coach was “akin to being a teacher.”<sup>71</sup> As a respected adult chosen to teach student athletes on the field and in the locker room, he was “clothed with the mantle of one who imparts knowledge and wisdom.”<sup>72</sup> Like a teacher, expression was an essential part of Coach Kennedy’s “stock in trade.”<sup>73</sup> As such, “[w]hen acting in an official capacity in the presence of students and spectators, [Coach] Kennedy was also responsible for communicating the District’s perspective on appropriate behavior through the example set by his own conduct.”<sup>74</sup>

Given that expression fell within the scope of Coach Kennedy’s job duties and professional obligations, the court next turned to the constitutional significance of Coach Kennedy’s 50-yard line prayer immediately after games, conducted within view of parents, students, and other spectators.<sup>75</sup> The court concluded, “[Coach] Kennedy was sending a message about what he values as a coach, what the District considers appropriate behavior, and what students should believe, or how they ought to behave.”<sup>76</sup> The court determined that Coach Kennedy was intentional in his speech.<sup>77</sup> All of the post-game prayers at issue in this case occurred at a school function, in the presence of students and their families, and in a capacity that could only be perceived as official.<sup>78</sup> In this case, Coach Kennedy had access to the field during and after the game “by virtue of his position as a

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70. *Id.*

71. *Id.* See *Grossman v. S. Shore Pub. Sch. Dist.*, 507 F.3d 1097, 1100 (7th Cir. 2007) (“Staff that interact with students play a role similar to teachers.”).

72. *Kennedy*, 869 F.3d at 826 (quoting *Pelozo v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 522 (9th Cir. 1994)). Coach Kennedy’s influence over his students was evidenced by the fact that “BHS players did not pray on their own in [Coach] Kennedy’s absence.” *Id.*

73. *Kennedy*, 869 F.3d at 826 (quoting *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 967 (9th Cir. 2011)).

74. *Id.* at 827.

75. *Id.*

76. *Id.*

77. *See id.* Coach Kennedy indicated that the location and the timing of his speech were essential elements of his claim. He insisted that he had to pray on the field on which the game was played and that it had to be directly after the game concluded as part of his sincerely held religious belief. The court noted, “[t]hese features confirm that the relevant conduct—[Coach] Kennedy’s demonstrative speech to students and spectators—owes its existence to [Coach] Kennedy’s position with the District.” *Id.* at 827–28 n.8.

78. *Id.* at 827 (explaining that if the “speech ‘owes its existence’ to his position as a teacher, then [the speaker] spoke as a public employee, not as a citizen, and our inquiry is at an end.” (quoting *Johnson*, 658 F.3d at 966)); *see also* *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

coach.”<sup>79</sup> Other groups who tried to access the field directly after the games were denied access because the field was not an open forum.<sup>80</sup> Furthermore, Coach Kennedy’s speech only carried “instructive force due to his position as coach.”<sup>81</sup> And the court noted that expression, both verbal and expressive, was part of Coach Kennedy’s “stock in trade” as a coach.<sup>82</sup> The court determined that Coach Kennedy “took advantage of his position to press his particular views upon the impressionable and captive minds before him.”<sup>83</sup> Thus, the court held that Coach Kennedy spoke as an employee of the school district, not as a private citizen, and that his speech was not protected under the First Amendment.<sup>84</sup>

## 2. *Eng Factor Four: Adequate Justification for Differentiated Treatment*

Circuit Judge Milan Dale Smith Jr. wrote a concurring opinion in which he extended the analysis of the *Eng* framework to consider the fourth factor, looking at whether attempting to avoid violating the Establishment Clause was an adequate justification for BHS’s restriction on employee speech.<sup>85</sup> Under the fourth *Eng* factor, “the District can escape potential

79. *Kennedy*, 869 F.3d at 827.

80. *Id.* Representatives of a Satanist group attempted to “conduct ceremonies on the field after [a] [BHS] football game” but were denied access. *Id.* (alterations in original).

81. *Id.* at 827–28 n.8. “Surely, if an ordinary citizen walked onto the field and prayed on the fifty-yard line, the speech would not communicate the same message because the citizen would not be clothed with [Coach] Kennedy’s authority.” *Id.*

82. *Id.* at 826 (quoting *Johnson*, 658 F.3d at 967). The court dismissed Coach Kennedy’s assertion that his speech was “private speech” because it did not relate to his job and/or was not “coaching.” *Id.* at 830. The court noted that

where, as here, a teacher speaks at a school event in the presence of students in a capacity one might reasonably view as official, we have rejected the proposition that a teacher speaks as a citizen simply because the content of his speech veers beyond the topic of curricular instruction, and instead relates to religion.

*Id.*

83. *Id.* at 828 (quoting *Johnson*, 658 F.3d at 968).

84. *Id.* at 830. The court noted that “[b]ecause his demonstrative speech fell within the scope of his typical job responsibilities, he spoke as a public employee, and the District was permitted to order [Coach] Kennedy not to speak in the manner he did.” *Id.* at 828; see *Johnson*, 658 F.3d at 967–70; *Tucker v. Cal. Dep’t of Educ.*, 97 F.3d 1204, 1213 (9th Cir. 1996) (“A teacher appears to speak for the state when he or she teaches; therefore, the department may permissibly restrict such religious advocacy.”). Because Coach Kennedy’s speech was not protected speech under the First Amendment, the court majority found it unnecessary to consider BHS’s right to restrict speech to avoid violating the Establishment Clause (*Eng* factor four). *Kennedy*, 869 F.3d at 822, 831.

85. *Kennedy*, 869 F.3d at 831 (Smith, J., concurring).

liability if it can show that it had adequate justification for treating Coach Kennedy differently from other members of the general public.”<sup>86</sup>

Judge Smith concluded that BSD satisfied the fourth *Eng* factor; the District had “justifiably restricted [Coach] Kennedy’s speech to avoid violating the Establishment Clause.”<sup>87</sup> Judge Smith noted that

[t]he record reflects . . . that Coach Kennedy cared deeply about his students, and that his conduct was well-intentioned and flowed from his sincerely-held religious beliefs. Given those factors, it is worth pausing to remember that the Establishment Clause is designed to *advance* and *protect* religious liberty, not to injure those who have religious faith.<sup>88</sup>

However, despite his good intentions, Coach Kennedy’s prayer constituted government speech that threatened students’ freedom of belief and worship.<sup>89</sup> Specifically, Judge Smith concluded, “an objective BHS student familiar with the history and context of [Coach] Kennedy’s conduct would perceive his practice of kneeling and praying on the fifty-yard line immediately after games in view of students and spectators as District endorsement of religion or encouragement of prayer.”<sup>90</sup> Judge Smith concluded his concurring opinion by noting, “[t]hankfully, we no longer resolve these

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86. *Id.* at 832. “[A] state interest in avoiding an Establishment Clause violation ‘may be characterized as compelling,’ and therefore may justify content-based discrimination.” *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001) (quoting *Widmar v. Vincent*, 454 U.S. 263, 271 (1981)); *see also* *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 522 (9th Cir. 1994) (“The school district’s interest in avoiding an Establishment Clause violation trumps [a teacher’s] right to free speech.”).

87. *Kennedy*, 869 F.3d at 834. The parties disagree as to whether the District had to show an actual Establishment Clause violation as in *Good News Club*, 533 U.S. at 112–13, or if it could rely merely on its legitimate interest in avoiding an Establishment Clause violation as in *Lamb’s Chapel v. Center. Moriches Union Free School District*, 508 U.S. 384, 394 (1993). *Kennedy*, 869 F.3d at 832 n.1. Judge Smith does not state which approach would be correct under the law but does conclude that if Coach Kennedy resumed his post-game prayers, it would constitute a violation of the Establishment Clause. *Id.*; *see* *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 305 (2000) (holding that based on the totality of the circumstances, a court may find an Establishment Clause violation based on a district policy that “involves both perceived and actual endorsement of religion”).

88. *Kennedy*, 869 F.3d at 837.

89. *Id.* at 839.

90. *Id.* at 834. *See also id.* (“If [Coach] Kennedy’s practice were to resume, an objective student would observe a public-school employee in BHS-logoed attire demonstratively praying in front of ‘a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property.’” (quoting *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 307)).

conflicts with violence, but instead use courts of law, where parties make arguments in free and open hearings to address their differences.”<sup>91</sup>

## II. SIGNIFICANCE OF JUSTICE ALITO’S CONCURRENCE: OPENING A DOOR FOR THE NEW JUSTICES

Coach Kennedy appealed the Ninth Circuit Court’s decision to the Supreme Court of the United States.<sup>92</sup> On January 22, 2019, the Court denied Coach Kennedy’s Petition for Writ of Certiorari.<sup>93</sup> While the petition was denied, Justice Alito, joined by Justices Thomas, Gorsuch, and Kavanaugh, argued that the denial of certiorari “does not signify that the Court necessarily agrees with the [Ninth Circuit’s] decision . . . . In this case, 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>94</sup> Justice Alito’s concurrence is a multi-page critique of the current state of Establishment Clause jurisprudence, particularly as it applies to religious speech of public employees.<sup>95</sup>

Justice Alito first critiqued how the district and circuit courts handled Coach Kennedy’s case. He noted that “[w]hen the case was before the [d]istrict [c]ourt, the court should have made a specific finding as to what petitioner was likely to be able to show regarding the reason or reasons for his loss of his employment.”<sup>96</sup> If the district court had determined that Coach Kennedy was likely fired for his neglect of duties, such as failing to adequately supervise players, then his free speech claim would likely not have been successful.<sup>97</sup> However, if the district court determined that Coach Kennedy would likely have been able to prove that he was not on duty when the prayer took place or that it took place during a time “when it would have been permissible for him to engage briefly in other private conduct, say, calling home or making a reservation for dinner[,]” then “[Coach

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91. *Id.* at 839.

92. Petition for Writ of Certiorari, *Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634 (2019) (No. 18-12).

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

94. *Id.* at 635 (Alito, J., concurring). Justice Alito notes that at this point in the case, to be entitled to an injunction, Coach Kennedy would have to show “that he was likely to prevail on his claim that the termination of his employment violated his free speech rights, and in order to answer that question it is necessary to ascertain what he was likely to be able to prove regarding the basis for the school’s action.” *Id.*

95. *See generally id.*

96. *Id.* at 635.

97. *Id.*

Kennedy’s] free speech claim would have [had] far greater weight.”<sup>98</sup> However, Justice Alito complained that neither the district court nor the Ninth Circuit clearly identified what Coach Kennedy was likely able to prove.<sup>99</sup> Given the unresolved issues of fact involved in the case, the Supreme Court could not grant discretionary review.<sup>100</sup> Justice Alito noted that while “petitioner’s free speech claim may ultimately implicate important constitutional issues . . . [,] review of petitioner’s free speech claim is not warranted at this time.”<sup>101</sup> Justice Alito seems to be sending a very specific message: he believed there were important issues that needed to be decided here and that this case might well come back for further review in the future, once the factual issues are resolved.<sup>102</sup> Justice Alito’s concurrence reads like an invitation for Coach Kennedy to appeal any final decisions in this case to the Supreme Court if he is ultimately unsuccessful in the district and circuit courts.

In Section II of the concurring opinion, Justice Alito took aim more generally at the current state of Establishment Clause jurisprudence, particularly as the Clause has been applied by the Ninth Circuit Court of Appeals.<sup>103</sup> Specifically, he took issue with the Ninth Circuit’s application of the *Garcetti v. Ceballos*<sup>104</sup> decision—calling it “highly tendentious.”<sup>105</sup> Justice Alito characterized the Ninth Circuit’s ruling as permitting the firing of “public school teachers and coaches . . . if they engage in any expression that the school does not like while they are on duty” and that “teachers and coaches . . . [are 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

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98. *Id.* at 635–36.

99. *Id.* at 636. Justice Alito argued that the Ninth Circuit was particularly imprecise regarding what Coach Kennedy would likely be able to prove. *Id.* He noted that the Ninth Circuit focused more on Coach Kennedy’s “prayer-related activities over the course of several years, including conduct in which he engaged as a private citizen, such as praying in the stands as a fan after he was suspended from his duties.” *Id.*

100. *Id.* Justice Alito argued that  
if [the] case were before us as an appeal within our mandatory jurisdiction, our clear obligation would be to vacate the decision below with instructions that the case be remanded to the District Court for proper application of the test for a preliminary injunction, including a finding on the question of the reason or reasons for petitioner’s loss of employment.

*Id.*

101. *Id.*

102. *See id.*

103. *See id.*

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

105. *Kennedy*, 139 S. Ct. at 636.

students.”<sup>106</sup> Under this interpretation of *Garcetti*, a teacher bowing his or her head in prayer before lunch when visible to students would violate the Establishment Clause.<sup>107</sup> Justice Alito argued the Supreme Court did not intend or promote this interpretation of *Garcetti*.<sup>108</sup> While *Garcetti* does allow an employer to regulate employee speech associated with his or her job duties, an employer may not create “excessively broad job descriptions” in an effort to convert private speech to public speech.<sup>109</sup> Justice Alito warned that if the Ninth Circuit continues to apply *Garcetti* in this manner in future public school employee speech cases, employee speech at public schools may be “appropriate” for Supreme Court review.<sup>110</sup>

In the same section, Justice Alito also took issue with how the Ninth Circuit Court of Appeals has applied the *Garcetti* decision to the specific facts in this case.<sup>111</sup> He noted, “[w]hat is perhaps most troubling . . . is language that can be understood to mean that a coach’s duty to serve as a good role model requires the coach to refrain from any manifestation of religious faith—even when the coach is plainly not on duty.”<sup>112</sup> Justice Alito took particular issue with the Ninth Circuit’s interpretation of Coach Kennedy’s media appearances and prayers in the bleachers while he was on suspension.<sup>113</sup> He observed that the Ninth Circuit interpreted Coach Kennedy’s conduct as a signal of “his intent to send a message to students and parents about appropriate behavior and what he values as a coach.”<sup>114</sup> Justice Alito argued that “[t]he suggestion that even while off duty, a teacher or coach cannot engage in any outward manifestation of religious faith is remarkable.”<sup>115</sup>

While Justice Alito’s perceived restriction on private speech might be unacceptably burdensome on public school employees, he seems to have overlooked some facts in the case or to have interpreted them in a light more favorable to Coach Kennedy. Coach Kennedy’s media appearances and prayers in the bleachers might not be interpreted by others as disconnected from his work for the District. While he was not being paid at the time of

106. *Id.*

107. *See id.* Justice Alito goes on to further speculate that “a school could also regulate what teachers do during a period when they are not teaching by preventing them from reading things that might be spotted by students or saying things that might be overheard.” *Id.*

108. *Id.*

109. *Id.* (quoting *Garcetti*, 547 U.S. at 424).

110. *Id.* at 636–37.

111. *See id.* at 637.

112. *Id.*

113. *Id.*

114. *Id.* (quoting *Kennedy v. Bremerton Sch. Dist.*, 869 F.3d 813, 826 (9th Cir. 2017)).

115. *Id.*

his media appearances, the facts seem to indicate that Coach Kennedy had access to such a public platform as a direct result of his employment with BSD and that a reasonable observer could still attribute his speech to the District.<sup>116</sup> Certainly, these are facts that must be resolved by the trier-of-fact.<sup>117</sup>

In Section III of his concurring opinion, Justice Alito issued a reminder that the petition under consideration was based only on Coach Kennedy's free speech claims and that Coach Kennedy still had active claims under the Free Exercise Clause of the First Amendment and Title VII of the Civil Rights Act of 1964.<sup>118</sup> With an eye on the horizon for cases that allow the Court to reconsider some key Free Exercise Clause rulings, Justice Alito listed two opinions that might be ripe for reconsideration: *Employment Division, Department of Human Resources of Oregon v. Smith* and *Trans World Airlines, Inc. v. Hardison*.<sup>119</sup> In *Trans World Airlines, Inc.*,<sup>120</sup> the Court limited Title VII's requirement of employers' accommodation of religious practice to those that have only a *de minimis* burden.<sup>121</sup> Justice Alito concludes by noting that, "[i]n this case . . . we have not been asked to revisit those decisions."<sup>122</sup> The way that this section is constructed, with these two cases which have seemingly very little to do with *Kennedy* highlighted in the last paragraph, seems to invite challenges to those particular cases.

Justice Alito's opinion leaves many doors open for those who wish to challenge the Court's jurisprudence on religious expression and speech in public schools, particularly by employees, and for direct challenges to the *Employment Division* and *Trans World Airlines* cases. Any significant change in any of these areas could have wide-spread implications for all public employers. Preparing for what might be coming, considering the new Court membership, is especially timely.

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

117. *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1129 (9th Cir. 2008) (noting that "the determination whether the speech in question was spoken as a public employee or a private citizen presents a mixed question of fact and law."). The *Posey* court goes on to note that "[f]acts that can be 'found' by 'application of . . . ordinary principles of logic and common experience . . . are ordinarily entrusted to the finder of fact'" and that "the scope and content of a plaintiff's job responsibilities can and should be found by a trier of fact through application of these principles." *Id.* (internal citations omitted).

118. *Kennedy*, 139 S. Ct. at 637.

119. *Id.* at 637 (citing *Emp't Div. v. Smith*, 494 U.S. 872 (1990); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977)).

120. *Trans World Airlines, Inc.*, 432 U.S. at 63.

121. *Id.* at 84.

122. *Kennedy*, 139 S. Ct. at 637.

As Coach Kennedy's case demonstrates, the ability for an individual to exercise his or her right of religious expression in public schools remains a significant point of contention for both sides of the issue. Over the past decade, the membership of the Court has continued to change, shifting slightly left or right with each appointment.<sup>123</sup> However, with Justice Kavanaugh taking Justice Kennedy's seat, the pendulum may swing in a way that has a noticeable impact.<sup>124</sup> As Justice Alito implies in his concurring opinion, there may be a greater willingness of the Court to reexamine and modify the guidelines related to public prayer. Examining how Justices Gorsuch and Kavanaugh have addressed Establishment Clause cases in the past provides insight into how they might rule if *Kennedy*, or a similar case involving public school prayer, comes back up to the Supreme Court on appeal.

### III. JUSTICES GORSUCH AND KAVANAUGH TAKE THE HELM: THE FUTURE OF RELIGIOUS SPEECH JURISPRUDENCE IN PUBLIC SCHOOLS

President Trump's nominations and subsequent confirmations of Justices Neil Gorsuch (April 2017) and Brett Kavanaugh (October 2018) set the stage for potential reversals of caselaw dictating how public schools have balanced the restrictions associated with the Establishment Clause with rights guaranteed by the Free Exercise Clause.<sup>125</sup> As evidenced below, Justices Gorsuch and Kavanaugh's prior opinions illustrate their willingness to consider prayer as part of the public-school experience. Justices Gorsuch and Kavanaugh subscribe to the notion that in many instances the Court has chilled individual religious rights in public schools by promoting avoidance of violating the Establishment Clause to the detriment of the Free Exercise Clause.

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123. Scholars previously noted the composition of the Court can greatly affect religious speech jurisprudence. For example, in a 2008 analysis of the *Santa Fe Independent School District v. Doe*, 503 U.S. 290 (2000), Erwin Chemerinsky aptly noted that the affirmation of the ban on prayer at public school events was strong, despite the changes in the composition of the Court that preceded the *Santa Fe* ruling that shifted the collective political ideology of the Court to the right. Erwin Chemerinsky, *The Story of Santa Fe Independent School District v. Doe: God and Football in Texas*, in *EDUCATION LAW STORIES* 332-33 (Michael A. Olivas & Ronna Greff Schneider eds. 2008).

124. See, e.g., Matthew C. Turk & Karen E. Woody, *Justice Kavanaugh, Lorenzo v. SEC, and the Post-Kennedy Supreme Court*, 71 ADMIN. L. REV. 193 (2019); see generally Elliott Ash & Daniel L. Chen, *What Kind of Judge is Brett Kavanaugh?*, 2018 CARDOZO L. REV. De Novo 70 (2018) (discussing the conservative nature of Justice Kavanaugh based on quantitative analysis).

125. *Supreme Court Nominations (Present-1789)*, U.S. SENATE, <https://perma.cc/58R5-L7K9>.

### A. *The Ghost of Antonin Scalia*

The judicial philosophies of the late Justice Antonin Scalia have become standard conservative positions regarding prayer in public schools. Without a majority of like-minded jurists, Justice Scalia's dicta on the Establishment Clause did not make up the majority of the court in his lifetime. Noteworthy was Justice Scalia's view that the Founders of the nation were prominent Christians who created a country that intended to embed religion, specifically Christianity, into all private, and more importantly, public activities.<sup>126</sup> Furthermore, he argued that the Framers did not wish to establish an impermeable wall separating church from state as Thomas Jefferson described and has become engrained in public prayer cases.<sup>127</sup> Secondly, Justice Scalia discarded the notion that the government must be neutral in its capacity to permit religion in the public square.<sup>128</sup> Lastly, was Justice Scalia's open vitriol toward the *Lemon* test,<sup>129</sup> which controlled Establishment Clause cases for a lengthy period until it began to wane in the 1980s. Justice Scalia was generally "unsympathetic to claims that government action had unlawfully aided religion."<sup>130</sup> In fact, in his three decades on the Court, "[he] never wrote or joined an opinion that found a government authority had violated the Establishment Clause."<sup>131</sup> Justice Scalia was an active participant in religious freedom cases, with his most notable dissenting opinions critiquing majority opinions that used the Establishment Clause to invalidate legislative accommodations of religion and public expressions of faith.<sup>132</sup>

Justice Scalia provided a clear insight into many of his judicial philosophies in his dissents on Establishment Clause violation cases. The cases most prominent to defining his Establishment Clause jurisprudence are *Lee v. Weisman* (1992), *Lamb's Chapel v. Center Moriches Union Free School*

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126. 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, 1111–14 (2006).

127. See generally *id.*; see also Jay Schlosser, *The Establishment Clause and Justice Scalia: What the Future Holds for Church and State*, 63 NOTRE DAME L. REV. 380, 385–92 (1988).

128. See Colby, *supra* note 126 at 1122–23.

129. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (holding government actions or practices violate the Establishment Clause if they: (1) have a sectarian purpose, and (2) advance or impede religion, or create excessive government entanglement with religion).

130. REGNERY PUB., *SCALIA'S COURT: A LEGACY OF LANDMARK OPINIONS AND DISSENTS* 277 (Kevin A. Ring, ed., 2016).

131. *Id.*

132. *Id.* at 278.

*District* (1993), and *McCreary County v. ACLU* (2005).<sup>133</sup> Within these dissents, Scalia created a legal calculus for addressing Establishment Clause violations. His dissenting opinion in *Lee v. Weisman*<sup>134</sup> is no exception.

The dispute in *Lee v. Weisman* arose out of a challenge to a Rhode Island public school system's practice of inviting members of the clergy to offer prayers at middle and high school graduation ceremonies.<sup>135</sup> A student and her father sued the school district, alleging that the prayers amounted to government required participation in religion.<sup>136</sup> In a 6-3 decision, the Supreme Court agreed that the district's practice violated the Establishment Clause of the First Amendment.<sup>137</sup> Notably, the Court did not use the *Lemon* test in its analysis.<sup>138</sup> Instead, the Court focused on the issue of coercion and the pressure that school sponsorship of prayer would put on a non-believing student.<sup>139</sup> The Court held that what might begin as an innocuous and tolerant expression of religion may ultimately end up in a policy to inculcate and coerce students into participating in religious practice.<sup>140</sup> Prayer exercises in elementary and secondary schools carry a particular risk of indirect coercion due to the fact that school age children are impressionable and, if adults in the school exhibit certain traits or characteristics, the students may feel that they should act or behave in the manner demonstrated by the adults.<sup>141</sup>

The majority in *Lee* held that on these facts, government involvement with religious activity was pervasive to the point that a state-sponsored and state-directed religious exercise was established in a public school district.<sup>142</sup> The Court noted that the school district's supervision and control of a high school graduation ceremony placed subtle and indirect public and peer pressure on attending students to stand as a group or maintain

133. *McCreary County v. ACLU*, 545 U.S. 844 (2005); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Lee v. Weisman*, 505 U.S. 577 (1992).

134. *Lee*, 505 U.S. at 631–46 (Scalia, J., dissenting).

135. *Id.* at 580 (majority opinion).

136. *Id.* at 581.

137. *Id.* at 598–99.

138. *Id.* at 587.

139. *Id.* at 587–88; *see id.* at 587 (The majority provided “[t]he principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. The majority further stated “[i]t is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which ‘establishes a [state] religion or religious faith, or tends to do so.’” (alteration in original) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)).

140. *Id.* at 591–92.

141. *See id.* at 595.

142. *Id.* at 587.

respectful silence during the invocation and benediction.<sup>143</sup> The Court established that a reasonable dissenter of high school age could interpret that standing signified his or her participation or approval of the group's exercise versus respect for the event.<sup>144</sup> The Court was not persuaded by arguments that the prayers were of a *de minimis* character.<sup>145</sup> High school graduation is a quintessential event, and the Court determined that forcing students to choose between participating in prayer or skipping the graduation celebration was unacceptable.<sup>146</sup>

In a fiery dissent, Justice Scalia argued that the potential harm of “coercion” that may be felt by nonbelievers is outweighed by the benefit of having people of many different faiths be able to come together in the “unifying mechanism” of public prayer.<sup>147</sup> Scalia opined that “the Establishment Clause must be construed in light of the [g]overnment policies of accommodation, acknowledgment, and support for religion [that] are an accepted part of our political and cultural heritage.”<sup>148</sup> Justice Scalia confirmed that “[a] test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause.”<sup>149</sup> Justice Scalia further noted that the Court’s holding in *Lee* “[laid] waste a tradition that is as old as public school graduation ceremonies themselves, and that is a component of an even more longstanding American tradition of nonsectarian prayer to God at public celebrations generally.”<sup>150</sup> Justice Scalia forcefully contended that “prayer has been a prominent part of governmental ceremonies” and should not be prohibited because it is classified as religious speech.<sup>151</sup>

Justice Scalia’s concurrence in *Lamb’s Chapel*<sup>152</sup> provides further articulation of the conservative position regarding the Establishment Clause, which argued more allowance of religious actions in public schools. The

143. *Id.* at 593.

144. *Id.*

145. *Id.* at 594. The dissent written by Justice Scalia and joined by Chief Justice White and Justice Thomas, argued that the majority’s opinion, “[t]hat a student who simply *sits* in ‘respectful silence’ during invocation and benediction (when all others are standing) has somehow joined—or would somehow be perceived as having joined—in the prayers is nothing short of ludicrous.” *Id.* at 637 (Scalia, J., dissenting).

146. *See id.* at 595–96 (majority opinion).

147. *Id.* at 646 (Scalia, J., dissenting).

148. *Id.* at 631 (alterations in original) (internal quotation marks omitted).

149. *Id.* (alteration in original) (quoting *County of Allegheny v. ACLU*, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in part, dissenting in part)).

150. *Id.* at 632.

151. *Id.* at 633.

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

majority held that a church, Lamb's Chapel, did not violate the Establishment Clause by requesting to use a public school to show a religious-oriented movie.<sup>153</sup> By denying the church's request, the school violated the Free Speech Clause because it rejected the request solely on religious viewpoint.<sup>154</sup> Justice Scalia's concurred with the majority's holding, but did not agree with the majority's reasoning that allowing a group to view a religious movie in a public school building after school hours was constitutional on the basis that it did not cause the community to "think that the District was endorsing religion or any particular creed."<sup>155</sup> The majority validated its finding using the three-part *Lemon* test.<sup>156</sup> While Justice Scalia was likely pleased with the Court's finding that a religious group using a public school after school hours did not violate the Establishment Clause, he took umbrage with the use of the *Lemon* test in cases like these and the general philosophy that the use of a school's facilities is constitutional because it would not signal an endorsement of religion.<sup>157</sup>

Justice Scalia, critiqued the *Lemon* test in his concurrence by opining that

[l]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. Its most recent burial, only last Term, was, to be sure, not fully six feet under: Our decision in *Lee v. Weisman* conspicuously avoided using the supposed 'test,' but also declined the invitation to repudiate it. Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart (the author of today's opinion repeatedly), and a sixth has joined an opinion in doing so.<sup>158</sup>

Justice Scalia further highlighted his displeasure with what he termed "the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced."<sup>159</sup> Justice Scalia contended that the Court had been incongruous in its analysis of the Establishment Clause

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153. *Id.* at 395 (applying the three-part *Lemon* test).

154. *Id.* at 394.

155. *Id.* at 398 (Scalia, J., concurring in the judgement) (internal quotation marks omitted).

156. *Id.* at 395 (majority opinion).

157. See REGNERY PUB., *supra* note 130, at 276–77.

158. *Lamb's Chapel*, 508 U.S. at 398 (Scalia, J., concurring in the judgment) (citation omitted).

159. *Id.* at 399.

using the *Lemon* test,<sup>160</sup> noting, “[w]hen we wish to strike down a practice [the *Lemon* test] forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely. Sometimes, we take a middle course, calling its three prongs ‘no more than helpful signposts[.]’”<sup>161</sup>

Justice Scalia’s concurrence shows that he was agitated by the *sui generis* of the Constitution, which provides preferential treatment for “religion in general,” as identified in the Free Exercise Clause, yet forbids endorsement of religion in general.<sup>162</sup> He proffered the notion that the Founders of the nation who wrote the Constitution “believed that the public virtues inculcated by religion are a public good.”<sup>163</sup> Justice Scalia cited multiple examples from the early days of America where religion, primarily Christian prayer, was employed in public ceremonies.<sup>164</sup> He noted specifically that the Northwest Territory Ordinance in 1787 and the Confederate Congress that constructed Article III provided that “[r]eligion, morality, and knowledge, *being necessary to good government and the happiness of mankind*, schools and the means of education shall forever be encouraged.”<sup>165</sup> Noting the italicized portion of this statement, Justice Scalia argued that this is one such example of the Founding Fathers demanding the inculcation of religious philosophy to establish good government and ensure happiness.<sup>166</sup>

A third opinion that helps illustrate the late Justice Scalia’s perspective on Establishment Clause violations is his dissent in *McCreary County v. ACLU*.<sup>167</sup> In this case, two counties in Kentucky posted readily visible copies of the Ten Commandments in their courthouses.<sup>168</sup> After the ACLU sued to remove the displays on the grounds they violated the Establishment

160. *Id.* (“I agree with the long list of constitutional scholars who have criticized *Lemon* and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced.”).

161. *Id.* (citations omitted).

162. *Id.* at 400.

163. *Id.*

164. *Id.* at 400–01; see *McCreary County v. ACLU*, 545 U.S. 844, 886–87 (2005) (Scalia, J., dissenting) (noting the public ceremonies by prominent founding fathers that included prayer were not idiosyncratic but reflected the beliefs of the period); *Lee v. Weisman*, 505 U.S. 577, 633–35 (1992) (Scalia, J., dissenting) (citing George Washington, Thomas Jefferson, and James Madison and amplifying the use of prayer in public ceremonies such as presidential inaugurations and Thanksgiving celebrations). *Contra* Geier & Blankenship, *supra* note 10, at 389–93 (contending that the notion that America was founded as a Judeo-Christian nation is erroneous and misapplied).

165. *Lamb’s Chapel*, 508 U.S. at 400 (emphasis in original) (citing N.W. ORD. art. III (1787)).

166. *Id.*

167. *McCreary*, 545 U.S. at 885.

168. *Id.* at 850.

Clause, the counties adopted resolutions calling for a more extensive exhibit of the Ten Commandments, arguing that they were Kentucky's precedent legal code.<sup>169</sup> The new displays included nine framed documents including the Declaration of Independence, the lyrics to the *Star Spangled Banner*, and the Ten Commandments.<sup>170</sup> Upholding the district court's ruling, a 5-4 Supreme Court held that the display violated the Establishment Clause.<sup>171</sup> Consistent with his philosophy, Justice Scalia dissented with this finding.<sup>172</sup>

Justice Scalia began his dissent with a historical analysis of religion in the United States, noting that public expressions of faith had a long history in the United States and clearly would not have violated the Constitution in the eyes of the Framers.<sup>173</sup> Justice Scalia believed that just as prayer at graduation does not elicit any legal controversy, a public display of the Ten Commandments was innocuous as well.<sup>174</sup> He promoted two bolder conclusions in his dissent for *McCreary*. First, Justice Scalia contended that the Constitution does not require the government to be neutral on religious issues, and reaffirmed his contention that neutrality is not rooted in the history of the United States, but is in error in the Court's precedents.<sup>175</sup> Secondly, Justice Scalia declared that the Constitution does not prohibit the government from favoring some religious beliefs over others in the context of public acknowledgements.<sup>176</sup> He noted that 97.7% of all believers, including Christians, Jews, and Muslims, are monotheistic and concluded that public expressions of faith that favor this great majority of believers did not offend the Constitution.<sup>177</sup>

The judicial philosophy of Justice Scalia regarding Establishment Clause violations has become the primary doctrine for many conservatives.

169. *Id.* After the ACLU sued, the counties adopted nearly identical resolutions that called for a more extensive exhibit. The resolutions noted that the state legislature's acknowledgment of Christ as the "Prince of Ethics." *Id.* at 853. The displays around the Commandments were modified to include eight other small historical documents containing religious references as their sole common element. *Id.* at 853-54.

170. *Id.* at 853-56. After revising the displays again, the counties neglected to modify the resolutions, leaving the Ten Commandments as part of the display. *Id.* at 856.

171. *Id.* at 881.

172. *Id.* at 885 (Scalia, J., dissenting).

173. *Id.* at 886.

174. *Id.* at 908-09.

175. *Id.* at 886-93. Justice Scalia believed that the Court had gone too far in removing religion from the public square and had sided too often with those who charged an Establishment Clause violation. *Id.* at 893. This philosophy can be summed in the comment from his dissent, "[i]f religion in the public forum had to be entirely nondenominational, there could be no religion in the public forum at all." *Id.*

176. *Id.* at 893.

177. *Id.* at 894.

The belief that religiosity has been wrongly nullified in public squares (most notably public schools) since the official sponsorship of public-school prayer was held unconstitutional in 1962<sup>178</sup> is a ruling conservatives seek to modify.<sup>179</sup> Simply by the fact that Justice Scalia never found in favor of an Establishment Clause violation, but upheld Free Exercise rights, demonstrates his yearning to bring tolerance to religion in public schools.<sup>180</sup> Justice Scalia developed a strong conservative philosophy supporting religious speech in public schools by never finding that individuals or organizations violated the Establishment Clause. Maintenance of this philosophy will be demonstrated by examining the two most recent Justices nominated to the United States Supreme Court: Justice Gorsuch and Justice Kavanaugh.

### *B. Justice Neil Gorsuch*

While Justice Gorsuch has not written specifically on prayer in public schools, he is likely to subscribe to many of the tenets espoused by the late Justice Antonin Scalia.<sup>181</sup> Additionally, a review of his testimony in his Senate confirmation hearings, and the opinions he penned as an appellate court judge, provide evidence of how Justice Gorsuch might vote on future Establishment Clause cases, particularly school prayer cases.

The conservative sentiment of permitting religious expression in public schools, as expressed by Senator John Cornyn, is that the Supreme Court has “lost its way.”<sup>182</sup> In his Senate confirmation hearing, Neil Gorsuch was asked to speak on the separation of church and state.<sup>183</sup> His response was less than revealing; in noting that the First Amendment bars laws respecting an establishment of religion but also protects its free exercise, he stated:

It’s a very difficult area doctrinally. . . . So you’re guaranteed free exercise of religion, and you’re also guaranteed no establishment of religion. . . . Those two commands are in tension because to the extent that we accommodate free expression, at some point, the accommodation can be so great that someone’s going to stand up and say

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178. *Engel v. Vitale*, 370 U.S. 421 (1962) (holding that school officials may not require devotional religious exercises during the school day, as this practice unconstitutionally entangles the state in religious activities and establishes religion).

179. See, e.g., Valerie Strauss, *The Truth About School Prayer*, WASH. POST (Dec. 24, 2011), <https://perma.cc/G5A4-ETLW>.

180. See REGNERY PUB, *supra* note 130, at 277.

181. See Erwin Chemerinsky, *Symposium: The New Court and Religion*, SCOTUSBLOG (July 26, 2019), <https://perma.cc/HXV3-9KT2>.

182. Rob Boston, *Going with Gorsuch*, AM. UNITED: CHURCH & ST. MAG. (May 2017), <https://perma.cc/JVK3-HTUU> (internal quotation marks omitted) (prefacing a question to nominee Neil Gorsuch in confirmation hearings by Senator John Cornyn).

183. *Id.*

you've established or you've passed a law respecting an establishment of religion. It's a spectrum, and it's a tension.<sup>184</sup>

As a circuit court judge, now-Justice Gorsuch struggled with the separation of church and state because the Supreme Court itself is divided on the issue. He recognized the fact that the Free Exercise Clause and Establishment Clause are in tension, noting:

[T]o the extent that we accommodate free expression, at some point, the accommodation can be so great that someone's going to stand up and say you've established or you've passed a law respecting an establishment of religion. It's a spectrum, and it's a tension. And in so many areas of law, judges have to mediate two competing important values that our society holds dear.<sup>185</sup>

However, Judge Gorsuch was never directly faced with a case that specifically addressed a public-school prayer issue while on the Tenth Circuit, during a time when “[t]he so-called ‘culture wars’ [did] not seem to be abating, conventional religious observance and affiliation appear[ed] to be declining, and the nature—even the value—of religious liberty seem[ed] increasingly contested.”<sup>186</sup>

While Judge Gorsuch did not directly rule on a public-school prayer case, he did hear a number of cases that likely reveal his constitutional positioning on the issue. The following Tenth Circuit cases illustrate how now Justice Gorsuch might balance individual religious rights with the rights of the community at large in Supreme Court decisions.

### 1. Hobby Lobby Case

Most commonly known as the *Hobby Lobby* case, Justice Gorsuch sat on the bench of the Tenth Circuit Court as this case made its way through the courts.<sup>187</sup> Mr. and Mrs. Green ran both Hobby Lobby (a craft store) and Mardel (a Christian bookstore) stores nationwide.<sup>188</sup> The Greens argued that the “2010 Patient Protection and Affordable Care Act [(ACA)] force[d] them to violate their sincerely held religious beliefs.”<sup>189</sup> The Greens

184. *Id.*

185. *Confirmation Hearing for Neil Gorsuch for U.S. Supreme Court; White House Press Briefing*, CNN (Mar. 21, 2017), <https://perma.cc/S49Q-R5EU>.

186. Richard W. Garnett, *Neil Gorsuch, the Supreme Court, and Religious Freedom*, RELIGION AND POL. (March 22, 2017), <https://perma.cc/4ABR-2PK5>.

187. *See Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013), *aff'd sub nom.* *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

188. *Id.* at 1120.

189. *Id.*

established their business with “express religious principals in mind.”<sup>190</sup> For example, the religious tenets of the Greens prescribed rest on Sunday; thus, their businesses were closed on Sundays.<sup>191</sup> Also, Hobby Lobby “refuse[d] to engage in business activities that facilitate or promote alcohol use.”<sup>192</sup> The Greens also subscribed to the idea that life began at conception and any act that caused the termination of a human embryo is immoral.<sup>193</sup> The Greens operated Hobby Lobby and Mardel through a management trust also guided by religious principles (each Green family member was a trustee).<sup>194</sup>

The ACA required employment-based group health plans covered by the Employee Retirement Income Security Act (ERISA) to “provide certain types of preventive health services.”<sup>195</sup> “One provision mandates coverage, without cost-sharing by plan participants or beneficiaries, of ‘preventive care and screenings’ for women ‘as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [HRSA].’”<sup>196</sup> The mandatory preventative health services included Food and Drug Administration (FDA)-approved contraceptive methods.<sup>197</sup> Twenty such contraceptive methods were approved by the FDA “ranging from oral contraceptives to surgical sterilization.”<sup>198</sup> The Greens believed that life began at conception and objected to any FDA-approved contraception that prevented the implantation of a fertilized egg.<sup>199</sup> Therefore, the Greens were particularly opposed to Hobby Lobby health benefit plans covering “the four FDA-approved contraceptive methods that prevent uterine implantation.”<sup>200</sup>

Several entities were fully or partially exempted from the contraceptive-coverage requirement under the ACA, including religious employers.<sup>201</sup> A religious employer is defined as an organization that meets the following requirements:

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190. *Id.* at 1122.

191. *Id.*

192. *Id.*

193. *Id.* at 1125.

194. *Id.* at 1122.

195. *Id.*

196. *Id.* (alteration in original) (quoting 42 U.S.C. § 300gg-13(a)(4) (2012)).

197. *Id.* at 1123.

198. *Id.*

199. *Id.* at 1124–25.

200. *Id.* at 1125 (noting the four contraceptive methods: Ella, Plan B, and the two IUDs).

201. *Id.* at 1124–25; see Coverage of Preventative Health Services, 45 C.F.R. § 147.130(a)(iv)(B)(1) (2012).

(1) The inculcation of religious values is the purpose of the organization. (2) The organization primarily employs persons who share the religious tenets of the organization. (3) The organization serves primarily persons who share the religious tenets of the organization. (4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.<sup>202</sup>

The government proposed an accommodation for certain other nonprofit organizations, including religious institutions of higher education, that maintained religious objections to contraceptive coverage yet would not qualify as a religious employer under the aforementioned definition.<sup>203</sup> Many of these organizations were granted a temporary “safe harbor,” exempting them from having to cover contraceptive services.<sup>204</sup> “[I]f a business [did] not make certain significant changes to its health plans after the ACA’s effective date, those plans [were] considered ‘grandfathered’ and [were] exempt[ed] from the contraceptive-coverage requirement.”<sup>205</sup> Businesses with fewer than fifty employees were also “not required to participate in employer-sponsored health plans.”<sup>206</sup> As written, the ACA did not include an exemption that extended to for-profit organizations.<sup>207</sup>

While the Greens’ businesses did not qualify for an exemption, they objected to providing employees with health insurance coverage for contraceptive methods that prevent uterine implantation.<sup>208</sup> The deadline for compliance with the contraceptive-coverage requirement was July 1, 2013, after which time failure to comply resulted in “immediate tax penalties, potential regulatory action, and possible private lawsuits.”<sup>209</sup> The Greens also faced

202. *Id.* at 1123; *see also* 45 C.F.R. § 147.130(a)(1)(iv)(B)(1).

203. *See* Coverage of Certain Preventative Services Under the Affordable Care Act, 78 Fed. Reg. 8456, 8461 (Feb. 6, 2013) (to be codified at 45 C.F.R. pt. 147).

204. *Hobby Lobby Stores, Inc.*, 723 F.3d. at 1124.

205. *Id.* The government reasoned that the number of grandfathered health plans would diminish over time, that many of the grandfathered plans actually covered contraceptives, and that financial incentives would push small businesses into providing health plans that complied with the contraceptive-coverage requirement. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 1124–25. The Greens did not object to providing coverage for the other sixteen contraceptive methods; they only objected to providing coverage for those methods that specifically prevented the implantation of a fertilized egg into the uterine wall. *Id.* at 1125.

209. *Id.* The contraceptive-coverage requirement mandated coverage to all twenty of the FDA-approved contraceptive methods. *See id.*

a more immediate penalty of regulatory taxes for each individual to whom such failure related.<sup>210</sup>

The Greens filed suit on September 12, 2012, challenging the constitutionality of the contraceptive-coverage requirement as delineated by the Religious Freedom Restoration Act (“RFRA”) under the Free Exercise Clause of the First Amendment and the Administrative Procedure Act.<sup>211</sup> One of the first hurdles the plaintiffs had to clear was establishing their right to bring a claim under the RFRA and demonstrating the likelihood of success on their RFRA claim to warrant a preliminary injunction.<sup>212</sup> The principle questions presented to the Tenth Circuit Court of Appeals were: “(1) whether Hobby Lobby and Mardel [were] ‘persons’ exercising religion for purposes of RFRA; (2) if so, whether the corporations’ religious exercise [was] substantially burdened; and (3) if there [was] a substantial burden, whether the government [could] demonstrate a narrowly tailored compelling government interest.”<sup>213</sup> The Tenth Circuit concluded that “the contraceptive-coverage requirement substantially burden[ed] Hobby Lobby and Mardel’s rights under RFRA” and that the government had not demonstrated “a narrowly tailored compelling interest to justify [the] burden.”<sup>214</sup>

Judge Gorsuch joined in the majority opinion of the court, but wrote a concurring opinion “to explain why the Greens . . . , as individuals,

210. *Id.* The regulatory tax of \$100 per day for each of the 13,000 individuals insured by Hobby Lobby would have totaled “at least \$1.3 million per day, or almost \$475 million per year.” *Id.* at 1125. If Hobby Lobby instead chose to “drop employee health insurance altogether,” they would have faced “penalties of \$26 million per year.” *Id.*

211. *Hobby Lobby Stores, Inc.*, 723 F.3d at 1125. Their motion for preliminary injunction was repeatedly unsuccessful because several courts (or judges) concluded that the petitioners’ entitlement to such relief was not clear. The request for injunctive relief was initially denied by the district court, the Tenth Circuit, and the Supreme Court (Justice Sotomayor, sitting alone) before coming back to the Tenth Circuit for a hearing by the full court. *Hobby Lobby Stores, Inc. v. Sebelius*, 568 U.S. 1401 (2012); *Hobby Lobby Stores, Inc. v. Sebelius*, No. 120-6294, 2012 U.S. App. LEXIS 26741, at \*1 (10th Cir. Dec. 20, 2012); *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278 (W.D. Okla. 2012), *rev’d*, 723 F.3d 1114 (10th Cir. 2013), *aff’d sub nom.* *Burwell v. Hobby Lobby Stores, Inc.* 573 U.S. 682 (2014).

212. *Hobby Lobby Stores, Inc.*, 723 F.3d. at 1121. The plaintiffs had to establish a prima facie case under RFRA by showing that enforcement would substantially burden a sincerely held religious belief. *See Kikumura v. Hurley*, 242 F.3d 950, 960 (10th Cir. 2001). Once the plaintiffs met that burden, the burden of proof shifted to the government to show that “the compelling interest test is satisfied through application of the challenged law ‘to the person’—the particular claimant whose sincere exercise of religion is being substantially burdened.” *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006) (quoting 42 U.S.C. § 2000bb-1(b) (2012)).

213. *Hobby Lobby Stores, Inc.*, 723 F.3d at 1126.

214. *Id.* at 1128.

[were] . . . entitled to relief” under the Anti-Injunction Act.<sup>215</sup> Judge Gorsuch’s concurring opinion provides some insight as to how he approaches religious rights under the law. Judge Gorsuch began his concurring opinion by discussing the concept of complicity and the moral culpability associated with conduct that conflicts with religious doctrine.<sup>216</sup> Specifically, he wrote:

All of us face the problem of complicity. All of us must answer for ourselves whether and to what degree we are willing to be involved in the wrongdoing of others. For some, religion provides an essential source of guidance both about what constitutes wrongful conduct and the degree to which those who assist others in committing wrongful conduct themselves bear moral culpability. The Green family members are among those who seek guidance from their faith on these questions. Understanding that is the key to understanding this case.<sup>217</sup>

In this paragraph, Judge Gorsuch arguably implied that adherence to one’s religious faith might be more important to some than principles of law. He focused on the sincerity of the Greens’ religious beliefs and not the contestability of their religious convictions.<sup>218</sup> He noted that the Religious Freedom Restoration Act “does [not] just apply to protect popular religious beliefs: it does perhaps its most important work in protecting unpopular religious beliefs . . . .”<sup>219</sup> To Gorsuch, jurisprudential philosophy was not “to question the correctness or the consistency of tenets of religious faith,” but rather “to protect the exercise of faith.”<sup>220</sup> The Greens found themselves at the nexus of the ACA and the RFRA—the former compelled them to act, while the latter said they did not have to.<sup>221</sup> “Congress structured RFRA to override other legal mandates, including its own statutes, if and when they encroach[ed] on religious liberty.”<sup>222</sup> Congress noted that “[w]hen construing any ‘federal statutory law adopted after November 16, 1993,’ . . . [this Court] should deem it ‘subject to [RFRA] unless such law explicitly excludes such application.’”<sup>223</sup> “In this way, RFRA is indeed something of a

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215. *Id.* at 1152 (Gorsuch, J., concurring).

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.* at 1152–53.

220. *Id.* at 1153.

221. *Id.* at 1156.

222. *Id.*

223. *Id.* at 1157 (last alteration in original) (quoting 42 U.S.C. § 2000bb-3(b) (2012)).

‘super-statute.’”<sup>224</sup> “[B]ecause the government [did not identify any] explicit exclusion in the ACA . . . , it [was] RFRA’s legislative direction that must prevail in the end.”<sup>225</sup>

In order to predict Justice Gorsuch’s future votes for cases dealing with religion in public schools, analyzing *Hobby Lobby* is critical. As the introduction to this section on Justice Gorsuch noted, he has yet to crystallize his judicial philosophy when analyzing the tension between the Religion Clauses of the First Amendment. His position in *Hobby Lobby* demonstrates that he will most likely be sympathetic to religious claimants and will side with making accommodations for religious action in the public square.

## 2. American Atheists v. Davenport

*American Atheists v. Davenport* is another Tenth Circuit case that illustrates how Justice Gorsuch’s prior decisions might influence his Establishment Clause interpretations on the Supreme Court.<sup>226</sup> “In 1998 the Utah Highway Patrol Association [(“UPHA”)] . . . began a project to memorialize [Utah Highway Patrol (“UHP”)] troopers . . . by placing large white crosses near the locations of their deaths.”<sup>227</sup> “The crosses [were] approximately twelve feet tall” and “[bore] the UHP’s beehive symbol, the deceased trooper’s picture, and a plaque containing the officer’s biographical information.”<sup>228</sup> “The deceased officer’s name and badge number [were] painted on the six-foot crossbar in large, black lettering.”<sup>229</sup> “The [s]tate of Utah permitted the UHPA to erect approximately thirteen crosses on public property, but explicitly stated that it ‘neither approve[d] or disapprove[d] the memorial marker[s].’”<sup>230</sup>

The Tenth Circuit struck down the project under the Establishment Clause by “[employing] Justice O’Connor’s endorsement test.”<sup>231</sup> “Under [Justice O’Connor’s] framework, governmental action violates the Establishment Clause if, as viewed by a ‘reasonable observer,’ it has the ‘effect of communicating a message of government endorsement or disapproval of

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224. *Id.* (quoting Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 253 (1995)).

225. *Id.*

226. *Am. Atheists v. Davenport*, 637 F.3d 1095 (10th Cir 2010).

227. *Id.* at 1102 (Kelly, J., dissenting).

228. *Id.*

229. *Id.*

230. *Id.* (last alteration in original) (quoting *Am. Atheists v. Duncan*, 616 F.3d 1145, 1151 (10th Cir. 2010)).

231. *Id.*

religion.”<sup>232</sup> The concept of a “reasonable observer” in Establishment Clause jurisprudence “is kin to the fictitious ‘reasonably prudent person’ of tort law.”<sup>233</sup> “[T]he reasonable observer ‘is presumed to know far more than most actual members of a given community . . . .’”<sup>234</sup> Under the endorsement test, a court’s ultimate task is not to determine “whether *some* people may be offended by the display, or whether *some* reasonable person *might* think [the State] endorses religion.”<sup>235</sup> Instead, a court must determine whether a fully informed, intelligent, and judicious reasonable observer would conclude that the display effectively sends a message that the government “prefer[s] one religion over another.”<sup>236</sup>

Judge Gorsuch joined the dissent in which Judge Kelly concluded that the court’s application of the endorsement test [was] incorrect to the extent [that] it: (1) effectively imposed a presumption of unconstitutionality on religious symbols in the public sphere; (2) employed a ‘reasonable observer’ who ignored certain facts of the case and instead drew unsupported and quite odd conclusions; and (3) incorrectly focused on the religious nature of the crosses themselves, instead of the messages [the crosses] convey.<sup>237</sup>

The dissent noted that the Tenth Circuit correctly determined that the Latin crosses denoted a symbol of the Christian faith.<sup>238</sup> However, Judge Kelly complained that the majority opinion focused more on the religious connotation of the crosses instead of the secular items on the crosses themselves, such as the officer’s picture, “name and badge number,” and a “plaque containing biographical information.”<sup>239</sup> Judge Kelly argued the court had a duty to first “thoroughly analyze the appearance, context, and factual background of the challenged displays” and then to decide the full display’s constitutionality.<sup>240</sup>

232. *Id.* (quoting *Lynch v. Donnelly*, 465 U.S. 688, 692 (1984) (O’Connor, J., concurring)).

233. *Duncan*, 616 F.3d at 1158 (quoting *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1031 (10th Cir. 2008)).

234. *Id.* at 1159 (quoting *Weinbaum*, 541 F.3d at 1031 n.16).

235. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O’Connor, J., concurring in part and concurring in the judgment) (alteration in original) (quoting *Ams. United for Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538, 1544 (6th Cir. 1992)).

236. *Duncan*, 616 F.3d at 1156 (quoting *Weinbaum*, 541 F.3d at 1029).

237. *Davenport*, 637 F.3d at 1102.

238. *Id.*

239. *Id.* at 1102–03.

240. *Id.* at 1103; see *County of Allegheny v. ACLU*, 492 U.S. 573, 598–600 (1989); *Lynch v. Donnelly*, 465 U.S. 668, 679–80 (1984); *Green v. Haskell Cty. Bd. of Comm’rs*, 568 F.3d 784, 799–805 (10th Cir. 2009); *Weinbaum v. City of Las Cruces*, 541 F.3d 1017,

In contrast to the immediate assumption of unconstitutionality, in *Lynch v. Donnelly*<sup>241</sup> and *County of Allegheny v. ACLU*,<sup>242</sup> the Supreme Court carefully considered all relevant factors to decide whether the displays conveyed a message of endorsement, rather than presuming unconstitutionality.<sup>243</sup> In *Allegheny*, the Supreme Court rejected the view that religious symbols on public property are presumptively unconstitutional.<sup>244</sup> Similarly, in *Green v. Haskell County Board of Commissioners*, the Supreme Court expressly rejected a presumption of unconstitutionality for displays of the Ten Commandments on public property.<sup>245</sup>

Adding neutrality to the debate about religious icons being displayed in the public square, Judge Kelly postulated that while the state “cannot erect or maintain symbols that convey ‘a message of governmental endorsement of religion,’” the opposite is also true—the state “*can* erect or maintain religious symbols that do *not* convey a message of endorsement.”<sup>246</sup> Judge Kelly contended that “the mere presence of the memorial crosses, which are undoubtedly the ‘preeminent symbol of Christianity’ tells us next to nothing.”<sup>247</sup> Furthermore, “[w]ithout consulting all relevant factors, [the court cannot] determine whether the challenged displays violate the Establishment Clause.”<sup>248</sup> “To presume otherwise is to evince hostility towards religion, which the First Amendment unquestionably prohibits.”<sup>249</sup> Therefore, “at the outset of this case the [d]efendants were not required to ‘secularize the message’ of the memorial crosses.”<sup>250</sup> Instead, “like in any other case, the [p]laintiff’s bore the initial burden of proof—here, showing that, given

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1033–37 (10th Cir. 2008); *O’Connor v. Washburn Univ.*, 416 F.3d 1216, 1227–31 (10th Cir. 2005). Judge Kelly noted that all of these “cases cited [involved] a display with at least some religious content.” *Davenport*, 637 F.3d at 1103.

241. *Lynch*, 465 U.S. at 668.

242. *County of Allegheny*, 492 U.S. at 573.

243. See *County of Allegheny*, 492 U.S. at 598–600; *Lynch*, 465 U.S. at 679–80.

244. *County of Allegheny*, 492 U.S. at 614 (“The mere fact that Pittsburgh displays symbols of both Christmas and Chanukah does not end the constitutional inquiry.”).

245. See *Green*, 568 F.3d at 799 (rejecting at the outset Mr. Green’s argument that governmental displays of the text of the Ten Commandments are presumptively unconstitutional).

246. *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1103 (quoting *Am. Atheists, Inc. v. Duncan*, 616 F.3d 1145, 1160 (10th Cir. 2010)); see, e.g., *Lynch*, 465 U.S. at 668; *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1017 (10th Cir. 2008).

247. *Davenport*, 637 F.3d at 1103 (quoting *Duncan*, 616 F.3d at 1160) (citation omitted).

248. *Id.*

249. *Id.*

250. *Id.* (quoting *Duncan*, 616 F.3d at 1160).

all relevant context and history, the memorial crosses had the purpose or effect of endorsing religion.”<sup>251</sup>

The dissenters next addressed the second issue with the majority’s application of the endorsement test.<sup>252</sup> Judge Kelly specifically analyzed the concept of “reasonable observer,” which is central to impugning the majority’s proscription of placing memorial crosses on public roadsides.<sup>253</sup> Several cases are noted, which demonstrate a “reasonable observer is keenly aware of the details of [a] challenged display.”<sup>254</sup> According to the dissenters, contrasting the facts of what a “reasonable observer” should infer with the argument of the majority, the “reasonable observer” in *American Atheists v. Duncan* failed to account for “the officer’s name and badge number painted on the crossbar in large, black letters, the officer’s picture, and the biographical plaque.”<sup>255</sup> “Ostensibly[,] this is because ‘a motorist driving by one of the memorial crosses at 55-plus miles per hour may not notice, and certainly would not focus on, the biographical information.’”<sup>256</sup> Using the majority’s theory, the dissent states, “the court itself noted that the reasonable observer’s knowledge is ‘not limited to the information gleaned simply from viewing the challenged display.’”<sup>257</sup> Thus, Judge Kelly argues that there should be a presumption that the reasonable observer knows “far more than most actual members of a given community.”<sup>258</sup>

The reasonable observer, in the majority opinion, did not “address the obvious and critical facts surrounding the memorial crosses.”<sup>259</sup> Judges Kelly and Gorsuch concluded the following facts were persuasive in showing that the cross memorials did not primarily express religion: the location of the cross was marking the spot of the officer’s death, the cross was sponsored by a private organization, the selection of the cross by the officer’s family, and the disclaimer that the state of Utah did not endorse the memorials.<sup>260</sup> The dissent noted that in other cases, a reasonable observer fully

251. *Id.* at 1103–04.

252. *Id.* at 1104.

253. *Id.*

254. *Id.*; see, e.g., *Green v. Haskell Cty. Bd. of Comm’rs*, 568 F.3d 784, 800–03 (10th Cir. 2009); *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1033 n.18 (10th Cir. 2009); *O’Connor v. Washburn Univ.*, 416 F.3d 1216, 1229 (10th Cir. 2005).

255. *Davenport*, 637 F.3d at 1104.

256. *Id.* at 1104 (quoting *Am. Atheists, Inc. v. Duncan*, 616 F.3d 1145, 1160 (10th Cir. 2010)).

257. *Id.* (quoting *Duncan*, 616 F.3d at 1158).

258. *Id.* (citing *Duncan*, 616 F.3d at 1159).

259. *Id.* at 1105.

260. *Id.*

considered relevant background information.<sup>261</sup> This additional information actually mitigates the effect of government endorsements.

In concert with the contention that the court disregarded the relevant facts of the reasonable observer theory, the dissent also claimed the majority incorrectly focused on the religious nature (namely, size) of the crosses, instead of the messages they convey.<sup>262</sup> The argument was that the link between the UHP's beehive symbol and religiosity was impetus and erroneously deduced that the UHP was some form of "Christian police . . . in enforcing the law and hiring new employees."<sup>263</sup> The dissent argued memorials should conjure the conclusion that they memorialize fallen police officers—not a government endorsement of a state-sponsored religion.<sup>264</sup> The memorial crosses were more than what they appeared and the reasonable observer should not construct an analysis upon unfounded fears of discrimination.<sup>265</sup> *Freidman v. Board of County Commissioners* is an amplified example of this ability to dissect a potential state endorsement of religion.<sup>266</sup> In *Freidman*, a county's seal was affixed to law enforcement vehicles, which bore a cross surrounded by a blaze of golden light, a flock of sheep, and a Spanish phrase that translated to "with this, we conquer."<sup>267</sup> However, in *American Atheists*, the majority repeatedly emphasized the size of the crosses, noting "that the twelve-foot memorials [were] considerably [larger] than most roadside crosses."<sup>268</sup> The UHPA's explanation for the size of the seal was to ensure that passing motorists would notice the display and absorb the "message of 'death, honor, remembrance, gratitude, sacrifice and safety.'"<sup>269</sup> The dissent concluded that it was unlikely that the reasonable observer test would be met if the crosses were smaller as the information contextualizing the memorial would be illegible.<sup>270</sup> Governments would then be faced with a "Hobson's choice" of "foregoing memorial crosses or facing litigation."<sup>271</sup>

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261. *Id.*; see, e.g., *Green v. Haskell Cty. Bd. of Comm'rs*, 568 F.3d 784, 800–01 (10th Cir. 2009); *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1037; *O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1228 (10th Cir. 2005).

262. *Davenport*, 637 F.3d at 1105–06.

263. *Id.* at 1105 (quoting *Duncan*, 616 F.3d at 1161).

264. *Id.*

265. *Id.*

266. *Friedman v. Bd. of Cty. Comm'rs*, 781 F.2d 777 (10th Cir. 1985).

267. *Id.* at 779.

268. *Davenport*, 637 F.3d at 1105.

269. *Id.* at 1106 (quoting *Duncan*, 616 F.3d at 1151).

270. *Id.*

271. *Id.*

Judge Gorsuch joined Judge Kelly's dissent, but sought to draw attention to two more issues in his own dissenting opinion. First, like Judge Kelly, he claimed that the Tenth Circuit repeatedly misapplied Justice O'Connor's endorsement test.<sup>272</sup> To Judge Gorsuch, a reasonable observer is not "any ordinary individual, who might occasionally do unreasonable things, but . . . a personification of a community ideal of reasonable behavior."<sup>273</sup> According to Judge Gorsuch, the reasonable observer in *American Atheists* was "biased, replete with foibles, and prone to mistake[s]."<sup>274</sup> Differing from Judge Kelly, Judge Gorsuch argued that the observer in this case started with a "biased presumption that Utah's roadside crosses are unconstitutional."<sup>275</sup> This preconception was held despite the fact that a plurality of the Supreme Court held in *Salazar v. Buono* that "[a] cross by the side of a public highway marking, for instance, the place where a state trooper perished need not be taken as a statement of governmental support for sectarian beliefs."<sup>276</sup> However, the observer in *American Atheists* took no heed of the Supreme Court's direction and was assumed to disregard the secularizing details, "such as the fallen trooper's name inscribed on the crossbar" because the majority contended that a motorist driving by the memorial at more than 55 miles per hour would not notice the biographical information.<sup>277</sup> Judge Gorsuch acerbically responded to this notion by stating:

So it is that we must now apparently account for the speed at which our observer likely travels and how much attention he tends to pay to what he sees. We can't be sure he will even bother to stop and look at a monument before having us declare the state policy permitting it unconstitutional.

But that's not the end of things. It seems we must also take account of our observer's selective and feeble eyesight. Selective because our observer has no problem seeing the Utah highway patrol insignia and using it to assume some nefarious state endorsement of religion is going on; yet, mysteriously, he claims the inability to see the fallen trooper's name posted directly above the insignia.

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272. *Id.* at 1107–11 (Gorsuch, J., dissenting).

273. *Id.* at 1107–08 (quoting Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 779–80 (1995) (O'Connor, J., concurring)).

274. *Id.* at 1108.

275. *Id.*

276. *Id.* (alternation in original) (quoting *Salazar v. Buono*, 559 U.S. 700, 718–19 (2010)).

277. *Id.*

And feeble because our observer can't see the trooper's name even though it is painted in approximately 8-inch lettering across a 6-foot cross-bar—the same size text used for posting the words “SPEED LIMIT” alongside major interstate highways . . . . All the same, our observer plows by, some combination of too blind and too fast to read signs adequate for interstate highway traffic. Biased, selective, vision impaired, and a bit of a hot-rodder our observer may be, but the reasonable observer of Justice O'Connor's description he is not.<sup>278</sup>

Secondly, Judge Gorsuch argued that “anything a . . . ‘reasonable observer’ could think ‘endorses’ religion” might raise constitutional infirmities.<sup>279</sup> He strongly contended that the Utah state actors did not act with any religious purpose, nor did the memorials coerce anyone to participate in any religious exercise.<sup>280</sup> In actuality, most citizens of Utah did not revere the cross; thus, the majority held Utah's policy violated the First Amendment because the majority was “able to imagine a hypothetical ‘reasonable observer’ who *could think* Utah mean[t] to endorse religion—even when it [did not].”<sup>281</sup> Instead, Judge Gorsuch claimed that the reasonable observer test may not be the most appropriate lens by which Establishment Clause challenges should be analyzed.<sup>282</sup> The majority in this case failed to consider this perspective.<sup>283</sup>

### 3. Abdulhaseeb v. Calbone

In 2010, the Tenth Circuit adjudicated *Abdulhaseeb v. Calbone*, which also provides for examination of Judge Gorsuch's judicial philosophy toward individual religious liberties.<sup>284</sup> Madyun Abdulhaseeb, an Islamic inmate in Oklahoma, brought suit under the Religious Land Use and Institutionalized Persons Act of 2000, and set forth seventeen claims concerning the conditions of his incarceration.<sup>285</sup> The district court granted summary

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278. *Id.* at 1108–09 (citations omitted).

279. *Id.* at 1110.

280. *Id.*

281. *Id.*

282. *Id.*; see *Van Orden v. Perry*, 545 U.S. 677, 687 (2005); *Card v. City of Everett*, 520 F.3d 1009, 1018 (9th Cir. 2008); *ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772, 778 n.8 (8th Cir. 2005); *Myers v. Loudoun Cty. Pub. Sch.*, 418 F.3d 395, 402 (4th Cir. 2005).

283. See *Davenport*, 637 F.3d at 1110.

284. *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1324 (10th Cir. 2010) (Gorsuch, J., concurring).

285. *Id.* at 1306–09; see 42 U.S.C. §§ 2000cc–2000cc-5 (2012); *Civil Action for Deprivation of Rights*, 42 U.S.C. § 1983 (2012).

judgment on all but two claims because Abdulhaseeb did not exhaust his administrative remedies prior to the suit.<sup>286</sup>

Abdulhaseeb first contended that his “religious exercise was substantially burdened when [Oklahoma State Penitentiary officials] denied his request for a halal diet”<sup>287</sup> and his subsequent “request for halal meat for an Islamic feast.”<sup>288</sup> In addition, certain foods were placed on Abdulhaseeb’s tray that must be completely avoided according to Islamic law.<sup>289</sup> The two claims that the district court did not dismiss were claim five, failing to provide halal meats for the Islamic feast of Eid-ul-Adha, and claim ten, denying him a halal diet at Oklahoma State Penitentiary.<sup>290</sup>

The Tenth Circuit determined that Abdulhaseeb had shown a genuine issue of material fact as to whether his religious exercise was substantially burdened.<sup>291</sup> Prison officials did not challenge the sincerity of Abdulhaseeb’s faith,<sup>292</sup> so the only query before the court was whether there was a genuine issue of material fact regarding the denial of a halal diet as a substantial burden on Abdulhaseeb’s beliefs.<sup>293</sup> The Oklahoma Department of Corrections (“ODOC”) maintained a policy that food be brought in only by approved vendors and the ODOC had not approved any vendors from which Abdulhaseeb could have purchased or obtained halal food.<sup>294</sup> The Tenth Circuit held Abdulhaseeb’s rights could be violated for two reasons.<sup>295</sup> First, Abdulhaseeb was indigent.<sup>296</sup> Second, even if he was not indigent, he could not be required to make a Hobson’s choice between essentials—his religion or sustenance.<sup>297</sup>

The court held that “the Religious Land Use and Institutionalized Persons Act (RLUIPA) prohibit[ed] the government from forcing a prisoner to

286. *Abdulhaseeb*, 600 F.3d at 1305–06.

287. *Id.* at 1306. On several occasions, Abdulhaseeb requested an Islamic diet in which animals are raised, fed, and slaughtered according to Islamic dietary laws. *Id.*; see generally *What is Halal?*, IFANCA, <https://perma.cc/CZW9-LTSF>.

288. *Abdulhaseeb*, 600 F.3d at 1306.

289. *Id.*

290. *Id.* at 1306–09.

291. *Id.* at 1316–18.

292. *Id.* at 1314–15.

293. *Id.* at 1315. While the Tenth Circuit affirmed the grant of summary judgment in favor of the defendants in almost all of Abdulhaseeb’s claims, it vacated the grant of summary judgement in claims five and ten against the Department of Corrections defendants in their professional capacities and remanded the case. *Id.* at 1323.

294. *Id.* at 1320.

295. *Id.* at 1317–18.

296. *Id.* at 1317.

297. *Id.* at 1318.

choose between following his sincerely held religious beliefs and staying alive.”<sup>298</sup> “RLUIPA prohibits the government from creating a substantial burden on a prisoner’s sincerely held religious beliefs”.<sup>299</sup>

[A] religious exercise is substantially burdened under 42 U.S.C. § 2000cc-1(a) when a government (1) requires participating in an activity prohibited by a sincerely held religious belief, or (2) prevents participation in conduct motivated by a sincerely held religious belief, or (3) places substantial pressure on an adherent either not to engage in conduct motivated by a sincerely held religious belief or to engage in conduct contrary to a sincerely held religious belief, such as where the government presents the plaintiff with a Hobson’s choice—an illusory choice where the only realistically possible course of action trenches on an adherent’s sincerely held religious beliefs.<sup>300</sup>

The majority held that a reasonable jury could conclude that the denial of a halal diet substantially burdened Abdulhaseeb.<sup>301</sup>

Judge Gorsuch supported the holding of the majority, yet additionally composed a concurrence. Judge Gorsuch argued that the facts of the case should have been interpreted to favor Abdulhaseeb, giving him the benefit of the doubt.<sup>302</sup> Abdulhaseeb required a halal-certified diet and ODOC provided no means for him to procure it for himself.<sup>303</sup> Therefore, he was forced to choose between violating his religious tenets or starving to death.<sup>304</sup> Judge Gorsuch indicated that the court should have applied the *Sherbert-Thomas* prohibition,<sup>305</sup> stating, “[t]o say that access to edible food

298. *Id.* at 1324 (Gorsuch, J., concurring).

299. *Id.*

300. *Id.* (internal quotation marks omitted).

301. *Id.* at 1320 (majority opinion).

302. *Id.* at 1324 (Gorsuch, J., concurring) (“As both the summary judgment non-movant and a *pro se* litigant, Mr. Abdulhaseeb deserves the benefit of the doubt.”).

303. *Id.* at 1324–25.

304. *Id.* at 1325.

305. *Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963). The *Sherbert-Thomas* test is a type of test adopted by courts when determining whether to grant or deny unemployment compensation. The government needs to show a compelling government interest when unemployment compensation is denied to a person who was fired from a job as the job did not agree with the person’s religion. The test is used to broaden the protection granted through the Free Exercise Clause. The test consists of four criteria to determine if an individual’s right to religious free exercise has been violated:

[1] [w]hether the person has a claim involving a sincere religious belief, [2] [w]hether the government action places a substantial burden on the person’s ability to act on that belief[,] [3] [whether the government action is] in furtherance of a “compelling state interest,” and [4] [whether the government] has pursued that interest in the manner least restrictive, or least burdensome, to religion.

qualifies as an important benefit is to put it mildly, and Mr. Abdulhaseeb's Claim 10 thus falls squarely within the *Sherbert-Thomas* prohibition.<sup>306</sup>

Finally, Judge Gorsuch addressed the claim that questionable foods had sporadically been placed onto Mr. Abdulhaseeb's cafeteria tray, rendering his entire meal inedible.<sup>307</sup> He contended that this occasional impediment was not a constructive prohibition of Abdulhaseeb's religious exercise.<sup>308</sup> While many questions remained at the conclusion of this opinion, it remains apparent that Justice Gorsuch views obstructions to religious liberties as strongly violative of the First Amendment.

### C. Justice Brett Kavanaugh

The record of Supreme Court Justice Brett Kavanaugh's judicial philosophy on public-school prayer cases addresses more specifically the notion of religious activities in public schools compared to Justice Gorsuch's. Justice Kavanaugh, like Justice Scalia, contends that government invocation or endorsement of belief in a monotheistic God does not violate the Establishment Clause, and that the Founders did not proscribe prayer in public venues such as public schools.<sup>309</sup> Relying on the nation's historical traditions as reason to allow prayer in public schools,<sup>310</sup> Justice Kavanaugh's conservative philosophy of accepting religiosity in public schools also seeks to protect private speech when individuals pray aloud in public schools.<sup>311</sup> The cases that then-Judge Kavanaugh ruled on while sitting on the District of Columbia Court of Appeals position him to rule in favor of individual religious expression in public schools and overturn cases that have

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*What Does "Free Exercise" of Religion Mean Under the First Amendment?*, FREEDOM F. INST., <https://perma.cc/46BT-VTKF>. In both cases, the Supreme Court found First Amendment violations when the government denied unemployment benefits to religious adherents because they followed their beliefs.

306. *Abdulhaseeb*, 600 F.3d at 1325 (internal quotation marks omitted).

307. *Id.*

308. *Id.*

309. See, e.g., Nelson Tebbe, *Judge Kavanaugh Would Vote to Expand Religious Exemptions From General Laws*, WASH. POST (Sept. 7, 2018), <https://perma.cc/ABS2-YHY3>; Ariane de Vogue, *Justice Brett Kavanaugh Signals Court Should Take Up Religious Liberty Case in the Future*, CNN (Mar. 4, 2019), <https://perma.cc/2WXW-KNA9>.

310. See KATHERINE STEWART, *THE GOOD NEWS CLUB: THE CHRISTIAN RIGHT'S STEALTH ASSAULT ON AMERICA'S CHILDREN* 85, 87 (2012) (stating that Justices Scalia and Thomas purported that the founders of the Nation never intended to separate church and state).

311. See JEFFERY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 95–97, 127 (2007) (highlighting that Justice Scalia contended that the Establishment Clause was never meant and has never been read by the Court to serve as an impediment to purely private religious speech).

identified Establishment Clause violations.<sup>312</sup> The holdings in *Priests for Life v. U.S. Department of Health and Human Services*,<sup>313</sup> *Nedow v. Roberts*,<sup>314</sup> and the amicus brief for *Santa Fe Independent School District v. Doe*<sup>315</sup> demonstrate Justice Kavanaugh's views of religious expression in public schools.

### I. Priests for Life v. U.S. Department of Health and Human Services

In *Priests for Life*, a nonprofit organization challenged an accommodation created by the Obama Administration for religiously affiliated nonprofit organizations under the Affordable Care Act (“ACA”).<sup>316</sup> The accommodation allowed nonprofit organizations to simply fill out a form to opt out of the ACA benefit that required most health insurance plans to cover contraception.<sup>317</sup> The government then worked with the insurance company to ensure that the nonprofits' employees would still have no-cost coverage without the nonprofits providing insurance coverage for birth control directly.<sup>318</sup> The nonprofit organization Priests for Life, among others, contended that merely filling out the form to obtain the accommodation violated their religious beliefs.<sup>319</sup> The United States Circuit Court of Appeals for the District of Columbia ruled that the government's accommodation struck a fair balance of protecting both women's access to health care and the religious beliefs of employers.<sup>320</sup>

In a subsequent petition for rehearing en banc, then-Judge Kavanaugh wrote a dissent, contending that a nonprofit organization should be permitted to use religious beliefs to obstruct women's access to birth control.<sup>321</sup> Judge Kavanaugh noted that many religious organizations around the country complained that submitting the required form contravened their religious beliefs because in doing so, they were complicit in providing coverage for

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312. See Liz Hayes, *The Case Against Kavanaugh*, 71 AM. UNITED: CHURCH & ST. MAG., 6, 7 (Sept. 2018), <https://perma.cc/5NX9-8AF9> (stating that Judge Kavanaugh's record “suggests he would be open to overturning” Supreme Court precedent regarding school-sponsored prayers in public schools).

313. *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229 (D.C. Cir. 2014), *vacated and remanded by* *Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

314. *Newdow v. Roberts*, 603 F.3d 1002 (D.C. Cir. 2010).

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

316. *Priests for Life*, 772 F.3d at 239–40.

317. *Id.* at 239.

318. *Id.*

319. *Id.*

320. *Id.* at 267.

321. *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 808 F.3d 1, 14 (D.C. Cir. 2015) (denying petition for rehearing en banc) (Kavanaugh, J., dissenting).

contraceptives.<sup>322</sup> These organizations would have been subject to a monetary penalty for failing to submit the form, and that constituted a substantial burden on their exercise of religion.<sup>323</sup> The nonprofits here also claimed that the government had less restrictive ways of ensuring that the employees of the religious organizations had access to contraception without requiring complicity.<sup>324</sup>

In his dissent, Judge Kavanaugh relied on three primary arguments. First, requiring submission of the form substantially burdened any religious organization's exercise of religion because "the regulations require[d] the organization[] to take an action contrary to [its] sincere religious beliefs" or pay a "significant" penalty.<sup>325</sup> Second, the *Hobby Lobby* case strongly suggested "that the Government ha[d] a compelling interest in facilitating access to contraception for the employees of these religious organizations."<sup>326</sup> Lastly, requiring religious organizations to submit the form was "not the Government's least restrictive means of furthering its interest in facilitating access to contraception for the organizations' employees."<sup>327</sup> This case helps to demonstrate Justice Kavanaugh's overarching philosophy of allowing nonprofit organizations the right to use religious beliefs to obstruct women's access to birth control. Taken to the next level, it can be surmised that Justice Kavanaugh would favor more religious freedoms in public areas such as schools.

## 2. *Newdow v. Roberts*

In 2010, then-Judge Kavanaugh sat on the District of Columbia Circuit when it ruled on *Newdow v. Roberts*.<sup>328</sup> While not specifically a case on public-school prayer, it does provide some insight into Justice Kavanaugh's position on religious demonstrations by public officials in situations, as when an audience is comprised of both students and the general public.<sup>329</sup> In *Newdow*, a group of self-proclaimed atheists filed suit for declaratory and injunctive relief to have the phrase "So help me God" and any other prayer

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322. *Id.* at 15.

323. *Id.*

324. *See id.*

325. *Id.* (referring to *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014)).

326. *Id.*

327. *Id.* at 15–16.

328. *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the judgment).

329. *See id.* at 1016.

elements barred from President Obama's 2009 presidential inauguration.<sup>330</sup> Some individuals and organizations believed the separation of church and state was violated when the President took the oath of office and utters the phrase "So help me God."<sup>331</sup> The court concluded that the plaintiffs' claims were moot and that they lacked standing.<sup>332</sup> While the court ruled on procedural grounds, Judge Kavanaugh noted that "those longstanding practices do not violate the Establishment Clause as it has been interpreted by the Supreme Court."<sup>333</sup>

Judge Kavanaugh wrote a concurring opinion focusing specifically on the merits of the plaintiffs' claims.<sup>334</sup> He noted that Americans of all faith backgrounds, including atheists, have equal status and legal rights in the United States.<sup>335</sup> Therefore, religious language, even that which addresses the beliefs of many faiths and which has historically been used, may cause real "anguish and outrage" to some Americans.<sup>336</sup> Despite that, Judge Kavanaugh concluded that "we likewise cannot dismiss the desire of others in America to publicly ask for God's blessing on certain government activities and to publicly seek God's guidance for certain government officials."<sup>337</sup>

Judge Kavanaugh then turned to a viewpoint-neutrality analysis. The plaintiffs suggested that the removal of the religious components of the inaugural ceremony would have cleansed the ceremony of religious expression and would have reflected "true government 'neutrality' toward religion."<sup>338</sup> The defendants argued that stripping government ceremonies of any reference to God or religious expression would have reflected "unwarranted hostility to religion and would, in effect, 'establish' atheism."<sup>339</sup> To the defendants, the plaintiffs' suit was "[a] relentless and all-pervasive

330. *Id.* at 1006–07 (majority opinion). Plaintiffs also sought a permanent injunction to bar such religious references at any future inaugurations. *See id.*

331. *See, e.g.,* Rob Boston, *Swear to God – Or Not, It's Up to You*, AM. UNITED: WALL SEPARATION BLOG (Jan. 2, 2019), <https://perma.cc/3MA3-HFSA>.

332. *Newdow*, 603 F.3d at 1008–13.

333. *Id.* at 1013 (Kavanaugh, J., concurring).

334. *Id.* at 1016–22. Kavanaugh dedicated the first section of his concurring opinion to explaining why the plaintiffs' claims were not moot and why they did, indeed, have standing. *Id.* at 1013–16. The remaining portion of the concurring opinion focuses on why such religious speech at inaugurations is not a violation of the Establishment Clause. *Id.* at 1016–22.

335. *Id.* at 1016.

336. *Id.*

337. *Id.* Stripping such religious language from government ceremonies might be construed as hostile towards religion, resulting in an Establishment Clause violation of a different sort: "establish[ing] atheism". *Id.* (internal quotation marks omitted).

338. *Id.*

339. *Id.*; *cf. Salazar v. Buono*, 559 U.S. 700 (2010).

attempt to exclude religion from every aspect of public life [which] could itself become inconsistent with the Constitution.”<sup>340</sup>

Next, Judge Kavanaugh referenced the historical tradition of legislative prayer. He argued that, based on the Supreme Court’s own jurisprudence, the Establishment Clause does not allow for a “one-size-fits-all test.”<sup>341</sup> Justice Kavanaugh relied on *Marsh v. Chambers*, in which the Court upheld a state legislature’s practice of beginning each session with a prayer by a state-employed chaplain.<sup>342</sup> The *Marsh* Court held that opening a legislative session with prayer was “‘deeply embedded in the history and tradition of this country.’”<sup>343</sup> “‘Since the Founding, the ‘practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom.’”<sup>344</sup> The practice of opening legislative sessions with prayer has become “‘part of the fabric of our society’” such that invoking God was “‘not, in these circumstances, an “establishment” of religion . . . [but] simply a tolerable acknowledgement of beliefs widely held among the people of this country.’”<sup>345</sup> Justice Kavanaugh concluded that “‘the words ‘so help me God’ in the Presidential oath [were] not proselytizing or otherwise exploitative” like the legislative prayer in *Marsh*.<sup>346</sup>

A presidential oath requires a performative utterance that is required by the Constitution, and therefore, has a legal function. Using the *Marsh* rule, as interpreted by Judge Kavanaugh, religious utterances by the government are constitutional so long as they are rooted in history and tradition and do not proselytize. Government expressions of religion would be constitutionally permissible if they endorsed particular religious ideas, unless they aggressively advocated a specific religious creed.

### 3. Santa Fe Independent School District v. Doe (*Amicus Brief*)

The amicus brief in *Santa Fe Independent School District v. Doe*,<sup>347</sup> co-authored by now-Justice Kavanaugh, provides further indication of his judicial philosophy regarding prayer in public schools. Despite the fact that Justice Kavanaugh co-wrote an amicus brief on behalf of others as a private

340. *Lee v. Weisman*, 505 U.S. 577, 598 (1992).

341. *Newdow*, 603 F.3d at 1017.

342. *Id.* (citing *Marsh v. Chambers*, 463 U.S. 783, 784–86 (1983)).

343. *Id.* (quoting *Marsh*, 463 U.S. at 786).

344. *Id.* (quoting *Marsh*, 463 U.S. at 786).

345. *Id.* (alteration in original) (quoting *Marsh*, 463 U.S. at 792).

346. *Id.* at 1018.

347. Brief of Amici Curiae Congressman Steven Largent and Congressman J.C. Watts in Support of Petitioner, *Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (No. 99-62) [hereinafter Brief of Amici Curiae].

attorney, based on other compositions, arguably many tenets in the brief would be embraced and facilitated by Judge Kavanaugh.<sup>348</sup> The school district in Santa Fe, Texas chose to permit students to deliver a brief invocation and/or message during the pre-game ceremonies at home varsity football games.<sup>349</sup> Under the guidance of the school's principal, the Santa Fe High School Student Council conducted a secret ballot election of the student body to determine whether a statement or invocation was to be a part of the pre-game ceremonies; if so, the student body elected a "[s]tudent [c]haplain" to deliver the statement or invocation.<sup>350</sup> The student volunteer who was selected by his or her classmates decided what message and/or invocation to deliver.<sup>351</sup>

The school district argued that the student invocations were private speech that should not be chilled by the Establishment Clause.<sup>352</sup> The Supreme Court concluded that the district's attempt to disentangle itself from the religious messages by creating an official process for selecting the student chaplain did not make the invocations constitutional.<sup>353</sup> The Court determined that "[t]he delivery of such a message—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—[was] not properly characterized as 'private' speech."<sup>354</sup> The amicus argued that not only were the school-sponsored prayers constitutional, but that "[t]he Establishment Clause permit[ed] a student speaker to deliver a religious message in a neutrally available school forum, so long as the school itself d[id] not select, compose, deliver, or require a religious message."<sup>355</sup> He noted that in several cases<sup>356</sup> the Court stressed a "critical distinction 'between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."<sup>357</sup> The amici brief made the assertion that the plaintiffs' (two students and their mothers) theory of the Constitution was inverted: "If

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348. See Frank Ravitch, *Judge Kavanaugh on Law & Religion Issues*, SCOTUSBLOG (July 30, 2018) <https://perma.cc/R9B4-H5M9>; see also Tebbe, *supra* note 309.

349. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 297–98 (2000).

350. *Id.* at 297–98, 309.

351. *Id.* at 321 (Rehnquist, J., dissenting) ("The elected student, not the government, would choose what to say.")

352. *Id.* at 302 (majority opinion).

353. *Id.* at 305–06.

354. *Id.* at 310.

355. Brief of Amici Curiae, *supra* note 347, at 8–9.

356. *E.g.*, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 841 (1995).

357. Brief of Amici Curiae, *supra* note 347, at 9 (quoting *Rosenberger*, 515 U.S. at 841).

Santa Fe High School took steps to *prevent* the student speaker from invoking God's name or uttering religious words or saying a prayer in his or her pre-game statement, then the school *would* violate the Constitution . . . .<sup>358</sup>

Justice Kavanaugh has repeatedly written on issues that impact religious freedom, and most often sided with those who seek religious liberties in the public spectrum.<sup>359</sup> “[Justice] Kavanaugh’s [views on the Establishment Clause] would allow government expression that is unambiguously sectarian.”<sup>360</sup>

### CONCLUSION

Balancing when and how religion and faith may be expressed in public schools by both students and employees has proved challenging for the United States Supreme Court.<sup>361</sup> For example, *Engel v. Vitale*<sup>362</sup> caused a tremendous upheaval<sup>363</sup> when the Supreme “Court [first] held that the First Amendment’s [Establishment Clause] barred public school educators from leading their pupils in religious exercises.”<sup>364</sup> The Supreme Court’s decisions barring religious exercises in public schools proved unpopular “because they contravened longstanding, cherished practices that occurred throughout much of the nation on a daily basis.”<sup>365</sup> “[M]any commentators have contended that these decisions demonstrate the Supreme Court’s hostility toward religion . . . .”<sup>366</sup> These critics generalize the holding in *Engel* as eliminating prayer in public schools.<sup>367</sup> However, freedom of expression for students was not chilled in *Engel*; instead, state sponsorship of public prayer was debarred, ensuring viewpoint neutrality which complies with the intent of the Establishment Clause.<sup>368</sup>

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358. *Id.* at 3.

359. *See* Ravitch, *supra* note 348.

360. Tebbe, *supra* note 309; *see also* Ravitch, *supra* note 348 (concluding that “more likely to lean toward the mold of Chief Justice William Rehnquist, who rarely agreed that government action violated the establishment clause”).

361. *See* JUSTIN DRIVER, *THE SCHOOL HOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND* 362 (2018).

362. *Engel v. Vitale*, 370 U.S. 421, 422 (1962).

363. *See* Corinna Barrett Lain, *God, Civic Virtue, and the American Way: Reconstructing Engel*, 67 *STAN. L. REV.* 479, 507 (2015).

364. DRIVER, *supra* note 361, at 362.

365. *Id.*

366. *Id.* at 363.

367. *See, e.g.*, Charles C. Haynes, *50 Years Later, How School-Prayer Ruling Changed America*, *FREEDOM F. INST.* (2012).

368. *See* DRIVER, *supra* note 361, at 363–76.

The *Kennedy v. Bremerton* case is a prime example of the longstanding separation of church and state philosophy that could be overturned with the appointments of Justices Gorsuch and Kavanaugh—both as it applies to public school football games as a forum for individual prayer and the attempt to insulate private religious speech in public fora.<sup>369</sup> The Court has been consistent since the 1962 *Engel* ruling—that public schools are not temples of indoctrination, and that “religious education is the province of parents and religious communities, *not* government bureaucrats.”<sup>370</sup> If courts are concerned about the student-on-student peer pressure to conform to the same religious beliefs, then that concern is intensified if the pressure comes from adults. An adult employee who engages in religious rituals in the presence of students is sure to impart some coercion on the students to participate in the activity. If the employee is revered by the students, such as the case with a well-liked teacher or a respected coach, then there is the potential for even stronger influence. The protection of students against religious coercion in public school settings has been protected multiple times in court<sup>371</sup> and the separation of church and state philosophy has been respected by various secular and non-secular organizations.<sup>372</sup>

The “period of détente”<sup>373</sup> that has permeated religion and public schools since 1962 is in jeopardy with addition of Justices Gorsuch and Kavanaugh to the Supreme Court bench. There is now a real chance that we could see cases like *Kennedy v. Bremerton* come out in favor of the public

369. *Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 635 (2019) (Alito, J., concurring).

370. Heather L. Weaver, *Can the Wall Between Church and State Survive Brett Kavanaugh?*, ACLU: SPEAK FREELY (Sept. 7, 2018) <https://perma.cc/5ME4-WC7W>.

371. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 580, 599 (1992) (holding that clergy offering invocation at middle and high school graduations is unconstitutional); *Doe v. Duncanville Ind. Sch. Dist.*, 994 F.2d 160, 161, 168 (5th Cir. 1993) (affirming an injunction prohibiting district employees from leading, encouraging, promoting, or participating in prayer with students during extracurricular or curricular activities before, during or after school related sporting events); *Jager v. Douglas Cty. Sch. Dist.*, 862 F.2d 824, 826 (11th Cir. 1989) (holding that beginning games with an invocation is unconstitutional).

372. *See, e.g., Tina Kelly, Coach in New Jersey Cannot Pray with Players*, N.Y. TIMES (Apr. 16, 2008), <https://perma.cc/VL79-GL9N>. A federal appeals court ruled that a school district did not violate the constitutional rights of a football coach when it prohibited staff members from participating in students’ prayers. Jeffery S. Solochek & Matt Baker, *Faith and Football a Controversial Pairing*, TAMPA BAY TIMES, Sept. 28, 2013, at C1. A Pasco County Superintendent sent a memo to all employees noting that it is unconstitutional for them to be praying with students before a school sponsored activity. SEE YOU AT THE POLE, <https://perma.cc/Y5RA-2LLP>. “See You at the Pole” is a student-led and student organized global movement of prayer where students meet at the school’s flagpole during non-instructional time to participate in a prayer activity. The organization notes on its website that adults must not lead the event irrespective of whether the adult is an employee or not.

373. *See DRIVER, supra* note 361, at 362.

employee, which would splinter the current philosophy of viewpoint neutrality and reduce the protection of the Establishment Clause. This change would allow for the potential coercion of religion upon students of public schools.

The essence of the argument in the *Kennedy* case is still relevant because “important unresolved factual questions would make it very difficult if not impossible at this stage to decide the free speech question . . . .”<sup>374</sup> There, Justices Alito, Thomas, Gorsuch, and Kavanaugh all concurred that Coach Kennedy had two questions: (1) Was he “likely to prevail on his claim that the termination of his employment violated his free speech rights,” and (2) in order to answer question 1, what he “was likely to be able to prove regarding the basis for the school’s action.”<sup>375</sup> After Coach Kennedy engaged in prayer “on the field, under the game lights, in BHS-logoed attire, in front of an audience,” the superintendent reprimanded Kennedy for neglecting his responsibilities “including the supervision of players” and that such conduct would lead “any reasonable observer” to think that the district was endorsing religion.<sup>376</sup> The district court made the conclusion that Coach Kennedy was still in charge and was “responsible for the conduct of his students” on the team.<sup>377</sup> “A reasonable observer,” in the district court’s opinion, “would have seen [Kennedy] as a coach, participating [and] leading an orchestrated session of faith.”<sup>378</sup>

This conclusion led to a review by the Ninth Circuit. Justices Alito, Thomas, Gorsuch, and Kavanaugh characterized the Ninth Circuit as more imprecise on the question of fact than the District Court.<sup>379</sup> “[T]he Ninth Circuit recounted all of [Coach Kennedy’s] prayer-related activities over the course of several years, including conduct in which he engaged as a private citizen, such as praying in the stands as a fan after he was suspended from his duties.”<sup>380</sup> “If this case [was an] appeal within [the Supreme Court’s] mandatory jurisdiction,” then there would be a “clear obligation . . . to vacate the [lower court’s] decision” and remand it back to the District Court.<sup>381</sup> The question before the Court, however, was “whether [the Court] should grant discretionary review, and [they] generally do not

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374. *Kennedy*, 139 S. Ct. at 635.

375. *Id.*

376. *Kennedy v. Bremerton Sch. Dist.*, 869 F.3d 813, 818–19 (9th Cir. 2017) (quoting Oct. 23, 2015, letter from Superintendent Aaron Leavell to Coach Kennedy).

377. *Id.* at 821 (quoting Sep. 19, 2016, order denying injunction).

378. *Id.* (first alteration in original) (internal quotation marks omitted).

379. *Kennedy*, 139 S. Ct. at 636.

380. *Id.*

381. *Id.*

grant such review to decide highly fact-specific questions.”<sup>382</sup> Therefore, the denial of the *writ* was done due to the facts in question, not based upon the merits of “whether [Coach Kennedy] . . . was likely to prevail on his claim that the termination of his employment violated his free speech rights.”<sup>383</sup>

An opportunity is sagaciously delineated in the denial to return to the Supreme Court with a case on public school employees’ free speech rights when dealing with religion.<sup>384</sup> Alito found fault with the Ninth Circuit’s analysis that “public school teachers and coaches may be fired if they engage in any expression that the school does not like while they are on duty . . . .”<sup>385</sup> He amplified his concern for this position by commenting on the Ninth Circuit’s application of *Garcetti v. Ceballos*.<sup>386</sup> Interpreting the *Kennedy* case through the lens of *Garcetti*, the Ninth Circuit “appear[ed] to regard teachers and coaches as being on duty at all times from the moment they report to work until to the moment they depart.”<sup>387</sup> Therefore, “if [public school employees] 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.”<sup>388</sup> The “school could also regulate what [those employees] do during a period when they are not teaching by preventing them from reading things that might be spotted by students.”<sup>389</sup> Justice Alito concluded his concurrence with concern for the use of *Garcetti* in this manner noting that “a public employer cannot convert private speech into public speech ‘by creating excessively broad job descriptions.’”<sup>390</sup> The final worthy note from the Justices is their objection to the Ninth Circuit’s position that “a coach’s duty to serve as a good role model requires the coach to refrain from any manifestation of religious faith—even when the coach is plainly not on duty.”<sup>391</sup> To these Justices, “[t]he suggestion that even while off duty, a teacher or coach cannot engage in any outward manifestation of religious faith is remarkable.”<sup>392</sup>

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382. *Id.*

383. *Id.* at 635.

384. *Id.* at 636 (“[T]he Circuit’s understanding of the free speech rights of public-school teachers is troubling and may justify review in the future.”).

385. *Id.*

386. *Garcetti v. Ceballos*, 547 U.S. 410, 426 (2006) (holding that expression pursuant to official job responsibilities is not protected).

387. *Kennedy*, 139 S. Ct. at 636.

388. *Id.*

389. *Id.*

390. *Id.* (quoting *Garcetti*, 547 U.S. at 424).

391. *Id.* at 637.

392. *Id.*

In sum, it seems apparent that at the very least, this cadre of Justices believes this type of scenario is ripe and they have the appetite to review a case of this nature.