In the CAPE HENRY COLLEGIATE SUPREME COURT

KENNEDY V BREMERTON SCHOOL DISTRICT

OPINION BY Justice W. McGraw in which Chief Justice Hutchens and Justices Angilly, Garran, Granados, Gregory, and Horgan join and which Justices Kezman and Shepherd join with respect to Part II only.

In this case, we have been asked to decide whether Respondent Bremerton School District (Bremerton) violated the free speech and religious rights of Petitioner Joseph Kennedy (Kennedy) when it placed him on administrative leave from his job as a high school football coach.

STATEMENT OF FACTS

While there are many facts in dispute in this case, all parties basically agree on the following:

Joseph Kennedy was an assistant high school football coach at Bremerton High School, a public high school in the state of Washington. He is a "practicing Christian whose religious beliefs require him to give thanks through prayer, at the end of each game." When he began his job, he initially prayed alone, but over time some of his players – and eventually a majority of the team – joined him. One parent complained that his son, an atheist and a player on the team, felt like he had to join in the prayer or face a loss of playing time.

The school district ordered Kennedy to stop praying so that the district did not violate the Constitution's Establishment Clause, which prohibits the government from favoring one religion over another (or of favoring religion generally). Kennedy announced that he would not comply, prompting a large gathering of people – including parents, a state legislator, and members of both teams – to support him by joining him at the 50-yard line after a game in October 2015.

The school district tried to accommodate Kennedy by giving him a private space to pray and by allowing him to pray alone after the crowd had left the stadium. But Kennedy and his lawyers declined those offers, and after Kennedy prayed on the

field again following two more games, the school district placed Kennedy on paid administrative leave because of his midfield prayers.

Kennedy has sued Bremerton claiming that Bremerton violated his First Amendment speech and religious rights by prohibiting him from praying and by taking adverse employment action against him because he prayed.

Bremerton offers two defenses. First, Bremerton argues that Kennedy's speech was government speech (not private speech) and the government can always control what its employees say or do as part of their official job duties. Second, Bremerton argues that even if Kennedy's speech was private speech (not government speech), it nevertheless acted lawfully because allowing him to continue his post-game prayers would have put the school in violation of the First Amendment's Establishment Clause.

The Court will address each issue in turn.

PART I - GOVERNMENT SPEECH

"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." Garcetti v Ceballos (2006) (a district attorney could be fired for writing a memo recommending dismissal of a case) (emphasis added). "The critical question under Garcetti is whether the speech at issue is itself **ordinarily within the scope of an employee's duties . . .**" Lane v Franks (2014) (emphasis added).

As a high school football coach, Kennedy's job duties were not limited to calling plays and teaching his players how to tackle. He was also required to motivate his players and to act as a role model for them. No coach goes home as soon as the whistle blows, and it is common practice for coaches to deliver post-game speeches that are usually less about tactics and more about motivating a team after a loss or congratulating them after a victory. Because post-game speeches are a common practice in athletics, addressing the team after the game was one of Kennedy's responsibilities as a coach. As a result, his employer, Bremerton, had the right to control whether he spoke to his players, when he spoke to his players, where he spoke to his players, and what he said to them. While Bremerton could

not in any way regulate Kennedy's religious activity when he is "off the clock," it does have the power to regulate what he says and does when he is acting as a coach. For these reasons, we grant the request of Attorney Poulos to dismiss Coach Kennedy's lawsuit on the grounds that his post-game prayers were government speech that Bremerton had the right to control.

PART II - THE ESTABLISHMENT CLAUSE

Although our decision on the government speech issue disposes of the case, we will nevertheless address the parties' Establishment Clause arguments. The Court was impressed with the passionate, articulate, and intelligent arguments presented to the Court by Attorney Sobers on behalf of Coach Kennedy, but we nevertheless hold that Kennedy's actions put Bremerton in violation of the Establishment Clause.

Bremerton admits that it did not renew Kennedy's contract because of his midfield prayers, and a state government may only violate a citizen's speech or religious rights if it has a "compelling interest" in doing so. Widmar v Vincent (1981). The Supreme Court has previously held, however, that avoiding a Constitutional violation is a "compelling interest." So the question for the Court is: would allowing Kennedy to continue his post-game prayers have put the school in violation of the Establishment Clause? We answer in the affirmative.

In recent years, this Court has at different times used two different tests to determine whether a government has violated the Establishment Clause: the Endorsement test and the Coercion test. Regardless of which test we use, we find that Kennedy's actions put Bremerton in violation of the Establishment Clause.

Under the endorsement test, a government is in violation of the Establishment Clause if a reasonable observer would have viewed the government's actions as an endorsement of religion. In Santa Fe v. Doe, for example, a public high school allowed students to say prayers over the public address system before high school football games. While the school argued that it was merely allowing the students to speak before the games with the students themselves choosing what to say, the Court nevertheless held that a reasonable observer sitting in the stands would have believed that the school was endorsing the prayers. Similarly, in this case, any

reasonable observer seeing Kennedy praying at midfield with many of his players would assume that the school was endorsing his actions and, in turn, endorsing religion. In fact, one opposing coach said that he thought it was "pretty cool" that the school district allowed Kennedy to do this. As Attorney Cake argued, if this Court won't allow students to pray before a high school football game, it certainly shouldn't allow a government employee to pray with students after a high school football game.

The other question the Court asks when deciding Establishment Clause cases is whether the government has coerced people into supporting or participating in religion against their will. We believe that Kennedy's actions did just that. In Lee v. Weisman, a public school invited a rabbi to give an opening prayer at a graduation ceremony. The Court held that this was a violation of the Establishment Clause because it required students and their families to basically choose between skipping the graduation ceremony and sitting as a captive audience as the rabbi prayed. Similarly, in this case, there was evidence that at least one player believed that he was being forced to choose between joining Kennedy at midfield for the prayer and losing playing time. It is true that no evidence has been found of any player actually losing playing time for refusing to join Kennedy at midfield. But if students felt as if they had to join or fall out of favor with the coach, that is coercion, regardless of whether Kennedy actually penalized his players for remaining on the sideline.[1] That many students felt exactly this way is evidenced by the fact that after Kennedy was placed on leave, the midfield prayers stopped. Our decision on coercion is also amply supported by the psychological research on the adolescent mind and the coach-player relationship that was presented by Attorney Anderson.

For the foregoing reasons, we uphold the decision of the District Court and the Ninth Circuit Court of Appeals dismissing Coach Kennedy's lawsuit.

OPINION by Justices Kezman and Shepherd, dissenting with respect to Part I but concurring with respect to Part II.

We dissent with respect to Part I of the opinion as we believe that Kennedy's speech was private speech.

Under Garcetti, the relevant inquiry for a court when it is determining whether speech is "government speech" or "private speech" is not whether the employee is "on the clock" at the time. If so, a school district could prohibit a teacher from saying a silent prayer at his desk in an empty room during his planning bell on the grounds that the teacher's speech was government speech.

Nor is the relevant inquiry whether the speech occurred while the employee was alone or while she was surrounded by others. If so, a school district could prohibit a teacher from silently saying grace in a crowded cafeteria before eating her lunch on the grounds that the teacher's speech was "government speech."[2]

Rather, the relevant inquiry concerns the nature of the speech itself. If the speech "is the kind of speech activity engaged in by citizens who do not work for the government," such as "writing a letter to a local newspaper or discussing politics with a co-worker," then it is private speech and protected. Garcetti. But where the speech lacks a "relevant analogue to speech by citizens who are not government employees," it is government speech. Id. In other words, if the speech at issue could have been engaged in by a private citizen, it is private speech.

The difference can be readily seen when comparing the facts of Pickering v. Bd. of Education (1968) to the facts of Garcetti. In Pickering, a school teacher wrote a letter to a local newspaper criticizing a decision by the local school board. When the school tried to fire him, the Court held that his speech was private speech and, therefore, protected by the First Amendment, because writing a letter to a newspaper editor is the kind of speech in which any citizen can engage. In Garcetti, on the other hand, the employee, Ceballos, was a government attorney who was fired for writing a memorandum to his superiors recommending dismissal of a case. The Court held that Ceballos' speech was government speech because writing a case memo for his bosses was part of Ceballos' job duties and was not the type of activity in which the average citizen can engage.

Again, the fact that Kennedy was on the clock - or that he was at times surrounded by others - is in our view of little legal relevance to this part of the analysis. We believe that his speech was private speech because praying with students was not part of Kennedy's job description and because prayer is an activity that anyone can engage in.[3] In fact, to hold that a prayer by a government employee is

government speech would give the government the authority to completely eliminate religion from the workplace.

We also hold, however, that Kennedy's prayers, although private speech, put Bremerton in violation of the Establishment Clause for all of the reasons stated by the majority opinion. Therefore, we join the other Justices in Part II of the majority opinion and would uphold the lower court opinions dismissing Coach Kennedy's lawsuit.

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[1] Furthermore, it would be rare for a coach to admit to benching a player for refusing to pray, even if that's exactly what she did.

[2] "Private", in this context, does mean "alone." Rather, "private", in this context, means "non-government."

[3] We also reiterate the point made by Attorney Sullivan that prayer is private speech regardless of whether the prayer is Christian, Jewish, Islamic, or that of any other religion.