*Kennedy v. Bremerton School District*

**Argument Date: April 25, 2022**

Background

The First Amendment to the Constitution states, “Congress shall make **no law respecting an establishment of religion**, or prohibiting the **free exercise** thereof…” The **Establishment Clause** of the First Amendment prohibits state or federal governments from endorsing religion by setting up churches, passing laws aiding one or all religions, or favoring one religion over another. The Establishment Clause is said by some to create a “wall of separation between church and state”—but the wall is not absolute. Religious institutions are aided by government in many ways, including fire and police protection and an exemption from paying taxes. In addition, the First Amendment’s **Free Exercise Clause** protects religious expression and practice, but also not without exceptions. Taken together, the First Amendment prohibits governmental endorsement of religion and protects against government’s interference with religious beliefs and practices. Courts are often asked to decide cases when there is tension between the Free Exercise and Establishment Clauses of the First Amendment.

The First Amendment also prohibits making laws “abridging the freedom of speech…” However, that does not mean everyone is free to speak all things at all times. For instance, the speech of government employees can be restricted during their official duties, where their speech is understood to be **government speech**. Government has its own rights as a speaker and can communicate its own ideas and messages. Public schools are operated by local governments; therefore, teachers and coaches are government employees. Public schools also receive government funding and are important institutions of U.S. democracy, where the teaching of citizenship, rights, and freedoms are common. However, not all speech by school employees is considered government speech. In *Pickering v. Board of Education* (1968), the Supreme Court ruled that teachers have a right to speak out about public issues without being fired, as long as they do not knowingly or recklessly make false statements.

*Kennedy v. Bremerton School District* is a case about whether a coach praying in public after a football game is protected by the Free Exercise Clause and Free Speech Clause or violates the Establishment Clause.

Facts[[1]](#endnote-2)

From 2008–2015, Joseph Kennedy was employed as an assistant coach for Bremerton High School’s varsity football team and as the head coach for the junior varsity team. Kennedy is a Christian whose religious beliefs compel him to kneel and pray at the 50-yard line immediately after football games. Bremerton High School (BHS) is a public high school in Washington state.

At the beginning, Kennedy knelt to say a quiet 30-second prayer by himself after each game to express his gratitude for player safety, sportsmanship, and spirited competition. Soon players asked if they could join him on the 50-yard line to pray. He replied “[t]his is a free country” and “[y]ou can do what you want.” The number of players grew until most of the team and sometimes members of the opposing team joined him. By the end of that first season, Kennedy would stand to give motivational speeches that included prayers while players knelt around him. Players were not required to participate in this post-game activity. Even before Kennedy began coaching at BHS, the football team often said pregame prayers in the locker room. This tradition continued, and Kennedy sometimes participated with the team. He also sometimes led students and coaching staff in the pre-game prayer.

For seven years, there were no recorded complaints about Kennedy’s prayers, speeches, or kneeling. However, in 2015, an employee of another high school brought the prayers to the BHS principal’s attention. Then, after a BHS administrator expressed disapproval of the practice to him, Kennedy posted on Facebook, “I think I just might have been fired for praying.” Although Kennedy had not been fired, the post went viral and prompted people from across the country to email, call, and send letters to BHS expressing their disagreement.

On September 17, 2015, the school district superintendent sent Kennedy a letter informing him of

the district’s investigation into whether he was complying with the school board’s policy on “Religious-Related Activities and Practices.” The policy provides that, “[a]s a matter of individual liberty, a student may of his/her own volition engage in private, non-disruptive prayer at any time not in conflict with learning activities.” While the policy states that “staff shall neither encourage nor discourage a student from engaging in non-disruptive oral or silent prayer or any other form of devotional activity,” the policy did not directly address religious activity by staff. The letter identified two practices as potential violations: (1) Kennedy’s practice of giving players motivational post-game talks that included prayers or religious content, and (2) Kennedy’s practice of leading or participating in pre-game locker room prayers with students. Although the letter acknowledged that participation in these practices was voluntary for players, it nonetheless concluded that these practices violated the policy because students might feel coerced to participate.

The school district clarified its policy and told Kennedy that he could “engage in religious activity, including prayer, so long as it does not interfere with job responsibilities,” the prayer is “physically separate from any student activity, and students [are] not … allowed to join such activity.” The district also stated that, “to avoid the perception of endorsement” of religion, the prayer should not outwardly be recognizable as religious activity.

The next game after receiving the letter, Kennedy gave the players a post-game motivational speech that did not include a prayer. Kennedy also did not kneel at the 50-yard line after the game to say a quiet prayer. After everyone left the stadium, Kennedy returned to the field, knelt, and prayed alone.

On October 14th, Kennedy’s attorneys wrote a letter to the superintendent and the school board formally requesting a religious accommodation to engage in prayer on the field at the conclusion of the games. Kennedy did not ask to be able to continue leading pre-game prayers or giving post-game religious motivational talks with religious content. But he asked to continue his practice of saying a brief, quiet prayer after games, and he maintained that students should not be prohibited from kneeling on the field next to him and saying their own prayers if they chose to do so. The letter also informed the school that Kennedy would resume his practice of kneeling to say a brief, quiet prayer on October 16th, and that he would continue that practice whether or not students chose to join him. After the next game (October 16th), Kennedy waited until players were leaving the field and knelt to say a brief prayer. Players and coaches from both teams joined by kneeling beside him on the field. Community members, spectators, and the media also rushed to the field, which the district maintained created security concerns for players, cheerleaders, and band members.

The district denied Kennedy’s request to continue his mid-field, post-game prayers. They based their denial on the reasoning that allowing him to kneel to pray after games would distract him from work and that “any reasonable observer saw a District employee, on the field only by virtue of his employment with the District, still on duty, under the bright lights of the stadium, engaged in what was clearly, given your prior public conduct, overtly religious conduct.”

The superintendent wrote a second letter on October 23rd, informing Kennedy that his religious exercise would be accommodated if it did not interfere with his performance of his duties and would not be perceived as an endorsement of religion by the school. But the district stated that permitting Kennedy to pray immediately following football games when his prayer would be observable by students would be perceived as endorsement. The superintendent offered Kennedy the option of praying in a private location where students could not see him, such as inside the school building, athletic facility, or press box. The principal also told Kennedy he could return to the field to pray after the crowds and players had left. But the district informed Kennedy that he could not engage in any prayer or other overtly religious conduct in view of students after games. Kennedy did not accept those offers, stating his belief that prohibiting him from praying on the 50-yard-line after games violated his constitutional rights.

On October 26th at the end of a junior varsity game, Kennedy knelt to say a brief prayer at mid-field and was joined by a group including state legislators and others from the community. On October 28th, Kennedy was placed on paid administrative leave and prohibited from participating in any way with the football team. BHS notified Kennedy that it was because he had engaged in “overt, public and demonstrative religious conduct while still on duty as an assistant coach.” And the district explained that it was suspending Kennedy because he continued his practice of kneeling on the field and praying immediately following football games. Kennedy also received a poor performance evaluation for the first time in his coaching career with a recommendation not to rehire him because he “failed to follow district policy” and “failed to supervise student-athletes after games.” When his contract expired at the end of the year, Kennedy did not reapply to coach at BHS. While the district acknowledged that Kennedy never pressured any student to join him in prayer, according to its attorneys, some parents of players thanked the school for ending the “awkward situation where they did not feel comfortable declining to join with the other players in Mr. Kennedy’s prayers.”[[2]](#endnote-3)

Kennedy sued the school district, arguing that prohibiting him from saying a brief, quiet prayer on the 50-yard-line after games violated his First Amendment rights. The District Court found for the school district on the ground that Kennedy’s prayers were government speech; therefore, the school could prohibit them. The court also concluded that the district had to prohibit Kennedy’s prayer to avoid violating the Establishment Clause. The U.S. Court of Appeals for the Ninth Circuit affirmed the District Court’s ruling and ruled against Kennedy again. The court found that even if Kennedy’s prayer was private expression protected by the Free Speech and Free Exercise Clauses, the Establishment Clause nevertheless required its suppression. Kennedy petitioned the Supreme Court to hear the case and they agreed.

Issue

Is a public school employee’s prayer in view of students immediately following the conclusion of a football game protected speech and religious exercise, and, if so, must the public school employer prohibit it to avoid violating the Establishment Clause?

Constitutional Provisions and Supreme Court Precedents

* **First Amendment to the U.S. Constitution**

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech…;”

* *Tinker v. Des Moines Independent Community School District* (1969)

Students John and Mary Beth Tinker and Christopher Eckhardt opposed the war in Vietnam. To show their opposition, they planned to wear black armbands to school. Having found out about the students’ plan, the Des Moines principals adopted a new policy prohibiting armbands. Despite the policy, the students wore armbands to school and were suspended. The students sued arguing wearing the armbands was symbolic speech and the school violated their right to free speech.

The U.S. Supreme Court ruled 7-2 in favor of the students. It made clear that “[n]either students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”[[3]](#endnote-4) To restrict student speech, a school must demonstrate that the speech would “materially and substantially interfere” with the work of the school or interfere with the rights of other students. School officials in Des Moines, the Court explained, could not reasonably predict that the students’ speech would cause a substantial disruption or invade the rights of others.

* *Board of Education of Westside Community Schools v. Mergens By and Through Mergens* (1990)

A group of students trying to form a Christian club at Westside High School, a public high school, was denied permission to meet like other clubs. The school based its decision principally on a concern that permitting the club would violate the Establishment Clause. The students sued, arguing the denial violated the Equal Access Act, which requires schools that receive federal funding to ensure equal access to student groups expressing religious, political, philosophical, or other content messages.

The U.S. Supreme Court found that the school violated the Act, and that giving equal access to the Christian group would not violate the Establishment Clause. It found that “the proposition that schools do not endorse everything they fail to censor is not complicated” and that “secondary school students are mature enough … to understand that a school does not endorse or support … speech that it merely permits on a nondiscriminatory basis.”[[4]](#endnote-5)

* *Lee v. Weisman* (1992)

A middle school invited a Jewish rabbi to deliver a prayer at the graduation ceremony. The prayer referred to “God” and “Lord” in general terms. The Supreme Court ruled that this prayer violated the Establishment Clause. It explained that the government violates the Establishment Clause if it (1) provides direct aid to religion in a way that would tend to establish a state church, or (2) coerces people to support or participate in religion against their will. It noted that schools are a location where Establishment Clause interests are heightened. “What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.”[[5]](#endnote-6) It held that students could feel coerced to participate in an officially sponsored prayer at graduation.

* *Santa Fe Independent School District v. Doe* (2000)

In 1995, the Santa Fe Independent School District established a policy that would allow students to give voluntary pre-game prayers over the public address system at high school football games. During the pre-game ceremonies, the school district would maintain complete control over the programs and facilities, including the ability to cut off the microphone. Two families sued the school district, claiming that the policy violated the First Amendment’s Establishment Clause.

In 6-3 decision, the U.S. Supreme Court ruled in favor of the families, declaring that Santa Fe’s policy violated the Establishment Clause. The Court concluded that the prayer constituted government speech, emphasizing that it would have the “imprint of the state”[[6]](#endnote-7) because the school would be extensively involved. Specifically, the prayer would be reviewed in advance by the school and would take place during a school-sponsored event, over the school’s speaker system, and according to school policies. The Court based its decision on its precedent in *Lee v. Weisman*. A school-sponsored pre-game prayer forced on those in “voluntary”[[7]](#endnote-8) attendance would have the effect of pressuring them into an act of religious worship. Schools cannot compel students to make the difficult choice whether to attend these games or to risk facing a personally offensive religious ceremony.

Arguments for Kennedy (petitioner)

* The Free Exercise Clause and Free Speech Clause of the First Amendment protect Kennedy’s brief, personal prayers after the game. Private religious speech is given preferential treatment and is the most protected form of speech.
* Kennedy never coerced students to pray, and he quit participating in the pregame prayers and including religious content in his post-game speeches as soon as he was asked. He wanted only to kneel and say a quiet prayer by himself, which is clearly private speech even if some students may choose to kneel alongside him.
* Kennedy’s prayer occurred at a time when the school acknowledged that he would have been free to engage in other non-coaching related activities, like talking to friends or family or making personal phone calls. If he could engage in other speech unrelated to his coaching duties, he should free to engage in religious speech too.
* Kennedy’s clearly private religious speech was not government speech. No reasonable observer would conclude that a coach who “walks to mid-field to say a short, private, personal prayer is speaking on behalf of the state,” especially when the school has made very clear that it does not embrace, endorse, or support the prayer.
* *Tinker v. Des Moines* established, “[n]either students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”[[8]](#endnote-9) Therefore, teachers and coaches remain individuals with First Amendment rights on school premises and during school activities; therefore, the suppression of all of their visible or audible religious expression is not permitted, let alone required, by the First Amendment.
* The *Mergens* decision established that “The proposition that schools do not endorse everything they fail to censor is not complicated.”[[9]](#endnote-10) A public school does not endorse religion simply because it does not prohibit private religious speech on school grounds, including the private religious speech of teachers and coaches.
* If there was any concern about the public misunderstanding Kennedy’s prayer, the district could have issued a disclaimer explaining that Kennedy’s expression did not reflect its own position on religion. Educating the public on free-speech and free-exercise rights is a far better approach for schools than silencing speech or forbidding all visible signs of faith.
* If everything coaches and teachers say or do in view of students is government speech that is entitled to no First Amendment protection, then coaches and teachers effectively have no First Amendment rights on the job, which is directly contrary to what *Tinker* said.

Arguments for Bremerton School District (respondent)

* For seven years, Kennedy’s post-game speeches were not quiet. Rather, the players knelt while he stood giving speeches that often included religious content and a prayer. That history and context is critical to understanding how a reasonable observer would view his post-game prayer.
* Kennedy’s prayer was government speech because he was still on duty as a coach during the prayers immediately after the game ended. His duties continued until students had left the school. As government speech, the district must have the ability to control that speech in order to best meet the needs of the students it serves.
* The district had many good reasons to regulate its own speech, including by its employees: (1) to protect the religious liberty of its students and their families; (2) to avoid an Establishment Clause violation; (3) to protect the safety of players and other students; and (4) to avoid opening up the football field as a “public forum,” which could otherwise require the district to allow all other community members to walk onto the field and present their own speech.
* The religion clauses of the First Amendment required the school to prohibit Kennedy’s public prayers in view of or surrounded by his players because the prayers had the effect of making students feel coerced to participate, sometimes in violation of their own beliefs.
* *Lee v. Weisman* (1992) and *Santa Fe Independent School District v. Doe* (2000) established that schools cannot put students in a difficult situation where they must choose between attending a school activity or participating in an unwanted religious ceremony.
* Kennedy’s prayer violated the Establishment Clause because it had the imprint of the government: “any reasonable observer saw a District employee, on the field only by virtue of his employment with the District, still on duty, under the bright lights of the stadium, engaged in what was clearly… overtly religious conduct.”[[10]](#endnote-11) By allowing Kennedy’s prayer to continue, the school would appear to be endorsing the prayers.
* The district reasonably accommodated Kennedy’s religious exercise by providing alternative locations for his post-game prayer away from public view or allowing him to return after the crowds had left the field. These arrangements allowed for Kennedy to pray, but also respected the beliefs of students and their families.
* Kennedy was suspended for not following district policy after being warned in writing that his behavior would have those consequences. He chose not to reapply to coach the next year.

Notes

1. Quoted content in *Facts* comes from the following source, unless otherwise noted: *Joseph A. Kennedy v. Bremerton School District,* No. 21-418, Brief for Petitioner, February 23, 2022, <https://www.supremecourt.gov/DocketPDF/21/21-418/214753/20220223131330291_2022-02-23%20Kennedy%20Opening%20Brief%20FINAL.pdf>. [↑](#endnote-ref-2)
2. *Joseph A. Kennedy v. Bremerton School District,* No. 21-418, Brief for the Respondent in Opposition, <https://www.supremecourt.gov/DocketPDF/21/21-418/204295/20211207122626202_21-418%20BIO%20final.pdf>. [↑](#endnote-ref-3)
3. *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969), <https://supreme.justia.com/cases/federal/us/393/503/#tab-opinion-1947775>. [↑](#endnote-ref-4)
4. *Board of Educ. v. Mergens,* 496 U.S. 226 (1990), <https://supreme.justia.com/cases/federal/us/496/226/>. [↑](#endnote-ref-5)
5. *Lee v. Weisman,* 505 U.S. 577 (1992), <https://supreme.justia.com/cases/federal/us/505/577/>. [↑](#endnote-ref-6)
6. *Santa Fe Independent School District v. Doe,* 530 U.S. 290 (2000), <https://supreme.justia.com/cases/federal/us/530/290/>. [↑](#endnote-ref-7)
7. See note 6. [↑](#endnote-ref-8)
8. See note 3. [↑](#endnote-ref-9)
9. See note 4. [↑](#endnote-ref-10)
10. See note 1. [↑](#endnote-ref-11)