FROM *GARCETTI* TO *KENNEDY*: TEACHERS, COACHES, AND FREE SPEECH AT PUBLIC SCHOOLS

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INTRODUCTION

"I think it's a great ruling for America,"[1] said assistant football coach Joseph Kennedy when the Supreme Court's 6-3 decision in *Kennedy v. Bremerton School District*[2] came out. The Court had just ruled that Kennedy's practice of praying on the 50-yard line immediately after each football game was protected by the Free Speech and Free Exercise Clauses

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1. Kiro 7 News Staff, *U.S. Supreme Court Backs Former Bremerton High Football Coach Who Prayed After Games*, KIRO 7 NEWS (June 27, 2022, 10:05 PM), https://www.kiro7.com/news/local/us-supreme-court-backs-former-bremerton-high-football-coach-who-prayed-after-games/TE44PCRK4ZAYPNVHOTQN2YS3IM/ [https://perma.cc/KP86-7U5S].

2. 142 S. Ct. 2407 (2022).

of the First Amendment—and that the Bremerton School District had violated both of those rights by telling him to stop.[3] "People of faith or no faith, everybody has the same rights and that is what the Constitution is all about," Kennedy reflected. "It's my freedom to be able to just have that moment of prayer by myself."[4]

Kennedy's comments—indeed, much of the discussion after the decision was released—focused on the religious aspects of his case.[5] And, to be sure, *Kennedy* has critical implications for the meaning of the Free Exercise Clause, the Establishment Clause, and the relationship between the two. But this Article focuses on the other piece of Kennedy's lawsuit: his free speech claim. Kennedy's victory marks a new turn in the doctrine surrounding public school employees' free speech rights. Ever since the Supreme Court's 2006 decision in *Garcetti v. Ceballos*[6]—which held that when government employees are speaking in their capacity as employees, the First Amendment does not protect their speech—K-12 public school employees (usually teachers) had generally been losing their free speech claims in court.[7] This held true for all of their on-the-job speech, from their curricular and pedagogical choices to their classroom decorations to even their one-off conversations with students. The idea was that, per *Garcetti*, all such speech "owe[d] its existence to [the teacher's] professional responsibilities,"[8] and was thus wholly unprotected by the Free Speech Clause. Indeed, this is precisely why Kennedy lost his free speech claim in the courts below. As one Ninth Circuit judge put it, Kennedy "would not have had access to the field if he had not been working as a coach."[9]

But, of course, that was not how *Kennedy* ultimately came out. On the contrary, Kennedy was vindicated by the Supreme Court, which ruled that he was speaking as a private citizen, not a coach, when he prayed on

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3. *Id.* at 2432–33.

4. Kiro 7 News Staff, *supra* note 1; *"A great ruling for America": Football coach who lost job over praying reacts to winning Supreme Court case*, CBS NEWS (June 27, 2022, 2:56 PM), https://www.cbsnews.com/news/joseph-kennedy-supreme-court-ruling-religious-freedom/ [https://perma.cc/8L2D-CWDM].

5. Kiro 7 News Staff, *supra* note 1. *See also Kennedy v. Bremerton: A First Amendment Analysis*, FREEDOM FORUM, https://www.freedomforum.org/kennedy-v-bremerton/ [https://perma.cc/JK2E-7QUV]; *ACLU Comment on Supreme Court Decision in Kennedy v. Bremerton School District*, ACLU (June 27, 2022, 10:00 AM), https://www.aclu.org/press-releases/aclu-comment-supreme-court-decision-kennedy-v-bremerton-school-district [https://perma.cc/RGC3-SSEU].

6. 547 U.S. 410 (2006).

7. *Id.* at 411. *See, e.g.*, Brown v. Chicago Bd. of Educ., 824 F.3d 713, 715 (7th Cir. 2016) (noting that a public school teacher's First Amendment claim "fails right out of the gate" because of the Supreme Court's decision in *Garcetti*); David L. Hudson, Jr., *Rights of Teachers*, FREE SPEECH CENT. AT MID. TENN. ST. UNIV. (Sept. 19, 2023), https://firstamendment.mtsu.edu/article/rights-of-teachers/ [https://perma.cc/W5QK-L7FG]; Nathaniel Levy, *First Amendment: Garcetti's Impact on Teachers*, ONLABOR (June 3, 2019), https://onlabor.org/garcettis-impact-on-teachers/ [https://perma.cc/DNR6-T3FA].

8. *Garcetti*, 547 U.S. at 421–22.

9. Kennedy v. Bremerton Sch. Dist., 4 F.4th 910, 926 (9th Cir. 2021).

the football field.[10] *Kennedy* has thus called into question the rough consensus that had been developing since 2006 regarding K-12 educators' free speech rights. And the stakes are higher than ever in this highly-charged era, where public schools have increasingly become "ground zero" for culture wars over issues like parents' rights, sex education, gender identity, and critical race theory.[11] Understanding the current scope of teachers' First Amendment protection for their on-campus speech is now crucial.

This Article analyzes *Kennedy*'s implications for educators' free speech rights at school. It is important to note, at the outset, that the *Kennedy* majority's description of the actual facts at issue is highly debatable. Indeed, the majority presented a sanitized account of what actually occurred on the ground, minimizing the highly public nature of Kennedy's prayers and the football players' involvement in them.[12] That said, if we take the facts as the majority presented them, and then move to the majority's *assessment* of those facts, we emerge with an interesting gloss on *Garcetti*. Synthesizing *Garcetti* and *Kennedy* points toward a more nuanced way of discerning the line between when teachers are speaking *purely* as employees (in which case no First Amendment protection applies) and when they are simultaneously speaking as employees and private citizens (in which case the First Amendment does have a role to play). This Article argues that when the speech involves the delivery of the educational program itself to students (including both academics and extracurricular activities), it should be seen as pure employee speech. Examples falling into this category include curricular and pedagogical choices, classroom decorations, coaching techniques, and the ways in which students are addressed (e.g., pronouns). But there is also speech that falls outside this scope, even though it happens at school and students may therefore see or hear it. This includes, for instance, what educators choose to wear, the decoration of their own private offices, the pronouns that they use for themselves, and—as the *Kennedy* Court put it—"whether they "pray[] quietly over…lunch in the cafeteria."[13] In these latter situations, this Article suggests, the speech should be recognized as implicating enough of a "private citizen" component to give rise to a First Amendment interest, one that must ultimately be weighed against the school district's interests in regulating the speech.

The Article proceeds in four parts. Part I discusses the state of the law before the 2022 *Kennedy* decision. This includes the pre-*Garcetti* uncertainty over how to conceptualize teachers' free speech rights at

10. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2424–25 (2022).

11. *See generally* Thomas F. Harrison, *Back to school…and back to the culture war*, COURTHOUSE NEWS (Sept. 3, 2022), https://www.courthousenews.com/back-to-school-and-back-to-the-culture-war/ [https://perma.cc/V8CA-CUU7].

12. *Kennedy*, 142 S. Ct. at 2430–31.

13. *Id.* at 2425.

school, how *Garcetti* affected this analysis, and the rough post-*Garcetti* consensus that emerged from 2006 to 2022 as amplified by the "government speech" doctrine. Part II turns to *Kennedy,* examining the case through the lens of school district employees' free speech rights. Part III suggests a new synthesis of *Garcetti* and *Kennedy* for analyzing this issue, proposing a framework that can guide school districts and courts as these sorts of speech controversies recur in the future. That framework uses, as its dividing line, whether the speech in question involves the delivery of the educational program to students. Part IV briefly concludes.

I. THE STATE OF THE LAW BEFORE *KENNEDY*

A. The Pre-*Garcetti* Period: A Circuit Split Over the Framework for Teacher Speech

How to conceptualize public school teachers' First Amendment protection for their in-school speech has long been a tricky issue. During the 1990s and early 2000s, a circuit split developed over this very question, with two competing frameworks. Some circuits held that the appropriate legal framework for analyzing teachers' free speech rights was the general public employee framework, often named the *Pickering*-*Connick* framework after *Pickering v. Board of Education*[14] and *Connick v. Myers*.[15] (Once *Garcetti* was decided in 2006, it became the *Pickering*-*Connick*-*Garcetti* framework.) Under that framework, the threshold question is whether the employee is speaking as a citizen on a matter of public concern ("*Pickering* step one").[16] If the answer is no, the employee's free speech claim immediately fails. If the answer is yes, then the court proceeds to weigh the First Amendment interest in that speech against the employer's justification for regulating it ("*Pickering* step two").[17]

In the pre-*Garcetti* period, the courts applying the public employee framework often, but not always, ruled against teachers in their free speech claims.[18] For example, in 1989, the Fifth Circuit used the *Pickering*-*Connick* framework to rule against a teacher who had been fired for using an unapproved reading list, concluding that the choice to do so did not implicate a matter of public concern.[19] By contrast, in 2001, the Sixth Circuit used the *Pickering*-*Connick* framework to rule in favor of a teacher who was terminated for bringing in the actor Woody Harrelson to talk to her class about the environmental benefits of industrial hemp.[20] The Sixth

14. 391 U.S. 563 (1968).
15. 461 U.S. 138 (1983).
16. *See, e.g.*, Garcetti v. Ceballos, 547 U.S. 410, 418 (2006).
17. *Id.*
18. *See, e.g.*, Cockrel v. Shelby Cnty. Sch. Dist., 270 F.3d 1036, 1059–60 (6th Cir. 2001); Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 802 (5th Cir. 1989).
19. *Kirkland*, 890 F.2d at 802.
20. *Cockrel*, 270 F.3d at 1042.

Circuit held that this speech related to a matter of public concern and thus proceeded to a balancing inquiry, ultimately holding that the teacher's First Amendment interest in the speech outweighed the school district's interest in restricting it.[21]

Other circuits, however, thought the more appropriate framework for teacher speech was the *student speech* framework—in particular, the 1988 case of *Hazelwood v. Kuhlmeier*.[22] *Hazelwood* itself involved a principal's censorship of several student articles from a school newspaper.[23] The *Hazelwood* Court differentiated the school newspaper situation from *Tinker v. Des Moines School District*,[24] where a school had prohibited students from wearing armbands to protest the Vietnam War.[25] The *Hazelwood* Court stated that *Tinker* had involved "educators' ability to silence a student's personal expression that happens to occur on the school premises."[26] In such situations, the *Hazelwood* Court reasoned, a high bar for speech restrictions made sense.[27] (Under *Tinker*, school districts can restrict purely independent student expression only if it is likely to cause a material disruption or invade the rights of other students.[28]) *Hazelwood*, however, did not involve purely independent student speech. Rather, *Hazelwood* implicated "educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." Accordingly, the *Hazelwood* Court reasoned, a different standard was warranted. The Court thus held that in the context of "school-sponsored speech," educators could impose restrictions "as long as their actions are reasonably related to legitimate pedagogical concerns."[29] This was clearly a much less speech-protective standard than *Tinker*. Essentially, the combination of *Tinker* and *Hazelwood* divided the student speech universe in two: independent student speech that happens to occur at school (to which *Tinker* applies); and student speech that can be considered school-sponsored (to which *Hazelwood* applies).

After *Hazelwood* came out, some circuits decided that its "legitimate pedagogical concerns" standard should be applied to teacher speech disputes as well. For example, in *Miles v. Denver Public Schools*,[30] the Tenth Circuit used *Hazelwood* to analyze the free speech claim brought by a teacher who was disciplined for commenting to his students about a rumor that two students had been seen having sex on the tennis court. "I

21. *Id.* at 1059–60.
22. 484 U.S. 260 (1988).
23. *Id.* at 262.
24. 393 U.S. 503 (1969).
25. *Id.* at 513–14.
26. *Hazelwood*, 484 U.S. at 270–71.
27. *Id.*
28. *Tinker*, 393 U.S. at 513.
29. *Hazelwood*, 484 U.S. at 273.
30. 944 F.2d 773 (10th Cir. 1991).

don't think in 1967 you would have seen two students making out on the tennis court," the teacher told his ninth grade government class.[31] The Tenth Circuit found that there was "no reason to distinguish between the classroom discussion of students and teachers in applying *Hazelwood* here," applied *Hazelwood*, and ultimately ruled against the teacher because the discipline was reasonably related to the school's pedagogical interests.[32]

The most extended discussion of whether the *Pickering-Connick* public employee framework or the *Hazelwood* student speech framework should apply to teachers' free speech claims occurred in the Fourth Circuit case of *Boring v. Buncombe County Board of Education*.[33] There, a teacher was transferred after choosing a "controversial" play for the students in her advanced acting class to perform in a statewide competition.[34] The majority applied *Pickering-Connick* to reject the teacher's subsequent free speech claim, stating that the teacher had not been speaking on a matter of public concern and that the speech at issue (her choice of the play) represented "an ordinary employment dispute."[35] Thus, in the majority's view, the teacher's claim could not survive *Pickering*'s first step. The court also noted that *Hazelwood* would produce the same result because "the school administrative authorities had a legitimate pedagogical interest in the makeup of the curriculum of the school."[36] One concurrence more explicitly stated that *Pickering-Connick* rather than *Hazelwood* supplied the appropriate standard, because *Hazelwood* was "concerned only with student speech."[37] Meanwhile, six judges dissented, on grounds that *Hazelwood* should apply to teacher speech instead, and that the school lacked any legitimate pedagogical reasons for disciplining the teacher.[38] Notably, one dissent argued that *Pickering-Connick* failed to account for "the unique character of a teacher's in-class speech," which is "neither ordinary employee workplace speech nor common public debate."[39]

The challenge of applying *Pickering-Connick*'s binary framework—which divided all speech into either "speech as a citizen on a matter of public concern" or "speech as an employee on a private matter," even though some speech straddled that line—was not limited to teacher speech. In *Garcetti v. Ceballos*, a similar issue came up with a prosecutor who had spoken, as part of his job responsibilities, about a matter of public concern. *Garcetti* ultimately made its way to the Supreme Court, which issued a decision that clarified the *Pickering-Connick* framework. In particular, as the next section explains, the Court ruled that the primary

31. *Id.* at 774.
32. *Id.* at 775–79.
33. 136 F.3d 364 (4th Cir. 1998) (en banc).
34. *Id.* at 366–67.
35. *Id.* at 368.
36. *Id.* at 369–70.
37. *Id.* at 373 (Luttig, J., concurring).
38. *Id.* at 374–75 (Hamilton, J., dissenting); *id.* at 375–80 (Motz, J., dissenting).
39. *Id.* at 378 (Motz, J., dissenting).

consideration in *Pickering*-*Connick*'s first step is whether the plaintiff was speaking as a citizen or an employee.[40]

B. Enter *Garcetti v. Ceballos*

Garcetti involved the free speech claim of Richard Ceballos, a deputy district attorney for the Los Angeles County District Attorney's Office who exercised some supervisory responsibilities.[41] In early 2000, a defense attorney contacted Ceballos to express concerns about a pending criminal case.[42] The defense attorney told him that there were inaccuracies in a sheriff's affidavit that had been used to obtain a critical search warrant.[43] When Ceballos investigated, he agreed.[44] He wrote a memo explaining his concerns and recommended dismissal of the case.[45] However, his supervisor still proceeded with the prosecution, at which point Ceballos was called by the defense to recount his concerns about the affidavit.[46] The trial judge ultimately rejected the defense's challenge to the warrant.[47] Ceballos alleged that in the aftermath, he experienced workplace retaliation, including a reassignment, a transfer, and the denial of a promotion.[48] He brought a free speech claim and won at the Ninth Circuit, which concluded that his memo had addressed a matter of public concern (thus passing *Pickering* step one) and that his First Amendment interest outweighed his employer's interest in regulating the memo (thus passing *Pickering* step two).[49]

But the Supreme Court reversed. The Court ruled that the "public concern" aspect was not the driving factor in the first step of the *Pickering* analysis; rather, the "citizen" aspect controlled.[50] Since Ceballos had been acting as an employee rather than a citizen when he wrote the memo, he could not get past *Pickering* step one. The memo was "written pursuant to Ceballos' official duties," the Court explained. The Court further reasoned that "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created."[51]

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40. Garcetti v. Ceballos, 547 U.S. 410, 420 (2006).
41. *Id.* at 413.
42. *Id.*
43. *Id.*
44. *Id.* at 414.
45. *Id.*
46. *Id.* at 414–15.
47. *Id.* at 415.
48. *Id.*
49. *Id.* at 415–16.
50. *Id.* at 420–21.
51. *Id.* at 421–22.

The *Garcetti* holding raised a big question for educators as well: did it mean that any speech that they engaged in as part of their job was unprotected? After all, educators speak as part of their job responsibilities throughout each and every day. Justice Souter, writing in dissent, explicitly flagged his concern about the decision's effects on higher education. He wrote that the *Garcetti* holding "is spacious enough to include even the teaching of a public university professor, and I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to official duties.'"[52] The majority acknowledged Justice Souter's concern and left the issue open:

> There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship and teaching.[53]

No one, however, said anything about protecting the free speech rights of K-12 public educators, as opposed to public university professors. And, as the next Section explains, *Garcetti* ushered in an era where free speech protections for K-12 public school teachers—which had already been very weak[54]—diminished further.

C. The Post-*Garcetti* Rough Consensus

1. "The Teachers Generally Lose"[55]

Shortly after *Garcetti* was decided, the Sixth and Seventh Circuits both relied on it to reject the free speech claims of public school teachers. First, in 2007, the Seventh Circuit decided *Mayer v. Monroe County*,[56] which involved an elementary teacher who answered a student's classroom question about whether she participated in political demonstrations by

52. *Id.* at 438 (Souter, J., dissenting).

53. *Id.* at 425.

54. *See, e.g.*, Kristi Bowman, *The Government Speech Doctrine and Speech in Schools*, 48 WAKE FOREST L. REV. 211, 255 (2013) (noting that "even before *Garcetti*, teachers' instructional speech rights under *Pickering* and *Connick* were virtually nil").

55. Levy, *supra* note 7.

56. 474 F.3d 477 (7th Cir. 2007).

indicating that had honked to oppose the War in Iraq.[57] Some parents complained, and when the teacher's probationary appointment was not renewed at the end of the year, she sued, alleging that the non-renewal was retaliation for her speech.[58] The court held that "*Garcetti* applies directly" because the teacher's lesson was part of her "assigned tasks in the classroom," and thus rejected her First Amendment claim.[59] The Sixth Circuit further elaborated on why *Garcetti* doomed most teacher speech cases in *Evans-Marshall v. Board of Education*[60] decided in 2010. In *Evans-Marshall*, a teacher sued after her contract was allegedly not renewed due to her curricular and pedagogical choices.[61] "The key insight of *Garcetti* is that the First Amendment has nothing to say about these kinds of decisions," the Sixth Circuit wrote.[62]

Not all courts were as quick to immediately hold that *Garcetti* applied to the K-12 context. Some courts, for instance, continued to analyze teacher speech claims by applying *Pickering-Connick* without the *Garcetti* gloss but still reached the same outcome of ruling against the teachers.[63] Other courts hedged their bets, analyzing teacher-speech controversies under both the public employee framework and *Hazelwood's* student speech framework.[64] But here, too, it made little difference in terms of the outcome: the teachers lost. As the Sixth Circuit put it, in *Garcetti*'s aftermath, "the common thread through all of [the] cases is that, when it comes to in-class curricular speech at the primary or secondary level, no other court of appeals has held that such speech is protected by the First Amendment."[65]

That generalization continued to hold true in the ensuing years. In *Lee-Walker v. NYC Department of Education*,[66] a district court in the Southern District of New York ruled against a teacher whose appointment was not renewed after the principal expressed concern about a lesson that she had taught to her ninth-grade students about the Central Park Five. The court explained that the teacher's free speech claim failed under *Garcetti* and would similarly fail under *Hazelwood*.[67] A New Jersey district court followed similar reasoning in *Melynk v. Teaneck Board of Education*,[68] in

57. *Id.* (explaining that the teacher responded to the question by noting that when she passed a demonstration opposing the War in Iraq and saw a placard saying, "Honk for Peace," she honked her car's horn in support).

58. *Id.* at 478.

59. *Id.* at 480.

60. 624 F.3d 332 (6th Cir. 2010).

61. *Id.* at 336.

62. *Id.* at 342.

63. *See, e.g.*, Lee v. York Cnty. Sch. Div., 484 F.3d 687, 694 (4th Cir. 2007).

64. *See, e.g.*, Panse v. Eastwood, 303 F. App'x 933, 934–35 (2d Cir. 2008); Kramer v. New York City Bd. of Educ., 715 F. Supp. 2d 335, 352 (E.D.N.Y. 2010).

65. Evans-Marshall v. Bd. of Educ., 624 F.3d 332, 343 (6th Cir. 2010).

66. 220 F. Supp. 484 (S.D.N.Y. 2016).

67. *Id.* at 490–94.

68. 2016 WL 6892077, at *1–2 (D. N.J. Nov. 22, 2016).

which a teacher brought a free speech claim after being reprimanded for a classroom discussion with her students about her relatives dressing in black face. Likewise, in *Johnson v. Pitt County Board of Education*,[69] a North Carolina federal district court applied *Garcetti* to rule against a substitute teacher who was not asked back after commenting to students during a World History class that Christmas had pagan origins.

These outcomes were not limited to cases involving in-class speech. In *Johnson v. Poway*,[70] for example, the Ninth Circuit applied *Garcetti* to reject the free speech claim of a teacher whose principal told him to remove the religiously-themed banners ("IN GOD WE TRUST," "GOD SHED HIS GRACE ON THEE," and the like) he had hung in his classroom. The Ninth Circuit reasoned that the teacher "spoke as an employee" when he hung the banners: after all, "an ordinary citizen could not have walked into Johnson's classroom and decorated the walls as he or she saw fit."[71] Indeed, the court explicitly expanded *Garcetti* beyond curricular instruction, explaining:

> [T]eachers do not cease acting as teachers each time the bell rings or the conversation moves beyond the narrow topic of curricular instruction. Rather, because of the position of trust and authority they hold, and the impressionable young minds with which they interact, teachers *necessarily* act as teachers for purposes of a *Pickering* inquiry when at school or a school function, in the general presence of students, in a capacity one might reasonably view as official.[72]

In short, as one legal blog put it in 2019, "[w]hen *Garcetti* is applied to public education, the teachers generally lose."[73]

2. Parallels with the "Government Speech" Doctrine

These defeats lined up with the related "government speech" doctrine that gained prominence during roughly the same post-2006 period. The government speech doctrine, which the Supreme Court articulated in great detail in the 2009 case of *Pleasant Grove City v. Summum*,[74] applies in situations where the government is communicating its *own* message, rather than creating a forum for private speech. In such situations, as the

69. 2017 WL 2304211, at *4 (E.D.N.C. May 25, 2017).
70. 658 F.3d 954, 958 (9th Cir. 2011).
71. *Id.* at 967–68.
72. *Id.*
73. Levy, *supra* note 7.
74. 555 U.S. 460, 468 (2009).

Court explained in *Summum*, there is no viable free speech claim for private speakers to bring.

Summum involved a park in Pleasant Grove City, Utah that contained fifteen permanent displays, at least eleven of which had been donated by private entities.[75] These displays included a wishing well, a Ten Commandments monument that had been donated by the Fraternal Order of Eagles, and a historic granary.[76] Summum, a religious organization, sought to donate a monument that would contain the "Seven Aphorisms of SUMMUM," but the city council declined the request.[77] Summum sued, alleging that the city had violated Summum's free speech rights by accepting the Ten Commandments monument but rejecting the Summum monument.[78] The Supreme Court unanimously rejected Summum's claim, holding that "permanent monuments displayed on public property typically represent government speech," not private speech, and that Summum therefore did not have a viable free speech challenge.[79] The Court later reached a similar result in *Walker v. Texas Division, Sons of Confederate Veterans*,[80] holding that Texas's specialty license plates reflected government speech and that the Sons of Confederate Veterans thus did not have a viable free speech challenge to Texas's rejection of their proposal for a specialty license plate featuring a Confederate battle flag.

As Kristi Bowman observed, the government speech doctrine has implications for public schools as well, since "the government speaks a lot in schools, as do students and teachers."[81] Indeed, *Hazelwood* can be seen as a cousin of the government speech doctrine (in its emphasis on whether the speech was "school-sponsored"). And *Garcetti* is essentially a sibling of the government speech doctrine (in its focus on whether the speech was "commissioned" or "created" by the government employer). In neither case did the Court go as far as saying that the government *itself* was speaking, rather than the student journalist or deputy district attorney. But the government's entwinement with the speech in question heavily influenced the Court's analysis, ultimately dooming the speakers' First Amendment claims. Indeed, the *Hazelwood* Court reasoned that student speech deserved less protection in "school-sponsored" contexts, like school newspapers, where the public "might reasonably perceive [the speech] to bear the imprimatur of the school."[82] And the *Garcetti* Court likewise held that the prosecutor's free speech claim failed precisely because the government

75. *Id.* at 464.
76. *Id.* at 465.
77. *Id.*
78. *Id.* at 466.
79. *Id.* at 470.
80. 576 U.S. 200, 219–20 (2015).
81. Bowman, *supra* note 54, at 213.
82. 484 U.S. 260, 271 (1988).

employer was simply "exercis[ing] . . . control over what the employer itself ha[d] commissioned or created."[83]

Notably, in *Kennedy v. Bremerton*[84]—to which this Article now turns—the Court took this view a step further. The Court essentially collapsed the *Pickering*-*Connick*-*Garcetti* framework into the government speech doctrine, framing the free speech question as follows: "Did Mr. Kennedy offer his prayers in his capacity as a private citizen, or did they amount to government speech attributable to the District?"[85] By suggesting that the choice was between "private citizen" and "government speech," the Court essentially set up the latter as a straw man argument to be rejected. Indeed, as the next section of the Article discusses, the *Kennedy* Court presented the facts and the issues in an oversimplified way that favored Kennedy.

II. CALLING AN AUDIBLE: *KENNEDY V. BREMERTON*

Kennedy v. Bremerton featured free speech and free exercise claims brought by Joseph Kennedy against the Bremerton School District in Bremerton, Washington. Kennedy began working for the school district as an assistant football coach at Bremerton High School in 2008.[86] His responsibilities included various coaching tasks as well as acting as a "mentor and role model for the student athletes," "exhibit[ing] sportsmanlike conduct at all times," and helping "create good athletes and good human beings."[87] Kennedy was also a practicing Christian who felt that his sincerely-held beliefs required him to "give thanks through prayer, at the end of each game, for what the players had accomplished and for the opportunity to be a part of their lives through the game of football."[88]

Starting in 2008, when Kennedy first began his position, he established a practice of praying at the fifty-yard line immediately after football games.[89] At first, he prayed alone.[90] Some of the players then asked Kennedy if they could join him; Kennedy replied, "[i]t's a free country. You can do what you want."[91] Over time, most of the team ended up joining him for at least some of the games.[92] Even players from the opposing team sometimes joined the prayer.[93] Kennedy's prayer practice

83. 547 U.S. 410, 422 (2006).
84. 142 S. Ct. 2407 (2022).
85. *Id.* at 2424.
86. Kennedy v. Bremerton Sch. Dist., 443 F. Supp. 3d 1223, 1228 (W.D. Wash. 2020).
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2416 (2022).
92. *Id.*
93. *Id.*

also grew to include postgame inspirational talks in which he would raise student helmets and make religious references.[94]

In September of 2015, the Bremerton School District learned about Kennedy's post-game prayer practice when a coach from another football team told the high school principal that Kennedy had invited his team to join them in prayers after the game.[95] The school district then sent Kennedy a letter telling him to change course, noting a potential Establishment Clause violation.[96] The letter told Kennedy that any prayer he engaged in could not include students, must be physically separate from student activity, and should not be "outwardly discernible as religious activity."[97]

Kennedy sent back a letter, drafted by counsel, stating that his religious beliefs compelled him to offer a post-game personal prayer at midfield and that he would do so at the next game on October 16, 2015.[98] He also made multiple media appearances describing his plan to pray right after the game at the fifty-yard line.[99] After the October 16th game, many community members rushed to the field to join Kennedy in prayer, knocking down some band members and cheerleaders.[100] The district then told Kennedy that his conduct had risked an Establishment Clause violation and that if it happened again, he would face discipline or termination.[101] Despite that warning, Kennedy again prayed at the fifty-yard line after the next two football games. At the October 23rd game, he kneeled on the field with "players standing nearby" (but not praying with him), and at the October 26th game, he prayed "surrounded by members of the public," with football players joining him at midfield after he stood up from his prayer.[102] The school district responded by putting Kennedy on administrative leave and not rehiring him for the following year.[103] After Kennedy's suspension, no football players engaged in any post-game prayers on the field.[104] Some parents later thanked the school district, saying that their children had joined the prayers to avoid being separated from their teammates or to ensure playing time.[105]

Kennedy subsequently filed suit in a federal district court in Washington, alleging that the district had violated his free speech and free exercise rights.[106] He initially sought a preliminary injunction in the district

94. Kennedy v. Bremerton Sch. Dist., 991 F.3d 1004, 1011 (9th Cir. 2021).
95. *Id.*
96. *Id.*
97. *Id.*
98. Kennedy v. Bremerton Sch. Dist., 443 F. Supp. 3d 1223, 1230 (W.D. Wash. 2020).
99. *Id.*
100. *Id.*
101. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2439 (Sotomayor, J., dissenting).
102. *Id.*
103. *Id.*
104. *Id.* at 2440.
105. *Id.*
106. Kennedy v. Bremerton Sch. Dist., 443 F. Supp. 3d 1223, 1231 (W.D. Wash. 2020).

court, which declined to grant it.[107] On appeal, the Ninth Circuit affirmed that denial, applying *Garcetti* to conclude that Kennedy had been speaking as an employee when he prayed.[108] The Ninth Circuit explained that Kennedy had "special access to the field by virtue of his position as a coach" and that the prayer's "celebration of sportsmanship" fell within Kennedy's job description of "demonstrating sportsmanship."[109] The Ninth Circuit acknowledged that Kennedy's prayers had been in *contravention* of what the school district wanted, so that it might seem strange to think of the prayers as employee speech.[110] But the court pointed out that this was always true in cases involving the *Pickering-Connick-Garcetti* framework: after all, employers only punish employees for their speech when they are unhappy with it.[111] Thus, *every* "First Amendment retaliation case in the employment context involves some degree of employer disagreement with the expressive conduct."[112]

Kennedy then filed a petition for a writ of certiorari to the Supreme Court. The petition was denied, but not without a separate writing by Justice Alito (joined by Justices Thomas, Gorsuch, and Kavanaugh) on the *Garcetti* issue.[113] Justice Alito said that while he agreed with denying certiorari at this early point in the case, he was troubled by the Ninth Circuit's decision.[114] He stated that the court had applied *Garcetti* in a "highly tendentious way," opining:

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

107. *Id.* at 1232.
108. Kennedy v. Bremerton Sch. Dist., 869 F.3d 813, 824–26 (9th Cir. 2017).
109. *Id.* at 827–28.
110. *Id.* at 828.
111. *Id.*
112. *Id.*
113. Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634 (2019).
114. *Id.* at 636.

> things that might be overheard. This Court certainly has never read *Garcetti* to go that far.[115]

With the cert petition denied, Kennedy's case went back to the district court, which then dismissed his free speech claim on summary judgment, holding that he had been speaking in his capacity as a public employee. The Ninth Circuit affirmed for the same reason.[116]

In their opinions, both the district court and Ninth Circuit directly responded to Justice Alito's concern about an overbroad application of *Garcetti.* The district court acknowledged that "there is a point at which an educator's speech is so obviously personal that it is delivered as a citizen. This may be the case when a coach greets family in the bleachers during a game or a teacher wears a cross around their neck."[117] It concluded, however, that Kennedy's behavior fell on the "employee" side of the employee/citizen divide.[118] The Ninth Circuit similarly explained that its earlier opinion "should not be read to suggest that, for instance, a teacher bowing her head in silent prayer before a meal in the school cafeteria would constitute speech as a government employee," adding that such expression is "of a wholly different character than Kennedy's: Kennedy insisted his speech occur while players stood next to him, fans watched from the stands, and he stood at the center of the football field."[119]

The question of how to categorize Kennedy's prayers came up once again when the Ninth Circuit considered whether to rehear the case en banc.[120] Ultimately, the majority voted against doing so, with one concurring judge analogizing Kennedy's behavior to "a drama teacher taking center stage to pray after a school play."[121] The dissent, by contrast, asserted that Kennedy's prayers should be considered private citizen speech because they were distinct from classic football coach speech like "calling a play, addressing the players at halftime, or teaching how to block and travel."[122] In contrast to the concurrence's analogy to a drama teacher taking center stage, the dissent analogized Kennedy's prayer to instances where "a coach might speak…for purely personal reasons, such as chatting about the weather with a spectator or calling his family to let them know the game is over."[123]

Kennedy went back to the Supreme Court with a petition for certiorari, and this time the Court agreed to hear the case. Its 6-3 decision came down emphatically on the side of the "private speech" argument.

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115. *Id.*
116. Kennedy v. Bremerton Sch. Dist., 991 F.3d 1004, 1010 (9th Cir. 2021).
117. Kennedy v. Bremerton Sch. Dist., 443 F. Supp. 3d 1223, 1235 (W.D. Wash. 2020).
118. *Id.* at 1236.
119. *Kennedy*, 991 F.3d at 1015.
120. Kennedy v. Bremerton Sch. Dist., 4 F.4th 910, 911 (9th Cir. 2021).
121. *Id.* at 929 (Christen, J., concurring).
122. *Id.* at 936 (O'Scannlain, J., dissenting).
123. *Id.* at 936–37.

Writing for the Court, Justice Gorsuch stated that when Kennedy uttered his prayers, he was not speaking "pursuant to government policy" or conveying a "government-created message."[124] Nor was he engaging in coach-specific speech like discussing football strategy.[125]

The Court also analogized Kennedy's fifty-yard-line prayers to more private speech utterances. For example, the Court stated that during the immediate post-game period when Kennedy was on the fifty-yard line, coaches were free to "engage in all manner of private speech," like checking their phones or greeting family members in stands.[126] The Court thus suggested that Kennedy's highly-visible prayers were analogous to those sorts of expressions. "That Mr. Kennedy chose to use the same time to pray does not transform his speech into government speech," the Court reasoned.[127] "To hold differently would be to treat religious expression as second-class speech."[128] The Court did not, however, acknowledge that in those other situations, the speech would be far more private, and largely unnoticeable to others.[129] Similarly, the Court analogized Kennedy's fifty-yard line prayers to "a Muslim teacher . . . wearing a headscarf in the classroom" or "a Christian aide . . . praying quietly over her lunch in the cafeteria."[130] Justice Gorsuch's majority opinion thus resurrected the analogy that Justice Alito had drawn in his opinion on the earlier certiorari petition in the case. But the majority opinion never addressed the Ninth Circuit's response that there was a difference between a quiet, individual prayer in the cafeteria and a public prayer among students on the fifty-yard line immediately after a heavily attended football game.[131]

After ruling that Kennedy passed the first step of the *Pickering-Connick-Garcetti* analysis, the Court then ruled for him on step two as well.[132] Under step two, as explained above, a court is supposed to weigh the employee's First Amendment interest in the speech against the employer's interest in regulating it.[133] Here, the Court rejected the school district's argument that it had an Establishment Clause interest in regulating Kennedy's prayers, concluding that the prayers posed no Establishment Clause problem at all because students were not being coerced to join them.[134]

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124. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2424 (2022).
125. *Id.*
126. *Id.* at 2425.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.* at 2426.
133. *Id.* at 2425.
134. *Id.* at 2426–31.

The dissent, meanwhile, gave less attention to the *Garcetti* aspect of the case.[135] Justice Sotomayor did state, in reference to *Garcetti*, that the school district had a "strong argument that Kennedy's speech, formally integrated into the center of a District event, was speech in his official capacity as an employee that is not entitled to First Amendment protections at all."[136] She added, however, that it was unnecessary to resolve this question because even if Kennedy *had* been speaking as a private citizen, the Establishment Clause would still justify restricting his prayers.[137] The dissent concluded that the majority had "elevate[d] the religious rights of a school official, who voluntarily accepted public employment and the limits that public employment entails, over those of his students."[138]

III. NOW WHAT?

The immediate effect of *Kennedy* was that Joseph Kennedy got his coaching job back (and a significant monetary settlement), though he then resigned after the first game of the next season.[139] But what about the longer-term effects on public educators' speech rights? Today, this question is particularly pressing. Public schools have emerged as perhaps *the* key battleground for issues like critical race theory, gender identity, parental rights, and more, with numerous states passing laws about how public schools should handle them.[140] These issues can relate to every aspect of the public school experience—from the curriculum itself to extracurricular activities, bathroom access, and even the names and pronouns that students and educators use for themselves and one another.[141]

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135. *Id.* at 2445 (Sotomayor, J., dissenting).

136. *Id.*

137. *Id.*

138. *Id.* at 2453.

139. *See, e.g.*, Zach Barnett, *High School Coach Who Sued Over Midfield Prayers Reinstated With $1+ Million Settlement*, FOOTBALL SCOOP (Mar. 22, 2023), https://footballscoop.com/news/joseph-kennedy-bremerton-assistant-coach-prays-midfield-supreme-court-settlement [https://perma.cc/H3E7-T4W2]; Nina Shapiro, *Praying Bremerton Football Coach Joe Kennedy Quits, Claims Retaliation*, SEATTLE TIMES (Sept. 6, 2023, 3:39 PM), https://www.seattletimes.com/seattle-news/praying-bremerton-football-coach-joe-kennedy-quits-after-one-game/ [https://perma.cc/CB73-LLJE].

140. *See, e.g.*, Tess Bissell, *Teaching in the Upside Down: What Anti-Critical Race Theory Laws Tell us About the First Amendment*, 75 STAN. L. REV. 205, 214–15 (2023) (noting that as of September 28, 2022, forty-two states had introduced bills or taken other steps "that would limit discussions of racism and sexism in public schools," and that seventeen of those forty-two states had "successfully passed laws or taken other legally binding action," whether through legislation, executive order, or agency rules); Emily Gold Waldman & Bridget J. Crawford, *Period Rhetoric and Partisan Politics*, FAM. L.Q. (forthcoming 2024) (manuscript on file with author) (describing Florida's "Parental Rights in Education Act" that passed in 2022, HB 1557, and its expansion in 2023 through HB 1069).

141. These concepts have long been the source of controversy within public institutions prior to the Court's decision in *Kennedy*. *Compare* Piggee v. Carl Sandburg Coll., 464 F.3d 667, 672 (7th Cir. 2006) (finding no First Amendment protection for a professor who

The extent to which individual educators can express and act upon their *own* views regarding these issues is therefore likely to be increasingly litigated in court. Notably, this question can cut both ways on the political spectrum. It all depends on the underlying law or policy that the educator wants to diverge from. Kennedy's free speech claim against his school district, for instance, was generally seen as a "conservative" claim.[142] And indeed, the judicial line-up of the 6-3 decision fell along those ideological lines.[143] By contrast, a 2023 case from New Hampshire, *Local 8027, AFT-N.H. v. Edelbut,*[144] came from the opposite direction. It involved public educators' free speech challenge to a new state law called HB2 that was labeled by opponents as an "anti-Critical Race Theory" or "banned concept" law, and by proponents as an "antidiscrimination provision."[145] That law, among other things, prohibited educators from teaching students that any individual was "inherently racist, sexist, or oppressive, whether consciously or unconsciously."[146] HB2 would likely be seen as a "conservative" law. And the public educators challenging it—who presumably wanted the freedom to have classroom discussions about topics like structural racism or unconscious bias—would likely be seen as "liberal."[147] The ways in which the politics of educators' free speech rights get continually reshuffled, depending on *who* is challenging *what*, points toward the importance of an objective standard that can be consistently deployed.

Taken together, *Garcetti* and *Kennedy* can be synthesized to provide workable guidance. They point toward a useful dividing line: whether the public educators' speech at issue involves the delivery of the educational program (including both academics and extracurriculars) to students. If the speech does, it should be seen as pure employee speech that cannot give rise to a viable free speech claim. In other words, any free speech claim involving such speech should fail at "step one" of the *Pickering-Connick-Garcetti* framework. If the speech falls outside that scope, however, then a free speech claim about it should proceed to "step two." The remaining sections of this Part flesh this proposed standard out in more detail.

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distributed homophobic pamphlets in class), *with* Meriwether v. Hartop, 992 F.3d 492, 505 (6th Cir. 2021) (insulating a professor who refused to call an individual by their preferred pronouns in class under the free-exercise clause).

142. *See* Matt Ford, *The Supreme Court's Conservatives Love a Good Story, Facts Be Damned*, THE SOAPBOX (Nov. 20, 2023), https://newrepublic.com/article/167044/bremerton-castro-huerta-plantiffs-story [https://perma.cc/E8RB-SCFU].

143. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2021).

144. Loc. 8027, AFT-N.H., AFL-CIO v. Edelblut, 651 F. Supp. 3d 444 (D.N.H. 2023).

145. *Id.* at n.1.

146. *Id.* at 447.

147. *See* Dan Weeks, *New Hampshire is better, and braver, than HB 544*, N.H. BUS. REV. (Nov. 20, 2023), https://www.nhbr.com/new-hampshire-is-better-and-braver-than-hb-544/ [https://perma.cc/U2JE-8W6T].

A. Speech Involving the Delivery of the Educational Program

Much of the "post-*Garcetti* consensus" that this Article described in Part I.C should survive *Kennedy*.[148] Indeed, *Kennedy* implicitly endorsed the idea that *Garcetti* provided the applicable standard for its free speech analysis, given that the Court relied exclusively on *Garcetti* and never mentioned Hazelwood.[149] Additionally, the Court never even considered the notion that *Garcetti*'s carve-out for higher education extended to K-12 public education.[150] Here, too, *Kennedy* preserved the status quo.

What *Kennedy* added to the analysis was a narrowing of what counts, under *Garcetti*, as employee (rather than citizen) speech. The *Kennedy* decision emphasized that "what matters is whether Mr. Kennedy offered his prayers *while acting within the scope of his duties* as a coach."[151] The majority's key move was to differentiate Kennedy's prayer from situations where a coach is "instructing players, discussing strategy, [or] encouraging better on-field performance,"[152] suggesting that only those sorts of situations counted as employee speech. It rejected the district and circuit courts' broader views of what fell under the employee speech umbrella.

Going forward, then, what does it mean for a public educator to be speaking "while acting within the scope of his duties"? The key dividing line, this Article argues, should be whether the speech involves the delivery of the educational program (academic or extracurricular) to students. There are numerous examples of speech falling into this category.

First, for a teacher, curricular decisions and classroom instruction clearly fit into this category of delivering the educational program. Likewise, for a coach, coaching decisions and techniques likewise fit. Indeed, those are straightforward cases. *Kennedy* thus confirms *Garcetti*'s implication that K-12 public school teachers do not have strong grounds for bringing "academic freedom"-based challenges against, say, legislation that controls the way they teach about American History or sex education in the classroom. Such laws go to the heart of the delivery of the educational program.

That does not mean that there are no grounds whatsoever for challenging curriculum-focused laws. Vagueness challenges may sometimes be appropriate. Indeed, a federal judge recently struck down New Hampshire's HB2 law on grounds that it did not "give teachers fair notice of what they can and cannot teach."[153] The court explained that the law threatened to put teachers in an impossible position, by leaving

148. *See supra* Section I.C.
149. *See generally* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2021).
150. *See id.*
151. *Id.* at 2425.
152. *Id.* at 2424.
153. Loc. 8027, AFT-N.H., AFL-CIO v. Edelblut, 651 F. Supp. 3d 444 (D.N.H. 2023).

virtually no space at all between what they were prohibited from and required to do:

> Teachers in New Hampshire have an affirmative duty to teach topics that potentially implicate several of the banned concepts. For example, state law explicitly mandates teaching about the evolution of "intolerance, bigotry, antisemitism, and national, ethnic, racial, or religious hatred and discrimination," as well as "how to prevent the evolution of such practices". . . [Thus,] beyond teaching the historical existence of Jim Crow laws, teachers are supposed to discuss their evolution and how such practices can be prevented. In this context, it is not difficult to imagine that a discussion of remedies for past discrimination such as reparations would take place, which could subject a teacher to sanctions [under HB2] for teaching a banned concept. As a result, teachers could, in plaintiffs' words, be left with "an impermissible Hobson's choice."[154]

Other potential challenges that may be relevant, depending on the law in question, may be rooted in the Equal Protection Clause, the Establishment Clause, or perhaps even parents' own rights to control their children's upbringing. The point here is simply that an "academic freedom"-related argument, of the types brought in *Boring* and *Evans-Marshall*, remains equally unavailing to educators in *Kennedy's* aftermath. The coach's victory in *Kennedy* did nothing to change that.

Beyond curricular instruction and coaching techniques, there are other types of public educator speech also falling within the "delivery of educational program" category. Classroom decorations are one such example. The decoration of the classroom is intertwined with the instruction that happens there each day; indeed, a substantial body of research indicates that classroom décor affects student learning.[155] The Ninth Circuit thus reached the right decision in *Johnson v. Poway*,[156] discussed above, in which it concluded that the teacher's religiously-themed decorations in his classroom reflected employee speech under *Garcetti*. To be sure, the *Johnson's* court's broad reasoning—that "teachers necessarily act as teachers for purposes of a *Pickering* inquiry when at school or at a school function, in the general presence of students, in a capacity one might

154. *Id.*

155. Andrew Watson, *Do Classroom Decorations Distract Students? A Story in 4 Parts…*, LEARNING & THE BRAIN (Nov. 20, 2023), https://www.learningandthebrain.com/blog/do-classroom-decorations-distract-students-a-story-in-4-parts/ [https://perma.cc/V7D9-Xn4C].

156. Johnson v. Poway Unified Sch. Dist. 658 F.3d 954, 957 (9th Cir. 2011).

reasonably view as official"[157]—does not fully survive *Kennedy*. But *Johnson's* holding as to the specific context of classroom decorations is consistent with *Kennedy* and should remain good law.

Another important example is educators' use of students' names and pronouns. Addressing students in one's classroom is an inherent aspect of delivering the educational program to them. Thus, it too should be considered core employee speech. As Caroline Mala Corbin has written, "'teaching' necessarily encompasses how to address individual students.'"[158] A Wyoming district court recently reached that same conclusion in *Willey v. Sweetwater County School District*,[159] where a teacher claimed that the Free Speech Clause protected her right to deviate from the school district policy that required her to use students' "preferred/chosen names." The court reasoned that the policy only implicated the teacher's "interactions with students inside her classroom" and that she was being "compelled to speak only in her capacity as a teacher in the private sphere."[160] Therefore, the teacher's claim could not get past the first step of the *Pickering-Connick-Garcetti* framework.[161] It is true that in *Meriwether v. Hartop*,[162] the Sixth Circuit reached a different conclusion in regard to a public university professor's use of student pronouns. However, the *Meriwether* court specifically relied on *Garcetti's* carving-out of the higher education context.[163] *Meriwether* is therefore not in conflict with *Willey*, nor with this Article's analysis for K-12 public education.

Again, it is important to recognize that classifying the use of students' names and pronouns as pure employee speech can cut both ways, ideologically. In *Willey*, because of the school district policy at issue, teachers had to use pronouns matching students' gender identity. But in a state or school district that takes the opposite approach—*i.e.*, requiring teachers to use the pronouns according to the sex on students' birth certificates—teachers will not have a free speech basis for challenging that rule either. (Note, however, students themselves may have viable Equal Protection or Title IX challenges to those sorts of policies.)

A final type of speech presents perhaps the closest call: situations where, when class is not in session, teachers engage in one-off interactions with students. Whether such interactions are sufficiently related to the delivery of the educational program to count as employee speech will be a highly fact-specific inquiry. *Kennedy* itself, of course, is somewhat

157. *Id.* at 967–68.

158. Caroline Mala Corbin, *When Teachers Misgender: The Free Speech Claims of Public School Teachers*, 1 J. FREE SPEECH L. 615, 638 (2022).

159. Willey v. Sweetwater Cnty. Sch. Dist., No. 23-CV-069, 2023 WL 4297186, at *11 (D. Wyo. June 30, 2023).

160. *Id.* at *23.

161. *Id.*

162. Meriwether v. Hartop, 992 F.3d 492 (6th Cir. 2021).

163. *Id.* at 505–09.

analogous to this situation. After all, Kennedy was not literally coaching his players on the field when he uttered the speech in question (the prayers), but he was still visible to them and was even joined by some of them.[164] There was a strong argument that, because Kennedy's prayers occurred immediately after the game on the fifty-yard line—a place he only had access to because of his coaching position—his prayers crossed the line from citizen speech into employee speech. The Supreme Court majority obviously rejected that view.[165] Still, it clearly *did* matter to the majority that Kennedy was not directly engaging with his players by, for example, calling them over and encouraging them to join his prayers.[166] The Court also emphasized that Kennedy had ceased his earlier practice of engaging in postgame religious talks to students.[167] These observations suggest that when the educator's speech *is* more clearly and intentionally directed at students, it will generally qualify as "employee speech," even if it occurs outside of class.

An illustrative example comes from *Clay v. Greendale School District*,[168] a recent case arising from an incident in a middle school French class. One student joked about marrying her female friend; the teacher then commented to the female student who had been identified as the "husband" that he did not know she was a boy, prompting other students to say "that's discrimination!"[169] That night, the teacher emailed the seven students who had been involved in the discussion, using his school email account and their school email addresses.[170] He wrote: "I want to address the playful conversation in the back row about gay marriage. When a student mentioned my 'discrimination' I want to share that words were placed in my mouth. I support all of my Frenchy students . . . . But if you were asking me to support LGBT marriage, that is an issue I definitely oppose."[171] Students then went to the principal to express concern about the email, and some parents spoke up as well.[172] The teacher was subsequently suspended with pay, on grounds that he had violated district policies connected to the use of the email system and the goals of diversity and inclusion.[173] He then brought a free speech claim, which was dismissed. The court explained that the teacher's email qualified as employee speech, given his use of the school district's email system and the fact that he was emailing the students

164. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2416 (2022).

165. *Id.* at 2439 (Sotomayor, J., dissenting).

166. This, of course, was relevant to the Establishment Clause analysis as well. The majority emphasized, for instance, that "Mr. Kennedy did not seek to direct any prayers to students or require anyone else to participate." *Id.* at 2429 (majority opinion).

167. *Id.*

168. Clay v. Greendale Sch. Dist., 602 F. Supp. 3d 1110 (E.D. Wis. 2022).

169. *Id.* at 1114.

170. *Id.* at 1115.

171. *Id.*

172. *Id.*

173. *Id.* at 1116.

as their teacher about something that had happened in class.[174] Therefore, the teacher lost at step one of the *Pickering-Connick-Garcetti* framework, and the court did not need to proceed to the interest-balancing inquiry of step two.[175]

Clay usefully illustrates that even though a teacher's speech may not itself be curricular—and may even be in contravention of school policies—it can still relate enough to the delivery of the educational program to count as "employee speech."[176] Whether the speech was intentionally directed at students should be a key factor here.[177] *Kennedy*, meanwhile, makes clear that not all educator speech that occurs at school for students to see or hear will count as employee speech.[178]

Kennedy's reasoning and outcome is consistent with a focus on whether the speech was *intentionally directed* at students, as opposed to a singular focus on *where* the speech occurs. Indeed, the football coach's speech in *Kennedy* clearly did not go as far—in terms of being intentionally directed at students—as did the French teacher's speech in *Clay*.[179] The next section turns to some other examples that would arguably fall short of that threshold, and are more likely to qualify as citizen speech.

B. Speech Outside the Delivery of the Educational Program

In the initial opinion denying the petition for certiorari in *Kennedy*, four Supreme Court justices (Alito, Thomas, Gorsuch, and Kavanaugh) made clear that they disagreed with viewing "teachers and coaches as being on duty at all times from the moment they report for work to the moment they depart, provided that they are within the eyesight of students."[180] The 6-3 *Kennedy* outcome made that disagreement even clearer—and created binding precedent. So, going forward, what types of educator speech can occur during work hours, "within the eyesight of students," without counting as "employee speech"? Other than the very specific facts of *Kennedy*, are there other scenarios where on-campus educator speech will fall on the "citizen speech" side of the divide?

Some examples do come to mind, although they are not drawn from actual cases (yet). One set of examples comes from *Kennedy* itself, which compared Kennedy to a "Muslim teacher . . . wearing a headscarf in the classroom" or a "Christian aide . . . praying quietly over her lunch in the cafeteria."[181] The *Kennedy* Court clearly viewed these instances as citizen

174. *Id.* at 1121–23.
175. *Id.* at 1123.
176. *Id.*
177. *Id.*
178. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2425 (2022).
179. *Compare* Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634, 636 (2019), *with Clay*, 602 F. Supp. 3d at 1114.
180. *Kennedy*, 139 S. Ct. at 636.
181. *Kennedy*, 142 S. Ct. at 2425.

speech, and that makes sense. What a teacher wears, even though it is noticeable to students, does not bear directly on the teacher's delivery of the educational program to them.[182] And clothing is not intentionally directed at students in the same way that classroom speech or coaching techniques are. Similarly, if teachers are privately praying (or engaging in other speech) during their non-teaching time, that too is separate from their delivery of the educational program, even though students may see or hear it.[183]

Another example might be educators' decorations of their *own* offices, as opposed to their decorations of classrooms or other "public" spaces within the school, like billboards. Even though students may visit teachers' private offices, those spaces are more readily attributable to individual teachers and students are not exposed to them daily in the same way that they are to classrooms. Indeed, such offices may function more as private respites for teachers during their breaks. This can also be argued the other way: after all, teachers would not have access to offices within public school buildings if they were not employed as teachers in the first place. But that was also true with respect to Kennedy's access to the fifty-yard line immediately after the football game, and that did not sway the Supreme Court.[184] It seems reasonable, in *Kennedy's* aftermath, to treat such private office decorations as "citizen speech" rather than "employee speech."

Another timely example, given recent legislation from Florida, involves educators' usage of names and pronouns for *themselves* (rather than their students). Under Florida's House Bill 1069, an "employee or contractor of a public K-12 educational institution may not provide to a student his or her preferred personal title or pronouns if such preferred personal title or pronouns do not correspond to his or her sex."[185] The bill defines "sex" as "the classification of a person as either female or male based on the organization of the body of such person for a specific reproductive role, as indicated by the person's sex chromosomes, naturally occurring sex hormones, and internal and external genitalia present at birth."[186] In other words, the bill means that transgender employees of school districts are not allowed to use the pronouns that correspond with their gender identity; they must instead use the pronouns that reflect the sex listed on their birth certificates.[187] On August 7, 2023, the Deputy Counsel of the Orange County Public Schools—the state's fourth-largest school district—released explicit guidance to that effect.[188] One Palm Beach

182. *Id.*
183. *Id.*
184. *Id.*
185. H.B. 1069, 2023 Leg., 125th Cong. Sess. (Fl. 2023).
186. *Id.*
187. *Id.*
188. John C. Palmerini, *Condensed Guidance House Bill 1069 Regarding Pronouns and House Bill 1521 Regarding Restrooms*, ORANGE CNTY. PUB. SCH. 1 (Nov. 20, 2023), https://cdnsm5-ss15.sharpschool.com/UserFiles/Servers/Server_54619/File/Current%20

County special education teacher told *The New York Times* that in a faculty training session, teachers were told that when referring to transgender colleagues, they should "use the title 'teacher' instead of their preferred honorific such as Mr. or Ms., if that honorific does not match their sex assigned at birth."[189]

This Article's analysis suggests that public school educators should have a decent First Amendment challenge to this legislation. Although the pronouns that educators use for *students* arguably count as pure employee speech, given that such pronouns are so closely linked to the delivery of the educational program to students, the pronouns that educators use for *themselves* implicate a strong "private citizen" component. After all, teachers use these pronouns at all times, not just when they are at school. Such pronouns should be seen as a personal choice, akin to what the teachers choose to wear and other decisions they make about their self-presentation. The fact that students will become *aware* of their educators' pronouns does not transform those pronouns into employee speech any more than students' awareness of a teachers' prayers transforms the prayers into employee speech.

In each example fitting into this second category (educator speech that falls outside delivery of the educational program), there is still the potential for educators to ultimately lose their Free Speech claims. The fact that their speech is "citizen speech" rather than "employee speech" does not automatically mean victory. It simply means that claims arising from such speech can survive the first step of the *Pickering-Connick-Garcetti* analysis and will proceed to the second step's interest-balancing inquiry. At that point, the school district will have the opportunity to explain why its interest in restricting the speech should outweigh the employee's First Amendment interest in expressing it. If the school district can show, for instance, that the educator's speech is disrupting the school or otherwise undermining the school's efficiency or ability to educate students, then the school district should win. If not, the educator's First Amendment interest should prevail.

CONCLUSION

Kennedy is simultaneously an education law case, an employment law case, and a constitutional law case. Its implications for public school educators' free speech rights strike at the intersection of all three areas, affecting students and educators alike. And, although there is much that is debatable about the *Kennedy* decision, it does point toward a useful test for

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Families/Condensed%20guidance%20regarding%20pronouns%20and%20restrooms%20(8.7.2023).pdf [https://perma.cc/UWM7-K9GY].

189. Dana Goldstein, *Florida Schools Try to Adapt to New Rules on Gender, Bathrooms and Pronouns*, N.Y. TIMES (Aug. 10, 2023), https://www.nytimes.com/2023/08/10/us/florida-schools-rules-transgender-pronouns.html [https://perma.cc/N44V-DUAT].

determining whether an educator's speech should be viewed as pure employee speech: namely, whether the speech involves the delivery of the educational program itself. By training their focus on this inquiry, courts can navigate thorny speech controversies that are likely to arise in today's highly politicized educational climate.