RELIGIOUS LIBERTY (THE "PRAYING COACH" CASE) — KENNEDY V. BREMERTON SCHOOL DISTRICT OPINION JUNE 27, 2022

CORE CONSTITUTIONAL QUESTION(S):

Did a public school violate the First Amendment by firing a high school football coach for praying at school football games?

FACTS:

- Joseph Kennedy, a high school football coach, engaged in prayer with a number of students during and after school games.
- His employer, the Bremerton School District, asked that he discontinue the practice in order to protect the school from a lawsuit based on violation of the Establishment Clause, but Kennedy refused.
- After being suspended by the school district, Kennedy sued it for violating his rights under the First Amendment and Title VII of the Civil Rights Act of 1964.

RULE:

The Free Exercise and Free Speech Clauses of the First Amendment protect an individual engaging in a personal religious observance from government reprisal and the Constitution neither mandates nor permits the government to suppress such religious expression.

DECISIONS:

- In a 6-3 ruling, the Supreme Court held that Bremerton School District's discipline of high school football coach Joseph Kennedy for praying after football games violated Kennedy's rights to free exercise and free speech under the First Amendment.
- The majority opinion by **Justice Gorsuch**, joined by the five other conservative justices, rejected the district's argument that allowing Kennedy's prayers to continue would have violated the Constitution's Establishment Clause.
    - Justice Gorsuch argued that Kennedy's prayers were private speech that was not "ordinarily within the scope" of his duties as a coach.
    - He rejected the district's concerns that Kennedy's actions coerced students to pray due to a lack of evidence.
- The majority effectively announced the overruling of the *Lemon* test—a test created by the 1971 case *Lemon v. Kurtzman.*

  - Under the *Lemon* test, a law or practice that involves religion or religious elements was constitutional under the Establishment Clause if: 1) it has a secular purpose, 2) its principal effect does not advance or inhibit religion, and 3) it does not create an "excessive entanglement with religion."
  - Some justices have long criticized *Lemon* (like the late Justice Scalia), and here Gorsuch expressly dismissed *Lemon* as having been "long ago abandoned."
  - The new test announced by Justice Gorsuch says that courts should determine whether a law or practice violates the Establishment Clause by looking at history and the understanding of the drafters of the Constitution.

- **Justice Sotomayor** wrote the dissenting opinion, joined by Justices Breyer and Kagan, criticizing the majority for privileging the Free Exercise Clause at the expense of the Establishment Clause.
  - She argued that allowing a school district employee to "incorporate a public, communicative display of the employee's personal religious beliefs into a school event" violates the First Amendment's Establishment Clause.
  - She also disputed the majority's portrayal of the facts of the case and its claim that Kennedy's speech was private. She argued that Kennedy's prayers occurred while he was on duty as the coach.
  - She also argued that Kennedy's prayer, which was visible to students, would improperly coerce or pressure students into joining him, since coaches are mentors and role models to students.

ANALYSIS:

- The Supreme Court decided 6-3 in favor of Kennedy. The majority stated that whether under the Free Exercise Clause or Free Speech Clause, the burden was upon the government and school district here that its restrictions on the plaintiff's protected rights satisfy the "strict scrutiny" test and serve a compelling interest and are narrowly tailored to that end.
- The Court added that even under a lower, intermediate standard, Kennedy's speech and exercise of religion was protected.
- The Court majority abandons the *Lemon (Lemon v. Kurtzman)* test for Establishment Clause cases. To survive an Establishment Clause challenge under this test, the government had to show that the challenged law, action, or practice had a "legitimate secular purpose," that its "primary effect" was "one that neither advances nor inhibits religion," and that it did not result in an "excessive entanglement with religion." Instead, the Court endorsed an approach to its Establishment Clause cases relying on "original meaning and history."The majority suggests that the Court long ago abandoned the

Lemon approach and its endorsement test, because its "shortcomings" were apparent and the test was "ambitious, abstract and ahistorical."

- The dissent, written by Justice Sotomayor and joined by Justices Breyer and Kagan, asserts that the case is about whether public schools "must permit" a school official to say a prayer "at the center of a school event" and they find that the Constitution does not authorize or require public schools to embrace this conduct. They say that any official-led prayer "strikes at the core" of First Amendment religious liberty under the Establishment and Free Exercise Clauses.

CONCLUSION:

- The majority concludes that Kennedy's prayer at midfield was quiet and that he did not compel student athletes to join. The Court argued that while some people would have witnessed this religious exercise and may have heard him pray, "learning how to tolerate speech or prayer of all kinds is 'part of learning how to live in a pluralistic society'" and "respect for religious expression is indispensable to life in a free and diverse Republic."