No. 06-3890

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE THIRD CIRCUIT**

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MARCUS A. BORDEN,

*Plaintiff-Appellee*,

v.

SCHOOL DISTRICT OF THE TOWNSHIP OF EAST BRUNSWICK, BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, and JO ANN MAGISTRO, in her capacity as Superintendent,

*Defendants-Appellants*.

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On Appeal From the United States District Court
For the District of New Jersey, No. 2:05-cv-05923 (DMC)

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# BRIEF FOR APPELLANTS

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## RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Appellants are a political subdivision of the State of New Jersey, its elected Board of Education, and its superintendent. None are publicly held corporations.

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## INTRODUCTION

For 23 years, Marcus Borden, the head football coach and Spanish teacher at East Brunswick High School, violated the Establishment Clause by sponsoring official prayers at mandatory team dinners and in the locker room before football games. When Superintendent Jo Ann Magistro found out, because parents complained, she issued a policy directive ordering him to stop.

But Borden chose not to obey. Instead, he sought an injunction preventing the School District[1] from enforcing its policy, so that he could continue participating in team prayer by bowing his head and 'taking a knee.' And he ordered the student captains to poll the team about whether to continue his pregame-prayer rituals, and to report the votes to him, thus ensuring that the prayers would continue, albeit in a form that he could present in court as initiated by students. Insisting that bowing and genuflecting during prayer are secular coaching techniques for fostering team unity, Borden sought to have the District's policy invalidated principally on the theory that it violates his supposed academic-freedom and free-expression rights as a coach.

Borden should not have been leading students in prayer; and he should not now be participating in prayer at official team functions. His conduct exposes the District to liability for violating students' and parents' Establishment Clause rights.

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[1] Appellants are treated collectively except when necessary to describe Magistro's or the Board of Education's specific actions.

But this Court need not decide whether Borden's participation in team prayer violates the Establishment Clause. For public school districts have discretion to control their curricula, their employees' instructional methods, and indeed, all aspects of their employees' official interactions with students. The School District values academic freedom and free expression, just as it respects all students' and teachers' religious beliefs. But there is no constitutional right to coach. Borden does not get to infringe students' and parents' religious freedom because, as a public employee, he does not get to make policy: The District does. In failing to recognize that settled rule, the court below erred in granting summary judgment to Borden instead of to the District.

## JURISDICTIONAL STATEMENT

The court below had jurisdiction to hear Borden's federal claims under 28 U.S.C. § 1331, and supplemental jurisdiction to hear his state-law claims under 28 U.S.C. § 1367(a). The School District timely filed its notice of appeal on August 23, 2006. This Court has appellate jurisdiction from the district court's final judgment under 28 U.S.C. § 1291.

## QUESTIONS PRESENTED

1. As a matter of law, classroom teachers and other public employees have no constitutional right to ignore their employers' policies when performing official duties. The court below held that the District violated Borden's constitutional rights by forbidding him to participate in team prayers. Did the court err in finding that high-school-football coaches have rights to violate school-district policies that classroom teachers and all other public employees lack?[2]

2. A school district is permitted to infringe constitutional rights if its actions are reasonably related to legitimate pedagogical concerns. Borden's pregame-prayer rituals engendered complaints and threats of litigation, and caused rancorous religious divisions in the school community. Does the District have a legitimate governmental interest in imposing policies that respect students' religious diversity, avoid litigation, and comply with Establishment Clause dictates?[3]

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[2] The District raised this issue in, among other places, its summary-judgment brief (at 4, 25, 34-35) and reply (at 1-2, 13, 44, 46-47, 50, 53-54). The court ruled on it at JA46 (Tr.).

[3] The District raised this issue in, among other places, its summary-judgment brief (at 3, 13, 16-26) and reply (at 2, 16-43). The court ruled on it at JA45 (Tr.).

## STATEMENT OF FACTS

For 23 years, Borden sponsored and led the football team, the assistant coaches, other students, and students' families in official pregame prayers at events that were mandatory for the team. Upon learning of Borden's prayer rituals from complaining parents, Dr. Magistro — the superintendent — did what any responsible public-school administrator would have done: She issued a policy specifying that although students are free to pray where, when, and how they see fit, District employees are forbidden to lead or participate in prayer with students during school activities. The court below ruled that, in issuing that policy, the District violated Borden's federal and state constitutional rights — most notably, his academic-freedom and free-expression rights as a coach to manage the football team as he pleases.

### A. Borden's prayers and the District's response

For almost two and a half decades, Borden led and sponsored official team prayers, both at pregame meals and in the locker room before kickoff, in what he calls his pregame "ritual" or "rite."[4]

#### 1. Pregame-meal rite

Pregame meals are a football tradition at East Brunswick High School. Attendance is mandatory for football players, student managers, student trainers, and

[4] JA117 (Borden Dep.).

coaches.[5] Players' families and other invited guests also attend.[6] Since he became coach, Borden has included prayer in the program, though his process for selecting prayergivers has changed over time.

Soon after becoming coach in 1983, Borden received a call from the Rev. Smith — a Presbyterian minister at a nearby church — who asked him whether he planned to continue the previous coach's practice of inviting clergy to say grace at pregame meals.[7] Borden extended the invitation, and the Rev. Smith (or occasionally a rabbi) led the prayers for Borden.

In approximately 1997, however, the high-school athletic director told Borden that clergy could no longer lead pre-meal prayers.[8] So the Rev. Smith penned a prayer, which Borden and Smith began appointing seniors on the team to recite.[9]

That practice continued until 2003, when Smith retired and stopped attending pregame meals.[10] Borden then changed his ritual: He began personally leading the

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5 JA110-11 (Borden Dep.).

6 JA443-44 (Borden Decl.).

7 JA112-13 (Borden Dep.).

8 JA114 (Borden Dep.).

9 *Id.*

10 JA113-16 (Borden Dep.).

prayer at each season's first pregame meal, with seniors appointed to perform that task for the remainder of the season.[11] Borden would ask everyone to stand, then recite a prayer or have a student compose and lead one, taking "just a moment of time in giving thanks to the Lord."[12]

**2. Parents' and students' complaints**

Magistro first learned about Borden's prayer rituals during the 2005 football season. On September 26, Magistro received a call from a parent whose daughter, a cheerleader, had attended a pregame meal at which Borden had initiated official prayer, making the cheerleader uncomfortable.[13] (The cheerleading squad began attending the pregame dinners in 2004.[14]) According to the parent, Borden invited everyone to pray, then had a student lead a prayer invoking Jesus.[15] On September 27,

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[11] JA115-16 (Borden Dep.). There is conflicting evidence on how the official student prayergivers were selected. According to Borden, the students chose the prayergivers. JA116 (Borden Dep.). But according to Magistro, a complaining player's mother said that Borden himself chose (JA155-56 (Magistro Dep.)), and Borden admitted that fact to Magistro (JA159 (Magistro Dep.)).

[12] JA122-25 (Borden Dep.); JA450-51 (Magistro Cert.).

[13] JA154 (Magistro Dep.).

[14] JA123 (Borden Dep.).

[15] JA155 (Magistro Dep.).

Magistro received a similar complaint from another cheerleader's parent.[16] Magistro then learned from cheerleader boosters that other parents had complained about the prayers during the 2004 season.[17] So she called the high-school principal, who informed her that students had also complained to the school's constitutional-law teacher.[18] The principal told Magistro that Borden had previously been instructed to cease his prayer practices.[19]

On September 29, a football player's mother contacted Magistro. The parent tearfully explained that Borden selected students to lead prayers, and that her son was extremely upset about potentially being appointed prayergiver.[20] The mother stated that, when she had asked her son why he didn't tell Borden of his discomfort, he had responded, "because I want to play football."[21] The mother explained that she was

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16 *Id.*

17 JA149-50 (Magistro Dep.).

18 JA155 (Magistro Dep.).

19 JA157 (Magistro Dep.).

20 JA155-56 (Magistro Dep.).

21 JA156 (Magistro Dep.); JA451 (Magistro Cert.).

complaining to Magistro rather than the high-school administration because she feared that she might ruin her son's chances to play.[22]

Over the following week, Magistro received repeat calls from parents complaining that Borden had held prayers at the September 30 pregame meal.[23] One parent had already spoken with a lawyer and threatened litigation.[24]

### 3. The District's response

On approximately September 29, Magistro informed the District's attorney, Martin Pachman, that she had received complaints about Borden's pregame-meal-prayer rituals.[25] Meanwhile, the high-school principal instructed the athletic director to tell Borden once again to stop leading team prayers.[26] Magistro later learned from a complaining parent that Borden's response had been to tell some students at the September 30 pregame meal that if they were uncomfortable with the prayer, they should leave and wait in the bathroom.[27]

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22 JA156 (Magistro Dep.).

23 *Id.*

24 *Id.*; JA451 (Magistro Cert.).

25 JA156 (Magistro Dep.).

26 JA157 (Magistro Dep.).

27 *Id.*

Magistro and Pachman met with the school board in closed session on October 6, explaining the law on prayer in public schools and informing the Board about the litigation risks to which Borden's conduct exposed the District.[28] Pachman informed the Board that students are free to pray, but District employees cannot lawfully lead, initiate, encourage, or participate in student prayer.[29]

Magistro then met with Borden on October 7. She informed him of parents' complaints and asked him to describe his pregame-meal practices.[30] He responded that, when dinner was ready, he would ask everyone to stand, select a student prayergiver, and remain present throughout the prayer.[31] Borden said that the premeal prayers invoked "God" and "the Lord."[32] And he told Magistro that he held additional team prayers in the locker room.[33]

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[28] *Id.* Although Borden vaguely insinuated that the Board should not have met outside his presence, the closed session addressed litigation risks to the District, not Borden's employment status. *Id.*

[29] JA157-58 (Magistro Dep.).

[30] JA159 (Magistro Dep.).

[31] *Id.*

[32] *Id.*

[33] *Id.*

Magistro informed Borden that he could not continue selecting student prayergivers.[34] She then included Pachman (who would defend the District and Borden should they be sued over Borden's conduct) in the meeting by speakerphone, so Pachman could clarify the rules and Borden could ask him questions.[35] Borden expressed his desire to continue his longstanding tradition of initiating prayer,[36] complaining that if he were to comply with District policy, that would mean "the parents win."[37]

Magistro instructed Pachman to prepare written guidelines on prayer in public schools,[38] which she gave Borden that afternoon.[39] The guidelines explained that "[s]tudents have a constitutional right to engage in prayer on school property" that is "truly student initiated" and "does not interfere with the normal operations of the school district," but forbade "any representative of the school district (teacher, coach, administrator, board member, etc.)" to "encourage, lead, initiate, mandate, or

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34 *Id.*

35 JA160 (Magistro Dep.).

36 JA159 (Magistro Dep.).

37 JA160 (Magistro Dep.).

38 *Id.*

39 JA438-39 (Borden Decl.).

otherwise coerce, directly or indirectly, student prayer at any time in any school-sponsored setting, including classes, practices, pep rallies, team meetings, or athletic events," or to "participate in student-initiated prayer."[40] Magistro's covering memorandum to Borden stated that failure to comply with the guidelines would constitute "insubordination."[41] Magistro invited Borden to contact her with questions.[42] But he never did.[43] Nor did he ever return the numerous telephone calls that Magistro and the athletic director made to him.[44]

**4. Borden's locker-room rite**

As noted, Borden informed Magistro that, throughout his tenure as coach, he also conducted a locker-room rite:[45] At about 6:30 p.m. on game days, Borden would gather the players in the locker room and direct them to "take a knee."[46] After

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40 JA220-21 (Policy).

41 JA218.

42 *Id.*

43 JA160-61 (Magistro Dep.).

44 *Id.*

45 JA117 (Borden Dep.).

46 JA105-06 (Borden Dep.).

reviewing strategy for the night's game,[47] Borden would get down on his knee, join hands with the students in a prayer circle, and personally recite a prayer on their behalf:

> [D]ear lord, please guide us today in our quest, in our game, our championship. Give us the courage and determination that we would need to come out successful. Please let us represent our families and our community well. Lastly, please guide our players and opponents so that they can come out of this game unscathed, no one is hurt.[48]

**5. Borden's reaction to the policy**

After receiving the guidelines on October 7, Borden failed to show up for that night's football game. Nor did he return telephone calls from Magistro and the high-school athletic director.[49] Only later did they learn that Borden had resigned by e-mail.[50]

Meanwhile, Borden's prayer rites and resignation caused dissension in the high school and throughout the East Brunswick community.

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47 JA108-09 (Borden Dep.).

48 JA109 (Borden Dep.).

49 JA160-61 (Magistro Dep.).

50 JA160 (Magistro Dep.); JA439 (Borden Decl.); JA224 (e-mail).

On October 8, players, coaches, and parents gathered outside Borden's home to show support for him.[51] Two days later, Magistro sent an e-mail message to all 1300 District employees, reiterating that "[s]tudents have a constitutional right to engage in prayer," but that "[r]epresentatives of the school district (teacher, coach, administrator, board member, etc.) cannot participate in student initiated prayer."[52] That same day, Magistro called a meeting at the high school to address players' and parents' inquiries about recent events.[53]

Students began harassing and threatening those suspected of having complained about Borden's rituals. A student-weblog posting accused two "Jewish cheerleaders" of having lodged complaints against Borden, spurring vituperative anti-Semitic slurs and threats against the cheerleaders; and racist, sexist, and homophobic slurs and threats directed at students who either defended the cheerleaders or argued that Borden's conduct might have been inappropriate.[54] The cheerleaders also suffered harassment at pep rallies and football games.[55]

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51 JA439 (Borden Decl.).

52 JA138-39 (Magistro Dep.); JA226 (e-mail).

53 JA139 (Magistro Dep.).

54 JA151 (Magistro Dep.). The postings appear at JA457-95.

55 JA151 (Magistro Dep.).

What is more, Magistro received complaints from area rabbis about the controversy; and a complaint was lodged with the county prosecutor.[56]

At his lawyers' suggestion, Borden withdrew his resignation on October 17 so he could build a lawsuit, but stated that he would obey the District's policy for the remainder of the 2005 season.[57] At a school-board meeting three days later, the Board's then-president expressed support for Magistro's actions; underscored that the Board expected Borden to follow District policy; and specifically recognized Borden's right to disagree with that policy — so long as he complied.[58]

### B. Borden files his complaint, then manipulates students

A month later, Borden filed his action challenging the District's policy forbidding staff participation in team prayers.[59] He requested both a declaratory judgment that the policy violates a congeries of federal- and state-constitutional rights, and an injunction that would allow him to bow his head and 'take a knee' during team prayer.

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[56] JA150 (Magistro Dep.).

[57] JA440 (Borden Decl.).

[58] JA234 (Baker Statement); JA364-65 (Baker Dep.).

[59] JA79-81 (Compl.).

Then, with an eye toward the 2006 season, Borden, on his lawyer's advice, ordered the football team's student captains to poll the other players on whether to continue the prayer rituals. On April 26, Borden e-mailed instructions to cocaptains Randall Nixon and Sergio Garcia:

> Please consult with the players and let me know whether the players wish to follow the same practices as last year regarding the player initiated and composed grace before pre-game meals and the pre-game taking of a knee in the locker room. Whatever the players decide to do is fine with me.
>
> Be sure to email me their response and let me know that you spoke with all the players on the roster.[60]

Unsatisfied with the cocaptains' progress in complying, Borden sent a follow-up directive:

> My lawyer keeps asking me for the results of your contact with the other players. He is trying to set up a trial date and *he needs* this information right away. You guys have to touch base with everyone by Monday so that I can fax him your email.[61]

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[60] JA497.

[61] JA498.

On April 30, Nixon responded:

> Coach Borden,
>
> We talked to all of the players you asked about, and everybody agreed that we would like to continue our pregame prayer ritual. Hope this helps you out and sorry it took so long.[62]

## C. Summary-judgment proceedings

In June 2006, the District moved for summary judgment, arguing that any rights Borden might have were trumped by the District's right to control employee conduct and its duty to comply with the Establishment Clause. Borden cross-moved, contending that participating in team prayer by 'taking a knee' or bowing his head is not religious but instead is a secular technique for building team unity and morale, and for showing respect to the players. He argued principally that he has academic-freedom and free-expression rights ***as a coach*** to disregard District policy because it violates his constitutional "right and ability to be a coach, to do what coaches do."[63] He also argued that the policy violates his federal privacy, autonomy, and associational rights, as well a liberty right to move his head and limbs as he pleases. Borden specifically eschewed any free-exercise claim.

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62 *Id.*

63 JA25 (Tr.).

On July 25, the district court (Dennis M. Cavanaugh, J.) orally granted summary judgment to Borden, finding that the School District had violated Borden's federal and state constitutional rights. The court was unmoved by (a) the District's duty to comply with the Establishment Clause; (b) its desire to avoid litigation brought by parents and students; (c) its determination to respect students' religious freedom by not subjecting them to unwanted prayer at school activities; (d) its policy to eliminate the appearance that it or its football program favors religion; and (e) its desire to quell the religiously based divisiveness into which Borden's actions had plunged the school community.

The court explained that it would "take the Plaintiff at his word as to what he wants to do" in the future,[64] without regard for the history and context underlying his actions. The court thus explicitly rejected the argument that Borden's conduct must be judged in light of his 23-year history of initiating and leading team prayer; and it refused to consider Borden's e-mailed directives to the team captains as evidence of unlawful religious purpose or official religious endorsement. Finally, the court made what were essentially factual findings that 'taking a knee' in football "does not have

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[64] JA9 (Tr.).

the [religious] significance typically associated" with kneeling during prayer,[65] and that in the future Borden would simply be "bowing [his] head and taking a knee as a sign of respect for his players' actions and traditions."[66] In so ruling, the court declined even to consider that Borden, in his official capacity as coach, had been the one perpetuating those "traditions" for more than two decades.

The court did not issue a written opinion.

## STATEMENT OF THE CASE

Borden originally filed his complaint as No. C-327-05 in the Chancery Division of New Jersey Superior Court for Middlesex County on November 22, 2005. In accordance with 28 U.S.C. §§ 1441 and 1446, the School District removed on December 21. In June 2006, the District moved for summary judgment, and Borden cross-moved. On July 25, the court denied the District's motion and granted Borden's. The District filed its notice of appeal on August 23.

## RELATED CASES AND PROCEEDINGS

There are no related cases or proceedings.

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65 JA43 (Tr.).

66 JA45 (Tr.).

## SUMMARY OF ARGUMENT

The court below found that Borden has academic-freedom and free-expression rights to violate District policy by participating in prayer with students during mandatory team activities because it accepted that bowing and genuflecting are secular techniques for building team unity and morale. But even if those acts were somehow secular, the ruling would be wrong as a matter of law because Borden is a public employee performing his official duties. Hence, he has no constitutional rights to disobey school policies.

Even if Borden had the rights that he asserts, however, the District would still prevail so long as it has a legitimate governmental purpose reasonably related to the challenged policy. And there is ample justification for the policy: The District seeks to promote inclusiveness in a religiously diverse student body, to avoid difficult decisions about what and how much religious conduct by teachers to permit, and to forestall Establishment Clause litigation. Most importantly, Borden's coaching activities are imputed to the District, so the Establishment Clause compels the District to stop Borden's coercing students to pray and endorsing religion through his pregame-prayer rituals.

## STANDARD OF REVIEW

Because this Court reviews summary judgments and interpretations of the Constitution *de novo*,[67] all issues in this appeal receive plenary review.

## ARGUMENT

Football coaches are no more entitled to ignore school-district policies than classroom teachers are. If Borden dislikes those policies, he can resign as coach and continue teaching Spanish without fear of reprisal. What he cannot do is thumb his nose at the Board's and the superintendent's authority — especially when doing so also violates students' Establishment Clause rights and threatens to embroil the District in costly litigation to defend prayer rituals that the District does not condone.

### I. The District has discretion to regulate Borden's instructional methods and conduct toward students.

Borden's arguments and the district court's ruling ignore the one undisputed fact on which this case turns: Borden is an instructor in a public school — a state employee charged by law with carrying out school-district policy. The court below found that the District violated Borden's federal rights to academic freedom, free expression, and freedom of association, as well as his state-law rights to liberty and free speech, because it failed to recognize that Borden does not have discretion to

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[67] *Blackhawk v. Pennsylvania*, 381 F.3d 202, 206 (3d Cir. 2004).

decide what and how he will teach East Brunswick students: The District does. And Borden has an obligation to obey.

### A. Borden has no academic-freedom or free-expression right to violate school-district policy by participating in team prayers.

No one is suggesting that Borden forfeits all First Amendment rights by accepting public employment. But the rights that he retains are those of a private citizen; they do not attach to performance of his coaching duties. In *Pickering v. Board of Education*[68] and its progeny, the Supreme Court made clear that public-school teachers have some rights to speak in noninstructional contexts on school-policy-related topics.[69] But the Court recognized that "the interests of the teacher, as a citizen, in commenting upon matters of public concern" must be balanced against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[70] So the Court established a two-step inquiry: "The first requires determining whether the employee [speaks] as a citizen on a matter of public concern. If the answer is no, the employee has ***no*** First

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[68] 391 U.S. 563 (1968).

[69] *See, e.g.*, *Connick v. Myers*, 461 U.S. 138, 140 (1983); *Pickering*, 391 U.S. at 574.

[70] *Pickering*, 391 U.S. at 568.

Amendment cause of action based on [the school district's] reaction to the speech."[71] If the answer is yes, "[t]he question becomes whether the [school district] had an adequate justification for treating the employee differently from any other member of the general public."[72] A school district has "broad[] discretion to restrict speech when it acts in its role as employer, [so long as] the restrictions it imposes [are] directed at speech that has some potential to affect the [district's] operations."[73] When coaching, Borden speaks as a District employee, not as a citizen — and not on a matter of public concern. So his claims fail at step one. But even if not, they fail at step two because he is interfering with the District's education of its students.

1. In *Garcetti v. Ceballos*, the Supreme Court held that, "when public employees make statements pursuant to their official duties the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[74] Borden has consistently argued that participating in team prayers is part of coaching: He contends that the

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[71] *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1958 (2006) (emphasis added; citation omitted).

[72] *Id.*

[73] *Id.* The same standards apply to academic-freedom claims. *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1188 (6th Cir. 1995).

[74] 126 S. Ct. at 1960.

District's policy trenches on his right to "do what coaches do."[75] But under *Garcetti*, Borden does not speak as a citizen, and therefore has no rights, when acting ***as a coach***.

That rule straightforwardly applies to public-school teachers: "Although a teacher's out-of-class conduct, including her advocacy of particular teaching methods, is protected, her in-class conduct is not."[76] And if classroom teachers do not have the academic-freedom and free-expression rights that Borden asserts, then neither do football coaches.[77]

In 1990, this Court held in *Bradley* that public-school teachers do not have academic freedom to use pedagogical approaches that their school district has chosen to ban, for "no court has found that teachers' First Amendment rights extend to choosing their own curriculum or classroom management techniques in contravention

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[75] JA25 (Tr.).

[76] *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1176 (3d Cir. 1990) (citation omitted).

[77] Because the New Jersey Constitution's free-speech protections are coterminous with the First Amendment's (*see McCusker v. City of Atlantic City*, 959 F. Supp. 669, 675 (D.N.J. 1996) (citing *Anderson v. Sills*, 363 A.2d 381, 386 (N.J. Super. Ct. Ch. Div. 1976) (collecting cases)), Borden's federal and state free-speech claims fail for the same reasons.

of school policy or dictates."[78] The school board in *Bradley* banned a teaching approach called Learnball. So a teacher sought an injunction against the ban, arguing that Learnball was "'a classroom management system'" that was "'mainly a method for [the teacher] to express her positive personality, feelings, and philosophy to her students'" — "'a political statement on [the teacher's] part.'"[79] The teacher contended that she had First Amendment rights to manage her classroom and interact with students using methods she found effective.[80] But this Court disagreed, holding that school districts have an "undisputed right to control the classroom curriculum," including instructors' teaching methods.[81] The school district had discretion to determine that "Learnball is not an appropriate pedagogical method," and to forbid its use; and the teacher "ha[d] no right of academic freedom that extends to the choice of Learnball classroom management techniques despite the school's ban."[82]

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78 910 F.2d at 1176.

79 *Id.*

80 *Id.*

81 *Id.* at 1177.

82 *Id.* at 1176.

Eight years later, in *Edwards v. California University of Pennsylvania*,[83] this Court (per then-judge Alito) reaffirmed *Bradley*'s holding, rejecting a tenured college professor's claim that his university had violated his free-speech and academic-freedom rights by suspending him for injecting religious views into classes. The Court saw no need to consider whether the district judge had properly instructed the jury on balancing the professor's rights against the university's educational interests because, "as a threshold matter, * * * a public university professor does not have a First Amendment right to decide what will be taught in the classroom" or to choose what curricular materials or teaching methods to use.[84] The Court based that ruling in part on "the Supreme Court's jurisprudence concerning the state's ability to say what it wishes when it is the speaker,"[85] explaining that, for First Amendment

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[83] 156 F.3d 488 (3d Cir. 1998).

[84] *Id.* (citing *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 370 (4th Cir. 1998) (en banc) ("the school, not the teacher, has the right to fix the curriculum")); *see also, e.g.*, *Lacks v. Ferguson Reorganized Sch. Dist. R-2*, 147 F.3d 718, 719 (8th Cir. 1998); *Dambrot*, 55 F.3d at 1190; *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F. 3d 719, 722 (2d Cir. 1994); *Miles v. Denver Pub. Sch.*, 944 F.2d 773, 779 (10th Cir. 1991); *Bishop v. Aronov*, 926 F.2d 1066, 1075-76 (11th Cir. 1991); *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 795 (5th Cir. 1989); *Lovelace v. Se. Mass. Univ.*, 793 F.2d 419, 426 (1st Cir. 1986); *Palmer v. Bd. of Educ.*, 603 F.2d 1271, 1274 (7th Cir. 1979); *Cary v. Bd. of Educ.*, 598 F.2d 535, 543-44 (10th Cir. 1979); *Ahern v. Bd. of Educ.*, 456 F.2d 399, 403-04 (8th Cir. 1972).

[85] *Edwards*, 156 F.3d at 491 (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833-34 (1995)).

purposes, the school is the speaker when it acts with concern for the "'content of the education it provides.'"[86] The teacher is not.

What is more, teachers lack free-expression rights to teach, sponsor, foster, or encourage religion among students, even by quietly setting an example through personal devotional acts during instructional time.[87]

But even if ***classroom teachers*** had legally cognizable rights to select teaching methods or express ideas to students that their school district disfavors, Borden, a coach, should still lose here. In *Dambrot*, the Sixth Circuit held that a coach's claim to academic freedom is, if anything, weaker than a classroom teacher's because restrictions on coaching do not stem the free flow of ideas:

> Unlike the classroom teacher whose primary role is to guide students through the discussion and debate of various viewpoints * * *, [a coach's] role as a coach is to train his student athletes how to win on the court. The plays and strategies are seldom up for debate. Execution of the coach's will is paramount. Moreover, the coach controls who plays and for how long, placing a disincentive on any debate with the coach's ideas * * *.[88]

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[86] *Id.* at 492 (quoting *Rosenberger*, 515 U.S. at 833).

[87] *See, e.g.*, *Roberts v. Madigan*, 921 F.2d 1047, 1055-58 (10th Cir. 1990) (because principal "feared that [teacher] was setting a Christian tone in his classroom," she "had a duty to take corrective steps"); *see also, e.g.*, *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 522 (9th Cir. 1994) (teacher lacked free-speech right to engage students in religious-themed conversations during school day).

[88] 55 F.3d at 1190.

Borden argued below that bowing and kneeling for team prayers builds team unity, motivates students, and conveys his respect for them — claims functionally indistinguishable from the teacher's in *Bradley* and the coach's in *Dambrot*. But this Court held in *Bradley* that the teacher's objective — conveying positive feelings toward students — did not justify disobeying school-district policies.[89] And the Sixth Circuit went even further in *Dambrot*, recognizing that a coach's attempts to motivate players do not advance any "academic message," so they would not receive First Amendment protection even if teachers' in-class expression did.[90] "[T]he First Amendment does not * * * require the government as employer or the [school] as educator to accept [a coach's chosen expression] as a valid means of motivating players."[91]

2. Nor is Borden speaking on matters of public concern: A coach's attempt to motivate players "is a reasonable matter of concern, certainly, to the coach, but not the kind of question that is fairly cast as a 'public' issue."[92] And if bowing and kneeling are mere coaching techniques, as Borden contends, the fact that he employs

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89 910 F.2d at 1176.

90 55 F.3d at 1190.

91 *Id.*

92 *Id.* at 1187-88; *see also id.* at 1190-91.

them "'in the locker room [and cafeteria] for his players' private consumption'" only underscores that he is not speaking on matters of public concern.[93]

3. But even if Borden's claims survived stage one of the *Pickering* analysis, they would fail at stage two because bowing and kneeling during team prayer "impede[] * * * proper performance of his daily duties in the classroom" and "interfere[] with the regular operation of the schools generally."[94] Not only is Borden's conduct coercive and exclusionary for all the reasons explained in Part II below, thus inhibiting his performance as an instructor, but the religious divisiveness that it engenders in the school community undeniably interferes with the regular operation of the school: Harassment of "Jewish cheerleaders" and others suspected of complaining about Borden's conduct degrades the learning environment.[95] The District cannot properly serve its students if it allows this hostile climate to persist.

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[93] *Id.* at 1188 (quoting district-court opinion).

[94] *Pickering*, 391 U.S. at 572-73.

[95] Borden has added yet more fuel to that fire by publicly ridiculing the idea that his players might disfavor team prayer — thus further intimidating them into participating — while pointing his finger at the cheerleaders as troublemakers. Stan Grossfeld, *An issue of fair pray: Disagreement sends coach, school to court*, BOSTON GLOBE, Nov. 7, 2006, at D1.

Borden argued below that the court was required to ask whether the District's restrictions on participating in student prayer were "interfering with [his] right and ability to be a coach, to do what coaches do."[96] But coaches in public schools can do only what their school boards ***let*** them do. The District has discretion — indeed, an "undisputed right" — to control its teachers' conduct in the classroom.[97] Surely it has no less discretion to control their conduct in the locker room. Because the First Amendment rights that Borden asserts do not exist, the district court's determination that the School District violated them is insupportable as a matter of law.

### B. Borden has no other rights to participate in student prayer.

Borden also contended below that the policy violates his First Amendment associational rights, Fourteenth Amendment autonomy and privacy rights, and liberty interests under the New Jersey Constitution. And he argued that the policy is vague and overbroad.[98] But again, Borden made a category mistake in supposing that the asserted interests apply to a public-high-school coach performing his official coaching duties.

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96 JA25 (Tr.).

97 *Bradley*, 910 F.2d at 1177.

98 JA45-46 (Tr.).

1. Public-school instructors have no cognizable associational interest in choosing how to interact with students in an educational setting. Indeed, in *Zykan v. Warsaw Community School Corp.*,[99] the Seventh Circuit considered and flatly rejected the more plausible claim that ***students*** have associational rights "to be taught in the classroom * * * in accordance with [a] teacher's own sense of the best material."[100] The court held that "[a] student's appreciation of a teacher's skills simply does not invest a teacher with a constitutionally-based tenure when the actions of the school board have given that teacher none."[101] If students don't have a valid claim, then neither do teachers — or coaches.

Borden relied below on the Supreme Court's decisions in *Roberts v. United States Jaycees*[102] and *Boy Scouts v. Dale*[103] in asserting associational rights to participate in student prayer. But those cases dealt with purely private associations, not with public-school instructors interacting with their charges during school

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99 631 F.2d 1300 (7th Cir. 1980).

100 *Id.* at 1307-08.

101 *Id.* at 1308.

102 468 U.S. 609 (1984) (club members' associational rights not violated by compelling admission of women).

103 530 U.S. 640 (2000) (Boy Scouts' associational rights would be violated by compelling Scouts to admit gay scoutmasters).

activities. Private associational rights simply do not attach to a public-school coach acting as a coach.

2. The court below did not rule on Borden's claims that the District violated his Fourteenth Amendment privacy and autonomy rights. Those claims similarly confused the rights of private citizens in their private lives with the duties of public employees performing official functions. Borden located his purported privacy and autonomy rights in *Griswold v. Connecticut*[104] and *Lawrence v. Texas*,[105] both of which dealt with rights of consenting adults to engage in sexual relations in their own homes; *Planned Parenthood v. Casey*,[106] which addressed women's abortion rights; and *Washington v. Glucksberg*,[107] which concerned terminally ill patients' rights to commit suicide. Each clarified ***private individuals'*** rights regarding ***private*** conduct; none deal with ***public officials'*** rights while performing their official duties. Borden also relied on *O'Connor v. Ortega*,[108] which clarified public employees' rights

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[104] 381 U.S. 479 (1965).

[105] 539 U.S. 558 (2003).

[106] 505 U.S. 833 (1992).

[107] 521 U.S. 702 (1997).

[108] 480 U.S. 709 (1987).

respecting searches of their private offices. It did not address government employees' official interactions with those they are hired to serve.

3. Although the court below found that the District had infringed Borden's liberty rights under the New Jersey Constitution,[109] we find no authority for the proposition that public-school instructors or other state employees have a liberty interest in violating their employers' work-related policies. Nor did Borden or the court below cite to any.

4. Finally, the court below found that the policy is vague and overbroad.[110] But the overbreadth doctrine applies only where a law threatens protected speech.[111] Here, there is no protected speech: The policy affects District employees' instructional activities only.[112] And it tracks the federal Equal Access Act — upheld

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[109] JA46 (Tr.).

[110] JA45-46 (Tr.).

[111] *See Lutz v. City of York*, 899 F.2d 255, 270-71 (3d Cir. 1990) (Becker, J.) (overbreadth doctrine "is allowed in the First Amendment context only because of 'the transcendent value to all society of constitutionally protected expression'") (quoting *Gooding v. Wilson*, 405 U.S. 518, 521 (1972)).

[112] *See, e.g.*, *Marchi v. Bd. of Coop. Educ. Servs.*, 173 F.3d 469, 480 (2d Cir. 1999) (rejecting overbreadth claim where "language of the directive * * * expressly limits its application to [teacher's] instructional program"); *diLeo v. Greenfield*, 541 F.2d 949, 954 (2d Cir. 1976) ("due and sufficient cause" dismissal standard not overbroad where subject to "saving construction under which it applies only to conduct bearing on the performance of teaching duties").

by the Supreme Court in *Board of Education v. Mergens*[113] — which permits faculty monitoring of student religious clubs but forbids teacher participation.[114] If the District's policy were unconstitutional, the Equal Access Act would be too, the Supreme Court's contrary holding in *Mergens* notwithstanding.

Nor is the policy unconstitutionally vague. There can be no void-for-vagueness claim by public employees who have no liberty or property interests in continued employment.[115] And even where those rights exist, a policy is unconstitutionally vague only if it is stated "'in terms so vague that men of common intelligence must necessarily guess at its meaning,'" so that it fails "to give 'fair warning' of prohibited conduct."[116] So long as "ordinary persons using ordinary common sense would be notified that certain conduct will put them at risk of discharge,"[117] the policy passes constitutional muster.

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[113] 496 U.S. 226, 250-53 (1990).

[114] 20 U.S.C. § 4071(c)(2)-(3).

[115] *San Filippo v. Bongiovanni*, 961 F.2d 1125, 1134-35 (3d Cir. 1992); *Brady v. Gebbie*, 859 F.2d 1543, 1547-48 (9th Cir. 1988).

[116] *San Filippo*, 961 F.2d at 1135-36 (citations omitted).

[117] *Id.* at 1136.

As explained above, Borden has no constitutional right to ignore District policies. And he has no property interest in his nontenured coaching position.[118] Yet dismissal from coaching is the most severe penalty that Borden could face.[119]

What is more, "broad public employee dismissal standards have been upheld against void for vagueness attacks"[120] — standards such as: "'conduct unbecoming a teacher . . . or other good cause,'"[121] "'adequate cause,'"[122] and even "'such cause as will promote the efficiency of the [civil] service.'"[123] The policy here is far more specific (and functionally identical to the Equal Access Act's prohibition against

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[118] *See, e.g., Wowkun v. Closter Bd. of Educ.*, 2006 WL 1933475, at *4 (N.J. Super. Ct. App. Div. July 14, 2006). Even if Borden were a tenured coach, his vagueness claim would still fail because under New Jersey law, tenure protects employment only "during good behavior," permitting dismissal for "inefficiency, incapacity, or conduct unbecoming * * * a teach[er] * * * or other just cause" (N.J. Stat. Ann. § 18A:28-5), a standard that would encompass insubordination (*see Garrett v. Mathews*, 474 F. Supp. 594, 599 (N.D. Ala. 1979) (failing to respond to or comply with superiors' requests constituted insubordination), *aff'd*, 625 F.2d 658 (5th Cir. 1980)).

[119] JA147-48, 161 (Magistro Dep.).

[120] *San Filippo*, 961 F.2d at 1136.

[121] *Id.* at 1137 (quoting *Wishart v. McDonald*, 500 F.2d 1110, 1111 (1st Cir. 1974)); *accord Fowler v. Bd. of Educ.*, 819 F.2d 657, 664-65 (6th Cir. 1987) ("conduct unbecoming a teacher"); *diLeo*, 541 F.2d at 951, 953 ("due and sufficient cause").

[122] *San Filippo*, 961 F.2d at 1137 (quoting *Garrett*, 474 F. Supp. at 599).

[123] *Id.* at 1136 (quoting *Arnett v. Kennedy*, 416 U.S. 134, 159-60 (1974)).

teachers' participation in students' religious meetings).[124] "'It is not feasible or necessary for [the District] to spell out in detail all that conduct which will result in retaliation'"[125] because "participation" in student activities is a perfectly intelligible concept to public-school coaches, who deal every day with students' participation in school activities.[126] Borden never asked for policy clarifications (or even bothered to return his superiors' telephone calls), despite being given ample opportunity to do so.[127] "'[A]lthough the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising common sense can sufficiently understand and comply with.'"[128]

Indeed, the policy explicitly refers to *Doe v. Duncanville Independent School District*, which held that coaches violate the Establishment Clause when they "manifest approval and solidarity with student religious exercises"[129] — precisely what Borden seeks to do. *Duncanville* and the policy put Borden on notice because

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[124] *Compare* 20 U.S.C. § 4071(c)(3) *with* JA221 (Policy).

[125] *Arnett*, 416 U.S. at 161 (citation omitted).

[126] JA163 (Magistro Dep.).

[127] JA160-61 (Magistro Dep.).

[128] *Arnett*, 416 U.S. at 159 (quoting *Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 578 (1973)).

[129] 70 F.3d 402, 406 n.4 (5th Cir. 1995).

genuflecting and bowing are "fairly identifiable by an ordinary person"[130] as participation in, approval of, and solidarity with, student prayer. If Borden had been fired for insubordination — and to date he has suffered ***no*** adverse employment consequences — the "'real safeguard'" would be "'the common-law adjudicatory process and judicial review'" to determine whether his punishment was substantively fair; it would not be to invalidate the District's policy on vagueness grounds.[131] Where Borden has no First Amendment rights in the first place, dismissal for bowing and genuflecting during team prayer would hardly be "'so unexpected . . . as to chill * * * appropriate speech.'"[132]

## II. The District was justified in limiting Borden's coaching methods.

Even if this Court were to conclude that the District has impaired some heretofore unknown constitutional right to coach, it still should not affirm the judgment below. For even when ***private*** actors (students or outsiders) engage in expression during school-sponsored activities, school authorities may impose restrictions on the content that are "reasonably related to legitimate pedagogical

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130 *San Filippo*, 961 F.2d at 1137.

131 *Id.* (quoting *Wishart*, 500 F.2d at 1117).

132 *Arnett*, 416 U.S. at 162 (citation omitted).

concerns."[133] A state actor like Borden surely is entitled to no greater protections than private actors are.[134] Thus, if Borden had a right to coach, the District could impair it so long as the District acted "in any reasonable manner."[135]

The court below did not address whether legitimate educational concerns animated the District's actions. Rather, it asked only whether the policy was compelled by the Establishment Clause.[136] Thus, the court erred not only in attributing to Borden constitutional rights that he does not possess, but also in imposing a standard for justifying deprivations that the District does not bear. If the court had asked the proper question, it would have found a variety of considerations justifying the District's policy. And even with respect to the question that the court asked, it got the wrong answer. For "a long line of cases [establishes] what essentially

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[133] *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988); *see also Walz ex rel. Walz v. Egg Harbor Twp. Bd. of Educ.*, 342 F.3d 271, 280-81 (3d Cir. 2003); *C.H. ex rel. Z.H. v. Oliva*, 195 F.3d 167, 172 (3d Cir. 1999), *aff'd by an equally divided court*, 226 F.3d 198 (3d Cir. 2000) (en banc).

[134] *Cf. Edwards*, 156 F.3d at 491 (noting that even if professor had right to choose course content, school could impose restrictions "reasonably related to a legitimate educational interest").

[135] *Hazelwood*, 484 U.S. at 270.

[136] JA40-45 (Tr.).

amounts to a *per se* rule prohibiting public-school-related or -initiated religious expression or indoctrination."[137]

### A. The policy serves legitimate governmental interests.

> No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.[138]

This Court has recognized that "[s]chool officials who exercise judgment based on their expertise and authority should be afforded leeway in making choices designed to foster an appropriate learning environment and further the educational process."[139] The upshot is that this Court need "not reach the establishment questions raised by [Borden's] conduct" because the District "can restrict speech that falls short of an establishment violation."[140] By asking only whether bowing and kneeling would violate the Establishment Clause, and disregarding all the other reasons for the policy, the court below improperly deprived the District of its discretionary authority.

The policy advances several objectives: discouraging divisiveness, fostering inclusiveness, protecting parents' prerogatives to direct their children's religious

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137 *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 165 (5th Cir. 1993).

138 *Milliken v. Bradley*, 418 U.S. 717, 741 (1974).

139 *Walz*, 342 F.3d at 277.

140 *Bishop*, 926 F.2d at 1077.

upbringing, and allowing religious diversity to flourish. That these governmental interests are legitimate can hardly be gainsaid, as all are values that the Establishment Clause was designed to serve.[141] Whether or not the Constitution ***requires*** the policy, the District had discretion to impose it.

First, the District seeks to ensure that all students — irrespective of their religious beliefs or practices — feel welcome on its athletic teams and at its official school functions. The Supreme Court has recognized that maintaining diversity within public schools is a legitimate — indeed, compelling — governmental

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[141] *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 125 S. Ct. 2722, 2742 (2005) ("The Framers and the citizens of their time intended * * * to guard against the civic divisiveness that follows when the Government weighs in on one side of religious debate * * *." (citation omitted)); *id.* at 2746 (O'Connor, J., concurring) (Establishment Clause promotes religious diversity); *Van Orden v. Perry*, 545 U.S. 677, 125 S. Ct. 2854, 2868 (2005) (controlling concurring opinion of Breyer, J.) (Religion Clauses "seek to avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike."); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309-10 (2000) (Establishment Clause protects against students of minority faiths being made to feel like outsiders); *Lee v. Weisman*, 505 U.S. 577, 589 (1992) ("The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere * * *."); *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) ("Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family."); *Steele v. Van Buren Pub. Sch. Dist.*, 845 F.2d 1492, 1495 (8th Cir. 1988) (parents have cognizable interest in having their "children educated in public schools that do not impose or permit religious practices").

interest.[142] Thus, in *Walz*, this Court concluded under *Hazelwood* that a school could prevent students from distributing religious items in a school-sponsored gift exchange, where the "activities [were] defined * * * to teach social skills and respect for others in a festive setting."[143] And in *Bishop*, the Eleventh Circuit upheld a prohibition against a professor's religious speech in class where the university's objective was to ensure that "courses be taught without personal religious bias unnecessarily infecting the teacher or the students."[144] School districts undeniably have legitimate interests in "prevent[ing] teachers from giving students and others the impression that the school prefers a particular religion, or religion in general."[145]

Second, the District seeks to avoid entangling itself in potentially controversial decisions concerning staff conduct. If Borden may bow and kneel for team prayer, may the baseball coach hold hands with players in a prayer circle? May the tennis

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[142] *Grutter v. Bollinger*, 539 U.S. 306, 328-29 (2003) (schools have "compelling interest in a diverse student body" because diversity "is at the heart of [schools'] proper institutional mission"); *see also, e.g.*, *Anderson v. Town of Durham*, 895 A.2d 944, 960 (Me. 2006), *cert. denied*, __ U.S. __, 2006 WL 2094482 (Nov. 27, 2006).

[143] *Walz*, 342 F.3d at 279.

[144] *Bishop*, 926 F.2d at 1076.

[145] *Marchi*, 173 F.3d at 475 (schools have "authority" to "direct teachers to 'refrain from expression of religious viewpoints in the classroom and like settings,'" as well as "constitutional duty to make 'certain . . . that subsidized teachers do not inculcate religion'" (citations omitted)).

coach say "Amen" without reciting the prayer? May the French teacher engage, at the beginning of each class period, in the very same activity that Borden claims as his constitutional entitlement? And what should the District do about teachers or coaches who want to engage with students, to the same extent that Borden does, in religious rituals guided by the teachings of Wicca or the Nation of Islam? The District can surely promulgate policies to avoid these constitutional and public-relations quagmires. And the courts have recognized avoiding excessive entanglements — even those not forbidden by the Establishment Clause — as a legitimate governmental interest.[146]

Third, the District seeks to respect the rights of parents to control their children's religious upbringing — an interest that this Court has recognized as legitimate.[147] Indeed, this Court has held that school officials may preemptively exclude religious expression from curricular settings, without waiting for parents to complain, because complaints are easily anticipated: Where there is a "religiously heterogeneous and captive audience," school officials can reasonably "expect that some parents * * * would regard a compelled * * * exposure to [religious material]

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[146] *See, e.g.*, *Anderson*, 895 A.2d at 960-61 ("concern to avoid excessive entanglements provides a rational basis to maintain the funding limitation" restricting tuition vouchers to nonsectarian schools).

[147] *Oliva*, 195 F.3d at 175.

as an infringement of their parental right to guide the religious development of their children"; and "any resentment engendered by [the exposure] would have a significant adverse impact on the important relationship between the parents, the teacher, and their school."[148] Here, the District's fears are by no means hypothetical: Parents, students, and local clergy have complained about Borden's prayer rituals; a parent has threatened litigation; and a complaint has been lodged with the county prosecutor. The District made a legitimate judgment — constitutionally compelled or otherwise — to heed the community's concerns. Its "exercise of * * * discretion is entitled to substantial deference from this Court not only because [District officials are] professional educator[s], but also because [they are] in a far better position than [this Court] to predict how students and their parents are likely to respond" to religious activities at school-sponsored events, and to predict "what impact those responses may have on the ongoing educational process."[149]

Fourth, the District seeks to avoid Establishment Clause litigation. Governmental "breathing space" is especially important when public schools negotiate the complex relationship between government and religion: "[W]hen government endeavors to police itself and its employees in an effort to avoid transgressing

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148 *Id.*

149 *Id.* at 174.

Establishment Clause limits, it must be accorded some leeway, even though the conduct it forbids might not inevitably be determined to violate the Establishment Clause," and even though it might restrict rights that employees have when "not acting as * * * agent[s] of government."[150] It follows that "the scope of the employees' rights must sometimes yield to the legitimate interest of the government[] * * * in avoiding litigation by those contending that an employee's desire to exercise his [constitutional rights] has propelled his employer into an Establishment Clause violation."[151] Recognizing that "even the appearance of proselytizing by a professor should be a real concern to the University," the Eleventh Circuit thus held in *Bishop* that restrictions on faculty religious speech were justified by the university's interest in avoiding a "potential establishment conflict," whether or not a court would resolve a lawsuit in the complainant's favor.[152] And the Second Circuit held in *Marchi* that, to further its "legitimate interest * * * in avoiding litigation," a school district "may proscribe

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[150] *Marchi*, 173 F.3d at 476 ("The decisions governmental agencies make in determining when they are at risk of Establishment Clause violations are difficult, and, in dealing with their employees, they cannot be expected to resolve so precisely the inevitable tensions * * * that they may forbid only employee conduct that, if occurring, would violate the Establishment Clause * * *."); *accord Knight v. Conn. Dep't of Pub. Health*, 275 F.3d 156, 165 (2d Cir. 2001); *Draper v. Logan County Pub. Library*, 403 F. Supp. 2d 608, 620 (W.D. Ky. 2005).

[151] *Marchi*, 173 F.3d at 476 ("employee must accept that he does not retain the full extent of * * * rights that he would enjoy as a private citizen").

[152] 926 F.2d at 1077.

interactions * * * that risk giving the impression that the school endorses religion."[153] That is all the policy does here.

### B. The policy is reasonably related to the District's legitimate aims.

The policy prohibiting faculty from participating in prayer with students during school activities is reasonably related to the legitimate aims of promoting inclusiveness, avoiding entangling controversies, respecting parents' prerogatives, and avoiding litigation. By forbidding Borden to bow and genuflect during team prayer, the District has taken steps to ensure that students, and especially those of minority faiths, will no longer feel that they must participate in prayers in order to be full-fledged team members — a significant concern, as Borden insists that prayer is necessary to build team unity. The District has also avoided the hairsplitting activity of determining how much participation by staff is too much. Parents cannot complain that the school is usurping their prerogatives. And the District has reduced the risk that parents and students will sue over violations of their religious-freedom rights.

If anything, the policy here is underinclusive. The factual circumstances — including the 23-year history of Borden's pregame rites, Borden's continuation of

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[153] 173 F.3d at 476, 477. Although in *Tenafly Eruv Ass'n v. Borough of Tenafly*, this Court held that government does not have a ***compelling*** interest "in imposing greater separation of church and state than the Federal Establishment Clause mandates" (309 F.3d 144, 172 (3d Cir. 2002)), a compelling interest is not necessary to justify regulating teachers' on-the-job conduct.

premeal prayers after his supervisors told him to stop in 1997, Borden's resignation and refusal to coach without prayers, and Borden's directives to the team captains to poll the players about continuing the prayer rituals — would have justified requiring Borden to leave the room during student prayer. For a football player would reasonably conclude that Borden's pro-prayer views remain unchanged, irrespective of whether Borden crafts the prayers, selects the prayergivers, participates in the prayers, or simply watches to see which students are 'team players' who pray and which 'erode team unity' by abstaining. The District allows Borden to remain in the room when students pray, counting heads and developing prejudices — conscious or otherwise — against those who forgo praying. To further its legitimate aims, the District would have been fully justified in ordering Borden to leave the room and insulate himself against discovering who participates in student prayer.

### C. The Establishment Clause compels the District's actions.

If all those interests did not justify the District's policy, another surely suffices: The Establishment Clause ***does*** require the District to halt Borden's conduct.[154] As Justice Scalia has explained, "a State has a compelling interest in not committing

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[154] *See, e.g., Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971) (schools have constitutional duty to make "certain * * * that subsidized teachers do not inculcate religion"); *Marchi*, 173 F.3d at 475.

*actual* Establishment Clause violations."[155] The District's interest in avoiding Establishment Clause violations "trumps" any rights that Borden might have.[156]

The Supreme Court has articulated three separate tests for determining whether governmental action violates the Establishment Clause.[157] The first — the coercion test — focuses primarily on whether religious activity in public schools has a coercive effect on students.[158] The second — the *Lemon* test — considers whether official conduct (a) has a religious purpose, (b) has the effect of advancing or inhibiting religion, or (c) excessively entangles government with religion.[159] The third — the endorsement test — asks whether an objective observer would perceive the challenged action as official endorsement of religion.[160] Borden's participation in team prayers violates the Establishment Clause under all three tests.

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155 *Locke v. Davey*, 540 U.S. 712, 730 n.2 (2004) (Scalia, J., dissenting); *see also Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993); *Widmar v. Vincent*, 454 U.S. 263, 271 (1981).

156 *Peloza*, 37 F.3d at 522; *Knight*, 275 F.3d at 166.

157 *Modrovich v. Allegheny County*, 385 F.3d 397, 400 (3d Cir. 2004).

158 *Id.*

159 *Id.* at 401.

160 *Santa Fe*, 530 U.S. at 308.

### 1. Borden's conduct is coercive.

Although a showing of coercion is not necessary to an Establishment Clause challenge,[161] it suffices to invalidate a practice.[162] Here, Borden's coercion of students is manifest.

Borden steadfastly maintained below that bowing and kneeling with students during team prayer are secular acts, going so far as to argue that the prayers themselves are secular. But prayer is "intrinsically religious."[163] So participation in it is an "overt religious exercise."[164] Hence, the Supreme Court has explicitly recognized that, "for many, if not most," even "the act of standing or remaining silent [is] an expression of participation in * * * prayer" at school functions.[165]

Recognizing that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure," including peer pressure, "in the elementary and secondary public schools," the Supreme Court in *Lee v. Weisman* struck down

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[161] *Sch. Dist. v. Schempp*, 374 U.S. 203, 221, 223 (1963).

[162] *Lee*, 505 U.S. at 592-93, 599.

[163] *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824, 830 (11th Cir. 1989); *accord Jaffree v. Wallace*, 705 F.2d 1526, 1534 (11th Cir. 1983) (prayer is "quintessential religious practice"), *aff'd*, 472 U.S. 38 (1985).

[164] *Lee*, 505 U.S. at 588.

[165] *Id.* at 593; *accord Santa Fe*, 530 U.S. at 312; *Mellen v. Bunting*, 327 F.3d 355, 362, 371-72 (4th Cir. 2003).

prayer at public-school graduations because "prayer exercises in public schools carry a particular risk of indirect coercion."[166] Although graduation ceremonies were voluntary, the Court recognized that "[t]o say that a student must remain apart from the ceremony at the opening invocation and closing benediction is to risk compelling conformity in an environment * * * where * * * the risk of compulsion is especially high."[167]

In *Santa Fe*, the Supreme Court went further, holding that a school's "policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause."[168] The Court saw unconstitutional coercion in the fact that "[t]here are some students," including "the team members themselves, for whom seasonal commitments mandate their attendance."[169] But even voluntary attendees were coerced: "To assert that high school students do not feel immense social pressure, or have a truly genuine desire, to be involved in the extracurricular event that is American high school football is 'formalistic in the extreme.'"[170] Simply put, "the

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166 505 U.S. at 592, 595.

167 *Id.* at 596.

168 530 U.S. at 301.

169 *Id.* at 311.

170 *Id.* (quoting *Lee*, 505 U.S. at 595).

delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship"; and the Establishment Clause does not permit school officials "'to exact religious conformity from a student as the price' of joining her classmates at a varsity football game" — or any other "traditional gathering[] of a school community."[171]

For more than two decades, Borden has unconstitutionally coerced student participation in prayer in the District's name. It does not matter that, instead of leading the prayers or selecting student prayergivers, Borden now pledges to limit himself to bowing and kneeling. For Borden's participation alone makes the prayers part of the team's official activities; and he uses the mandatory pregame-meal and locker-room rites to get the team ready for the impending game. It is highly coercive to make a student who does not share Borden's faith get up off his knee and leave the team gathering when Borden gets down on his own knee for prayer — particularly because Borden believes that 'taking a knee' "is a demonstrative way to show team solidarity, team cohesion, and team seriousness of purpose."[172] Students who don't pray with Borden risk being viewed as less serious, and less part of the team, than those who do. So those who want playing time will conclude that they should bow

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171 *Id.* at 312.

172 JA441 (Borden Decl.).

and genuflect with Borden — practices that constitute coerced participation under *Lee*.[173]

*Santa Fe* also makes clear that school officials cannot constitutionally make even nonplayers choose between participating in unwanted religious practices and absenting themselves from "traditional gatherings of [the] school community."[174] Yet Borden did just that when he told students to leave the pregame meal and go into the bathroom if they didn't approve of the prayers.[175]

Borden's violations are even more egregious than those in *Lee* and *Santa Fe*. As head coach, Borden has absolute control over "who plays and for how long, placing a disincentive on any debate with the coach's ideas."[176] So unlike in *Santa Fe*, which says nothing about the coach's attitude toward pregame prayer, Borden's well-known belief in the rite only strengthens the compulsion to pray if one wishes to play. And making students leave pregame meals or the locker room in order to avoid official prayer requires them to signal to the school community that they do not share the majority's faith — an unreasonable demand to place on high-school students.

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173 *See* 505 U.S. at 593.

174 530 U.S. at 311-12.

175 JA157 (Magistro Dep.).

176 *Dambrot*, 55 F.3d at 1190.

Borden's belittling of students' concerns and the harassment of students suspected of having complained only increase the pressure to conform.[177]

To say that high-school students have a real choice not to participate in team prayer, when their coach not only participates but also believes that prayer is essential to team solidarity, does not apprehend the pressure on objecting students to conform to what they believe that the coach wants. Nor should objecting students have to forfeit the character-building benefits of school sports to avoid unwanted religious observance. Regardless of whether Borden retaliates against players who abstain from prayer, a student's case against the District for unconstitutional religious coercion would be straightforward under *Santa Fe* and *Lee*. So while the District should not, and does not, restrict students' voluntary prayer, it has both the authority and the duty to prohibit its coaches from coercing religious practice by participating in team prayer.

### 2. Borden's conduct violates the *Lemon* test.

Borden's participation in team prayer also violates the *Lemon* test. Under *Lemon*, official conduct is constitutional only if (a) its primary purpose is secular;[178] (b) its primary effect neither advances nor inhibits religion; and (c) it does not foster

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177 *See supra* pages 13-14, 28.

178 *McCreary*, 125 S. Ct. at 2735.

excessive governmental entanglement with religion.[179] While failing any one part of the test would be fatal,[180] Borden's conduct fails all three.

a. *Purpose*

Although courts are "normally deferential to a State's articulation of a secular purpose,"[181] they must ensure that the avowed purpose is "genuine, not a sham, and not merely secondary to a religious objective."[182] Borden's avowed secular purposes for bowing and genuflecting fail for at least three reasons.

First, "[b]ecause prayer is 'a primary religious activity in itself,' a teacher or administrator's intent to facilitate or encourage prayer in a public school is *per se* an unconstitutional intent to further a religious goal."[183] "'Recognizing that prayer is the quintessential religious practice implies that no secular purpose can be satisfied . . . .'"[184] Thus, the Supreme Court concluded in *Santa Fe* that the school

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179 *Lemon*, 403 U.S. at 612-13.

180 *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 343 (5th Cir. 1999); *May v. Cooperman*, 780 F.2d 240, 246 (3d Cir. 1985).

181 *Aguillard*, 482 U.S. at 586-87.

182 *McCreary*, 125 S. Ct. at 2735.

183 *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252,1285 (11th Cir. 2004) (citation omitted).

184 *Id.* at 1286 (quoting *Jaffree*, 705 F.2d at 1534-35); *accord Jager*, 862 F.2d at 830 ("an intrinsically religious practice cannot meet the secular purpose prong

district's professed secular purposes for pregame prayers — solemnizing sporting events and promoting good sportsmanship — were shams because they could have been achieved by other, nonreligious means.[185] Here, Borden claims that his participation in team prayer promotes team unity and shows respect for students. But Borden could accomplish those goals through secular means, such as giving motivational speeches or rewarding players who best exemplify qualities that he wants to promote. In choosing prayer as his means, Borden reveals a religious purpose.

Second, even if Borden's professed secular aims were genuine, "a person attempting to further an ostensibly secular purpose through avowedly religious means is considered to have a constitutionally impermissible purpose."[186] Borden has no right to use prayer to build team unity or to show respect for students.

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of the *Lemon* test").

[185] 530 U.S. at 309; *accord Jager*, 862 F.2d at 831 (striking down pregame prayer in part because "School District could satisfy its secular objectives by prescribing a strictly secular invocation").

[186] *Holloman*, 370 F.3d at 1286; *see also, e.g.*, *Schempp*, 374 U.S. at 223-24; *Jager*, 862 F.2d at 830 ("'The unmistakable message of the Supreme Court's teachings is that the state cannot employ a religious means to serve otherwise legitimate secular interests.'" (citation omitted)); *Hall v. Bradshaw*, 630 F.2d 1018, 1020-21 (4th Cir. 1980); *Doe v. Aldine Indep. Sch. Dist.*, 563 F. Supp. 883, 886 (S.D. Tex. 1982).

Finally, Borden's conduct "indicates that [he] intended to preserve the practice of prayer before football games."[187] In *Santa Fe*, the school originally had a student chaplain lead pregame prayers; but then, after that policy was challenged, the school authorized student elections to determine whether prayer would occur.[188] The Supreme Court held that, "in light of the school's history of regular delivery of a student-led prayer at athletic events, it is reasonable to infer that the specific purpose of the [new] policy was to preserve a popular 'state-sponsored religious practice.'"[189] The same is true here: For years, Borden perpetuated formal school prayer — sometimes clergy-led, sometimes student-led, and sometimes led by Borden himself. After he was ordered to stop, and in an effort to improve his litigating position while still preserving his prayer rituals, Borden directed the student captains to poll other players and continue the rites if they voted to do so. But unlike in *Santa Fe*, where the ballot was secret, Borden ordered the captains to report back to him how the students had voted, thus creating extra pressure to vote as the players knew Borden wanted them to.[190]

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187 *Santa Fe*, 530 U.S. at 309.

188 *Id.* at 294-98.

189 *Id.* at 309 (quoting *Lee*, 505 U.S. at 596).

190 JA497-98.

The court below refused to consider that Borden had initiated and led team prayer for 23 years, taking him at his word that his prospective conduct, bowing and genuflecting, would be secular.[191] But the court was not entitled to accept at face value Borden's "transparent claim to secularity,"[192] nor could it "ignore perfectly probative evidence" or "'turn a blind eye to the context in which [Borden's new conduct] arose.'"[193] For the objective student observer, whose judgment about purpose is key, has a "reasonable memor[y]" and is "presumed to be familiar with the history" of Borden's actions.[194] The objective student would know that Borden had sponsored and led prayers for years and that he had changed his practice only because the District made him do so — and only after he had initially resigned because he was unwilling to coach without official team prayer. The only reasonable inference is that Borden's purpose is to "preserve the practice of prayer before football games."[195]

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[191] JA5-6, 9 (Tr.).

[192] *McCreary*, 125 S. Ct. at 2735; *id*. at 2736 ("we have not made the purpose test a pushover for any secular claim").

[193] *Id.* at 2737 (quoting *Santa Fe*, 530 U.S. at 315).

[194] *Id.*

[195] *Santa Fe*, 530 U.S. at 309. Noting that the prayer practice in *Santa Fe* was "the latest step in developing litigation brought as a challenge to institutional practices that unquestionably violated the Establishment Clause," the Supreme Court explained that the question was whether the school's shift to student-initiated, student-led prayers "insulate[d] the continuation of such prayers from constitutional scrutiny."

The court below also brushed aside Borden's orders to the team captains to poll the players, because Borden gave those orders to improve his litigating position.[196] But that is just what the school district did in *Santa Fe* and the counties did in *McCreary*; and the Supreme Court refused to ignore their past actions in ascertaining their current purposes.

Borden, meanwhile, contended below that his bowing and genuflecting cannot be taken as manifesting a religious purpose. In *Santa Fe*, however, the Supreme Court considered and flatly rejected a similar argument:

> The District * * * asks us to pretend that we do not recognize what every Santa Fe High School student understands clearly — that this policy is about prayer. The District further asks us to accept what is obviously untrue: that these messages are necessary to "solemnize" a football game * * *. We refuse to turn a blind eye to the context in which this policy arose, and that context quells any doubt that this policy was implemented with the purpose of endorsing school prayer.[197]

Substitute 'build team unity' for "'solemnize' a football game," and the same reasoning applies here.

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*Id.* at 315. It did not: "Our inquiry into this question not only can, but must, include an examination of the circumstances surrounding its enactment." *Id.*

196 JA9, 16 (Tr.).

197 530 U.S. at 315.

b. *Effect*

Because "[e]ffect under the *Lemon* test is cognate to endorsement," we consider the two together below.[198]

c. *Entanglement*

Borden's conduct also entangles government with religion. Although Borden has had a student pledge that future team prayers will be nondenominational,[199] making the prayers nondenominational does not cure the constitutional violation but instead may exacerbate it. The change reduces the number of objectors, increasing their "sense of isolation and affront."[200] Beyond that, meddling in the prayers' content would be impermissible even if the ritual were genuinely student initiated.[201] And school employees' participation in prayer at "school-controlled, curriculum-related activities that members of the [football] team are required to attend * * * improperly entangles [the school] in religion."[202]

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198 *See infra* pages 58-65.

199 JA169 (Nixon Decl.).

200 *Lee*, 505 U.S. at 594.

201 *See id.* at 590; *Holloman*, 370 F.3d at 1287.

202 *Duncanville*, 70 F.3d at 406.

### 3. Borden is endorsing religion.

Official action unconstitutionally endorses religion when it "'convey[s] or attempt[s] to convey a message that religion or a particular religious belief is *favored* or *preferred*.'"[203] "School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'"[204] So this court must determine what message Borden's conduct conveys to a reasonable, objective observer in the "listening audience" who knows the history of Borden's prayer rituals.[205] Here, that objective observer — a hypothetical East Brunswick High School football player[206] — considers all publicly available information about Borden's conduct, not to determine what Borden's

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[203] *County of Allegheny v. ACLU*, 492 U.S. 573, 593 (1989) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in judgment)).

[204] *Santa Fe*, 530 U.S. at 309-10 (citation omitted).

[205] *McCreary*, 125 S. Ct. at 2736-37 (objective observer presumed familiar with history of government's actions and "competent to learn what history has to show"); *Santa Fe*, 530 U.S. at 308 (objective observer familiar with "'implementation of'" pregame-prayer practice (citation omitted)).

[206] *Santa Fe*, 530 U.S. at 308; *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 715 (M.D. Pa. 2005).

purpose actually is, but instead to ascertain whether the conduct "in fact conveys a message of endorsement or disapproval of religion" to students.[207]

Although the court below purported to apply the endorsement test, it did not consider the objective meaning that Borden's bowing and genuflecting would have for students; it considered only Borden's avowed subjective purposes and his self-serving assertions about what 'taking a knee' means in football.[208] And rather than evaluating the bowing and kneeling in light of Borden's historic sponsorship of the prayers, as it was required to do, the court expressly refused to consider Borden's past conduct.[209] Had the court considered the case from the standpoint of a hypothetical East Brunswick student who knows the history and context of Borden's participation in team prayer — as the Supreme Court and this Court require[210] — it would have been compelled to reach a different result.

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[207] *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).

[208] *Compare id.* at 690 ("we must examine both what [government] intended to communicate * * * and what message [its conduct] actually conveyed") *with* JA43-44 (Tr.) (Borden "claims that taking a knee is 'not praying, nor can it be compared in any way to kneeling to pray.'") (quoting JA441(Borden Decl.)).

[209] JA5-6, 9 (Tr.).

[210] *See, e.g., McCreary*, 125 S. Ct. at 2734-37; *Santa Fe*, 530 U.S. at 308, 315; *Child Evangelism Fellowship v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 530-31 (3d Cir. 2004).

1. "[I]f while acting in their official capacities, [school] employees join hands in a prayer circle or otherwise manifest approval and solidarity with student religious exercises, they cross the line between respect for religion and endorsement of religion."[211] When Borden participates in team prayer, whether by bowing and kneeling or otherwise, he is "present as representative[] of the school and [his] actions are representative of [District] policies."[212] At least some students perceive the District to be the speaker for Borden's message.[213] Because, "given our social conventions, a reasonable dissenter [at a school activity] could believe that the group exercise" of standing or remaining silent during prayer "signified her own participation or approval of it,"[214] so too would a dissenter perceive Borden's genuflecting and bowing during prayer as official participation and endorsement. And

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[211] *Duncanville*, 70 F.3d at 406 n.4.

[212] *Id.* at 406; *accord Bishop*, 926 F.2d at1073; *see generally Dambrot*, 55 F.3d at 1190-91.

[213] *Edwards*, 156 F.3d at 491; *Peloza*, 37 F.3d at 522 ("Peloza is not just any ordinary citizen. He is a teacher. * * * He is clothed with the mantle of one who imparts knowledge and wisdom. His expressions of opinion are all the more believable because he is a teacher. The likelihood of high school students equating his views with those of the school is subtantial. To permit him to discuss his religious beliefs with students during school time on school grounds would violate the Establishment Clause * * *."); *Bishop*, 926 F.2d at 1073 (school has interest in scrutinizing teacher's in-class expression because "'the public might reasonably perceive'" it to bear school's "'imprimatur'" (citation omitted)).

[214] *Lee*, 505 U.S. at 593.

because "not all of [Borden's] students would receive a purportedly secular message," the District must halt the conduct.[215]

Nor is it any answer to say that the District could have disclaimed Borden's actions. Because Borden's conduct as coach is the District's, a this-is-just-our-employee-and-not-us disclaimer would look, to the objective student, like yet another artifice to preserve official prayer. Government cannot avoid an Establishment Clause violation by disclaiming its own speech.[216]

2. The objective football player would know that Borden has initiated and led team prayer for more than two decades, changing to student-led prayer only after being ordered to stop. The student would also know that Borden is so devoted to team prayer that he initially resigned as coach rather than obey District policy. The student would know, too, that when Borden stopped leading prayers, he ordered students to poll the team and report the votes to him, thus subtlely exercising his authority to secure his desired outcome. And the objective student would know that Borden has consistently described team prayer not as voluntary student activity but as a critical

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[215] *Roberts*, 921 F.2d at 1057-58; *see also Duncanville*, 70 F.3d at 406.

[216] *See Allegheny*, 492 U.S. at 600 (disclaimer stating that creche in county courthouse belonged to Roman Catholic Church insufficient to avoid Establishment Clause violation because it simply demonstrated that county was endorsing Church's message rather than communicating its own).

part of his football program.[217] Armed with this knowledge, the student would perceive that Borden "intended to preserve the practice of prayer before football games" at all costs.[218] "No reasonable observer could swallow the claim that [Borden] had cast off the objective so unmistakable in the earlier" prayer rituals.[219]

3. Nor does Borden's claim that bowing and kneeling are "ceremonial, de minimis * * * respectful acknowledgment[s]" of football's longstanding traditions[220] fare any better. Not only are there no *de minimis* constitutional violations,[221] but this Court has explicitly rejected the notion that "'history and ubiquity' of a practice * * * create[] an 'artificial exception'" to the Establishment Clause.[222] And although the district court found that pregame prayers are permissible under a supposed exception

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217 JA441 (Borden Decl.).

218 *Santa Fe*, 530 U.S. at 309.

219 *McCreary*, 125 S. Ct. at 2740.

220 Pls.' Summ. J. Br. 48-50.

221 *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 36 (2004) (O'Connor, J., concurring in judgment).

222 *See Freethought Soc'y v. Chester County*, 334 F.3d 247, 260 & n.10 (3d Cir. 2003) (citation omitted).

(for traditional "invocations") to the prohibition against official prayer,[223] the Supreme Court has explicitly held that exception inapplicable in public-school contexts.[224]

4. Rather than defending his past prayer practices below,[225] Borden attempted to turn the required history-and-context analysis against the District by pointing to *Pope ex rel. Pope v. East Brunswick Board of Education*[226] — a 1993 ruling that the District had violated the Equal Access Act. Borden argued that the District had been hostile toward religion in *Pope*, so a reasonable observer would not now think that the District was endorsing religion when Borden participates in team prayer. But the reasonable observer would know that the policies in *Pope* were adopted in 1989-90, and that neither Magistro nor any current board members had any

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[223] JA43 (Tr.). The court relied on *Marsa v. Wernik*, 430 A.2d 888 (N.J. 1981), an application of *Marsh v. Chambers*, 463 U.S. 783 (1983) (approving nonsectarian legislative prayer because practice dated back to first Congress, which also proposed First Amendment).

[224] *Lee*, 505 U.S. at 596-97; *see also Jager*, 862 F.2d at 829 (rejecting attempt to apply *Marsh* to pregame prayers "because invocations at school-sponsored football games were nonexistent when the Constitution was adopted").

[225] *Cf. McCreary*, 125 S. Ct. at 2739 (counties' "refusal to defend the second [religious] display" after putting up a third "is understandable, but the reasonable observer could not forget it").

[226] 12 F.3d 1244 (3d Cir. 1993).

involvement with them,[227] so the observer would not attribute any motivations underlying those policies to current District officials. More importantly, the reasonable student observer would equate Borden — the coach who controls playing time — with the District.[228] The observer would look to ***Borden's*** past conduct — intentionally violating the Establishment Clause for more than two decades and resigning rather than coaching without team prayer — when determining what the official position is on prayer.[229]

5. There is also another, simpler reason why the District had to curtail Borden's conduct. The Supreme Court held in *Santa Fe* that the school's policy of having students vote whether there would be pregame prayer was alone enough to violate the First Amendment.

> Through its election scheme, the District has established a governmental electoral mechanism that turns the school into a forum for religious debate. It further empowers the student body majority with the authority to subject students of minority views to constitutionally improper messages. The award of that power alone, regardless of the students' ultimate use of it, is not acceptable. * * * Simply by establishing this school-related procedure, which entrusts the inherently nongovernmental

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[227] JA453 (Magistro Cert.).

[228] *Edwards*, 156 F.3d at 491; *Duncanville*, 70 F.3d at 406; *Peloza*, 37 F.3d at 522.

[229] *Holloman*, 370 F.3d at 1284 ("Establishment Clause applies [to] * * * acts and decisions of individual * * * teachers," not just to school boards (citing *Lee*, 505 U.S. at 587)).

> subject of religion to a majoritarian vote, a constitutional violation has occurred. No further injury is required for the policy to fail a facial challenge.[230]

Borden's directive to the team captains to poll the players on whether to continue the prayer rituals is irreconcilable with *Santa Fe*.[231]

## CONCLUSION

Does the elected Board of Education and its duly authorized superintendent get to make policy for the District? Or does the football coach? As a matter of law, the Board and superintendent have discretion to determine what instructional methods District employees may use; Borden does not. So even if Borden had the constitutional rights that he asserts — which he doesn't — the District's legitimate pedagogical aims, including complying with the Establishment Clause, would trump those rights. Accordingly, this Court should reverse the judgment below and grant summary judgment to the District instead.

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[230] 530 U.S. at 316-17 (footnotes omitted).

[231] *See also, e.g.*, *Jager*, 862 F.2d at 831 ("equal access plan" for allowing pregame prayer unconstitutional because "the likely result * * * will be the continuation of Protestant Christian invocations").

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 13,892 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in 14-point Times New Roman type, a proportionally spaced font, using WordPerfect 10.

/s/ Richard B. Katskee

Dated: December 13, 2006

## CERTIFICATIONS UNDER THIRD CIRCUIT LOCAL RULES

In accordance with this Court's Local Rules, I hereby certify that:

1. The electronic version of the foregoing brief filed with this Court is identical to the hard copies filed with the Court and served on Appellee.

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3. Lead Counsel Richard B. Katskee is a member of the Bar of this Court.

/s/ Richard B. Katskee

Dated: December 13, 2006

## CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of December 2006, I caused to be served by first-class U.S. Mail, postage prepaid, two bound paper copies and one electronic copy each of the foregoing Brief for Appellants and one bound paper copy and one electronic copy each of the Joint Appendix, to the following addresses:

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