No. 08-482

In the Supreme Court of the United States

MARCUS A. BORDEN,

Petitioner,

v.

SCHOOL DISTRICT OF THE TOWNSHIP OF EAST BRUNSWICK; BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK; AND DR. JO ANN MAGISTRO, SUPERINTENDENT, SCHOOL DISTRICT OF THE TOWNSHIP OF EAST BRUNSWICK,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

For 23 years, Marcus Borden sponsored and led official team prayers as head football coach at East Brunswick High School. In 2005, when parents complained, the superintendent directed him to stop. Borden immediately resigned, explaining that he was unwilling to coach without joining students in team prayer. Ten days later, he rescinded his resignation; and five weeks after that, he filed suit. Alleging in his Complaint that he would no longer lead the team prayers or say them aloud, he claimed constitutional rights to continue bowing his head during prayers at team dinners and 'taking a knee' for prayers before games. He then directed the team to vote on whether to continue the prayers, letting the students know that he needed the results for his lawsuit.

The Third Circuit unanimously held that Borden lacks any right to disobey the School District's directive, and accordingly, he has no valid claim, irrespective of whether his desired conduct would violate the Establishment Clause. The panel members divided over the hypothetical question whether the Establishment Clause would bar a coach with no history of involvement in student prayers from bowing and taking a knee during voluntary, student-initiated prayers. Taking no issue with the Third Circuit's unanimous holding that he lacks any right to disobey the School District's directive, Borden presents only the non-dispositive, hypothetical question that divided the panel.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

This case involves a public-high-school football coach's extravagant claim of a constitutional right to violate a school policy designed to avoid faculty entanglement in student prayer. The School District specified how its faculty should interact with students in class and at school activities. Borden disagreed. But he does not challenge the Third Circuit's unanimous — and case-dispositive — ruling that he lacks any right to disobey. Rather, he asks this Court to review the question whether the School District *would have* had an Establishment Clause justification to override that right *if* it had actually existed — a determination that the court below expressly recognized to be unnecessary to deciding the case.

The question that the petition purportedly presents is irrelevant to the disposition of this case for another reason, as well. Borden asks this Court to ignore the history and context of his actions, and to decide, in a vacuum, whether a teacher or coach with no previous involvement in student prayer may make "secular gestures of silent respect in response to * * * student-initiated religious acts." Pet. i. That question bears no relation to the facts of this case.

STATEMENT

For 23 years, Borden "orchestrated" and "led" official team prayers. Pet. App. 48a. When parents complained, the School District directed him to stop. This action is his challenge to the District's authority to issue that directive.

1. The East Brunswick High School holds team meals in the cafeteria after school on game days. Attendance is mandatory for the players. Cheerleaders, other students, and parents also attend.

At every pregame meal since becoming coach in 1983, Borden has directed the players and other attendees to stand for formal team prayers. For many years, he invited the local Presbyterian minister (or occasionally, early on, a rabbi), to deliver those prayers. In approximately 1997, however, the high-school athletic director told him that doing so was impermissible. So Borden had the minister write an official team prayer, which Borden "selected seniors on the team to recite." Pet. App. 49a. Starting in 2003, Borden took it upon himself personally to lead the prayer at the first pregame meal each fall, while continuing to appoint seniors to do so for the other games.

Borden also led a separate prayer in the locker room before every game during his entire tenure as coach. After the players suited up, he directed them to 'take a knee' and gather around the blackboard to review strategy. Then, just before the players took the field, he got down on his knee with the team, and personally led the team in prayer.

2. Jo Ann Magistro, the superintendent of schools, first learned about the prayers a few weeks into the 2005 football season, when two cheerleaders' parents called, complaining that their daughters became uncomfortable at a pregame dinner when Borden told everyone to stand, bowed his head, and had a student lead a prayer invoking Jesus. Magistro then learned

that other students and parents had complained the previous year, and that Borden had been told to cease his mealtime-prayer practice but had not done so.

A few days later, a "'crying and overwrought'" mother of a football player complained to Magistro that her son was both upset by the prayers and afraid that Borden would appoint him to lead one. Pet. App. 63a (McKee, J., concurring) (quoting C.A. App. 451). "When Magistro asked why her son participated in the team prayers despite his discomfort, the mother responded that he 'was fearful that if he did not go along with what was obviously the coach's desire, he would not get playing time.'" *Ibid.*

Magistro had the athletic director tell Borden to stop leading mealtime prayers. (She did not yet know about the locker-room prayers.) But Borden continued them anyway, and, according to a parent, "told the students that if they felt uncomfortable during the prayer, they could wait in the restroom until it was over." Pet. App. 8a. Yet more parents complained, including one who had consulted a lawyer and was threatening litigation.

3. Magistro met with Borden, told him of the parents' complaints, and asked him to describe the mealtime prayers. Borden explained that, when the food was ready, he would ask everyone to stand, and would then select a student to deliver a prayer. He went on to tell Magistro that he also led prayers in the locker room.

Magistro included the School District's attorney in the meeting by teleconference, so that he could clarify

the rules regarding prayer in school; and together they instructed Borden to stop conducting team prayers. At the end of the meeting, Borden said that he did not know how he was going to respond to that directive because obeying would mean that "the parents win." C.A. App. 160.

That same day, the attorney prepared written guidelines on school prayer:

> 1. Students have a constitutional right to engage in prayer on school property, at school events, and even during the course of the school day, provided that:
>
> A. The activity is truly student initiated; and
>
> B. The prayer activity does not interfere with the normal operations of the school district.
>
> This would mean that * * * if student athletes on their own decide to hold a prayer huddle before a game, after a game, or during half-time, they have a right to do so.
>
> 2. Neither the school district nor any representative of the school district (teacher, coach, administrator, board member, etc.) may constitutionally encourage, lead, initiate, mandate, or 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.
>
> 3. Representatives of the school district, as referenced above, cannot participate in student-initiated prayer. That very issue was decided by the Fifth Circuit Court of Appeals in a decision cited with approval by the United States Supreme Court and is, therefore, the operative law of the land at this time. To quote the Court, "If while acting in their official capacities (school district) 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," and such conduct was prohibited.

C.A. App. 220-21 (quoting *Doe* v. *Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 406 n.4 (5th Cir. 1995)).

That afternoon, Magistro sent Borden the guidelines, acknowledging Borden's disagreement but instructing him to comply. She invited him to contact her with questions, but he never did.

4. Borden did not show up for the football game that evening. Nor did he return Magistro's or the athletic director's telephone calls asking where he was. Later that night, he sent the athletic director an e-mail announcing that he was resigning as coach, "effective immediately." C.A. App. 224.

Ten days after resigning, Borden, through his attorney, rescinded his resignation. He explained that he had quit because he was unwilling to coach if he could no longer pray with students before games, but that he was now prepared to resume his coaching duties, and to "adhere to the District's directive to him," while preparing to sue. C.A. App. 228-229. At a school-board meeting a few days later, the board president formally recognized Borden's right to disagree with the school-prayer policy, but not to disobey it.

Meanwhile, word got out that some cheerleaders had complained about Borden's prayers. The cheerleading squad immediately became the object of harassment and ridicule at athletic events. And the District's "student internet message boards were bombarded with posts" (Pet. App. 13a n.3) attacking "Jewish Cheerleaders who suck," on the apparent assumption that the two Jewish members of the squad had been the ones to complain. These are some of the posts:

- "Madeline Witchell and Debbie Elson...you guys thought u dint have friends to begin with...now ur really f**ked...I will make sure that I make the rest of the year a living hell for both of u"
- "First they crucify Jesus, then they get Borden fired...what the hell. Jews gotta learn to stop ruining everything cool."
- "The jew is wrong. Borden is right. Let us pray."
- "lets have a rumble...jews vs. christians....."

- "F * * K THE JEWS"
- "d**n jews..then you wonder why hitler did what he did back in the day"
- "MAYBE if [Borden] held a gun to the jjjjewwws head and was like b*tch get on ur knees and pray to jesus!! then that might be breaking the law...ehhh maybe not! * * * just suck it up if u don't fu*king like whats going on in america then GO THE FU*K BACK TO YOUR COUNTRY AND STAY THERE AND PRAY AND EAT ME ook?"
- "Heil Hitla!!! seig heilll."

C.A. App. 457-495; Pet. App. 67a-68a. Students who defended the cheerleaders or suggested that Borden's actions might be inappropriate became victims of equally ugly racist, sexist, and homophobic slurs and threats. As a result, the superintendent received yet more complaints — including one from a local rabbi, who had also lodged a complaint with the county prosecutor.

5. Five weeks after rescinding his resignation, Borden filed suit, challenging the District's school-prayer policy as violating various state constitutional provisions and depriving him of federal due-process rights. Although contending that he has the right to continue leading team prayers, Borden nonetheless alleged that he would stop saying the prayers aloud. He expected that the players would continue the prayers regardless, because, he explained, they were longstanding school traditions; and he sought a

declaratory judgment that he has the right to continue bowing and 'taking a knee' for them.

That spring, while preparing for trial, Borden ordered the team's student captains to ask each of the other players whether to continue the prayers, and to report their responses to him:

> 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.

C.A. App. 497. A couple of days later, 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.

Id. at 498.

One of the student captains quickly 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.

C.A. App. 498.

6. The School District sought summary judgment, arguing principally that its school-prayer policy does not violate Borden's free-exercise rights and is required by the Establishment Clause. Borden responded by denying that he was making any free-exercise claim. He argued that bowing and taking a knee for team prayer are not religious acts, but instead are secular coaching techniques essential for fostering team unity. Describing a football team as a "family unit," he contended that he, the coach, could not be a part of that family without bowing and taking a knee with the players for prayers. C.A. App. 72, 441-442.

Borden also cross-moved for summary judgment, contending that the District's policy violates his federal and state free-speech and academic-freedom "right and ability to be a coach, to do what coaches do," as well as his federal privacy, autonomy, and associational rights to interact with students; and that it constitutes "an 'old fashioned' liberty violation, reminiscent of the Middle Ages, by which [his] bodily movements have been restrained by government as if he is chained and shackled." C.A. App. 25; Borden's Summ. J. Opp'n 35. He also argued that the policy is vague and overbroad.

The District responded principally by arguing that Borden's conduct violates the Establishment Clause, and that his rights are outweighed by its interests under the *Pickering* balancing test. See *Pickering* v. *Bd. of Educ.*, 391 U.S. 563, 568 (1968).

7. In an unpublished, oral ruling from the bench, the district court granted summary judgment to Borden on virtually all his claims. Although acknowledging that "an Establishment Clause violation would occur if the coach initiated and led the [prayers]," the court found that (a) silently bowing and taking a knee for the prayers are not violations; (b) the District's policy is vague and overbroad; and (c) the policy violates Borden's "First and Fourteenth Amendment rights to free speech, freedom of association, academic freedom, as well as New Jersey's constitutional rights to liberty and free speech." Pet. App. 86a. The court did not rule on Borden's privacy or autonomy claims.

The court rejected the School District's argument that Borden's conduct must be judged in light of his 23-year history of initiating and leading team prayers. C.A. App. 9-10. The court also refused to consider the constitutional implications of the team vote, excusing it as a litigation strategy. *Id.* at 8-9. And because 'taking a knee' in football "does not have the [religious] significance typically associated" with kneeling for prayer, the court held that Borden's taking a knee *for prayer* is simply "a sign of respect for his players' actions and traditions." Pet. App. 84a, 86a. Thus, the district court "[took] the Plaintiff at his word as to what he wants to do," and treated his promise about

his future conduct as the only fact on which the case turns. C.A. App. 9.

8. The court of appeals (per Judge Fisher) reversed, unanimously holding that the school-prayer policy is not unconstitutional, either on its face or as applied. Pet. App. 21a-43a; *id.* at 72a (Barry, J., concurring).

The court held that because the policy has numerous valid applications, it is not overbroad. Pet. App. 22a-24a. Because it clearly describes the prohibited conduct, it is not unconstitutionally vague. *Id.* at 25a-26a.

The court then rejected Borden's free-speech claim, explaining that Borden's "silent acts of bowing his head and taking a knee are not [speech] on matters of public concern" under *Pickering*. Pet. App. 37a. And because Borden conceded that bowing his head and taking a knee are pedagogical methods that he employs "pursuant to his official duties as a coach," his conduct is not protected by academic freedom. *Id.* at 36a n.13, 38a-39a. The School District had the lawful authority to "choose both how its students are taught and what its students are taught"; and Borden, while free to "voice his disagreement," has no right to disobey. *Id.* at 39a.

Next, the court held that public-school football teams are not constitutionally protected private, expressive associations; and "the relationship [between coaches and players] is typically not so close as to" give rise to rights of intimate association. Pet. App. 40a-41a. The panel also concluded that Borden suffered no

deprivation of due process because no fundamental rights were at issue. *Id.* at 42a-43a.

Finally, after unanimously and fully disposing of all Borden's claims to have constitutionally cognizable interests in disobeying the District's school-prayer policy, the court went on to consider whether the District would have had an Establishment Clause justification for overriding those interests if they had existed. Pet. App. 43a-56a. The court began by noting that its analysis was irrelevant to the outcome of the case: "[B]ecause Borden has no First Amendment right to his silent acts, we do not need to analyze the policy" to determine whether the District had adequate justification for it. *Id.* at 44a. "However, even if we applied that standard to the present case, we would arrive at the same result: the School District had a right to adopt its policy." *Ibid.*

The majority proceeded to conclude that, on the facts of this case, Borden's desired conduct would violate the Establishment Clause; and hence, the School District had no choice but to prohibit it. The court pointed to Borden's "significant history of pre-game prayers," including the facts that he personally organized and led those prayers for 23 years and that, "when [school] officials asked [him] to discontinue this conduct, he initially resigned from his position as coach of the team rather than continue as coach without engaging in the prayer activities." Pet. App. 50a. The court thus held that "[t]his history * * * leads to a reasonable inference that [Borden's] current requested conduct is meant to preserve a popular state-sponsored religious practice of praying with his team prior to

games." *Ibid.* (internal quotation marks and citations omitted).

The court rejected the claim that Borden's conduct must be viewed as wholly secular, explaining that, "although taking a knee in a huddle to discuss strategy is a gesture well known to football gurus as being part of the game," *Borden*'s practice is instead to take a knee for prayer. Pet. App. 52a n.21. Thus, "[a]lthough Borden believes that he must continue to [bow and take a knee] to demonstrate solidarity with his team, * * * [a] reasonable observer would have knowledge of Borden's extensive involvement with the team's prayers over the past twenty-three years during which he organized, participated in, and led prayer," and "would conclude that Borden is showing not merely respect when he bows his head and takes a knee with his teams and is instead endorsing religion." *Id.* at 53a-54a.

Having held that Borden's actions unconstitutionally endorse prayer, the court chose not to decide whether they also fail the coercion or *Lemon* tests. Pet. App. 46a. Nor did the court decide whether the team vote was unconstitutional — although it noted that the "argument is supported by the Supreme Court's decision in *Santa Fe*." *Id.* at 54a n.23.

9. Judge Fisher, writing for himself alone, went on to comment that, while "the conclusion we reach today is clear" because of Borden's history, it "would not be so clear" without that history. Pet. App. 54a-56a. Suggesting that "we would *likely* reach a different conclusion" for a coach "who had never engaged in prayer with his team," Judge Fisher listed a number of

factual considerations that would affect that determination on a case-by-case basis. *Id.* at 55a & n.25 (emphasis added).

Judge McKee wrote separately, disagreeing with Judge Fisher about the likely outcome for a coach who had no history of involvement in team prayer. Given the relationship between coach and players, Judge McKee explained, "a non-religious student * * * might feel subtle (albeit unintentional) coercion to participate in the ritual despite disagreement or discomfort with it." Pet. App. 60a. Judge McKee also opined that, on the facts of *this* case, "the players must have known how important prayer was to their coach — and no high school athlete would want to disappoint the coach, or * * * risk incurring the communal wrath that had been visited on the unfortunate cheerleaders." *Id.* at 62a. While "[a]ny player who held opposing beliefs should not have had to 'go along to get along' by silently participating in religious observances he disagreed with," "these players were put in the untenable position of either compromising any opposing [religious] beliefs they may have had or going on record * * * as opposing their coach and perhaps a majority of their team." *Id.* at 62a-64a. Judge McKee thus concluded that the School District had adopted a policy "to protect the First Amendment liberties of *everyone* in the school community." *Id.* at 65a-66a (emphasis in original).

Judge Barry, too, wrote separately. She agreed with the case-dispositive holding that Borden's claims fail because he has no affirmative rights against the District. Pet. App. 72a. But in light of Borden's promise

that he would no longer lead the team prayers, she opined that his desired conduct would not violate the Establishment Clause, despite the history underlying it. *Id.* at 73a.

REASONS FOR DENYING THE PETITION

Borden seeks review on whether public-school coaches "violate the Establishment Clause if they make secular gestures of silent respect in response to constitutionally protected student-initiated religious acts." Pet i. But because he does not seek review of the Third Circuit's unanimous holding that he lacks any affirmative rights to engage in that behavior, his claims necessarily fail — regardless of whether his conduct would violate the Establishment Clause if the School District chose to allow it. The question on which he seeks review can thus have no bearing on the outcome of this case.

In addition, the court's fact-bound alternative holding that Borden's conduct violates the Establishment Clause is correct and does not conflict with any decision of this Court or another court of appeals. As for how the Establishment Clause might apply to a coach with no history of involvement in student prayers, which is the only question on which Borden seeks review, the panel members' disagreement pertained to the possible resolution of hypothetical cases with different facts — and even then, only with respect to the court's alternative holding.

I. The Question Presented In The Petition Can Have No Effect On The Outcome Of This Case.

This case is not a typical Establishment Clause action in a public-school setting: No parent has sued to curtail the imposition of religious practices on a child. Rather, the School District enacted a policy governing staff conduct, which one staff member dislikes and wishes to disobey. The Establishment Clause came up solely as a justification for the policy.

That justification would be pertinent here only if school employees had some legally cognizable interest in disobeying the challenged policy. In the absence of such interests, the District has the right to make and enforce decisions specifying how its employees perform the functions it assigns to them. *Connick* v. *Myers*, 461 U.S. 138, 146 (1983) (under *Pickering*, "ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable"); *Givhan* v. *W. Line Consol. Sch. Dist.*, 439 U.S. 410, 414-415 & nn.3-4 (1979); see, *e.g.*, *Edwards* v. *Cal. Univ. of Pa.*, 156 F.3d 488, 491 (3d Cir. 1998) (Alito, J.) (rejecting challenge to jury instruction on balancing professor's rights against university's asserted interests "because, as a threshold matter, we conclude that a public university professor does not have a First Amendment right to decide what will be taught in the classroom").

Because Borden does not challenge the Third Circuit's unanimous holding that he has no legally cognizable interest in disobeying the school-prayer

policy, the question whether his desired conduct would be constitutional if the School District permitted it is purely academic: No interpretation or application of the Establishment Clause could change the outcome for Borden.

II. The Decision Below Creates No Circuit Split And Engenders No Doctrinal Confusion.

Even if the Establishment Clause issues raised by Borden's petition were squarely presented in this case, they would not warrant review.

Borden claims that, in applying the endorsement test, the court below erred by considering the history behind his actions. He asserts that history matters under the Establishment Clause for determining the purpose underlying a governmental action, but not for ascertaining the action's effect. But both this Court and the lower courts routinely consider history and context as an essential feature of *any* Establishment Clause inquiry; the purported circuit split does not exist.

When that argument for certiorari fails, so, too, do all Borden's others. Only by first cutting history and context out of the equation can Borden claim that bowing and kneeling simply show respect for student-initiated religious observances. And in all events, there is no doctrinal confusion that warrants clarification by this Court.

A. There is no conflict over whether context matters in Establishment Clause cases.

According to Borden, this Court has allowed consideration of history solely to determine un-

constitutional purpose under the *Lemon* test. Pet. 16-19. He is incorrect.

In fact, this Court has consistently refused to turn a blind eye to a challenged act's historical context in *any* Establishment Clause inquiry — whether relating to religious purpose, religious effect, religious endorsement, religious preference, or excessive entanglement. Thus, this Court considered the history surrounding the legislative creation of a school district in determining that the resulting statute afforded an unconstitutional religious preference. *Bd. of Educ.* v. *Grumet*, 512 U.S. 687, 703 (1994). It looked to the general "history of government grants" in determining that a particular grant would inevitably come with intrusive oversight, entangling government with religion. *Lemon* v. *Kurtzman*, 403 U.S. 602, 621 (1971). It looked to the past iterations of a governmental display in determining that a new display was erected with a religious purpose. *McCreary County* v. *ACLU of Ky.*, 545 U.S. 844, 866, 869-872 (2005). And it considered history in concluding that a Sunday-closing law had undergone sufficient changes since enactment to shed its religious character. *McGowan* v. *Maryland*, 366 U.S. 420, 432-434 (1961).

Most notably, this Court looked to history in *Santa Fe Independent School District* v. *Doe*, 530 U.S. 290 (2000), to ascertain *both* the purpose for, *and* the effect of, a public school's football-prayer practice. It thus held that a reasonable student observer in the listening audience would consider the evolution of the prayer practice in evaluating the practice's current iteration, and would "unquestionably perceive the inevitable

pregame prayer as stamped with [the] school's seal of approval." *Id.* at 308-309.

The Third Circuit conducted the same inquiry here; and, on the specific facts of this case, reached the same conclusion. Explicitly declining to perform a purpose analysis, the court nonetheless determined that it "must consider all of [Borden's] prior prayer activities with his team, as the Supreme Court did in *Santa Fe*," not because past Establishment Clause violators are forever tarred with their violations, but because, "[b]ased on th[e] undisputed history," a reasonable observer would evaluate Borden's evolving practices in light of his "significant history of pre-game prayers," including his "initially resign[ing] * * * rather than continu[ing] as coach without engaging in the prayer activities." Pet. App. 49a-50a, 52a n.21. In concluding that the "history of Borden's prayers with the football team leads to a reasonable inference that his current requested conduct is meant to preserve a popular state-sponsored religious practice of praying with his team prior to games," what the court was actually deciding is that students would view Borden's prospective actions within the frame set by his past and current conduct; and in so doing, they would see the prayers as stamped with Borden's seal of approval, whether he intended them to be or not. *Id.* at 50a (quoting *Santa Fe*, 530 U.S. at 309 (quoting *Lee* v. *Weisman*, 505 U.S. 577, 596 (1992))) (internal quotation marks omitted).

The three court-of-appeals cases that Borden cites for the proposition that history is out of bounds all predate *Santa Fe*. If they conflicted with it, they would no longer be good law. But far from forbidding

consideration of history, all expressly looked to that factor. The courts simply concluded, on the facts before them, that the practices being challenged were not tainted by past violations. *Granzeier* v. *Middleton*, 173 F.3d 568 (6th Cir. 1999), rejected the claim that an "errant" county employee's one-time posting of religious signs relating to a holiday closing could forever after taint the county's *pre-existing* holiday-closing policy. It did so because a reasonable observer would weigh the county's venerable tradition and its secular purpose against the employee's recent misstep, and would infer a governmental endorsement of religion only for the year that the signs were displayed. *Id.* at 573-576. *Metzl* v. *Leininger*, 57 F.3d 618 (7th Cir. 1995), invalidated a state law requiring school closures on Good Friday, but suggested that a revised statute might withstand constitutional scrutiny if — but only if — the state could provide sufficient evidence that either the new statute or Good Friday itself had become sufficiently secularized. And *ACLU of New Jersey* v. *Schundler*, 168 F.3d 92 (3d Cir. 1999), rejected the argument that an earlier, unconstitutional holiday display necessarily tainted a later one because, given the "fine line-drawing" that holiday-display cases require, "the mere fact that city officials miscalculate and approve a display that is found * * * to cross over the line is hardly proof of the officials' bad faith." *Id.* at 105. In other words, the court refused to assume a continuing unconstitutional purpose where one likely never existed in the first place; and it declined to find a continuing religious endorsement based on a single impropriety that the government quickly and fully corrected.

B. There is no split of authority over whether nonparticipation in prayer constitutes religious animus.

Borden claims that the decision below mandates hostility toward religion, thus conflicting with decisions requiring neutrality. But public officials' nonparticipation in private religious exercises need not be hostile: Merely sitting on the sidelines does not show disdain for those in the huddle. No court has ever held to the contrary.

Neither this Court nor the lower courts have treated public officials' bare nonparticipation — failing to bow and kneel for prayer, and the like — as prohibited religious animus. Quite the contrary. They have uniformly recognized it as constitutionally permitted — if not affirmatively required.[1]

The petition incorrectly claims that other courts have barred only "active participation" while the decision here forbids mere passivity. Both Congress and the courts of appeals have routinely spoken only in

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[1] See, *e.g.*, *Bd. of Educ.* v. *Mergens*, 496 U.S. 226, 251 (1990) (because the Equal Access Act, 20 U.S.C. §§ 4071–4074, "expressly limits participation by school officials at meetings of student religious groups," it avoids "any risk of official state endorsement or coercion"); *Grossman* v. *S. Shore Pub. Sch. Dist.*, 507 F.3d 1097, 1099 (7th Cir. 2007) (Posner, J.); *Holloman* v. *Harland*, 370 F.3d 1252, 1287 (11th Cir. 2004); *Chandler* v. *James*, 180 F.3d 1254, 1264 (11th Cir. 1999), *vacated and remanded*, 530 U.S. 1256, *reinstated*, 230 F.3d 1313 (11th Cir. 2000); *Ingebretsen* v. *Jackson Pub. Sch. Dist.*, 88 F.3d 274, 279 (5th Cir. 1996); *Duncanville*, 70 F.3d at 406 & n.4.

terms of "participation," without the modifier.[2] In any event, Borden is anything but passive: He bows his head and takes a knee expressly, and only, for prayer. See C.A. App. 108-109, 441; cf. *Lee*, 505 U.S. at 593 (even "the act of standing or remaining silent [is] an expression of participation in * * * prayer" sufficient to give rise to Establishment Clause concerns).

C. There is no doctrinal confusion about how the endorsement test applies to this case.

Borden invites this Court to use this case as an opportunity to refine or jettison the endorsement test. There is no occasion here for doing either.

Although the members of the panel below parted company over how the endorsement test might apply to a new coach with no history of involvement in student prayers, that hypothetical case bears no relation to the facts here. Accordingly, this case would be an exceedingly poor vehicle for resolving the disagreement.[3]

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[2] See Equal Access Act, 20 U.S.C. §§ 4071–4072; *Holloman*, 370 F.3d at 1287; *Chandler*, 180 F.3d at 1264-1265; *Ingebretsen*, 88 F.3d at 279; *Duncanville*, 70 F.3d at 405-406.

[3] As Judge Fisher recognized, a number of "additional facts" would have to be considered "[f]or a court to complete the required analysis." Pet. 55a-56a n.25; cf. *McCreary*, 545 U.S. at 867 ("under the Establishment Clause detail is key"); *Selman* v. *Cobb County Sch. Dist.*, 449 F.3d 1320, 1323 (11th Cir. 2006) (In Establishment Clause cases, "the devil is in the details. Facts and context are crucial and they, of course, must be determined from the evidence * * *.").

Borden also asserts that the lower courts have settled on different vantage points for the reasonable observer. Pet. 28-29. But all the cases to which he points, save one, concern religious displays.[4] The lone public-school case is *Rusk* v. *Crestview Local School District*, 379 F.3d 418 (6th Cir. 2004), which involved the distribution of religious fliers to parents via their children's school mailboxes. Not only does that situation bear no relation to this one, but this Court has since specified the reasonable observer's vantage point for that type of case. See *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 117-19 (2001).[5] This Court has similarly specified the reasonable observer for situations like the one at hand, stating unequivocally that football-prayer practices are to be evaluated from the standpoint of a student in the listening audience. *Santa Fe*, 530 U.S. at 308. Borden does not deny that his practices should be evaluated through that lens. Thus, there is no circuit split or doctrinal confusion for this Court to resolve.

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[4] See *Kong* v. *City & County of S.F.*, No. 00-15261, 2001 WL 1020102 (9th Cir. Sept. 5, 2001) (unpublished); *Freedom from Religion Found., Inc.* v. *City of Marshfield*, 203 F.3d 487 (7th Cir. 2000); *Ams. United for Separation of Church & State* v. *City of Grand Rapids*, 980 F.2d 1538 (6th Cir. 1992); *Doe* v. *Small*, 964 F.2d 611 (7th Cir. 1992).

[5] This Court has also recently clarified the reasonable observer's vantage point in religious-display cases. See *McCreary*, 545 U.S. at 866.

III. The Decision Below Is Plainly Correct And Does Not Warrant Further Review.

The decision below is a straightforward and manifestly correct application of settled law. It presents nothing requiring clarification or correction by this Court.

A. The Third Circuit correctly held that Borden has no right to disobey the District's policy.

There is no dispute that Borden seeks to bow and take a knee for team prayer in his official capacity as a public-school coach. Indeed, he candidly explains that he employs those activities as a teaching tool. For four decades, however, this Court and the lower courts have uniformly recognized that school districts, not individual employees, have the final say in choosing the curriculum and teaching methods for the schools they operate.

As then-Judge Alito put it for a prior Third Circuit panel, "'no court has found that teachers' [or coaches'] First Amendment rights extend to choosing their own curriculum or classroom management techniques in contravention of school policy or dictates.'" *Edwards*, 156 F.3d at 491. Borden cites no contrary authority.[6]

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[6] As for Borden's freedom-of-association, privacy, and autonomy claims, the first failed because public-school football teams and their state-employed coaches are neither expressive associations, nor intimate ones. Pet. App. 40a-41a & n.15 (quoting *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 648 (2000); *Bd. of Dirs. of Rotary Int'l* v. *Rotary Club*, 481 U.S. 537, 545-547 (1987); *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 619-620 (1984)). The other two failed because state employees do not enjoy the same rights when

What is more, the School District would have had the authority to enforce its policy, even if Borden did have some legally cognizable interests at stake here, and it would not have had to show that Borden's conduct goes so far as to violate the Establishment Clause. The District has the right to prohibit teachers' conduct (even when constitutional rights may genuinely be at issue) if that conduct inhibits the District's ability to "operate [its schools] efficiently and effectively." *Tenn. Secondary Sch. Athletic Ass'n* v. *Brentwood Academy*, 127 S. Ct. 2489, 2495-2496 (2007) (internal quotation marks and citation omitted); accord *Pickering*, 391 U.S. at 572-573 (teacher's speech unprotected if it "in any way either impede[s] the teacher's proper performance of his daily duties in the classroom or * * * interfere[s] with the regular operation of the schools generally"). Fragmentation of the student body along religious lines, vituperative attacks on students who complain, and threats of litigation from parents all hamper school administration and harm the learning environment. Thus, whether or not Borden's desired conduct would violate the Establishment Clause, the District had strong reasons to regulate it.[7]

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performing their official public functions as they do when in their own homes. Pet. App. 42a-43a (explaining that Borden premises his privacy and autonomy claims on cases like *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), and *Lawrence* v. *Texas*, 539 U.S. 558 (2003)).

[7] Cf. *Grossman*, 507 F.3d at 1100 (Posner, J.) ("Even if it is certain that there is no danger of a suit, the school authorities have a right * * * to control the policies of * * * [their] staff."); *Marchi* v. *Bd. of Coop. Educ. Servs.*, 173 F.3d 469, 476 (2d Cir.

B. The Third Circuit correctly determined that Borden's conduct violates the Establishment Clause.

Although the Third Circuit was correct that there was no need here to decide the Establishment Clause question, it was equally correct in the answer that it gave: Borden's actions violate the Establishment Clause.

Under *Santa Fe*, the court below properly concluded that "[a] reasonable observer would have knowledge of Borden's extensive involvement with the team's prayers over the past twenty-three years during which he organized, participated in, and led prayer," as well as his decision to "resign[] from his position as coach of the team rather than continue as coach without engaging in the prayer activities," and would therefore "conclude that Borden is showing not merely respect when he bows his head and takes a knee with his teams and is instead endorsing religion." Pet. App. 50a, 53a-54a.

Moreover, when Borden declares loudly and repeatedly that team prayer is vital to "team solidarity, team cohesion, and team seriousness of purpose" (C.A. App. 441), and then bows and takes a knee for the prayers at mandatory team events — after having personally spent two decades orchestrating and leading those prayers — he can hardly be said to be taking a

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1999) (Newman, J.) ("[W]hen [a school district] endeavors to police itself and its employees in an effort to avoid transgressing 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.").

"hands-off" approach to student prayer (*Santa Fe*, 530 U.S. at 305). He has instead thrown the weight of his authority as coach behind the team prayers. It would be unreasonable to expect a student, upon seeing Borden take a knee and bow his head for team prayer, to get up, leave the huddle, and risk branding himself as not being a team player or a member of the coach's "family unit." Compare C.A. App. 72, 441-442, with *Santa Fe*, 530 U.S. at 311-312, and *Lee*, 505 U.S. at 593-596. And a non-anonymous team vote on whether to continue having prayers "does nothing to protect minority views but rather places the students who hold such views at the mercy of the majority." *Santa Fe*, 530 U.S. at 304-305.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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