No. 06-3890

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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.

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

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INTRODUCTION

According to Borden, the School District is powerless to forbid anything other than his effort to "take complete control of an entire curriculum";[1] short of that, he enjoys unlimited freedom in his "bodily movements."[2] That argument grossly understates the District's power to control its employees' behavior.

Borden contends, however, that by focusing below on the justifications for the infringement of Borden's rights, the District waived its ability to explain that he doesn't have the rights in the first place.[3] But whether Borden has rights and whether those rights may be infringed are not separate issues. In both instances, when it comes to performance of an employee's duties, competing interests are balanced, but the balancing analysis is truncated because the government's interests always prevail.

Borden also seeks to preclude the District's proffering any justification for its actions other than avoiding being sued.[4] Both the facts and the filings below demonstrate that the District was principally concerned about its constitutional duty to avoid Establishment Clause violations and about furthering the values that underlie that constitutional provision — including concerns for students and parents, and for

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1 Borden's Br. 49.

2 Borden's Br. 57.

3 Borden's Br. 35-39.

4 Borden's Br. 24, 62-63.

avoiding controversial decisions about staff behavior. As for the test for measuring the District's justifications, Borden claims that it is the one applicable to students,[5] rather than the one applicable to teachers.

Although Borden's arguments about affirmative rights and the governing legal standards are meritless, this Court need not reach those questions. For whatever rights Borden may have, and whatever standard applies, the District's actions withstand the strictest scrutiny: Borden's actions violate the Establishment Clause. So in the interest of judicial economy, we begin our argument there.

I. Borden's Actions Violate the Establishment Clause.

A. The operative tests

Borden urges the Court to eschew the *Lemon* and coercion tests, limiting its analysis to the endorsement test.[6] But *Santa Fe Independent School District v. Doe* and *Child Evangelism Fellowship v. Stafford Township School District* make clear that all three tests apply to the public-school context.[7]

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[5] Borden's Br. 33-34.

[6] Borden's Br. 68-69.

[7] *Santa Fe*, 530 U.S. 290, 302-10, 316 (2000) (endorsement); *id.* at 310-12 (coercion); *id.* at 309-10, 314-16 (*Lemon*); *Child Evangelism*, 386 F.3d 514, 530-535 (3d Cir. 2004); *see also Modrovich v. Allegheny County*, 385 F.3d 397, 400 (3d Cir. 2004) (coercion test applies to "government action in public education").

B. Borden's actions fail every test.

Borden does not deny that the pregame meals and locker-room meetings are mandatory for students.[8] Nor does he deny — indeed, he affirmatively argues — that he is acting within the scope of his official duties.[9] But he asserts that his conduct should nonetheless be permitted because: (1) when he bows and kneels, he is engaging in secular acts, not religious ones; (2) his acts are not attributable to the District because team prayers are student-initiated and student-led; and (3) any religious endorsement is negated by the District's supposed antireligious history, or is remediable with a disclaimer. He is wrong on all counts.

1. Borden's activities are religious.

Borden asks the Court to focus exclusively on his 2006-season behavior because, he says, his lawsuit was limited to that conduct.[10] Even if his lawsuit were

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[8] District's Br. 4-5.

[9] Borden's Br. 43-45.

[10] Borden's Br. 15-16. Likewise, Borden claims that all parental complaints concerned his pre-2006 behavior. Borden's Br. 16-18. There is no record about Borden's 2006-season conduct not because that conduct is unobjectionable, but because it occurred postjudgment. Beyond that, *Lee* and *Santa Fe* did not turn on the existence of complaints, for students endure the same peer pressure not to complain as to conform to the prayer. *Cf. Lee v. Weisman*, 505 U.S. 577, 593 (1992); *Santa Fe*, 530 U.S. at 312. The Supreme Court referred to "potential," not actual, divisiveness (*Lee*, 505 U.S. at 587-88), and the prayer practices had been occurring for "many years" without challenge (*id.* at 581). *Accord Santa Fe*, 530 U.S. at 311 (noting that prayer policy "encourages divisiveness," without citing actual complaints); *C.H. ex*

so limited, which it is not,[11] Borden could not circumvent the Establishment Clause through artful pleading. As a matter of law, the history matters in determining whether, when he bows and kneels, Borden violates the Establishment Clause ***today***.[12]

That history consists, Borden concedes, of his sponsoring and leading team prayer for 23 years.[13] It also includes a pattern of conduct demonstrating Borden's determination to maintain both the prayers and his involvement in them: After being told in 1997 to stop having clergy-led prayers, he appointed students to lead them or led them himself; when told in 2004 to stop doing that, he ignored the directive; when told again in 2005, he informed objecting students that they could leave the pregame meal to wait in the bathroom, and he complained that ceasing sponsoring prayers would mean that "the parents win"; he resigned rather than obeying the District's

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rel. Z.H. v. Oliva, 195 F.3d 167, 175 (3d Cir. 1999) (school need not wait for complaints because it is not "unreasonable to expect" parents to be upset by children's exposure to religion), *aff'd by an equally divided court*, 226 F.3d 198 (3d Cir. 2000) (en banc).

[11] *See* Opp'n Mot. Dismiss Appeal (to be filed Mar. 14, 2007).

[12] *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 866 (2005); *Santa Fe*, 530 U.S. at 315.

[13] Borden's Br. 15. That concession disposes of Borden's claim that "[h]e has no history of affirmatively promoting religion or prayer by his football players which might be a basis for finding endorsement." Borden's Br. 76. It also renders irrelevant that no court has found Borden liable for an Establishment Clause violation. Borden confuses the lack of a judicial ruling with the lack of a constitutional violation. *Cf.* Borden's Br. 4.

policy; and he rescinded that resignation solely so he could sue.[14] Borden denies none of these facts.[15]

The court below erred in confining itself to only "the latest news about the last in a series of governmental actions"[16] when it concluded that Borden's current purpose for bowing and kneeling is nonreligious. History shows that Borden has been "simply reaching for any way" to maintain his religious activities.[17] Any other conclusion would "cut context out of the enquiry, to the point of ignoring history."[18]

But history aside, the religious nature of Borden's 2006 conduct is manifest. Borden claims that football, not religion, is the context against which to consider his actions;[19] that "taking a knee" "has no religious meaning whatsoever in the context of

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[14] District's Br. 4-13.

[15] Although he labels as "rank hearsay" Superintendent Magistro's testimony that he told objectors to leave a pregame meal and wait in the bathroom (Borden's Br. 80), Borden does not deny making the statement.

[16] *McCreary*, 545 U.S. at 866.

[17] *Id.* at 873.

[18] *Id.* at 864. Borden claims that his past behavior should be disregarded because he continued a preexisting tradition. Borden's Br. 74-75. But the Establishment Clause binds the District, not just Borden. So the entire history matters. Further, Borden's tenure comprises a substantial portion of that history, and he could have discontinued the tradition had he wanted to.

[19] Borden's Br. 7-9.

football";[20] and that his bowing and kneeling are therefore properly understood solely as secular gestures of respect and deference.[21] But the Supreme Court recognized in *Santa Fe* that prayer is "religious" even in football.[22]

To be sure, football teams can 'take a knee' during strategy sessions. But the question is not whether 'taking a knee' is religious as a general matter.[23] It is whether ***Borden's*** bowing and kneeling are properly viewed as religious. And on that

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[20] Borden's Br. 11.

[21] Borden's Br. 8-14, 67, 71-74, 81-83. Borden claims that the District failed to meet its burden of production on whether "any reasonable observer would view [his] head bow and taking a knee as prayer or endorsement" (Borden's Br. 71; *accord id.* at 7, 13-14, 67), an issue that he claims is factual rather than legal (Borden's Br. 28). That question is ultimately a legal one. *Santa Fe*, 530 U.S. at 315 (purpose) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring) (effect and endorsement)). To the extent that it turns on subsidiary facts, the District presented substantial evidence about (a) Borden's past prayer practices and parents' and students' reactions; (b) the context for Borden's bowing and kneeling; and (c) the inherently religious meaning of bowing and kneeling during prayer (District's Summ. J. Reply 30-31; *accord* Interfaith Alliance Amicus Br. 7-14).

[22] 530 U.S. at 312.

[23] Although Borden relies on the Teaff Affidavit to argue that bowing and kneeling are nonreligious in football, Teaff makes clear that team prayer, and Teaff's participation in it ***is*** religious. Teaff attests that he did not "pray ***every time*** I bowed my head with my team prior to a football game," but often "[thought] about the details of playing the game." Teaff Aff. ¶ 14 (emphasis added). To read that statement as establishing that bowing and kneeling are nonreligious is tantamount to saying that attending church is inherently secular because attendees' minds may occasionally wander during services.

question, the evidence is undisputed: Borden's pre-2006 practice was to bow and kneel only for the prayers (though his players remain on bended knee for pregame strategy sessions); and the remedy he seeks is to continue doing just that.[24]

[24] JA108-09 (Borden Dep.).

In the face of this photograph,[25] Borden cannot honestly contend that his "2006 players understood that [he] did not intend to, and would not, pray with them."[26] As the picture makes clear, Borden is not a bystander, or even one among equals when he bows and genuflects.[27] He is the center of attention and apex of authority.

Nor does it matter that Borden no longer crafts or says the prayers.[28] For ***participating*** in student prayer is equally impermissible.[29] Although coaches need not "make their non-participation vehemently obvious,"[30] *Duncanville* is quite clear, in distinguishing between respect for and endorsement of religion, that affirmative acts — such as joining a prayer circle,[31] "standing over [the team], heads bowed,"[32]

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[25] *See* Stan Grossfeld, *An Issue of Fair Pray*, BOSTON GLOBE, Nov. 7, 2006,at D1, *available at* http://www.boston.com/sports/schools/football/articles/2006/11/07/an_issue_of_fair_pray. Borden permitted a reporter to take the photograph during the 2006-season pregame prayer.

[26] Borden's Br. 10.

[27] To genuflect is "to bend the knee," "to touch the knee to the floor or ground esp[ecially] in worship," or "to be servilely or humbly obedient or respectful." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 948 (1986).

[28] Borden's Br. 9-10.

[29] *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 406 (5th Cir. 1995).

[30] 70 F.3d at 406 n.4.

[31] *Id.*

[32] *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 161 (5th Cir. 1993).

or otherwise "participating" — cross the line.[33] And in *Lee* and *Santa Fe*, school officials crossed that line merely by establishing the mechanism for presenting prayer, without taking part.[34] As a matter of law, Borden's pre- and postjudgment conduct is unconstitutional.

2. The prayers are not student-initiated, and the vote was an independent constitutional violation.

Borden claims that the students' 2006 prayers were student-initiated because the players voted to continue them.[35] That is wrong: The prayers resulted from a vote that Borden initiated and continued a longstanding school tradition and.

In *Santa Fe,* student-led prayers were deemed school-sponsored, for reasons equally true here: The school had a longstanding tradition of football prayer;[36] the prayers were "authorized by a government policy and [took] place on government property at government-sponsored school-related events;"[37] the decision whether to continue the tradition was made using a "majoritarian process" limited to the question

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

34 *Santa Fe*, 530 U.S. at 295-98; *Lee*, 505 U.S. at 581.

35 Borden's Br. 8, 79-80.

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

37 *Id.* at 302.

whether to have prayer;[38] the prayers occurred because school personnel "ha[d] chosen to permit students to deliver" them;[39] some students were required to attend;[40] and the prayers occurred in the context of football games, where students "feel immense social pressure" to conform.[41] Indeed, the facts here are more egregious than in *Santa Fe*: Borden actively participates in the prayers, further diminishing any claim that they are not school-sponsored; and objectors cannot hide in crowded stands, greatly increasing the coercive pressure to participate.

Even setting history and context aside, the vote alone violated the Establishment Clause.[42] Borden's only response is a footnote asserting, without record citations, that "Defendants' stipulation and concession that the players are entitled to determine if they will conduct pre-game prayers" precludes taking issue with the vote.[43] But while

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38 *Id.* at 304-07.

39 *Id.* at 306.

40 *Id.* at 311.

41 *Id.* at 311-12.

42 *Id.* at 317.

43 Borden's Br. 80 n.10.

the District recognized that students may engage in truly student-initiated prayer,[44] we affirmatively argued that the vote was improper.[45]

3. Ending the violations requires stopping Borden's actions.

1. Borden cites to *Pope ex rel. Pope v. East Brunswick Board of Education*[46] to argue that the District's supposed hostility toward religion negates his religious endorsements.[47] *Pope* concerned the District's refusal to allow a Bible Club (and a slew of nonreligious clubs) because the District mistakenly believed that the disallowed clubs were not covered by the Equal Access Act.[48] The reasonable observer would know that *Pope* did not address restrictions on teachers' conduct; that the Board and superintendent who passed the *Pope* policies are long gone; and that there has been no hint of religious animus since then.

More importantly, the District need never cure religious endorsements on Borden's theory, because the past would negate all future violations. But "reasonable

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[44] Borden's Summ. J. Reply 39-40.

[45] JA8-9. Although Borden complains that he had no opportunity to respond, he could have filed a reply on his cross-motion for summary judgment or addressed the issue at oral argument below. He did neither.

[46] 12 F.3d 1244 (3d Cir. 1993).

[47] Borden's Br. 76.

[48] 12 F.3d at 1247.

observers have reasonable memories,"[49] and would not think that a current religious endorsement is negated by other decisionmakers' behavior nearly two decades ago, in an altogether different context.

2. Equally unavailing is the claim that the District's disavowal of Borden's behavior negates his religious endorsement. On that theory, a school district could insulate teachers' flagrant constitutional violations by simply disclaiming all employee conduct.[50] But the Supreme Court has explicitly held that government cannot avoid Establishment Clause violations by disclaiming its own speech;[51] and Borden's conduct ***is*** the District's.[52]

II. Borden Lacks the Free-Speech and Academic-Freedom Rights He Claims.

Even if the Establishment Clause did not bar Borden's bowing and kneeling for team prayer, the District would still prevail because it has discretion to regulate employees' on-the-job speech.

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[49] *McCreary*, 545 U.S. at 866.

[50] Borden's Br. 78-79.

[51] *See County of Allegheny v. ACLU*, 492 U.S. 573, 600 (1989). Borden cites *Board of Education v. Mergens*, 496 U.S. 226, 250 (1990), as support for a disclaimer (Borden's Br. 78), but *Mergens* involved students' private, noncurricular speech, not school employees' official conduct.

[52] *Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 491 (3d Cir. 1998); *Duncanville*, 70 F.3d at 406.

A. The District preserved the ability to argue that Borden lacks the asserted rights.

Borden contends that the District did not preserve the ability to argue that he lacks the rights he claims, so it is limited to arguing that infringements of those rights were justified.[53] But whether teachers have rights to choose their teaching methods "is in reality not different from" whether school boards have legitimate pedagogical interests in regulating curricula.[54] *Pickering*, *Garcetti*,[55] *Bradley*, *Edwards*, and the other cases standing for the proposition that Borden lacks the rights he claims are not premised on the assumption that no balance need be struck between the interests of the state and its employees. Rather, the cases conclude that governmental interests are

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[53] Borden's Br. 35-39, 48.

[54] *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 369-70 (4th Cir. 1998).

[55] Borden argues that the District cannot rely on *Garcetti* because we did not cite it below. Borden's Br. 38. But *Garcetti* is just the most recent case in the *Pickering* line, and we expressly relied on *Pickering*. *See* Borden's Summ. J. Reply 46-47. Furthermore, parties are required to preserve "claims," not arguments supporting claims (*Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992); *Kirk v. Raymark Indus.*, 61 F.3d 147, 156-57 (3d Cir. 1995); *Gallenstein v. United States*, 975 F.2d 286, 290 n.4 (6th Cir. 1992)) — much less case citations. Finally, this Court is "reluctant to apply waiver doctrine when only an issue of law is raised," — such as whether, as a matter of law, Borden's asserted rights don't exist — and "may consider a pure question of law even if not raised below where a refusal to reach the issue would result in a miscarriage of justice or where the issue's resolution is of public importance." *Huber v. Taylor*, 469 F.3d 67, 74-75 (3d Cir. 2006). That is manifestly the case here.

paramount when it comes to employees' performing the duties for which they were hired. Balancing occurs, but the analysis is truncated because the government's interests ***always*** prevail.[56] Those cases fall at one end of a single spectrum, with off-duty statements on matters of public concern at the other.

Borden's argument also raises the question whether the applicable standard is the one in *Pickering* — in which case the analysis ends once the context is narrowed to curricular speech — or a more explicit balancing test under *Hazelwood*, *Tinker*, or some other case. That is a "threshold question necessary to a proper analysis of the parties' arguments," so waiver does not apply.[57]

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[56] *See, e.g., Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1176 (3d Cir. 1990) ("teachers' First Amendment rights [do not] extend to choosing their own curriculum or classroom management techniques in contravention of school policy or dictates"). It matters not whether Borden had an opportunity to "present[] facts showing that [his] right to engage in the silent gestures was a matter of acute public interest." Borden's Br. 37. Whether or not he has a right to advocate outside class for team prayer, speech undertaken in his instructional capacity is unprotected. *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1960 (2006); *Bradley*, 910 F.2d at 1176.

[57] *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 158 n.15 (3d Cir. 2002) (borough could raise, for first time on appeal, argument that conduct was not "speech" under Free Speech Clause).

B. Borden lacks First Amendment rights when coaching.

Borden acknowledges — indeed, insists — that his conduct is critical to his coaching curriculum.[58] That admission dooms his claim, for the government's interests in controlling instructional speech always trump employees' free-speech rights.[59] (The Fourth, Fifth, and Seventh Circuits apply this same *per se* rule.[60])

Borden contends that the rule is inconsistent with academic freedom,[61] and that *Bradley*-type cases apply only when a teacher implements what he terms an "entire all-pervasive curriculum."[62] The governing principle is far broader: "Although a teacher's out-of-class conduct, including her advocacy of particular teaching methods,

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[58] Borden's Br. 10, 42-47.

[59] *See Brown v. Armenti*, 247 F.3d 69, 74-75 (3d Cir. 2001); *Edwards*, 156 F.3d at 491-92; *Bradley*, 910 F.2d at 1176-77. Borden's conduct warrants even less protection than pure speech. *See Texas v. Johnson*, 491 U.S. 397, 406 (1989) ("The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word.").

[60] *See, e.g., Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477, 479-80 (7th Cir. 2007) (Easterbrook, J.) (applying *Garcetti* to uphold teacher's termination because "the school system does not 'regulate' teachers' speech as much as it *hires* that speech"); *Urofsky v. Gilmore*, 216 F.3d 401, 408 n.6 (4th Cir. 2000) ("the government is entitled to control the content of [its employees'] speech because it has, in a meaningful sense, 'purchased' the speech * * * through * * * payment of a salary"); *Boring*, 136 F.3d at 368-70; *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 799-802 (5th Cir. 1989).

[61] Borden's Br. 32-39.

[62] *Id.* at 49.

is protected, her in-class conduct is not."[63] What is more, the teachers in *Bradley*, *Edwards*, and *Brown v. Armenti* never sought to usurp the entire curriculum. *Brown*, for example, concerned a teacher's assignment of a grade to a single student's work.[64] Borden's assertion of free-speech and academic-freedom rights here cannot be squared with those decisions.

C. The District prevails under any conceivable legal standard.

1. No Circuit protects teachers' in-class religious speech.

To be sure, some circuits extend First Amendment protections to certain categories of teachers' in-class speech, where this Court does not.[65] But Borden would lose regardless.

The Sixth Circuit applies *Pickering*, but deems some instructional speech protected. Thus, *Cockrel* recognized a teacher's academic freedom to have an outside speaker address students, whereas *Dambrot v. Central Michigan University* held that a coach's motivational statements to a sports team are unprotected.[66] *Cockrel*, and the

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[63] *Bradley*, 910 F.2d at 1176; *accord Brown*, 247 F.3d at 75 (professor has no First Amendment rights "[i]n the classroom,"); *Edwards*, 156 F.3d at 491.

[64] 247 F.3d at 71, 75.

[65] *See Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1051-55 (6th Cir. 2002) (discussing differences among circuits).

[66] 55 F.3d 1177, 1185-87 (6th Cir. 1995).

Sixth Circuit's approach generally, are unlikely to survive *Garcetti*.[67] But Borden loses under *Dambrot* either way.

Some other circuits have applied the standard from *Hazelwood School District v. Kuhlmeier* — which originally applied to ***student*** speech reasonably perceived as bearing the school's imprimatur.[68] Those courts consider whether restrictions are reasonably related to legitimate pedagogical concerns, and generally agree that schools have legitimate interests in restricting instructional speech.[69]

Finally, a few courts have applied *Tinker v. Des Moines Independent County School District* — which held that a student cannot be prohibited from wearing a protest armband unless the school can demonstrate material and substantial disruption to its operations.[70] They, too, generally agree that restrictions on teachers' in-class

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[67] *See Mayer*, 474 F.3d at 480 (noting that *Cockrel* is "inconsistent with later authority and unpersuasive").

[68] 484 U.S. 260, 271-73 (1988).

[69] *See, e.g., Lacks v. Ferguson Reorganized Sch. Dist. R-2*, 147 F.3d 718, 724 (8th Cir. 1998); *Miles v. Denver Pub. Sch.*, 944 F.2d 773, 775-76, 778 (10th Cir. 1991); *Ward v. Hickey*, 996 F.2d 448, 452-53 (1st Cir. 1993); *Conward v. Cambridge Sch. Comm.*, 171 F.3d 12, 23 (1st Cir. 1999); *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719, 723 (2d Cir. 1994). *But see James v. Bd. of Educ.*, 461 F.2d 566, 574-75 (2d Cir. 1972) (upholding teacher's right to wear black armband to class). Judge Easterbrook recently explained that *James* is "inconsistent with later authority and unpersuasive." *Mayer*, 474 F.3d at 480.

[70] 393 U.S. 503, 513 (1969).

behavior are permissible.[71] *Russo v. Central School District No. 1* recognized a teacher's right not to salute the flag or recite the Pledge of Allegiance.[72] But it did not limit the school's power to "prescribe curriculum, set classroom standards, and evaluate conduct of teachers and students in light of the special characteristics of the school environment."[73] And since *Russo*, the Second Circuit has applied *Hazelwood* to teachers' in-class behavior, upholding as legitimate all the restrictions to come before it — religious or otherwise[74]

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[71] In *Roberts v. Madigan*, the Tenth Circuit rejected under *Tinker* a teacher's challenge to a restriction on in-class behavior. 921 F.2d 1047, 1056-57 (10th Cir. 1990). Likewise, in *Peloza v. Capistrano Unified School District*, the Ninth Circuit held, without committing to any particular test, that a school's prohibition against in-class religious conduct withstood even *Tinker* scrutiny. 37 F.3d 517, 522 (9th Cir. 1994). Since then, both circuits have applied *Hazelwood* to teachers' in-class conduct. *See Miles*, 944 F.2d at 775-76; *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1148-49 (9th Cir. 2001).

[72] 469 F.2d 623, 631-32 (2d Cir. 1972).

[73] *Id.* at 633 (internal quotation marks omitted). The *Russo* court appears to have concluded that the teacher's anti-Pledge position would not be viewed as school-sponsored because a more senior instructor led recitations, and because the Pledge was broadcast over the school's public-address system. 469 F.2d at 625, 633.

[74] *Silano*, 42 F.3d at 723; *accord Marchi v. Bd. of Coop. Educ. Servs.*, 173 F.3d 476, 476-477 (2d Cir. 1999).

Aside from *Russo*, Borden relies on *South Jersey Catholic School Teachers Organization v. St. Teresa of the Infant Jesus Church Elementary School*[75] for the *Tinker* standard, which he claims "is recognized by the New Jersey Supreme Court."[76] But *Tinker* gets nary a mention in *South Jersey*. Borden also relies on *Karins v. City of Atlantic City*.[77] But *Karins* applies *Pickering*, never citing *Tinker*. And *Karins* involves a firefighter, not a teacher. Finally, Borden claims that the "*Tinker* standard has been followed"[78] in this Court's unpublished decision in *Policastro v. Kontogiannis*.[79] But Borden neglects to mention that the speech in *Policastro* was noninstructional, occurring between teachers outside class; nor does he acknowledge that the speech would have been subject to *Hazelwood* had it been school-sponsored.[80]

In sum, the federal courts of appeals have been extraordinarily circumspect about recognizing teachers' First Amendment rights in instructional contexts — under any standard. What is more, no Circuit has ever recognized a First Amendment

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75 696 A.2d 709 (N.J. 1997).

76 Borden's Br. at 33.

77 706 A.2d 706, 709 (N.J. 1998).

78 Borden's Br. 33.

79 No. 04-2883, 2005 WL 1005131 (3d Cir. Jan. 12, 2005).

80 *Id.* at *1-*2.

entitlement to engage in ***religious*** speech in an instructional context.[81] That is true under *Hazelwood*,[82] and even under *Tinker*.[83]

2. The District did not waive the argument that valid pedagogical considerations justify the policy.

Although this Court has held as a matter of law that school districts' interests in controlling their curricula always prevail over instructors' First Amendment rights respecting in-class conduct, an explicit balancing analysis here would only confirm that Borden's interests must give way.

As explained in our opening brief, the District sought to accomplish four objectives, in addition to avoiding Establishment Clause violations: (1) to ensure that

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[81] *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), and *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), dealt with teachers' out-of-class associations, not in-class religious conduct. *See Hetrick v. Martin*, 480 F.2d 705, 708-09 (6th Cir. 1973); *Urofsky*, 216 F.3d at 413. *Meyer v. Nebraska*, 262 U.S. 390 (1923), addressed ***parochial-school*** teachers' rights; but government has far less interest in regulating parochial schools' curricula than in regulating its own in public schools. And *Epperson v. Arkansas*, 393 U.S. 97 (1968), and *Edwards v. Aguillard*, 482 U.S. 578 (1987), struck down restrictions on teachers' in-class activities because they were religiously-motivated, not because government lacks authority to impose them. *See Edwards v. Cal. Univ.*, 156 F.3d at 492 n.2 ("At no point in *Aguillard*, which is an Establishment Clause case, does the Court define academic freedom for purposes of the Free Speech Clause.").

[82] *See Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004, 1008 (7th Cir. 1990); *Bishop v. Aronov*, 926 F.2d 1066, 1074 (11th Cir. 1991); *Marchi*, 173 F.3d at 476-477.

[83] *See Peloza*, 37 F.3d at 522-23; *Roberts*, 921 F.2d at 1056-58.

students of all faiths feel welcome on its athletic teams and at school functions; (2) to avoid controversial decisions about where to draw the line on staff involvement in religious activities; (3) to respect the rights of parents to control their children's religious upbringing; and (4) to avoid Establishment Clause litigation.[84]

Borden does not dispute that the first three are legitimate governmental aims. Rather, he claims that they were not asserted below.[85] But the District argued that "[d]efendants have the ability to craft the solution that they deem reasonably balances Plaintiff's rights with Defendants' legitimate interests,"[86] remarking that "[i]t is disappointing that Plaintiff has not set forth any acknowledgment of those concerns."[87] With respect to both students' discomfort and parents' rights, the District explained that "[i]t is out of respect to ***all*** students including those who might not share Plaintiff's beliefs, along with the recognition of the obvious power Plaintiff has over the public school students he coaches, that Defendants have acted."[88] The District further argued that Borden's participation in student prayer would create "enormous"

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84 District's Br. 39-65.

85 Borden's Br. 24, 62-63.

86 District's Summ. J. Reply 53-54.

87 *Id*. at 5.

88 *Id*.

pressure to conform, and that "this concern ***and*** the belief that Plaintiff's actions violated the Establishment Clause * * * is why" it issued the policy.[89] As for avoiding controversial decisions, the District explained that it could not readily distinguish Borden's "official duties" from actions that should "not be ascribed to his public employer."[90] The District also explained that it cannot "police Plaintiff as he goes about every minute of his coaching duties," but must rely on administrable rules.[91] The District further noted that it could not treat Borden differently than "a biology teacher [who] argue[d] the right to teach 'intelligent design.'"[92]

The District plainly preserved the ability to argue not just that Borden's actions ***actually*** violated the Establishment Clause, but also that its policy sought to further all the values underlying that Clause. And while Borden calls the District's pedagogical arguments "*post hoc* pretextual" justifications, it is undisputed that the

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[89] *Id.* at 2-3 (emphasis added). The District repeatedly reasserted its interest in fostering inclusiveness. *See e.g.*, *id.* at 2, 3, 13, 16-17, 22-24, 30-31; District's Summ. J. Reply 22-25; JA13-14, 36 (Tr.).

[90] District's Summ. J. Reply 4.

[91] *Id*. at 51-52.

[92] *Id.* at 53.

District told Borden to stop praying with students immediately upon learning of his conduct and long before any parent raised the specter of litigation.[93]

3. The policy is reasonably related to the District's pedagogical concerns.

Borden argues that the first three pedagogical objectives "do[] not arise" because the prayers result from "the football players' independent decision to engage in student-led prayer,"[94] and because his actions are not religious.[95] These arguments are no more availing here than they are under the Establishment Clause: Only the most myopic view of history would support the notions that Borden's bowing and kneeling during prayer are secular acts, or that the players acted independently and without school sponsorship when they voted, at Borden's direction, to continue a school tradition.[96]

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[93] District's Br. 6-11.

[94] Borden's Br. 64.

[95] Borden's Br. 8-14, 65-66.

[96] Even if Borden's actions were nonreligious, the District could still prohibit them in order to avoid having to decide what is or is not religious. *See Peck ex rel. Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 630 (2d Cir. 2005) (*Hazelwood* does not entail least-restrictive-alternative analysis). Government is permitted to cast the net more broadly than the Establishment Clause requires. *Bishop*, 926 F.2d at 1078 ("[t]he University can restrict speech that falls short of an Establishment Clause violation").

Borden does not deny that parents and students complained about his prayer rituals or that this controversy has provoked virulent attacks against students presumed to have complained. Instead, he argues that the policy is not reasonably related to the District's interest in protecting students because the complaints were not reduced to sworn declarations.[97] But the District was well within its rights to act on complaints, whether sworn, unsworn, or anonymous.[98] And although Borden labels the complaints "rank hearsay,"[99] they were relevant to the District's motivations for issuing the policy; they were not "offered in evidence to prove the truth of the matter asserted";[100] and Borden confirmed their accuracy before the District acted on them.[101]

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[97] Borden's Br. 16-18. Borden also takes issue with the District's mention of the divisive student blogs, arguing that they could not have motivated the policy because they appeared after it. Borden's Br. at 24-26. But the District has never claimed that they motivated the policy. *See* District's Br. 42. Rather, the postings demonstrate that students had good reason to fear reprisals if they spoke out against Borden's actions.

[98] *See Peck*, 426 F.3d at 630 ("Just as *Hazelwood* requires only that the school's employed method of censorship be reasonable, we similarly conclude that the predicate factual determinations made by the school in triggering the censorship need only be reasonable.").

[99] Borden's Br. 18.

[100] *See* Fed R. Evid. 801(c).

[101] District's Br. 9.

Borden's counsel, meanwhile, withdrew his insistence that the complainants be identified.[102]

Nor was the District required to wait for complaints about Borden's new-and-improved 2006-season behavior.[103] Having received complaints describing how uncomfortable Borden's previous practices had made students, the District reasonably decided that allowing staff participation in student prayer — in any form — threatened its legitimate pedagogical interests.

Borden also argues that the policy is unrelated to valid pedagogical concerns because his participation in student prayer is in keeping with East Brunswick's School Philosophy.[104] Not only does Borden's interpretation of the policy rest on a gross distortion of its text, but the ***District*** gets to decide what school-sponsored expression comports with it; Borden does not.[105] The Philosophy states that East Brunswick provides "a positive climate for learning in which all students can reach their full

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[102] JA26 (Tr.); JA151 (Magistro Dep.).

[103] *See Oliva*, 195 F.3d at 175 (school may stop expression based on "reasonabl[e] conclu[sion]" of "pedagogical detriment likely to flow from permitting [it]").

[104] Borden's Br. 43.

[105] *See, e.g.*, *Boring*, 136 F.3d at 371.

potential" — an "environment of mutual respect."[106] The District reasonably determined that making students uncomfortable detracts from "a positive environment," and that staff participation in prayer disrespects East Brunswick's diverse student body — especially those students who would feel uncomfortable abstaining from prayer while their coach participates.

Under Borden's interpretation of the Philosophy, math teachers, English teachers, band leaders, and everyone else would have the same rights that he does, leaving the District no escape from the legally precarious position in which he would plunge it. Despite hyperbolic claims that the District wants to "purge [his] thoughts,"[107] Borden has failed to show that it did anything other than exercising its lawful discretionary authority over staff conduct, to serve lawful objectives.

4. The District's policy also avoids Establishment Clause litigation.

The District argued below that an "'employee's rights must sometimes yield to the legitimate interest of the governmental employer in avoiding litigation.'"[108] But

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106 JA354.

107 Borden's Br. 46.

108 District's Summ. J. Br. 18 (quoting *Marchi*, 173 F.3d at 476).

Borden claims that avoiding litigation is not a legitimate governmental interest.[109] He is wrong: The federal courts of appeals have consistently held that it is, and that school districts can therefore restrict speech that could give rise to a constitutional challenge even though the speech might ultimately be found not to transgress Establishment Clause limits.[110] Otherwise, school districts would be charged with foretelling, at the peril of legal liability, precisely where the courts would draw the line between constitutionally permissible and impermissible activity.[111] The Supreme Court has identified "play in the joints" that permits policies enforcing greater church-state separation than the Establishment Clause requires;[112] there need not be a "Scylla and Charybdis through which any state or federal actions must pass in order to survive constitutional scrutiny."[113]

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[109] Borden's Br. 66.

[110] *See* District's Br. 43-44; *see also Webster*, 917 F.2d at 1008 (avoiding "***possible*** establishment clause violations" constitutes "legitimate concern") (emphasis added)).

[111] *See Marchi*, 173 F.3d at 476.

[112] *Locke v. Davey*, 540 U.S. 712, 718 (2002) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970)).

[113] *Thomas v. Review Bd.*, 450 U.S. 707, 721 (1981) (Rehnquist, J., dissenting).

Apparently recognizing that his position is inconsistent with the Supreme Court's majority opinion in *Locke v. Davey*, Borden cites a dissent.[114] He also cites *Tenafly* for the proposition that government lacks a compelling interest in imposing greater church-state separation than the Establishment Clause mandates.[115] But *Tenafly* involved private speech outside the public schools, so this Court applied strict scrutiny — a standard inapplicable here.

III. Borden Has No Other Right To Control His Coaching Activities.

A. Borden lacks associational rights to ignore District policies.

Borden conflates intimate and expressive association.[116] But neither theory protects his behavior.

The right of intimate association attaches to "marriage, the begetting and rearing of children, child rearing and education, and cohabitation with relatives"[117] — in other words, relationships in which "'one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal

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[114] Borden's Br. 66.

[115] *Id.*

[116] *Cf. Montgomery v. Stefaniak*, 410 F.3d 933, 937 (7th Cir. 2005) (explaining differences between intimate and expressive association).

[117] *Bd. of Dirs. v. Rotary Club*, 481 U.S. 537, 545 (1987). *Pierce v. Soc'y of Sisters* recognizes associational rights respecting education; but the rights belong to ***parents***, not teachers. 268 U.S. 510, 534-35 (1925).

aspects of one's life.'"[118] Thus, groups like Boy Scout troops,[119] Jaycees chapters,[120] and Rotary Clubs[121] are not intimate associations, belying Borden's reliance on *Dale* and *Roberts*. And *Moore v. City of East Cleveland* does not provide the expansive definition of 'family' that Borden contends.[122] The Court protected a grandmother's choice to live with her grandson, expressly distinguishing between the "'freedom of personal choice in matters of marriage and family life'" — which the Constitution protects — and the freedom of unrelated persons to live together — which it does not.[123] Sports teams are surely no more intimate than Boy Scout troops, fraternities, or groups of close friends.[124]

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[118] *Rotary Club*, 481 U.S. at 545 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 619-20 (1984)).

[119] *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647-50 (2000).

[120] *Roberts*, 468 U.S. at 619-20.

[121] *Rotary Club*, 481 U.S. at 545.

[122] 431 U.S. 494 (1977).

[123] *Id.* at 498-99 (distinguishing *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), because regulation of living arrangements among unrelated persons did not improperly intrude on familial relationships) (citation omitted).

[124] *See, e.g.*, *Wallace v. Tex. Tech. Univ.*, 80 F.3d 1042, 1051 (5th Cir. 1996) ("The specific types of intimate associations which have found protection in the First Amendment have been more intimate than our image of typical coach-player relationships."). Even if "abstract" coach-player associational rights could exist, they would be trumped by a school's "interest in promoting the efficient coaching of its [sports] team." *Id.* at 1052.

Nor would an expressive-association claim fare any better. A public-school football team is not a private association, but an official school activity run by instructors hired by, paid by, and acting on behalf of, the state. Nor is it political or otherwise expressive: Its purpose is to play football, not to engage in constitutionally protected speech.[125]

What is more, this Court recognized in *Holder v. City of Allentown* that associational rights do not shield one from the consequences of one's illegal acts. For a public-school coach to endorse team prayer and then to claim an associational right to avoid employee discipline is akin to "a police official * * * engag[ing] in unlawful adultery and then su[ing] to retain his position on the theory of freedom of association * * * [or] to criminal defendants entering into an unlawful conspiracy and then defending their conspiracy on the theory of freedom of association."[126]

Nor does *Duncanville* recognize a coach's "right to associate with his players * * * while they engage in the important team act of saying pre-game prayers,"

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[125] *See Gruenke v. Seip*, 225 F.3d 290, 308 (3d Cir. 2000) ("While the Constitution * * * guards those associational activities necessary to further other activities, such as speech and assembly, that the First Amendment directly protects, purely social rights to association lack this same heightened constitutional protection.").

[126] 987 F.2d 188, 199 (3d Cir. 1993).

as Borden contends.[127] Rather, it acknowledges that the Establishment Clause forbids school-district employees both to endorse and to disparage students' religious practices: Coaches must "treat[] students' religious beliefs and practices with deference and respect."[128] But "if while acting in their official capacities, [coaches] * * * manifest approval and solidarity with student religious exercises, they cross the line between respect for religion and endorsement of religion."[129] Borden crosses that line.

B. Borden's state constitutional claims are meritless.

1. Although Borden blithely asserts that the New Jersey Constitution affords "more protection to liberty and free speech than the United States Constitution,"[130] the case on which he relies is *State v. Schmid*.[131] *Schmid* holds that the state-action doctrine does not apply to New Jersey's free-speech clause, thus allowing suits against

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127 Borden's Br. 54.

128 *Duncanville*, 70 F.3d at 406 n.4.

129 *Id.*

130 Borden's Br. at 55.

131 423 A.2d 615 (N.J. 1980).

private parties.[132] It does not abrogate the settled rule that New Jersey's free-speech protections against the state are coterminous with the First Amendment's.[133]

2. Apparently recognizing that his federal privacy and autonomy claims are frivolous, Borden has abandoned them; but he uses the same inapposite authority to assert state-law liberty rights — with no better result.[134]

There is no basis for supposing that a New Jersey court — or indeed, any court, anywhere — would view the federal privacy cases as even minimally relevant to whether public-school instructors have liberty rights to violate school policies, the Establishment Clause, and the Equal Access Act.[135] Borden complains, however, that his "bodily movements, personal autonomy, privacy, thoughts, wishes, and desires have been restrained by government as if he is chained and shackled," making him

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[132] *Id.* at 628.

[133] *See, e.g.*, *McCusker v. City of Atlantic City*, 959 F. Supp. 669, 675 (D.N.J. 1996); *Anderson v. Sills*, 363 A.2d 381, 386 (N.J. Super. Ct. Ch. Div. 1976) (collecting cases).

[134] Borden's Br. 55-57.

[135] Only *O'Connor v. Ortega* involved a public employee; and it concerned an extremely limited expectation of privacy in not having the desk in one's private office searched. 480 U.S. 709, 718-19 (1987). All the rest concern even more intensely personal conduct by private citizens. *See* District's Br. 55-57.

feel "degraded * * * as a person and humiliated * * * in the presence of his players."[136] But the District's policy does not regulate Borden's "innermost private thoughts, wishes, and desires": It regulates his conduct. He can think whatever he pleases, whenever he pleases; and he can pray privately, even during school hours. What he cannot do is lead, encourage, or participate in team prayer. Chains-and-shackles metaphors bear no relation to the District's modest, lawful, and constitutionally required restrictions on employee conduct.

The U.S. Supreme Court's decision in *Kelley v. Johnson*[137] sheds light on Borden's actual liberty interests. *Kelley* distinguishes between privacy claims made by members of the general public and those made by government employees, explaining that because "comprehensive and substantial restrictions upon activities of both federal and state employees lying at the core of the First Amendment" are permissible under *Pickering*, "there is surely even more room for restrictive regulations of state employees where the claim implicates only the more general contours of the substantive liberty interest protected by the Fourteenth Amendment."[138] Thus, in analyzing a public-school teacher's liberty interest in

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136 Borden's Br. 57.

137 425 U.S. 238 (1976).

138 *Id.* at 245.

violating a school dress code, the Second Circuit held that, "[a]s with most legislative choices, the [school] board's dress code is presumptively constitutional," so the teacher "failed to carry the burden set out in *Kelley* of demonstrating that the dress code is 'so irrational that it may be branded 'arbitrary.'"[139] Borden's claims would be subject to a similar standard; and they are similarly unpersuasive.

IV. Borden's Vagueness and Overbreadth Arguments Are Meritless.

A. The policy is not unconstitutionally vague.

Borden rests his vagueness claim entirely on the word 'participation' in the District's policy, as though that term stood alone and unadorned. The policy forbids employees not just to participate but also to "encourage, lead, initiate, mandate, or otherwise coerce, directly or indirectly, student prayer at any time in any school-sponsored setting * * *."[140] And the policy uses *Duncanville* to elaborate on forbidden participation, explaining:

> Representatives of the school district * * * 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

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[139] *E. Hartford Educ. Ass'n v. Bd. of Educ.*, 562 F.2d 838, 860-61 (2d Cir. 1977).

[140] JA221.

> 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.[141]

Borden obviously understood what the policy required, as he knew how to follow it and never asked for clarification. He assures this Court that he "honored and obeyed the District's directives"; that "[n]ot once did he disobey"; that he "complied with the Board's wishes, 'even though he disagreed with'" them; and that he "adhere[d] to" and "obeyed" the policy.[142] Those are hardly the statements of someone with no idea what was required of him.

In all events, schools need not "expressly prohibit every imaginable inappropriate conduct by teachers" in order to survive a vagueness challenge.[143] Quite the contrary. A policy is constitutional if, "based on existing regulations, policies, discussions, and other forms of communication between school administration and teachers," it is "reasonable for the school to expect the teacher to know that her conduct was prohibited."[144] Thus, "[a]ware that precise delineation of sanctionable

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[141] *Id.*

[142] Borden's Br. 22-23.

[143] *Ward*, 996 F.2d at 454.

[144] *Ward*, 996 F.2d at 454; *accord San Filippo v. Bongiovanni*, 961 F.2d 1125, 1135-36 (3d Cir. 1992) (vagueness doctrine's "purpose is only to give 'fair warning' of prohibited conduct"). Borden declined to return his supervisors' telephone calls to discuss the policy. JA160-61 (Magistro Dep.).

conduct is close to impossible, courts have granted schools, acting in their capacity as employers, significant leeway,"[145] approving teacher-conduct standards far less specific than the one at issue here, including standards that forbid "conduct unbecoming a teacher,"[146] "commenting on items that would reflect negatively on individual [students],"[147] and, significantly, making "references to religion."[148]

The specificity that Borden seeks is neither required nor possible.[149] "[I]t is not feasible or necessary for the Government to spell out in detail all that conduct which will result in retaliation,"[150] because "[t]here are limitations in the English language

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[145] *Marchi*, 173 F.3d at 480; *see also id*. at 489 ("Though the key proscription — 'references to religion' — will inevitably require interpretation in various circumstances, its basic meaning is as clear as the context permits, and, as a facial matter, gives Marchi fair notice of what conduct is proscribed.").

[146] *San Filippo*, 961 F.2d at 1137 (quoting *Wishart v. McDonald*, 500 F.2d 1110, 1111 (1st Cir. 1974); *accord Conward*, 171 F.3d at 23; *Fowler v. Bd. of Educ.*, 819 F.2d 657, 664-66 (6th Cir. 1987).

[147] *Miles*, 944 F.2d at 778-79 ("[Plaintiff's] argument regarding the vagueness and overbreadth of the reprimand invites us to tailor the language or to pick an appropriate action for the school. We decline to do so. * * * We should not and will not run the schools.").

[148] *Marchi*, 173 F.3d at 472.

[149] *See Kolender v. Lawson*, 461 U.S. 352, 361 (1983) ("due process does not require 'impossible standards' of clarity").

[150] *Arnett v. Kennedy*, 416 U.S. 134, 161 (1974).

with respect to being both specific and manageably brief."[151] "[E]ven when a law implicates First Amendment rights, the constitution must tolerate a certain amount of vagueness."[152] Here, 'participation' is a "word[] of common understanding to which no teacher is a stranger."[153] The District's express incorporation of *Duncanville*'s prohibition against "manifest[ing] approval and solidarity with student religious exercises" effectively clarifies what 'participation' entails. And the policy is no more restrictive than the constitutional prohibition against endorsing religion, so even New Jersey's statutory good-cause termination standard put Borden on notice that he was risking disciplinary action.[154]

Borden complains, however, that "neither the Board nor the Superintendent understood the meaning of their own prohibition," so he can't be expected to

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[151] *Id.* at 159.

[152] *Cal. Teachers Ass'n*, 271 F.3d at 1150.

[153] *Id.* at 1151; *see* JA163 (Magistro Dep.).

[154] *Smith v. Goguen*, 415 U.S. 566 (1974), is the only case Borden cites that actually deems anything unconstitutionally vague. Borden's Br. 60. *Goguen* concerns a criminal statute, not a school policy — to which its analysis would be inapplicable (*see Muller ex rel. Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1542 (7th Cir. 1996) ("[Plaintiffs] condemn the vagueness of [school's] language with Supreme Court cases addressing restrictions on adult expression outside the school setting. [citing *Goguen*.] However, schools are different.")).

understand it either.[155] But the policy is entirely clear for the heartland of cases: Not only is Borden forbidden to "encourage, lead, initiate, mandate, or otherwise coerce" student prayer,[156] but the provision barring 'participation' also undeniably prohibits him from reciting the prayers, kneeling, or joining hands with the students. Nothing in the record suggests otherwise.

While Borden points to Superintendent Magistro's testimony that kneeling to pray ***separately*** is permissible,[157] that is not what Borden claims to have been unlawfully restrained from doing. And while he contends that Magistro and the Board president were unsure whether he could bow his head or clasp his hands in prayer,[158] the record reflects no such confusion. Magistro testified straightforwardly that Borden "cannot bow his head with the students when they pray," and cannot clasp his hands during prayer if, "[t]o any reasonable observer he [would] appear to be involved or participating with students."[159] Far from reflecting confusion over what is permissible, Magistro's testimony mirrors the Establishment Clause's requirement that

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155 Borden's Br. 58-60.

156 JA221.

157 Borden's Br. 59.

158 *Id.*

159 JA164 (Magistro Dep.).

Borden's conduct must be viewed in context. The Board president was asked about hand clasping by a religious club's unpaid adviser, not by a paid coach.[160] And he was asked whether the ***Constitution*** prohibits head bowing, not whether the ***policy*** does; so his testimony that he had not researched the constitutional question suggests no ambiguity in the policy.[161]

The only genuine confusion that Borden has identified concerns whether the policy permits him to close his eyes during pre-meal prayers.[162] That is too slender a reed on which to hang a claim that the policy is void for vagueness. For "uncertainty at a statute's margins will not warrant facial invalidation if it is clear what the statute proscribes 'in the vast majority of its intended applications.'"[163]

B. The overbreadth doctrine is inapplicable.

Borden mischaracterizes the overbreadth doctrine, claiming that the District's challenged policy is unconstitutionally overbroad because it forbids him to bow and

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160 JA390-92 (Baker Dep.).

161 JA379.

162 JA164 (Magistro Dep.).

163 *Cal. Teachers Ass'n.*, 271 F.3d at 1151 (quoting *Hill v. Colorado*, 530 U.S. 703, 733 (2000)); *see also Marchi*, 173 F.2d at 489.

kneel as he wishes.[164] "The overbreadth doctrine permits a person who is not himself injured to raise the First Amendment rights of others;"[165] it is not a vehicle for claiming infringement of one's own rights. In all events, the policy is not overbroad because it does not prohibit protected conduct. Instead, it parallels the federal Equal Access Act upheld in *Mergens*,[166] which "expressly limits participation by school officials at meetings of student religious groups."[167]

CONCLUSION

Borden has done everything that one would do if one were determined to preserve school prayer at all costs, and nothing that one would do if one were committed to obeying the Establishment Clause and respecting students' and parents' religious-freedom rights. The District has the authority — and the affirmative constitutional duty — to stop him. His claims to the contrary are meritless. The District is entitled to judgment as a matter of law. The decision below should be reversed.

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164 *See* Borden's Br. 61.

165 *San Filippo*, 961 F.2d at 1135 n.14.

166 496 U.S. at 251.

167 *Id.* at 253.

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B), as modified by this Court's Order of February 26, 2007 (granting Appellants' Unopposed Motion for Leave to File Overlength Reply of up to 9,250 words), because it contains 8,982 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 12.

/s/ Richard B. Katskee

Dated: March 12, 2007

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.

2. The electronic versions of the brief were successfully scanned against viruses using Symantec Antivirus Version 10.1.5.5000.

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

/s/ Richard B. Katskee

Dated: March 12, 2007

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of March 2007, I caused to be served by first-class U.S. Mail, postage prepaid, two bound paper copies and one electronic copy of the foregoing *Reply Brief for Appellants*, to the following addresses:

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I also caused to be sent to the Clerk's Office (a) an electronic copy of the Brief via e-mail; as well as (b) an original and ten bound paper copies of the Brief by first-class U.S. Mail, postage prepaid.

/s/ Richard B. Katskee

Dated: March 12, 2007