No. 08-_____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Lee v. Weisman*, 505 U.S. 577, 599 (1992), this Court reserved for future decision the question of public school educators' Establishment Clause obligations when they interact with public school students who are exercising their constitutional right to engage in religious acts. In *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 313 (2000), this Court confirmed the constitutional right of public school students to pray in public schools "at any time" but did not decide the corollary question of what public school educators are allowed and not allowed to do under the Establishment Clause when students engage in prayer in their presence. This petition squarely presents the question reserved in *Lee,* not addressed in *Santa Fe,* but of vital importance to public school educators in this country:

Do public school administrators, faculty, coaches and staff violate the Establishment Clause if they make secular gestures of silent respect in response to constitutionally protected student-initiated religious acts?

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Marcus A. Borden respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The decision of the court of appeals is reported at *Borden v. School District of the Township of East Brunswick*, 523 F.3d 153 (3d Cir. 2008), and is reprinted as Appendix A, Pet. App. 1a–75a.

The court of appeals reversed the summary judgment order entered in petitioner's favor by the United States District Court for the District of New Jersey on July 25, 2006, reprinted as Appendix B, Pet. App. 76a–77a. That order incorporated oral findings of fact and conclusions of law made on the same date, which are reprinted as Appendix C, Pet. App. 78a–87a.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Third Circuit entered its judgment and opinion on April 15, 2008, and denied petitioner's timely request for rehearing en banc on May 15, 2008. Justice Souter granted petitioner's applications to extend the time to file a petition for writ of certiorari, extending the deadline until October 10, 2008. Supreme Court Dkt. No. 07A1023. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides, in relevant part:

> Congress shall make no law respecting an establishment of religion . . . .

STATEMENT OF THE CASE

A. Factual History

1. Petitioner Marcus A. Borden is a public school teacher and head football coach at East Brunswick High School ("EBHS") in East Brunswick, New Jersey, a position that he has held since 1983. He has received three national coaching awards, including recognition as the national high school football coach of the year. J.A. 437.[1] Respondents are the EBHS Board of Education, the EBHS School District, and the Superintendent of EBHS schools. J.A. 68.

For a number of years, Coach Borden and the EBHS football team engaged in two pre-game prayer traditions. Pet. App. 80a; J.A. 174–175. These traditions were started by Coach Borden's predecessor, sometime prior to 1983. Pet. App. 6a; J.A. 112–114. *First*, Borden joined in prayer before meals with his players, sometimes leading the prayer himself, at a pre-game private dinner in the

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[1] Unless otherwise noted, references to "J.A." are to the Joint Appendix filed before the court of appeals, and references to "R." are to docket entries before the district court.

school cafeteria. Pet. App. 6a; J.A. 110. *Second*, the players and coaches would "take a knee" together in the locker room immediately before each game. J.A. 106, 108, 441, 447–448. While taking a knee with his team, Borden would discuss tactics and strategies and rally his players for the game. Taking a knee is a part of football tradition in America. J.A. 108–109; 126–127. Following that discussion, Borden either joined in or led the team in prayer. J.A. 174–175.

2. In October 2005, Coach Borden stopped praying with his players at the direction of School District superintendent Jo Ann Magistro. J.A. 158–159. Borden then sought guidance as to what he could and could not do in response to the voluntary, student-initiated pre-game prayers. After neither Magistro nor the School District's counsel, Martin Pachman, could provide Borden with definitive guidance, respondents issued written guidelines that attempted to answer Borden's questions.

Respondents' guidelines stated that (i) students have "a constitutional right to engage in prayer on school property, at school events, and even during the course of the school day"; (ii) students could pray before a meal in the cafeteria and hold a "prayer huddle" before a game; (iii) school representatives, including coaches, could not "encourage, lead, initiate, mandate, or otherwise coerce, directly or indirectly, student prayer at any time"; and (iv) school representatives could not "participate in student-initiated prayer." Pet. App. 9a–10a. The word "participate" was not defined, nor was any distinction drawn between active and passive

participation. The guidelines also failed to address the concrete questions Coach Borden had previously asked, such as: if his team began to pray voluntarily, must he leave the room? J.A. 439. Could he stand when the players stood to pray, or must he remain seated? J.A. 439. Shortly after the School District issued the guidelines, the EBHS Board of Education issued a public statement supporting Superintendent Magistro and further stating that "[w]e respect the rights of any employee to disagree with policies, procedures and legal interpretations, but cannot and will not tolerate violations of these rules by any employee of the district." Pet. App. 11a.

In light of the unclear guidelines, Borden believed that he was obligated to distance himself completely from his team's two traditional pre-game prayer activities for the remainder of the 2005 season. At the team's pre-game dinners, to avoid any appearance of participation, he remained motionless while the students prayed. J.A. 440–441. During the pre-game locker room strategy discussion he continued to take a knee, but stood up and remained motionless once the players initiated prayer. J.A. 441–442. The captain of the 2006 team, who was a player on the 2005 team, said that watching Borden respond to the 2005 team's pre-game prayers, was "awkward to watch," and hurtful to "team morale and team spirit." J.A. 169.

B. Procedural History

1. In November 2005, Borden filed suit against respondents in the Superior Court of New Jersey.

Pet. App. 14a. He sought a declaratory judgment that the school district's guidelines and the Board's statement violated his rights under the free speech, due process, and equal protection provisions of the New Jersey Constitution and federal Constitution. Coach Borden did *not* seek to pray or join with his players in pre-game prayers. Rather, he sought only to engage in two silent, respectful gestures: (i) to bow his head when students pray at the pre-game dinner, and (ii) to continue to "take a knee" with the team when they conclude the pre-game locker room meeting with a player-led prayer. Pet. App. 15a.

After respondents removed the case to federal district court, respondents moved for summary judgment, asserting that Borden's gestures of silent respect, if permitted, would violate the Establishment Clause. R. 15 at 16. Borden cross-moved for summary judgment, advancing his affirmative claims while asserting that his silent gestures would not violate the Establishment Clause. R. 16. In reply, respondents conceded (i) that there were no material facts in issue, J.A. 27, and (ii) that if respondents' Establishment Clause defense were rejected, then Borden would be entitled to summary judgment on all of his affirmative constitutional claims:

> [I]f this Court were to find [Borden's] actions do not implicate the Establishment Clause, then regardless of what constitutional right Plaintiff seeks relief under . . . he would be entitled to participate in voluntary, non-disruptive student prayers.

R. 20 at 46.

In July 2006, the district court granted Borden's cross-motion and denied respondents' motion. Pet. App. 78a–87a. The court relied on (i) Borden's representation that he was not seeking to join with or lead his players in pre-game prayers, J.A. 5; (ii) respondents' concession that there were no material facts in issue, J.A. 27; and (iii) respondents' concession that Borden had the constitutional right to engage in his silent gestures as long as they did not violate the Establishment Clause, R. 20 at 46.

Applying this Court's "endorsement" test, the district court held that Borden's secular gestures would not violate the Establishment Clause. *First*, the district court found that bowing one's head and taking a knee in football are not religious acts and, thus, rejected the argument that a reasonable observer would view Borden's secular actions as an endorsement of religion. Pet. App. 84a. *Second*, the court rejected Respondents' coercion concerns, holding that Borden's silent signs of respect could not have any coercive effect on students. Pet. App. 85a. *Finally*, the district court underscored the lack of clarity in the school's "guidelines":

> [W]e come down to what is considered participation. What is the coach to do? Should he leave the room? Turn his back? Stand at attention and not move a muscle? I don't think so. May he clasp his hands? At what angle or degree is his head considered bowed? May he crouch down, bend a knee, take a knee, or completely kneel?

> I don't think it's fair to ask a coach to do nothing. I agree that an Establishment Clause violation would occur if the coach initiated and led the activity, but I find nothing wrong with remaining silent and bowing one's head and taking a knee as a sign of respect for his players' actions and traditions, nor do I believe would a reasonable observer.

Pet. App. 85a–86a. Having rejected respondents' Establishment Clause defense, the district court held, consistent with respondents' concession, that Borden's constitutional rights had been violated by the respondents' guidelines. Pet. App. 86a.

2. Respondents appealed to the Third Circuit.[2] Represented by new counsel, respondents reversed their legal positions and attempted to abandon their district court concession that Borden had valid constitutional rights to bow his head and take a knee. On appeal, respondents argued that Borden had no rights under the state and federal constitutions and, therefore, that it was not

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[2] Respondents made no efforts to stay the district court's declaratory judgment pending appeal. Shortly after the district court entered judgment against them, respondents stated that they were "pleased" by the decision. John P. Martin, *School Coach Can Kneel While Players Pray*, The Star Ledger (Newark, N.J.), July 26, 2006, at 1. Hence, during the 2006 and 2007 football seasons, Borden bowed his head in silent respect during player-led grace at pre-game meals, and remained on his knee at the conclusion of pre-game locker room meetings while his players voluntarily prayed.

necessary for the court of appeals to reach respondents' Establishment Clause affirmative defense, even though that was the only contested issue before the district court. Pet. C.A. Br. 30–32.

Judge Fisher's lead opinion allowed respondents, over Borden's objections, to retract their district court concessions and make new arguments challenging the validity of Borden's affirmative constitutional claims. Rather than remanding to the district court to address these new arguments, the lead opinion went on to decide the merits of Borden's affirmative constitutional claims in favor of respondents.

As to a number of Borden's affirmative constitutional claims, the court's holding was linked to and depended upon the interpretation of the Establishment Clause. Specifically, the court ruled that "the guidelines prohibiting [Borden] from participating in the players' prayer activities do not interfere with his freedom of association rights, particularly because he is violating the Establishment Clause while doing so." Pet. App. 41a. Likewise, the court concluded that "the School District has the right to issue its guidelines, particularly because it needed to prevent Borden from violating the Establishment Clause." Pet. App. 41a–42a n.15. Indeed, the court rejected Coach Borden's due process claim based on its conclusion that "Borden has no interest—privacy, liberty, or otherwise—in behavior that violates the Establishment Clause." Pet. App. 43a. As such, the court concluded that its interpretation of the Establish-

ment Clause was "necessary" to its ultimate resolution of the case. Pet. App. 45 n.17.

Two of the Third Circuit judges concluded that Coach Borden's silent gestures would violate the Establishment Clause. Pet. App. 5a. They discounted that Coach Borden had not only stopped praying with his players in October 2005, but had also represented that he no longer sought to pray with his players. The lead opinion solely relied upon "Borden's twenty-three years of prior prayer activities[,]" Pet. App. 5a, to support the conclusion that a reasonable observer would construe Borden's silent acts of respect to be an impermissible endorsement of religion regardless of his actual intent. Pet. App. 48a–54a. However, in doing so, it was acknowledged that (i) Borden's two silent gestures of respect, standing alone, were not religious acts; and (ii) were it not for Borden's discontinued prayerful history, his silent gestures of respect would be permitted under the Establishment Clause:

> We agree with Borden that bowing one's head and taking a knee can be signs of respect. Thus, if a football coach, who had never engaged in prayer with his team, were to bow his head and take a knee while his team engaged in a moment of reflection or prayer, we would likely reach a different conclusion[.]

Pet. App. 55a.

Judge McKee's concurring opinion, agreed that Coach Borden's silence during player-initiated

prayers violated the Establishment Clause, but disagreed with the statement that there would likely be a different outcome if there had been no history of Borden's prior participation in student prayer. Pet. App. 57a. According to Judge McKee, a reasonable observer "could interpret Borden's proposed actions as an endorsement of religion even absent the coach's history of promoting team prayer[.]" Pet. App. 58a. Judge McKee then further rejected the lead opinion's Establishment Clause analysis by suggesting that the 2006 team's student-led prayers were actually the result of indirect coercion. Pet. App. 60a–70a.

Judge Barry's separate concurring opinion was sharply critical of the majority in three respects. *First*, she would not have allowed respondents to transform the "legal landscape" by going back on "their word" to Coach Borden and the district judge:

> Given my druthers, I would hold defendants to their word and would not entertain, as my distinguished colleagues have so generously entertained, the new issues and arguments raised on this appeal.

Pet. App. 71a–72a. *Second*, Judge Barry disagreed with Judge Fisher's and Judge McKee's application of the endorsement test. She wrote that she would have held Borden's gestures of silent respect did not violate the Establishment Clause:

> Thus, if and when in the future a player decides to initiate prayer, the reasonable observer would know, given Borden's repre-

> sentations, that he did not ask for a prayer; did not select someone to say a prayer; did not monitor the content of the prayer; did not provide a means for broadcasting the prayer; did not join his hands with anyone; and did not mouth the words of the prayer, or say it aloud, or otherwise do anything to put the imprint of the state on the prayer. A reasonable observer would simply see Borden bow his head or take a knee in a silent, unobtrusive sign of respect for the private choices made by individual players who are constitutionally permitted to choose to engage in religious activities.

Pet. App. 73a–74a. *Third*, Judge Barry criticized the religiously hostile consequences of the lead opinion's holding:

> Judge Fisher "would likely" find, as would I, *no* endorsement of religion were a football coach, who had never engaged in prayer with his team, to bow his head or take a knee while his team engaged in a moment of reflection or prayer. *Apparently, it is only Borden, given his prior history, who cannot constitutionally respond to constitutionally protected student-initiated and student-composed prayer* but, if he can, we are not told what response might be permissible. Surely he would not be required to keep his head erect or turn his back or stand and walk away.[] Any such requirement would evidence a hostility to religion that no one would intend.

Pet. App. 74a–75a (emphasis added, footnote omitted).

The court of appeals denied Coach Borden's petition for panel rehearing and rehearing en banc.

REASONS FOR GRANTING THE PETITION

Sixteen years ago this Court held that a public school's official sponsorship of a clergy member's invocation and benediction at a graduation ceremony violated the Establishment Clause. The Court, however, was careful to say that the Establishment Clause permits religious practices in public schools. *Lee v. Weisman*, 505 U.S. 577, 599 (1992). Eight years later, this Court again invalidated a public school's sponsorship of religious activity but also again was careful to say that student religious acts in public schools, such as student prayer, are permitted by the Establishment Clause. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313 (2000). As Justice Kennedy wrote in *Lee:* "[a] relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution. We recognize that . . . *throughout the course of the educational process, there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students. . . . But these matters, often questions of accommodation of religion, are not before us.*" 505 U.S. at 598–599 (citations omitted, emphasis added). In the intervening years, this Court, the lower courts, and public school educators have struggled to resolve exactly how constitutionally protected

student "religious values" and "religious practices" must be responded to by public school educators "throughout the course of the educational process." *Id.* at 599. Unfortunately, when lower courts have examined these inevitable interactions between public school educators and students through the lens of the Court's Establishment Clause jurisprudence, the conflicting results have engendered more confusion than clarity.

This case epitomizes the confusion among all persons involved with public school education and highlights the pressing need for guidance from this Court. Here, a group of high school football players voluntarily chose to follow tradition and engage in a team prayer before every football game. Their coach, Marcus Borden, does not seek to pray with them. He neither encourages nor condemns their choice to engage in student-initiated prayer. He seeks to do no more than to show respect for their religious activity. Yet when Coach Borden asked for guidance, respondents told him only that he could not "participate" in the prayer. When Coach Borden turned to the courts for clarity, four judges have given him four different opinions about the requirements of the Establishment Clause.

Coach Borden's dilemma is pervasive in our public schools. Every public school administrator, teacher, coach and staff member throughout the nation inevitably must, from time to time, respond to constitutionally protected student religious practices that are expressly allowed by this Court's decisions in *Lee, Santa Fe,* and *Board of Education of the Westside Community Schools v. Mergens*, 496 U.S.

226 (1990). Students may, for example, want to pray in their homerooms at the start of a school day, in a cafeteria before meals, before sporting events, at memorial services, or at student club activities. J.A. 247–282. These hundreds of thousands of public school educators must, therefore, regularly confront the question expressly left open in *Lee* and not addressed in *Santa Fe:* How should they respond when confronted with student-initiated constitutionally protected religious exercise? Through its opinions below, the Third Circuit has caused further confusion, shown improper hostility to constitutionally protected private religious exercise, and generated conflict with decisions of this Court and other federal courts of appeals.

First, in conflict with the decisions of this Court and several courts of appeals, the decision below held that Coach Borden's non-religious acts of silent respect violated the Establishment Clause solely because he previously had prayed with his players. This Court, however, has never found an Establishment Clause violation solely based on discontinued prior religious practices. Such a holding is contrary to decisions by other federal circuit courts and is tantamount to permanently branding certain public school educators with a scarlet letter, treating them as Establishment Clause violators even after they have stopped joining in student-initiated prayer.

Second, the Third Circuit's decision forces Borden to engage in conduct that is overtly hostile to his players' voluntary religious acts. Under the ruling below, it is not enough that Coach Borden

merely stop joining with his players in pre-game prayers. Instead, Coach Borden must sequester himself from his team, under threat of insubordination, whenever his players voluntarily pray. As such, the Third Circuit's decision runs afoul of this Court's repeated instructions that the Constitution requires government to respect religion and forbids government hostility to religion. Rather than preventing a constitutional violation, the decision below anomalously requires state actors to violate the Establishment Clause.

This case provides an ideal vehicle for this Court to restore government neutrality to religion in public schools, to clarify Establishment Clause jurisprudential issues that have confused and engendered conflict among the lower courts, to answer the question left open in *Lee* and *Santa Fe*, and to provide much-needed guidance to public school teachers, coaches, staff, and administrators who seek to understand what the Establishment Clause permits and prohibits on those many occasions when they must inevitably respond to the protected religious practices of public school students. The petition for certiorari should be granted.

I. THE THIRD CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS AS TO WHETHER SUBSEQUENT SECULAR SILENT GESTURES OF RESPECT VIOLATE THE ESTABLISHMENT CLAUSE SOLELY BECAUSE OF A DISCONTINUED PRIOR HISTORY OF PRAYER.

The Third Circuit's decision creates an inflexible and unreasonable rule: once an Establishment Clause violator, always an Establishment Clause violator. The Third Circuit held that *even though* Coach Borden had stopped praying with his players, and *even though* his requested acts of silent respect were, standing alone, appropriate under the Establishment Clause, Coach Borden's non-religious conduct nevertheless violated the Establishment Clause because of a history of prayerful activities that ended two and a half years before the Third Circuit decision. Such a holding is inconsistent with this Court's analysis of such history when addressing Establishment Clause claims and contradicts the holdings of several federal courts of appeals.

A. This Court Has Never Held That a Subsequent Secular Government Practice Preceded By A Discontinued Religious History Violates the Establishment Clause.

Though history has long played a role in application of the endorsement test's "reasonable

observer" standard, this Court has never relied on history alone to invalidate a secular act by a state actor. To the contrary, the Court has relied on a history of prior religious activity for two narrow reasons: (i) to corroborate the unconstitutional religious purpose of a government act, or (ii) to expose a proffered secular purpose as a "sham."

For example, in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), this Court invalidated a school district's practice of having a student read a prayer over the loudspeaker prior to school football games. Though the school's policy regarding "pre-game ceremonies" at football games had evolved over time, the Court stressed that its inquiry was focused solely on the validity of the most current version of the policy. *Id.* at 297–298. Only *after* concluding that the current policy was facially unconstitutional did the Court turn its attention to other corroborating factors, one of which was the policy's religious history. *Id.* at 307. Using history to corroborate its decision, the Court concluded that the school district's stated secular justifications for the current policy were shams, designed to conceal its true intent to continue the district's historical involvement in religious activity. *Id.* at 308–309.

This Court similarly made a limited use of history in *Edwards v. Aguillard*, 482 U.S. 578 (1987), when it invalidated a Louisiana statute that forbade the teaching of evolution in public schools. Though the state argued that the statute was supported by a secular purpose, the Court concluded that the proffered secular purpose was not furthered by the statute's text. *Id.* at 586–587. The Court

then relied on the statute's history to corroborate that advocacy for "creation science" was actually intended to be a religious act, and therefore that the statute violated the Establishment Clause. *Id.* at 591–592.

Both *Santa Fe* and *Edwards* used religious history to corroborate an independent determination that challenged government practices violated the Establishment Clause because they had a religious character. By contrast, a majority of the panel below agreed that Coach Borden's silent acts of respect, standing alone, were *not* religious in character nor was there any suggestion that Coach Borden's stated secular purposes are "shams." Pet. App. 54a–55a; 72a–75a. Nevertheless, Coach Borden's non-religious acts were held to violate the Establishment Clause solely because of his prior history of prayerful activities with his players. Pet. App. 53a–54a, 70a–72a. In so holding, the Third Circuit opinion rewrites the words of the Establishment Clause to prohibit not only government establishment of religion but also conduct that does nothing more than reflect government respect for religion.

This Court has never held that a state actor is obligated to show hostility for private religious activity because that actor previously engaged in religious activity that has been deemed to violate the Establishment Clause. To the contrary, the Court has rejected the notion that religious history is outcome-determinative under the Establishment Clause, or that past religious conduct "forever taint[s]" all future acts dealing with the same subject matter. *McCreary County v. ACLU*, 545 U.S. 844,

873–874 (2005). Where, as here, a challenged practice has been found to be non-religious, this Court's precedent precludes using religious history to transform a secular act into an Establishment Clause violation. The decision below thus conflicts with this Court's jurisprudence.

The Third Circuit's Establishment Clause ruling is central to the outcome of this case. In the ruling below, Coach Borden's affirmative claims were resolved by the Third Circuit based on its interpretation and analysis of the requirements of the Establishment Clause. *See* Pet. App. 40a–41a (freedom of association claim); *id.* at 41a–42a n.15 (expressive association claim); *id.* at 42a–43a (due process claim). Indeed, the Third Circuit recognized that its analysis of petitioner's claims made it "necessary" to decide the Establishment Clause issue. *See* Pet. App. 45a n.17. Thus, the Third Circuit's Establishment Clause holding is an essential basis for the judgment below. As such, this case is an appropriate vehicle for deciding the question presented.

B. The Third Circuit's Decision Conflicts With Circuit Court Decisions That Have Upheld The Constitutionality Of Subsequent Secular Government Practices Even When Preceded By A Discontinued Religious Activity.

The Third Circuit's opinion directly contradicts decisions of several other federal courts of appeals which have refused to treat subsequent secular government acts as Establishment Clause violations merely because of a discontinued prior religious history.

For example, in a series of cases reviewing "Good Friday" closing laws, the Sixth and Seventh Circuits have held that subsequent secular government practices preceded by a discontinued religious history do not violate the Establishment Clause. First, in *Metzl v. Leininger*, 57 F.3d 618 (7th Cir. 1995), the Seventh Circuit considered the constitutionality of a state law mandating that Good Friday be treated as a school holiday. The court of appeals invalidated the practice, finding that the law's "purpose was to encourage Christian religious observances." *Id.* at 620–621. But in doing so, the court expressly noted that the state could continue the same practice in the future by adopting a secular justification:

> [W]e have left open the possibility that Illinois can accomplish much the same thing either by officially adopting a "spring weekend" rationale for the law, in place of

> the governor's proclamation of a state religious holiday, or by moving to a system of local option for school districts.

Id. at 623–624. By doing so, the Seventh Circuit rejected any argument that the state's history of religiously motivated Good Friday closings would preclude enactment of a subsequent similar-but-secular school closing statute.

In *Granzeier v. Middleton*, 173 F.3d 568 (1999), the Sixth Circuit took *Metzl* to its logical conclusion. The *Granzeier* court considered a challenge to a Kentucky county's practice of closing county and state courts and offices on Good Friday. *Id.* at 571. In 1995, a court employee announced the closure with "signs bearing an image of the Crucifixion"—signs which all parties agreed were unconstitutional. *Id.* at 571–573. But in spite of this religious history, the Sixth Circuit rejected the argument that the signs "irrevocably established an endorsement of religion, from which Defendants cannot retreat." *Id.* at 574. The court held that the closing practice was supported by secular purposes, and thus would not have the effect of establishing religion despite its blatant religious history. *Id.* at 574–576. It concluded that "future closings will not make a reasonable person think the defendants were endorsing religion," even though the prior religious history "could make a reasonable observer think that Defendants endorsed the Christian religion." *Id.* at 576. In doing so, the Sixth Circuit refused to allow religious history to transform non-religious conduct into an Establishment Clause violation.

A prior panel of the Third Circuit also recognized that religious history could not serve to invalidate subsequent similar secular acts by government actors. In *ACLU v. Schundler*, 168 F.3d 92 (3d Cir. 1999), the court of appeals considered a challenge to a Jersey City "holiday display." The display was a modified version of a display previously struck down by the Third Circuit. The Third Circuit rejected the argument that the religious history of the display created a permanent "unconstitutional taint" that required the new display's automatic invalidation. 168 F.3d at 105. Writing for the Court, then-Judge Alito concluded:

> The mere fact that Jersey City's first display was held to violate the Establishment Clause is plainly insufficient to show that the second display lacked "a secular legislative purpose," or that it was "intend[ed] to convey a message of endorsement or disapproval of religion."

Id. at 105 (internal citations omitted).

In all three of these cases, the courts of appeals recognized that a subsequent secular government practice preceded by a religious history does not violate the Establishment Clause. Accordingly, the decision below conflicts with these circuit decisions.

II. THE THIRD CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS BECAUSE IT REQUIRES PUBLIC SCHOOL ADMINISTRATORS, TEACHERS, COACHES, AND STAFF TO SHOW HOSTILITY TO STUDENT RELIGIOUS PRACTICES IN ORDER TO AVOID AN ESTABLISHMENT CLAUSE VIOLATION.

In *Lynch v. Donnelly*, this Court recognized that the Establishment Clause "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." 465 U.S. 668, 673 (1984); *see also Cutter v. Wilkinson*, 544 U.S. 709 (2005) (recognizing that government action respecting and accommodating religion does not violate the constitution). By enjoining Coach Borden from showing respect for his players voluntary prayer acts, the decision below requires public school educators to violate the Establishment Clause by showing disrespect and hostility towards student-initiated religious practices.

A. This Court's Decisions Hold That Under the Establishment Clause Public School Officials Cannot Show Hostility Towards Student Religious Activity.

As Justice Douglas noted in *Zorach v. Clauson*, 343 U.S. 306 (1952), this Court has long recognized that public schools and religion should not be "aliens to each other" nor should they be "hostile, suspicious,

and even unfriendly." *Id.* at 312. Rather, government neutrality towards religion, especially in the public school context, remains a cornerstone of the Establishment Clause. *Id.* at 314 (upholding public school program that "respects the religious nature of our people and accommodates the public service to their spiritual needs").

Decades later, these principles were echoed by both concurring and dissenting opinions in *Lee v. Weisman*, which reiterate that the Establishment Clause requires that the government must respect and accommodate religious activity in public schools. *See* 505 U.S. at 627–629 (Souter, J., concurring) (stating that government respect for religion is evidence of neutrality towards, not endorsement of, religion); *id.* at 637 (Scalia, J., dissenting) (stating that "fostering respect for religion generally" trumps even the government interest in avoiding "the false appearance of participation"). The decision below thus conflicts with this Court's consensus of opinion that the Establishment Clause requires state actors to respect religion.

This Court's opinions in *Board of Education of the Westside Community Schools v. Mergens*, 496 U.S. 226 (1990), provide an example of how a school district's zeal to achieve religious "neutrality" can result, as here, in religious hostility violative of the Establishment Clause. Under the Equal Access Act, public secondary schools who allow non-academic student groups to meet on school property are "prohibited from discriminating against students who wish to conduct a meeting . . . on the basis of the 'religious, political, philosophical, or other content of

the speech at such meetings.'" *Id.* at 235. After the Westside school system refused to accommodate a student's request to form a Christian club, it defended its actions on the grounds that the Equal Access Act violated the Establishment Clause. *Id.* at 249–250. Writing for a plurality, Justice O'Connor stressed that even though the Act provided "incidental benefits" to religious groups, this alone did not amount to an establishment of religion. *Id.* at 248. Rather, allowing religious groups equal access evidenced neutrality, while refusing to do so "would demonstrate not neutrality but hostility towards religion." *Id.* A modicum of respect by the school system was thus required in order to avoid violating the Constitution.

Justice Kennedy, joined by Justice Scalia, concurred separately to stress the concern that application of the Establishment Clause's "endorsement" test could, as here, require state actors to violate the Establishment Clause by showing hostility to religion:

> The plurality uses a different test, one which asks whether school officials, by complying with the Act, have endorsed religion. It is true that when government gives impermissible assistance to a religion it can be said to have "endorsed" religion; but endorsement cannot be the test. The word endorsement has insufficient content to be dispositive. And for reasons I have explained elsewhere, *its literal application may result in neutrality in name but hostility in fact when the question is the government's*

> *proper relation to those who express some religious preference.*

Id. at 261 (Kennedy, J., concurring) (emphasis added).

Such concern is particularly apt in this case. Here, the Third Circuit's decision requires Coach Borden to distance himself physically from his team's religious acts, clearly signaling hostility towards the students' constitutionally protected religious expression. J.A. 169–170. If left unreviewed by this Court, the Third Circuit decision will cause Coach Borden to violate the Establishment Clause every time his players voluntarily choose to say a pre-game prayer.

B. The Third Circuit's Decision Conflicts With Circuits That Have Recognized That Public School Officials Cannot Show Hostility To Religion in Public Schools.

The Third Circuit's decision conflicts with decisions in the Fourth, Fifth, and Sixth Circuits, all of which have stressed that the Establishment Clause forbids public schools from exhibiting hostility towards voluntary acts of student-initiated religious activity.

In *Doe v. Duncanville Independent School District*, 70 F.3d 402 (5th Cir. 1995), the Fifth Circuit concluded that "neither the Establishment Clause nor the district court's order prevent [school] employees from treating students' religious beliefs and practices with deference and respect; indeed, the

constitution *requires* this. Nothing compels [school] employees to make their non-participation vehemently obvious or to leave the room when students pray[.]" *Id.* at 406. By contrast, the Third Circuit's decision requires Coach Borden to engage in vehement non-participation every time his players pray. This reality was recognized by the district court and Judge Barry's concurrence, as well as confirmed in actual practice by Borden and his players during the 2005 season. J.A. 169; Pet. App. 85a; Pet. App. 74a–75a & n.34.

The Fourth and Sixth Circuits have similarly stressed that when neutrality is not maintained the Establishment Clause is violated. In *Child Evangelism Fellowship v. Montgomery County Public Schools*, 373 F.3d 589 (4th Cir. 2004), the Fourth Circuit rejected a school district's argument that it would violate the Establishment Clause if it allowed a school religious club to circulate "take-home flyers" to students. *Id.* at 592. In rejecting the school district's Establishment Clause concerns, the court of appeals recognized that any danger that a reasonable observer would perceive the school's actions as an endorsement of religion was no greater than the likelihood that students would perceive the school as being hostile towards religion if distribution of the club's flyers were not allowed. *Id.* at 595–596. The Sixth Circuit followed suit in *Rusk v. Crestview Local School District*, 379 F.3d 418 (6th Cir. 2004), which also rejected Establishment Clause concerns about a flyer distribution program on the grounds that denying access to religious groups would constitute hostility, not neutrality, towards protected religious activity. *Id.* at 422–423.

The Third Circuit's analysis of the Establishment Clause was a necessary part of its rejection of Coach Borden's affirmative claims. Enjoined by the Third Circuit from showing silent respect for his student's voluntary prayer activities, Coach Borden must now affirmatively distance himself from their religious acts. Such "vehement" disrespect and hostility for religion, mandated by the Third Circuit's decision, conflicts with decisions of the Fourth, Fifth and Sixth Circuits.

III. THE THIRD CIRCUIT OPINIONS AND CONFLICTING CIRCUIT COURT DECISIONS UNDERSCORE THE PRESSING NEED FOR DEFINITIVE GUIDANCE FROM THIS COURT REGARDING THE OBLIGATIONS UNDER THE ESTABLISHMENT CLAUSE OF PUBLIC SCHOOL EDUCATORS WHEN RESPONDING TO STUDENT-INITIATED RELIGIOUS ACTIVITIES.

The Third Circuit's array of opinions and conflicting circuit court decisions illustrate the well-documented problems that lower courts and public school educators regularly face when deciding how they may constitutionally respond to student-initiated religious activities. Many of these problems stem from the "endorsement test," an analytic framework criticized by members of this Court, lower courts, and legal commentators.

The circuits have long been uncertain of the appropriate amount of contextual or historical

knowledge to assign to the endorsement test's hypothetical reasonable observer. *See, e.g.*, *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F. 3d 487, 495 n.2 (7th Cir. 2000) (noting "the unresolved dispute which exists within various circuits and within the Supreme Court as to the proper level of understanding to impute onto our mythical reasonable observer"). Lacking clear guidance, they have settled on a wide range of different possibilities when applying the endorsement test. *See e.g., Rusk*, 379 F.3d at 420–421 (in school endorsement case, using reasonable and knowledgeable parent as baseline rather than student); *Marshfield*, 203 F. 3d at 494 (considering viewpoint of "reasonable but unknowledgeable observer") *Kong v. City of San Francisco*, 18 Fed. App'x. 616, 617 (9th Cir. 2001) (same); *Ams. United for Separation of Church and State v. City of Grand Rapids*, 980 F.2d 1538, 1543–1544, 1557–1558 (6th Cir. 1992) (Lively J., dissenting) (disputing proper degree of local knowledge to impute to reasonable observer); *Doe v. Small*, 964 F. 2d 611, 629–630 (7th Cir. 1992) (Easterbrook J., concurring) (viewpoint of "obtuse observer" who mistakenly believes that "the government endorses what it does not forbid" cannot create a constitutional violation).

The inconsistent opinions below highlight the judicial confusion engendered by the "endorsement test," especially in the context of public schools. Judge Fisher's lead opinion purported to rely upon a "reasonable observer" imbued only with historical knowledge:

> [W]e must consider whether a reasonable observer would perceive [Borden's] actions as endorsing religion, not whether Borden intends to endorse religion. 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. Based on this history, we hold that a reasonable observer 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.

Pet. App. 53a–54a (footnotes omitted). On the other hand, Judge Barry relied upon a "reasonable observer" invested with a perspective that was far more comprehensive and contextual:

> [A] reasonable observer would not only have knowledge of [Borden's] history, but would know of all that has taken place leading up to and during this litigation and know that Borden, under oath, has represented what he will and will not do and that he merely wishes to show respect for his players when they pray. A reasonable observer would have no reason to believe that Borden was lying.

Pet. App. 73a. Thus, though Judge Fisher and Judge Barry both agreed that a "reasonable observer"

served as the correct benchmark, they came to opposite conclusions—one concluding Borden's gestures violated the Establishment Clause and the other concluding no violation.

Legal commentators have similarly noted flaws in the endorsement test because it is "driven by ambiguities and analytical flaws" that render the test "ineffectual as a doctrinal tool." Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test,* 86 Mich. L. Rev. 266, 300 (1987); *see also id.* ("Because the test is composed of unmanageable or fatally ambiguous concepts, it cannot provide the needed predictability or guidance for lower courts and governmental entities."). As one commentator explains, the test's primary flaw is that it is "all subjective line-drawing. The basic problem with the endorsement test is that it is no test at all, but merely a label for the judge's largely subjective impressions." Michael Stokes Paulson, *Religion and the Public School After Lee v. Weisman: Lemon is Dead,* 43 Case W. Res. 795, 815 (1993). The endorsement test's reliance on vast judicial discretion has yielded inconsistent results. *See* James A. Campbell, *Newdow Calls for a New Day in Establishment Clause Jurisprudence: Justice Thomas's "Actual Legal Coercion" Standard Provides the Necessary Renovation,* 39 Akron L. Rev. 541, 555–556 (2006).

If the endorsement test cannot be consistently applied throughout the lower courts, as reflected in the four different judicial opinions Borden has gotten, then public school teachers, coaches,

administrators, and staff cannot realistically be expected to know, or even predict, whether their conduct violates the Establishment Clause. Here, it was only petitioner's religious history that caused the Third Circuit to render unconstitutional his acts of respectful silence in response to his players' prayers. Yet it is equally reasonable that, under the endorsement test, petitioner's retreat from his religious history reasonably signaled a conscious and effective effort to comply with the Establishment Clause. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 118 (2001) ("[E]ven if we were to inquire into the minds of schoolchildren in this case, we cannot say that the danger that children would misperceive the endorsement of religion as any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded"). Further, the Third Circuit's lead opinion creates a regime in which Coach Borden's exact actions, if engaged in by another coach in the same school, would be wholly permissible—making consistent interpretation and application of the Establishment Clause impossible even within the same school

Although the endorsement test was designed to ensure consistency of outcomes among the courts when assessing factually similar situations, the test has become an unworkable vehicle by which judges impose their subjective impressions and personal perspectives. The result is court decisions that blur the line between permitted government accommodation and prohibited government establishment of religion, thereby compounding rather than eliminating the guessing that public

educators must daily make about the boundaries of the Establishment Clause. This Court's intervention is therefore necessary to provide guidance to lower courts and public school educators who not only are required, but genuinely want, to ensure that their conduct conforms to the requirements of the Establishment Clause.

CONCLUSION

For the reasons provided above, the petition for a writ of certiorari should be granted.

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APPENDIX