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No. 06-3890

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

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MARCUS A. BORDEN,

*Plaintiff-Appellee,*

v.

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

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On appeal from the United States District Court  
for the District of New Jersey, No. 2:05-cv-05923 (DMC)

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**BRIEF *AMICI CURIAE* OF THE INTERFAITH ALLIANCE,  
THE ANTI-DEFAMATION LEAGUE, HADASSAH, JEWISH  
WOMEN INTERNATIONAL, MUSLIM ADVOCATES, SIKH AMERICAN  
LEGAL DEFENSE AND EDUCATION FUND, SIKH COUNCIL ON  
RELIGION AND EDUCATION, AND UNION FOR REFORM JUDAISM  
IN SUPPORT OF DEFENDANTS-APPELLANTS EAST BRUNSWICK  
SCHOOL BOARD, ET AL.**

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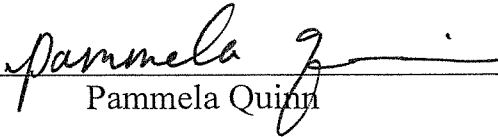
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**CORPORATE DISCLOSURE STATEMENT.**

Pursuant to Fed. R. App. P. 26.1, I certify that all of the *amici* organizations are § 501(c)(3) & (4) non-profit organizations.

None of the *amici* organizations has a parent corporation and none have issued shares or securities.

Date: December 21, 2006

  
Pammela Quinn

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## INTEREST OF *AMICI CURIAE*<sup>1</sup>

The Interfaith Alliance (“TIA”) is a 501(c)(4) nonpartisan advocacy organization committed to ensuring that America is a nation where religious belief and practice are free and voluntary, and that the government does not favor or discriminate against citizens based on their religious beliefs or non-belief. TIA promotes the positive and healing role of religion in public life by encouraging civic participation, facilitating community activism, and challenging religious political extremism.

TIA is deeply concerned with the danger to freedom of religion posed by the actions of Marcus Borden and by the unintended consequences of the district court’s decision.

\* \* \*

The Anti-Defamation League (“ADL”) was organized in 1913 to advance good will and mutual understanding among Americans of all races and creeds and to combat racial and religious prejudice in the United States. It is today one of the leading civil rights and human relations organizations in the world. ADL believes that its stated goals, as well as the general stability of our democracy, are best served through strict separation of church and state and commensurately strict

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<sup>1</sup> Pursuant to Fed. R. App. Proc. 29(a), blanket letters of consent from the parties have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and nobody other than *amici*, their members, or their counsel contributed monetarily to the brief.

enforcement of the Free Exercise Clause. ADL has accordingly participated as an *amicus* in the Supreme Court’s major church-state cases over the last 56 years.

\* \* \*

Hadassah, the Women’s Zionist Organization of America, founded in 1912, is the largest women’s and Jewish membership organization in the United States, with nearly 300,000 members nationwide. In addition to Hadassah’s mission of maintaining health care institutions in Israel, Hadassah has a proud history of protecting the rights of the Jewish community in the United States. Hadassah has long been committed to the protection of the separation between church and state that has served as a guarantee for religious freedom and diversity.

\* \* \*

Jewish Women International (“JWI”), founded in 1897 as B’nai B’rith Women, is dedicated to honoring the concept of *tikkun olam* – repairing the world – through education, action, and advocacy. JWI has more than a dozen anti-violence initiatives in the United States, Israel, and around the world. These initiatives help women and girls worldwide celebrate their strength and achieve independence – so every Jewish home and relationship can be a safe and healthy place to thrive. Embedded in JWI’s mission is the core Jewish belief that all freedoms in society thrive when women, men, and children have the unflinching

ability to honor their individual religious beliefs. The fundamental principle of separation of church and state will preserve the rights of individuals to honor their religious beliefs separate from and without the interference from government institutions. Religious freedom is essential to ensuring that all freedoms in society are respected and maintained.

\* \* \*

Muslim Advocates is a nonprofit educational, charitable entity dedicated to promoting and protecting freedom, justice and equality for all, regardless of faith, using the tools of legal advocacy, policy engagement and education and by serving as a legal resource to promote the full participation of Muslims in American civic life. Founded in 2005, Muslim Advocates is a sister entity to the National Association of Muslim Lawyers, a network of over 500 Muslim American legal professionals. Muslim Advocates firmly believes that freedom of religion and belief is a cornerstone of our democracy and has allowed all people regardless of faith background to live freely, thrive and flourish in our great nation. The First Amendment's Free Exercise Clause and Establishment Clause are essential to protecting this religious freedom and to preserving our nation's cohesion and religious diversity.

\* \* \*

The Sikh American Legal Defense and Education Fund (“SALDEF”), is the oldest Sikh American advocacy organization in the United States. Founded in 1996, SALDEF is a Washington, DC–based national non-profit civil rights and educational organization. SALDEF’s mission is to create a fostering environment in the United States for future generations of Sikh Americans. SALDEF protects and promotes the civil rights of Sikh Americans through legal aid, advocacy, and educational outreach. Sikhism is a distinct religious faith that is over five hundred years old. There are approximately half a million Sikhs living in the United States.

The separation of Church and State is fundamental to the preservation of our nation’s ideals as a democratic nation based on freedom and liberty. Religion is personal to individuals, religious institutions and homes, while public schools, acting as government agents, should be open and respectful to students of all faiths.

\* \* \*

The Sikh Council on Religion and Education (“SCORE”) is a faith-based non-profit organization dedicated to creating awareness of the Sikh religion and the Sikh people in the United States and around the globe and promoting the values of justice, equality, and brotherhood imbibed in the Sikh religion. It aims to provide a platform for interfaith dialogue to create a peaceful coexistence of all faiths.

SCORE is focused on the religious freedom of all people and particularly the Sikh community in the United States and around the globe. SCORE believes in a strong First Amendment, which allows the free exercise of religion and prohibits state-sponsored prayer or promotion of religion.

\* \* \*

The Union for Reform Judaism (“Union”), founded in 1873, is the central body of the Reform Movement in North America including 900 congregations encompassing 1.5 million Reform Jews.

The Union for Reform Judaism comes to this issue out of its longstanding commitment to the principle of separation of church and state, believing that the First Amendment to the Constitution is the bulwark of religious freedom and interfaith amity. Public schools, acting as agents of the state, exist to educate children of all faith traditions and of none. No student should ever be directly or indirectly coerced by a school official advocating particular religious practices. The maintenance and furtherance of religion are the responsibility of the synagogue, the church and the home, and not any agency of the government, especially the public schools. The principle of separation of church and state protects both church and state and is indispensable for the preservation of that spirit of religious liberty which is a unique blessing of American democracy.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The first principle of religious freedom under the First Amendment is so well-understood as to be beyond dispute: prayer by private citizens – including prayer on public property – is not only permissible, but constitutionally protected under the Free Exercise Clause, while government-sponsored prayer or other religious exercise by governmental officials is flatly prohibited by the Establishment Clause. The line between purely private and officially sponsored religious expression can be difficult to draw in the school context. But in this case, it is easy. Coach Borden crosses that line, and by a wide margin, when he participates, in his official capacity as a high school coach and teacher, in prayer sessions with his players.

The district court could avoid that obvious conclusion only by mischaracterizing Coach Borden's conduct – bowing his head and kneeling with his players while they engage in prayer – as non-religious, secular symbolic conduct. Tr. of Proceedings, July, 25, 2006 [hereinafter "Tr."], at 39, 44-45. That finding is not only wrong as a matter of law and common sense. It is also deeply insulting to religious believers – who may belong to any number of different religious faiths – who understand the conduct at issue as embodying and conveying a deeply spiritual meaning. Moreover, by stripping the act of bowing and kneeling during a prayer exercise of its religious content, the district court brings that

conduct outside the ambit of the Free Exercise Clause, raising unsettling questions about the government's authority to regulate core religious activity.

## ARGUMENT

### **I. The District Court Erred In Characterizing Coach Borden's Pre-Game Conduct As Secular Expression.**

Throughout this case, Coach Borden has argued that bowing his head and kneeling while his players are engaged in a prayer session is a "purely secular symbolic act," Pl's. Br. in Opp. to Defs.' Mot. for Summ. J. and in Supp. of Pls.' Cross-Mot. for Summ. J. [hereinafter Pl's. Summ. J. Br.], at 11, that has "nothing to do with prayer," Tr. 21. The district court allowed that bowing and kneeling during a group prayer "possibly could be looked at with some religious overtones," Tr. 43, but ultimately adopted Coach Borden's characterization of his conduct, ruling that bowing the head and kneeling is in fact a wholly "secular" tradition, Tr. 44. That ruling is a necessary predicate of the district court's holding that the Coach's conduct is constitutionally permissible, for it is well-understood that a high school coach, acting in his official capacity, may not himself engage in prayer with his students. It is also flatly incorrect.

#### **A. Bowing One's Head And Kneeling During Prayer Are Inherently Religious Acts.**

1. Both Coach Borden and the district court rely heavily on the fact that while once Coach Borden led his team in prayer verbally, he now wishes only to

silently bow his head and kneel during the team prayer exercise. Tr. 30 (Plaintiff's counsel) ("He's not praying, because, if he was praying, he would pray. He would say the words . . . ."); *id.* at 44-45 (court) (approving "passive participation" in student-led prayer and "silent" symbolic conduct). That Coach Borden now claims only the right to engage in silent symbolic conduct, rather than spoken prayer, does not affect the religious import of his actions. Indeed, as the Supreme Court has observed, much religious expression comes in the form of silent and symbolic conduct, and includes "not only belief and profession but the performance of (or abstention from) physical acts." *Employment Div. v. Smith*, 494 U.S. 872, 877-78 (1990).

Courts have expressly recognized many forms of non-verbal, symbolic religious conduct, including the wearing of a yarmulke, *Goldman v. Weisberger*, 475 U.S. 503, 509 (1986) (describing as an act of "silent devotion"), "participating in sacramental use of bread and wine" and "abstaining from certain foods or certain modes of transportation," *Smith*, 494 U.S. at 877, and the carrying of a kirpan (a symbolic sword) by some Sikhs' and some Buddhists' adherence to vegetarianism, *Sherbert v. Verner*, 374 U.S. 398, 411 (1963) (Douglas, J., concurring), to name but a few. Religious life is rife with examples of actions that are deeply sacred and religiously significant despite the lack of any spoken affirmation. Any suggestion that conduct can be understood as "religious" only

when it is accompanied by some spoken expression not only misunderstands the nature of a great deal of religious practice, but worse, denigrates the powerfully symbolic component of many religious actions and rituals.

2. Both bowing one's head and kneeling are widely recognized as falling within the category of symbolic religious conduct. Many different religious faiths define these particular acts as integral components of worship, alone or in conjunction with spoken prayers. For example, both the Bible and the Torah repeatedly reference bowing and kneeling as part of religious exercise. *See, e.g., Nehemiah 8:6; Philippians 2:10; Psalms 95:6; Genesis 24:26.* So too does the Koran. *See KORAN 22:77* ("O you who believe! bow down and prostrate yourselves and serve your Lord"); 3:43 ("keep to obedience to your Lord and humble yourself, and bow down with those who bow"). The Rig Veda, one of the sacred texts of Hinduism, includes many references to bowing and kneeling in prayer, RIG VEDA 4.25.2 ("Who hath with prayer bowed . . .?"); 6.51.9 ("I bow me down, O Holy Ones, with homage."); 6.1.6 ("Let us approach thee shining in thy dwelling, kneeling upon our knees, with adoration.") (Ralph T. H. Griffith trans., 1896). Bowing is central to the Navakar Mantra, the most important prayer in Jainism. *See Jainism Global Resource Center, The Navakar Mantra, available at <http://www.jainworld.com/jainbooks/guideline/1.htm>.*

Indeed, the Supreme Court has repeatedly recognized bowing and kneeling as religious acts protected by constitutional principles of free exercise. *See Smith*, 494 U.S. at 877-78 (1990) (using bowing as example of religious exercise in form of physical act); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943) (noting that bowed head may be religious gesture of respect); *Wallace v. Jaffree*, 472 U.S. 38, 105 (1985) (Rehnquist, J., dissenting) (quoting treatise that describes bowing as manifestation of religious belief); *cf. County of Allegheny v. ACLU*, 492 U.S. 573, 672 (1989) (noting depiction of George Washington kneeling in prayer as an example of government recognition of religion).

Even the dictionary definition advanced by Coach Borden himself unmistakably captures the religious aspect of bowing the head, describing it as a “token of reverence, respect, or submission; to make obeisance.” Pl’s. Summ. J. Br. at 53. That definition, with its connotation of prostration before a religious deity, is fully consistent with both the long-held beliefs of religious faiths themselves and the Supreme Court’s understanding of those faith traditions. It is only Coach Borden’s argument that bowing and kneeling is a purely secular act, adopted by the district court, that is out of step with precedent and tradition.

**B. The Context Provides Further Evidence That Coach Borden’s Conduct Is Religious.**

Both Coach Borden and the district court are under the impression that the context surrounding Coach Borden’s actions makes it clear, were there any

question, that the bowing and kneeling at issue is not religious in nature. *E.g.*, Pl’s. Summ. J. Br. at 53-61; Tr. 44 (court). In fact, the polar opposite is true. Context does count when it comes to the Establishment Clause. *See, e.g., McCreary County v. ACLU of Kentucky*, 125 S. Ct. 2722, 2739-41 (2005) (physical and historical context associated with government display indicate prohibited endorsement of religion); *Lynch v. Donnelly*, 465 U.S. 668, 690 (O’Connor, J., concurring) (full context of government display relevant to endorsement inquiry); *Freethought Society v. Chester County*, 334 F.3d 247, 251 (3d. Cir. 2003) (“reasonable observer” of endorsement inquiry is aware of history and physical surroundings of arguably religious message). But here, the context powerfully confirms the religious nature of Coach Borden’s conduct.

To begin with, Coach Borden did not simply bow his head and kneel in some sort of vacuum. He engaged in that conduct joined with students who were doing the same – and doing so concededly as part of a prayer session. The immediate physical surroundings thus show clearly that the coach’s actions are part of the same prayer exercise in which his players are engaged. *Cf. McCreary*, 125 S. Ct. at 2739-41 (physical surroundings of government-erected Ten Commandments display relevant to endorsement inquiry); *Lynch*, 465 U.S. at 690 (O’Connor, J., concurring) (same with respect to government crèche display). Of course, the meaning of a football player’s kneeling or bowing might have another

meaning in a different context – in an on-field huddle discussing the next play, for instance, or after dropping a catch. But the fact that football players kneel in certain circumstances that have no religious significance cannot change the reality that a coach or player who is bowing his head and kneeling in a circle with members of his team while one team member leads a pre-game prayer (or who is bowing his head while a prayer is said during a before-dinner grace) is engaging in religious conduct.<sup>2</sup>

The historical context makes equally clear that Coach Borden is engaged in religious conduct when he bows his head and kneels with his students during a prayer session. Prior to this litigation, as explained more fully in the parties' briefs, Coach Borden had a long history of himself leading team prayers, of organizing team prayers and designating a student as prayer leader, and of inviting local religious leaders to lead prayers at pre-game dinners. All of those actions undisputedly constitute official participation in and endorsement of religious activity. Against that background, a reasonable observer, deemed aware of the historical context, could only conclude that Coach Borden's present conduct of bowing and kneeling during team prayers is of a piece with and a continuation of

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<sup>2</sup> As is often the case, the group prayers at issue here generally have a single speaker designated as a prayer "leader." The reason the speaker is so designated, of course, is that he is speaking on behalf of the other, silent members of the group, "leading" them in the same prayer in which he or she is engaged. Any reasonable observer, coming upon Coach Borden kneeling and bowing his head with his team as a prayer "leader" intoned a prayer, would conclude that the Coach was participating in the prayer session along with the other team members.

his prior, acknowledged participation in team religious exercises. *Cf., e.g., McCreary*, 125 S. Ct. at 2737 (“history of the government’s actions” indicates endorsement of religion); *Wallace*, 472 U.S. at 70 (O’Connor, J., concurring) (history of direct endorsement of school prayer indicates that facially neutral “moment of silence” statute endorses religion).<sup>3</sup>

Finally, the inherent dynamics of a high school football team – as well as the particular dynamics admittedly at work in this case – highlight further the religious nature of Coach Borden’s conduct. It is Coach Borden’s view that “a [high school football] coach and his team should ‘share a single heartbeat.’” Pl’s. Summ. J. Br. at 38. If that is so, and if Coach Borden acts on that dictate, then it is hard to believe – particularly in the face of all the evidence recounted above – that when he bows his head and kneels with his players during prayer, he is actually holding himself apart from his team rather than praying with them. Similarly, Coach Borden’s own admission – adopted by the district court, Tr. 43 – that in bowing his head and kneeling he wishes to convey respect “for his players *while they pray*,” Pls’ Summ. J. Br. at 50 (emphasis added), as opposed to respecting students who

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<sup>3</sup> When the school board’s lawyer argued before the district court that Coach Borden’s “prospective conduct” – the bowing and kneeling during team prayer exercises – “has to be looked at through the prism of what had been going on” before, the district court appeared to disagree. Tr. at 9. But the law on this point is abundantly clear: as the cases cited above indicate, and as Coach Borden explains in his briefing, Pl’s. Summ. J. Br. at 53-59, the “reasonable observer” of Establishment Clause doctrine is deemed “familiar with the history of the government’s actions and competent to learn what history has to show.” *McCreary*, 125 S. Ct. at 2737.

might make other choices, also suggests that his conduct is intended to and does endorse the particular religious practice in which some of his students are engaging.

**C. Coach Borden's Religious Conduct Violates The Establishment Clause.**

1. The twin principles underlying Religion Clause jurisprudence are now clear beyond any real dispute. *Private* religious expression is not only permitted but constitutionally protected, even when it occurs on public or school property. At the same time, *governmental* religious expression or endorsement of religion is prohibited. *See, e.g., Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000) (school district's "long-established tradition of sanctioning student-led prayer at varsity football games" was "unquestionably" a "violat[ion] of the Establishment Clause"); *Westside Comm. Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion) ("[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."). Thus, *amici* firmly believe – and do not understand the School Board to argue otherwise – that Coach Borden's *players* are entitled under the Constitution to engage in truly student-initiated and voluntary group prayer exercises before games and during team dinners. *Coach Borden*, on the other hand, in his official capacity as a coach in a public high school, is fully subject to the Establishment

Clause bar on governmental sponsorship or endorsement of religious exercises. His obligation, as an agent of the government, is to remain neutral as to religion, *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947) (government must be “a neutral in its relations with groups of religious believers and non-believers”), a stance that precludes participating in or endorsing prayer. *See Santa Fe Indep. Sch. Dist.*, 530 U.S. at 315; *Tenafly Eruv Ass’n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 165 (3d Cir. 2002).<sup>4</sup>

Coach Borden violates his obligation of neutrality toward religion when he joins his students in prayer – or even gives the appearance of doing so. Coach Borden is correct in his belief that he should show respect to his students. But, as a

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<sup>4</sup> Government endorsement of one religion over another (or even religion over non-religion) does great harm to adherents of minority religions by signaling to them that they are outsiders and do not belong. This is particularly poignant in the public school context:

School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadher[e]nts “that they are outsiders, not full members of the political community, and an accompanying message to adher[e]nts that they are insiders, favored members of the political community.”

*Santa Fe Indep. Sch. Dist.*, 530 U.S. at 309-10 (quoting *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring)).

Borden’s participation in the team’s prayer activity sends a strong signal to non-adherents that they do not belong. In fact, this creation of “insiders” and “outsiders” did lead to those students who objected to the prayer being ostracized, insulted, and threatened, sometimes in very strong anti-Semitic terms. *See* Declaration of Dr. Jo Ann Magistro ¶ 5 [hereinafter “Magistro Decl.”]; *see also* Br. *Amicus Curiae* of the American Civil Liberties Union § II.B. (quoting Magistro Decl., Ex. A at 4: “First they crucify Jesus, then they got Borden fired”).

government agent, he must respect *all* students without regard to their religious beliefs – those who pray together before the game, but also those who do not. *See Santa Fe Indep. Sch. Dist.*, 530 U.S. at 305 (school policy violated Establishment Clause because it favored religious over secular expression); U.S. Dep’t of Educ., *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools* (Feb. 7, 2003) [hereinafter Dep’t of Educ. Prayer Guidance], available at [http://www.ed.gov/policy/gen/guid/religionandschools/prayer\\_guidance.html](http://www.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html) (“Nor may school officials attempt to persuade or compel students to participate in prayer or other religious activities.”).

By insisting on conduct that conveys selective approval only of the first group, Coach Borden – acting as an agent of the government – endorses the religious expression of some students over the principled choices of others. This the Constitution does not allow. *See McCreary*, 125 S. Ct. at 2733 (“The touchstone for our analysis is the principle that the ‘First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.’” (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968))); *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 305 (invalidating school pre-game speaker policy because it favored religious expression over secular expression).

2. Coach Borden argues – and the district court appears to agree – that he cannot respect the religious observances of his students without himself engaging

in those observances by bowing his head and kneeling. Pl’s. Summ. J. Br. at 25. (School Board directive against participation in prayer forces Coach to “disrespect” praying students); *id.* at 47 (compliance with directive against participation in prayer would manifest “hostility toward religion”); Tr. at 44-45 (Coach’s failure to bow and kneel during prayer exercise could be viewed as “disrespectful to” players engaged in prayer). If that were so – if school officials had no choice but to either participate in or “disrespect” student religious exercises – then the long-standing requirement that government officials remain neutral as to private religious expression on school grounds would be a nullity. But of course, it is not true; Coach Borden can be respectful of his players’ prayer without praying himself or affirmatively endorsing prayer.

In a pluralistic and religiously diverse culture like ours, people often are confronted with expressions of religious faith that they do not share. Indeed, that is the unremarkable result of welcoming private expressions of faith into the public square. But Coach Borden and the district court notwithstanding, people can and routinely do find it possible to show respect for religious practices that are not their own without actually participating in or otherwise endorsing those practices. Indeed, the entire predicate of the first principle of Religion Clause jurisprudence – that private citizens have a right to engage in religious conduct in public – is that non-believers, confronted with such exercises, will not be coerced into

participating by a fear that standing apart would be “disrespectful,” but may instead, and with full respect, simply decline to take part.

The “See You At The Pole” movement is a good example. “See You At The Pole” encourages students, including public-school students, to meet for prayer at the school flagpole before classes begin. See Richard W. Riley, *Religious Expression in Public Schools*, U.S. Dep’t of Educ. (1995), available at <http://www.ed.gov/Speeches/08-1995/religion.html> (describing such gatherings); see also Dep’t of Educ. Guidance, *supra* (citing flagpole prayer gatherings as an example of student-initiated religious activity protected by the First Amendment in current version of Guidance). *Amici* support “See You At The Pole” on the grounds that it represents truly private and voluntary student prayer – so long as school officials fulfill their obligation of neutrality, and neither coerce nor endorse student participation. But if the district court and Coach Borden are right, then coercion is the inevitable result of “See You At The Pole”: any student happening upon a flagpole prayer exercise who does not wish to convey disrespect for the religious beliefs of praying students would have no choice but to participate in the prayer exercise, regardless of his or her own religious choices. In fact, of course, students do not feel coerced to participate in flagpole prayer simply by virtue of its proximity, and do not disrespect the choices of those who do if they simply go about their business before class. And by the same token, Coach Borden would

not manifest any disrespect by standing aside quietly in the locker room or sitting upright at the dinner table while students exercised their right to pray. Instead, he would manifest respect for the choices of *all* members of his team – those who wish to pray and those who do not.<sup>5</sup>

## II. CHARACTERIZING BOWING AND KNEELING DURING PRAYER AS SECULAR IS DEGRADING AND DANGEROUS TO RELIGION.

1. Characterizing Coach Borden’s conduct – bowing his head and kneeling during a prayer exercise – as “secular” is not only wrong as matter of law and reason. It is also deeply insulting to religious adherents. As discussed above, many religions consider bowing the head and kneeling to be core acts of religious expression. To label those practices “non-religious” is to second-guess the meaning that adherents and their faith communities attach to their own religious conduct, and to trivialize core religious rituals of a number of faiths.

The disclaimer proposed by Coach Borden, Pl’s Br. in Opp. to Mot. for Summ. J. 61, would only aggravate the problem. Civic entities like public school

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<sup>5</sup> Coach Borden’s concerns about the “awkwardness” of declining to participate in the prayer exercises, *see* Tr. at 25, are in any event badly misplaced. As a coach and authority figure, Coach Borden is in the ideal position to arrange team activities and his own conduct in a way that avoids the necessity for any “awkward” withdrawals from the team circle, and to model for his students the proper way to show respect for religious exercise even when one declines to participate. So long as he himself participates in the prayer exercises, however, creating the impression that they are an officially sanctioned part of team membership, his players are likely to feel very “awkward” indeed if they decline to join the prayer exercise, and may well be coerced into joining their coach in prayer. *See Lee v. Weisman*, 505 U.S. 577, 593 (1992) (school-endorsed religious exercise unconstitutionally coerces students to pray, even absent formal compulsion).

districts have no role to play in defining what does and does not count as a religious exercise for various faiths; that job is left to religious communities. *Cf. Presbyterian Church v. Mary Elizabeth Blue Hull Church*, 393 U.S. 440, 447 (1969) (civil court may not decide whether church properly understands and applies own religious doctrine). Having the School Board propound some kind of official finding that bowing one’s head and kneeling during prayer is not truly religious conduct would demean the beliefs of those people of faith who view head-bowing and kneeling as integral parts of their religious exercise, and would likely – and rightly – be interpreted as hostile to religion.

By contrast, the School Board’s actual directive, which instructs teachers and coaches not to join in or manifest approval for student prayer, fully respects religious practice. By acknowledging the religious import of bowing and kneeling in prayer, the Board respects the views of the many religions that believe bowing and kneeling to be deeply-felt acts of religious expression, and protects the right of private citizens to engage in that conduct under the Free Exercise Clause. And by prohibiting governmental participation in and endorsement of prayer exercises, the Board validates the long-standing insight that official neutrality toward religious expression protects the integrity of religious belief. “[R]eligious beliefs and religious expression are too precious to be either proscribed or prescribed by the State.” *Lee* 505 U.S. at 589.

2. If this Court were to accept Coach Borden's invitation to divest head-bowing and kneeling – during prayer – of religious significance, the legal implications would be worrying for religious observers. The Free Exercise Clause is the chief guarantor of religious freedom, but its protection extends only to specifically *religious* conduct. If the district court is right, and kneeling and bowing ones head during a prayer service is not conduct of a religious nature, then that conduct is not protected by the Free Exercise Clause.

It follows, first of all, that to the extent that Coach Borden's conduct is purely "secular" than Coach Borden's *students* – at least, those who remain silent while they are led in prayer – would lose their Free Exercise right to bow their heads and kneel with their fellow players during the prayer exercise. If such conduct is secular when Coach Borden engages in it, then it is secular when his players do, as well. The result – in addition to disparaging the students' own religious beliefs about the import of their conduct – is to deprive students of Free Exercise Clause protection on the ground that it is merely "secular symbolic conduct."

It also would follow that the government would be free to enact any number of rules regulating or even prohibiting bowing and kneeling in all sorts of contexts, without even implicating the Free Exercise Clause. Nobody now believes that the government could do such a thing – because nobody believes that a law regulating

head-bowing and kneeling would be anything other than a law targeted specifically at religious conduct and thus prohibited by the Free Exercise Clause. *Cf. Smith*, 494 U.S. at 877-78 (“It would doubtless be unconstitutional . . . to prohibit bowing down before a golden calf.”). But that seemingly obvious conclusion is called into real question by Coach Borden’s novel argument for the secular nature of head-bowing and kneeling, which, if adopted, could have deeply unsettling legal implications for religious believers.

## CONCLUSION

By bowing his head and kneeling in a prayer circle with students as they pray, Coach Borden unconstitutionally crosses the line from government neutrality to government participation in and endorsement of religious exercise. Coach Borden's claim that his action lack religious content is both disingenuous and insulting to sincere religious adherents. For the foregoing reasons, *amici curiae* respectfully asks this Court to dissolve the district court's injunction preventing the school district from enforcing its regulations on Coach Borden, reverse its grant of summary judgment in favor of Coach Borden, and remand with directions to grant summary judgment in favor of the Defendants.

Respectfully submitted,



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**PROOF OF FILING AND SERVICE**

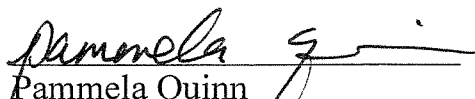
I hereby certify that the Brief *Amici Curiae* of The Interfaith Alliance, The Anti-Defamation League, Hadassah, Jewish Women International, Muslim Advocates, Sikh American Legal Defense and Education Fund, Sikh Council on Religion and Education, and Union for Reform Judaism in Support of Defendants-Appellants East Brunswick School Board, et al. was timely filed because it was mailed to the clerk by overnight courier on December 21, 2006, in accordance with Fed. R. App. P. 25(2)(B)(i) and 29(e). I also certify that the following counsel were served by first-class mail on December 21, 2006, in accordance with Fed. R. App. P. 25(b) & (c):

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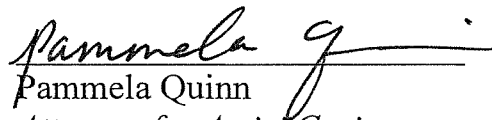
  
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**CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,935 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word in 14 point Times New Roman.

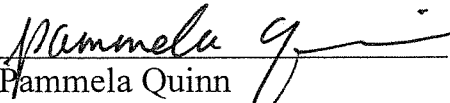
DATED: December 21, 2006

  
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**CERTIFICATE OF BAR ADMISSION**

Pursuant to 3d Cir. LAR 28.3(d) (1997), *amici* certify that Pammela Quinn, whose name appears on this brief, is a member of the bar of this Court.

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