



## The Establishment Clause versus First Amendment Rights

By Robin Salisian

On October 3, a three-judge panel began to decide whether a high school coach asking his players to kneel for a moment of silence was unconstitutional or not—again.



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The case first came before judges in 2005, when Superintendent Jo Ann Magistro learned from parents about the coach's actions and "promptly issued a policy directive ordering him to stop,"

says an [article](#) on [Law.com](#).

Head coach Marcus Borden, however, fought back. He "sought an injunction preventing the school district from enforcing the directive" and won.

While the school board's lawyers "argued that the directive was proper because the district was merely trying to comply with the Establishment Clause and avoid a lawsuit by parents and students," Borden's attorneys disagreed and said that "bowing and genuflecting are secular coaching techniques for fostering team unity."

With the latter, U.S. District Judge Dennis M. Cavanaugh agreed. His reasons? "The school district had violated the coach's federal and state constitutional rights," and "'taking a knee' in football 'does not have the religious significance typically associated' with kneeling during prayer."

The school board appealed. And now the debate over the Establishment Clause versus First Amendment rights has begun.

Both sides, each with a string of new lawyers, bring new arguments to the case.

On the school board's side, attorneys argue that Borden's actions "[expose] the district to liability for violating students' and parents' Establishment Clause rights." But more than that, "the case is really about the autonomy of school districts and the duty of their employees to follow district rules." And one of those rules, as stated in the district's brief, is as follows:

"Public school districts have discretion to control their curricula, their employees' instruction methods, and, indeed, all aspects of their employees' official interactions with students."

Therefore, "Borden does not get to infringe students' and parents' religious freedom because, as a public employee, he does not get to make policy: The district does."

But Borden's lawyers argue in their brief that "the school district did not have a 'sufficient governmental interest' to support a policy that infringed on Borden's rights." The lawyers continue, "The only reason offered for the policy 'was the purported need to protect the school district from potential litigation.'"

This "potential litigation" was a "hypothetical threat," they argue. "No suit has ever been filed...and no possible plaintiff has ever been identified."

Marcus Borden, who has been the head coach at East Brunswick High School in New Jersey for 23 years, still awaits the judges' decision.

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