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Re: The Constitutionality of School Chaplains Under Senate Bill No. 763

Dear Superintendent and School Board Members:

I write in response to the ACLU's letter of June 26, 2023,[1] which threatens your school district with lawsuits if it decides to employ chaplains under Senate Bill 763. The ACLU claims that the presence of chaplains in public schools would violate the Establishment Clause, and it implies your school district will lose in court if anyone challenges the constitutionality of the practice. The ACLU's claims are false, and you should not allow its threats to influence your decisions.

The Establishment Clause says that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. Making chaplains available to public-school students is not an "establishment" of religion if the students remain free to decide whether they will use the chaplain's services. The only circumstance in which the presence of a public-school chaplain could violate the Supreme Court's establishment-clause doctrine is if a school coerces its students to participate in chaplain-related programs or activities. *See Kennedy v. Bremerton School District*, 142 S. Ct. 2407, 2429 (2022) ("[G]overnment may not . . . make a religious observance compulsory . . . may not coerce anyone to attend church, nor may it force citizens to engage in a formal religious exercise." (citations and internal quotation marks omitted). In the absence of coercion, there is no Establishment Clause violation and no reason to fear lawsuits from the ACLU.

If your school decides to employ or accept chaplains under Senate Bill 763, it would be prudent to adopt a policy making clear that no student may be coerced to use the services or programs offered by the chaplain's office, and that any student involvement with the chaplain must be purely voluntary. My law offices would be happy to advise or assist a school district considering a policy of this sort. But even without an official anti-coercion policy, there can be no Establishment Clause violation and no reason to fear a lawsuit unless actual coercion occurs.

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1. The letter of June 26, 2023, is signed by leaders from the American Civil Liberties Union Program on Freedom of Religion and Belief, the American Civil Liberties Union of Texas, Americans United for Separation of Church and State, and the Freedom from Religion Foundation. For simplicity and ease of exposition, I will refer to the letter of June 26, 2023, as "the ACLU's letter" and will refer to the signatories collectively as "the ACLU."

The ACLU's letter acknowledges that the constitutionality of public-school chaplains hinges on the presence or absence of coercion, yet it claims that the mere presence of a chaplain in a public school is inherently coercive and indoctrinating. That is nonsense. A student who voluntarily seeks a school chaplain on his own accord is not being "coerced" or "indoctrinated," unless one is prepared reject the notion of free will and claim that all human action is determined by pre-existing causes. And the current membership of the Supreme Court will not be amenable to the theory of coercion in the ACLU's letter. There was a time not long ago when a Supreme Court majority might be receptive to the ACLU's arguments, when moderately separationist jurists like Sandra Day O'Connor and Anthony Kennedy controlled the outcomes in Establishment Clause cases. *See, e.g.*, *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992). But those days are over. President Trump's recent appointments to the Supreme Court and the Fifth Circuit have cemented conservative supermajorities, which are intent on rolling back the separationist doctrines that the ACLU and like-minded judges have been propagating for the last 50 years. Just last year, the Roberts Court recognized the overruling of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the crown jewel of separationist jurisprudence, and declared that coercion rather than separationism would be the touchstone in future Establishment Clause litigation. *See Kennedy*, 142 S. Ct. at 2427 ("[T]his Court long ago abandoned *Lemon* and its endorsement test offshoot."). If the ACLU believes that the current members of the Supreme Court or the Fifth Circuit will disapprove the employment of school chaplains or find their presence inherently "coercive," then we should welcome the opportunity to have the federal judiciary set them straight.

There may be other reasons not to employ a school chaplain, and I take no position on whether your school district should make a chaplain available to students. But your decision should be based solely on whether you and your constituents think public-school chaplains are a good idea. Do not allow your decisions to be influenced by idle threats from organizations that are struggling to stay relevant now that they no longer have a Supreme Court majority that supports their views.

Please do not hesitate to call my office or e-mail me if you would like to discuss any of this further.

Sincerely,

Jonathan F. Mitchell
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