



10/10/2023

1701 N. Congress Avenue
Austin, Texas 78701

Re: Constitutionality of chaplains in public schools

Dear Members of the Texas State Board of Education,

The purpose of this letter is address the constitutionality of recently passed SB 763, which allows for public schools to utilize chaplains as school counselors.

By way of introduction, Pacific Justice Institute is a non-profit law firm specializing in the areas of religious freedom, parental rights and other civil liberties.

Extensive United States Supreme Court precedent would support the utilization of chaplains in public schools without violating the Establishment Clause of the First Amendment.

Beginning with *Marsh v. Chambers* in 1983, the Supreme Court determined that maintaining the history and tradition of prayer prior to a legislative session is so important that it does not violate the Establishment Clause.

Later, in *Katcoff v. Marsh*, the Court found that military chaplain programs do not violate the Establishment Clause. The Court found in this case that while military personnel are not home and able to access their usual places of worship, the chaplaincy program was a substitute. To not to provide such substitutes would be hostile toward religion rather than neutral, violating the First Amendment.

More recently in 2022, the Court discarded the longstanding Lemon Test in *Kennedy v. Bremerton School District*. Under the Lemon Test, the Court would examine whether the government or a law violated the Establishment Clause. The three prong test included whether the proposed activity had a clear secular purpose, whether the primary effect of the aid would advance or inhibit religion, and whether the aid would create an excessive governmental entanglement with religion. By eliminating the use of the Lemon Test, the court emphasized that the Free Exercise Clause is expansive and the Establishment Clause is more narrow. As such, any government activity must be viewed in light of this expansive view of the Free Exercise Clause.

Finally, both *Espinoza v. Montana Department of Revenue* and *Carson v. Makin* in 2020 and 2022 respectively, clearly stated that government funding of religious schools is not an establishment clause problem. If government funding is generally provided to schools, religious schools cannot be discriminated against.

Based on the above interpretations of the Establishment Clause, particularly by the current Supreme Court, as well as history and tradition, Texas' use of chaplains in the

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public school setting would survive a constitutional challenge.

Very truly yours,



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