ACLJ
AMERICAN CENTER
for LAW & JUSTICE

[redacted]

March 12, 2024

Re: RESPONSE OF THE AMERICAN CENTER FOR LAW AND JUSTICE TO THE ACLU OPEN LETTER REGARDING PUBLIC SCHOOL CHAPLAIN

Dear State Legislators:

On March 6, 2024, a coalition of organizations, led by the American Civil Liberties Union ("ACLU"), published an open letter opposing chaplains in public schools. Considering the strict separationist philosophy that has animated many of these organizations for decades, the position advanced by the letter is not surprising. Groups like the ACLU, Freedom from Religion Foundation, Americans United for Separation of Church and State, and the American Humanist Association ("AHA"), have long sought to "compel the government to purge from the public sphere anything an objective observer could reasonably infer endorses or partakes of the religious." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427 (2022) (citation and internal quotation marks omitted). For example, in *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019), the AHA tried and failed to remove the Bladensburg Peace Cross, a 100-year-old monument dedicated to 49 soldiers who gave their lives in World War I. Currently, the AHA is attempting to have a court declare unconstitutional a prayer vigil held in Ocala, Florida, which was organized in response to a shooting spree in the city that left several children injured. *Rojas v. City of Ocala*, 5:14-cv-651 (M.D. Fla., filed Nov. 24, 2014). For these groups, the Establishment Clause creates an impenetrable wall between church and state.

The American Center for Law and Justice ("ACLJ") believes that the ACLU's open letter requires a response. The ACLJ is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued before the Supreme Court of the United States in several significant cases involving the freedoms of speech and religion. *See, e.g.*, *Pleasant Grove v. Summum*, 555 U.S. 460, 464 (2009) (unanimously holding that the Free Speech Clause does not require the government to accept counter-monuments when it has a war memorial or Ten

Commandments monument on its property); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist*., 508 U.S. 384, 392 (1993) (unanimously holding that denying a church access to public school premises to show a film series on parenting violated the First Amendment); *Bd. of Educ. v. Mergens*, 496 U.S. 226, 253 (1990) (holding by an 8-1 vote that allowing a student Bible club to meet on a public school's campus did not violate the Establishment Clause).

The ACLJ of course agrees with the open letter that any public-school chaplaincy must comport with the Establishment Clause. The letter, however, misunderstands how that clause would apply to such a program.

Though much ink has been spilled over its meaning, the Establishment Clause can be written on the back of an envelope: "Congress shall make no law respecting an establishment of religion . . . ." U.S. Const. amend. I. Nowhere in this provision of the First Amendment is there anything about a "wall of separation of church and state" (a phrase that appeared in Thomas Jefferson's private letter to the Danbury Baptists in 1802).

In fact, as the United States Supreme Court has correctly noted, "this Nation's history has not been one of an entirely sanitized separation between Church and State," nor has it ever "been thought either possible or desirable to enforce a regime of total separation." *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973). As one federal court of appeals noted, in a case where the ACLU tried to have a display of documents, including the Ten Commandments, removed from a county courthouse:

> [T]he ACLU makes repeated reference to "the separation of church and state." This extra-constitutional construct has grown tiresome. The First Amendment does not demand a wall of separation between church and state.

ACLU of Ky. v. Mercer Cty., 432 F.3d 624, 638 (6th Cir. 2005).

Just two years ago, the Supreme Court explained that "the Establishment Clause must be interpreted by 'reference to historical practices and understandings' at the time of the founding," *Kennedy*, 142 S. Ct. at 2414 (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2013)), and described what the Establishment Clause prohibits as an original and historical matter: (1) to "make a religious observance compulsory"; (2) to "coerce anyone to attend church"; or (3) to "force citizens to engage in 'a formal religious exercise,'" 142 S. Ct. at 2429 (citations omitted). The Court pointed out that "coercion along these lines was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment." *Id*.

To elucidate this point, *Kennedy* points to several sources, *id*. at n.5, including Justice Gorsuch's opinion in *Shurtleff v. City of Boston*, 142 S. Ct. 1583 (2022), where he notes that "telling traits" of an "establishment of religion" included: (1) government control "over the doctrine and personnel of the established church"; (2) mandatory attendance in the established church and punishment for those who disobeyed; (3) penalizing "dissenting churches and individuals for their religious exercise"; (4) "restrict[ing] political participation by dissenters"; (5) providing financial support for the established church, and (6) "government use of the established church to carry out certain civil functions," *id*. at 1609 (Gorsuch, J., concurring in the judgment).

One of the clearest examples of what the founding era did not consider to be an impermissible establishment of religion is paid legislative chaplains. "The First Congress made it an early item of business to appoint and pay official chaplains, and both the House and Senate have maintained the office virtually uninterrupted since that time." *Town of Greece*, 572 U.S. at 575. "Clearly the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of [the Establishment Clause]." *Marsh v. Chambers*, 463 U.S. 783, 788 (1983). Courts have upheld the constitutionality of chaplains in other contexts as well. *See, e.g*., *Malyon v. Pierce County*, 935 P.2d 1272, 131 Wash. 2d 779 (Wash. Sup. Ct. 1997) (holding that a local Sheriff's Department chaplaincy program did not violate the Establishment Clause); *Carter v. Broadlawns Medical Ctr*., 857 F.2d 448 (8th Cir. 1988) (holding that employment of a chaplain by a county-owned hospital was constitutional).

While there is no case law directly addressing the constitutionality of a public-school chaplaincy program, the principles articulated in the foregoing cases will support such a program so long as certain factors are satisfied—the most important being a lack of coercion. *See Kennedy*, 142 S. Ct. at 2429 ("[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). If students are free to decide whether they will use a chaplain's services, and if schools ensure that students will not be coerced into visiting with a chaplain, or seek counsel from a chaplain, the protections guaranteed by the Establishment Clause will be preserved. For these reasons, any public school adopting a chaplaincy program should make it clear that no student may be coerced to use the services offered by a chaplain, and that any student involvement with a chaplain must be purely voluntary.

The ACLU's open letter acknowledges what *Kennedy* reaffirmed about coercion but does not explain how or why a public school chaplaincy program would inextricably lead to the coercion of any student. In fact, the letter even states that parental consent for a child to seek a chaplain's services would not cure the constitutional violation, citing *Edwards v. Aguillard*, 482 U.S. 578 (1987). But

Edwards is not the current standard for interpreting the Establishment Clause; *Kennedy* is, including its emphasis on coercion as a defining feature of what would constitute an establishment of religion at the time of the founding. In addition, *Edwards* relied squarely on *Lemon v. Kurtzman*, 403 U.S. 602 (1971), in rendering its decision. But, as the Supreme Court explained in *Kennedy*, *Lemon*'s "'shortcomings'" became so "'apparent' that this Court long ago abandoned *Lemon*." *Kennedy*, 142 S. Ct. at 2427 (quoting *Am. Legion*, 139 S. Ct. at 2079-81). *See also Rojas v. City of Ocala*, 40 F.4th 1347, 1351 (11th Cir. 2022) ("[T]he Supreme Court has definitively decided that *Lemon* is dead — long live historical practices and understandings."); *Freedom from Religion Found., Inc. v. Mack*, 49 F.4th 941, 954 n.20 (5th Cir. 2022) (noting that *Lemon* "is now over") (citing *Kennedy*, 142 S. Ct. at 2427).

In addition, *Kennedy*'s holding that the "Establishment Clause must be interpreted by 'reference to historical practices'" does not mean there must be examples of public-school chaplains at the time of the founding for such a program to be constitutional. What matters is not whether "the **specific practice** challenged" has a "very direct connection, via the First Congress, to the thinking of those who were responsible for framing the First Amendment." *Am. Legion*, 139 S. Ct. at 2088-89 (plurality) (emphasis added). What matters is whether the challenged practice "on the whole reflects and embraces our tradition." *Town of Greece*, 572 U.S. at 585. *See also Am. Humanist Ass'n v. McCarty*, 851 F.3d 521, 527 (5th Cir. 2017) (rejecting challenge to school board's invocation policy even though "[s]chool-board prayer presumably does not date back to the Constitution's adoption"); *Doe v. United States*, 901 F.3d 1015, 1021 (8th Cir. 2018) (noting that even though "the specific practice of placing 'In God We Trust' on U.S. money did not begin until 1864 and was not uniform across all currency until almost a century later . . . the practice comports with early understandings of the Establishment Clause as illuminated by the actions of the First Congress."). In other words, a public-school chaplaincy program will satisfy constitutional scrutiny if it "accor[ds] with history and faithfully reflec[ts] the understanding of the Founding Fathers." *Kennedy*, 142 S. Ct. at 2428.

So long as a public-school chaplaincy program ensures that student participation is purely voluntary and takes measures to guarantee an absence of any coercion—and so long as no religious test is imposed on chaplains—there is nothing under current Establishment Clause jurisprudence that would forbid it outright. For the ACLU and others to suggest otherwise is wrong.

Finally, the ACLJ agrees with the open letter that families and students across the country "practice a wide variety of faiths, and many are nonreligious." It agrees that "[a]ll should feel welcome in public schools." However, the letter's attempt to squash efforts at accommodating the religious beliefs and practices of students by way of a chaplaincy program is very much misguided. Religious neutrality does not demand the cleansing of the public sphere of all things related to religion. *See, e.g.*,

Van Orden v. Perry, 545 U.S. 677, 684 n.3 (2005) (plurality) ("we have not, and do not, adhere to the principle that the Establishment Clause bars any and all governmental preference for religion over irreligion.").

As Justice Kennedy observed, "[g]overnment policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage," and "the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society." *City of Allegheny v. ACLU*, 492 U.S. 573, 657 (1989) (Kennedy, J., concurring in part and dissenting in part). "Any approach less sensitive to our heritage would border on latent hostility toward religion, as it would require government in all its multifaceted roles to acknowledge only the secular, to the exclusion and so to the detriment of the religious." *Id*.

In conclusion, while the constitutionality of public school chaplains would have been a matter of serious legal dispute under case law predating *Kennedy*, that decision has changed the framework for interpreting the Establishment Clause for the foreseeable future. As explained above, a school chaplaincy program is not inherently unconstitutional, as the ACLU's open letter asserts. Such a program may comport with the Establishment Clause so long as it accords with principles set forth by the Supreme Court in *Kennedy* and other Supreme Court decisions that have not been undermined by that decision.

Very truly yours,

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