ACLJ
American Center
for Law & Justice
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Chief Counsel

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Mr. Barry Alvarez
Director of Athletics
Intercollegiate Athletics
[redacted]

Dear Director Alvarez,

The American Center for Law & Justice (ACLJ) has prepared this letter on behalf of 37,767 concerned citizens and in response to Freedom From Religion Foundation's (FFRF) demand that certain universities, including the University of Wisconsin, terminate their sports team chaplaincies. The purpose of this letter is to explain the relevant law, and to dispel FFRF's erroneous assertion that sports team chaplains are per se unconstitutional. By way of introduction, 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 a number of significant cases involving the freedoms of speech and religion. *See, e.g., Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (unanimously holding that a monument erected and maintained by the government on its own property constitutes government speech and does not create a right for private individuals to demand that the government erect other monuments); *McConnell v. FEC*, 540 U.S. 93 (2003) (unanimously holding that minors enjoy the protection of the First Amendment); *Lamb's Chapel v. Ctr. Moriches Sch. Dist.*, 508 U.S. 384 (1993) (unanimously overturning the Second Circuit and 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 (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); *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987) (unanimously striking down a public airport's ban on First Amendment activities).

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Analysis

In its letter demanding termination of sports team chaplaincies, FFRF claims that such chaplaincies somehow infringe the "rights of every student athlete to hold his or her own religious or nonreligious views, free from direct or indirect coercion or contrary endorsement." FFRF develops this theme further in its Report claiming that, 1) "Christian coaches and chaplains are converting football fields into mission fields;" 2) "The effect of chaplaincies is to impose religion on players;" and 3) "it is in the best interest of public universities to adopt policies that protect student athletes from discrimination and unlawful religious coercion."

FFRF's concern that university students are being "coerced" by the presence of sports team chaplains is completely unwarranted. The Supreme Court of the United States has recognized that "university students are, of course, young adults." *Widmar v. Vincent*, 454 U.S. 263, 274 n.14 (1981). They are less impressionable than younger students, and "fully capable of understanding the '"proposition that schools do not endorse everything they fail to censor."'" *Board of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (holding that *high school students* can understand the distinction between endorsement and neutrality).

Because of the age and maturity difference of college students, courts have generally acknowledged that college students are unlikely to be "coerced" by religious expression at school sponsored events. Thus, courts have held that prayers at college graduation ceremonies do not violate the Establishment Clause. For example, in *Chaudhuri v. Tennessee*, the Sixth Circuit upheld prayers offered at public university graduations, faculty meetings, dedication ceremonies, and guest-lectures. 130 F.3d 232, 238 (6th Cir. 1997). Distinguishing *Lee v. Weisman*, 505 U.S. 577, 587 (1992), the court held that there was "absolutely no risk" that "any . . . unwilling adult listener . . . would be indoctrinated by exposure to the prayers." *Id.* Likewise, the Seventh Circuit in *Tanford v. Brand* upheld a prayer at a public university graduation ceremony because

> the mature stadium attendees were voluntarily present and free to ignore the cleric's remarks. Most remained seated. Under these facts, in which the special concerns underlying the Supreme Court's decision in *Lee* are absent, the district court correctly determined that *Lee* does not require the challenged practices to be struck down.

104 F.3d 982, 985–86 (7th Cir. 1997). The court additionally noted that many students had, in fact, boycotted the graduation, evidencing that there was "no coercion—real or otherwise—to participate." *Id.* at 986. Therefore, the court concluded, the practice of prayer at public university graduations is "simply a tolerable acknowledgment of beliefs widely held among the people of this country" and a practice that is "widespread throughout the nation." *Id.* (citing *Marsh v. Chambers*, 463 U.S. 783, 792 (1983)).

The single circuit that has struck down a prayer at a public university event did so in the narrow context of a military institution. *See Mellen v. Bunting*, 327 F.3d 355, 371–72 (4th Cir. 2003) (holding that "supper prayer" in the mess hall at Virginia Military Institute violated the Establishment Clause because of the uniquely coercive military atmosphere).

As it so often does, FFRF mistakes offense for coercion, an error expressly repudiated in *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1826 (2014). In *Galloway*, the Supreme Court upheld the constitutionality of voluntary chaplains invited to say a prayer before town board meetings. In its opinion, the Court rejected many of the same arguments advanced by FFRF. Emphasizing that "offense…does not equate to coercion," the Court stated that adults should be able to withstand "speech they find disagreeable," without imagining that the Establishment Clause is violated every time they "experience a sense of affront from the expression of contrary religious views." 134 S. Ct. at 1826. Significantly, the Court's decision was not altered by the fact that children sometimes were in attendance at the meetings. *Id.* at 1831 (Alito, J., concurring).

The Court also rejected the speculation that because the chaplains were overwhelmingly Christian, there was increased risk of discriminatory treatment of town residents who were not Christians. Galloway argued that citizens attending the meetings "might feel pressure to join the prayers to avoid irritating the officials who would be ruling on their petitions," but the Court ruled that the argument had "no evidentiary support." *Id.* at 1826.

> Nothing in the record indicates that town leaders allocated benefits and burdens based on participation in the prayer, or that citizens were received differently depending on whether they joined the invocation or quietly declined. In no instance did town leaders signal disfavor toward nonparticipants or suggest that their stature in the community was in any way diminished. A practice that classified citizens based on their religious views would violate the Constitution, but that is not the case before this Court.

Id. FFRF's fear of discriminatory treatment of football players is similarly baseless.

Chaplaincy programs in other contexts, such as police and fire departments, prisons, hospitals, the military, and airports have been widely upheld by courts. *See e.g., Katcoff v. Marsh*, 755 F.2d 223 (2d Cir. 1985), *Cutter v. Wilkinson*, 544 U.S. 709 (2005), *Vostuinkel v. City of Charlotte*, 495 F. Supp. 588 (W.D.N.C. 1980), *Carter v. Broadlawns Med. Ctr.*, 857 F.2d 448 (8th Cir. 1988), *Brashich v. Port Auth. of N.Y. & N.J.*, 484 F. Supp. 697 (S.D.N.Y. 1979). By providing opportunities for student athletes to engage in religious activities, the university is fostering the free exercise of students' rights as protected by the First Amendment.

University students understand that they will be exposed to a variety of religious and nonreligious views on campus. Sports team chaplaincies pose no threat to the rights of university students to hold their own religious views, any more than does graduation prayer, or for that matter, a professor's avowed atheism. The Establishment Clause does not compel the expulsion of sports team chaplains who serve voluntarily to meet the spiritual needs of student athletes, any more than the Establishment Clause requires the razing of university chapels that exist to meet similar needs.

Recommendations

While the Establishment Clause does not generally bar voluntarily sports team chaplains, the ACLJ recommends adherence to the following guidelines to ensure that such chaplaincies remain constitutional.

• Voluntariness/Student-Initiation

Public universities may not compel or coerce students to participate in religious activities sponsored by chaplains.[1] Thus, any chaplain-sponsored activities should be optional *accommodations* of students' spiritual needs rather than *requirements* imposed by the team coaches or staff.[2] Moreover, the optional nature of the activities should be clearly communicated. Likewise, if a prayer is offered before a game or practice, players should not be pressured in any way to participate but should instead remain free to join in or abstain.

• Equal access/opportunity

The Establishment Clause requires the government to adopt a position of neutrality toward religion, neither taking sides on religious questions, nor showing a preference toward one religion over others.[3] Neutrality is best served when government offers equal opportunities and accommodations to all faiths. Thus, if a sports team invites religious leaders from the community to serve as chaplains, the invitation should be open to religious leaders of all faiths.[4] In other words, if the sports team invites a Christian minister to host a chapel for players, it should also consider inviting a Jewish rabbi or Muslim imam to host a similar religious activity for any interested players. There is no requirement, however, that sports teams guarantee that all faiths are represented equally in chaplaincy programs.[5] The chaplaincy program must simply maintain a policy of nondiscrimination.[6]

• Avoid anything other than de minimis (or insignificant) expenditure of government funds

The neutrality principle bars the use of government money to fund religious activities, as this may suggest that the government is favoring one religion over others,[7] or religion over non-

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[1] *See, e.g., Lee v. Weisman*, 505 U.S. 577, 587 (1992) (explaining that the "Constitution guarantees that government may not coerce anyone to support or participate in religion or the exercise" of it).

[2] *See Widmar v. Vincent*, 454 U.S. 263, 281 (1981) (Stevens, concurring) (explaining that because participation in a religious after school activity was entirely voluntary the University's fear of violating the Establishment Clause by allowing such a religious meeting on their campus was groundless).

[3] *See id.* at n. 15 (holding that the Establishment Clause means the government cannot pass laws that "aid one religion, aid all religions, or prefer one religion over another").

[4] *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 114 (2001) (stating that neutrality is not violated when even-handed policies are followed which extend benefits to recipients whose ideologies and viewpoints are diverse); *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1817 (2014).

[5] *Galloway*, 134 S. Ct. at 1824 (So long as the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing. The quest to promote "a 'diversity' of religious views" would require the town "to make wholly inappropriate judgments about the number of religions [it] should sponsor and the relative frequency with which it should sponsor each.").

[6] *Id.*

[7] *See Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (identifying "the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity'") (citation omitted).

religion, in violation of the Establishment Clause.[8] To the extent that there are costs associated with a team chaplain's participation in activities, such as travel and lodging, those should be covered by private funds (boosters, outside private organizations, etc.) rather than funds from the university's budget unless those costs are truly insignificant.

• Coaches/staff

It is important for public university coaches and staff to be aware that their involvement in religious activities while acting in their official capacity may be construed as a governmental endorsement of religion. While prayer and other religious activities are permissible, and indeed protected under the First Amendment during off-duty hours, such activities may be constitutionally suspect if undertaken during work hours. For example, while a coach or other staff member may join players for a Bible study or chapel service, and may even take a leading role if the players so desire, this should be done while the team official is "off the clock."

We hope that this letter will be helpful to your athletic program in evaluating both FFRF's demand and the constitutionality of your chaplaincy program. *Please understand that this letter is for informational purposes only and does not constitute legal advice* regarding the constitutionality of your specific sports team chaplaincy program. Should you have any questions, please feel free to contact us.

Sincerely,

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[8] *See, e.g., Committee for Public Ed. v. Nyquist*, 413 U.S. 756, 774 (1973) (holding that payment of tax dollars to Roman Catholic Schools in low-income areas violated the Establishment Clause because its primary effect and purpose was to advance religion).