



June 26, 2023

## Re: Unconstitutional proposals to allow chaplains in public schools

Dear Superintendent and School Board Members:

The Texas Legislature recently enacted Senate Bill No. 763, which purports to allow public-school districts and charter schools to employ, or accept as volunteers, chaplains who will “provide support, services, and programs for students.”<sup>1</sup> Specifically, the law requires every school board in Texas to vote by March 1, 2024, on whether to adopt a policy that would authorize individual schools to have chaplains.<sup>2</sup> But hiring or otherwise allowing chaplains in public schools would amount to state-sponsored religion and lead to religious proselytization and coercion of students, as well as other violations of the U.S. and Texas Constitutions. We thus urge you to vote against adopting a chaplaincy policy and to decline to hire or accept chaplains in your schools. We will closely monitor the implementation of the chaplaincy legislation across Texas and will take any action that is necessary and appropriate to protect the rights of Texas children and their parents, who practice a wide array of faiths or none at all.

There are “heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.”<sup>3</sup> Thus, in the public-school context, the U.S. Supreme Court “has been particularly vigilant in monitoring compliance with the Establishment Clause” of the First Amendment to the U.S. Constitution.<sup>4</sup> To that end, the Court has repeatedly recognized that public schools “may not coerce anyone to support or participate in religion or its exercise.”<sup>5</sup> Just last year, in *Kennedy v. Bremerton School District*, the Court reaffirmed this fundamental Establishment Clause principle.<sup>6</sup>

The primary role of chaplains is to provide pastoral or religious counseling to people in spiritual need. Allowing them to assume official positions—whether paid or voluntary—in public schools will create an environment ripe for religious coercion and indoctrination of students. This is especially true under S.B. No. 763 because the law provides that school chaplains are “not required to be certified by the State Board for Educator Certification.”<sup>7</sup> They are, therefore, not

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<sup>1</sup> Tex. S.B. No. 763, p. 1, lines 8-10 (June 18, 2023), <https://bit.ly/3XiR6jg>.

<sup>2</sup> *Id.*, p. 3, line 23 to p. 4, line 8.

<sup>3</sup> *Lee v. Weisman*, 505 U.S. 577, 592 (1992).

<sup>4</sup> *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987).

<sup>5</sup> *Lee*, 505 U.S. at 587.

<sup>6</sup> 142 S. Ct. 2407, 2429, 2431-32 (2022).

<sup>7</sup> S.B. No. 763, *supra* n.1, p. 1, lines 12-14. By contrast, school counselors must pass a school-counselor certification exam, hold at least a master’s degree in counseling from an accredited institution of higher education, and have two

likely to have the training and experience necessary to ensure that they adhere to public schools' educational mandates and avoid veering into impermissible religious counseling and other promotion of religion. Indeed, providing religious guidance to students appears to be the ultimate objective of S.B. No. 763. The legislation's sponsor, Senator Mayes Middleton, proclaimed in committee that chaplains "represent God in our government" institutions.<sup>8</sup> In school districts that adopt chaplaincy policies, many students will be vulnerable to religious indoctrination. For example, students may feel pressure to submit to religious proselytizing by chaplains or to join them in prayer. This is precisely the kind of coercion that the Establishment Clause forbids.

Moreover, the Establishment Clause also prohibits public schools from favoring one religion over another or favoring religion over nonreligion.<sup>9</sup> It was adopted to prevent the government from "placing its official stamp of approval upon one particular kind" of religious practice,<sup>10</sup> to bar "a fusion of governmental and religious functions,"<sup>11</sup> and to ensure "governmental neutrality between religion and religion, and between religion and nonreligion."<sup>12</sup> In fact, James Madison, the architect of the First Amendment, famously condemned government support for teachers of religion.<sup>13</sup> The Texas Constitution is equally robust in its guarantee of religious neutrality, proclaiming that "[n]o human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion, and no preference shall ever be given by law to any religious society or mode of worship."<sup>14</sup>

Chaplains are generally affiliated with specific religious denominations and traditions. In deciding which chaplains to hire or accept as volunteers, schools will inherently give preference to particular denominations, violating the "clearest command" of the Establishment Clause: "[O]ne religious denomination cannot be officially preferred over another."<sup>15</sup> Schools that do so and decline to accept chaplains of minority religions, even controversial ones, will place themselves at greater risk of liability. Furthermore, because the legislation exempts chaplains from certification requirements that apply to school counselors, teachers, and other educational professionals, hiring or accepting chaplains on these unequal terms would result in a preference for religion over nonreligion.

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creditable years of teaching experience as a classroom teacher. Student Servs. Certificates, Tex. Educ. Agency, <https://bit.ly/43YKo4K> (last visited June 26, 2023).

<sup>8</sup> Kimberly Reeves, *School chaplain bill headed toward passage*, Spectrum News 1 (May 10, 2023), <https://bit.ly/3Ps0D5X>.

<sup>9</sup> See *Everson v. Bd. of Educ.*, 330 U.S. 1, 15-16 (1947); *Engel v. Vitale*, 370 U.S. 421, 429-33 (1962); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 216, 226 (1963); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

<sup>10</sup> *Engel*, 370 U.S. at 429.

<sup>11</sup> *Schempp*, 374 U.S. at 222.

<sup>12</sup> *Epperson*, 393 U.S. at 104.

<sup>13</sup> See generally James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), <https://bit.ly/2YwACub>.

<sup>14</sup> Tex. Const. art. I, § 6 (1876).

<sup>15</sup> *Larson v. Valente*, 456 U.S. 228, 244 (1982).

Pursuant to the Establishment Clause’s anti-coercion and neutrality principles, courts have repeatedly ruled that it is unconstitutional for public schools to invite religious leaders onto campus to engage in religious activities, such as prayer and religious counseling, with students.<sup>16</sup> Indeed, the Supreme Court has issued a “long line of cases carving out of the Establishment Clause what essentially amounts to a *per se* rule prohibiting public-school[ ] . . . -initiated religious expression or indoctrination.”<sup>17</sup> And a Texas federal court previously struck down a school-district program that allowed volunteer clergy into schools to counsel and mentor students.<sup>18</sup> These cases make clear that permitting volunteers to act as chaplains and proselytize students in public schools—let alone employing them—would violate the First Amendment.

To be sure, some courts have upheld the constitutionality of government-provided chaplains in very limited settings. Generally, the government may provide chaplains only where they are needed to accommodate the religious-exercise rights of people who would otherwise lack the capacity to access religious services—specifically, for those in prison, confined to a public hospital, or serving in the military.<sup>19</sup> No such justification exists here. Public-school students have unfettered access to religious services in their communities and through their families. They do not need chaplains, selected and imposed by the government, to practice their faith.<sup>20</sup>

Families and students in Texas practice a wide variety of faiths, and many are nonreligious. All should feel welcome in public schools. Freedom of religion means that parents and faith communities—not government officials—have the right to direct their children’s religious education and development. We therefore urge you to reject any proposed policy that would allow chaplains in your schools.

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<sup>16</sup> See, e.g., *Lee*, 505 U.S. at 597-99 (public school forbidden from inviting clergy to deliver prayers at graduation ceremonies); *McCullum v. Bd. of Educ.*, 333 U.S. 203, 211-12 (1948) (Establishment Clause prohibited public school from allowing clergy and others to teach religious classes on campus during school day); *Doe v. S. Iron R-1 Sch. Dist.*, 498 F.3d 878, 882 (8th Cir. 2007) (holding that public school could not permit religious group to distribute Bibles to students in school); *Doe v. Porter*, 370 F.3d 558, 562-64 (6th Cir. 2004) (barring public school from allowing volunteers from local religious college to conduct proselytizing Bible-study class during school day); *Berger v. Rensselaer Cent. Sch. Corp.*, 982 F.2d 1160, 1170-71 (7th Cir. 1993) (ruling that public schools could not authorize religious group to distribute Bibles to students in classrooms or auditoriums); cf. *Busch v. Marple Newtown Sch. Dist.*, 567 F.3d 89, 100-01 (3d Cir. 2009) (upholding school district’s refusal, on Establishment Clause grounds, to allow parent to read Bible to kindergarten students).

<sup>17</sup> *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 165 (5th Cir. 1993).

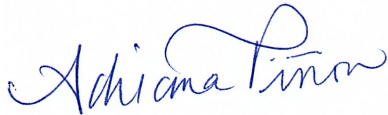
<sup>18</sup> *Oxford v. Beaumont Indep. Sch. Dist.*, 224 F. Supp. 2d 1099, 1114-15 (E.D. Tex. 2002).

<sup>19</sup> See, e.g., *Johnson-Bey v. Lane*, 863 F.2d 1308, 1312 (7th Cir. 1988) (“Patients in public hospitals, members of the armed forces . . . and prisoners . . . have restricted or even no access to religious services unless government takes an active role in supplying those services.”); *Katcoff v. Marsh*, 755 F.2d 223, 237 (2d Cir. 1985) (upholding military chaplaincy); *Carter v. Broadlawns Med. Ctr.*, 857 F.2d 448, 457 (8th Cir. 1988) (upholding county hospital chaplaincy); see also, e.g., *Schempp*, 374 U.S. at 297 (Brennan, J., concurring) (providing chaplains for prisoners or military personnel can be “sustained on constitutional grounds as necessary to secure to the members of the Armed Forces and prisoners those rights of worship guaranteed under the Free Exercise Clause”).

<sup>20</sup> Cf. *Voswinkel v. City of Charlotte*, 495 F. Supp. 588, 597 (W.D.N.C. 1980) (government provision of chaplains for police officers was unconstitutional because it was “inconsistent with th[e] fundamental rule of neutrality,” and police officers do not face “the extraordinary restraint to which both soldiers and prisoners are subjected” that would limit their ability “to pursue their spiritual needs”).

Thank you for your consideration of this letter. Please do not hesitate to contact us if you would like to discuss this matter further.

Sincerely,



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