



April 2, 2015

**Via U.S. Mail & Electronic Mail**  
**at chancellor@ku.edu**

Dr. Bernadette Gray-Little  
Office of the Chancellor  
University of Kansas  
Strong Hall  
1450 Jayhawk Blvd., Room 320  
Lawrence, Kansas 66045

***Re: Chaplains for the Kansas University Basketball Team***

Dear Chancellor Gray-Little:

We recently learned that the Freedom from Religion Foundation (FFRF) wrote you a letter, demanding an investigation into the character coach and chaplain that serves the University of Kansas (KU) basketball team. According to FFRF's misinformation, this chaplain's position and activities violate the First Amendment's Establishment Clause. But in reality, public universities have great leeway in accommodating the religious needs of their students, and providing chaplains is one time-honored and constitutionally permissible method for doing so.

By way of introduction, Alliance Defending Freedom is an alliance-building, non-profit legal organization that advocates for the right of people to live out their faith freely. Among other things, we are dedicated to educating public officials on how the First Amendment commands them to accommodate religion and prohibits them from viewing anything religious with a jaundiced eye (as FFRF so evidently does). We hope that this letter will discharge any concerns and reassure you that KU may work with chaplains to serve the spiritual needs of student athletes.

#### **ANALYSIS**

#### **I. The First Amendment requires government to accommodate religion, and public universities have great latitude in that endeavor.**

FFRF's complaints rest on the so-called "separation of church and state." While the Supreme Court has used the phrase, groups like FFRF have twisted it to suggest that anything remotely religious must be purged from public view. Due to such efforts, "[t]his extra-constitutional construct has grown tiresome. The First Amendment does not demand a wall of separation between church and state."<sup>1</sup> The

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<sup>1</sup> *ACLU of Ky. v. Mercer Cnty.*, 432 F.3d 624, 638 (6th Cir. 2005).

oft-repeated “misleading metaphor”<sup>2</sup> does not appear *anywhere* in the Constitution or the debates surrounding it.<sup>3</sup> The Supreme Court and Tenth Circuit have made it clear that the Constitution “do[es] not call for total separation between church and state.”<sup>4</sup> Rather, the Establishment Clause “affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.”<sup>5</sup> It merely “requires the state to be a neutral in its relations with . . . religious believers and non-believers; it does not require the state to be their adversary.”<sup>6</sup> Thus, it certainly does not require government entities to dissociate themselves from everything religious.

By relying primarily on elementary and high school cases, FFRF ignores the fact that federal courts allow universities much greater latitude in accommodating religion. For example, the only two federal appellate courts to consider the issue concluded that public universities may constitutionally include clergy-led prayers at their graduation ceremonies.<sup>7</sup> Both courts determined that these prayers serve a secular purpose<sup>8</sup> and observed that the university context primarily involves adults, rendering the public school cases FFRF cites inapplicable.<sup>9</sup> More importantly, both courts ruled that the First Amendment does not require universities to become “religion-free” zones. As the Sixth Circuit observed, “[t]he people of the United States did not adopt the Bill of Rights in order to strip the public square of every last shred of public piety.”<sup>10</sup> The Seventh Circuit agreed, saying these prayers were “simply a tolerable acknowledgment of beliefs widely held among the people of this country.”<sup>11</sup> The Sixth Circuit acknowledged that someone “may f[ind] the prayers offensive, but that reaction, in and of itself, does not make them unconstitutional.”<sup>12</sup> If a university can accommodate religion by including clergy-led prayers in its very public graduation ceremonies, it can certainly accommodate religion by allowing chaplains to serve the spiritual needs of interested student athletes. FFRF may “strenuously oppose[]” this, but that does not make the chaplain position unconstitutional.

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<sup>2</sup> *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting).

<sup>3</sup> *See id.* at 91–114 (Rehnquist, J., dissenting) (tracing debates surrounding the formation and ratification of the First Amendment); *see also* DAVID BARTON, ORIGINAL INTENT: THE COURTS, THE CONSTITUTION, & RELIGION 13, 19–20, 43–48 (2000).

<sup>4</sup> *Friedman v. Bd. of Cnty. Comm’rs of Bernalillo Cnty.*, 781 F.2d 777, 790 (10th Cir. 1985); *accord Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249, 1261 (10th Cir. 2005) (“Total separation between church and state is not possible in an absolute sense.”); *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (“Nor does the Constitution require complete separation of church and state. . .”).

<sup>5</sup> *Lynch*, 465 U.S. at 673.

<sup>6</sup> *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 18 (1947); *see also Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (noting that private religious speech is not a “First Amendment orphan”).

<sup>7</sup> *Tanford v. Brand*, 104 F.3d 982 (7th Cir. 1997); *Chaudhuri v. Tennessee*, 130 F.3d 232 (6th Cir. 1997), *cert. denied* 523 U.S. 1024 (1998).

<sup>8</sup> *Chaudhuri*, 130 F.3d at 236; *Tanford*, 104 F.3d at 986 (citing *Lynch*, 465 U.S. at 693 (O’Connor, J., concurring)).

<sup>9</sup> *Chaudhuri*, 130 F.3d at 237–39; *Tanford*, 104 F.3d at 985–86.

<sup>10</sup> *Chaudhuri*, 130 F.3d at 236.

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<sup>12</sup> *Chaudhuri*, 130 F.3d at 239 (quoting *Lee v. Weisman*, 505 U.S. 577, 597 (1992)).

## II. In a wide variety of situations, the First Amendment allows—and sometimes even requires—the government to provide a chaplain.

When accommodating religion, many public universities work with volunteer chaplains to serve the needs of student athletes who are often consumed with studying, team practice, and team travel. These chaplains serve the spiritual needs of student athletes who cannot attend religious services due to their busy schedules.

No court has ever said that public universities may not utilize chaplains for their athletic teams. In fact, many courts have upheld chaplaincy programs in other similar contexts: the military, prisons, police and fire departments, hospitals, airports, and the legislative branches of government. These courts demonstrate that the government does not violate the Establishment Clause by accommodating the religious needs of its student athletes through a chaplain. In fact, the state may violate the First Amendment by *not* providing chaplains for student athletes. In each of the following examples, courts ruled that the state may provide chaplains.

- **Military chaplains.** Ever since the American Revolution, the military has provided chaplains, and when two students complained about the Army's chaplaincy program in the 1980s, a federal appeals court in New York rejected their complaint and held that the program was constitutional "[s]ince the program [met] the requirement of voluntariness by leaving the practice of religion solely to the individual soldier."<sup>13</sup> The court said the Army chaplaincy program alleviated the unique stresses of military life and provided military personnel Free Exercise of religion in remote locations away from home.<sup>14</sup> And it added, "[i]ndeed, if the Army prevented soldiers from worshipping in their own communities by removing them to areas where religious leaders of their persuasion and facilities were not available it could be accused of violating the Establishment Clause unless it provided them with a chaplaincy. . . ."<sup>15</sup>
- **Prison chaplains.** Prisons may also provide chaplains to inmates. In 2000, Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA) to provide prisoners more religious liberty protections,<sup>16</sup> and the Supreme Court upheld it under the Establishment Clause.<sup>17</sup> Prison chaplains, like military chaplains, protect the religious liberty of "institutionalized persons who are unable freely to attend to their religious needs."<sup>18</sup>
- **Hospital chaplains.** Government-operated hospitals may hire paid chap-

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<sup>13</sup> *Katcoff v. Marsh*, 755 F.2d 223, 225, 231–32 (2d Cir. 1985).

<sup>14</sup> *Id.* at 228, 232, 235.

<sup>15</sup> *Id.* at 232.

<sup>16</sup> 42 U.S.C. § 2000cc.

<sup>17</sup> *Cutter*, 544 U.S. at 713.

<sup>18</sup> *Id.* at 721 & 722.

lains without violating the Establishment Clause.<sup>19</sup> These chaplains provided grief counseling and related services. They also walked a careful line between providing religious instruction when asked and refraining from doing so when not asked. And the state hospital actually reduced its entanglement with religion by providing chaplains to meet patients' religious needs.<sup>20</sup>

- **Police department chaplains.** Local municipalities may provide chaplains to their police force. The Washington Supreme Court said that these chaplains are constitutional when they provide broad-based counseling to officers of all religions or no religion at all.<sup>21</sup> But a police department may violate the Establishment Clause if it pays a chaplain to serve only one faith group.<sup>22</sup>
- **Airport chapels.** Without much comment, a federal court in New York noted that government-operated airports may provide religious chapels for the public to accommodate travelers without violating any constitutional principle.<sup>23</sup>
- **Legislative chaplains.** Finally, the Supreme Court recently ruled that opening meetings of government bodies with prayer is constitutional,<sup>24</sup> reaffirming a doctrine it declared more than thirty years ago when it upheld the use of chaplains in state legislatures.<sup>25</sup>

Simply put, no court has ever declared that public universities may not provide chaplains for student athletes. In similar contexts, the law protects the state's ability to use chaplains. Key factors to look for are (1) whether the chaplains serve students who are engaged in athletic programs that disable them from participating freely in religious practices on their own time; (2) whether the chaplains provide resources to all religious faiths; and (3) whether the chaplain's programs are voluntary, allowing students to opt-out.

Mr. Simien's involvement with KU's athletic teams appears to tick all of those boxes. Many of KU's student athletes are consumed with busy practice and studying schedules. They travel often, especially on weekends, and do not have adequate access to religious services on weekends. Student athletes, like "[p]atients in public hospitals, members of the armed forces in some circumstances . . . and prisoners . . . have restricted or even no access to religious services unless government takes an active role in supplying those services."<sup>26</sup>

Mr. Simien appears to provide resources to student athletes of all faiths. He ap-

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<sup>19</sup> *Carter v. Broadlawns Med. Ctr.*, 857 F.2d 448 (8th Cir. 1988).

<sup>20</sup> *Id.* at 454–56.

<sup>21</sup> *Malyon v. Pierce Cnty.*, 935 P.2d 1272, 1275, 1286, 1288 (Wash. 1997) (en banc).

<sup>22</sup> *Voswinkel v. City of Charlotte*, 495 F. Supp. 588 (W.D.N.C. 1980).

<sup>23</sup> *Brashich v. Port Auth. of N.Y. & N.J.*, 484 F. Supp. 697, 698–99, 703 (S.D.N.Y. 1979).

<sup>24</sup> *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014).

<sup>25</sup> *Marsh*, 463 U.S. 783.

<sup>26</sup> *Johnson-Bey v. Lane*, 863 F.2d 1308, 1312 (7th Cir. 1988).

pears willing to counsel and advise any student and to find a local religious leader to advise a student on a particular faith if he is unable to do so.

Of course, chaplains provided by public universities may run into trouble if student athletes are required to attend the religious events.<sup>27</sup> FFRF places great stock in *Mellen v. Bunting*, but there, VMI cadets said prayers every day at supper and had no ability to opt out.<sup>28</sup> As long as KU does not require student athletes to participate in religious exercises, *Mellen* does not apply, and KU's chaplain program does not run afoul of the Establishment Clause's ban on mandatory religious activities.

### III. The Constitution does not prohibit religious organizations from promoting or discussing their religious beliefs.

FFRF dedicates considerable energy to proving the obvious: an organization that helps provide and train chaplains has religious objectives and motivations. From this, it insinuates that KU would violate the Establishment Clause if it has anything to do with such an organization. But in so doing, FFRF merely repeats an argument that federal courts have repeatedly rejected.

In 2005, the Tenth Circuit ruled that "a governmental action is not 'unconstitutional simply because it *allows* churches to advance religion, which is their very purpose,"<sup>29</sup> a conclusion other federal courts had previously reached.<sup>30</sup> The Seventh Circuit explained this principle by saying that a government action did not violate the Establishment Clause "merely because [it] has the indirect effect of making it easier for people to practice their faith."<sup>31</sup> The Eighth Circuit similarly ruled that "[t]he mere fact a government body takes action that coincides with the . . . desires of a particular religious group . . . does not transform the action into an impermissible establishment of religion,"<sup>32</sup> and again, the Tenth Circuit reached a similar conclusion.<sup>33</sup> The Supreme Court validated these decisions when it ruled in 2005 that "[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause."<sup>34</sup> Indeed, Justice

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<sup>27</sup> See *Mellen v. Bunting*, 327 F.3d 355, 370 (4th Cir. 2003) (finding supper prayers at Virginia Military Institute were unconstitutional because there was no ability to opt-out); *Anderson v. Laird*, 466 F.2d 283 (D.C. Cir. 1972) (striking down a mandatory chapel attendance requirement at the military academies).

<sup>28</sup> *Mellen*, 327 F.3d at 370.

<sup>29</sup> *Utah Gospel Mission*, 425 F.3d at 1260 (quoting *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 337 (1987)).

<sup>30</sup> *Cohen v. City of Des Plaines*, 8 F.3d 484, 491 (7th Cir. 1993) (quoting *Amos*, 483 U.S. at 337); *Forest Hills Early Learning Ctr., Inc. v. Grace Baptist Church*, 846 F.2d 260, 263 (4th Cir. 1988) (quoting *Amos*, 483 U.S. at 337).

<sup>31</sup> *Bridenbaugh v. O'Bannon*, 185 F.3d 796, 801-02 (7th Cir. 1999).

<sup>32</sup> *Clayton by Clayton v. Place*, 884 F.2d 376, 380 (8th Cir. 1989); accord *Stark v. Indep. Sch. Dist., No. 640*, 123 F.3d 1068, 1074-76 (8th Cir. 1997) (ruling that "the fact that the [school] district's actions"—opening a public school and granting certain exemptions—"coincide with the [religiously-motivated] desires of certain parents does not mean that the Establishment Clause has been violated." (citing *Clayton*, 884 F.2d at 380)).

<sup>33</sup> *Bauchman for Bauchman v. W. High Sch.*, 132 F.3d 542, 555 (10th Cir. 1997) (finding no Establishment Clause violation when high school choir used songs and venues that "may coincide with religious beliefs different from those of [the plaintiff]").

<sup>34</sup> *Van Orden v. Perry*, 545 U.S. 677, 690 (2005); accord *ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d

Breyer warned that “the Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious.”<sup>35</sup> Hence, the mere fact that a religious organization expresses its religious mission does not mean that KU is violating the First Amendment by allowing a chaplain to serve the spiritual needs of interested student athletes.

#### **IV. It is the FFRF’s demands that actually violate the First Amendment.**

The FFRF is demanding that KU investigate and then discontinue its chaplain simply because he is religious, engages in religious expression, and associates with a religious organization. It is this demand that violates the First Amendment. It is well-established that government discrimination against certain viewpoints, including religious ones, is unconstitutional.<sup>36</sup> And the Establishment Clause “forbids hostility toward any [religion].”<sup>37</sup> As a private organization, FFRF is free to express its hostility towards religious people and their beliefs, but as a public university, KU is constitutionally prohibited from adopting FFRF’s views.

#### CONCLUSION

Student athletes, by the nature of their activity, face some of the same obstacles to free exercise faced by military members, prisoners, police officers, and hospital and airport patrons. As they strive to represent their school honorably and adeptly, they may be on the road frequently, and often on the weekends during designated days of worship. Whether training, competing, riding a team bus, or stuck at a hotel, the athletes’ First Amendment right to freely exercise their religious beliefs is hindered in their service to a state institution. A public university’s appointment of chaplains to accommodate the religious worship of athletic team members is permissible, and may even be mandated, depending on the demands of a student athlete’s schedule.

Though athletes, unlike prisoners, participate voluntarily (more like soldiers and firemen), it would be ludicrous to force an athlete to choose between playing sports and exercising his religious rights. Though the burden imposed by the state upon the student-athlete is freely taken, it remains a state-imposed burden that chaplains may alleviate. This kind of accommodation has consistently been upheld in the multi-faith environment of prisons. If prisoners receive this accommodation, student athletes should as well.

Chaplains are not merely pre-game prayer leaders. They are life counselors and community and family liaisons. While their viewpoints, when espoused, may share

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772, 778 (8th Cir. 2005).

<sup>35</sup> *Van Orden*, 545 U.S. at 699 (Breyer, J. concurring).

<sup>36</sup> *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829, 831 (1995).

<sup>37</sup> *See, e.g., Lynch*, 465 U.S. at 673 (noting that the Establishment Clause “affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any”); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 108 (2001) (noting that government hostility toward religion is just as forbidden as religious endorsement); *Rosenberger*, 515 U.S. at 846 (“[F]ostering a pervasive bias or hostility to religion . . . undermine[s] the very neutrality the Establishment Clause requires.”).

a particular religious view, the athletic team chaplains serve important secular purposes. So long as a public university does not require student athletes to participate in religious exercises provided by chaplains, and so long as those chaplains serve the various faith needs of the students, the university does not violate the Establishment Clause by coercing participation in religion or preferring some religions over others.

Hopefully these principles will assist you in deflecting FFRF's criticism of KU's association with chaplains like Mr. Simien. If you have any questions or wish to discuss this further, please do not hesitate to contact us.

Sincerely,



Travis Christopher Barham  
Legal Counsel  
ALLIANCE DEFENDING FREEDOM

Cc:

- Mr. Richard W. Morefield, Esq. at [r.morefield@msblawkc.com](mailto:r.morefield@msblawkc.com)
- Mr. Philip Ridenour, Esq. at [ridelaw@ucom.net](mailto:ridelaw@ucom.net)





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**Via U.S. Mail & Electronic Mail**  
**at [cmoffice@louisville.edu](mailto:cmoffice@louisville.edu)**

Dr. James R. Ramsey  
Office of the President  
Grawemeyer Hall  
University of Louisville  
Louisville, Kentucky 40292

***Re: Chaplains for the University of Louisville Basketball Team***

Dear President Ramsey:

We recently learned that the Freedom from Religion Foundation (FFRF) wrote you a letter, demanding an investigation into the chaplain that serves the University of Louisville basketball team. According to FFRF's misinformation, this chaplain's position and activities violate the First Amendment's Establishment Clause. But in reality, public universities have great leeway in accommodating the religious needs of their students, and providing chaplains is one time-honored and constitutionally permissible method for doing so.

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#### **ANALYSIS**

**I. The First Amendment requires government to accommodate religion, and public universities have great latitude in that endeavor.**

FFRF's complaints rest on the so-called "separation of church and state." While the Supreme Court has used the phrase, groups like FFRF have twisted it to suggest that anything remotely religious must be purged from public view. Due to such efforts, the Sixth Circuit has ruled that "[t]his extra-constitutional construct has grown tiresome. The First Amendment does not demand a wall of separation be-



tween church and state.”<sup>1</sup> The oft-repeated “misleading metaphor”<sup>2</sup> does not appear *anywhere* in the Constitution or the debates surrounding it.<sup>3</sup> The Supreme Court and Tenth Circuit have made it clear that the Constitution “do[es] not call for total separation between church and state.”<sup>4</sup> Rather, the Establishment Clause “affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.”<sup>5</sup> It merely “requires the state to be a neutral in its relations with . . . religious believers and non-believers; it does not require the state to be their adversary.”<sup>6</sup> Thus, it certainly does not require government entities to dissociate themselves from everything religious.

By relying primarily on elementary and high school cases, FFRF ignores the fact that federal courts allow universities much greater latitude in accommodating religion. For example, the only two federal appellate courts to consider the issue concluded that public universities may constitutionally include clergy-led prayers at their graduation ceremonies.<sup>7</sup> Both courts determined that these prayers serve a secular purpose<sup>8</sup> and observed that the university context primarily involves adults, rendering the public school cases FFRF cites inapplicable.<sup>9</sup> More importantly, both courts ruled that the First Amendment does not require universities to become “religion-free” zones. As the Sixth Circuit observed, “[t]he people of the United States did not adopt the Bill of Rights in order to strip the public square of every last shred of public piety.”<sup>10</sup> The Seventh Circuit agreed, saying these prayers were “simply a tolerable acknowledgment of beliefs widely held among the people of this country.”<sup>11</sup> The Sixth Circuit acknowledged that someone “may [find] the prayers offensive, but that reaction, in and of itself, does not make them unconstitutional.”<sup>12</sup> If a university can accommodate religion by including clergy-led prayers in its very public graduation ceremonies, it can certainly accommodate religion by allowing chaplains

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to serve the spiritual needs of interested student athletes. FFRF may “strenuously oppose[]” this, but that does not make the chaplain position unconstitutional.

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<sup>16</sup> *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005).

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like military chaplains, protect the religious liberty of “institutionalized persons who are unable freely to attend to their religious needs.”<sup>19</sup>

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tice and studying schedules. They travel often, especially on weekends, and do not have adequate access to religious services on weekends. Student athletes, like “[p]atients in public hospitals, members of the armed forces in some circumstances . . . and prisoners . . . have restricted or even no access to religious services unless government takes an active role in supplying those services.”<sup>27</sup>

Father Bradley appears to provide resources to student athletes of all faiths. He appears willing to counsel and advise any student and to find a local religious leader to advise a student on a particular faith if he is unable to do so.

Of course, chaplains provided by public universities may run into trouble if student athletes are required to attend the religious events.<sup>28</sup> FFRF places great stock in *Mellen v. Bunting*, but there, VMI cadets said prayers every day at supper and had no ability to opt out.<sup>29</sup> As long as the University does not require student athletes to participate in religious exercises, *Mellen* does not apply, and its chaplain program does not run afoul of the Establishment Clause’s ban on mandatory religious activities.

### CONCLUSION

Student athletes, by the nature of their activity, face some of the same obstacles to free exercise faced by military members, prisoners, police officers, and hospital and airport patrons. As they strive to represent their school honorably and adeptly, they may be on the road frequently, and often on the weekends during designated days of worship. Whether training, competing, riding a team bus, or stuck at a hotel, the athletes’ First Amendment right to freely exercise their religious beliefs is hindered in their service to a state institution. A public university’s appointment of chaplains to accommodate the religious worship of athletic team members is permissible, and may even be mandated, depending on the demands of a student athlete’s schedule.

Though athletes, unlike prisoners, participate voluntarily (more like soldiers and firemen), it would be ludicrous to force an athlete to choose between playing sports and exercising his religious rights. Though the burden imposed by the state upon the student-athlete is freely taken, it remains a state-imposed burden that chaplains may alleviate. This kind of accommodation has consistently been upheld in the multi-faith environment of prisons. If prisoners receive this accommodation, student athletes should as well.

Chaplains are not merely pre-game prayer leaders. They are life counselors and community and family liaisons. While their viewpoints, when espoused, may share

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<sup>27</sup> *Johnson-Bey v. Lane*, 863 F.2d 1308, 1312 (7th Cir. 1988).

<sup>28</sup> See *Mellen v. Bunting*, 327 F.3d 355, 370 (4th Cir. 2003) (finding supper prayer at Virginia Military Institute were unconstitutional because there was no ability to opt-out); *Anderson v. Laird*, 466 F.2d 283 (D.C. Cir. 1972) (striking down a mandatory chapel attendance requirement at the military academies).

<sup>29</sup> *Mellen*, 327 F.3d at 370.

Dr. James R. Ramsey  
April 2, 2015  
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a particular religious view, the athletic team chaplains serve important secular purposes. So long as a public university does not require student athletes to participate in religious exercises provided by chaplains, and so long as those chaplains serve the various faith needs of the students, the university does not violate the Establishment Clause by coercing participation in religion or preferring some religions over others.

Hopefully these principles will assist you in deflecting FFRF's criticism of the University's association with chaplains like Father Bradley. If you have any questions or wish to discuss this further, please do not hesitate to contact us.

Sincerely,



Travis Christopher Barham  
Legal Counsel  
ALLIANCE DEFENDING FREEDOM

Cc:

- Mr. Aaron J. Silletto, Esq. at [asilletto@goldbergsimpson.com](mailto:asilletto@goldbergsimpson.com)
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April 2, 2015

**Via U.S. Mail & Electronic Mail**  
**at president@umd.edu**

Dr. Wallace Loh  
Office of the President  
University of Maryland  
1101 Main Administration Building  
College Park, Maryland 20742

***Re: Chaplains for the University of Maryland Basketball Team***

Dear President Loh:

We recently learned that the Freedom from Religion Foundation (FFRF) wrote you a letter, demanding an investigation into the character coach and chaplain that serves the University of Maryland basketball team. According to FFRF's misinformation, this chaplain's position and activities violate the First Amendment's Establishment Clause. But in reality, public universities have great leeway in accommodating the religious needs of their students, and providing chaplains is one time-honored and constitutionally permissible method for doing so.

By way of introduction, Alliance Defending Freedom is an alliance-building, non-profit legal organization that advocates for the right of people to live out their faith freely. Among other things, we are dedicated to educating public officials on how the First Amendment commands them to accommodate religion and prohibits them from viewing anything religious with a jaundiced eye (as FFRF so evidently does). We hope that this letter will discharge any concerns and reassure you that the University may work with chaplains to serve the spiritual needs of student athletes.

#### **ANALYSIS**

**I. The First Amendment requires government to accommodate religion, and public universities have great latitude in that endeavor.**

FFRF's complaints rest on the so-called "separation of church and state." While the Supreme Court has used the phrase, groups like FFRF have twisted it to suggest that anything remotely religious must be purged from public view. Due to such efforts, "[t]his extra-constitutional construct has grown tiresome. The First Amendment does not demand a wall of separation between church and state."<sup>1</sup> The

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<sup>1</sup> *ACLU of Ky. v. Mercer Cnty.*, 432 F.3d 624, 638 (6th Cir. 2005).

oft-repeated “misleading metaphor”<sup>2</sup> does not appear *anywhere* in the Constitution or the debates surrounding it.<sup>3</sup> The Supreme Court and Fourth Circuit have made it clear that the Constitution “does not require total separation of Church and State.”<sup>4</sup> Rather, the Establishment Clause “affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.”<sup>5</sup> It merely “requires the state to be a neutral in its relations with . . . religious believers and non-believers; it does not require the state to be their adversary.”<sup>6</sup> Thus, it certainly does not require government entities to dissociate themselves from everything religious.

By relying primarily on elementary and high school cases, FFRF ignores the fact that federal courts allow universities much greater latitude in accommodating religion. For example, the only two federal appellate courts to consider the issue concluded that public universities may constitutionally include clergy-led prayers at their graduation ceremonies.<sup>7</sup> Both courts determined that these prayers serve a secular purpose<sup>8</sup> and observed that the university context primarily involves adults, rendering the public school cases FFRF cites inapplicable.<sup>9</sup> More importantly, both courts ruled that the First Amendment does not require universities to become “religion-free” zones. As the Sixth Circuit observed, “[t]he people of the United States did not adopt the Bill of Rights in order to strip the public square of every last shred of public piety.”<sup>10</sup> The Seventh Circuit agreed, saying these prayers were “simply a tolerable acknowledgment of beliefs widely held among the people of this country.”<sup>11</sup> The Sixth Circuit acknowledged that someone “may f[ind] the prayers offensive, but that reaction, in and of itself, does not make them unconstitutional.”<sup>12</sup> If a university can accommodate religion by including clergy-led prayers in its very public graduation ceremonies, it can certainly accommodate religion by allowing chaplains to serve the spiritual needs of interested student athletes. FFRF may “strenuously oppose[]” this, but that does not make the chaplain position unconstitutional.

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<sup>2</sup> *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting).

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<sup>10</sup> *Chaudhuri*, 130 F.3d at 236.

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## II. In a wide variety of situations, the First Amendment allows—and sometimes even requires—the government to provide a chaplain.

When accommodating religion, many public universities work with volunteer chaplains to serve the needs of student athletes who are often consumed with studying, team practice, and team travel. These chaplains serve the spiritual needs of student athletes who cannot attend religious services due to their busy schedules.

No court has ever said that public universities may not utilize chaplains for their athletic teams. In fact, many courts have upheld chaplaincy programs in other similar contexts: the military, prisons, police and fire departments, hospitals, airports, and the legislative branches of government. These courts demonstrate that the government does not violate the Establishment Clause by accommodating the religious needs of its student athletes through a chaplain. In fact, the state may violate the First Amendment by *not* providing chaplains for student athletes. In each of the following examples, courts ruled that the state may provide chaplains.

- **Military chaplains.** Ever since the American Revolution, the military has provided chaplains, and when two students complained about the Army's chaplaincy program in the 1980s, a federal appeals court in New York rejected their complaint and held that the program was constitutional "[s]ince the program [met] the requirement of voluntariness by leaving the practice of religion solely to the individual soldier."<sup>13</sup> The court said the Army chaplaincy program alleviated the unique stresses of military life and provided military personnel Free Exercise of religion in remote locations away from home.<sup>14</sup> And it added, "[i]ndeed, if the Army prevented soldiers from worshipping in their own communities by removing them to areas where religious leaders of their persuasion and facilities were not available it could be accused of violating the Establishment Clause unless it provided them with a chaplaincy. . . ."<sup>15</sup>
- **Prison chaplains.** Prisons may also provide chaplains to inmates.<sup>16</sup> In 2000, Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA) to provide prisoners more religious liberty protections,<sup>17</sup> and the Supreme Court upheld it under the Establishment Clause.<sup>18</sup> Prison chaplains, like military chaplains, protect the religious liberty of "institutionalized persons who are unable freely to attend to their religious needs."<sup>19</sup>
- **Hospital chaplains.** Government-operated hospitals may hire paid chap-

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<sup>13</sup> *Katcoff v. Marsh*, 755 F.2d 223, 225, 231–32 (2d Cir. 1985).

<sup>14</sup> *Id.* at 228, 232, 235.

<sup>15</sup> *Id.* at 231–32.

<sup>16</sup> *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005).

<sup>17</sup> 42 U.S.C. § 2000cc.

<sup>18</sup> *Cutter*, 544 U.S. at 713.

<sup>19</sup> *Id.* at 721 & 722.

lains without violating the Establishment Clause.<sup>20</sup> These chaplains provided grief counseling and related services. They also walked a careful line between providing religious instruction when asked and refraining from doing so when not asked. And the state hospital actually reduced its entanglement with religion by providing chaplains to meet patients' religious needs.<sup>21</sup>

- **Police department chaplains.** Local municipalities may provide chaplains to their police force. The Washington Supreme Court said that these chaplains are constitutional when they provide broad-based counseling to officers of all religions or no religion at all.<sup>22</sup> But a police department may violate the Establishment Clause if it pays a chaplain to serve only one faith group.<sup>23</sup>
- **Airport chapels.** Without much comment, a federal court in New York noted that government-operated airports may provide religious chapels for the public to accommodate travelers without violating any constitutional principle.<sup>24</sup>
- **Legislative chaplains.** Finally, the Supreme Court recently ruled that opening meetings of government bodies with prayer is constitutional,<sup>25</sup> reaffirming a doctrine it declared more than thirty years ago when it upheld the use of chaplains in state legislatures.<sup>26</sup>

Simply put, no court has ever declared that public universities may not provide chaplains for student athletes. In similar contexts, the law protects the state's ability to use chaplains. Key factors to look for are (1) whether the chaplains serve students who are engaged in athletic programs that disable them from participating freely in religious practices on their own time; (2) whether the chaplains provide resources to all religious faiths; and (3) whether the chaplain's programs are voluntary, allowing students to opt-out.

Mr. Jones' involvement with the University's athletic teams appears to tick all of those boxes. Many of your student athletes are consumed with busy practice and studying schedules. They travel often, especially on weekends, and do not have adequate access to religious services on weekends. Student athletes, like "[p]atients in public hospitals, members of the armed forces in some circumstances . . . and prisoners . . . have restricted or even no access to religious services unless government takes an active role in supplying those services."<sup>27</sup>

Mr. Jones appears to provide resources to student athletes of all faiths. He

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<sup>20</sup> *Carter v. Broadlawns Med. Ctr.*, 857 F.2d 448 (8th Cir. 1988).

<sup>21</sup> *Id.* at 454–56.

<sup>22</sup> *Malyon v. Pierce Cnty.*, 935 P.2d 1272, 1275, 1286, 1288 (Wash. 1997) (en banc).

<sup>23</sup> *Voswinkel v. City of Charlotte*, 495 F. Supp. 588 (W.D.N.C. 1980).

<sup>24</sup> *Brashich v. Port Auth. of N.Y. & N.J.*, 484 F. Supp. 697, 698–99, 703 (S.D.N.Y. 1979).

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Of course, chaplains provided by public universities may run into trouble if student athletes are required to attend the religious events.<sup>28</sup> FFRF places great stock in *Mellen v. Bunting*, but there, VMI cadets said prayers every day at supper and had no ability to opt out.<sup>29</sup> As long as the University does not require student athletes to participate in religious exercises, *Mellen* does not apply, and its chaplain program does not run afoul of the Establishment Clause's ban on mandatory religious activities.

### III. The Constitution does not prohibit religious organizations from promoting or discussing their religious beliefs.

FFRF dedicates considerable energy to proving the obvious: an organization that helps provide and train chaplains has religious objectives and motivations. From this, it insinuates that the University would violate the Establishment Clause if it has anything to do with such an organization. But in so doing, FFRF merely repeats an argument that federal courts have repeatedly rejected.

In 1988, the Fourth Circuit ruled that a governmental action "is not 'unconstitutional simply because it *allows* churches to advance religion, which is their very purpose,"<sup>30</sup> a conclusion other federal courts had previously reached.<sup>31</sup> The Seventh Circuit explained this principle by saying that a government action did not violate the Establishment Clause "merely because [it] has the indirect effect of making it easier for people to practice their faith."<sup>32</sup> The Eighth Circuit similarly ruled that "[t]he mere fact a government body takes action that coincides with the . . . desires of a particular religious group . . . does not transform the action into an impermissible establishment of religion."<sup>33</sup> The Supreme Court validated these decisions when it ruled in 2005 that "[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause."<sup>34</sup> Indeed, Justice Breyer warned that "the Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the reli-

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<sup>28</sup> See *Mellen v. Bunting*, 327 F.3d 355, 370 (4th Cir. 2003) (finding supper prayers at Virginia Military Institute were unconstitutional because there was no ability to opt-out); *Anderson v. Laird*, 466 F.2d 283 (D.C. Cir. 1972) (striking down a mandatory chapel attendance requirement at the military academies).

<sup>29</sup> *Mellen*, 327 F.3d at 370.

<sup>30</sup> *Forest Hills Early Learning Ctr., Inc. v. Grace Baptist Church*, 846 F.2d 260, 263 (4th Cir. 1988) (quoting *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 337 (1987)).

<sup>31</sup> *Cohen v. City of Des Plaines*, 8 F.3d 484, 491 (7th Cir. 1993) (quoting *Amos*, 483 U.S. at 337); *Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249, 1260 (10th Cir. 2005) (quoting *Amos*, 483 U.S. at 337).

<sup>32</sup> *Bridenbaugh v. O'Bannon*, 185 F.3d 796, 801–02 (7th Cir. 1999).

<sup>33</sup> *Clayton by Clayton v. Place*, 884 F.2d 376, 380 (8th Cir. 1989); accord *Stark v. Indep. Sch. Dist., No. 640*, 123 F.3d 1068, 1074–76 (8th Cir. 1997) (ruling that "the fact that the [school] district's actions"—opening a public school and granting certain exemptions—"coincide with the [religiously-motivated] desires of certain parents does not mean that the Establishment Clause has been violated." (citing *Clayton*, 884 F.2d at 380)).

<sup>34</sup> *Van Orden v. Perry*, 545 U.S. 677, 690 (2005); accord *ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772, 778 (8th Cir. 2005).

gious.”<sup>35</sup> Hence, the mere fact that a religious organization expresses its religious mission does not mean that the University is violating the First Amendment by allowing a chaplain to serve the spiritual needs of interested student athletes.

#### **IV. It is the FFRF’s demands that actually violate the First Amendment.**

The FFRF is demanding that the University investigate and then discontinue its chaplain simply because he is religious, engages in religious expression, and associates with a religious organization. It is this demand that violates the First Amendment. It is well-established that government discrimination against certain viewpoints, including religious ones, is unconstitutional.<sup>36</sup> And the Establishment Clause “forbids hostility toward any [religion].”<sup>37</sup> As a private organization, FFRF is free to express its hostility towards religious people and their beliefs, but a public university is constitutionally prohibited from adopting FFRF’s views.

#### **CONCLUSION**

Student athletes, by the nature of their activity, face some of the same obstacles to free exercise faced by military members, prisoners, police officers, and hospital and airport patrons. As they strive to represent their school honorably and adeptly, they may be on the road frequently, and often on the weekends during designated days of worship. Whether training, competing, riding a team bus, or stuck at a hotel, the athletes’ First Amendment right to freely exercise their religious beliefs is hindered in their service to a state institution. A public university’s appointment of chaplains to accommodate the religious worship of athletic team members is permissible, and may even be mandated, depending on the demands of a student athlete’s schedule.

Though athletes, unlike prisoners, participate voluntarily (more like soldiers and firemen), it would be ludicrous to force an athlete to choose between playing sports and exercising his religious rights. Though the burden imposed by the state upon the student-athlete is freely taken, it remains a state-imposed burden that chaplains may alleviate. This kind of accommodation has consistently been upheld in the multi-faith environment of prisons. If prisoners receive this accommodation, student athletes should as well.

Chaplains are not merely pre-game prayer leaders. They are life counselors and community and family liaisons. While their viewpoints, when espoused, may share a particular religious view, the athletic team chaplains serve important secular purposes. So long as a public university does not require student athletes to participate in religious exercises provided by chaplains, and so long as those chaplains

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<sup>35</sup> *Van Orden*, 545 U.S. at 699 (Breyer, J. concurring).

<sup>36</sup> *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829, 831 (1995).

<sup>37</sup> *See, e.g., Lynch*, 465 U.S. at 673 (noting that the Establishment Clause “affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any”); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 108 (2001) (noting that government hostility toward religion is just as forbidden as religious endorsement); *Rosenberger*, 515 U.S. at 846 (“[F]ostering a pervasive bias or hostility to religion . . . undermine[s] the very neutrality the Establishment Clause requires.”).

serve the various faith needs of the students, the university does not violate the Establishment Clause by coercing participation in religion or preferring some religions over others.

Hopefully these principles will assist you in deflecting FFRF's criticism of the University's association with chaplains like Mr. Jones. If you have any questions or wish to discuss this further, please do not hesitate to contact us.

Sincerely,



Travis Christopher Barham  
Legal Counsel  
ALLIANCE DEFENDING FREEDOM

Cc:

- Mr. Charles E. Lohmeyer, Esq. at celohmeyer.esq@gmail.com
- Mr. Steven L. Tiedemann, Esq. at steve@hardhatlegal.com



April 2, 2015

**Via U.S. Mail & Electronic Mail**  
**at nan9k@virginia.edu & sgh4c@virginia.edu**

Dr. Teresa Sullivan  
Office of the President  
University of Virginia  
P.O. Box 400224  
Charlottesville, Virginia 22904

***Re: Chaplains for the University of Virginia Basketball Team***

Dear President Sullivan:

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#### **ANALYSIS**

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By relying primarily on elementary and high school cases, FFRF ignores the fact that federal courts allow universities much greater latitude in accommodating religion. For example, the only two federal appellate courts to consider the issue concluded that public universities may constitutionally include clergy-led prayers at their graduation ceremonies.<sup>7</sup> Both courts determined that these prayers serve a secular purpose<sup>8</sup> and observed that the university context primarily involves adults, rendering the public school cases FFRF cites inapplicable.<sup>9</sup> More importantly, both courts ruled that the First Amendment does not require universities to become “religion-free” zones. As the Sixth Circuit observed, “[t]he people of the United States did not adopt the Bill of Rights in order to strip the public square of every last shred of public piety.”<sup>10</sup> The Seventh Circuit agreed, saying these prayers were “simply a tolerable acknowledgment of beliefs widely held among the people of this country.”<sup>11</sup> The Sixth Circuit acknowledged that someone “may [find] the prayers offensive, but that reaction, in and of itself, does not make them unconstitutional.”<sup>12</sup> If a university can accommodate religion by including clergy-led prayers in its very public graduation ceremonies, it can certainly accommodate religion by allowing chaplains to serve the spiritual needs of interested student athletes. FFRF may “strenuously oppose[]” this, but that does not make the chaplain position unconstitutional.

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<sup>14</sup> *Id.* at 228, 232, 235.

<sup>15</sup> *Id.* at 231–32.

<sup>16</sup> *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005).

<sup>17</sup> 42 U.S.C. § 2000cc.

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lains without violating the Establishment Clause.<sup>20</sup> These chaplains provided grief counseling and related services. They also walked a careful line between providing religious instruction when asked and refraining from doing so when not asked. And the state hospital actually reduced its entanglement with religion by providing chaplains to meet patients' religious needs.<sup>21</sup>

- **Police department chaplains.** Local municipalities may provide chaplains to their police force. The Washington Supreme Court said that these chaplains are constitutional when they provide broad-based counseling to officers of all religions or no religion at all.<sup>22</sup> But a police department may violate the Establishment Clause if it pays a chaplain to serve only one faith group.<sup>23</sup>
- **Airport chapels.** Without much comment, a federal court in New York noted that government-operated airports may provide religious chapels for the public to accommodate travelers without violating any constitutional principle.<sup>24</sup>
- **Legislative chaplains.** Finally, the Supreme Court recently ruled that opening meetings of government bodies with prayer is constitutional,<sup>25</sup> reaffirming a doctrine it declared more than thirty years ago when it upheld the use of chaplains in state legislatures.<sup>26</sup>

Simply put, no court has ever declared that public universities may not provide chaplains for student athletes. In similar contexts, the law protects the state's ability to use chaplains. Key factors to look for are (1) whether the chaplains serve students who are engaged in athletic programs that disable them from participating freely in religious practices on their own time; (2) whether the chaplains provide resources to all religious faiths; and (3) whether the chaplain's programs are voluntary, allowing students to opt-out.

Mr. Soucie's involvement with the University's athletic teams appears to tick all of those boxes. Many of your student athletes are consumed with busy practice and studying schedules. They travel often, especially on weekends, and do not have adequate access to religious services on weekends. Student athletes, like "[p]atients in public hospitals, members of the armed forces in some circumstances . . . and prisoners . . . have restricted or even no access to religious services unless government takes an active role in supplying those services."<sup>27</sup>

Mr. Soucie appears to provide resources to student athletes of all faiths. He

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Of course, chaplains provided by public universities may run into trouble if student athletes are required to attend the religious events.<sup>28</sup> FFRF places great stock in *Mellen v. Bunting*, but there, VMI cadets said prayers every day at supper and had no ability to opt out.<sup>29</sup> As long as the University does not require student athletes to participate in religious exercises, *Mellen* does not apply, and its chaplain program does not run afoul of the Establishment Clause's ban on mandatory religious activities.

### III. The Constitution does not prohibit religious organizations from promoting or discussing their religious beliefs.

FFRF dedicates considerable energy to proving the obvious: an organization that helps provide and train chaplains has religious objectives and motivations. From this, it insinuates that the University would violate the Establishment Clause if it has anything to do with such an organization. But in so doing, FFRF merely repeats an argument that federal courts have repeatedly rejected.

In 1988, the Fourth Circuit ruled that a governmental action "is not 'unconstitutional simply because it *allows* churches to advance religion, which is their very purpose,"<sup>30</sup> a conclusion other federal courts had previously reached.<sup>31</sup> The Seventh Circuit explained this principle by saying that a government action did not violate the Establishment Clause "merely because [it] has the indirect effect of making it easier for people to practice their faith."<sup>32</sup> The Eighth Circuit similarly ruled that "[t]he mere fact a government body takes action that coincides with the . . . desires of a particular religious group . . . does not transform the action into an impermissible establishment of religion."<sup>33</sup> The Supreme Court validated these decisions when it ruled in 2005 that "[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause."<sup>34</sup> Indeed, Justice Breyer warned that "the Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the reli-

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gious.”<sup>35</sup> Hence, the mere fact that a religious organization expresses its religious mission does not mean that the University is violating the First Amendment by allowing a chaplain to serve the spiritual needs of interested student athletes.

#### **IV. It is the FFRF’s demands that actually violate the First Amendment.**

The FFRF is demanding that the University investigate and then discontinue its chaplain simply because he is religious, engages in religious expression, and associates with a religious organization. It is this demand that violates the First Amendment. It is well-established that government discrimination against certain viewpoints, including religious ones, is unconstitutional.<sup>36</sup> And the Establishment Clause “forbids hostility toward any [religion].”<sup>37</sup> As a private organization, FFRF is free to express its hostility towards religious people and their beliefs, but a public university is constitutionally prohibited from adopting FFRF’s views.

#### **CONCLUSION**

Student athletes, by the nature of their activity, face some of the same obstacles to free exercise faced by military members, prisoners, police officers, and hospital and airport patrons. As they strive to represent their school honorably and adeptly, they may be on the road frequently, and often on the weekends during designated days of worship. Whether training, competing, riding a team bus, or stuck at a hotel, the athletes’ First Amendment right to freely exercise their religious beliefs is hindered in their service to a state institution. A public university’s appointment of chaplains to accommodate the religious worship of athletic team members is permissible, and may even be mandated, depending on the demands of a student athlete’s schedule.

Though athletes, unlike prisoners, participate voluntarily (more like soldiers and firemen), it would be ludicrous to force an athlete to choose between playing sports and exercising his religious rights. Though the burden imposed by the state upon the student-athlete is freely taken, it remains a state-imposed burden that chaplains may alleviate. This kind of accommodation has consistently been upheld in the multi-faith environment of prisons. If prisoners receive this accommodation, student athletes should as well.

Chaplains are not merely pre-game prayer leaders. They are life counselors and community and family liaisons. While their viewpoints, when espoused, may share a particular religious view, the athletic team chaplains serve important secular purposes. So long as a public university does not require student athletes to participate in religious exercises provided by chaplains, and so long as those chaplains

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<sup>35</sup> *Van Orden*, 545 U.S. at 699 (Breyer, J. concurring).

<sup>36</sup> *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829, 831 (1995).

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Dr. Teresa Sullivan  
April 2, 2015  
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serve the various faith needs of the students, the university does not violate the Establishment Clause by coercing participation in religion or preferring some religions over others.

Hopefully these principles will assist you in deflecting FFRF's criticism of the University's association with chaplains like Mr. Soucie. If you have any questions or wish to discuss this further, please do not hesitate to contact us.

Sincerely,



Travis Christopher Barham  
Legal Counsel  
ALLIANCE DEFENDING FREEDOM

Cc:

- Mr. Barry Agnew, Esq. at [bpagnew@arlegalgroup.com](mailto:bpagnew@arlegalgroup.com)
- Ms. Catherine A. Bowers, Esq. at [cmbowers@walkerjoneslaw.com](mailto:cmbowers@walkerjoneslaw.com)



April 2, 2015

**Via U.S. Mail & Electronic Mail**  
**at actionline@ou.edu**

Dr. David L. Boren  
Office of the President  
University of Oklahoma  
Evans Hall Room 110  
660 Parrington Oval  
Norman, Oklahoma 73019

***Re: Chaplains for the University of Oklahoma Basketball Team***

Dear President Boren:

We recently learned that the Freedom from Religion Foundation (FFRF) wrote you a letter, demanding an investigation into the character coach and chaplain that serves the University of Oklahoma (OU) basketball team. According to FFRF's misinformation, this chaplain's position and activities violate the First Amendment's Establishment Clause. But in reality, public universities have great leeway in accommodating the religious needs of their students, and providing chaplains is one time-honored and constitutionally permissible method for doing so.

By way of introduction, Alliance Defending Freedom is an alliance-building, non-profit legal organization that advocates for the right of people to live out their faith freely. Among other things, we are dedicated to educating public officials on how the First Amendment commands them to accommodate religion and prohibits them from viewing anything religious with a jaundiced eye (as FFRF so evidently does). We hope that this letter will discharge any concerns and reassure you that OU may work with chaplains to serve the spiritual needs of student athletes.

#### **ANALYSIS**

#### **I. The First Amendment requires government to accommodate religion, and public universities have great latitude in that endeavor.**

FFRF's complaints rest on the so-called "separation of church and state." While the Supreme Court has used the phrase, groups like FFRF have twisted it to suggest that anything remotely religious must be purged from public view. Due to such efforts, "[t]his extra-constitutional construct has grown tiresome. The First Amendment does not demand a wall of separation between church and state."<sup>1</sup> The

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<sup>1</sup> *ACLU of Ky. v. Mercer Cnty.*, 432 F.3d 624, 638 (6th Cir. 2005).

oft-repeated “misleading metaphor”<sup>2</sup> does not appear *anywhere* in the Constitution or the debates surrounding it.<sup>3</sup> The Supreme Court and Tenth Circuit have made it clear that the Constitution “do[es] not call for total separation between church and state.”<sup>4</sup> Rather, the Establishment Clause “affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.”<sup>5</sup> It merely “requires the state to be a neutral in its relations with . . . religious believers and non-believers; it does not require the state to be their adversary.”<sup>6</sup> Thus, it certainly does not require government entities to dissociate themselves from everything religious.

By relying primarily on elementary and high school cases, FFRF ignores the fact that federal courts allow universities much greater latitude in accommodating religion. For example, the only two federal appellate courts to consider the issue concluded that public universities may constitutionally include clergy-led prayers at their graduation ceremonies.<sup>7</sup> Both courts determined that these prayers serve a secular purpose<sup>8</sup> and observed that the university context primarily involves adults, rendering the public school cases FFRF cites inapplicable.<sup>9</sup> More importantly, both courts ruled that the First Amendment does not require universities to become “religion-free” zones. As the Sixth Circuit observed, “[t]he people of the United States did not adopt the Bill of Rights in order to strip the public square of every last shred of public piety.”<sup>10</sup> The Seventh Circuit agreed, saying these prayers were “simply a tolerable acknowledgment of beliefs widely held among the people of this country.”<sup>11</sup> The Sixth Circuit acknowledged that someone “may f[ind] the prayers offensive, but that reaction, in and of itself, does not make them unconstitutional.”<sup>12</sup> If a university can accommodate religion by including clergy-led prayers in its very public graduation ceremonies, it can certainly accommodate religion by allowing chaplains to serve the spiritual needs of interested student athletes. FFRF may “strenuously oppose[]” this, but that does not make the chaplain position unconstitutional.

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<sup>2</sup> *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting).

<sup>3</sup> *See id.* at 91–114 (Rehnquist, J., dissenting) (tracing debates surrounding the formation and ratification of the First Amendment); *see also* DAVID BARTON, ORIGINAL INTENT: THE COURTS, THE CONSTITUTION, & RELIGION 13, 19–20, 43–48 (2000).

<sup>4</sup> *Friedman v. Bd. of Cnty. Comm’rs of Bernalillo Cnty.*, 781 F.2d 777, 790 (10th Cir. 1985); *accord Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249, 1261 (10th Cir. 2005) (“Total separation between church and state is not possible in an absolute sense.”); *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (“Nor does the Constitution require complete separation of church and state. . .”).

<sup>5</sup> *Lynch*, 465 U.S. at 673.

<sup>6</sup> *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 18 (1947); *see also Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (noting that private religious speech is not a “First Amendment orphan”).

<sup>7</sup> *Tanford v. Brand*, 104 F.3d 982 (7th Cir. 1997); *Chaudhuri v. Tennessee*, 130 F.3d 232 (6th Cir. 1997), *cert. denied* 523 U.S. 1024 (1998).

<sup>8</sup> *Chaudhuri*, 130 F.3d at 236; *Tanford*, 104 F.3d at 986 (citing *Lynch*, 465 U.S. at 693 (O’Connor, J., concurring)).

<sup>9</sup> *Chaudhuri*, 130 F.3d at 237–39; *Tanford*, 104 F.3d at 985–86.

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<sup>12</sup> *Chaudhuri*, 130 F.3d at 239 (quoting *Lee v. Weisman*, 505 U.S. 577, 597 (1992)).



## II. In a wide variety of situations, the First Amendment allows—and sometimes even requires—the government to provide a chaplain.

When accommodating religion, many public universities work with volunteer chaplains to serve the needs of student athletes who are often consumed with studying, team practice, and team travel. These chaplains serve the spiritual needs of student athletes who cannot attend religious services due to their busy schedules.

No court has ever said that public universities may not utilize chaplains for their athletic teams. In fact, many courts have upheld chaplaincy programs in other similar contexts: the military, prisons, police and fire departments, hospitals, airports, and the legislative branches of government. These courts demonstrate that the government does not violate the Establishment Clause by accommodating the religious needs of its student athletes through a chaplain. In fact, the state may violate the First Amendment by *not* providing chaplains for student athletes. In each of the following examples, courts ruled that the state may provide chaplains.

- **Military chaplains.** Ever since the American Revolution, the military has provided chaplains, and when two students complained about the Army's chaplaincy program in the 1980s, a federal appeals court in New York rejected their complaint and held that the program was constitutional "[s]ince the program [met] the requirement of voluntariness by leaving the practice of religion solely to the individual soldier."<sup>13</sup> The court said the Army chaplaincy program alleviated the unique stresses of military life and provided military personnel Free Exercise of religion in remote locations away from home.<sup>14</sup> And it added, "[i]ndeed, if the Army prevented soldiers from worshipping in their own communities by removing them to areas where religious leaders of their persuasion and facilities were not available it could be accused of violating the Establishment Clause unless it provided them with a chaplaincy. . . ."<sup>15</sup>
- **Prison chaplains.** Prisons may also provide chaplains to inmates.<sup>16</sup> In 2000, Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA) to provide prisoners more religious liberty protections,<sup>17</sup> and the Supreme Court upheld it under the Establishment Clause.<sup>18</sup> Prison chaplains, like military chaplains, protect the religious liberty of "institutionalized persons who are unable freely to attend to their religious needs."<sup>19</sup>
- **Hospital chaplains.** Government-operated hospitals may hire paid chap-

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a particular religious view, the athletic team chaplains serve important secular purposes. So long as a public university does not require student athletes to participate in religious exercises provided by chaplains, and so long as those chaplains serve the various faith needs of the students, the university does not violate the Establishment Clause by coercing participation in religion or preferring some religions over others.

Hopefully these principles will assist you in deflecting FFRF's criticism of OU's association with chaplains like Mr. Thompson. If you have any questions or wish to discuss this further, please do not hesitate to contact us.

Sincerely,



Travis Christopher Barham  
Legal Counsel  
ALLIANCE DEFENDING FREEDOM

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April 2, 2015

**Via U.S. Mail & Electronic Mail**  
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Wichita State University  
1845 Fairmout, Box 1  
Wichita, Kansas 67260

***Re: Chaplains for the Wichita State University Basketball Team***

Dear President Bardo:

We recently learned that the Freedom from Religion Foundation (FFRF) wrote you a letter, demanding an investigation into the character coach and chaplain that serves the Wichita State University (WSU) basketball team. According to FFRF's misinformation, this chaplain's position and activities violate the First Amendment's Establishment Clause. But in reality, public universities have great leeway in accommodating the religious needs of their students, and providing chaplains is one time-honored and constitutionally permissible method for doing so.

By way of introduction, Alliance Defending Freedom is an alliance-building, non-profit legal organization that advocates for the right of people to live out their faith freely. Among other things, we are dedicated to educating public officials on how the First Amendment commands them to accommodate religion and prohibits them from viewing anything religious with a jaundiced eye (as FFRF so evidently does). We hope that this letter will discharge any concerns and reassure you that WSU may work with chaplains to serve the spiritual needs of student athletes.

#### **ANALYSIS**

#### **I. The First Amendment requires government to accommodate religion, and public universities have great latitude in that endeavor.**

FFRF's complaints rest on the so-called "separation of church and state." While the Supreme Court has used the phrase, groups like FFRF have twisted it to suggest that anything remotely religious must be purged from public view. Due to such efforts, "[t]his extra-constitutional construct has grown tiresome. The First Amendment does not demand a wall of separation between church and state."<sup>1</sup> The

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<sup>1</sup> *ACLU of Ky. v. Mercer Cnty.*, 432 F.3d 624, 638 (6th Cir. 2005).

oft-repeated “misleading metaphor”<sup>2</sup> does not appear *anywhere* in the Constitution or the debates surrounding it.<sup>3</sup> The Supreme Court and Tenth Circuit have made it clear that the Constitution “do[es] not call for total separation between church and state.”<sup>4</sup> Rather, the Establishment Clause “affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.”<sup>5</sup> It merely “requires the state to be a neutral in its relations with . . . religious believers and non-believers; it does not require the state to be their adversary.”<sup>6</sup> Thus, it certainly does not require government entities to dissociate themselves from everything religious.

By relying primarily on elementary and high school cases, FFRF ignores the fact that federal courts allow universities much greater latitude in accommodating religion. For example, the only two federal appellate courts to consider the issue concluded that public universities may constitutionally include clergy-led prayers at their graduation ceremonies.<sup>7</sup> Both courts determined that these prayers serve a secular purpose<sup>8</sup> and observed that the university context primarily involves adults, rendering the public school cases FFRF cites inapplicable.<sup>9</sup> More importantly, both courts ruled that the First Amendment does not require universities to become “religion-free” zones. As the Sixth Circuit observed, “[t]he people of the United States did not adopt the Bill of Rights in order to strip the public square of every last shred of public piety.”<sup>10</sup> The Seventh Circuit agreed, saying these prayers were “simply a tolerable acknowledgment of beliefs widely held among the people of this country.”<sup>11</sup> The Sixth Circuit acknowledged that someone “may [find] the prayers offensive, but that reaction, in and of itself, does not make them unconstitutional.”<sup>12</sup> If a university can accommodate religion by including clergy-led prayers in its very public graduation ceremonies, it can certainly accommodate religion by allowing chaplains to serve the spiritual needs of interested student athletes. FFRF may “strenuously oppose[]” this, but that does not make the chaplain position unconstitutional.

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<sup>2</sup> *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting).

<sup>3</sup> *See id.* at 91–114 (Rehnquist, J., dissenting) (tracing debates surrounding the formation and ratification of the First Amendment); *see also* DAVID BARTON, ORIGINAL INTENT: THE COURTS, THE CONSTITUTION, & RELIGION 13, 19–20, 43–48 (2000).

<sup>4</sup> *Friedman v. Bd. of Cnty. Comm’rs of Bernalillo Cnty.*, 781 F.2d 777, 790 (10th Cir. 1985); *accord Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249, 1261 (10th Cir. 2005) (“Total separation between church and state is not possible in an absolute sense.”); *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (“Nor does the Constitution require complete separation of church and state. . .”).

<sup>5</sup> *Lynch*, 465 U.S. at 673.

<sup>6</sup> *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 18 (1947); *see also Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (noting that private religious speech is not a “First Amendment orphan”).

<sup>7</sup> *Tanford v. Brand*, 104 F.3d 982 (7th Cir. 1997); *Chaudhuri v. Tennessee*, 130 F.3d 232 (6th Cir. 1997), *cert. denied* 523 U.S. 1024 (1998).

<sup>8</sup> *Chaudhuri*, 130 F.3d at 236; *Tanford*, 104 F.3d at 986 (citing *Lynch*, 465 U.S. at 693 (O’Connor, J., concurring)).

<sup>9</sup> *Chaudhuri*, 130 F.3d at 237–39; *Tanford*, 104 F.3d at 985–86.

<sup>10</sup> *Chaudhuri*, 130 F.3d at 236.

<sup>11</sup> *Tanford*, 104 F.3d at 986 (quoting *Marsh v. Chambers*, 463 U.S. 783, 792 (1983)).

<sup>12</sup> *Chaudhuri*, 130 F.3d at 239 (quoting *Lee v. Weisman*, 505 U.S. 577, 597 (1992)).



## II. In a wide variety of situations, the First Amendment allows—and sometimes even requires—the government to provide a chaplain.

When accommodating religion, many public universities work with volunteer chaplains to serve the needs of student athletes who are often consumed with studying, team practice, and team travel. These chaplains serve the spiritual needs of student athletes who cannot attend religious services due to their busy schedules.

No court has ever said that public universities may not utilize chaplains for their athletic teams. In fact, many courts have upheld chaplaincy programs in other similar contexts: the military, prisons, police and fire departments, hospitals, airports, and the legislative branches of government. These courts demonstrate that the government does not violate the Establishment Clause by accommodating the religious needs of its student athletes through a chaplain. In fact, the state may violate the First Amendment by *not* providing chaplains for student athletes. In each of the following examples, courts ruled that the state may provide chaplains.

- **Military chaplains.** Ever since the American Revolution, the military has provided chaplains, and when two students complained about the Army's chaplaincy program in the 1980s, a federal appeals court in New York rejected their complaint and held that the program was constitutional "[s]ince the program [met] the requirement of voluntariness by leaving the practice of religion solely to the individual soldier."<sup>13</sup> The court said the Army chaplaincy program alleviated the unique stresses of military life and provided military personnel Free Exercise of religion in remote locations away from home.<sup>14</sup> And it added, "[i]ndeed, if the Army prevented soldiers from worshipping in their own communities by removing them to areas where religious leaders of their persuasion and facilities were not available it could be accused of violating the Establishment Clause unless it provided them with a chaplaincy. . . ."<sup>15</sup>
- **Prison chaplains.** Prisons may also provide chaplains to inmates.<sup>16</sup> In 2000, Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA) to provide prisoners more religious liberty protections,<sup>17</sup> and the Supreme Court upheld it under the Establishment Clause.<sup>18</sup> Prison chaplains, like military chaplains, protect the religious liberty of "institutionalized persons who are unable freely to attend to their religious needs."<sup>19</sup>
- **Hospital chaplains.** Government-operated hospitals may hire paid chap-

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<sup>13</sup> *Katcoff v. Marsh*, 755 F.2d 223, 225, 231–32 (2d Cir. 1985).

<sup>14</sup> *Id.* at 228, 232, 235.

<sup>15</sup> *Id.* at 231–32.

<sup>16</sup> *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005).

<sup>17</sup> 42 U.S.C. § 2000cc.

<sup>18</sup> *Cutter*, 544 U.S. at 713.

<sup>19</sup> *Id.* at 721 & 722.

lains without violating the Establishment Clause.<sup>20</sup> These chaplains provided grief counseling and related services. They also walked a careful line between providing religious instruction when asked and refraining from doing so when not asked. And the state hospital actually reduced its entanglement with religion by providing chaplains to meet patients' religious needs.<sup>21</sup>

- **Police department chaplains.** Local municipalities may provide chaplains to their police force. The Washington Supreme Court said that these chaplains are constitutional when they provide broad-based counseling to officers of all religions or no religion at all.<sup>22</sup> But a police department may violate the Establishment Clause if it pays a chaplain to serve only one faith group.<sup>23</sup>
- **Airport chapels.** Without much comment, a federal court in New York noted that government-operated airports may provide religious chapels for the public to accommodate travelers without violating any constitutional principle.<sup>24</sup>
- **Legislative chaplains.** Finally, the Supreme Court recently ruled that opening meetings of government bodies with prayer is constitutional,<sup>25</sup> reaffirming a doctrine it declared more than thirty years ago when it upheld the use of chaplains in state legislatures.<sup>26</sup>

Simply put, no court has ever declared that public universities may not provide chaplains for student athletes. In similar contexts, the law protects the state's ability to use chaplains. Key factors to look for are (1) whether the chaplains serve students who are engaged in athletic programs that disable them from participating freely in religious practices on their own time; (2) whether the chaplains provide resources to all religious faiths; and (3) whether the chaplain's programs are voluntary, allowing students to opt-out.

Mr. Dickie's involvement with WSU's athletic teams appears to tick all of those boxes. Many of WSU's student athletes are consumed with busy practice and studying schedules. They travel often, especially on weekends, and do not have adequate access to religious services on weekends. Student athletes, like "[p]atients in public hospitals, members of the armed forces in some circumstances . . . and prisoners . . . have restricted or even no access to religious services unless government takes an active role in supplying those services."<sup>27</sup>

Mr. Dickie appears to provide resources to student athletes of all faiths. He

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<sup>20</sup> *Carter v. Broadlawns Med. Ctr.*, 857 F.2d 448 (8th Cir. 1988).

<sup>21</sup> *Id.* at 454–56.

<sup>22</sup> *Malyon v. Pierce Cnty.*, 935 P.2d 1272, 1275, 1286, 1288 (Wash. 1997) (en banc).

<sup>23</sup> *Voswinkel v. City of Charlotte*, 495 F. Supp. 588 (W.D.N.C. 1980).

<sup>24</sup> *Brashich v. Port Auth. of N.Y. & N.J.*, 484 F. Supp. 697, 699–99, 703 (S.D.N.Y. 1979).

<sup>25</sup> *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014).

<sup>26</sup> *Marsh*, 463 U.S. 783.

<sup>27</sup> *Johnson-Bey v. Lane*, 863 F.2d 1308, 1312 (7th Cir. 1988).

appears willing to counsel and advise any student and to find a local religious leader to advise a student on a particular faith if he is unable to do so.

Of course, chaplains provided by public universities may run into trouble if student athletes are required to attend the religious events.<sup>28</sup> FFRF places great stock in *Mellen v. Bunting*, but there, VMI cadets said prayers every day at supper and had no ability to opt out.<sup>29</sup> As long as WSU does not require student athletes to participate in religious exercises, *Mellen* does not apply, and its chaplain program does not run afoul of the Establishment Clause's ban on mandatory religious activities.

### III. The Constitution does not prohibit religious organizations from promoting or discussing their religious beliefs.

FFRF dedicates considerable energy to proving the obvious: an organization that helps provide and train chaplains has religious objectives and motivations. From this, it insinuates that WSU would violate the Establishment Clause if it has anything to do with such an organization. But in so doing, FFRF merely repeats an argument that federal courts have repeatedly rejected.

In 2005, the Tenth Circuit ruled that “a governmental action is not ‘unconstitutional simply because it *allows* churches to advance religion, which is their very purpose,”<sup>30</sup> a conclusion other federal courts had previously reached.<sup>31</sup> The Seventh Circuit explained this principle by saying that a government action did not violate the Establishment Clause “merely because [it] has the indirect effect of making it easier for people to practice their faith.”<sup>32</sup> The Eighth Circuit similarly ruled that “[t]he mere fact a government body takes action that coincides with the . . . desires of a particular religious group . . . does not transform the action into an impermissible establishment of religion,”<sup>33</sup> and again, the Tenth Circuit reached a similar conclusion.<sup>34</sup> The Supreme Court validated these decisions when it ruled in 2005 that “[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.”<sup>35</sup> Indeed, Justice

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<sup>28</sup> See *Mellen v. Bunting*, 327 F.3d 355, 370 (4th Cir. 2003) (finding supper prayer at Virginia Military Institute were unconstitutional because there was no ability to opt-out); *Anderson v. Laird*, 466 F.2d 283 (D.C. Cir. 1972) (striking down a mandatory chapel attendance requirement at the military academies).

<sup>29</sup> *Mellen*, 327 F.3d at 370.

<sup>30</sup> *Utah Gospel Mission*, 425 F.3d at 1260 (quoting *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 337 (1987)).

<sup>31</sup> *Cohen v. City of Des Plaines*, 8 F.3d 484, 491 (7th Cir. 1993) (quoting *Amos*, 483 U.S. at 337); *Forest Hills Early Learning Ctr., Inc. v. Grace Baptist Church*, 846 F.2d 260, 263 (4th Cir. 1988) (quoting *Amos*, 483 U.S. at 337).

<sup>32</sup> *Bridenbaugh v. O'Bannon*, 185 F.3d 796, 801–02 (7th Cir. 1999).

<sup>33</sup> *Clayton by Clayton v. Place*, 884 F.2d 376, 380 (8th Cir. 1989); accord *Stark v. Indep. Sch. Dist., No. 640*, 123 F.3d 1068, 1074–76 (8th Cir. 1997) (ruling that “the fact that the [school] district’s actions”—opening a public school and granting certain exemptions—“coincide with the [religiously-motivated] desires of certain parents does not mean that the Establishment Clause has been violated.” (citing *Clayton*, 884 F.2d at 380)).

<sup>34</sup> *Bauchman for Bauchman v. W. High Sch.*, 132 F.3d 542, 555 (10th Cir. 1997) (finding no Establishment Clause violation when high school choir used songs and venues that “may coincide with religious beliefs different from those of [the plaintiff]”).

<sup>35</sup> *Van Orden v. Perry*, 545 U.S. 677, 690 (2005); accord *ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d

Breyer warned that “the Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious.”<sup>36</sup> Hence, the mere fact that a religious organization expresses its religious mission does not mean that WSU is violating the First Amendment by allowing a chaplain to serve the spiritual needs of interested student athletes.

#### **IV. It is the FFRF’s demands that actually violate the First Amendment.**

The FFRF is demanding that WSU investigate and then discontinue its chaplain simply because he is religious, engages in religious expression, and associates with a religious organization. It is this demand that violates the First Amendment. It is well-established that government discrimination against certain viewpoints, including religious ones, is unconstitutional.<sup>37</sup> And the Establishment Clause “forbids hostility toward any [religion].”<sup>38</sup> As a private organization, FFRF is free to express its hostility towards religious people and their beliefs, but as a public university, WSU is constitutionally prohibited from adopting FFRF’s views.

#### CONCLUSION

Student athletes, by the nature of their activity, face some of the same obstacles to free exercise faced by military members, prisoners, police officers, and hospital and airport patrons. As they strive to represent their school honorably and adeptly, they may be on the road frequently, and often on the weekends during designated days of worship. Whether training, competing, riding a team bus, or stuck at a hotel, the athletes’ First Amendment right to freely exercise their religious beliefs is hindered in their service to a state institution. A public university’s appointment of chaplains to accommodate the religious worship of athletic team members is permissible, and may even be mandated, depending on the demands of a student athlete’s schedule.

Though athletes, unlike prisoners, participate voluntarily (more like soldiers and firemen), it would be ludicrous to force an athlete to choose between playing sports and exercising his religious rights. Though the burden imposed by the state upon the student-athlete is freely taken, it remains a state-imposed burden that chaplains may alleviate. This kind of accommodation has consistently been upheld in the multi-faith environment of prisons. If prisoners receive this accommodation, student athletes should as well.

Chaplains are not merely pre-game prayer leaders. They are life counselors and community and family liaisons. While their viewpoints, when espoused, may share

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772, 778 (8th Cir. 2005).

<sup>36</sup> *Van Orden*, 545 U.S. at 699 (Breyer, J. concurring).

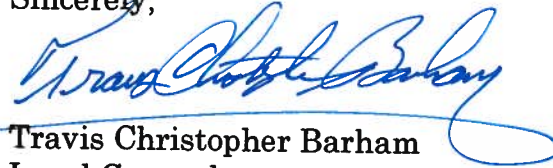
<sup>37</sup> *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829, 831 (1995).

<sup>38</sup> *See, e.g., Lynch*, 465 U.S. at 673 (noting that the Establishment Clause “affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any”); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 108 (2001) (noting that government hostility toward religion is just as forbidden as religious endorsement); *Rosenberger*, 515 U.S. at 846 (“[F]ostering a pervasive bias or hostility to religion . . . undermine[s] the very neutrality the Establishment Clause requires.”).

a particular religious view, the athletic team chaplains serve important secular purposes. So long as a public university does not require student athletes to participate in religious exercises provided by chaplains, and so long as those chaplains serve the various faith needs of the students, the university does not violate the Establishment Clause by coercing participation in religion or preferring some religions over others.

Hopefully these principles will assist you in deflecting FFRF's criticism of WSU's association with chaplains like Mr. Dickie. If you have any questions or wish to discuss this further, please do not hesitate to contact us.

Sincerely,



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ALLIANCE DEFENDING FREEDOM

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