FIRST LIBERTY

May 28, 2024

Carlsbad City Council, [redacted]
Mayor Keith Blackburn, [redacted]
Mayor Pro Tem Priya Bhat-Patel, [redacted]
Councilmember Melanie Burkholder, [redacted]
Councilmember Carolyn Luna, [redacted]
Councilmember Teresa Acosta, [redacted]
1200 Carlsbad Village Drive
Carlsbad, CA 92008

Re: Censorship of Chaplain Prayers

Dear City Council Members:

First Liberty Institute is the nation's largest law firm dedicated exclusively to defending and restoring religious liberty for all Americans. First Liberty has won three major religious freedom cases at the U.S. Supreme Court in the past two years: *Kennedy v. Bremerton School District*, 597 U.S. 507 (2022); *Carson v. Makin*, 596 U.S. 767 (2022); and *Groff v. DeJoy*, 600 U.S. 447 (2023). Another of our Supreme Court victories, *American Legion v. American Humanist Association*, 588 U.S. 29 (2019), upheld the government display of a 32-foot tall Latin cross erected as a WWI memorial on the median of a busy highway. *Kennedy*—which upheld a public school football coach's right to offer personal prayer on the field after games—was a landmark decision that now controls Establishment Clause matters under the First Amendment.

We urge you to revoke the City Manager's recent order that longtime fire chaplain Denny Cooper and police chaplain JC Cooper ("the Chaplains") cease praying in the name of Jesus. It is our understanding that this swift and dramatic change was made without consideration or a vote by the City Council. Because the Chaplains cannot in good conscience erase the name of Jesus from their prayers, this order deprives first responders of the solace and spiritual strength that the Chaplains' volunteer ministry has provided for nearly two decades. Therefore, we urge the City Council to return to its longstanding practice of inviting the Chaplains to pray freely in accordance with their sincere religious beliefs.

On March 13, 2024, JC prayed at the Carlsbad Police Department Awards Ceremony. This was at the police chief's request, for an audience of current police officers, their families, and a handful of city officials. On information and belief, it is our understanding that a city council member took offense that JC concluded his prayer by invoking Jesus' name. On April 9, Fire Chief Mike Calderwood told Denny that due to a decision from the City Manager, he could no longer give invocations unless he removed the customary conclusion "in Jesus' name" from his prayers. On April 10, Police Chief Christie Calderwood told JC that the City Council had decided that he could no longer

pray in Jesus' name, and that he could use any other name he wanted as long as it was not "Jesus." The police and fire chiefs have long been supportive of the Chaplains' ministry and prayers, yet felt compelled by city officials to communicate this decision. After seeking counsel from his lead pastor and Denny, JC told the police chief that removing the name of Jesus from his prayers would be a denial of his Savior Jesus Christ, a violation of his conscience, and a sin. Accordingly, JC respectfully declined to give the invocation at the recent Carlsbad Police Promotions Ceremony.

In a call with City Manager Scott Chadwick and the police chief on April 25, Mr. Chadwick claimed that invoking "Jesus" was considered harassment, created a hostile work environment, and lifted one religion above another. Mr. Chadwick then told JC that he could pray using any other name or term for God, but he could not say "Jesus."

The City Manager misunderstands the law concerning public chaplains and invocations, and we urge the City Council to revisit the decision to censor the Chaplains' prayers. The First Amendment's Establishment Clause does not require government "to purge from the public sphere anything an objective observer could reasonably infer endorses or partakes of the religious." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 534–35 (2022). In *Kennedy*, the Supreme Court overruled the long-criticized "endorsement" test established by *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Instead, "the Establishment Clause must be interpreted by reference to historical practices and understandings." *Kennedy*, 142 S. Ct. at 2427–28 (cleaned up).

Dating back to the Continental Congress in 1776, the United States has a robust and widely recognized tradition of both public prayer and chaplain programs. The Court has explicitly held that governmental bodies may begin their meetings or other events with a prayer or invocation. *See Marsh v. Chambers*, 463 U.S. 783 (1983); *Town of Greece v. Galloway*, 572 U.S. 565 (2014). While such prayers or invocations may not proselytize or disparage other faiths, *Marsh*, 463 U.S. at 794–95, chaplains do not have to scrub their prayers of language identifiable to their faith. *Town of Greece,* 572 U.S. at 578–79, 581. Government should not censor prayers in an attempt to make them "generic" or "nonsectarian." *See id.* at 581–82 ("Government may not mandate a civic religion that stifles any but the most generic reference to the sacred any more than it may prescribe a religious orthodoxy."). Indeed, in an increasingly diverse and pluralistic environment, it would be "daunting, if not impossible," to write an invocation that would be "inclusive beyond dispute," nor does the Constitution require anything of the sort—and "some may feel that they cannot in good faith deliver such a vague prayer." *Id.* at 595–96 (Alito, J., concurring). "The tradition reflected in *Marsh* permits chaplains to ask their own God for blessings of peace, justice, and freedom that find appreciation among people of all faiths. That a prayer is given in the name of Jesus, Allah, or Jehovah, or that it makes passing reference to religious doctrines, does not remove it from that tradition." *Town of Greece*, 572 U.S. at 583.

For decades, courts have upheld government chaplaincy programs as constitutional in many different contexts. *See, e.g.*, *Marsh*, 463 U.S. 783 (upholding state

legislature's practice of opening sessions with prayers by a state-employed chaplain); *Katcoff v. Marsh*, 755 F.2d 223 (2d Cir. 1985) (upholding military chaplaincy); *Freedom From Religion Found. v. Mack*, 49 F.4th 941 (5th Cir. 2022) (upholding justice of the peace's chaplaincy program); *Theriault v. Silber*, 547 F.2d 1279 (5th Cir. 1977) (upholding prison chaplaincy); *Carter v. Broadlawns Med. Ctr.*, 857 F.2d 448 (8th Cir. 1988) (upholding public hospital chaplaincy); *see also Murray v. Buchanan*, 720 F.2d 689, 690 (D.C. Cir. 1983) (upholding public funding of congressional chaplains). And the Supreme Court upholds chaplaincy programs even where the government selects a single chaplain to serve as its routine prayer-giver and that chaplain prays in accordance with his particular faith. *See Marsh*, 463 U.S. at 793–94.

The potential for offense is irrelevant, as "the Establishment Clause does not include anything like a 'modified heckler's veto, in which . . . religious activity can be proscribed' based on 'perceptions' or 'discomfort.'" *Kennedy*, 597 U.S. at 534–35 (quoting *Town of Greece*, 572 U.S. at 589). Simply put, "[o]ffense . . . does not equate to coercion." *Id.* And it is legally problematic—and sends a message of hostility—to equate simple expressions of faith to workplace harassment. *See generally Groff*, 600 U.S. at 472 (noting in Title VII case that it was not appropriate for an employer to consider "a coworker's dislike of 'religious practice and expression in the workplace'" as justifying refusal to accommodate another employee's religious beliefs).

The City Council should follow the Supreme Court's clear statements with respect to prayers such as the Chaplains' and allow them to pray according to their sincere religious beliefs. We are also happy to assist the City pro bono in developing a constitutionally appropriate chaplain policy. You can reach me at [redacted] or by email at [redacted]

Sincerely,

Kayla A. Toney

Kayla Toney
First Liberty Institute