FIRST LIBERTY

October 14, 2024

Phil DiStefano
Chancellor, University of Colorado Boulder
17 UCB,
Boulder, CO 80309

Patrick T. O'Rourke
Executive Vice Chancellor and Chief Operating Officer

Rick George
Athletic Director, University of Colorado Boulder

Tanya Cohen
University of Colorado System and Board of Regents
Office of University Counsel
1800 Grant St., Suite 700,
Denver, CO, 80203

Sent via email and U.S. Mail (CMRRR 9589 0710 5270 0175 4062 39;) 9589 0710 5270 0175 4058 81; 9589 0710 5270 0175 4058 98 and 9589 0710 5270 0175 4059 04)

Re: FFRF's Legal Analysis about Chaplain Programs is Incorrect.

Chancellor DiStefano:

First Liberty Institute is the nation's largest law firm dedicated exclusively to defending and restoring religious liberty for all Americans. This letter concerns Coach Deion Sanders' religious expression at the University of Colorado (CU). Please direct all communication on this matter to my attention.

We previously contacted you in response to another letter sent from Freedom From Religion Foundation (FFRF) regarding Coach Sanders' private prayers. Now, FFRF complains about Sanders inviting the CU's chaplain, Pastor E. Dewey Smith, into the locker room after CU's September 22, 2024 victory against Baylor.

We want to encourage you to continue ignoring FFRF's legally incorrect letters. We are confident that CU is well within its right to invite a chaplain into the locker room with its college athletes.

CU's Chaplaincy Program is Constitutional.

FFRF claimed in its letter that by inviting a chaplain to the locker room, Coach Sanders is "entangling the public university football program with Christianity." FFRF September 24, 2024 Letter, 2. Such a view ignores recent Supreme Court precedent that clarified how the government should analyze such questions.

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.

This rich precedent demonstrates that CU's program joins the long-standing American tradition that welcomes the participation of chaplains within a variety of America's public spaces—or, as the case may be, even a locker room. Given the Supreme Court's recent approval of such traditions, we believe CU's chaplaincy program would very likely be upheld as constitutional. *See American Legion v. American Humanist Association*, 588 U.S. 29, 57 (2019) (holding that "retaining established, religiously expressive monuments, symbols, and practices is quite different from erecting or adopting new ones. The passage of time gives rise to a strong presumption of constitutionality."). And, contrary to FFRF's assertions, Pastor Smith's prayer met the legal parameters because he did not disparage other faiths and honored his own. ("And thank you for being with us to the end. Lord, some people call it Hail Mary, some people call it karma, some people call it luck, but in my faith tradition we call it Jesus.") (FFRF September 24, 2024 Letter, 1.). *Town of Greece,* 572 U.S. at 581–82 (stating that the government may not censor prayers to make them "generic" or "nonsectarian").

Moreover, university students are old enough to appreciate a chaplain's prayer without being coerced by it. In *Kennedy*, the Court rejected the notion that secondary students are especially susceptible to coercion. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 539 (2022). When applying the First Amendment in the school context, courts differentiate between university students and primary and secondary school students. For example, the Supreme Court identified in *Widmar v. Vincent* that university students, as "young adults," are "less impressionable than younger students" and "should be able to appreciate that a university's policy is neutral toward religion." 454 U.S. 263, 274 n.14 (1981). In *Lee v. Weisman,* the Supreme Court declined to extend its holding to persons older than K-12 students. *See Lee*, 505 at 593 ("We do not address whether [the school's policy] is acceptable if the affected citizens are mature adults, but we think the State may not, consistent with the Establishment Clause, place primary and secondary children in this position.").[1] FFRF fails to acknowledge these facts in its letter.

Conclusion

Despite its frequent attempts to scrub religion from the public square, FFRF ignores the Supreme Court's constitutional analysis. "We are aware of no historically sound understanding of the Establishment Clause," the Court said, "that begins to make it necessary for government to be hostile to religion." *Kennedy,* 597 U.S. at 541 (citing *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)). Nor should the government understand the Establishment Clause to require anything like a "modified heckler's veto, in which . . . religious activity can be proscribed" based on "'perceptions'" or "'discomfort.'" *Id.* at 2427 (*citing Good News Club v. Milford Central School*, 533 U. S.

[1] The analysis FFRF relies on from in *Lee v. Weisman* is based on the Lemon Test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which the Supreme Court has now overruled. As such, *Lemon* is no longer good law and any case that relies upon it should be viewed with the same concern offered by the Supreme Court when it noted, in *Kennedy*, that the Free Speech, Establishment, and Free Exercise Clauses of the First Amendment are "not warring ones where one Clause is always sure to prevail over the others," but intended to act as complements each to the other. *Kennedy*, 597 U.S. at 533.

98, 119 (2001) (emphasis deleted)). CU may continue to offer a chaplaincy program without violating the Constitution.

You are welcome to discuss this matter with me at any time at [redacted] or [redacted]

Sincerely,

Keisha T. Russell

Keisha T. Russell
Senior Counsel
First Liberty Institute