FIRST LIBERTY

January 22, 2024

Sent via first class mail and email[1]

Matthew Cross, Board Chair
Rockingham County School Board
100 Mount Clinton Pike
Harrisonburg, VA 22802

Re: Help with Complaint About School Board Prayer

Dear Chairman Cross and Rockingham County School Board:

Earlier this month you received a letter dated January 11, 2024, from an anti-religion organization that complained about invocations at your school board meetings. Unsurprisingly, the letter omitted significant portions of the law. I write to provide you a fuller understanding of the law regarding government invocations (also known as legislative prayer), to encourage you regarding the lawfulness of legislative prayer, and offer to answer any questions you may have. Additionally, any assistance my firm or I provide will be done *pro bono* at no charge to you or the school district.

My firm, First Liberty Institute, is dedicated exclusively to defending and restoring religious liberty for all Americans. We have won three religious freedom cases at the U.S. Supreme Court in the past couple years alone: *Groff v. DeJoy*, 600 U.S. __, 143 S. Ct. 2279 (2023); *Kennedy v. Bremerton School District*, 597 U.S. __, 142 S. Ct. 2407 (2022); and *Carson v. Makin*, 596 U.S. __, 142 S. Ct. 1987 (2022).

Kennedy—which upheld a public high school football coach's right to offer private, personal prayer on the field after games—was a landmark decision that clarified and now controls Establishment Clause matters under the First Amendment. Among other things, in *Kennedy* the Supreme Court expressly abandoned the test laid out in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), as well as its endorsement test offshoot, which had dictated Establishment Clause matters in the lower courts for decades. The Court ruled they were no longer applicable to Establishment Clause matters. *See Kennedy*, 142 S. Ct. at 2427-28; *see also id.* at 2434 (Sotomayor, J., dissenting) ("Today[] . . . [t]he Court overrules *Lemon* . . . and replaces the standard for reviewing such questions with a new 'history and tradition' test.").

As the U.S. Court of Appeals for the Fourth Circuit, which has jurisdiction over Virginia, explained in discussing *Kennedy* and its effect on Establishment Clause

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jurisprudence, "[w]ith *Lemon* finally dead, … [the Supreme] Court has instructed that the Establishment Clause must be interpreted by reference to historical practices and understandings." *Firewalker-Fields v. Lee*, 58 F.4th 104, 121-22 (4th Cir. 2023) (internal quotations omitted). The Supreme Court now requires that the "analysis [must be] focused on original meaning and history." *Kennedy*, 142 S. Ct. at 2428. More specifically, "[t]he line that courts and governments must draw between the permissible and the impermissible [under the Establishment Clause] has to accord with history and faithfully reflect the understanding of the Founding Fathers." *Id.* The cases used in the complaint letter to throw doubt on prayer at your school board meetings were decided before *Kennedy* changed the rules for Establishment Clause matters, and several rely directly on the "dead" *Lemon* analysis.

Regarding legislative prayer, the Supreme Court found that the "opening of sessions of legislative and *other deliberative public bodies* with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom." *Marsh v. Chambers*, 463 U.S. 783, 786 (1983) (emphasis added). The Court "concluded that legislative prayer, while religious in nature, has long been understood as compatible with the Establishment Clause." *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 575 (2014). Accordingly, "[i]n light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with a prayer has become part of the fabric of our society." *Town of Greece*, 572 U.S. at 576 (quoting *Marsh*, 463 U.S at 792). In fact, the Court explained, "[t]o invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh*, 463 U.S. at 792.

Unsurprisingly, the Supreme Court has upheld the constitutionality of legislative prayer both times the issue has been before it, first in *Marsh* and more recently in *Town of Greece*. In both cases, which were decided well before *Kennedy*, the lawfulness of invocations to open meetings of deliberative public bodies was based on the nation's history and tradition. *Kennedy* then established history and tradition as the rule for Establishment Clause matters in general. Thus, while the lawfulness of legislative prayer was clear under *Marsh* and *Town of Greece*, under *Kennedy* it is unquestionable. For example, under the *Kennedy* standard – and in another First Liberty win – a federal appeals court upheld the lawfulness of invocations given at the opening of a court of law of a Texas justice of the peace. *See Freedom From Religion Found., Inc. v. Mack*, 49 F.4th 941 (5th Cir. 2022).[2]

[2] As further encouragement, in another First Liberty victory at the U.S. Supreme Court, the Court found "a presumption of constitutionality [under the Establishment Clause] for longstanding monuments, symbols, and practices." *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2082 (2019). Legislative prayer, among the most longstanding of American religious practices, certainly fits within that presumption.

As the complaint letter you received pointed out, in 2017, well before *Kennedy* was decided and changed the rules for Establishment Clause matters, the Fourth Circuit held invocations given by the county commissioners at the county board meetings in Rowan County, North Carolina, were unlawful. *Lund v. Rowan Cnty., N. Carolina*, 863 F.3d 268 (4th Cir. 2017). The court was careful to point out, however, that "the Establishment Clause indeed allows lawmakers to deliver invocations in appropriate circumstances. *Legislator-led prayer is not inherently unconstitutional*." *Id.* at 280 (emphasis added). The court further recognized "[a] single prayer will thus not despoil a practice that on the whole reflects and embraces our tradition of legislative prayer." *Id.* at 283 (internal quotations omitted). Even so, it struck down the county's prayer practice, finding that "while lawmakers may occasionally lead an invocation, this phenomenon appears to be the exception to the rule." *Id.* at 279.

Later that same year, the U.S. Court of Appeals for the Sixth Circuit reached the opposite conclusion. It ruled that invocations given by the county commissioners at the county board meetings in Jackson County, Michigan, were lawful. *Bormuth v. Cnty. of Jackson*, 870 F.3d 494 (6th Cir. 2017). Among other things, the Sixth Circuit found "the historical breadth of legislator-led prayer in the state capitals for over one hundred fifty years more than confirms to us that our history embraces prayers by legislators as part of the benign acknowledgment of religion's role in society." *Id.* at 510.

As the court explained, "history shows that legislator-led prayer is a long-standing tradition. Before the founding of our Republic, legislators offered prayers to commence legislative sessions," and "[l]egislator-led prayer has persisted in various state capitals since at least 1849." *Id.* at 509 (cleaned up). Accordingly, the court "g[a]ve no credence to [the] contention that these examples are just historical aberrations. The same can be said for the Fourth Circuit's conclusion in *Lund* that legislator-led prayer is a 'phenomenon [that] appears to be the exception to the rule,' especially because that court apparently did not consider the numerous examples of such prayers presented to us." *Id.* at 510 (cleaned up)(some quotation marks omitted).

While *Lund* remains the law in the Fourth Circuit for invocations given by elected officials to open their own meetings, it was decided before the Supreme Court handed down *Kennedy* and firmly established history and tradition as the standard for what is lawful under the Establishment Clause. Considering the nation's longstanding tradition of legislator led prayer, under *Kennedy* it is likely that *Lund* is an outlier that will not stand for long.

Similarly, two federal courts of appeals have ruled on invocations at public school board meetings after *Town of Greece* clarified the lawfulness of legislative prayer. The complaint letter you received pointed out that the U.S. Court of Appeals for the Ninth Circuit ruled against invocations at a school board meeting. *See Freedom from Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ.*, 896 F.3d 1132 (9th Cir. 2018). Like *Lund*, the

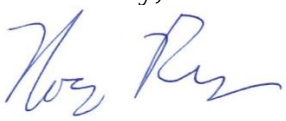
decision in *Chino Valley* came well before *Kennedy* unified Establishment Clause jurisprudence under the history and tradition test. In fact, to reach its decision, the court in *Chino Valley* expressly rejected the history and tradition analysis of *Marsh* and *Town of Greece* and applied the now defunct *Lemon* test. *Id.* at 1148. As the Fourth Circuit has recognized, however, "*Lemon* [is] dead." *Firewalker-Fields*, 58 F.4th at 121. So, while the Ninth Circuit's approach was spurious at best prior to *Kennedy*, under *Kennedy* it is just bad law.

Only a year earlier, the U.S. Court of Appeals for the Fifth Circuit upheld invocations at a school board meeting. *See Am. Humanist Ass'n v. McCarty*, 851 F.3d 521 (5th Cir. 2017). The court applied the history and tradition analysis of *Town of Greece* and held the invocations were well within the bounds of the Establishment Clause. It found that "dating from the early nineteenth century, at least eight states had some history of opening prayers at school-board meetings," and that "[*Marsh* and *Town of Greece*] show that there was a well-established practice of opening meetings of deliberative bodies with invocations." *Id.* at 527. *Kennedy* now mandates that same history and tradition as the standard for Establishment Clause matters, further solidifying the lawfulness of school board invocations.

In sum, my firm and I encourage you not to allow the complaint letter you received to intimidate you in any way. We also encourage you to seek full and thorough legal counsel regarding your invocation policy or practice before making any decisions. We routinely advise government officials on this very issue, which is surely fitting. As the Supreme Court has long observed, Americans are, after all, "a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

Again, we are more than happy to answer any questions, and we may be able to provide further assistance with evaluating the current policy and helping determine the best way forward. Feel free to call me at 972-941-4444.

Sincerely,



Roger Byron
Senior Counsel