

**CLERGY IN THE CLASSROOM: CHALLENGING TEXAS'S
SCHOOL CHAPLAIN LAW AFTER KENNEDY V.
BREMERTON**

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ABSTRACT

This Article examines the resurgence of religion in public education through recent state legislation, with a particular focus on Texas's groundbreaking school chaplain law, SB 763. Enacted in the wake of the Supreme Court's 2022 decision in Kennedy v. Bremerton, SB 763 authorizes public schools to employ unlicensed chaplains to provide counseling and mental health services. While proponents claim the law addresses resource gaps, its critics warn of religious coercion and violations of the Establishment Clause. This Article centers around one state's school chaplain bill, but its analyses are broadly relevant as many other states have followed Texas's lead by introducing similar chaplain bills.

Drawing on legislative history and constitutional doctrine, this Article argues that SB 763 is constitutionally suspect on multiple fronts. It analyzes the statute under the Kennedy "history and tradition" test and the Lee v. Weisman coercion framework and contends that the law fails the Establishment Clause's neutrality requirement. The Article also situates SB 763 alongside Texas's Ten Commandments and school prayer bills to illustrate broader legislative patterns that threaten the church-state divide. In anticipating likely legal challenges, this article offers a roadmap for evaluating SB 763's constitutionality and cautions against the broader implications of embedding chaplaincy into public education.

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INTRODUCTION

Clarence Darrow's 1925 proclamation that "[e]ducation was in danger from the source that always hampered it—religious fanaticism[]" appears prescient.¹ Today, several states are legislating religion back into public classrooms on myriad fronts, including mandating Bible-reading, prayer time, and Ten Commandment displays.² Texas is among those at the forefront of this effort and is the first state to enact a school chaplain law (SB 763 or Chaplain Act).³ Hailed as a way to bridge resource gaps, SB 763 allows unlicensed school chaplains to provide counseling and mental health services to public school students.⁴ Opponents of SB 763 argue it promotes religious indoctrination and disregards the wall between church and state.⁵

Proponents of the bill are galvanized by the Supreme Court's seismic 2022 ruling in *Kennedy v. Bremerton*,⁶ which held that a high school coach's public midfield prayers did not

1. CLARENCE DARROW, *You Can't Teach That!*, in ATTORNEY FOR THE DAMNED: CLARENCE DARROW IN THE COURTROOM 174, 175 (Arthur Weinberg, ed., Univ. of Chi. Press 1989) (1957).

2. See generally Mary Whitfill Roeloffs, *Trump Loves 'Ten Commandments in Public Schools': Says Louisiana Law Could Be 'Major Step' in Religion Revival*, FORBES (June 21, 2024, at 14:08 ET), <https://www.forbes.com/sites/maryroeloffs/2024/06/21/louisianas-new-ten-commandments-law-is-latest-example-of-states-pushing-to-allow-religion-in-public-schools/> [<https://perma.cc/FHD3-SHQW>] (describing how Louisiana passed a law requiring "In God We Trust" displays in classrooms, and listing states that have legalized students to leave school to attend religious classes including Oklahoma, Ohio, South Carolina and Tennessee, while Montana legalized praying at the start of the school day); David R. Brockman, *The Texas Legislature's Assault on Church-State Separation in Schools*, BAKER INST. FOR PUB. POL'Y (Apr. 12, 2024), <https://www.bakerinstitute.org/research/texas-legislatures-assault-church-state-separation-schools> [<https://perma.cc/28CS-49Y2>] (noting Christian Nationalist efforts to get religion in public schools through legislative efforts).

3. See Evie Blad, *School Chaplain Bills Multiply, Stirring Debate on Faith-Based Counseling*, EDUC. WK. (Mar. 15, 2024), <https://www.edweek.org/policy-politics/school-chaplain-bills-multiply-stirring-debate-on-faith-based-counseling/2024/03> [<https://perma.cc/LGY5-V6KB>] (reporting that Texas was the first state to enact a school chaplain law and that 14 states have proposed school chaplain bills).

4. TEX. EDUC. CODE ANN. § 23.001(a) (West 2025).

5. See Robert Downen & Brian Lopez, *Key Supporter of Texas School Chaplain Bill Has Pushed for Evangelism in Schools*, TEX. TRIB. (May 19, 2023, at 15:48 CT), <https://www.texastribune.org/2023/05/19/legislature-chaplain-bill-rocky-malloy/> [<https://perma.cc/H5DK-ZPSX>].

6. 597 U.S. 507 (2022).

violate the Establishment Clause.⁷ However, far from toppling the wall between church and state, *Kennedy* provides guidance for preserving the constitutional barriers that continue to safeguard both religious liberty and governmental neutrality.⁸ While this Article discusses general trends in school-religion legislation, it focuses on Texas's school chaplain law and makes prescriptive arguments for how its application may violate the Establishment Clause.⁹ The legislative record surrounding SB 763 provides critical insight into the statute's religious motivations and foreseeable effects, both of which inform the Establishment Clause analysis undertaken in this article.¹⁰ Although no litigation has yet been filed challenging SB 763,¹¹ this Article anticipates that constitutional claims are inevitable and explores how such challenges are likely to be framed under current First Amendment doctrine.

This Article contains five Parts. Part I considers the historical backdrop for current Establishment Clause litigation in public education, including the impact of the Supreme Court's *Kennedy* ruling. It briefly covers current legislative trends, which have given rise to the statutes discussed in detail. Part II introduces Texas's school chaplain law and a crucial omission from its statutory language. Part III explores how the implementation of SB 763 may violate the Establishment Clause on two fronts. One, it considers whether a school chaplain program would survive a history and tradition analysis under *Kennedy*.

7. See *id.* at 512–14, 543–44; see also Michelle Boorstein, *Texas Lawmakers Approve Bill to Allow School Districts to Replace Counselors with Chaplains*, WASH. POST (May 24, 2023), <https://www.washingtonpost.com/dc-md-va/2023/05/24/chaplain-texas-commandments-christianity/> [https://perma.cc/WE4S-3D84] (noting that supporters of the school chaplain bill “believe the Supreme Court’s ruling last summer in *Kennedy v. Bremerton*, in favor of a high school football coach who prayed with players, essentially removed any guardrails”).

8. *Kennedy*, 597 U.S. at 540–41.

9. See *infra* Part III.

10. See *infra* Part V.

11. But see ACLU of Tex., *Texas School Boards Must Reject School Chaplains*, *Civil-Liberties Groups Warn*, ACLU (June 26, 2023, at 16:45 ET), <https://www.aclu.org/press-releases/texas-school-boards-must-reject-school-chaplains-civil-liberties-groups-warn> [https://perma.cc/54NM-7UK4]. Back in 2023, civil liberty groups such as the ACLU warned that they would “take any action that is necessary and appropriate to protect the rights of Texas children” — with action presumably meaning an impending lawsuit. *Id.*

Two, it analyzes how the bill fosters religious coercion in violation of *Lee v. Weisman's* Coercion test. Part IV addresses SB 763's lack of neutrality. Specifically, this Part argues that the bill does not meet the Establishment Clause's requirement for governmental neutrality between religion and nonreligion, and among different religions. This portion concludes with a brief acknowledgment of how the preceding arguments will support claims for violations of the Free Exercise Clause, as well. Part V discusses Texas's Ten Commandments and School Prayer bills because, as more overt expressions of the same legislative impulse, they provide essential context for anticipating how SB 763 may function in practice and fare under constitutional scrutiny. The Article concludes with a brief recap of the analysis above and closes with a warning about school chaplains as a legislative bellwether.

I. PUBLIC SCHOOLS AS RELIGIOUS BATTLEFIELD

President Thomas Jefferson assuaged Connecticut's Danbury Baptists' concerns about state religion in 1802 by noting that the American people had codified their desire for the "separation of church and state" in the language of the First Amendment.¹² The early citizens of the United States demanded that the legislature "make no law respecting an establishment of religion, or prohibiting the free exercise thereof."¹³ The American people, according to Jefferson, built "a wall of separation

12. Letter from Thomas Jefferson to Danbury Baptist Assoc. (Jan. 1, 1802), in 8 THE WRITINGS OF THOMAS JEFFERSON: AUTOBIOGRAPHY, CORRESPONDENCE, REPORTS, MESSAGES, ADDRESSES, AND OTHER WRITINGS, OFFICIAL AND PRIVATE 113 (H. A. Washington ed., 1853-1854) ("Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus *building a wall of separation between church and State*. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.") (emphasis added).

13. U.S. CONST. amend. I.

between church and State.”¹⁴ The First Amendment was enacted in 1791—a full seventy-three years before slavery was ruled unconstitutional by the Thirteenth Amendment.¹⁵ At a time when fundamental human rights were up for debate, the founders cemented the wall between church and state before guaranteeing that men could not own other humans, underscoring how much the new republic prized religious autonomy.¹⁶ Yet today, many conservatives reject the premise of church-state separation.¹⁷

The Establishment and Free Exercise clauses were designed to work in unison to protect religious liberty, but modern politicians, pundits, and preachers draw self-satisfying inferences about what the Founding Fathers meant with the two (seemingly) incongruent provisions.¹⁸ Many argue that the First Amendment solely protects the church from the government, not the inverse, all in service to sowing Christian nationalist seeds into public realms.¹⁹ While modern language usage might offer more precise wording for two such crucial clauses, the Amendment’s purpose remains—234 years later—unambiguous: Americans, including public school students, are constitutionally guaranteed the privilege of choosing for themselves

14. JEFFERSON, *supra* note 12, at 113; *see also* Alexander Tsesis, *The Establishment of Religion in Schools*, 76 STAN. L. REV. 1725, 1731 nn.22 & 26 (2024) (supporting premise that Jefferson’s intent, while disputed by later scholars, was to acknowledge the separation between government and religion).

15. *The Bill of Rights: A Transcription*, NAT’L ARCHIVES, <https://www.archives.gov/founding-docs/bill-of-rights-transcript> [<https://perma.cc/K4XD-47ND>] (last visited Mar. 8, 2026) (describing how the First Amendment was ratified on December 15, 1791); *The Constitution: Amendments 11-27*, NAT’L ARCHIVES, <https://www.archives.gov/founding-docs/amendments-11-27> [<https://perma.cc/A9X9-5RZ2>] (last visited Mar. 8, 2026) (describing how the Thirteenth Amendment was ratified on December 6, 1865).

16. *See The Bill of Rights: A Transcription*, *supra* note 15; *see also* Tsesis, *supra* note 14, at 1732 (discussing the founders’ prioritization of the separation between church and state to preserve religious freedom).

17. Rebecca Shabad, *Speaker Mike Johnson Says Separation of Church and State Is a ‘Misnomer’*, NBC NEWS (Nov. 14, 2023, at 16:37 ET), <https://www.nbcnews.com/politics/congress/speaker-mike-johnson-says-separation-church-state-misnomer-rcna125181> [<https://perma.cc/HP4F-FHAP>] (quoting Mike Johnson saying “separation of church and state is a ‘misnomer’” and that the framers “did not want the government to encroach upon the church – not that they didn’t want principles of faith to have influence on our public life. It’s exactly the opposite”).

18. *See id.*

19. *See id.*

what to believe.²⁰ This guarantee includes freedom *from* belief, as well.²¹

Neither the word “God” nor the word “Christianity” can be found in the US Constitution. In fact, the only mention of religion relates to prohibitions on religious tests for public office.²² “The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny.”²³ In pursuit of a common theological destiny, wealthy conservatives and Christian ideologues, especially in Texas, have created a constitutional crisis by introducing a farrago of bills expressly designed to wedge their theology into schools;²⁴ some of the bills, including ones that have been signed into law by Texas Governor Greg Abbott, disregard longstanding Supreme Court precedent.²⁵

Many of these conservatives and ideologues are creationists, who seek to have public school children taught that Earth was formed only 6,000 years ago—which is “about a thousand years after the Sumerians invented glue.”²⁶ Former House

20. See *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) (“We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person ‘to profess a belief or disbelief in any religion.’”); U.S. CONST. amend. I.

21. *Id.*

22. U.S. CONST. art. VI, cl. 3 (“[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”).

23. *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring).

24. Pavan Acharya & Robert Downer, *Texas Senate Passes Bill To Put Ten Commandments in Public School Classrooms*, TEX. TRIB. (Mar. 19, 2025, at 21:39 CT), <https://www.texastribune.org/2025/03/04/texas-senate-ten-commandments-prayer-schools/> [<https://perma.cc/D2RR-479D>] (“The vote comes amid a broader push by conservative Christians to infuse more religion into public schools and life.”).

25. Eleanor Klibanoff & Alejandro Serrano, *More Parents Sue to Stop Texas’ Ten Commandments Requirement in Public Schools*, KTSA (July 3, 2025, at 06:11 CT), <https://www.ktsa.com/more-parents-sue-to-stop-texas-ten-commandments-requirement-in-public-schools/> [<https://perma.cc/9A85-9A3V>] (“Gov. Greg Abbott signed it in late June, the day after the 5th U.S. Circuit Court of Appeals found a similar law in Louisiana was ‘plainly unconstitutional.’”); *Stone v. Graham*, 449 U.S. 39, 42 (1980) (striking down a Kentucky law that required Ten Commandment displays in public school classrooms).

26. SAM HARRIS, LETTER TO A CHRISTIAN NATION, at x–xi (Knopf 2006); see Mike Hixenbaugh & Antonia Hylton, *Christian Activists Are Fighting To Glorify God in a Suburban Texas School District*, NBC NEWS (Oct. 4, 2023, at 15:23 ET), <https://www.nbcnews.com/news/us-news/grapevine-texas-school-board-election-christian-nationalism-rcna82246> [<https://perma.cc/WV3L->

Majority Leader Tom DeLay infamously blamed the Columbine High School massacre on schools teaching the theory of evolution.²⁷ Perhaps ironically, Texas public school students started the 2025 academic year with a new Bible-infused curriculum²⁸—2025 marks the 100th anniversary of the famous Scopes “Monkey” trial, in which Clarence Darrow and William Jennings Bryan made history arguing over whether evolution could be taught in a Tennessee biology class.²⁹

The Butler Act, named after state legislator John Washington Butler, criminalized teaching Darwin’s theory of evolution because it contradicted the biblical creation story.³⁰ John T. Scopes was the first and only teacher convicted of violating the Butler Act.³¹ It remained law until it was repealed in 1967, but it was never enforced again after the Scopes trial.³² Once the US Supreme Court ruled in 1940 that the Constitution’s Establishment and Free Exercise clauses applied to the states and not solely to the acts of the federal government, it could turn its

N8U8] (noting David Barton’s argument “that public schools should present the biblical creation narrative as an alternative to the science of evolution”).

27. Paul Krugman, *Gotta Have Faith*, N.Y. TIMES (Dec. 17, 2002), <https://www.nytimes.com/2002/12/17/opinion/gotta-have-faith.html> [<https://perma.cc/276H-UFM7>].

28. Jaden Edison, *State Board of Education Approves Bible-Infused Curriculum*, TEX. TRIB. (Nov. 22, 2024, at 16:54 CT), <https://www.texastribune.org/2024/11/19/texas-sboe-bible-christianity-curriculum/> [<https://perma.cc/ZCG9-V5T7>]. The Bible-infused Bluebonnet Learning curriculum is optional, but public-school districts that use it will receive \$60 per student. *Id.* The curriculum is available to schools starting in the 2025–2026 school year. *Id.*

29. BRENDA WINEAPPLE, *KEEPING THE FAITH, GOD, DEMOCRACY, AND THE TRIAL THAT RIVETED A NATION*, at xv–xvi (2024); Nell Greenfieldboyce, Regina G. Barber, Rachel Carlson & Rebecca Ramirez, *Evolution Went on Trial 100 Years Ago. Where Are We Now?*, NPR (July 9, 2025, at 03:00 ET), <https://www.npr.org/2025/07/09/1255376137/scopes-monkey-trial-human-evolution-creationism> [<https://perma.cc/7WKE-8KAJ>].

30. Butler Act, 1925 Tenn. Pub. Acts 50, § 1 (“[I]t shall be unlawful for any teacher . . . to teach any theory that denies the story of the Divine Creation of man as taught in the Bible, and to teach instead that man has descended from a lower order of animals.”); Noah Adams, *Timeline: Remembering the Scopes Monkey Trial*, NPR (July 5, 2005, at 00:00 ET), <https://www.npr.org/2005/07/05/4723956/timeline-remembering-the-scopes-monkey-trial> [<https://perma.cc/G8J8-CCN8>].

31. See *ACLU History: The Scopes ‘Monkey Trial’*, ACLU (Sep. 1, 2010), <https://www.aclu.org/documents/aclu-history-scopes-monkey-trial> [<https://perma.cc/S759-6RZQ>] (describing how Scopes stood trial as the first test case to challenge the constitutionality of the act, and after the Scopes trial, “the Butler Act was never again enforced”).

32. *Id.*; 1967 Tenn. Pub. Acts ch. 237, § 1.

attention to how those clauses intersected with education.³³ And the Court has since ruled in a litany of cases that have “carv[ed] out of the Establishment Clause what essentially amounts to a *per se* rule prohibiting public-school-related or initiated religious expression or indoctrination.”³⁴

A. From *Scopes* to *Kennedy*: A Century of Precedent

The first such case was *Illinois ex rel. McCollum v. Board of Education*³⁵ in 1948, which addressed the practice of private religious instruction inside public schools.³⁶ The Court held that public schools could no longer have religious instructors provide religious training to students during the school day, while at school.³⁷ In 1962, the Court ruled that official school-sanctioned prayer is unconstitutional.³⁸ A year later, the Court ruled that school-sponsored Bible readings and recitation of the Lord’s Prayer in public schools violated the Establishment Clause.³⁹ In 1992, the Court went further by holding that a school-sanctioned prayer offered by a rabbi at a public high

33. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). The Supreme Court reiterated its interpretation again a few years later in *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 18 (1947).

34. *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 165–66 (5th Cir. 1993) (holding that school district’s involvement in student religious practices violates the Establishment Clause); *see, e.g., Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 210–11 (1948) (holding that public schools could not facilitate religious instruction as part of school day); *Engel v. Vitale*, 370 U.S. 421, 438, 443 (1962) (striking down official school prayer in public schools); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 205 (1963) (invalidating Bible readings in public schools); *Wallace v. Jaffree*, 472 U.S. 38, 59–61 (1985) (holding that moments of silence intended to encourage prayer are unconstitutional); *Lee v. Weisman*, 505 U.S. 577, 598–99 (1992) (prohibiting clergy-led prayer at public school graduation ceremonies).

35. 333 U.S. 203 (1948).

36. *Id.* at 220–22. Technically, *Everson v. Board of Education*, which was a year before *ex. rel. McCollum*, was the first school-religion case in which the Court considered an Establishment Clause analysis, but the Court did not strike down the controversial busing policy. *See Everson*, 330 U.S. at 18. *Ex rel. McCollum* is the first case to strike a school program on Establishment Clause grounds. *See ex rel. McCollum*, 333 U.S. at 220–22.

37. *See ex rel. McCollum*, 333 U.S. at 231.

38. *See Engel*, 370 U.S. at 438, 443 (reasoning that because the prayers were written by the Board of Regents and deployed by teachers and administrators, the prayers were government-endorsed and thus violated the Establishment Clause).

39. *See Schempp*, 374 U.S. at 205.

school graduation was unconstitutional.⁴⁰ While far from a complete list of Supreme Court jurisprudence on church-state school cases, this brief overview highlights the Supreme Court's historical fidelity to keeping the church out of public schools. That fidelity, however, seems to have waned under an increasingly conservative Court, most notably with its 2022 *Kennedy* opinion.⁴¹

In *Kennedy*, a high school terminated its football coach over his unwillingness to cease public midfield prayers.⁴² Coach Kennedy was a popular football coach who made a public spectacle of his private faith by praying on the 50-yard line immediately after games while in his uniform.⁴³ Students and athletes routinely joined him in the exercise.⁴⁴ By enforcing its faculty policy against religious activity, Coach Kennedy felt the school abridged his right to pray on school grounds in view of his team, parents, and a stadium full of fans.⁴⁵ The threshold question was whether the coach's prayers were tantamount "to government speech attributable to the District?"⁴⁶ Proselytizing is in the eye of the beholder, because to observers, Coach Kennedy could easily have been praying in his official school capacity, which was the chief concern of the District.⁴⁷ Timing, as the adage goes, is everything. The Court found that Coach Kennedy took a knee when games were over and he could technically tend to personal matters.⁴⁸ Justice Gorsuch's majority opinion emphasized that, despite the fact that a bystander could

40. See *Lee v. Weisman*, 505 U.S. 577, 598–99 (1993) (reasoning that even though participation was voluntary, the unique social pressure to conform in the school environment made the religious exercise coercion).

41. See Bradley S. Girard & Gabriela Hybel, *The Free Exercise Clause vs. the Establishment Clause: Religious Favoritism at the Supreme Court*, HUM. RTS. MAG. (July 5, 2022), <https://www.americanbar.org/groups/crsj/resources/human-rights/archive/free-exercise-clause-vs-establishment-clause-religious-favoritism/> [https://perma.cc/S7NW-3HBT].

42. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 518–20 (2022).

43. *Id.* at 514–15.

44. *Id.* at 515.

45. See *id.* at 507.

46. *Id.* at 509.

47. *Id.* at 552.

48. *Kennedy*, 597 U.S. at 512–13.

interpret the scene differently, Coach Kennedy's prayers were private religious expressions and that he was not speaking on behalf of the school.⁴⁹ The majority viewed the school's restriction on Coach Kennedy's prayer as inconsistent with the nation's historical understanding of religious expression in the public sphere.⁵⁰ Coach Kennedy's religious freedom, under the Free Exercise Clause, carried the day.⁵¹

The *Kennedy* decision surprised few but disappointed many.⁵² Ruling in favor of the pious coach, a conservative Supreme Court seems to have weakened the wall between church and state.⁵³ Indeed, the ruling did the Establishment Clause and its adherents no obvious favors with an unvarnished repudiation of the *Lemon* test,⁵⁴ a delicate clemency of *Lee v. Weisman's* Coercion test,⁵⁵ and a full-throated embrace of a "history and tradition" analysis.⁵⁶ As a result, *Kennedy* has been a dog whistle to Christian nationalists and proponents of seeding schools

49. See *id.* at 512–14.

50. *Id.* at 535.

51. *Id.* at 543–44.

52. Pamela Paul, *In the Face of Fact, the Supreme Court Chose Faith*, N.Y. TIMES (July 17, 2022), <https://www.nytimes.com/2022/07/17/opinion/kennedy-bremerton-supreme-court.html> [<https://perma.cc/L89V-NCN8>] ("Naming the single worst decision of the Supreme Court's disgraceful 2021–22 term is a tough call. But the one that best captures the majority's brazen efforts to inflict its political and religious agenda on the rest of the country may well be *Kennedy v. Bremerton School District*, which ruled that the coach had a constitutional right to pray on the field."); see also *Kennedy*, 597 U.S. at 579 (Sotomayor, J., dissenting). Justice Sotomayor's dissent repeatedly registers her dismay at and disapproval of her colleagues' ruling. For example, one comment notes that the case "sets us further down a perilous path in forcing States to entangle themselves with religion, with all of our rights hanging in the balance." *Id.*

53. Rachel Tavani, *The End of the Establishment Clause?: Constitutional Chaos Created by the Court in Kennedy*, 23 RUTGERS J.L. & RELIGION 165, 172 (2024) ("The *Kennedy* ruling demonstrates the destruction of the delicate balance between the two existing clauses within the First Amendment's religious protection.").

54. *Id.* at 534; see also *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). The three-pronged *Lemon* test provides that a law is unconstitutional unless (1) it had a secular legislative purpose, (2) its primary effect was not to advance religion, and (3) it did not foster an excessive entanglement between church and state. *Id.*

55. See *Lee v. Weisman*, 505 U.S. 577, 592 (1992); see also *Mahmoud v. Taylor*, 606 U.S. 522, 601–03 (2025) (noting that *Kennedy* shifted Establishment Clause analyses away from the *Lemon* and endorsement tests; it did not repudiate the coercion test promulgated by *Lee v. Weisman*).

56. See *Kennedy*, 597 U.S. at 535–36; *id.* at 546–47 (Sotomayor, J., dissenting) ("In the process, the Court rejects longstanding concerns surrounding government endorsement of religion and replaces the standard for reviewing such questions with a new 'history and tradition' test.").

with theology.⁵⁷ Since 2022's ruling, at least twenty-nine states, most of which are in the South or the Midwest, have introduced legislation to increase religion's presence in public education.⁵⁸ Some efforts have already been considered at the Circuit Court level as well as the Supreme Court.⁵⁹ For instance, Louisiana attempted to mandate Ten Commandment displays in classrooms soon after the *Kennedy* ruling, despite settled Supreme Court precedent declaring such displays to be unconstitutional.⁶⁰ Originally, the Fifth Circuit ruled that Louisiana's Ten Commandments law violated the Establishment Clause and, thus, was unconstitutional.⁶¹ However, the Fifth Circuit recently punted on the issue by vacating its preliminary injunction over justiciability.⁶²

Further, in 2022, Oklahoma attempted to create the nation's first religious charter school.⁶³ The Oklahoma Supreme Court found the move unconstitutional, and an equally divided US Supreme Court upheld that ruling, but without issuing an

57. See Liya Cui & Joseph Ax, *How U.S. Public Schools Became a New Religious Battleground*, REUTERS (Aug. 7, 2024, at 13:09 ET), <https://www.reuters.com/world/us/how-us-public-schools-became-new-religious-battleground-2024-08-07/> [<https://perma.cc/P5E2-3XXX>].

58. See Brian Lopez, *Public Schools Would Have To Display Ten Commandments Under Bill Passed by Texas Senate*, TEX. TRIB. (Apr. 20, 2023, at 17:42 CT), <https://www.texastribune.org/2023/04/20/texas-senate-passes-ten-commandments-bill/> [<https://perma.cc/XTH8-32VE>] (“[Sen. King] said the U.S. Supreme Court cleared the way for his bill after it sided with Joe Kennedy, a high school football coach in Washington state who was fired for praying at football games.”); see also Cui & Ax, *supra* note 57 (“Lawmakers in 29 states have proposed at least 91 bills promoting religion in public schools [in 2024].”).

59. See, e.g., *Roake v. Brumley*, 141 F.4th 614, 626 (5th Cir. 2025) (affirming the unconstitutionality of a Louisiana statute mandating permanent display of the Ten Commandments in all classrooms); see *Drummond ex rel. Okla. v. Okla. Statewide Virtual Charter Sch. Bd.*, 558 P.3d 4, 15 (Okla. 2024), *aff'd*, 605 U.S. 165, 166 (2025) (affirming a “contract with a religious charter school . . . is unconstitutional”).

60. *Roake*, 141 F.4th at 626.

61. See *id.* at 645–46. In her panel opinion, Judge Ramirez relied on the Supreme Court's 1980 case, *Stone v. Graham*, which found a similar Ten Commandments bill in Kentucky to be unconstitutional, and argued that it remains precedential despite its reliance on the now disfavored *Lemon* test. *Id.* at 645 (quoting *Stone v. Graham*, 449 U.S. 39, 42 (1980)). Perhaps presciently, Judge Ramirez argued that Louisiana's statute is also unconstitutional under *Kennedy v. Bremerton's* history and tradition test. *Id.* at 645–46.

62. *Roake v. Brumley*, No. 24-30706, 2026 WL 482555, at *1, *3–4 (5th Cir. Feb. 20, 2026).

63. *Drummond v. Okla. Statewide Virtual Charter Sch. Bd.*, 558 P.3d 1, 6 (Okla. 2024).

opinion.⁶⁴ Texas, whose Constitution *does* reference “God” and requires office holders to declare a belief in a “Supreme Being,” stands out for both the volume and scope of its legislative efforts.⁶⁵

Yet, despite fomenting sectarian momentum, *Kennedy* is arguably more pro-Free Exercise than anti-Establishment for two reasons. First, because the record contained no evidence of student coercion resulting from Coach Kennedy’s prayers, the Court declined to engage in a full Establishment Clause analysis, focusing solely on whether the school’s conduct aligned with historical practices and understandings.⁶⁶ And, Coach Kennedy sought protection from a policy that was “hostile to religion.”⁶⁷ The Court did not analyze a policy that actively established a religion, such as the legislation discussed in this Article. Second, the Court found Coach Kennedy’s personal religious expression to be sacrosanct.⁶⁸ Even while observers understandably saw his sideline prayer as a school-sanctioned religious activity, particularly when players and others joined in, “Mr. Kennedy offer[ed] his prayers in his capacity as a private citizen.”⁶⁹ The Court’s judicial ring-fencing of one

64. *Id.* at 15; Okla. Statewide Charter Sch. Bd. v. Drummond, 605 U.S. 165, 166 (2025) (per curiam) (“The judgment is affirmed by an equally divided Court.”). While technically a win for opponents of religious charter schools, litigants are left without helpful guidance from a post-*Kennedy* analysis. See *Drummond*, 605 U.S. at 166.

65. See, e.g., TEX. CONST. art. I, § 4 (“No religious test shall ever be required as a qualification to any office, or public trust, in this State; nor shall any one be excluded from holding office on account of his religious sentiments, provided he acknowledge the existence of a Supreme Being.”); TEX. CONST. art. I, § 6 (“All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences.”). The U.S. Supreme Court ruled the requirement unconstitutional. *Torcaso v. Watkins*, 367 U.S. 488, 495–96 (1961) (holding that requiring office holders to declare a belief in God violates the First and Fourteenth Amendments); see also Brooke Schultz, *Christianity Is Ramping Up in Public Schools. Where Is This Headed?*, EDUC. WK. (June 17, 2025), <https://www.edweek.org/policy-politics/christianity-is-ramping-up-in-public-schools-where-is-this-headed/2025/06> [<https://perma.cc/N4R9-RQMU>] (noting Texas’s track record with Christian-focused legislation).

66. See *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 529–36 (2022).

67. *Id.* at 541 (acknowledging that the Establishment Clause does not require government to be hostile to religion, as the school’s policy limited Coach Kennedy’s religious exercise).

68. *Id.* at 542–43 (“Respect for religious expressions is indispensable to life in a free and diverse Republic—whether those expressions take place in a sanctuary or on a field, and whether they manifest through the spoken word or a bowed head.”).

69. *Id.* at 509.

American's right to religious expression could help future litigants fight unconstitutional legislation.

II. A TROJAN HORSE: TEXAS'S SCHOOL CHAPLAIN LAW⁷⁰

In May 2023, Texas passed Senate Bill 763.⁷¹ This school chaplain bill allows public schools to install chaplains as counselors and mental health providers.⁷² The canary in a legislative coal mine, Texas was the first state to pass such a law, with Florida enacting its own version in July 2024.⁷³ Similar legislation has been introduced or discussed in at least fourteen other states.⁷⁴ Under the Chaplain Act, Texas independent school districts can elect to either employ chaplains, using public funds for salaries, or accept them as volunteers.⁷⁵ The Chaplain Act only requires school chaplains to pass a criminal background check and not be registered sex offenders.⁷⁶ They do not need to be certified by the State Board for Educator Certification ("SBEC"), which promulgates requirements for teachers and counselors in public education.⁷⁷ Several proposed

70. See generally Downen & Lopez, *supra* note 5 (noting reference to a statement made by Rep. Talarico in opposition to SB 763, calling it a "Trojan horse to allow unqualified religious fanatics to enter our school and indoctrinate our kids").

71. TEX. EDUC. CODE ANN. § 23.001 (West 2025). The law's effective date was September 1, 2023, as the bill did not receive the two-thirds vote required for immediate effect. See S. 763, 88th Leg., Reg. Sess. § 5 (Tex. 2023).

72. TEX. EDUC. CODE ANN. § 23.001 (West 2025) ("A school district or open-enrollment charter school may employ or accept as a volunteer a chaplain to provide support, services, and programs for students as assigned by the board of trustees of the district or the governing body of the school.").

73. FLA. STAT. ANN. § 1012.461 (LexisNexis 2024); Haley Steiner, *The Legislative Momentum: Public School Chaplaincy in Law and Policy*, CHRISTIAN LEADERS ALL., <https://www.christianleadersalliance.org/public-school-legislation/> [https://perma.cc/7A79-US4T] (last visited Mar. 8, 2026).

74. Evie Blad, *School Chaplain Bills Multiply, Stirring Debate on Faith-Based Counseling*, EDUC. WK. (Mar. 15, 2024), <https://www.edweek.org/policy-politics/school-chaplain-bills-multiply-stirring-debate-on-faith-based-counseling/2024/03> [https://perma.cc/LGY5-V6KB] (reporting that Texas was the first state to enact a school chaplain law and that fourteen states have followed suit).

75. *Id.*; TEX. EDUC. CODE ANN. § 23.001(a).

76. *Id.* § 23.001(b)–(c).

77. *Id.* § 23.001(a); State Board for Educator Certification, TEX. EDUC. AGENCY, <https://tea.texas.gov/about-tea/leadership/state-board-for-educator-certification> [https://perma.cc/NUH5-E4CJ] (last visited Mar. 8, 2026).

amendments to SB 763 would have rendered the law more constitutionally neutral, but each failed.⁷⁸

A. *Who or What Is a School Chaplain?*

The Chaplain Act states that a school chaplain may “provide support, services, and programs for students as assigned by the board of trustees of the district or the governing body of the school.”⁷⁹ The law further specifies that school chaplains may provide “mental health personnel and support” and “behavioral health services.”⁸⁰ The Chaplain Act, however, does not specify who or what a “chaplain” is.

During congressional debate, Representative James Talarico proposed Amendment 1 to SB 763, which would define a school chaplain as someone “endorsed by an organization recognized by the United States Department of Defense, the Federal Bureau of Prisons, or the Texas Department of Criminal Justice to endorse chaplains.”⁸¹ Under this definition, only chaplains endorsed by the established groups already recognized to provide chaplains to the military, federal prisons, or Texas prisons would qualify, thereby excluding those endorsed by organizations like the National School Chaplain Association—a chief concern of several legislators, including Representative Talarico.⁸² The Amendment passed but did not make it into the final version of the bill signed into law.⁸³ As such, Texas’s

78. H.R., TEXAS HOUSE JOURNAL, 88th Leg., Reg. Sess., at 3409–24 (2023). Note that Amendment 2, which would prohibit use of public funds, and Amendment 3, which proposed requiring parental consent for students to meet with a chaplain and for the statute to prohibit proselytizing, both failed. *Id.* at 3410–17.

79. § 23.001(a).

80. TEX. EDUC. CODE ANN. § 48.115(ii)–(iii) (West 2025).

81. H.R., TEXAS HOUSE JOURNAL, 88th Leg., Reg. Sess., at 3409 (2023) (listing the wording of Amendment No. 1 as proposed by Rep. Talarico, not adopted).

82. Downen & Lopez, *supra* note 5 (noting how Talarico opposed SB 763, calling it a “Trojan horse to allow unqualified religious fanatics to enter our school and indoctrinate our kids”); see also *DoD-Listed Religious-Endorsing Organizations/Agents*, OFF. OF THE UNDER SEC’Y OF WAR FOR PERS. & READINESS, <https://prhome.defense.gov/M-RA/MPP/AFCB/Endorsements/> [https://perma.cc/FP6T-T7DK] (last visited Mar. 8, 2026) (omitting the National School Chaplain Association).

83. See TEX. EDUC. CODE ANN. § 23.001 (West 2025).

Chaplain Act does not define a chaplain and only states that they are “not required to be certified by the State Board for Educator Certification.”⁸⁴ “This is not what a real chaplaincy program looks like . . . [i]t is akin to an online marriage ordination.”⁸⁵

The bill’s sponsor, Senator Mayes Middleton, defines chaplains as religious figures who “represent God in our government institutes”.⁸⁶ Webster’s Dictionary defines a chaplain as “clergyperson” or “a person chosen to conduct religious exercises.”⁸⁷ Coroner Talk podcast defines a chaplain as “a minister, such as a priest, pastor, rabbi, imam or lay representative of a religious tradition, attached to a secular institution such as a hospital, prison, military unit, school, police department, university, or private chapel.”⁸⁸ Liberty University, founded by Jerry Falwell, offers a Master of Arts in Chaplaincy; its website boasts that students will “study the art of serving others in a way that points them to Christ.”⁸⁹ The National School Chaplain Association, which advocated for SB 763 and claims to be responsible for putting chaplains in over 36,000 schools, defines chaplains as “Godly counselors” and “trusted Biblical advisors.”⁹⁰ In short, chaplains are religious figures, and they’re now in Texas schools.

84. *Id.* § 23.001(a).

85. Downen & Lopez, *supra* note 5 (quoting statements by Joshua Houston of Texas Impact).

86. Kimberly Reeves, *School Chaplain Bill Headed Toward Passage*, SPECTRUM NEWS 1 (May 10, 2023, at 15:15 CT), <https://spectrumlocalnews.com/tx/south-texas-el-paso/politics/2023/05/10/school-chaplain-bill-headed-toward-passage> [<https://perma.cc/M6HN-5B9W>].

87. *Chaplain*, MERRIAM WEBSTER (Nov. 4, 2025), <https://www.merriam-webster.com/dictionary/chaplain> [<https://perma.cc/KG77-9QWD>].

88. Darren Dake, *Why a Chaplain*, CORONER TALK (April 10, 2016), <https://coronertalk.com/why-a-chaplain/> [<https://perma.cc/EH6H-8CAK>].

89. *Explore How To Give Spiritual Guidance in a Variety of Settings with Liberty’s MA in Chaplaincy*, LIBERTY UNIV., <https://www.liberty.edu/online/divinity/masters/chaplaincy/> [<https://perma.cc/MNT5-K5GU>] (last visited Mar. 7, 2026).

90. *The Historical Roots of Chaplaincy*, NSCA, <https://www.nationalschoolchaplainassociation.org/the-history-of-chaplaincy> [<https://perma.cc/AX68-P2F8>] (last visited Mar. 15, 2026); *The Worldwide Impact of NSCA School Chaplains*, NSCA, <https://www.nationalschoolchaplainassociation.org/> [<https://perma.cc/4BQD-TN2N>] (last visited Mar. 7, 2026); Downen & Lopez, *supra* note 5 (describing how the founder of the NSCA, Rocky Malloy, advocated for placing chaplains in schools, and sent an email thanking supporters after SB 763 passed).

B. Challenging SB 763

No plaintiff has challenged the constitutionality of the Chaplain Act yet, but such litigation is only a matter of time.⁹¹ Texas school districts had until March 1, 2024, to take a record vote on whether to employ or accept volunteer chaplains.⁹² So far, very few districts have voted in favor of adopting a chaplaincy program.⁹³ However, school districts can always choose to adopt later, via official Board vote.⁹⁴ Thus, the source for future plaintiffs is limited (for now) to those smaller school districts that have chosen to add chaplains.⁹⁵ Vocal opponents of the Chaplain Act, like the ACLU and the Freedom From Religion Foundation, who have issued warnings to school districts about deploying school chaplains, do not have independent standing to litigate the constitutionality of the Act.⁹⁶ And because SB 763 is optional—unlike other laws, such as Texas SB

91. As of the date of this Article, no lawsuit has been filed in Texas pertaining to SB 763. *But see* ACLU of Tex., *supra* note 11.

92. Annie Xia, *A New Texas Law Allows Schools to Hire Chaplains as Counselors. So Far, Only One School Has Opted into the Program*, TEX TRIB. (Apr. 5, 2024, at 20:33 CT), <https://www.texastribune.org/2024/04/05/texas-school-counselors-chaplains/> [https://perma.cc/RJT2-M84N]. School districts had to take a record vote no later than six months after the effective date of the Act, which was September 1, 2023. *See* S. 763, 88th Leg., Reg. Sess. §§ 3–5 (Tex. 2023).

93. *Texas Schools Say “No” to Chaplain Counselors*, TEX. AFT (Mar. 8, 2024, at 13:00 ET), <https://www.texasaft.org/uncategorized/texas-schools-say-no-to-chaplain-counselors/> [https://perma.cc/2KAN-YK4V]. Only one charter school and three independent school districts have opted into the chaplain program: Angleton ISD, Paducah ISD, Waskom ISD, and Newman International Academy (charter school). *Id.*

94. TEX. EDUC. AGENCY, SB 763 FREQUENTLY ASKED QUESTIONS – CHAPLAINS IN PUBLIC SCHOOLS 2 (2024) (noting that school boards may put a school chaplain program on their agenda for a vote of reconsideration at any time).

95. *Texas Schools Say “No” to Chaplain Counselors*, *supra* note 93.

96. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 561–62 (1992) (holding that standing requires an injury in fact “redress[able] by a favorable decision”); *see also* ACLU of Tex., *supra* note 11 (“We will not hesitate to defend the rights of students and families against school districts that take up the Legislature’s misguided and unlawful invitation to install clergy in official positions.”); Ryan Jayne, *Strongly Stated: The Danger of Public School Chaplains — and How to Stop Them*, FFRF ACTION FUND (July 1, 2025, at 21:07 ET), <https://ffrfaction.org/strongly-stated-the-danger-of-public-school-chaplains-and-how-to-stop-them/> [https://perma.cc/QPF5-KAHF] (“Monitor chaplains’ behavior any way you can, request public records if needed, and inform groups like the Freedom From Religion Foundation if you see anything concerning.”).

10's mandatory display of the Ten Commandments, discussed below—there is no immediate constitutional injury.⁹⁷

Depending on how a school district implements the Chaplain Act, however, a parent could challenge the presence of school chaplains before an injury occurs. The Supreme Court has held that unconstitutional school policies, like one allowing student-led prayer at games, can be challenged before they are implemented.⁹⁸ If a district's school chaplain policy were to allow or encourage religious activity with students, for example, a plaintiff "need not wait for the inevitable to confirm and magnify the constitutional injury."⁹⁹

What could an injury by a school chaplain look like? Considering the lack of training and credentials required for chaplains in schools, potential claims for negligence or privacy violations may arise.¹⁰⁰ The key concern for this Article, however, will be constitutional challenges due to coercion and a lack of neutrality.¹⁰¹

III. SB 763 VIOLATES THE ESTABLISHMENT CLAUSE

Kennedy v. Bremerton is not the first case to rest its analysis on the "history and tradition" test, but it is the first to do so in the educational setting.¹⁰² Prior Supreme Court cases repudiated the *Lemon* test in favor of history and tradition, but each pertained to religious exercises or displays in a public setting

97. See S. 10, 89th Leg., Reg. Sess. (Tex. 2025) (mandating requirements for the display); *Mahmoud v. Taylor*, 606 U.S. 522, 559–60 ("[W]hen a deprivation of First Amendment rights is at stake, a plaintiff need not wait for the damage to occur before filing suit.").

98. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 316 (2000) ("Therefore, the simple enactment of this policy, with the purpose and perception of school endorsement of student prayer, was a constitutional violation."); see also *Wallace v. Jaffree*, 472 U.S. 38, 60–61 (1985) (invalidating an unimplemented state statute that violated the Establishment Clause).

99. *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 316.

100. 19 TEX. ADMIN. CODE § 247.2(3)(A) (2025) (listing how the Educator's Code of Ethics Standard 3.1 requires school counselors to maintain confidential information regarding students).

101. See *infra* Part III.

102. See 597 U.S. 507, 535 (2022) (high school sports games); *Marsh v. Chambers*, 463 U.S. 783, 786 (1983) (state legislative prayer); *Town of Greece v. Galloway*, 572 U.S. 565, 579 (2014) (town board meeting prayer); *Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 29, 33 (2019) (religious monuments).

and not a school.¹⁰³ Thus, any constitutional challenge to SB 763 must show that a school chaplain program is inconsistent with historical understandings of the Establishment Clause.¹⁰⁴ A plaintiff may also argue that SB 763 violates the coercion principle established in *Lee v. Weisman*,¹⁰⁵ which the *Kennedy* opinion left intact.¹⁰⁶ While supporters of SB 763 may see *Kennedy* as a shield from Establishment Clause challenges, the statute should be tested under both frameworks.

A. America's History and Tradition of Keeping Clergy Out of Public Schools

The U.S. has a long history of using chaplains in public settings.¹⁰⁷ The Supreme Court upheld the use of legislative chaplains in *Marsh v. Chambers*, noting America's long history with the practice.¹⁰⁸ Military chaplains in America began with the Continental Army in 1775.¹⁰⁹ Chaplains were intended to provide spiritual support, boost morale, and minister to soldiers in the field.¹¹⁰ More than 3,000 chaplains currently serve across all branches of the U.S. military.¹¹¹ America also traditionally

103. See *Am. Legion*, 588 U.S. at 50–51.

104. *Kennedy*, 597 U.S. at 535 (“In place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by ‘reference to historical practices and understandings.’”).

105. 505 U.S. 577, 595 (1992).

106. See *Kennedy*, 597 U.S. at 568–69 (noting that *Kennedy* did not repudiate the coercion test promulgated by *Lee v. Weisman*); see also *id.* at 541 (noting lack of evidence of and complaint about coercion, and distinguishing *Kennedy* facts from *Lee* facts without repudiating *Lee*, and using it as a fact pattern against which to conduct its analysis).

107. *Katcoff v. Marsh*, 755 F.2d 223, 225 (2d Cir. 1985) (tracing military chaplaincy to the American Revolution).

108. *Marsh v. Chambers*, 463 U.S. 783, 791 (1983) (upholding the constitutionality of legislative prayer by chaplains in a state legislature).

109. See 2 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 229 (Worthington Chauncey Ford ed., U.S. Gov’t Printing Off. 1904) (1775) (appropriating the monthly pay of a Continental Army chaplain to 20 dollars per month).

110. See Paul Stamps, *250 Years of Sacred Service: Honoring the Army Chaplain Corps Legacy*, U.S. ARMY (Feb. 6, 2025), https://www.army.mil/article/282827/250_years_of_sacred_service_honoring_the_army_chaplain_corps_legacy [https://perma.cc/3628-DBCG].

111. Mel Slater, *Army Institute of Religious Leadership Set to Celebrate 250 Years of Chaplains*, U.S. ARMY (Jan. 10, 2025), https://www.army.mil/article/282439/army_institute_of_religious_leadership_set_to_celebrate_250_years_of_chaplains [https://perma.cc/9582-RDY3] (“Today’s Total Force Chaplain Corps includes more than 3,000 chaplains . . .”).

provides chaplains to the incarcerated.¹¹² The Federal Bureau of Prisons reported 236 chaplains on staff as of March 2020, and there are over 1,400 professional chaplains working in state prisons throughout the U.S.¹¹³ Courts have upheld chaplaincies in the military and prisons—where individuals are cut off from their religious communities.¹¹⁴ Public school students are not similarly situated. They are free citizens with access to their own religious communities outside of school.¹¹⁵ The U.S. does not have a “history or tradition” of using chaplains in schools.¹¹⁶ In fact, the Supreme Court has a history and tradition of keeping clergy *out* of public schools.¹¹⁷

In *Illinois ex rel. McCollum v. Board of Education*,¹¹⁸ the Supreme Court held that using public school facilities for religious instruction by clergy during school hours violated the Establishment Clause.¹¹⁹ In *ex rel. McCollum*, a Champaign, Illinois school district allowed clergy to provide religious classes for “released time” periods during the school day, on school property.¹²⁰ The classes were optional, but the program was organized with the cooperation of school officials, who managed student participation and approved instructors.¹²¹ As Justice Black noted in the majority opinion, because the school district’s

112. U.S. DEP’T OF JUST., NO. 21-09, AUDIT OF THE FEDERAL BUREAU OF PRISONS’ MANAGEMENT AND OVERSIGHT OF ITS CHAPLAINCY SERVICES PROGRAM, at i (2021), <https://oig.justice.gov/sites/default/files/reports/21-091.pdf> [<https://perma.cc/9NFS-V6YW>].

113. *Id.*; *Religion in Prisons – A 50-State Survey of Prison Chaplains*, PEW RSCH. CTR. (Mar. 22, 2012), <https://www.pewresearch.org/religion/2012/03/22/prison-chaplains-exec/> [<https://perma.cc/QYR5-HRT8>].

114. *See* *Katcoff v. Marsh*, 755 F. 2d 223, 237 (2d Cir. 1985) (holding military chaplains do not violate the Establishment Clause); *Horn v. California*, 321 F. Supp. 961, 965 (E.D. Cal. 1968), *aff’d*, 436 F.2d 1375 (9th Cir. 1970) (holding state-provided chaplain is constitutional).

115. *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 217 (1948) (“The preservation of the community from divisive conflicts . . . requires strict confinement of the State to instruction other than religious, leaving to the individual’s church and home, indoctrination in the faith of his choice.”).

116. *Id.* at 231–32 (invalidating program that allowed clergy onto public school property for religious instruction); *Oxford v. Beaumont Indep. Sch. Dist.*, 224 F. Supp. 2d 1099, 1114 (E.D. Tex. 2002) (rejecting formal clergy in school program).

117. *See* discussion *supra* note 33.

118. 333 U.S. 203 (1948).

119. *See id.* at 231–32.

120. *Id.* at 207–09, 226.

121. *Id.* at 208–09.

buildings were taxpayer-supported facilities and state law required students to attend (public if not private or parochial), the State was thereby complicit in the dissemination of religious doctrine.¹²² He mentioned that “[t]he State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through the use of the state’s compulsory public school machinery. This is not separation of Church and State.”¹²³

Justice Frankfurter, however, went further and provided a *Kennedy*-esque analysis in his concurring opinion. “We cannot illuminatingly apply the ‘wall-of-separation’ metaphor until we have considered the relevant history of religious education in America, the place of the ‘released time’ movement in that history, and its precise manifestation in the case before us.”¹²⁴ Specifically, Justice Frankfurter recognized that Champaign’s clergy program had to be considered in historic context.¹²⁵ He noted that while education in early America was historically religious, and that “commingling of sectarian with secular instruction” once prevailed, both the First and Fourteenth Amendments currently demanded a more precise separation between church and state.¹²⁶ “[B]y 1875 the separation of public education from Church entanglements, of the State from the teaching of religion, was firmly established in the consciousness of the nation.”¹²⁷

The *Kennedy* ruling did not overrule *ex rel. McCollum* or its core holding regarding clergy-led religious instruction in public schools.¹²⁸ *Ex rel. McCollum* should be instructive in assessing

122. *Id.* at 209–10.

123. *Id.* at 212 (“[A]s we said in the *Everson* case, the First Amendment had erected a wall between Church and State which must be kept high and impregnable.”).

124. *Ex rel. McCollum*, 333 U.S. at 213 (Frankfurter, J., concurring).

125. *Id.*

126. *Id.* at 212–13.

127. *Id.* at 217.

128. See *Rodríguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) (“If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”). The *Kennedy*

the constitutionality of Texas's Chaplain Act. Similar to the "released time" program in *ex rel. McCollum*, school chaplains will be on campus during the school day; the chaplaincy programs will be organized with the cooperation of school officials; and Texas school-aged children are legally mandated under the Texas Education Code to attend school from age six to eighteen.¹²⁹ While it is true that the Chaplain Act does not provide chaplains for the express purpose of religious instruction, (1) it does not prevent chaplains from proselytizing or providing religious instruction, and (2) as discussed in more detail below, religious instruction is precisely what proponents of the Act intended.¹³⁰

SB 763's authorization of chaplains in public schools lacks historical precedent and contravenes the established tradition of keeping public education secular. To the extent that originalist jurists use "history and tradition" to justify a school chaplain program, then they cannot selectively rely on some traditions while ignoring the broader, often exclusionary, traditions of American education itself. America had a history and tradition of segregating its public schools until 1954.¹³¹ The "history and tradition" test, properly applied, should render the Chaplain Act unconstitutional.

B. Intelligent Design: School Chaplains Are Meant to Coerce

Even if SB 763 could survive a historical analysis, it should fail the coercion test from *Lee*, which prohibits government practices that coerce individuals to participate in religious activity.¹³² In *Lee*, a Rhode Island public school invited a rabbi to

case did effectively overrule the *Lemon* test, but it did not invalidate other cases that relied on *Lemon*. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 535 (2022).

129. TEX. EDUC. CODE § 23.001(a) (West 2025) (school chaplains); TEX. EDUC. CODE § 25.085(b) (West 2025) (compulsory school attendance).

130. Compare S. 763, 88th Leg., Reg. Sess. (Tex. 2023) (promoting chaplains in schools), with *ex rel. McCollum*, 333 U.S. at 217 (critiquing religious entanglement in public school).

131. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493–95 (1954).

132. See *Kennedy*, 597 U.S. at 540. *Kennedy* did not repudiate *Lee*'s coercion test; it simply did not engage in a coercion analysis due to a dearth of evidence that Coach Kennedy's conduct was coercive. *Id.*; see also *Lee v. Weisman*, 505 U.S. 577, 587 (1992) ("It is beyond dispute that, at

deliver the opening and closing prayers at a high school graduation ceremony.¹³³ The school principal personally selected the rabbi and provided instructions for his prayer.¹³⁴ The Supreme Court found that the prayer created “subtle and indirect” pressure for students to participate.¹³⁵ Even though attendance at the graduation ceremony was technically voluntary—a student need not participate to receive a diploma—the Court was swayed by the gravitas of the event, seen as a rite of passage.¹³⁶ The Supreme Court has long recognized and been sensitive to how adolescents’ inherent need to belong makes them vulnerable to spiritual coercion.¹³⁷ The *Lee* Court acknowledged that “there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.”¹³⁸ Thus, under *Lee*, a court should consider the government’s role, as well as the unique nature of pressure on and vulnerability of students, even if participation is voluntary.¹³⁹

The Chaplain Act does not prohibit school chaplains from engaging in religious activities with students, which may create an environment where students feel pressured to participate.¹⁴⁰ And there is precedent establishing that clergy in public schools coerce students. In 1996, Texas’s Beaumont Independent School District (ISD) created a Clergy In Schools (CIS) program to place

a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise.”).

133. *Lee*, 505 U.S. at 581.

134. *Id.*

135. *Id.* at 593.

136. *Id.* at 595 (“Everyone knows that in our society and in our culture high school graduation is one of life’s most significant occasions.”).

137. *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 227 (1948) (Frankfurter, J., concurring). As noted by Justice Frankfurter’s concurrence regarding optional religious classes during the school day, “[t]he law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend.” *Id.*; see also *Kennedy*, 597 U.S. at 547 (Sotomayor, J., dissenting) (stating that the Court failed “to acknowledge the unique pressures faced by students when participating in school-sponsored activities”).

138. *Lee*, 505 U.S. at 592.

139. *Lee*, 505 U.S. at 585, 593.

140. See generally S. 763, 88th Leg., Reg. Sess. (Tex. 2023) (allowing chaplains to provide support, programs, and services to students).

volunteer clergy in public schools to “counsel and mentor students on secular topics.”¹⁴¹ The district enlisted volunteers from “nearly all local faiths, although the majority of participants were Protestant Christian.”¹⁴² The volunteer clergy were instructed to refrain from discussing religion or proselytizing and were told to avoid clothing that disclosed an affiliation with a certain religion or church.¹⁴³ When the school district rejected a request to integrate non-religious, professional counselors into the program, the plaintiffs sued for violations of the Establishment Clause.¹⁴⁴ “[T]he trial record reflects a few instances where participating clergy veered away from BISD’s secular mandates by wearing clerical garb to CIS sessions, quoting from the Bible, promoting prayer, and encouraging students to develop a strong relationship with God.”¹⁴⁵ As noted by Emily Eisen, a student who testified about her experience with the CIS program, “one of the clergy at the session she attended wore clerical garb and specifically inquired into her relationship with God and asked about her prayer habits. Ms. Eisen testified that those questions made her feel awkward.”¹⁴⁶ In 2002, the Eastern District of Texas ruled the school district could no longer allow volunteer clergy to mentor and counsel students at school.¹⁴⁷ Despite direct orders otherwise, the school clergy proselytized to students.

Because the Chaplain Act doesn’t specifically ban proselytizing, school chaplains may seek to influence students’ religious beliefs, and with each district setting its own rules, the standards for chaplain conduct will differ greatly. And as evidenced by the *Oxford v. Beaumont* case, express admonitions provide no guarantee against improper religious activity.¹⁴⁸ The legislative

141. *Oxford v. Beaumont Indep. Sch. Dist.*, 224 F. Supp. 2d 1099, 1100 (E.D. Tex. 2002).

142. *Id.*

143. *Id.*

144. *Id.* at 1101.

145. *Id.* at 1100.

146. *Id.* at 1103.

147. *Oxford*, 224 F. Supp. 2d at 1114–15.

148. *Id.* at 1100 (noting that despite instructions to refrain from discussing “‘religion, church affiliation, or church services’ . . . the trial record reflects a few instances where participating

history of the Act shows, however, that it was designed precisely to facilitate religious indoctrination of students.¹⁴⁹ Each school district is to determine its own playbook for any school chaplain it may employ or take as a volunteer.¹⁵⁰ Despite robust efforts to amend the proposed language of SB 763 to guard against coercion, the Chaplain Act reflects the policy as conceived by a host of Christian lobbyists and legislators.¹⁵¹

An opponent of school chaplains, Representative Talarico proposed an Amendment to SB 763 that would provide some guidance for and limitations on school chaplains specifically to avoid coercion.¹⁵² Duly concerned that the bill's primary author said chaplains "'represent[] God's presence within our public schools,'" Representative Talarico's Amendment Three required parental consent and imposed regulations on school chaplain conduct, including a prohibition on proselytizing.¹⁵³ In support,

clergy veered away from BISD's secular mandates by wearing clerical garb to CIS sessions, quoting from the Bible, promoting prayer, and encouraging students to develop a strong relationship with God").

149. See, e.g., H.R., TEXAS HOUSE JOURNAL, 88th Leg., Reg. Sess., at 3411–16 (2023) (voting against amendments that required chaplain to "refrain[] from proselytizing," respect students' culture, and obtain parental or guardian permission); Downen & Lopez, *supra* note 5 (noting that Talarico opposed SB 763, calling it a "Trojan horse to allow unqualified religious fanatics to enter our school and indoctrinate our kids").

150. H.R., TEXAS HOUSE JOURNAL, 88th Leg., Reg. Sess., at 3414 (2023) (listing comments by Amendment opponent Rep. Hefner stating that "[s]chools can require what they see fit . . . So there again, I want to make sure that we're making it clear that everybody knows that the schools may choose to do this or not. They can put whatever rules and regulations in place that they see fit").

151. *Id.* at 3411. Rep. Talarico proposed an amendment that would require chaplains to "*refrain from proselytizing or imposing the chaplain's values and beliefs on a student, a student's parent or guardian, or other public school employees . . .*" *Id.* (emphasis added). The amendment failed, and the text of the Chaplain Act includes no limitations on chaplain conduct. *Id.* at 3416.

152. See Downen & Lopez, *supra* note 5; H.R., TEXAS HOUSE JOURNAL, 88th Leg., Reg. Sess., at 3411 (2023) (listing Rep. Talarico's proposed amendment language which included that, "[t]he standards of conduct must: (1) require a school chaplain to: (A) protect the free exercise of religion of a student, a student's parent or guardian, and other public school employees; (B) *refrain from proselytizing or imposing the chaplain's values and beliefs on a student, a student's parent or guardian, or other public school employees . . .*" (emphasis added).

153. Holly Hollman, *Public Schools Are Not Sunday Schools*, TIME (Feb. 13, 2024, at 07:00 EST), <https://time.com/6694045/public-schools-not-sunday-schools-essay/> [<https://perma.cc/8ZDE-2BFT>]; see H.R., TEXAS HOUSE JOURNAL, 88th Leg., Reg. Sess., at 3415 (2023) (listing Rep. Talarico's comments during the debate on Amendment 3, and addressing Rep. Hefner's rebuke of adding criteria for chaplains to be in schools, during which he noted that his "primary concern is that by not putting these guardrails in this piece of legislation that we're going to add our name to that we'll allow organizations like the National School Chaplains Association— whose

State Representative Hinojosa argued that Amendment Three was designed “to ensure that all faiths are appreciated and welcomed by this chaplain who stands in a position of authority in our schools, and that the chaplain *refrains from proselytizing or imposing the chaplain’s values or beliefs or religion on a student.*”¹⁵⁴ During the hearing, Representative Hinojosa noted the basis for some of her concerns about the need for such guardrails: Rocky Malloy, the CEO of the National School Chaplains Association (NSCA), was a leading supporter of SB 763.¹⁵⁵

Mr. Malloy lobbied for the bill and testified before the Texas Senate Committee on Education.¹⁵⁶ Representative Hinojosa noted that the NCSA’s published mission “[t]o enhance ‘His presence by infiltrating the system and supporting Christians functioning and operating inside the school system’” was unconstitutional.¹⁵⁷ She further expressed alarm that the NSCA’s website stated that its “strategy is simple: leverage one of the largest networks on the earth—the existing school system—and utilize government funding along with your donation to teach Jesus in the classroom.”¹⁵⁸ During his testimony, Malloy deviated from NSCA’s public agenda and claimed that “[c]haplains operate within an individual’s belief and convictions—they are

stated purpose is to infiltrate our system—to take advantage of your legislation and infiltrate our public schools”).

154. H.R., TEXAS HOUSE JOURNAL, 88th Leg., Reg. Sess., at 3412 (2023). Rep. Hinojosa questioned her opponents’ issue with Rep. Talarico’s proposed amendment language requiring chaplains to “*refrain from proselytizing or imposing the chaplain’s values and beliefs on a student, a student’s parent or guardian, or other public school employees . . .*” *Id.* at 3411 (emphasis added).

155. *Id.* at 3412 (recording statement of Rep. Hinojosa in support of Rep. Talarico’s proposed amendment concerned about the NSCA); see also Allison Schneider, *Religion in Public Schools: A Case Study of America’s Chaplain Bills*, ETHICS & SOC’Y BLOG (Nov. 9, 2024), <https://ethicsandsociety.org/2024/11/19/student-faculty-research-paper-religion-in-public-schools-a-case-study-of-americas-chaplain-bills/> [<https://perma.cc/8PPA-9Z7J>] (describing how Rocky Malloy—CEO of the NSCA—was a proponent of SB 763 furthering the NSCA’s interest in “enhanc[ing] [God’s] presence by infiltrating the system”).

156. Downen & Lopez, *supra* note 5.

157. H.R., TEXAS HOUSE JOURNAL, 88th Leg., Reg. Sess., at 3412 (2023) (listing statement of Rep. Hinojosa in support of Rep. Talarico’s proposed amendment).

158. *Id.*; see *GiverConnect*, ECFA, <https://www.ecfa.org/GiverConnectResults.aspx?mid=8> [<https://perma.cc/UYY8-9K73>] (last visited Mar. 8, 2026) (explaining NSCA’s strategy in a public blog on June 19th, 2014).

not working to convert people to religion.”¹⁵⁹ Malloy’s congressional statement, however, contradicted not only the NSCA’s mission but also that of its parent organization, Mission Generation, which redirected its website during the debates to hide that its goal is to “influence those in education until the saving grace of Jesus becomes well-known, and students develop a personal relationship with Him.”¹⁶⁰ In short, one of the Chaplain Act’s biggest advocates—and a prolific provider of school chaplains—openly seeks to use public schools to proselytize Christianity. Texas legislators were unmoved, however.

Representative Hefner rejected Representative Hinojosa’s arguments, noting SB 763 was specifically crafted to be “permissive,” empowering school boards to unilaterally “establish their own rules.”¹⁶¹ Amendment Three was ultimately defeated.¹⁶² As a result, any Texas school district can install a chaplain who can meet with students without parental consent and without any prescribed limitations on conduct.¹⁶³ In fact, ISD’s can *substitute* experienced, licensed school counselors with an inexperienced, volunteer chaplain with whatever credentials that ISD chooses.¹⁶⁴

159. Steve Warren, *Texas Lawmakers Vote to Allow Chaplains in Public Schools to Combat Mental Health Crisis*, CBN (May 11, 2023), <https://cbn.com/news/us/texas-lawmakers-vote-allow-chaplains-public-schools-combat-mental-health-crisis> [https://perma.cc/DWJ4-3SNQ] (noting testimony of Rocky Malloy, Founder of the Nat’l Sch. Chaplain Ass’n); Jack Jenkins, *Texas Legislature Passes Bill Allowing Chaplains in Public Schools*, RELIGION NEWS SERV. (May 10, 2023), <https://religionnews.com/2023/05/10/texas-legislature-passes-bill-allowing-chaplains-in-public-schools/> [https://perma.cc/U76C-6BXJ].

160. Mission Generation’s website has since been archived. See *Home*, MISSION GENERATION (Oct. 5, 2021), <https://web.archive.org/web/20211025042005/https://missiongeneration.org/> [https://perma.cc/96U3-QP27]; Downen & Lopez, *supra* note 5.

161. H.R., TEXAS HOUSE JOURNAL, 88th Leg., Reg. Sess., at 3413–15 (2023) (listing comments by Amendment opponent Rep. Hefner).

162. *Id.* at 3416. “Amendment No. 3 failed of adoption by (Record 1277): 61 Yeas, 76 Nays, 1 Present, not voting.” *Id.*

163. Ryan Jayne, *Everything You Need to Know About Public School Chaplain Bills*, FFRF ACTION FUND (Feb. 27, 2024, at 22:33 ET), <https://ffrfaction.org/everything-you-need-to-know-about-public-school-chaplain-bills/> [https://perma.cc/9FKM-D3PD]; H.R., TEXAS HOUSE JOURNAL, 88th Leg., Reg. Sess., at 3413 (2023) (listing how Rep. Hefner argued that it was unnecessary to include prohibitions on proselytizing because districts could adopt their own restrictions as needed).

164. H.R., TEXAS HOUSE JOURNAL, 88th Leg., Reg. Sess., at 3415 (2023) (listing statement of Amendment opponent Rep. Hefner) (“The way this bill is drafted, and the intent of the bill, is

By rejecting Amendment Three, the Legislature advanced the agenda of proponents like Rocky Malloy and Representative Hefner and made it more difficult for potential plaintiffs to establish a clear basis for an Establishment Clause claim.¹⁶⁵ Without a statutory limit on religious expression, and with school districts left to define chaplaincy roles individually, the line between private and state action may become blurred.¹⁶⁶ But a school chaplain is not a private speaker, like Coach Kennedy.¹⁶⁷

C. School Chaplains on Duty: Distinguishing Kennedy

Contrary to sectarian celebrations post-*Kennedy*, the Court's analysis was fact-specific and did not create a blanket rule permitting religious activity by school officials.¹⁶⁸ Coach Kennedy's prayers did not constitute speech "ordinarily within the scope"

to allow the schools the option to have chaplains *in place of* or alongside the counselors.") (emphasis added); *id.* at 3416 (statement of Rep. Bernal) ("The way that the bill is crafted, a school board could opt to have no counselors, no family specialists, no school psychologists, and replace them entirely with chaplains."). The proposed text of SB 763 specified that a district could employ a chaplain instead of a school counselor – language that is not in the enacted statute. Compare S. 763, 88th Leg., Reg. Sess. (Tex. 2023) (as introduced by Middleton), with TEX. EDUC. CODE ANN. § 23.001 (West 2025). However, the Chaplain Act does not prohibit schools from replacing counselors with chaplains. See EDUC. § 23.001.

165. See Heather L. Weaver, *Why Allowing Chaplains in Public Schools Harms Students*, ACLU (Mar. 15, 2024), <https://www.aclu.org/news/religious-liberty/why-allowing-chaplains-in-public-schools-harms-students> [<https://perma.cc/3NBW-5EU3>]. To establish a claim for violation of the Establishment Clause, a plaintiff must show state action. *Doe v. Beaumont Indep. Sch. Dist.*, 173 F.3d 274, 281 (5th Cir. 1999) (holding that an Establishment Clause litigant "must demonstrate: [1] that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant [and] . . . [2] that the injury fairly can be traced to the challenged action. . ."). The Chaplain Act does not require schools to give guidance or instruction to school chaplains, leaving them to act in accordance with personal ideals. See EDUC. § 23.001. The lack of oversight could render a school chaplain a private—versus state—actor in an Establishment Clause claim. See Downen & Lopez, *supra* note 5.

166. See Nathan S. Chapman, *The Establishment Clause, State Action, and Town of Greece*, 24 WM. & MARY BILL RTS. J. 405, 405 (2015); *School Chaplaincy's Legal Precedent: Employing Chaplains*, NAT'L SCH. CHAPLAIN ASS'N, <https://www.nationalschoolchaplainassociation.org/employing-chaplains-legalities> [<https://perma.cc/2R4G-ZVVS>] (last visited Mar. 8, 2026).

167. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 529–30 (2022); see EDUC. § 23.001. While I neither agree with the Court's view of Coach Kennedy as a private speaker nor concede the point, I nonetheless present arguments pursuant to that rubric.

168. *Kennedy*, 597 U.S. at 562.

of his responsibilities as coach.¹⁶⁹ In *Kennedy*, the Coach was—at the time of the prayer—technically not “on duty.”¹⁷⁰ A school chaplain, by contrast, who prayed with a student during a counseling session would be within the ordinary scope of his responsibilities as a chaplain.¹⁷¹ Unlike Coach Kennedy, whose prayers did not “ow[e their] existence” to his duties as a public employee, a chaplain’s prayer or any other religious conversation with a student during a counseling session would unambiguously owe their existence to the chaplain’s duties as a public employee/volunteer.¹⁷² Further, “[t]he prayers for which Mr. Kennedy was disciplined were not publicly broadcast or recited to a *captive audience*.”¹⁷³ Coach Kennedy prayed in an open stadium, addressing only his higher power.¹⁷⁴ If a student seeks guidance or counseling from a school chaplain in their role as a mental health provider, how is that student anything other than a captive audience? In *Lee*, a brief, scripted prayer offered to a captive audience of public-school students who only sought a diploma was unconstitutional and far less intimate than an unscripted counseling session between a school chaplain and a student who seeks advice, a sympathetic ear, or wisdom.¹⁷⁵

Further, under *Lee*, a district’s school chaplain policy may be the key to a successful constitutional challenge.¹⁷⁶ The principal in *Lee* provided the rabbi with “Guidelines for Civic Occasions” and admonished him to make any prayer nonsectarian.¹⁷⁷ “Through these means the principal directed and controlled the content of the prayers.”¹⁷⁸ Thus, the state

169. *Id.* at 509.

170. *Id.*

171. See *What Is a Chaplain? Definition, Duties, and Impact of Chaplains*, THE INT’L FELLOWSHIP OF CHAPLAINS (Apr. 16, 2025), <https://ifoc.org/what-is-a-chaplain/> [<https://perma.cc/ZXW5-JCEA>].

172. *Kennedy*, 597 U.S. at 509, 530; see *What Is a Chaplain? Definition, Duties, and Impact of Chaplains*, *supra* note 171; EDUC. § 23.001(a).

173. *Kennedy*, 597 U.S. at 542 (emphasis added).

174. *Id.* at 517.

175. *Lee v. Weisman*, 505 U.S. 577, 580, 598–99 (1992).

176. See *id.* at 599.

177. *Id.* at 588.

178. *Id.*

controlled the prayer, in violation of the Establishment Clause.¹⁷⁹ If a Texas school district provides guidance to a school chaplain on his/her conduct or messaging, then the state is similarly directing and controlling what a chaplain does on campus. This is not to suggest that a district will instruct a school chaplain to pray with students or encourage overtly religious activity, but nothing in the Chaplain Act is preventing them from doing so. In the void of statutory instructions, a devout administrator at a Texas school could offer guidance to a school chaplain, akin to Principal Lee's direction to Rabbi Gutterman in *Lee*, in violation of the Establishment Clause.¹⁸⁰

D. What Conduct May Constitute Coercion

A school chaplain may directly coerce a student into engaging in religious activities or dialogue through proselytizing. As *Oxford v. Beaumont*¹⁸¹ demonstrated, even with strict policies regarding conduct, clergy in public schools are prone to over-index on their own faith traditions.¹⁸² Representative Hefner did not share his colleagues' concerns that, for instance, a Christian chaplain meeting with an atheist, Jewish, or Muslim student would feel compelled to offer counsel from a Christian perspective, which is problematic because "[c]hildren are particularly vulnerable to coercion" because of their school environment.¹⁸³ The stated rationale for installing chaplains in schools is to fill a void in mental health resources.¹⁸⁴ As such, school chaplains will ostensibly be addressing a vulnerable population of students seeking assistance, some of whom may be particularly

179. *See id.* ("The State's role did not end with the decision to include a prayer and with the choice of a clergyman.")

180. *See id.*

181. 224 F. Supp. 2d 1099 (E.D. Tex 2002).

182. *See id.* at 1100.

183. H.R., TEXAS HOUSE JOURNAL, 88th Leg., Reg. Sess., at 3417 (2023); *Kennedy v. Bremer-ton Sch. Dist.*, 597 U.S. 507, 560 (2022) (Sotomayor, J., dissenting).

184. MAYES MIDDLETON, SENATE RSCH. CTR., BILL ANALYSIS (SENATE COMMITTEE REPORT), S., 88th Leg., Reg. Sess., at 1 (Tex. 2023) ("Public schools are currently in need of additional qualified individuals to counsel their students. School districts are in need of additional options to further aid their students.").

susceptible to the coercive power of a school authority figure.¹⁸⁵ As evident by the Chaplain Act's premier advocate, the NSCA, "[s]chool chaplain duties include but are not limited to prayer, counsel, and spiritual care for the school staff, the students, and their families. [They] offer counsel based on timeless biblical values and serve as a source of biblical truth."¹⁸⁶

If a school district makes chaplain meetings mandatory, an LGBTQ student may be required to meet with a monotheistic chaplain with strong "biblical"—and anti LGBTQ—views. Allowing a school chaplain who adheres to such "biblical views"—particularly those aligned with traditional Christian doctrine on sexuality—to meet one-on-one with an LGBTQ student risks significant coercion, both subtle and overt.¹⁸⁷ Such chaplains may, even unintentionally, impart moral or theological judgments that pressure the student to conform to beliefs about sexuality or gender that conflict with their own identity.

Courts will also be concerned with whether a chaplain's presence alone may tacitly or indirectly coerce students, due to peer pressure or a desire to belong.¹⁸⁸ Even if participation is nominally voluntary or optional because an official counselor is also on staff the presence of religious authority, like a school chaplain, especially when sanctioned by the school, creates an environment where students may feel unable to opt out without negative consequences or social stigma.¹⁸⁹ "That a child is

185. See *Kennedy*, 597 U.S. at 560 ("Children are particularly vulnerable to coercion because of their 'emulation of teachers as role models' and 'susceptibility to peer pressure.'") (Sotomayor, J., dissenting).

186. *Educational School Chaplaincy Program To Bring Prayer into Schools Launched*, NAT'L SCH. CHAPLAIN ASS'N (Mar. 6, 2023), <https://www.nationalschoolchaplainassociation.org/blog/cvh9rqzr5it9rhd6mxah25l19jsbv> [<https://perma.cc/3V85-HHAZ>].

187. The NSCA does not expressly condemn LGBTQ, but its provider of chaplain certification, Oral Roberts University, openly condemns LGBTQ communities. See *Sexual Misconduct Policy: Notice of Non-Discrimination*, ORAL ROBERTS UNIV., <https://oru.edu/consumer-information/title-ix/policy/index.php> [<https://perma.cc/MP6Z-3WG5>] (last visited Mar. 8, 2026). Its website notes that it "is exempted from certain laws and regulations concerning discrimination on the basis of religion. ORU maintains the right, with regard to admissions, enrollment, employment, and other matters, to uphold and apply its religious beliefs related to, among other issues, marriage, sex (gender), gender identity, sexual orientation, and sexual activity." *Id.*

188. See *Kennedy*, 597 U.S. at 560 (Sotomayor, J., dissenting).

189. See *Lee v. Weisman*, 505 U.S. 577, 592–93 (1992). What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in

offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain."¹⁹⁰ Students seeing peers meet with chaplains, or perceiving that such meetings are favored or institutionally encouraged, can feel social or psychological pressure to conform or participate, even if they might otherwise choose not to.¹⁹¹

E. School Chaplains: A Solution in Search of a Problem

Senate Bill 763's proponents argue that Texas public school students' dire need for supplemental counseling resources necessitates the installation of clergy on campuses as a compassionate response.¹⁹² Rather than investing in certified mental health professionals or evidence-based student support systems, the state offers a theological remedy: chaplains, often untrained in counseling, positioned as substitutes for licensed educators and clinicians.¹⁹³ In this way, SB 763 elevates religious figures to a privileged status within the educational framework, cloaked in the language of pastoral care.

This model strongly echoes the Supreme Court's reasoning in *Lee*, where the Court rejected the claim that a graduation prayer was justified by the solemnity of the occasion.¹⁹⁴ "The importance of the event . . . becomes one of the principal

a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion. *Id.* It is worth noting that school districts could have a chaplain in addition to a licensed counselor. *But see supra* note 164 and accompanying text (noting how school counselors could be replaced with chaplains).

190. *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 227 (1948).

191. *See Lee*, 505 U.S. at 592–93.

192. *See* Kathryn Thomason, *School and Scripture: Examining Senate Bill 763*, TEX. UNDERGRADUATE L.J. (2023) (noting chaplains will help under-resourced districts staff counselor positions).

193. TEX. EDUC. CODE ANN. § 23.001 (West 2025); *see* Weaver, *supra* note 165; *Frequently Asked Questions*, CORP. CHAPLAINS OF AM., <https://chaplain.org/about/faqs/> [<https://perma.cc/M5HN-J5FQ>] (last visited Mar. 8, 2026).

194. *Lee*, 505 U.S. at 595.

reasons why [the school district's] argument must fail," the Court explained, recognizing that the ceremonial gravity of a public-school event heightens, rather than reduces, the coercive pressure on students to conform.¹⁹⁵ Likewise, SB 763 creates a school environment in which vulnerable students—facing personal crises, stress, or isolation—may feel pressured to turn to religious chaplains out of a lack of alternatives, or worse, under the mistaken belief that such figures represent state-sanctioned psychological authority. Thus, under the Court's own rationale, the sheer gravitas of student need necessitates a legitimate solution, free of coercion.¹⁹⁶

Texas's attempt to conflate pastoral care with secular mental health support, particularly when endorsed or formalized within public education, directly implicates the Establishment Clause. The veneer of voluntariness cannot conceal the reality that SB 763 functions as a subtle—but no less powerful—form of spiritual coercion in spaces where students are uniquely susceptible to institutional influence.

IV. SB 763 IS NOT NEUTRAL WITH RESPECT TO RELIGION

The Establishment Clause requires governmental neutrality between religion and nonreligion and among different religions.¹⁹⁷ SB 763 fails this test for myriad reasons. One, by authorizing public schools to employ or accept volunteer chaplains—who are, by definition, religious figures—SB 763 potentially privileges religious support over secular counseling.¹⁹⁸ Two, school districts, in deciding which chaplains to hire

195. *Id.*

196. *See id.* at 596.

197. *Cath. Charities Bureau, Inc. v. Wis. Lab. & Indus. Rev. Comm'n*, 605 U.S. 238, 247–48 (2025); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (“The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.”); *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (“The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can . . . aid one religion, aid all religions, or prefer one religion over another.”).

198. EDUC. § 23.001(a) (authorizing the use of chaplains to provide mental health services either as volunteers or as employees in public schools); Ahmed Ibrahim & Rob Whitley, *Religion and Mental Health: A Narrative Review with a Focus on Muslims in English-speaking Countries*, 45 *BJPSYCH BULL.* 170, 171 (2021).

or accept, may end up favoring certain denominations, which violates the Establishment Clause's "“clearest command”" that one religious denomination cannot be officially preferred over another.¹⁹⁹

A. *SB 763 Favors Religious Support over Secular Options*

The Chaplain Act empowers school districts to utilize chaplains instead of professional lay counselors.²⁰⁰ Those who do should face constitutional challenges for a non-neutral policy, similar to Beaumont's Clergy In Schools program. In *Oxford v. Beaumont*,²⁰¹ the Court ruled the Clergy In Schools program was not neutral because it exclusively used clergy as counselors without providing a secular alternative, and therefore, violated the Establishment Clause.²⁰² Further, that SB 763 allows a school district to use limited School Safety Allotment funds²⁰³ to pay a chaplain in lieu of a licensed counselor is a classic *reductio ad absurdum*.²⁰⁴ The sole purpose of the School Safety Allotment is to enhance student safety and well-being,²⁰⁵ yet SB 763 will help districts to divert those scarce resources away from trained professionals and toward clergy with no required counseling

199. *Cath. Charities Bureau*, 605 U.S. at 247.

200. EDUC. § 23.001(a) (“[A] school district or open-enrollment charter school may employ or accept as a volunteer a chaplain to provide support, services, and programs for students”); *see also* EDUC. § 48.160(b)(3)–(4) (requiring that funds allocated for mental health personnel include chaplains); H.R., TEXAS HOUSE JOURNAL, 88th Leg., Reg. Sess., at 3409–24 (2023) (noting the proposed draft of the bill intended to make it clear that chaplains could replace counselors).

201. 224 F. Supp. 2d 1099 (E.D. Tex. 2022).

202. *Id.* at 1114.

203. EDUC. § 48.160(b) (providing that School Safety Allotment funds are allocated to improve school safety and security, including, but not limited to, infrastructure, security cameras, peace officers, active shooter measures, and suicide prevention).

204. *Id.* § 48.160(b)(3)(C)(i)–(ii) (authorizing use of School Safety Allotment funds for “licensed counselors, social workers, behavioral interventionists, chaplains, and individuals trained in restorative discipline and justice or other discipline management practices” and for “mental health personnel and support, including chaplains”); *Reductio Ad Absurdum*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/reductio%20ad%20absurdum> [<https://perma.cc/GP59-2WD9>] (defining *reductio ad absurdum* as “disproof of a proposition by showing an absurdity to which it leads when carried to its logical conclusion”).

205. EDUC. § 48.160(b) (“Funds allocated under this section must be used to improve school safety and security”).

credentials or mental health expertise.²⁰⁶ The law undermines the very goals it purports to serve—to help public school students—and exclusively in favor of a religious option.²⁰⁷

Representative Gene Wu proposed Amendment Two, which would have prevented chaplains from being paid with public funds.²⁰⁸ Wu argued that “we should not use public monies to compensate religious services.”²⁰⁹ Representative Cole Hefner objected, stating “[t]his just completely messes up the purpose of the bill.”²¹⁰ Beyond seeding Christianity into public classrooms, it is not clear the purpose to which Representative Hefner refers. Amendment 2 suffered the same fate as its secular brethren.²¹¹ Therefore, school districts can employ chaplains and pay their salaries with public funds.²¹² Having chaplains serve any official role in a public school—even as a volunteer—raises the specter of state-endorsed religion.²¹³ So, how does having clergy officially on staff at a public school not run afoul of the Establishment Clause’s embargo against the state favoring religion over nonreligion?²¹⁴

206. H.R., TEXAS HOUSE JOURNAL, 88th Leg., Reg. Sess., at 3410 (2023) (Rep. Gene Wu offering Amendment 2 to SB 763) (“[I]f these chaplains are to be compensated, it should come from private sources or come from private organizations, and we should not use public monies to compensate religious services.”); Elizabeth Ledford, *Students Need Trained Counselors, Not Chaplains*, TEX. FREEDOM NETWORK (Apr. 26, 2023), <https://tfn.org/students-need-trained-counselors-not-chaplains-hb-3614/> [<https://perma.cc/3YFX-PCDG>].

207. See S. 763, 88th Leg., Reg. Sess. (Tex. 2023).

208. H.R., TEXAS HOUSE JOURNAL, 88th Leg., Reg. Sess., at 3410 (2023) (“A school district or open-enrollment charter school may not use public funds to compensate a chaplain under this chapter.”).

209. *Id.* (statement of Rep. Wu).

210. *Id.* (statement of Rep. Hefner).

211. Compare *id.* (citing the failed religious vote on Amendment 2 to SB 763), with *id.* at 3411–12, 3416 (citing the failed secular vote on Amendment 3 to SB 763).

212. See TEX. EDUC. CODE ANN. §23.001(a) (West 2025).

213. Letter from Adriana Piñon, Ams. C.L. Union of Tex., to Superintendent & Sch. Bd. Members 1 (June 26, 2023) (on file with ACLU Texas).

214. See *Drummond v. Okla. Statewide Virtual Charter Sch. Bd.*, 558 P.3d 1, 13 (Okla. 2024), *aff’d*, 605 U.S. 165 (2025) (holding that the Establishment Clause prevents the state from passing laws that aid religion or prefer certain denominations); *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 27 (1989) (Blackmun, J., concurring) (“[The] government may not favor religious belief over disbelief.”).

B. SB 763 Favors One Religion Over Another

The Establishment Clause prohibits public schools from favoring one religion over another.²¹⁵ Representative Wu's proposed Amendment No. Four would have required a school to at least provide a chaplain, or other religious personnel, of different faiths if requested by a student.²¹⁶ As discussed, the amendment would specifically make it possible for students to request counseling from different religious personnel with whom they would be comfortable.²¹⁷ Representative Wu argued in part that "[w]hen our kids have so much trauma in their life, simply letting them ask for someone they are comfortable with, for someone that they feel understands their background, understands their world view, that's not a big ask. That's not a big requirement."²¹⁸ The Amendment failed seventy-eight to fifty-nine.²¹⁹ The only opposition raised at the debate was by Representative Cole Hefner.²²⁰ He said, "[i]t's clear in the bill that chaplains do not push certain denominations so this is not necessary, and I ask you vote no."²²¹ There is nothing in the bill that makes "clear" that chaplains do or do not push anything, including denominations.²²² All attempts to include such limiting

215. *Engel v. Vitale*, 370 U.S. 421, 429 (1962) ("[O]ne of the greatest dangers . . . [is] the Government[] placing its official stamp of approval upon one particular form of religious services."); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 218, 226 (1963) ("State power is no more to be used so as to handicap religions than it is to favor them . . . [t]he place of religion in our society is an exalted one . . . [i]n the relationship between man and religion, the State is firmly committed to a position of neutrality.").

216. H.R., TEXAS HOUSE JOURNAL, 88th Leg., Reg. Sess., at 3417 (2023) ("A school district or open-enrollment charter school that employs or accepts as a volunteer a chaplain under this chapter shall provide a representative of any other denomination or faith if requested by a student, a student's parent or guardian, or a teacher.") (citing a proposed amendment by Rep. Wu).

217. *Id.* at 3418 (statement of Rep. Raphael Anchía) (explaining that without the amendment, his Catholic daughters would be denied Catholic counseling, as "the school district or school would mandate to them that they must receive counseling from a pastor or a chaplain in the faith tradition of the government[]").

218. *Id.* at 3419 (statement of Rep. Gene Wu).

219. *Id.*

220. *Id.* at 3417 (statement of Rep. Cole Hefner).

221. *Id.* (statement of Rep. Cole Hefner).

222. *See* TEX. EDUC. CODE ANN. § 23.001 (West 2023).

language were thwarted.²²³ But the “Constitution and the best of our traditions counsel mutual respect and tolerance, not censorship and suppression, for religious and nonreligious views alike.”²²⁴ Thus, chaplains working inside Texas public schools would necessarily be prohibited from favoring one religion over another or over nonreligion. School districts, too, would be prohibited from favoring one religion over another; no Texas ISD can refuse to consider an application by a non-Christian chaplain. As the law is to remain neutral and not favor Christianity, then chaplaincy programs should remain inclusive if adopted, paving the way for Muslim, Jewish, Zoroastrian faith leaders, among many others.²²⁵ However, as Senator Nathan Johnson acknowledged, it is “unlikely that we’re going to see anything close to parity in representation in terms of which religion is represented by chaplains on a school campus.”²²⁶ So far, only Christian chaplains have been employed in Texas schools under the Chaplain Act.²²⁷ Senator Johnson is probably right

223. See H.R., TEXAS HOUSE JOURNAL, 88th Leg., Reg. Sess., at 3419 (2023) (“Amendment No. 4 failed of adoption.”).

224. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 514 (2022).

225. Under *Kennedy*, the Court should find a school chaplaincy program to “undermine a long constitutional tradition under which learning how to tolerate diverse expressive activities has always been ‘part of learning how to live in a pluralistic society.’” *Id.* at 541 (citing *Lee v. Weisman*, 505 U.S. 577, 590 (1992)); see also *Mahmoud v. Taylor*, 606 U.S. 522, 615–16 (2025) (Sotomayor, J., dissenting) (“There are more than 370 distinct religious groups in this country.”) (citing CLIFFORD GRAMMICH, ERICA J. DOLLHOPF, MARY L. GAUTIER, RICHARD HOUSEAL, DALE E. JONES, ALEXEI KRINDATCH, RICHIE STANLEY & SCOTT THUMMA, U.S. CENSUS BUREAU, 2020 U.S. RELIGION CENSUS: RELIGIOUS CONGREGATIONS & ADHERENTS STUDY 7 (2023)). Would the Court view a school district’s decision to employ (or accept as volunteer) a Christian chaplain as incongruent with its own view of how to operate within our pluralistic society? Would denying students access to chaplains of their own faith (as proposed by failed Amendment 4 to SB 763) not be intolerant of “diverse expressive activities”?

226. Naaz Modan, *Texas Allows Schools to Hire Chaplains for Student Mental Health Needs*, K-12 DIVE (June 28, 2023), <https://www.k12dive.com/news/texas-allows-schools-to-hire-chaplains-for-student-mental-health-needs-ACLU-warning/654135/> [https://perma.cc/HJK5-XCMM].

227. See *Xia*, *supra* note 95. Newman International Academy, a public charter school system, has elected to employ (pay) school chaplains. *Id.* While direct public statements labeling chaplain Matthew Daniels explicitly as a “Christian chaplain” employed by Newman International Academy are limited, strong circumstantial and institutional evidence supports this conclusion. See *Meet the Leaders*, NEWMAN INT’L ACAD., http://newmanacademy.org/warrior_wellness/meet_the_leaders [https://perma.cc/F6A4-QL7Y] (last visited Mar. 9, 2026). Matthew Daniels’s educational background includes Lighthouse Christian Academy and Southwestern Assemblies of God University, both of which are Christian educational institutions. *Id.* Newman

that Texas is unlikely “to see Muslim [imams] and Jewish rabbis on a campus.”²²⁸

C. *SB 763 Furthers No Compelling Governmental Interest & Is Not Narrowly Tailored*

When a state law or policy is preferential to a denomination, the law must survive strict scrutiny.²²⁹ To withstand strict scrutiny, the state must show that its law furthers a compelling governmental interest and is narrowly tailored to achieve that interest.²³⁰

Texas has no compelling need for school chaplains. The primary justification offered for SB 763 is to address student mental health needs and to curb a mental health crisis.²³¹ However, school chaplains are not required to have any mental health or counseling credentials, unlike licensed school counselors.²³² This undermines the claim that the law is narrowly tailored to address a compelling interest in student welfare.

Who could—or *would*—argue that public schools would not benefit from additional resources, particularly mental health professionals?²³³ More than half of US public schools cannot

International Academy itself was established by a nonprofit organization with Christian roots, and its chaplaincy program is described by district staff and the media as faith-based. Xia, *supra* note 95.

228. Modan, *supra* note 226.

229. *Cath. Charities Bureau, Inc. v. Wis. Lab. & Indus. Rev. Comm'n*, 605 U.S. 238, 248 (2025) (“When a state law establishes a denominational preference, courts must ‘treat the law as suspect’ and apply ‘strict scrutiny in adjudging its constitutionality.’”) (citing *Larson v. Valente*, 456 U.S. 228, 246 (1982)) (noting that the First Amendment demands government neutrality, as it cannot favor one religion or a religion over irreligion, and that nonneutral laws are “suspect” and must survive strict scrutiny).

230. *Id.* at 252 (quoting *Larson*, 456 U.S. at 246–47) (noting that the non-neutral state law at issue “‘must be invalidated unless it is justified by a compelling governmental interest’ and is ‘closely fitted to further that interest.’”); *Gruenke v. Seip*, 225 F.3d 290, 305 (3d Cir. 2000) (holding that, when a school policy conflicts with a parent’s right to raise their child, “the primacy of the parents’ authority must be recognized and should yield only where the school’s action is tied to a compelling interest”).

231. See MIDDLETON, *supra* note 184; TEX. EDUC. CODE ANN. § 23.001(a) (West 2025).

232. See *Ledford*, *supra* note 206; EDUC. § 23.001(a) (“[School chaplains are] not required to be certified by the State Board for Educator Certification.”).

233. See Charles Brown & N’Daisha K. Carrington, *Increasing Access to School-Based Mental Health Services for Youth Subsequent to the COVID-19 Pandemic*, 3 HEALTH AFFS. SCHOLAR 1, 1 (2025). Fifty-two percent of public schools cannot provide adequate mental health services to

provide adequate mental health resources to students.²³⁴ The fallout from COVID is still being realized.²³⁵ But under what educational paradigm is religion a bulwark against psychological distress? One need not extrapolate too far to see how the inverse could be true—a non-religious student in distress seeks counsel from the on-staff “counselor” who is, in fact, a chaplain with an agenda.²³⁶

“Despite the explicit separation of church and state provided for by the U.S. Constitution, the level of religious belief in the United States (and the concomitant significance of religion in American life and political discourse) rivals that of many theocracies.”²³⁷ Senate Bill 763 represents yet another attempt by Christian nationalists to crowbar private beliefs into the public sphere. The magic of SB 763, however, is that it is a pretextual panacea to an irrefutable mental health crisis among American adolescents.²³⁸ Texas does not prioritize education; the state’s government supplies the lowest amount of educational financing per pupil for K-12 schools,²³⁹ and the state’s counselor-to-

students largely due to inadequate funding and shortages of licensed mental health professionals. *Id.*

234. *Id.*

235. See Marie Heffernan & Michelle L. Macy, *Trends in Mental and Physical Health Among Youths*, JAMA PEDIATRICS 683, 684 (2025) (“In this large, nationally representative sample of US youths, the proportions of youths with anxiety or depression increased from 2016 to 2022.”).

236. Caitlin Sievers, ‘Jesus is Better Than a Psychologist’: Arizona Republicans Want Chaplains to be in Public Schools, AZ MIRROR (Mar. 12, 2025, at 10:19 ET), <https://azmirror.com/2025/03/12/jesus-is-better-than-a-psychologist-arizona-republicans-want-chaplains-to-be-in-public-schools/> [<https://perma.cc/GM4R-DD25>]; see Maria Jakovljevic & Nkopodi Nkopodi, *A Model of Coercive Control in Higher Education: A Qualitative Study*, 11 F1000 RSCH. 1, 3 (2023) (studying the coercive control in higher education).

237. SAM HARRIS, THE MORAL LANDSCAPE: HOW SCIENCE CAN DETERMINE HUMAN VALUES 145 (2010).

238. See CENTERS FOR DISEASE CONTROL AND PREVENTION, YOUTH RISK BEHAVIOR SURVEY DATA SUMMARY & TRENDS REPORT: 2013-2023, U.S. DEP’T OF HEALTH AND HUM. SERVS. 55 (2024), <https://www.cdc.gov/yrbs/dstr/index.html> [<https://perma.cc/44YB-M8GR>] (providing data that shows that 40% of U.S. high school students reported persistent sadness or hopelessness, 20% seriously considered suicide in the past year); *Panacea*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/panacea> [<https://perma.cc/LD3N-BUYN>] (“[A] remedy for all ills or difficulties: cure-all”).

239. Melanie Hanson, *U.S. Public Education Spending Statistics*, EDUC. DATA INITIATIVE (Feb. 8, 2025), <https://educationdata.org/public-education-spending-statistics> [<https://perma.cc/VWC8-4KLC>] (reporting that Texas K-12 schools rank 37th in spending and 42nd in funding and are “second only to California in the size of its K-12 student population”).

student ratio is materially worse than national recommendations.²⁴⁰ Installing chaplains in schools to address counseling shortages is the legislative equivalent of playing both arsonist and firefighter. Texas's leaders have starved schools of resources, creating a void they now conveniently seek to fill with unqualified, unregulated clergy. Chaplains "are not qualified for the duties envisioned by SB 763."²⁴¹

Even if a court could identify a compelling government interest in school chaplains, SB 763 is not narrowly tailored. The law is both overinclusive (making volunteer chaplains available to every school regardless of need) and underinclusive in protections (lacking any constraints to ensure neutrality and prevent coercion).²⁴² It ignores less restrictive, secular, and effective alternatives, such as funding more certified counselors or social workers.²⁴³ The law sweeps far more broadly than necessary and is not narrowly tailored under prevailing First Amendment standards.

In fact, several bills aimed at bolstering the presence of certified counselors in Texas schools were introduced in recent legislative sessions but did not make it out of committee or were not signed into law. For instance, in the 87th Legislature, SB 178 would have required Texas schools to gradually increase the number of counselors employed, aiming to reach a 300:1 student-to-counselor ratio, but it died in committee.²⁴⁴ HB 2937, introduced during the 88th Legislature, would have provided additional funding and staffing requirements to increase the

240. AM. SCH. COUNS. ASS'N, 2023-2024 STUDENT-TO-SCHOOL COUNSELOR RATIO 2023-24 1 (2024), <https://www.schoolcounselor.org/getmedia/f2a319d5-db73-4ca1-a515-2ad2c73ec746/Ratios-2023-2024-Alpha.pdf> [<https://perma.cc/E2AS-FBR6>] (providing a recommended ratio of 250:1, which is in stark contrast to Texas's current ratio estimated to be 392:1).

241. Letter from Tex. Chaplains to All Tex. Sch. Bd. Members (Aug. 22, 2023), [<https://perma.cc/L4L8-STQQ>]; Peter Greene, *Texas Chaplains Urge Districts to Reject New School Chaplain Plan*, FORBES (Aug. 29, 2023, at 13:32 ET) <https://www.forbes.com/sites/peter-greene/2023/08/29/texas-chaplains-urge-districts-to-reject-new-school-chaplain-plan/> [<https://perma.cc/ED9F-WNNS>].

242. See TEX. EDUC. CODE ANN. § 23.001 (West 2025).

243. See *infra* notes 244–46.

244. S. 178, 87th Leg., Reg. Sess. 1, 2 (Tex. 2021) (died in committee).

number of certified counselors in school districts.²⁴⁵ The bill did not advance out of committee.²⁴⁶

Chaplains are not trained mental health professionals. To be sure, some chaplains hold professional counseling licensure, and vice versa. But to qualify as a chaplain, mental health training is not required.²⁴⁷ Further, school chaplains are not required to have the same credentials as teachers under the SBEC. In fact, licensed mental health professionals are not automatically qualified to work in public schools unless certified by the SBEC.²⁴⁸ Chaplains, however, are not beholden to the same standard.

A group of over 100 ordained chaplains opposed SB 763, noting its lack of mandates for training, licensure, and certification.²⁴⁹ They noted that chaplains are neither trained nor certified to provide educational or mental health counseling to students.²⁵⁰ The ACLU also filed an open letter objecting to the law, noting its blatant violation of the Establishment Clause.²⁵¹

To be a school counselor in Texas, it is not enough to be an LPC, or a Licensed Professional Counselor. Texas requires a counselor to obtain a school counseling certificate through the Texas Education Agency.²⁵² Candidates must hold a Bachelor's degree and, "at a minimum, a 48-hour master's degree in counseling from an accredited institution."²⁵³ Further, to become a certified school counselor, candidates must enroll in a Texas-

245. H. 2937, 88th Leg., Reg. Sess. (Tex. 2023) (referred to Public Education Committee and subsequently died in committee).

246. *Id.*

247. See, e.g., *FAQs Regarding Certification*, BD. OF CHAPLAINCY CERTIFICATION, INC., <https://www.apchaplains.org/bcci-site/becoming-certified/certification-frequently-asked-questions/#education> [<https://perma.cc/PMS6-DCNS>] (last visited Mar. 6, 2026).

248. See *Licensing & Certification Resources*, TEX. COUNS. ASS'N, <https://txca.org/resources/licensing-certification> [<https://perma.cc/4MJU-5PBY>] (last visited Mar. 6, 2026).

249. Letter from Tex. Chaplains to Tex. Sch. Bd. Members 1–2 (Sep. 12, 2023), https://bjconline.org/wp-content/uploads/2023/09/UPDATED-LETTER_-Texas-Chaplains-Say-No-to-Public-School-Chaplain-Programs.pdf [<https://perma.cc/6QUC-485F>].

250. *Id.* at 2 ("As trained chaplains, we are not qualified for the duties envisioned by SB 763.").

251. Letter from ACLU of Tex. to Tex. Sch. Bd. 3 (June 26, 2023), <https://www.aclu.org/documents/letter-to-texas-school-boards-re-unconstitutional-proposals-to-allow-chaplains-in-public-schools> [<https://perma.cc/GNB9-M8N4>].

252. See 19 TEX. ADMIN. CODE § 239.20 (West 2025).

253. *Id.* § 239.20(3).

approved Educator Preparation Program designed to prepare candidates for working in an educational setting.²⁵⁴ In addition to completing training requirements, candidates must pass the Texas school counselor certification exam (TexES 252).²⁵⁵ Texas recognizes that “[t]he contributions of school counselors and school counseling programs to the educational mission of a campus or district and to the individual student’s development are many and varied.”²⁵⁶ And yet, chaplains installed in Texas schools do not have to hold the same credentials. To counsel at a Texas public school, a chaplain must merely pass a background check and not be a registered sex offender.²⁵⁷

By contrast, chaplains serving in federal US prisons must meet rigorous qualifications.²⁵⁸ The Federal Bureau of Prisons requires chaplains to have a Bachelor’s Degree, graduate training in “theological or religious studies,” at least two years of ministerial experience, hold an ecclesiastical endorsement, and be ordained clergy or a member of an ecclesiastically religious institute.²⁵⁹ The U.S. Department of Defense and the Texas Department of Criminal Justice require equally rigorous credentials.²⁶⁰ The National School Chaplains Association, by contrast,

254. *Id.* § 239.20(1); *see also id.* § 239.10 (describing requirements of Educator Preparation Programs).

255. *Id.* § 239.20; *Texas School Counselor Certification Exam: Study Guide & Practice Test*, TEXESTEST.ORG, <https://texestest.org/texas/school-counselor-252/> [<https://perma.cc/S3XR-Y45K>] (last visited Mar. 4, 2026).

256. TEX. EDUC. AGENCY THE TEXAS MODEL FOR COMPREHENSIVE SCHOOL COUNSELING PROGRAMS 14 (5th ed. 2018), <https://tea.texas.gov/academics/learning-support-and-programs/school-guidance-and-counseling/pub2018texas-model5th-edition.pdf> [<https://perma.cc/A34A-C9PX>].

257. TEX. EDUC. CODE ANN. § 23.001(b)–(c) (West 2025); *see generally id.* §§ 22.081–22.09 (outlining criminal history requirements in Subchapter C).

258. *See generally Chaplain Qualifications – Frequently Asked Questions*, FED. BUREAU OF PRISONS, https://www.bop.gov/jobs/positions/docs/chaplain_faq.pdf [<https://perma.cc/69P-A-UHPE>] (last visited Mar. 5, 2026) (listing qualifications for chaplains working in federal facilities); *Qualification Requirements For Bureau of Prisons Chaplaincy*, FED. BUREAU OF PRISONS, <https://venturechurches.org/wp-content/uploads/2021/03/Qualification-Requirements-for-Bureau-of-Prisons-Chaplaincy-20202-2.pdf> [<https://perma.cc/986H-RMPT>] (last visited Mar. 5, 2026) (same).

259. *Chaplain Qualifications – Frequently Asked Questions*, *supra* note 258.

260. *See* U.S. DEP’T OF DEF., DOD INSTRUCTION 1304.28, THE APPOINTMENT AND SERVICE OF CHAPLAINS 9 (2021), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/130428p.pdf> [<https://perma.cc/P4JZ-S54T>]; TEX. DEP’T CRIM. JUST.,

requires only minimal training, including a 48-hour program equivalent to one college credit.²⁶¹ Notably, chaplains are typically provided to people who do not have access to spiritual guidance, like prisoners or military personnel, to fill a void.²⁶² “Government-sanctioned chaplains make sense in some settings, but not in our public schools.”²⁶³ Schools can address student mental health and support needs through licensed counselors, social workers, and secular support staff, all of whom offer alternative, less restrictive means.²⁶⁴ There is no evidence that only religious chaplains can meet these needs, or that excluding them would harm students’ rights or welfare.

D. SB 763 Violates the Free Exercise Clause

The prospect of school chaplains does not implicate only the Establishment Clause—it also raises substantial concerns under the Free Exercise Clause.²⁶⁵ Just as coerced participation in religious activity in public schools violates the Establishment Clause, so too can such coercion burden students’ and parents’ free exercise of religion or nonbelief.²⁶⁶ Where chaplains, acting under school auspices, introduce direct or indirect pressures that compel religious conformity or detour students from their

CHAPLAIN I JOB DESCRIPTION (April 2, 2025), <https://www.tdcj.texas.gov/divisions/hr/pd/045140.pdf> [https://perma.cc/Z2JB-RLMZ].

261. H.R., TEXAS HOUSE JOURNAL, 88th Leg., Reg. Sess., at 3414 (2023). During debate over Amendment 3, Rep. Talarico noted that chaplains training to work in hospitals, prisons, and the armed forces need master’s degrees and extensive training to counsel; he read from the NSCA’s website, noting that its school chaplain program requirements are “minimal” and “includes a 48-hour program that’s equivalent to one college credit.” *Id.*

262. See, e.g., *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 297 (1963) (Brennan, J., concurring) (providing that chaplains for military personnel or prisoners can be “sustained on constitutional grounds as necessary to secure to the members of the Armed Forces and prisoners those rights of worship guaranteed under the Free Exercise Clause”).

263. Letter from Tex. Chaplains to All Tex. Sch. Bd. Members, *supra* note 241, at 2.

264. See Nirmita Panchal, Cynthia Cox & Robin Rudowitz, *The Landscape of School-Based Mental Health Services*, KFF (Sep. 11, 2025), <https://www.kff.org/mental-health/the-landscape-of-school-based-mental-health-services/> [https://perma.cc/8A8W-KGZ8].

265. *Cath. Charities Bureau, Inc. v. Wis. Lab. & Indus. Rev. Comm’n*, 605 U.S. 238, 248 (2025) (“The Establishment Clause’s ‘prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause,’ too.”).

266. See *Schempp*, 374 U.S. at 223 (“[A] violation of the Free Exercise Clause is predicated on coercion . . .”).

own commitments, the resulting constitutional injury is two-fold: it establishes a state religion in violation of the First Amendment and infringes an individual's right to exercise—or not exercise—according to conscience.²⁶⁷ The focus on individual religious rights within the public-school context in *Kennedy v. Bremerton School District* increases the likelihood of successful Free Exercise challenges to Texas's Chaplain Act.²⁶⁸ The Supreme Court's willingness to essentially enshrine one person's Free Exercise rights suggests that students and parents burdened by a coercive religious environment, or by pressure to participate in chaplain-led activities, are now on especially strong constitutional footing.²⁶⁹ Parental rights include the liberty "to direct the religious upbringing of their children" free from state compulsion or coercion.²⁷⁰ Thus, a pious school chaplain who promotes his faith during a counseling session with a student of a different or no faith may burden the religious exercise of a parent by undermining or usurping their child's religious education or a family's nonreligious upbringing.²⁷¹

The Free Exercise Clause guarantees that "Congress shall make no law . . . prohibiting the free exercise [of religion]."²⁷² Texas has made a law that may well prohibit the free exercise of its citizens' religion.²⁷³ When it does, Texas then has the burden to show its conduct "was justified by a compelling state interest and was narrowly tailored in pursuit of that interest."²⁷⁴ As argued above, Texas will not meet that burden.

267. See generally Press Release, Texas Freedom Network, Statement from Senior Political Director Carisa Lopez on Passage of SB 763 (May 24, 2023), <https://tfn.org/chaplain-bill-passes/> [<https://perma.cc/5X7A-GZWX>] ("This bill violates the religious freedom of all faiths and Texans of non-faith . . .").

268. 597 U.S. 507, 532–36 (2022).

269. See *id.*

270. See *Mahmoud v. Taylor*, 606 U.S. 522, 543 (2025) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972)).

271. *Id.* at 530 (holding that, under the Free Exercise Clause, a public school "burdens the religious exercise of parents" where, as here, "it requires them to submit their children to instruction that poses 'a very real threat of undermining' the religious beliefs and practices that the parents wish to instill").

272. U.S. CONST. amend. I.

273. See S. 763, 88th Leg., Reg. Sess. (Tex. 2023).

274. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 525 (2022).

V. RENDER UNTO CAESAR: TEXAS'S TEN COMMANDMENTS
& PRAYER BILLS ²⁷⁵

Texas's enactment of SB 763 is not an isolated development, but part of a broader legislative movement to introduce overtly religious practices into public education.²⁷⁶ Several measures, advanced in the wake of SB 763, were signed into law despite significant opposition and precedent.²⁷⁷ Two bills in particular, SB 10 and SB 11, reveal more about the landscape in which SB 763 emerged and the political and ideological forces that will likely be on the other side of a constitutional challenge.

A. SB 11: *When the Bell Rings for Prayer*

In Texas's 89th legislative session, State Senator Mayes Middleton authored SB 11 to mandate prayer and Bible reading time during the public-school day.²⁷⁸ To ensure success with the sectarian mission, Representative David Spiller introduced a complementary bill in the House (HB 1425).²⁷⁹ Texas Governor Abbott signed SB 11 into law on June 21, 2025.²⁸⁰ The Prayer

275. *Matthew 22:21* (King James) says to "[r]ender therefore unto Caesar the things which are Caesar's; and unto God the things which are God's." Advocates for weaving Christianity and Biblical ideology into public schools ignore that the basis for keeping such doctrines out, in fact, comes from the Bible.

276. Sameea Kamal, *Prayer Period in Schools Backed by Texas Legislature*, TEX. TRIBUNE (May 23, 2025, at 10:00 CT), <https://www.texastribune.org/2025/05/22/texas-school-prayer-period-house-approval/> [<https://perma.cc/U3MM-VQRL>] ("Despite constitutional concerns from opponents, the Texas Legislature passed a bill Friday to allow a period for prayer or religious study—part of a larger national movement to infuse more Christianity into schools."); see also Roeloffs, *supra* note 2 (listing examples of other states passing laws that would bring religious practices into public school classrooms).

277. See H.R., TEXAS HOUSE JOURNAL, 89th Leg., Reg. Sess., at 6051–52 (2025) (calling for vote on SB 10 to be printed in Journal, Rep. Ward Johnson stated in part, "SB 10 is a gross overreach by the state, forcing an inherently religious display in public classrooms with no consideration for other faiths that students, teachers, and staff may practice. While we thought this was already settled law as decided in 1980 . . . [v]oting against SB 10 isn't voting against my religion or others that practice it. It's simply protecting the millions of Texas students and teachers that have different beliefs than I do from feeling targeted, left out, or ostracized . . .").

278. S. 11, 89th Leg., Reg. Sess. (Tex. 2025) (to be codified at TEX. EDUC. CODE § 25.0823).

279. See H. 1425, 89th Leg., Reg. Sess. (Tex. 2025).

280. S. 11, 89th Leg., Reg. Sess. (Tex. 2025); Press Release, Governor Abbott Signs Over 600 Critical Bills Passed During 89th Regular Legislative Session (June 21, 2025), <https://gov.texas.gov/news/post/governor-abbott-signs-over-600-critical-bills-passed-during-89th-regular-legislative->

Middleton, who believes “our schools are not God-free zones. . . . [and] [t]here is no such thing as ‘separation of church and state’ in our Constitution.”²⁸⁶ It is unclear on what evidence Senator Middleton based his proclamations, as the Texas Constitution—like the U.S. Constitution—indeed draws a distinct line between church and state.²⁸⁷ He also cites no authority for his declaration that schools are not “god-free.”²⁸⁸ To be sure, the many parochial schools throughout the state would agree with him.²⁸⁹ But roughly 26% of Texans identify as non-religious.²⁹⁰ Therefore, Texas public school populations almost certainly include students and faculty who do not believe in a god or observe a religion.

It is also unclear which “god” Senator Middleton references. The United States—as well as Texas—is home to people of polytheistic faiths or for whom the name “God” means something different than what it means to Senator Middleton.²⁹¹ Presumably, the Senator’s deity hales from the Old Testament, and by mandating Bible time in schools, he’s endeavoring to ensure children of all faiths—or no faith—are inculcated to his way of thinking.²⁹² The fact that participation in the prayer time and Bible reading is voluntary might seem to avoid the patina of state-

286. Pavan Acharya & Robert Downen, *In Quest to Infuse More Religion into Texas Schools, Advocates Say Courts Are Now on Their Side*, TEX. TRIBUNE (Feb. 12, 2025, at 12:49 CT), <https://www.texastribune.org/2025/02/12/texas-ten-commandments-school-prayer/> [<https://perma.cc/JC8J-V8RN>].

287. TEX. CONST. art. 1, §§ 6–7 (granting provisions that create Texas’s constitutional framework for separating religious institutions from the government). Section 6 protects individual religious freedom and bars government preference for any one religion, and section 7 prohibits the use of state funds for religious purposes. *Id.*

288. Archaya & Downen, *supra* note 286.

289. According to Private School Review, there are 255 Catholic private schools in Texas as of 2025, not including other religiously affiliated schools. *Best Texas Catholic Private Schools (2025-26)*, PRIV. SCH. REV., <https://www.privateschoolreview.com/texas/catholic-religious-affiliation> [<https://perma.cc/2B5F-Q8DY>] (last visited Mar. 10, 2026).

290. *People in Texas*, PEW RSCH. CTR.: RELIGIOUS LANDSCAPE STUDY, <https://www.pewresearch.org/religious-landscape-study/state/texas/> [<https://perma.cc/JM7Q-KFMR>] (last visited Mar. 19, 2026) (reporting that 26% of Texas adults identify as non-religious or religiously unaffiliated).

291. *See id.*

292. *See* S. 11 § 1, 89th Leg., Reg. Sess. (Tex. 2025) (to be codified at TEX. EDUC. CODE ANN. § 25.0823). The bill says “Bible or other religious text” as opposed to simply saying “religious text.” *Id.*

sanctioned religious activity.²⁹³ But students may feel pressure to conform to other students' faith traditions.²⁹⁴ According to its critics, the bill does not provide "freedom of religion," but "coercion under the guise of tradition."²⁹⁵ Multiple advocacy organizations have publicly indicated their intent to challenge it in court.²⁹⁶ The ACLU of Texas has warned that the Prayer Law will lead to religious coercion and exclusion by pressuring students to participate in activities contrary to their beliefs, thus, "threaten[ing] the constitutional rights of every student and teacher."²⁹⁷

B. SB 10: *Thou Shalt Disregard Supreme Court Precedent*

In Texas's 89th Legislature, the House of Representatives passed SB 10, which mandates that all Texas public school classrooms display a poster of the biblical Ten Commandments in "a conspicuous place."²⁹⁸ This bill, like SB 11, was considered crucial enough to be shepherded through the legislature on dual fronts.²⁹⁹ House Bill 2116, which mirrored SB 10, was the suspender to the Senate's proverbial belt.³⁰⁰ The enrolled version of SB 10 was sent to Texas Governor Greg Abbott on June 1, 2025 and signed into law on June 21, exactly *one day* after the Fifth Circuit, relying on established Supreme Court precedent,

293. See *id.* § 2 (to be codified at TEX. EDUC. CODE ANN. § 25.901) ("A public school student has an absolute right to individually, voluntarily, and silently pray or meditate in school.").

294. Evie Blad, *What's Behind a Legislative Push for Prayer and Bible Study in Public Schools*, EDUC. WK. (May 28, 2025), <https://www.edweek.org/policy-politics/whats-behind-a-legislative-push-for-prayer-and-bible-study-in-public-schools/2025/05> [<https://perma.cc/T6XX-NAPM>].

295. *Id.*

296. E.g., Kristi Gross, *ACLU of Texas Comments on Passage of S.B. 11 – Bill Forcing Christian Prayer into Public Schools*, ACLU TEX. (May 22, 2025, at 14:30 ET) <https://www.aclutx.org/en/press-releases/aclu-texas-comments-passage-sb-11-bill-forcing-christian-prayer-public-schools> [<https://perma.cc/QF3T-8FTT>].

297. *Id.*

298. S. 10, 89th Leg., Reg. Sess. (Tex. 2025) (codified at TEX. EDUC. CODE ANN. § 1.0041). The display must be sixteen inches wide and twenty inches tall and either framed or otherwise "durable." *Id.*

299. Texas Rep. Spiller introduced House Bill 2116 during the 89th Legislative Session, the text of which matched SB 10. See H. 2116, 89th Leg., Reg. Sess. (Tex. 2025).

300. See *id.*

ruled Louisiana's version of the law unconstitutional.³⁰¹ In 1980, the Supreme Court struck down mandatory displays of the Ten Commandments in public schools.³⁰² And yet, Texas (and several other states) has trudged ahead.³⁰³ According to Senator Phil King, the bill's sponsor, SB 10 was necessary because "our students cry out for the moral clarity, for the statement of right and wrong that they [the Ten Commandments] represent."³⁰⁴

A public school that reminds teenagers not to murder, steal, and lie is perhaps morally defensible.³⁰⁵ But forcing every classroom in Texas to command students—of all faiths, including nonbelievers—to observe the Sabbath³⁰⁶ or forego graven images³⁰⁷ is arguably anachronistic. Other faiths have rules and tenets. In fact, "Mahavira, the Jain patriarch, surpassed the morality of the Bible with a single sentence: '[d]o not injure, abuse, oppress, enslave, insult, torment, torture, or kill any creature or living being.'"³⁰⁸ If the pretextual objective of SB 10 is to offer moral guidance to American youth, would not a shorter, more

301. Tessa Gervasini, *Gov. Greg Abbott Signs Law Requiring Ten Commandments in All Texas Classrooms*, CATH. NEWS AGENCY (June 23, 2025, at 17:43 CT), <https://www.catholicnewsagency.com/news/264949/gov-greg-abbott-signs-law-requiring-ten-commandments-in-all-texas-classrooms> [<https://perma.cc/2EWV-E2WN>]; see cases cited *supra* note 59 and accompanying text; *Nathan v. Alamo Heights Indep., Sch. Dist.*, No. SA-25-cv-00756, 2025 WL 2417589 (W.D. Tex. Aug. 20, 2025) (granting a preliminary injunction against SB 10 on Establishment Clause and Free Exercise Clause grounds). Since the Fifth Circuit recently punted this issue for ripeness concerns, *supra* note 62 and accompanying text, we can likely anticipate that *Nathan v. Alamo Heights* will suffer the same fate. It is worth mentioning that an SB 10 case that is ripe for review (because the suit was filed after the commandments' installation) is currently before the Western District of Texas. *Ringer v. Comal Indep. Sch. Dist.*, No. CV SA-25-CV-1181-OLG, 2025 WL 3227708, at *1 (W.D. Tex. Nov. 18, 2025).

302. *Stone v. Graham*, 449 U.S. 39, 42–43 (1980).

303. See Libby Stanford, *Does a Ten Commandments Display in Classrooms Violate the Constitution?*, EDUC. WK. (June 19, 2024), <https://www.edweek.org/policy-politics/does-a-ten-commandments-display-in-classrooms-violate-the-constitution/2024/06> [<https://perma.cc/MT3F-7F6G>] (noting that in addition to Louisiana, Arizona, Georgia, Oklahoma, South Carolina, Utah, and West Virginia have all introduced similar legislation).

304. *Returning the Ten Commandments to Our Classrooms*, PHIL KING REPUBLICAN STATE SENATOR (Feb. 10, 2025), <https://www.philking.com/2025/02/10/returning-the-ten-commandments-to-our-classrooms/> [<https://perma.cc/GT9T-MWEK>].

305. *Exodus* 20:1–17 (King James) (referencing three of the Ten Commandments).

306. *Exodus* 20:8–11 (New Int'l) (citing the Fourth Commandment).

307. *Exodus* 20:4–5 (New Int'l) (citing the Second Commandment).

308. SAM HARRIS, LETTER TO A CHRISTIAN NATION, *supra* note 26, at 22–23.

poignant and relevant list—such as that proffered by Jains³⁰⁹—be a more direct and honest approach?

The Decalogue is unique to Judeo-Christian orthodoxy.³¹⁰ The commandments Senator King and his devout colleagues want on the walls of classrooms are unique to one religion: theirs. Yet, forcing a classroom to observe the tenets of one religion is the very definition of abridging another's religious freedom.³¹¹ To avoid the specter of religious hegemony, state representatives proposed various amendments to SB 10 that would have required schools to display posters of the tenets of other religions alongside the Biblical Ten Commandments.³¹² The amendments failed.³¹³ The First Commandment says, "thou shalt have no other gods before me."³¹⁴ Thus, Texas students from non-monotheistic faiths (Hindu, for instance) or non-believers will be reminded that neither their school nor their state values their belief system.

Advocates of Ten Commandment displays in schools, in Texas and elsewhere, spout varied arguments with a similar theme: that the Decalogue is the "moral bedrock" of western civilization, provides "timeless wisdom," and is fundamental to

309. Jainism is a recognized religion, with purportedly 100,000–150,000 American Jains. Jonathan Dickstein, *Next-Gen Jainism, Belief, and Authority*, ARIHANTA INST. (May 29, 2025), arihantainstitute.org/blog/137-next-gen-jainism-belief-and-authority [https://perma.cc/WJ8K-Q4TJ] (citing a 2019 Pew Research Center study).

310. Compare *Exodus* 20:1–17 (King James), with *Deuteronomy* 5:4–21 (Torah) (discussing the Ten Commandments); see also *Stone v. Graham*, 449 U.S. 39, 41 (1980) ("The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact.").

311. See, e.g., Charles Haynes, *Religious Freedom Means Little of People Aren't Safe to Practice Their Religion*, FREE SPEECH CTR. (Nov. 1, 2018), <https://firstamendment.mtsu.edu/post/charles-haynes-religious-freedom-means-little-if-people-arent-safe-to-practice-their-religion/> [perma.cc/H5L7-3GPY]. Charles Haynes, a religious freedom scholar speaking at the Freedom Forum in 2018 following the Pittsburgh synagogue massacre explains, "[r]eligious freedom as a legal right means little unless people of all religions are safe to practice their faith, wear their religious garb, speak their truth and in other ways follow their conscience without fear of discrimination, persecution or violence." *Id.*

312. See H.R., TEXAS HOUSE JOURNAL, 89th Leg., Reg. Sess., at 5781–84 (2025) (showing that Rep. Wu proposed amendments that would require the display of the "Four Noble Truths of Buddhism," the "Five Pillars of Islam," and "The 10 Yamas of Hinduism").

313. *Id.*

314. *Exodus* 20:1–17 (King James).

the American legal system.³¹⁵ One of the bill's chief enthusiasts, Lt. Gov. Dan Patrick, said that a Ten Commandments bill would "bring back this historical tradition of recognizing America's heritage, and remind students all across Texas of the importance of a fundamental foundation of American and Texas law: the Ten Commandments."³¹⁶ It remains unclear what part of "Texas law" Lt. Gov. Patrick believes is based on or even germane to the Ten Commandments. Perhaps he is referring to the Republic of Texas's original constitution from 1836, which explicitly prohibited the emancipation of slaves and preserved slaveowners' rights.³¹⁷ Because the Ten Commandments, indeed, sanction slavery.³¹⁸

The codified version of the bill signed by Governor Abbott specifies the exact and exclusive text of the Decalogue to be displayed.³¹⁹ The Tenth Commandment will say, "Thou shalt not covet thy neighbor's wife, nor his manservant, nor his maidservant, nor his cattle, nor anything that is thy neighbor's."³²⁰ Several Representatives favored an amendment that would remove "manservant" and "maidservant" because both terms refer to slaves.³²¹ Proponents of the amendment noted that removing the terms would not impact the meaning of the Commandment

315. See William Wolfe, *Should the Ten Commandments Be in Schools? Why This Debate Is Far From Over*, STANDING FOR FREEDOM CTR. (July 8, 2024), <https://www.standingforfreedom.com/2024/07/08/why-the-ten-commandments-belong-in-public-school-classrooms/> [<https://perma.cc/7DMJ-ZSYU>].

316. Brooke Kushwaha, *Lt. Gov. Dan Patrick Vows To Resurrect Texas' Own Ten Commandments Bill*, CHRON (June 20, 2024), <https://www.chron.com/news/article/dan-patrick-ten-commandments-19523865.php> [<https://perma.cc/3NUW-2L8P>].

317. TEX. CONST. of 1836, Gen. Provisions, § 9 (on file with Tarlton L. Libr., Univ. of Tex.), <https://tarlton.law.utexas.edu/constitutions/republic-texas-1836/general-provisions> [<https://perma.cc/YK83-9D7N>].

318. The New Revised Standard Version (NRSV) Bible's translation of the Tenth Commandment instructs, in part, "you shall not covet your neighbor's . . . male or female slave . . ." *Exodus* 20:17 (King James). Other translations of the Bible, like the King James Version (KJV), replace slave with servant. *Id.*; see also John T. Noonan, Jr., *The Religion of the Justice: Does It Affect Constitutional Decision Making?*, 42 TULSA L. REV. 761, 768 (2007) ("Two of the commandments contain an implicit acceptance of human slavery as an institution . . . where the objects not to be coveted include your neighbor's slave and slave girl.").

319. See TEX. EDUC. CODE ANN. § 1.0041 (West 2025).

320. *Id.* § 1.0041(c).

321. H.R., TEXAS HOUSE JOURNAL, 89th Leg., Reg. Sess., at 5794-97 (2025) (discussing Amendment No. 15 to SB 10, which was offered by Rep. Collier).

but would ensure school children did not see a daily reminder that their country, state, and the Christian god condoned slavery.³²² After extensive debate, the amendment was tabled.³²³

Many public buildings, like courthouses, have Ten Commandment displays. But public schools are not courthouses. Public schools are comprised of kindergarten through twelfth-grade students who are seated in classrooms for hours at a time, unlike adults passing a marble display of the Decalogue in a busy courthouse.³²⁴ It's noteworthy that Ten Commandments displayed—currently in public courthouses or as proposed for public school classrooms—do not include the Biblical punishments for breaking a commandment. One might wonder what teachers are expected to say if a student were to ask what happens if he or she studied on a Sunday, in violation of the 4th Commandment. The Bible's prescribed punishment: death.³²⁵

C. *Thou Shalt Pay For Another's Sin*

Both SB 10 and SB 11 contain provisions requiring the Texas Attorney General to defend school districts in any litigation arising from the implementation of these laws.³²⁶ Thus, if public school districts are sued for constitutional injuries caused by

322. *Id.*

323. *Id.* at 5797. Motion to table was voted by majority. *Id.*

324. Paul Finkelman, *The Ten Commandments on the Courthouse Lawn and Elsewhere*, 73 *FORDHAM L. REV.* 1477, 1477–81 (2005).

325. *Exodus* 31:15 (King James) (“Six days may work be done; but in the seventh *is* the sabbath of rest, holy to the LORD: whosoever doeth *any* work in the sabbath day, he shall surely be put to death.”).

326. S. 10, 89th Leg., Reg. Sess. (Tex. 2025) (to be codified at TEX. EDUC. CODE ANN. § 1.0041) (“The attorney general shall defend a public elementary or secondary school in a cause of action relating to any claims arising out of a school’s compliance with this section . . . the state is liable for the expenses, costs, judgments, or settlements”); S. 11, 89th Leg., Reg. Sess. (Tex. 2025) (to be codified at TEX. EDUC. CODE ANN. § 25.0823(f)) (“[T]he state is liable for the expenses, costs, judgments, or settlements of the claim arising out of the representation.”); TEXAS LEGISLATIVE BUDGET BOARD, GENERAL APPROPRIATIONS ACT FOR THE 2024-25 BIENNIUM CONFERENCE COMMITTEE REPORT, art. 1, 3–5 (2023) (demonstrating how the Texas Legislature appropriates funds from a variety of sources, chiefly taxes, to fund the Attorney General’s operations, including litigation, for example, legal expenses may include attorney fees, expert witness fees, litigation costs, and settlement amounts, all paid from the state’s general revenues—funded by taxpayers, including those students, families, and faculty potentially harmed by the legislation).

enforcing these statutes, the cost of the legal defense is borne by Texas taxpayers.³²⁷ Thus, like a sinister ouroboros, the State forces public school students and faculty to observe Christian practices while also requiring them to pay for any damage the State has caused by doing so. The Texas School Chaplain bill, however, does not have a similar provision.

CONCLUSION

The current trend in Establishment Clause litigation favors the religious and poses something of an existential threat to Americans who value the separation of church and state. The door propped open by *Kennedy's* non-prescriptive holding has left ample room for extremists to eek their varied agendas through while lower courts are left to try and make sense of how to properly analyze the constitutionality of sectarian dogma in public schools. Christian nationalists playing the long game shepherd religious bills through Congress and then wait and see what sticks after the inevitable fallout is litigated by injured families. The record of the debates around SB 763, along with other bills discussed herein, and the rejected amendments plainly shows a calculated effort to infuse religiosity into public education. Far from merely protecting individual rights to free exercise of faith, SB 763 and its ilk are designed precisely to infringe on the freedom—including freedom *from* religion—of those who do not share belief with Senator Middleton, Representative Hefner, or Lt. Governor Dan Patrick. But unlike other Establishment Clause cases dealing with adults opposed to prayer and Ten Commandment displays, it remains to be seen how school chaplain programs will be viewed by courts. With the *Lemon* test bleeding out in the jurisprudential gutter, courts are left to consider the history and tradition of clergy operating in public schools and whether their conduct is coercive. As evidenced by the legislative history of the various bills discussed here, religious indoctrination—or coercion—is the primary goal

327. See TEXAS LEGISLATIVE BUDGET BOARD, *supra* note 326.

of SB 763 and its proponents.³²⁸ Embedding chaplains in public schools is only one leg of a sectarian stool that includes (but is not limited to) Ten Commandment displays, Bible reading, prayer time, and even voucher programs.³²⁹ By the time the constitutionality of school chaplain programs is decided, much damage could already be done.³³⁰

328. H.R., TEXAS HOUSE JOURNAL, 88th Leg., Reg. Sess., at 3413 (2023) (showing how Amendment opponent Rep. Hefner explicitly rejected efforts to ensure chaplains could not proselytize students).

329. Acharya & Downen, *supra* note 24.

330. As noted by Justice Kennedy, “[i]t is of course true that great consequences can grow from small beginnings” *Lee v. Weisman*, 505 U.S. 577, 598 (1992) (citing *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 308 (1963)).