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VIA CERTIFIED MAIL

Samantha F. Lawrence
Staff Attorney
Freedom From Religion Foundation
P.O. Box 750
Madison, WI 53701

Re: Prayer on the Auburn University Baseball Team

Dear Ms. Lawrence:

The Alabama Attorney General's Office has reviewed your letter demanding that Auburn University "investigate" and "take action" with respect to religious activity among members of the men's baseball program. Your accusations against Auburn are factually unsubstantiated and legally unsound. I am advising the University not to assent to your demands.

The principal defect in your letter is its reliance on outdated authorities that no longer reflect the law of the land. Almost every judicial opinion you cite to support your speculation that Auburn University has violated the Establishment Clause applied the defunct test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971).¹ But as you well know, the Supreme Court has since "abandoned" *Lemon's* "historical approach to the Establishment Clause." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 534 (2022); *see id.* at 535 n.4 (collecting cases). In *Kennedy*, your organization asserted that student athletes "suffer" from prayers. *See Br. of the Freedom From Religion Foundation*, No. 21-418 (Apr. 1, 2022). The Supreme Court emphatically rejected your position.

Nonetheless, your organization remains committed to a kind of strict "separation" and total "neutrality" that have no basis in the Constitution. The

¹ For example, you cited *McCreary Cnty., Ky. v. ACLU of Ky.*, 545 U.S. 844 (2005); *Wallace v. Jaffree*, 472 U.S. 38, 53 (1985); *Mellen v. Bunting*, 327 F.3d 355, 371 (4th Cir. 2003); *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991); *Santa Fe Independent School District v. Doe*, 530 U.S. 290; *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). Each of these opinions relied on *Lemon*.

“Establishment Clause must be interpreted by ‘reference to historical practices and understandings,’” and the Supreme Court has offered several ways to measure state action against the Nation’s historical tradition. *Kennedy*, 597 U.S. at 535 (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014) & n. 5 (referencing the six “hallmarks” articulated in *Shurtleff v. City of Boston*, 596 U.S. 243, 276-288 (2022) (Gorsuch, J., concurring)). Your vague fear that prayer might “marginalize” the religiously unaffiliated is not one of them. It is not evidence that the State has established religion, and the Supreme Court has held exactly the opposite. *See Town of Greece*, 572 U.S. at 589 (“an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum”). Put differently: “Offense ... does not equate to coercion,” even when religious activity may make someone “feel excluded and disrespected.” *Id.*

Like Coach Kennedy’s prayers on the football field, the religious activity of members of the Auburn men’s baseball team does not “come close to crossing any line” into “impermissible government coercion.” 597 U.S. at 537. It is your suggestion that the University take adverse action toward employees or players for their form of worship—whether it be prayer with a team chaplain or Bible studies—that would depart from our tradition of protecting believers against persecution. Not only does the University lack any duty to stop the alleged religious activity; any attempt to do so would risk infringing on inalienable rights. *See U.S. Const. amend. I.* (“Congress shall make no law ... prohibiting the free exercise [of religion].”). Auburn’s apparent tolerance for religion is well within the bounds of the First Amendment.

Alabama is committed to preserving the liberties of all its citizens. Because of its fidelity to the Constitution, the State will not let “concerns about phantom constitutional violations justify actual violations of an individual’s First Amendment rights.” *Kennedy*, 597 U.S. at 543. For you to say that members of the baseball team should “pray privately ... on their own time” is offensive. For the government to say so would be both unconstitutional and un-American.

Consequently, the Alabama Attorney General’s Office requests that you withdraw the letter addressed to Counsel at Auburn University. Please direct any further concerns to me.

Sincerely,



Steve Marshall
Attorney General