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JOHN W. WHITEHEAD
Founder and President

April 15, 2024

By Electronic Mail

Michael Amiridis, President
University of South Carolina
Osborne Administration Building
Columbia, SC 29208
Via email to president@sc.edu
CC: trustees@sc.edu

**Re: First Amendment Rights of Coach Dawn Staley, and Response to April 1, 2024 Freedom From Religion Foundation letter**

Dear President Amiridis:

For more than 40 years, The Rutherford Institute[1] has championed the rights of all Americans to not be silenced by the government.

The First Amendment to the U.S. Constitution, which states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech…," was intended to protect the freedom to speak your mind, assemble and protest nonviolently without being bridled by the government. It also protects the freedom of the media, as well as the right to worship and pray without interference.

Thus, while the government may not establish or compel a particular religion, it also may not silence and suppress religious speech merely because others take offense. People are free to ignore, disagree with, or counter the religious speech of others, but they cannot compel the government to censor such speech. In other words, the Freedom From Religion Foundation (FFRF)[2] has the right to *complain* about the actions of the University's women's basketball coach Dawn Staley, but it does not have the right to *compel* the University of South Carolina to suppress the religious speech and expression made by Coach Staley as a private citizen.

Doing so would likely violate Coach Staley's First Amendment rights.

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[1] The Rutherford Institute is a nonprofit civil liberties organization which seeks to protect individuals' constitutional rights and educate the public about threats to their freedoms.
[2] FFRF letter to Michael Amiridis (Apr. 1, 2024), https://ffrf.org/uploads/files/University%20of%20South%20Carolina%2C%20SC%20-%20Coach%20Staley%202024.pdf.

**When acting or speaking as a private citizen, Coach Staley's rights are protected under the First Amendment.**

In its April 1, 2024 letter, FFRF claims that Coach Staley has "impose[d] religion on her players" by "[u]sing a coaching position…to promote Christianity" which "amounts to religious coercion" in violation of the Establishment Clause of the First Amendment.

FFRF has confused the matter.

"Because the First Amendment binds only the government," any claim of an Establishment Clause violation "is a nonstarter" if Coach Staley spoke or acted as a private citizen.[3] And, as a private citizen, Coach Staley has First Amendment rights under the Free Exercise Clause and the Free Speech Clause. As the U.S. Supreme Court has explained, those two "Clauses work in tandem. Where the Free Exercise Clause protects religious exercises, whether communicative or not, the Free Speech Clause provides overlapping protection for expressive religious activities. That the First Amendment doubly protects religious speech is no accident. It is a natural outgrowth of the framers' distrust of government attempts to regulate religion and suppress dissent."[4]

Thus, contrary to what FFRF's letter suggests, even when considering the Establishment Clause, the Supreme Court has stated that a "natural reading of that sentence [in the First Amendment] would seem to suggest the [three] Clauses have 'complementary' purposes, not warring ones."[5] The Court explained that

> the Establishment Clause does not include anything like a modified heckler's veto, in which religious activity can be proscribed based on "perceptions" or "discomfort." An Establishment Clause violation does not automatically follow whenever a public school or other government entity fails to censor private religious speech. Nor does the [Establishment] Clause compel the government to purge from the public sphere anything an objective observer could reasonably infer endorses or partakes of the religious.[6]

**Purging religious speech from the public sphere leads to a lack of diversity.**

FFRF's letter appeals to the University of South Carolina's values of diversity and inclusion, as well as the University's statement that its "campus community can truly thrive only when those of all backgrounds and experiences are welcomed and respected."

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[3] *See Lindke v. Freed*, 601 U.S. ___ (2024) (slip op., at 1), https://www.supremecourt.gov/opinions/23pdf/22-611_ap6c.pdf.
[4] *Kennedy v. Bremerton School Dist.*, 597 U.S. ___, 142 S.Ct. 2407 (2022) (slip op., at 11) (internal citations omitted), https://www.supremecourt.gov/opinions/21pdf/21-418_new_onkq.pdf.
[5] *Kennedy*, (slip op., at 20).
[6] *Kennedy*, (slip op., at 22) (cleaned up).

Ironically, FFRF calls on the University not to welcome, respect, or include Christians, and wants the University to accommodate the heckler's veto of some non-Christians by silencing the religious speech and expressions of Christians. But suppressing parts of the population based on their religious beliefs does not advance diversity or inclusion, nor does it help equip students to live and interact in a pluralistic society.

As the U.S. Supreme Court has explained, "learning how to tolerate speech or prayer of all kinds is part of learning how to live in a pluralistic society, a trait of character essential to a tolerant citizenry. …Of course, some will take offense to certain forms of speech or prayer they are sure to encounter in a society where those activities enjoy such robust constitutional protection. But offense does not equate to coercion."[7]

The Supreme Court's response to a school district's erroneous claim of an Establishment Clause violation by one of its coaches is fully applicable to FFRF's similar argument here:

> In the name of protecting religious liberty, the [FFRF] would have us suppress it. Rather than respect the First Amendment's double protection for religious expression, it would have us preference secular activity. …It is a rule that would defy this Court's traditional understanding that permitting private speech is not the same thing as coercing others to participate in it. It is a rule, too, that would 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. We are aware of no historically sound understanding of the Establishment Clause that begins to make it necessary for government to be hostile to religion in this way."[8]

The Court noted that "[r]espect for religious expressions is indispensable to life in a free and diverse Republic—whether those expressions take place in a sanctuary or on a [football] field [or on a basketball court], and whether they manifest through the spoken word or a bowed head."[9]

Therefore, the University should seek to respect, not suppress or punish, Coach Staley's religious expressions in order to promote a diverse and welcoming campus community, which will help prepare students to be citizens in a pluralistic society.

**Not everything Coach Staley does can be considered state action—she still acts and speaks as a private citizen.**

As mentioned above, any claim of an Establishment Clause violation "is a nonstarter" if Coach Staley spoke or acted as a private citizen.[10] The U.S. Supreme Court explained earlier this year in *Lindke v. Freed* that "[w]hile public officials [and employees] can act on behalf of the

[7] *Kennedy*, (slip op., at 26-27) (cleaned up).
[8] *Kennedy*, (slip op., at 28-29) (cleaned up).
[9] *Kennedy*, (slip op., at 31).
[10] *See Lindke*, (slip op., at 1).

State, they are also private citizens with their own constitutional rights."[11] Even more specifically, the Court has acknowledged that "the First Amendment's protections extend to teachers and students [and coaches], neither of whom shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[12] Therefore, a person has "not relinquish[ed] his First Amendment rights when he became [a public employee]. On the contrary, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern."[13] As the Supreme Court has recently confirmed that a public high school football coach's publicly displayed post-game silent "prayer constituted private speech on a matter of public concern,"[14] expressions of one's religious beliefs thus fall into this protected category of speech.

Therefore, the Supreme Court has indicated that whether a public employee's acts or statements violate the Establishment Clause or another's constitutional rights depends on whether the public employee "engaged in state action or functioned as a private citizen."[15] "An act is not attributable to a State unless it is traceable to the State's power or authority. Private action—no matter how 'official' it looks—lacks the necessary lineage."[16] Additionally, "to constitute state action, an official [or employee] must not only have state authority—he must also purport to use it."[17]

In light of this, the Supreme Court has cautioned government employers not to mistakenly infer too broad of a job description for its employees in an attempt to imply that "state action" would engulf all of the employee's private life and activities. The Court stated that a government official or employee "who routinely interacts with the public" (like Coach Staley) "may look like they are always on the clock, making it tempting to characterize every encounter as part of the job. But the state-action doctrine avoids such broad-brush assumptions" and "protects a robust sphere of individual liberty for those who serve as public officials or employees."[18]

More specific to Coach Staley's situation, the Court has acknowledged that "[t]eachers and coaches often serve as vital role models. But this argument [that coaches are basically always on duty] commits the error of positing an excessively broad job description by treating everything teachers and coaches say in the workplace as government speech subject to government control."[19]

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[11] *Lindke*, (slip op., at 7-8).
[12] *Kennedy*, (slip op., at 15) (cleaned up).
[13] *Lindke*, (slip op., at 7) (cleaned up).
[14] *Kennedy*, (slip op., at 19 n.2).
[15] *Lindke*, (slip op., at 7).
[16] *Lindke*, (slip op., at 9).
[17] *Lindke*, (slip op., at 12).
[18] *Lindke*, (slip op., at 7) (internal quotation marks omitted).
[19] *Kennedy*, (slip op., at 18).

**As a private citizen, Coach Staley is doubly protected by the First Amendment rights to both the Freedom of Speech and the Free Exercise of Religion, which the Establishment Clause does not negate.**

FFRF's argument that Coach Staley's speech and conduct violate the Establishment Clause is very similar to what the Bremerton School District argued to justify its disciplinary actions against public high school football coach Joseph Kennedy. However, two years ago in *Kennedy v. Bremerton School District*, the U.S. Supreme Court ruled that the School District had violated Coach Kennedy's First Amendment rights.[20] Afterwards, the School District agreed to settle the amount of Coach Kennedy's attorneys' fees by paying over $1.75 million.[21] Indeed, it is fitting that FFRF sent their letter on April Fool's Day, because the actions which FFRF is demanding the University of South Carolina take against Coach Staley to uphold the Constitution could actually end up being very costly for violating the Constitution.

As the Supreme Court explained about Coach Kennedy, "[l]ike many other football players and coaches across the country, Mr. Kennedy made it a practice to give thanks through prayer on the playing field at the conclusion of each game. In his prayers, Mr. Kennedy sought to express gratitude for what the players had accomplished and for the opportunity to be part of their lives through the game of football. Mr. Kennedy offered his prayers…by taking a knee at the 50-yard line and praying quietly for approximately 30 seconds. …[O]ver time, some players asked whether they could pray alongside him. …The number of players who joined Mr. Kennedy eventually grew to include most of the team."[22]

When this came to the School District's attention through a compliment from another school's employee (as there had been no complaints about this or any other religious expression by Coach Kennedy for over seven years),[23] "the District issued an ultimatum. It forbade Mr. Kennedy from engaging in any overt actions that could appear to a reasonable observer to endorse prayer while he is on duty as a District-paid coach,"[24] and "the only option it would offer Mr. Kennedy was to allow him to pray after a game in a 'private location' behind closed doors and 'not observable to students or the public.'"[25]

Even though "the District admitted that it possessed 'no evidence that students have been directly coerced to pray with Kennedy,'" it erroneously believed that it "could not allow Mr. Kennedy to engage in a public religious display" without violating the Establishment Clause.[26] And the School District had previously told Coach Kennedy, incorrectly, that "an employee's

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[20] *Kennedy v. Bremerton School Dist.*, 597 U.S. ___, 142 S.Ct. 2407 (2022) (slip op., at 1, 31-32) (internal citations omitted), https://www.supremecourt.gov/opinions/21pdf/21-418_new_onkq.pdf.
[21] *Bremerton school board reaches nearly $2M settlement with praying football coach Joe Kennedy*, FOX 13 Seattle (Mar. 17, 2023), https://www.fox13seattle.com/news/bremerton-school-board-reaches-nearly-2m-settlement-with-praying-football-coach-joe-kennedy.
[22] *Kennedy*, (slip op., at 2) (internal quotation marks and citations omitted).
[23] *Kennedy*, (slip op., at 2-3).
[24] *Kennedy*, (slip op., at 5) (cleaned up).
[25] *Kennedy*, (slip op., at 6).
[26] *Kennedy*, (slip op., at 7).

free exercise rights 'must yield so far as necessary to avoid school endorsement of religious activities.'"[27] The Supreme Court noted that this "rested on a mistaken view"[28] under which "the District effectively created its own vise between the Establishment Clause on one side and the Free Speech and Free Exercise Clauses on the other."[29]

The Supreme Court explained that "in forbidding Mr. Kennedy's brief prayer, the District failed to act pursuant to a neutral and generally applicable rule. A government policy will not qualify as neutral if it is specifically directed at religious practice. …Failing either the neutrality or general applicability test is sufficient to trigger strict scrutiny,"[30] which is the highest standard to overcome and rarely satisfied in favor of the government.

Thus, the Supreme Court ruled that Coach Kennedy's "prayers were not delivered as an address to the team, but instead in his capacity as a private citizen" even though the coach's "prayers took place 'within the office' environment—[t]here, on the field of play."[31] As the Court summarized,

> the Bremerton School District disciplined him…because it thought anything less could lead a reasonable observer to conclude (mistakenly) that it endorsed Mr. Kennedy's religious beliefs. That reasoning was misguided. Both the Free Exercise and Free Speech Clauses of the First Amendment protect expressions like Mr. Kennedy's. Nor does a proper understanding of the Amendment's Establishment Clause require the government to single out private religious speech for special disfavor. The Constitution and the best of our traditions counsel mutual respect and tolerance, not censorship and suppression, for religious and nonreligious views alike.[32]

The Court noted that "[t]o hold differently would be to treat religious expression as second-class speech and eviscerate this Court's repeated promise that teachers do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[33] The Court also explained that School District had created "a false choice premised on a misconstruction of the Establishment Clause. And in no world may a government entity's concerns about phantom constitutional violations justify actual violations of an individual's First Amendment rights."[34]

Therefore, the University of South Carolina should be aware of the mistakes and constitutional violations committed by the Bremerton School District when considering FFRF's letter and analysis, and not treat Coach Staley's religious expression as second-class speech.

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[27] *Kennedy*, (slip op., at 3).
[28] *Kennedy*, (slip op., at 31).
[29] *Kennedy*, (slip op., at 21) (internal quotation marks omitted).
[30] *Kennedy*, (slip op., at 13-14) (cleaned up).
[31] *Kennedy*, (slip op., at 18).
[32] *Kennedy*, (slip op., at 1).
[33] *Kennedy*, (slip op., at 19) (internal quotation marks omitted).
[34] *Kennedy*, (slip op., at 31) (internal citation omitted).

**Coach Staley's statement to the press should be considered an expression in her private capacity.**

FFRF's letter complains about Coach Staley's comment to ESPN reporter Holly Rowe shortly after South Carolina won the game against Oregon State on Easter Sunday, March 31, 2024, in the NCAA Women's Basketball Tournament to advance to the Final Four. Coach Staley was interviewed by Rowe on the court after being showered with confetti by her team. Rowe asked, "Since the last two games have been close and tough,…what's impressed *you* about this [team]?" (emphasis added).[35] This was a question about Coach Staley's personal opinion and assessment about the team's success. She was not making an official statement on behalf of the University and she was not speaking to the team or to any member of the University.

In answer to the question, Coach Staley praised the resilience and hard work of the players and then explained, "I'm giving all the glory to God, though. …The devastating loss that we had last year, to put us back here with a totally different team—if you don't believe in God, something's wrong with you, seriously. I'm a believer. I'm a believer because He makes things come true. When you're at your worst, He's at His best."

It is clear from her comments that Coach Staley was emotionally grateful for the success of her team this year, felt such success was unexplainable except for the blessing of God, and wondered how anyone could not believe in God in light of experiences like that. She "giv[es] all the glory to God" by giving God credit and praise, rather than taking any credit herself. Doing so is grounded in the religious convictions of many Christians, like Coach Kennedy,[36] because Jesus said, "So everyone who acknowledges me before men, I also will acknowledge before my Father who is in heaven, but whoever denies me before men, I also will deny before my Father in heaven."[37] Likewise, Romans 1:21 states "For although they knew God, they did not honor him as god or give thanks to him, but they became futile in their thinking, and their foolish hearts were darkened."[38] And Acts 12:23 states that after the people praised Herod, "[i]mmediately an angel of the Lord struck [Herod] down, because he did not give God the glory."[39] So, not to publicly acknowledge and give glory to God would likely go against Coach Staley's deeply held religious convictions and beliefs.

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[35] *'WE'RE COMMITTED!' 👏 - Dawn Staley on SC reaching 4th-straight Final Four | ESPN College Basketball*, ESPN (Mar. 31, 2024), https://www.youtube.com/watch?v=7kwZ03VOYxE.
[36] Coach Kennedy initially tried to comply with the School District's demands not to pray publicly, but, when "[d]riving home after a game,…felt upset that he had 'broken his commitment to God' by not offering his own prayer, so he turned his car around and returned to the field'" to pray. *Kennedy*, (slip op., at 4).
[37] Matthew 10:32-33 (translated in the English Standard Version ("ESV")).
[38] ESV.
[39] ESV.

The Supreme Court has explained that the "Free Exercise Clause…does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through the performance of (or abstention from) physical acts."[40]

Just as Coach Kennedy's prayer on the football field following games, even when voluntarily joined by high school players, was considered private speech protected by the First Amendment rather than the School District's speech or state action in violation of the Establishment Clause, so should Coach Staley's personal comments on the court after games or in press conferences be protected, especially as they are clearly understood to be her own personal opinions and not formal statements on behalf of the University.

Moreover, it should not make any difference that Coach Kennedy's prayer was silent while Coach Staley made a verbal statement, because the Supreme Court explained in Coach Kennedy's case that "[r]espect 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*."[41]

**Coach Staley's social media posts should also be considered an expression in her private capacity.**

FFRF's letter also criticizes Coach Staley's social media posts of Bible verses on X because her account lists her job as "Head Coach of South Carolina Women's Basketball" and is linked to the South Carolina Women's Basketball account.

But Coach Staley's X account clearly appears to be a personal account,[42] and is not the official account for South Carolina Women's Basketball, which maintains its own separate account on X.[43] And earlier this year in *Lindke v. Freed*, the U.S. Supreme Court held that it is not dispositive of whether a public official (a city manager in that case) was acting in his public capacity, rather than his private capacity, when he lists his job, links to the government's website, and even posts information and solicits feedback related to his job on his personal social media account.[44] The Court noted that "an official does not necessarily purport to exercise his authority simply by posting about a matter within [that authority]," and even when "public officials possess a broad portfolio of governmental authority that includes routine interaction with the public,…these officials too have the right to speak about public affairs in their personal capacities."[45]

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[40] *Kennedy*, (slip op., at 12) (internal quotation marks omitted).
[41] *Kennedy*, (slip op., at 31) (emphasis added).
[42] https://twitter.com/dawnstaley
[43] https://twitter.com/GamecockWBB
[44] *Lindke v. Freed*, 601 U.S. ___ (2024) (slip op., at 1-3), https://www.supremecourt.gov/opinions/23pdf/22-611_ap6c.pdf.
[45] *Lindke*, (slip op., at 14).

The Court explained that "a public official's social-media activity constitutes state action…*only if* the official [both] (1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when he spoke on social media."[46] And where there is ambiguity, "a post that is compatible with either a 'personal capacity' or 'official capacity' designation is 'personal' if it appears on a personal page."[47] Therefore, the government employee "must have actual authority rooted in written law or longstanding custom to speak for the State," and even when the employee has such state authority "he must also purport to use it."[48] Neither seems to apply to Coach Staley's social media posts at issue here.

**There is no indication of any coercion involved with Coach Staley's gameday devotionals.**

FFRF's letter further complains about Coach Staley's "practice of preparing 'gameday devotional' for players," and claims upon mere speculation without any evidence that "[p]layers trying to please the coach of a highly successful basketball program surely will feel immense pressure to participate in religious activities and go along with Coach Staley's proselytizing. Non-Christian players would not dare to make their personal beliefs known" because "Coach Staley's team is full of young and impressionable student athletes who would not risk giving up their scholarship, giving up playing time, or losing a good recommendation from the coach by speaking out or voluntarily opting out of her unconstitutional religious activities—even if they strongly disagreed with her beliefs." FFRF also claims that "[i]t is no defense to call these religious messages and activities 'voluntary.'"

This again echoes the erroneous analysis of the Bremerton School District with Coach Kennedy. While high school students did voluntarily choose to participate in prayers with Coach Kennedy at times, "there [was] no evidence anyone sought to persuade or force students to participate, and there [was] no formal school program accommodating the religious activity at issue,"[49] "nor [was] there any record evidence that students felt pressured to participate in these prayers."[50]

Despite the lack of any such evidence, the School "District [claimed] that, as a coach, Mr. Kennedy 'wielded enormous authority and influence over the students,' and students might have felt compelled to pray alongside him."[51] Thus, "the District suggest[ed] that *any* visible religious conduct by a teacher or coach should be deemed—without more and as a matter of law—impermissibly coercive on students. In essence, the District ask[ed the Court] to adopt the view that the only acceptable government role models for students are those who eschew any visible religious expression. …Really, it is just another way of repackaging the District's earlier submission that government may script everything a teacher or coach says in the workplace."[52]

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[46] *Lindke*, (slip op., at 8) (emphasis added).
[47] *Lindke*, (slip op., at 13 n.2).
[48] *Lindke*, (slip op., at 12).
[49] *Kennedy*, (slip op., at 29).
[50] *Kennedy*, (slip op., at 27).
[51] *Kennedy*, (slip op., at 27).
[52] *Kennedy*, (slip op., at 28).

But, as detailed above, the Supreme Court decisively rejected those arguments and views of the Bremerton School District.[53] Despite what the School District and FFRF claim, the Court explained that it "has long recognized as well that *secondary school students* are mature enough to understand that a school does not endorse, let alone coerce them to participate in, speech that it merely permits on a nondiscriminatory basis,"[54] "nor…does the possibility that students might choose, unprompted, to participate in Mr. Kennedy's prayers necessarily prove them coercive."[55]

If high school students are mature enough to understand this and not be passively coerced, then even more so are adult college students. Certainly, school faculty and staff should not have to censor themselves and give up any public religious talk or practices, but should be free to attend, participate, or speak at events of a local church or a religious student group on campus, which students and other staff may choose to attend or not. Also, FFRF's baseless insinuation that Coach Staley is going to show favoritism toward religious players over better players is absurd. Coach Staley is obviously a fantastic coach who realizes that her job is to win, which is achieved by putting in the best players, not the most religious ones.

Additionally, mere references to Biblical stories or passages can be made for secular motivational purposes without a religious context. Just as the "cross is undoubtedly a Christian symbol,"[56] there are "multiple purposes"[57] and "many contexts in which the symbol has also taken on a secular meaning,"[58] as the Supreme Court explained in overturning the erroneous decision by the Fourth Circuit Court of Appeals that the Bladensburg Peace Cross memorial for 49 soldiers who gave their lives in the First World War violated the Establishment Clause.[59] Many Biblical passages could be especially motivating in a sports context, such as the familiar story of David defeating Goliath against all odds, and statements of "forgetting what lies behind and straining forward to what lies ahead, I press on toward the goal,"[60] and "Do you not know that in a race all the runners run, but only one receives the prize? So run that you may obtain it. Every athlete exercises self-control in all things."[61]

Coach Staley is tasked with motivating her players as a team to win. After winning the NCAA championship this year, freshman Tessa Johnson "credited the team's success with the

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[53] And while Coach Kennedy's case was limited to considering his silent prayers because he voluntarily ceased any religiously motivational talks and team devotions, *Kennedy*, (slip op., at 13), the Court made no ruling that his motivational talks or prayers with the team violated or would have violated the Establishment Clause.
[54] *Kennedy*, (slip op., at 26) (emphasis added).
[55] *Kennedy*, (slip op., at 30 n.7).
[56] *American Legion v. American Humanist Assn.*, 588 U.S. ___, 139 S.Ct. 2067, 2090 (2019), https://www.supremecourt.gov/opinions/18pdf/17-1717_j426.pdf.
[57] *American Legion*, 139 S.Ct. at 2083.
[58] *American Legion*, 139 S.Ct. at 2074.
[59] *American Legion*, 139 S.Ct. at 2074, 2090.
[60] Philippians 3:13-14 (ESV).
[61] 1 Corinthians 9:24-25 (ESV).

environment Staley helped create: 'We're unselfish people and that's how we win it.'"[62] Indeed, the Bible contains many passages that call for people to be unselfish and work as a team: "Do nothing from selfish ambition or conceit, but in humility count others more significant than yourselves. Let each of you look not only to his own interests, but also to the interest of others;"[63] "the body is one and has many members,…[i]f one member suffers, all suffer together; if one member is honored, all rejoice together;"[64] and "love your neighbor as yourself."[65]

Even the passage which the FFRF letter mentions, "I have loved you with an everlasting love," can hardly be seen by itself to be "proselytiz[ing]," as FFRF characterizes it. And there is no indication that Coach Staley is requiring players to attend any devotionals or telling them that if they don't believe in Jesus Christ they will be condemned to hell, or that they have to believe in Jesus in order to play on the team.

To prohibit Coach Staley from making any reference to Biblical passages as a source of motivation and team building, while allowing her to make references to secular writers and stories, would be discriminatory and "may evidence hostility to religion," like "tearing down monuments with religious symbolism and scrubbing away any reference to the divine" or "amputating the arms of the [Bladensburg] Cross" memorial.[66]

**The scope of the Fourth Circuit's ruling in the VMI supper prayer case to all college students is questionable.**

While FFRF claims that the University of South Carolina is committing a similar Establishment Clause violation as the Fourth Circuit Court of Appeals had determined Virginia Military Institute (VMI) had done with a daily supper prayer to the assembled Corps in *Mellen v. Bunting*, FFRF minimizes the unique atmosphere of VMI and ignores that the Fourth Circuit used an analysis which the U.S. Supreme Court subsequently clarified had been abandoned in Coach Kennedy's case.

Foundational to the Fourth Circuit's analysis in *Mellen* was that VMI utilized an "adversative method of training" featuring "little privacy, minute regulation of personal behavior, and inculcation of certain values."[67] The method involved "a rigorous and punishing system of indoctrination" by subjecting cadets "to a series of hazing rituals."[68] At VMI, "surveillance is constant and privacy nonexistent," and the "rules and regulations control how cadets spend most hours of the day."[69] Therefore, "in VMI's educational system [cadets] are

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[62] Emma Bowman, *South Carolina defeats Iowa to win the women's NCAA basketball championship*, NPR (Apr. 7, 2024), https://www.npr.org/2024/04/07/1243319362/ncaa-championship-title-iowa-south-carolina-clark.
[63] Philippians 2:3-4 (ESV).
[64] 1 Corinthians 12:12, 26 (ESV).
[65] Matthew 22:39 (ESV).
[66] *See American Legion*, 139 S.Ct. at 2084-87.
[67] *Mellen v. Bunting*, 327 F.3d 355, 361 (4th Cir. 2003).
[68] *Mellen*, 327 F.3d at 361.
[69] *Mellen*, 327 F.3d at 361.

*uniquely susceptible* to coercion."[70] And in light of that uniquely "coercive atmosphere," the Fourth Circuit found that "the communal dining experience, like other official activities, is undoubtedly experienced as obligatory" rather than voluntary.[71] This distinguished the Fourth Circuit's ruling from previous rulings involving colleges by the Sixth and Seventh Circuit Courts of Appeals, which had upheld religious invocation or prayer at state universities' graduation ceremonies,[72] and the Fourth Circuit did not criticize those holdings but recognized that "our Nation's history has not been one of entirely sanitized separation between Church and State, and it has never been thought either possible or desirable to enforce a regime of total separation."[73]

The "unique features of VMI" and the Fourth Circuit's decision were further recognized by the U.S. Supreme Court, which declined to hear an appeal in the *Mellen* case due to it becoming moot and there no longer being an active controversy between the parties of the lawsuit.[74] Some justices of the Court noted the lack of a conflict among the Circuit Courts of Appeals because "the Fourth Circuit endorsed that principle [of the Sixth and Seventh Circuits that "college-age students are not particularly susceptible to pressure from their peers towards conformity"] in theory, but found it unhelpful in this case because of the features of VMI that distinguish it from more traditional institutions of higher education.[75]

Additionally, the Fourth Circuit decided the *Mellen* VMI case in 2003 at least partly under what is known as the *Lemon* test.[76] But in 2022, the U.S. Supreme Court made clear in Coach Kennedy's case that "the "shortcomings associated with this ambitious, abstract, and ahistorical approach to the Establishment Clause became so apparent that this Court long ago abandoned *Lemon* and its endorsement test offshoot."[77] So now, "[i]n 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,"[78] which was what the Superintendent of VMI had argued and the Fourth Circuit had rejected in *Mellen*.[79] Therefore, the Fourth Circuit's ruling in *Mellen*, the scope of its application to non-military institutions, and the soundness of the Fourth Circuit's analysis are questionable.

**Coach Staley should be rewarded, not have her First Amendment rights violated, for leading the South Carolina Gamecocks through an undefeated season to win a third NCAA championship.**

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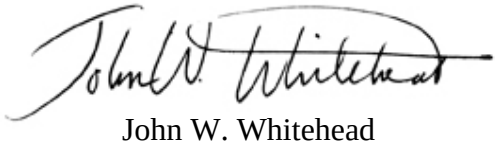
[70] *Mellen*, 327 F.3d at 371 (emphasis added).
[71] *Mellen*, 327 F.3d at 371-72.
[72] *Mellen*, 327 F.3d at 368 (discussing *Tanford v. Brand*, 104 F.3d 982 (7th Cir. 1997) and *Chaudhuri v. Tennessee*, 130 F.3d 232 (6th Cir. 1997)).
[73] *Mellen*, 327 F.3d at 376 (internal quotation marks omitted).
[74] *Bunting v. Mellen*, 541 U.S. 1019, 1019-21 (2004) (opinion of Stevens, J., respecting the denial of certiorari).
[75] *Bunting*, 541 U.S. at 1021 (opinion of Stevens, J., respecting the denial of certiorari).
[76] *Mellen*, 327 F.3d at 371-75.
[77] *Kennedy*, (slip op., at 22) (cleaned up).
[78] *Kennedy*, (slip op., at 23) (internal quotation marks omitted).
[79] *Mellen*, 327 F.3d at 368-69.

Coach Staley has once again done an excellent job and should be congratulated for leading her team to win the NCAA Tournament, helping to draw a record-breaking 18.9 million viewers for the championship game.[80] She should not be punished because her success has drawn greater attention from groups like FFRF to her religious expressions, but, like every other citizen, her constitutional rights should be protected.

In considering FFRF's complaints and the costly, unconstitutional missteps of the Bremerton School District, it is our hope that the University would err on the side of the First Amendment in respecting Coach Staley's rights.

Should you need any guidance in formulating a response to FFRF, please do not hesitate to call upon The Rutherford Institute.

Sincerely yours,



John W. Whitehead
President

[80] *Women's College Basketball Championship Game Draws Record-Breaking 18.9 Million Viewers*, NIELSEN (Apr. 9, 2024), https://www.nielsen.com/news-center/2024/womens-college-basketball-championship-draws-record-breaking-18-9-million-viewers/.