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KELLY COGHLAN: SENATE EDUCATION COMMITTEE TESTIMONY (H.B. 3678)

1. Chairman Shapiro & distinguished Senators:

2. My name is K.C. I am a Houston attorney, formerly with Vinson & Elkins and now Chief Counsel of Coghlan & Associates. Since 1994, I have concentrated much of my legal practice on Constitutional law. From 1999 to 2004, I prosecuted the *Ward v. Santa Fe* case for high school senior Marian Ward, obtaining the first federal injunction preventing censorship of a student's voluntary public prayer, culminating in a final judgment against the school district after 2 appeals to the 5th Circuit. Although I had the honor of being the chief drafter of this Bill, a cadre of more than 10 constitutional legal experts and specialist firms from across the country worked on this. I am speaking in favor of the Bill. For additional personal background information, I have attached my curriculum *vitae* as **Exhibit 1** to this testimony.

3. The Declaration of Independence refers to God 4 times. In public schools, children can hardly refer to God 1 time—without being sent to the principal's office.

4. Religious expression is being treated as second-class speech in many public schools. The First Amendment does not turn schools into anti-religion zones, nor teachers into prayer police, nor religious students into enemies of the State. Rather, schools are required to ensure neutrality--treating student's voluntary religious expression the same as all other expression. This bill settles that issue once and for all.

5. Some examples of religious discrimination occurring in Texas public schools include:

   - A Texas Superintendent announcing to the students that "if they prayed they would be disciplined the same as if they had cursed." The school then published speaking guidelines that said, "Prayers, blessings, invocations, and any reference to a deity are prohibited." A law suit ensued, a final judgment was entered against the school district. (*Ward v. Santa Fe)*;
   - In another Texas public school, students were reprimanded for talking about Jesus during Easter;
   - One school banned children from wishing deployed troops a "Merry Christmas;"
   - One school forbid children from using religious messages on gifts or cards including references to "St. Valentine's Day;"

- One school forbid children from bringing Christmas items to a school's "Winter Party" despite the acknowledgment of other faiths during the season;
- In another public school, a teacher trashed two Bibles belonging to students, took the students to the principal and threatened to call Child Protective Services on the parents for letting their children bring Bibles to school;
- In another public school, students were prevented from handing out candy-canes, when other candies were permitted, because candy-canes had a religious background;
- This last Easter when a teacher asked her class what came to mind when they thought about Easter, several children said the Easter Bunny, others said Easter Eggs. But one little girl said "Jesus" and was reprimanded in front of the class for using that name in a public school.
- This is just the tip of the iceberg. Since children don't know their constitutional rights and don't have the money to pursue such rights even if they did, most events, no doubt, go unreported
- While all these examples deal with Judeo/Christian discrimination, there are, no doubt, examples of children of other faiths suffering discrimination. This bill protects all children of all faiths.

6. In each instance, not only were student's rights violated, but the school entangled itself in expensive litigation that taxpayers ultimately have to pay. In Ward v. Santa Fe, for instance, when judgment was entered against the school, the school had to pay the child's attorney's fees of over $50,000 as well as their own attorney's fees of over $225,000. This Bill eliminates the confusion leading to these types of lawsuits.

7. The Bill accomplishes 3 broad purposes:

    1. **FIRST**, it codifies Supreme Court precedent into an accessible and understandable law. [**Exhibit 2**—"Summary of the State of the Law Regarding Faith-Based Viewpoints Expressed by Student Speakers in Public Schools (2007)"]. [**Exhibit 3**—"The Three Broad Purposes of H.B. 3678].

        a. The Bill begins with the following provision (at Sec. 25.151) and uses the Supreme Court's own language:

        > "A school district shall treat a student's voluntary expression of a religious viewpoint, if any, on an otherwise permissible subject in the same manner the district treats a student's voluntary expression of a secular or other viewpoint on an otherwise permissible subject and may not discriminate against the student based on a religious viewpoint expressed by the student on an otherwise permissible subject."

        b. Some of the Supreme Court holdings codified in this Bill include:

1. *Good News Club v. Milford Central School*, 533 U.S. at 111-12 and 107 n. 2 (2001): "[S]peech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint.... [Excluding a] religious perspective constitutes unconstitutional viewpoint discrimination."

See also, Cornelius v. NAACP Legal Defense & Educational Fund, 473 U.S. 788, 806 (1985) (even in a "non-public forum...the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject"); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993), *Rosenberger v. Rector of the University of Virginia*, 515 U.S. 819 at 828-29 (1995).

2. *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990):
   "[T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."

3. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969):
   "It can hardly be argued that...students...shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."

4. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313 (2000):
   "[T]he Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer," but "nothing in the Constitution...prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday."

5. *Lee v. Weisman*, 505 U.S. at 589 (1992):
   "[T]he First Amendment does not allow the government to stifle prayers...neither does it permit the government to undertake the task for itself. "Religious expression[s] are too precious to be either proscribed or prescribed by the State."

6. *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995):

"Private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression."

7. *Bd. of Educ. v. Mergens,* 496 U.S. 226, 250 (1990):
"The proposition that public schools do not endorse everything they fail to censor is not complicated."

8. *Zelman v. Simmons-Harris*, 536 U.S. 639, 653-55 (2002):
"We have never found a program of true private choice to offend the Establishment Clause. We believe that the program challenged here is a program of true private choice...neutral in all respects toward religion.... [N]o reasonable observer would think a neutral program of private choice...carries with it the imprimatur of government endorsement."

9. *Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290, 304-05 n.15, 316 n.23, 321:
If students are speaking in their individual capacities, even before a school organized audience, then government cannot discriminate against them based on the religious content of their speech on an otherwise permissible subject. As examples, in *Santa Fe v. Doe*, the Supreme Court pointed to students whose selection is based on neutral criteria such as the typically elected "student body president, or even a newly elected prom king or queen" as speakers who could use public speaking opportunities to express a religious viewpoint without violating the Establishment Clause.

c. Examples of how this would work:

1. Under this Bill, if the topic for a student speaker is "safety and sportsmanship", and one student says, "Let us have a safe game tonight" and another student says, "God, let us have a safe game tonight," since both expressions were on topic, both should be treated equally.

2. Under this Bill, if a student is given an assignment to draw a picture of a building and the student turns in a picture of Jesus, the Bill does not protect that student's religious viewpoint because the student's religious viewpoint was not on the subject that the school had assigned for the student. If a non-religious student had drawn a

picture of a flower when the topic was to draw a building, that would be the same problem. Both could get an "F" for not staying on topic.

3. If the assignment had been to draw "the hero of your choice" and a student drew a picture of Jesus, the Bill would protect that child's religious expression because the student stuck to the subject. Under the Bill, drawings of both secular and religious heroes must be treated the same and judged on the same academic bases.

2. **SECOND**, the Bill puts in safeguards to assure that a student's voluntary religious viewpoint, if any, will not be attributable to the school or mistaken as affirmatively sponsored by the school. Thus, there are requirements of: (1) limited public forums for student speakers, (2) selection of speakers based on neutral criteria, and (3) disclaimers to be read/printed.

    a. An additional reason the Bill provides for "**limited public forums**" for student speakers is to make schools PLAY FAIR. This eliminates a "PLOY" (MANUEVER) used by some schools of turning the students into government spokesmen and then telling the students that since they are government spokesmen, they can't mention God. A limited public forum is restricted as to the SUBJECT students may speak on; but it prohibits schools from discriminating against religious viewpoints of students on otherwise permissible subjects (*Good News Club v. Milford*).

3. **THIRD**, the Bill provides schools with an optional **safe harbor Model Policy** that school districts can choose to adopt to bring themselves into compliance with the law and provide neutral procedures for having student speakers at school events and graduations, and deal with matters of religious expression in homework, school clubs, and other activities.

    a. [**Exhibit 4**—TASB Legal]. One significant reason the Model Policy part of the Bill will be a lifesaver to Texas schools is because the attorney's at TASB have never provided schools a Local Policy (FNA) covering "Student Expression" to show schools how to procedurally comply with the law. TASB has only provided a "Legal Policy" merely stating the cold case pronouncements, without giving a Local Policy for a school to adopt to procedurally carry out the case law. Merely providing schools a cold statement of the law does not tell schools how to translate the technical legal principals into a workable, applicable policy. This void has left school in the dark and open to lawsuits from all sides.

        1. Look at the TASB FNA (LEGAL). There is no accompanying "Local" policy governing student speech.

2. The type of optional Model Policy of this Bill, at Section 25.156, has been tested in a number of public school districts for up to 6 years from Texas to Illinois, and the schools report that they have never had a student abuse the privilege, embarrass the school district, or in any way misuse or exploit any speaking opportunities. You will hear from the Superintendents of 2 such schools today—one live and one by written statement.

4. [**Exhibit 4—U.S Dept. Ed. Guidelines**]. Finally, Sections 25.153 & 154 of the Bill codify the almost identical language in the U.S. Dept. of Education "Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools," drafted by the attorneys of the U.S. Dept. of Education and U.S. Dept. of Justice. The U.S. Dept. of Education Guidance is not a law, it is only guidance, and because of that it has been ignored by many schools even though it correctly states the law. Once it becomes a part of our Education Code as State law, the schools should finally comply.

5. Once this Act becomes law--and children, parents, and school officials can read exactly what is allowed and not allowed--the law suits should end.

6. One constitutional attorney said the Bill should be named "The Religious Liberties and Lawsuit Prevention Act."

ONE CAVEAT TO THIS WOULD BE ANY FLOOR AMENDMENTS WHICH COULD UNINTENDEDLY MAKE THE BILL UNCONSTITUTIONAL: The Bill, as introduced in the Senate by Senator Tommy Williams, should not be amended. The language of this Bill was drafted over more than a 5 year period by a cadre of constitutional legal experts from across the country. This Bill deals with one of the most complicated areas of the law involving the Establishment, Free Exercise, and Free Speech clauses of the First Amendment. Each word of the Bill was carefully researched and selected to reflect existing Supreme Court precedent using specific Supreme Court language. Going beyond the language of the Bill (even with good sounding ideas) would likely invite law suits against the State and the school districts. Attempting to randomly guess beyond Supreme Court precedent would be the worst thing the Senate could do and likely put this Bill in constitutional jeopardy. We need to stick with the thoroughly researched and constitutionally supported language of this Bill as introduced by Senator Williams. [**Exhibit 6**—*See* Legal Opinions attached].

8. The Bill does not require or even suggest that any student should ever express a religious viewpoint, it just protects them if they do.

9. The Bill does not create any new EXTRA protection for religious speech simply because the speech is religious. Rather, the Bill provides that if students are already being allowed

to speak on a topic that the school says is a PERMISSIBLE SUBJECT, then a religious student cannot be censored simply because that student's viewpoint is religious.

10. H.B. 3678 is an anti-discrimination Bill that protects religious viewpoints only to the same degree--no more and no less--as secular viewpoints on the same topics. The Bill is merely an equal-opportunity bill.

11. Under this Bill, school children holding religious viewpoints:

    a. don't get extra rights, just **equal** rights;

    b. they don't get special protection, just **equal** protection;

    c. they don't get preferential treatment, just **equal** treatment;

    d. they don't get a leg up, just **equal** footing on a level playing field.

12. This Bill represents true "grass roots" legislation--neither Democratic nor Republican owned--for our children's religious liberties should bring us all together in one united voice.

13. To anyone who would vote against this Bill, the 4.5 Million children in Texas public schools might ask:

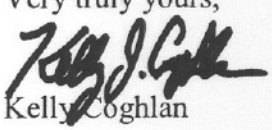
    a. "Which of us do you not want to protect from religious viewpoint discrimination?"

    b. Is it the Muslim children; the Christian children; the Jewish children?

    c. Which children do you think deserve religious discrimination in our public schools?

14. For all of these reasons, please make this Bill the law of Texas.

Very truly yours,



Kelly Coghlan

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EDUCATION:

Juris Doctor - *Cum Laude*, Southern Methodist University 1975-1978. Honors: Order of the Coif, Top 4% of Class; First Place Russell Baker Moot Court Competition; Southwestern Law Journal; American Jurisprudence Award in Property II; American Jurisprudence Award in Wills; Phi Delta Phi Legal Honorary

A/V Rated by Martindale-Hubbell 1988-present; Who's Who In American Law, 2nd, 8th, 13th Eds.

Licensed: State Bar of Texas 11/78; U.S. District Court (Southern District of Texas) 1979; U.S. Tax Court 1981; U.S. Court of Appeals (Fifth Circuit) 1981; U.S. Supreme Court 1984

B.B.A., *Cum Laude*, Finance, Southern Methodist University 1971-1975. Honors: Honor Roll all semesters at S.M.U.; "M" Award (highest student/faculty honor bestowed by S.M.U.); Who's Who Among Students in American Universities and Colleges; President Blue Key Senior Men's Honorary; President *Cycen Fjdor* Senior Men's Honorary; Beta Gamma Sigma Business School Honorary; Founding Charter Officer and member of S.M.U. Student Foundation; Student Senate Jr. & Sr. years; R.A. Jr. & Sr. years; Radar Business School Scholarship Sr. year; Opportunity Foundation Scholarship Jr. & Sr. years; T.A. in University College; S.M.U. Mustang Band; Lambda Chi Alpha Fraternity

Pre-College Achievements: Eagle Scout; God & Country Award; President Longview High School Student Council; President Longview High School InterClub Council (Presidents of all High School organizations); Honor Roll all semesters; Who's Who Among High School Students in America; National Honor Society; V.P. Rotary Interact Club; Texas Boy's State; President Teen Triangle Club; President Student Council Forest Park Jr. High School

PROFESSIONAL ASSOCIATIONS:

Texas Bar Association; H.B.A.; Fellow of the Houston Bar Foundation; Fellow of the College of the State Bar of Texas; Pro Bono College of the State Bar of Texas sustaining member 2003-present; H.Y.L.A. (Chairman Comm. on Consumer Rights 1981-1982); Christian Legal Society

EMPLOYMENT:

Coghlan & Associates, 505 Lanecrest, Suite One, Houston, Tx. 77024-6716, January 1, 1989-present

Dotson, Babcock & Scofield, Equity Partner, July 1984-January 1, 1989. Head of General Litigation Group of Litigation/Bankruptcy Section 1987, 1988. Chairman of Risk Management Committee (drafting and implementation of firm policies and procedures) 1987-88. Began in-house C.L.E. training program for trial attorneys. One of three partners in charge of C.L.E. for litigation attorneys in firm

Vinson & Elkins, Associate, General Litigation Section, April 1979-July 1984. First City Tower, Houston, Tx. 77002

Law Clerk to the Honorable Finis E. Cowan, U.S. District Judge for the Southern District of Texas, Houston Division 1978-79. Federal Building, 515 Rusk Ave., Houston, Tx. 77002

CIVIC ACTIVITIES AND HONORS:

Board of Directors K.S.B.J. Educational Foundation 1988-2006 (Vice President 1994-1997, Secretary 1990-1993, Chairman Long Range Planning Committee and "God Listens" Campaign 1989-1993); Life Member National Eagle Scout Association; Life Member American Mensa; Who's Who in America, 48th-62nd Eds.; Who's Who in the South and Southwest; Who's Who Among Young American Professionals; Who's Who Of Emerging Leaders in America; Rotary Club of Houston 1988-1998; Steering Committee Palmer Drug Abuse Program 1979-81; Deacon of Second Baptist Church, Houston, 2002-present, teacher and adult volunteer in Jr. High and High School youth programs 1990-present, percussionist in Church's "R.O.C.K." Band 1990-1997, Sunday School teacher in Singles Department 1999-2003; "Impact Player" of the year, December, 1999, Texas Lawyer; 2004 Ronald Reagan Gold Medal Recipient; Honor Guard of the Alliance Defense Fund

INTERVIEWS/ARTICLES:

Interviews: NBC, ABC, CBS, CNN, Fox News, MS-NBC, Court T.V., British Broadcasting Corporation (B.B.C. Europe and U.S.), Good Morning America, The Bryant Gumble Early Show, The Debra Duncan Show

Articles: USA Today (Nov. 16, 1999, 1-A; Mar. 29, 2000, 1-A), Houston Chronicle (Aug. 19, 1999, 25-A; Sept. 3, 1999, 29-A; Sept. 4, 1999, 1-A; Oct. 17, 1999, 1-E; June 21, 2000, 1-A; Ap. 13, 2002, 36-A; May 5, 2003, 15-A), The Dallas Morning News (Nov. 7, 1999, 1-A; Aug. 2, 2000, 27-A; Ap. 13, 2002, 33-A), Texas Lawyer (Sept. 9, 1999, 1; Dec. 20, 1999; June, 2004), The American Bar Association Journal (March, 2000, p. 34), The New York Times (Mar. 30, 2000, A-24), The Washington Post (Mar. 27, 2000, A-2), The Washington Times (March 30, 2000, A-4), World Magazine (Nov. 13, 1999), Longview News-Journal (Sept. 19, 1999, 1-A; Oct. 8, 1999), Amarillo Daily News (Nov. 10, 1999, 1-A), Texas City Sun, (Sept. 4, 1999, 2-A), The Beaumont Enterprise (Sept. 4, 1999, 1-A), Baltimore Sun (Sept. 3, 1999, 3-A), Texas Monthly (Nov. 2000, p. 116 following)

LAW REVIEW ARTICLES AND EDITORIALS:

Law Review Articles: Kelly Coghlan, *Those Dangerous Student Prayers*, 32 ST. MARY'S LAW 4, 809-880 (copy of article can be obtained free at www.kellycoghlan.com)

Editorials: Houston Chronicle (*Schools Don't Need Prayer Police*, March 26, 2000, Outlook 1-C; *Schools Never Intended to be 'Prayer Free' Zones*, May 2, 2002, Outlook 35-A; *Shock and Awe of a Resurgence in School Prayer*, May 1, 2003, Outlook 33-A); Longview News-Journal (*School Boards: Let Students Take Lead in Resolving School Prayer Issue*, Ed., 1999, Ed. Page); School *Board Silences Students. Why?*, Oct. 21, 1999, 3-B; *Students Win Prayer Wars in Courts*, Mar. 13, 2003, 3-C;), Gilmer Mirror (*Will Schools Keep 'Dissing' God*, May 5, 1999, 4-A), The Sealy News (*Students Take Lead in School Prayer Issue*, June 4, 1999).

OTHER:

Guardian ad litem in 25 Texas district court cases for more than 30 children. In 1992, handled a precedent setting case for a permanently brain-damaged 6 year old girl before the Texas Supreme Court in *McGough v. First Court of Appeals*, 842 S.W.2d 637 (Tex. 1992), obtaining a ruling of first impression holding that the appointment of a guardian ad litem is appropriate at every stage of a case to protect a child, even post-judgment.

Represented 159 Santa Fe I.S.D. students and parents *pro bono* before the United States Supreme Court as *amici*

SUMMARY OF THE STATE OF THE LAW REGARDING FAITH-BASED VIEWPOINTS EXPRESSED BY STUDENT SPEAKERS IN PUBLIC SCHOOLS (2007)

(by Kelly Coghlan)

The first twenty-two words of the First Amendment of the United States Constitution contain three clauses--the Establishment Clause, the Free Exercise Clause, and the Free Speech Clause: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech...." The First Amendment has been interpreted to apply not only to Congress but also, *via* the Fourteenth Amendment, to States and their political subdivisions, including public schools; and the word "law" has been interpreted to include not only formal laws, but also government policies and practices.

With regard to religious speech in public schools, the issue rests upon the clear principle to which the United States Supreme Court has adhered for *forty* years, crystallized in *Bd. of Educ. v. Mergens,* 496 U.S. 226 (1990): "[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Id.* at 250. In this context, *private speech* is any speech, whether stated in private or in public, attributable to a private individual as opposed to speech that is attributable to the government. The distinction between government speakers and private speakers is at the very core of the First Amendment. This same distinction has also been articulated as: "[T]he Constitution is abridged when the State *affirmatively sponsors* the particular religious practice of prayer," but "nothing in the Constitution...prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday." *Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290, 313 (2000).

To elaborate: Religious speech is attributable to the government (and, thus, affirmatively sponsored by the government) if government officials select a religious message, *Engel v. Vitale,* 370 U.S. 421 (1962), deliver a religious message, *Abington Sch. Dist. v. Schempp* 374 U.S. 203 (1963), give special encouragement and highlighting of a religious message as a favored practice, *Wallace v. Jaffree,* 472 U.S. 38 (1985), *Treen v. Karen B.,* 455 U.S. 913 (1982), require, arrange, and select a religious message to be given, *Lee v. Weisman,* 505 U.S. *577* (1992), or give an otherwise private speaker preferential access to a school forum, program, audience, or facility for the purpose and intent of having the speaker deliver a religious message, *Santa Fe,* 530 U.S. 290 (2000); *Stone v. Graham,* 449 U.S. 39 (1980). The Court has found no exception in a school context to the rules stated in this paragraph since *Zorach v. Clauson.* 343 U.S. 306 (1952).

If government has not affirmatively sponsored the particular religious speech by one of the means just discussed, that speech is deemed private (and voluntarily made), and constitutionally protected. To elaborate: If a private speaker selects and delivers his or her own message, if government employees express no opinion about that message, if government employees have not highlighted religious speech as a favored message, if government employees give the speaker no preferential access to government fora, programs, audiences, or facilities, and in general, if government employees treat the religious speaker like secular speakers similarly situated, the religious speech is attributable to the private speaker. This is the rule in public schools. *Good News Club v. Milford Central School*, 533 U.S. 98 (2001); *Lamb's Chapel*, 508 U.S. 384 (1993); *Mergens*, 496 U.S. 226 (1990). It is the rule in higher

education. *Rosenberger v. Rector of the University of Virginia*, 515 U.S. 819 (1995); *Widmar v. Vincent*, 454 U.S. 263 (1981). It is the rule on other government property. *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *Bd. of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569 (1987); *Poulos v. New Hampshire*, 345 U.S. 395 (1953); *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Niemotko v. Maryland*, 340 U.S. 268 (1951). The Supreme Court has never found an exception in any context to the rule stated in this paragraph. The Supreme Court has never held in any context, that government may or must discriminate against a private speaker based on the religious content of his speech.

If persons are speaking in their private capacities, even before a school organized audience, then government cannot discriminate against them based on the religious content of their speech. As examples, the Court has pointed to students whose selection is based on neutral criteria (as distinguished from students elected specifically to pray) such as the typically elected "student body president, or even a newly elected prom king or queen" as speakers who could use opportunities for public speaking to say prayers without violating the Establishment Clause (*Santa Fe,* 530 U.S. at 304-05 n.15, 316 n.23, 321). Students are not transformed into government speakers simply by ascending a podium.

The Establishment Clause is *not* a limit on religious free speech by private speakers. The Supreme Court has never held that the Establishment Clause limits the free speech rights of private speakers. For recent cases rejecting such limits, see *Good News Club v. Milford Central School*, 533 U.S. 98 (2001); *Rosenberger*, 515 U.S. 819; *Pinette*, 515 U.S. 753; and the string cite in *Pinette*, 515 U.S. at 760. Voluntary student speech that incidentally advances religion in some sense, cannot itself violate the Establishment Clause. The Court has consistently recognized "that a government [body] 'normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government].'" *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 546 (1987) [quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)]; *see also Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 337 (1987) (holding that "to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence"); *Zelman v. Simmons-Harris*, 536 U.S. 639, 653-55 (2002) (holding "we have never found a program of true private choice to offend the Establishment Clause. We believe that the program challenged here is a program of true private choice...neutral in all respects toward religion.... [N]o reasonable observer would think a neutral program of private choice...carries with it the imprimatur of government endorsement").

By carefully distinguishing government speech from private speech, the Supreme Court has adhered to a rule forbidding the *affirmative sponsorship* of prayer by public schools. But the common phrase to describe these cases in popular speech is simply "school prayer." This shorter phrase is not harmless, for it omits the critical concept of *affirmative sponsorship* by the school. In *Santa Fe*, the most recent prayer case, the Court equates *voluntary* student prayer to private speech ("nothing in the Constitution as interpreted by this Court prohibits any public school student from *voluntarily* praying at any time before, during, or after the schoolday," *Santa Fe*, 530 U.S. at 313); whereas prayer borne out of a school's policy that characterizes prayer as a governmentally favored practice is implicitly deemed non-voluntary non-private

government speech. *See id.* In the latter case, due to the school's own affirmative highlighting of prayer as a favored practice, the school is deemed to have "affirmatively sponsor[ed] the particular religious practice of prayer," which violates the Establishment Clause. *Id.*

Anti-religious school boards having an exaggerated concern about the Establishment Clause and feeling it their duty to cleanse public schools of religious expression offend the Constitution every bit as much as pro-religious school boards. The First Amendment does not convert public schools into religion free zones and into institutions of religious apartheid, nor does it transform school officials into prayer police or religious students into enemies of the state. Voluntary faith-based student speech is just as constitutionally protected as voluntary secular-based student speech: "Private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Pinette*, 515 U.S. 753, 760 (1995). "It can hardly be argued that...students...shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969). "[T]he First Amendment does not allow the government to stifle prayers...neither does it permit the government to undertake the task for itself." *Lee*, 505 U.S. at 589 (1992). "Religious expression[s] are too precious to be either proscribed or prescribed by the State." *Id.* "[N]othing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday." *Santa Fe*, 530 U.S. at 313.

As to otherwise permissible subjects and topics, schools may not apply restrictions on the time, place, and manner of students' voluntary faith-based speech which exceed those placed on students' secular-based speech: "[S]peech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint." *Good News Club*, 533 U.S. at 111-12. Excluding a "religious perspective constitutes unconstitutional viewpoint discrimination," not just subject matter or topic discrimination. *Id.* at 107 n. 2. Even in a "non-public forum..., the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." *Cornelius v. NAACP Legal Defense & Educational Fund*, 473 U.S. 788, 806 (1985); *see also Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983), *Lamb's Chapel*, 508 U.S. at 394, *Rosenberger*, 515 U.S. at 828-29.

"The proposition that public schools do not endorse everything they fail to censor is not complicated." *Mergens*, 496 U.S. at 250 (1990). The duty of America's public schools, school boards, and school officials is to protect both religious and secular speech and to remain neutral between the two.

THREE BROAD PURPOSES OF H.B. 3678

1. **FIRST:** The first purpose of the Bill is to codify current Supreme Court case-law and align State law with a number of important Supreme Court holdings, including, without limitation, the following:

   a. *Good News Club v. Milford Central School*, 533 U.S. at 111-12 and 107 n. 2 (2001):
   "[S]peech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint.... [Excluding a] religious perspective constitutes unconstitutional viewpoint discrimination."
   See also, Cornelius v. NAACP Legal Defense & Educational Fund, 473 U.S. 788, 806 (1985) (even in a "non-public forum...the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject"); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993), *Rosenberger v. Rector of the University of Virginia*, 515 U.S. 819 at 828-29 (1995).

   b. *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990):
   "[T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."

   c. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969):
   "It can hardly be argued that...students...shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."

   d. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313 (2000):
   "[T]he Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer," but "nothing in the Constitution...prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday."

   e. *Lee v. Weisman*, 505 U.S. at 589 (1992):
   "[T]he First Amendment does not allow the government to stifle prayers...neither does it permit the government to undertake the task for itself. "Religious expression[s] are too precious to be either proscribed or prescribed by the State."

   f. *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995):
   "Private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression."

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g. *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990):
"The proposition that public schools do not endorse everything they fail to censor is not complicated."

h. *Zelman v. Simmons-Harris*, 536 U.S. 639, 653-55 (2002):
"We have never found a program of true private choice to offend the Establishment Clause. We believe that the program challenged here is a program of true private choice...neutral in all respects toward religion.... [N]o reasonable observer would think a neutral program of private choice...carries with it the imprimatur of government endorsement."

i. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 304-05 n.15, 316 n.23, 321:
If students are speaking in their individual capacities, even before a school organized audience, then government cannot discriminate against them based on the religious content of their speech on an otherwise permissible subject. As examples, in *Santa Fe v. Doe*, the Supreme Court pointed to students whose selection is based on neutral criteria such as the typically elected "student body president, or even a newly elected prom king or queen" as speakers who could use public speaking opportunities to express a religious viewpoint without violating the Establishment Clause.

- The Bill begins with the following provision (at Sec. 25.151), which is repeated at the beginning of the model policy, using the Supreme Court's own language:

> "A school district shall treat a student's voluntary expression of a religious viewpoint, if any, on an otherwise permissible subject in the same manner the district treats a student's voluntary expression of a secular or other viewpoint on an otherwise permissible subject and may not discriminate against the student based on a religious viewpoint expressed by the student on an otherwise permissible subject."

- Sections 25.153 & 154 of the Bill codify the almost identical language of two sections of the U.S. Dept. of Education "Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary School" (which is not statutory law, but federal guidance), drafted by the attorneys of the U.S. Dept. of Education and U.S. Dept. of Justice to correctly state Supreme Court precedent, and is codified in this Bill.

2. **SECOND:** The second purpose of the Bill is to put safeguards in place to assure that a student's voluntary religious viewpoint, if any, will not be attributable to the school or mistaken as affirmatively sponsored by the school. Thus, there are requirements of: (1) limited public forums for student speakers, (2) selection of speakers based on neutral criteria, and (3) disclaimers to be read/printed.

3. **THIRD:** The third purpose is to give schools an optional safe-harbor local model policy that translates the Supreme Court's holdings into a workable, applicable, easy to implement policy that school districts can adopt and apply to bring themselves into compliance with the provisions of the subchapter covered by the model policy.

ALSO:

- The Bill does not require or even suggest that any student should ever express a religious viewpoint, it just protects them if they do.

- H.B. 3678 is an anti-discrimination bill that protects religious viewpoints only to the same degree--no more and no less--as secular viewpoints on the same topics.

- The Bill does not create any new EXTRA protection for religious speech simply because the speech is religious. Rather, the Bill provides that if students are already being allowed to speak on a topic that the school says is a PERMISSIBLE SUBJECT, then a religious student cannot be censored simply because that student's viewpoint is religious.

- The Bill doesn't give religious students special rights, just equal rights; not extra protection, just equal protection; not preferential treatment, just equal treatment; not a leg up, just equal footing on a level playing field.

- The Bill codifies and clarifies these rights to give much needed guidance to students and school officials.

FIRST AMENDMENT

A district shall take no action respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition a board for a redress of grievances. *U.S. Const. Amend. I*

FREEDOM OF SPEECH

Students do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. At school and school events, students have First Amendment rights, applied in light of the special characteristics of the school environment.

Student expression that is protected by the First Amendment may not be prohibited absent a showing that the expression will materially and substantially interfere with the operation of the school or the rights of others.

Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) [See also FNCI]

The inculcation of fundamental values necessary to the maintenance of a democratic society is part of the work of the school. The First Amendment does not prevent school officials from determining that particular student expression is vulgar and lewd, and therefore contrary to the school's basic educational mission. *Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986)*

PRAYER AT SCHOOL ACTIVITIES

A public school student has an absolute right to individually, voluntarily, and silently pray or meditate in school in a manner that does not disrupt the instructional or other activities of the school. A student shall not be required, encouraged, or coerced to engage in or refrain from such prayer or meditation during any school activity. *Education Code 25.901*

Nothing in the Constitution as interpreted by the U.S. Supreme Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday. But the religious liberty protected by the Constitution is abridged when a district affirmatively sponsors the particular religious practice of prayer.

A district shall not adopt a policy that establishes an improper majoritarian election on religion and has the purpose and creates the perception of encouraging the delivery of prayer at a series of important school events.

Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (addressing school-sponsored, student-led prayer delivered over the public address system at high school football games) [See also FMH]

FEDERAL FUNDS

As a condition of receiving certain federal funds, a district shall certify in writing to TEA that no policy of the district prevents, or other-

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wise denies participation in, constitutionally protected prayer in public schools, as detailed in the guidance from the United States secretary of education regarding constitutionally protected prayer. The certification shall be provided by October 1 of each year.

By November 1 of each year, TEA shall report to the secretary a list of districts that have not filed the certification or against which complaints have been made to TEA that the district is not in compliance with the paragraph above. The secretary may issue and secure compliance with rules or orders with respect to a district that fails to certify, or is found to have certified in bad faith, that no policy of the district prevents, or otherwise denies participation in, constitutionally protected prayer in public schools.

No Child Left Behind Act of 2001, 20 U.S.C. 7904

PATRIOTIC OBSERVANCES

A district may officially encourage students to express love for the United States by reciting historical documents or singing official anthems that contain religious references; such patriotic or ceremonial occasions do not constitute a school-sponsored religious exercise. *Engel v. Vitale, 370 U.S. 421 (1962)*

A district shall not, however, compel students to participate in patriotic observances. *West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (holding unconstitutional a requirement that students salute the United States flag and recite the Pledge of Allegiance)*

Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools

February 7, 2003

. . .

Religious Expression and Prayer in Class Assignments

Students may express their beliefs about religion in homework, artwork, and other written and oral assignments free from discrimination based on the religious content of their submissions. Such home and classroom work should be judged by ordinary academic standards of substance and relevance and against other legitimate pedagogical concerns identified by the school. Thus, if a teacher's assignment involves writing a poem, the work of a student who submits a poem in the form of a prayer (for example, a psalm) should be judged on the basis of academic standards (such as literary quality) and neither penalized nor rewarded on account of its religious content.

. . .

Organized Prayer Groups and Activities

Students may organize prayer groups, religious clubs, and "see you at the pole" gatherings before school to the same extent that students are permitted to organize other non-curricular student activities groups. Such groups must be given the same access to school facilities for assembling as is given to other non-curricular groups, without discrimination because of the religious content of their expression. School authorities possess substantial discretion concerning whether to permit the use of school media for student advertising or announcements regarding non-curricular activities. However, where student groups that meet for nonreligious activities are permitted to advertise or announce their meetings—for example, by advertising in a student newspaper, making announcements on a student activities bulletin board or public address system, or handing out leaflets—school authorities may not discriminate against groups who meet to pray. School authorities may disclaim sponsorship of non-curricular groups and events, provided they administer such disclaimers in a manner that neither favors nor disfavors groups that meet to engage in prayer or religious speech.

EXHIBIT
TABBIES
5

WHY H.B. 3678 HOUSE AMENDMENT CENSORING RELIGIOUS VIEWPOINTS ON "SEX, RACE, AGE, SEXUAL PRFENRENCE, OR RELIGIOUS BELIEFS" HAD TO BE REMOVED TO RETAIN CONSTITUTIONALITY OF BILL

I. Legal Reasons Language Had To Be Removed:

1. The original language of the Bill (as being presented in the Senate by Senator Tommy Williams) specifically tracks Supreme Court cases. The Davis amendment from the House does not track any Supreme Court case and finds no support in the law. The proponents of this language cannot cite to any federal case (much less, a Supreme Court case) to support it. In fact, every Constitutional expert consulted has said the language is unconstitutional and would subject all school districts to liability.

2. Attorney General: Representative Charlie Howard contacted the Attorney General's Office to seek a legal opinion as to whether the amendment's language would be unconstitutional and likely to lead to lawsuits against the State and schools. The Solicitor General of the Attorney General's Office, after researching the issue, reached the following conclusion:

> "This Amendment increases the chances of litigation and the legal vulnerability of the statute."

3. Additional Legal Opinions: Additional legal opinions were obtained from a number of constitutional experts, school-law attorneys, and organizations that regularly practice constitutional law and regularly litigate and win lawsuits regarding complex constitutional issues (in alphabetical order):

- Alliance Defense Fund: Attached hereto as Exhibit **A**, which is incorporated herein by reference, is a legal analysis of the amendment concluding, in part, the following:

> "Would the Davis Amendment render the Act vulnerable to constitutional attack? In our professional opinion, the answer is a resounding 'yes.'.... Including such an amendment in this Act could entangle the State and its schools in expensive litigation, litigation that they would likely lose. In sum, as viewpoint discrimination always violates the First Amendment, the Davis Amendment inserts a potentially fatal flaw into this bill."

- Coghlan & Associates: Attached hereto as Exhibit **B**, which is incorporated herein by reference, is a legal analysis of the amendment concluding, in part, the following:

> "Adding a censoring clause to the Bill--making certain religious viewpoints off limits on otherwise permissible subjects--is contradictory to and violative of Supreme Court holdings. Additionally, the amendment language is not needed since it is the school--not a student--that controls the subjects and topics for student discussion.... It is my legal opinion that if the amendment became part

of this Act, the Act could be successfully challenged on constitutional grounds, and the State and school districts would lose."

- Liberty Legal Institute: Attached hereto as Exhibit **C**, which is incorporated herein by reference, is a legal analysis of the amendment concluding, in part, the following:

  "If a student were to share their faith with another student or comment regarding their faith's position concerning marriage and morality, the school district would be obligated under Amendment One to ban the speech. Such a ban is a violation of the Free Speech Clause of the First Amendment to the United States Constitution because it is unlawful viewpoint discrimination.... [and] all school districts will be victims to successful lawsuits for enforcing the Amendment One provision, which requires schools to discriminate against, for example, speech supporting the Marriage Amendment that passed in Texas with a 76% majority."

- Joe H. Reynolds: Attached hereto as Exhibit **D**, which is incorporated herein by reference, is a legal analysis of the amendment concluding, in part, the following: "If this provision were to become a part of this Bill, it is my legal opinion that the provision would be unconstitutional and put the entire Bill into constitutional jeopardy."

I. Additional Reasons the Language Is Unnecessary as a Practical Matter:

1. The language is unnecessary since it is the school--not a student--that controls the subjects and topics for student discussion.

2. Sec. 25.151 of H.B. 3678 states:

   "A school district shall treat a student's voluntary expression of a religious viewpoint, if any, on an otherwise PERMISSIBLE SUBJECT in the same manner the district treats a student's voluntary expression of a secular or other viewpoint on an otherwise PERMISSIBLE SUBJECT and may not discriminate against the student based on a religious viewpoint expressed by the student on an otherwise PERMISSIBLE SUBJECT." (emphasis added).

3. The school selects the "permissible subject" that students will be allowed to discuss. Thus, if the school does not want students to give their viewpoints (religious, secular, or otherwise) on the pros and cons of sex, race, age, sexual preferences, or differences in religious beliefs, then the school is not required to designate those subjects/topics as "permissible subjects" for student discussion. The school has control over this. If a particular subject or topic is not an "otherwise permissible subject" to discuss, then neither a secular nor religious viewpoint would be permissible to express. It is only when secular viewpoints are permitted on a subject that religious viewpoints on the same subject must be permitted.

4. Therefore, if the school does not want students giving their viewpoints on subjects that might lead to expressions that some could interpret as discriminatory regarding sex, race, age, sexual preferences, or others religious beliefs, the school does not have to designate those subjects as ones for discussion. The school has control over what subject is a "permissible subject" for student discussion; but once the school opens the door to a subject by designating it as a "permissible subject" for student discussion, the school cannot then discriminate against and censor the religious viewpoint in favor of the secular viewpoint on the same subject.

5. Also, there may be limited instances in which a school might actually desire for students—in order to advance some instructive, pedagogical or educational purpose--to hear each other's ideas (pro and con) regarding some of these subjects, and therefore would want to designate as "permissible subjects" (for that particular discussion) the topics of sex, race, age, sexual preference, and other's religious beliefs. One might see, for instance, such an occasion in a debate or speech class or regarding specific class assignments touching on any of these topics. Under the language of the amendment, a student's expression of a religious viewpoint that might be negative (i.e., viewed as discriminatory) as to any of these topics/subjects would have to be censored from the discussion, debate, or speech.

6. The amendment would censor every student's religious viewpoint that disagreed, for instance, with same-sex marriage, or with radical Islam's doctrine of Jihad, or with the religious belief supporting "death to the Jews and death to America," or with the Catholic doctrine allowing men only to become priests, or with the Episcopalian doctrine of ordination of homosexual priests, or with women serving in combat in the military, or with some affirmative action programs, or with the "sexual preference" of pedophilia (notwithstanding the practice is illegal), or with the "sexual preference" of bestiality (notwithstanding the practices is illegal), and on and on. Also, the scriptures and/or doctrines of many religions would be censored as impermissible viewpoints that could never be expressed or defended.

7. In Good News Club v. Milford this type of religious viewpoint discrimination was held unconstitutional. This amendment would have the government censoring every student's religious viewpoint that differed from the government's preferred viewpoint on subjects that the school was otherwise permitting students to discuss.

III. Conclusion:

1. The language of this Bill was drafted over a 5 year period by a cadre of constitutional legal experts across the country and tracks Supreme Court cases. Each word was carefully researched and selected to reflect Supreme Court holdings using specific Supreme Court language. This is one of the most complicated areas of the law dealing with the Establishment, Free Exercise, and Free Speech clauses of the First Amendment. Going beyond the language of the Bill (even with good sounding ideas) would likely invite law suits against the State and school districts. The Davis amendment does not track any Supreme Court case and finds no support in the law. The proponents of this

language cannot cite to any federal case (much less, Supreme Court authority) to support it. Every Constitutional expert consulted has said the language is unconstitutional and would subject school districts to liability.

2. This Bill is intended to stop law suits against schools, not invite them. This Bill is intended to bring schools within the parameters of the Constitution, not thrust them into unconstitutional practices.

3. We need to stick with the thoroughly researched and constitutionally supported language of this Bill as presented in the Senate by Senator Tommy Williams.

ALLIANCE DEFENSE FUND
Defending Our First Liberty

May 8, 2007

The Honorable Tommy Williams
Texas Senate
P.O. Box 12068—Capitol Station
Austin, Texas 78711

The Honorable Charles Howard
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

Dear Senator Williams and Representative Howard:

I am responding to your question about the Schoolchildren's Religious Liberties Act ("Act") and the Davis Amendment. As you know, the Alliance Defense Fund ("ADF") is a legal alliance dedicated to defending America's first liberty—religious freedom. ADF's Center for Academic Freedom is dedicated to ensuring that religious students enjoy the rights to speak, associate, and learn on an equal basis as students of different faiths or of no faith at all. ADF is not a political organization, and we do not engage in lobbying efforts. But we do objectively analyze the constitutionality of proposed legislation upon occasion.

Regarding the general details of this bill, ADF defers to the expertise and experience of Mr. Kelly Coghlan and Mr. Kelly Shackelford, both of whom have been involved with this bill for many years. You have contacted us with a very narrow question: Would the Davis Amendment render the Act vulnerable to constitutional attack? In our professional opinion, the answer is a resounding "yes." As many of your materials note, in a limited public forum, the government cannot limit speech simply because of the viewpoint espoused on an otherwise permissible topic. *See, e.g.*, *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985); *Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98, 107 n.2, 111–12 (2001). The Davis Amendment enables such prohibited viewpoint discrimination because it bars students from addressing any of the permitted subjects if their speech "promotes discrimination" based on a number of characteristics and behaviors. While all content-based speech restrictions are constitutionally suspect, "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

Even in a school context, the Davis Amendment remains constitutionally suspect. While school officials may limit student speech, generally they can only do so if the speech poses a substantial and material disruption to the academic environment or invades the rights of others. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 211–12 (3d Cir. 2001). But the standard for a substantial and material disruption is very high because "in our system, undifferentiated fear or apprehension of distur-

bance is not enough to overcome the right to freedom of expression." *Id.* at 508; *Saxe*, 240 F.3d at 211–12. Thus, to limit student speech, school officials must be able to "point to a well-founded expectation of disruption—especially one based on past incidents arising out of similar speech," but even this may not be enough for the restriction to be constitutional. *Saxe*, 240 F.3d at 212. The mere fact that some people (or even many people) would find certain speech offensive does not give school officials the right to restrict it, even in the name of preventing discrimination. *Id.* at 212, 217. This is one of the fundamental tenets of the First Amendment:

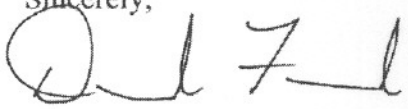
> If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable.

Texas v. Johnson, 491 U.S. 397, 414 (1989).

Furthermore, prohibiting speech that "promotes discrimination" is inherently vague because ordinary students cannot know exactly what they can or cannot say. *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). In reality, school officials would have unfettered discretion to define this provision as they see fit. *See City of Chicago v. Morales*, 527 U.S. 41, 56 (1999); *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). If a Christian student shares the Gospel with another student outside of class, does this "promote discrimination" based on religion? If a Christian student expresses his religiously-based moral objections to homosexual conduct, does this "promote discrimination"? The Davis Amendment does not answer these questions clearly, but in both cases, school officials could use the Davis Amendment to prohibit speech that the First Amendment clearly protects.

In sum, if we were to challenge the constitutionality of the Schoolchildren's Religious Liberties Act, we would very readily attack the viewpoint discrimination and vagueness inherent in the Davis Amendment. As Texas' Solicitor General has correctly concluded: "This amendment increases the chance of litigation and the legal vulnerability of the statute." Including such an amendment in this Act could entangle the State and its schools in expensive litigation, litigation that they would probably lose. In sum, as viewpoint discrimination always violates the First Amendment, the Davis Amendment inserts a potentially fatal flaw into the bill.

Sincerely,



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MEMORANDUM OF LAW: CONSTITUTIONALITY OF ADDITION TO BILL OF A CENSORING CLAUSE ON "SEX, RACE, AGE, SEXUAL PRFENRENCE, OR RELIGIOUS BELIEFS"

1. Background:

   The language of H.B. 3678 was drafted over more than a 5 year period by a cadre of constitutional legal experts. Although the undersigned was the chief drafter, numerous other constitutional experts and specialty law firms from across the country were consulted and provided input in the research and drafting. This Bill deals with one of the most complicated areas of the law involving the Establishment, Free Exercise, and Free Speech clauses of the First Amendment. Each word of the Bill was carefully researched and selected to reflect existing Supreme Court precedent using specific Supreme Court language. The purpose of the Bill is not to add or prohibit new religious rights but to codify those that already exist in the context of public schools. The amendment goes beyond the Bill's purpose by placing new restrictions on the expressions of religious viewpoints which the Supreme Court has never permitted.

2. Legal Analysis:

   The original language of the Bill (as being presented in the Senate by Senator Tommy Williams) specifically tracks Supreme Court cases. The Davis amendment from the House does not track any Supreme Court case and finds no support in the law. The proponents of this language cannot cite to any federal case (much less, a Supreme Court case) to support it. In fact, every Constitutional expert consulted has said the language is unconstitutional and would subject all school districts to liability.

3. Going beyond the language of the Supreme Court tracked by the Bill (even with good intentioned and good sounding ideas) would likely invite law suits against the State and the school districts. Attempting to randomly guess beyond Supreme Court precedent would add risk to the viability of the Bill and put the Bill in constitutional jeopardy.

4. One of the Supreme Court holdings codified in the Bill is *Good News Club v. Milford Central School*, 533 U.S. at 111-12 and 107 n. 2 (2001):

   > "[S]peech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious

> viewpoint.... [Excluding a] religious perspective constitutes unconstitutional viewpoint discrimination." (emphasis added).

See also, Cornelius v. NAACP Legal Defense & Educational Fund, 473 U.S. 788, 806 (1985) (even in a "non-public forum...the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject"); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983),; *Lamb's Chapel*, 508 U.S. at 394, *Rosenberger v. Rector of the University of Virginia*, 515 U.S. 819 at 828-29 (1995).

5. These and other Supreme Court cases make it clear that government may not bar religious perspectives on otherwise permitted subjects. Government need not fear an Establishment Clause violation for neutrally allowing religious viewpoints on the same subjects as secular and other student viewpoints are being permitted. Viewpoints on permissible subjects are not to be selectively permitted or proscribed according to official preference.

6. The House amendment would have the government censoring every student's religious viewpoint that differed from the government's preferred viewpoint on subjects that the school was permitting students to otherwise freely discuss or debate.

7. Adding a censoring clause to the Bill--making certain religious viewpoints off limits on otherwise permissible subjects--is contradictory to and violative of Supreme Court holdings.

8. Additionally, the amendment language is not needed since it is the school--not a student--that controls the subjects and topics for student discussion.

9. Sec. 25.151 of the Bill provides (and the same phrase is repeated throughout the Bill):

> A school district shall treat a student's voluntary expression of a religious viewpoint, if any, on an otherwise permissible subject in the same manner the district treats a student's voluntary expression of a secular or other viewpoint on an otherwise permissible subject and may not discriminate against the student based on a religious viewpoint expressed by the student on an otherwise permissible subject.

10. The school selects the "permissible subject" that students will be allowed to discuss. Thus, if the school does not want students to give their viewpoints (religious, secular, or otherwise) on the pros and cons of sex, race, age, sexual preferences, or differences in religious beliefs, then the school is not required to designate those subjects/topics as "permissible subjects" for student discussion. The school has control over this. If a particular subject or topic is not an "otherwise permissible subject" to discuss, then neither a secular nor religious viewpoint would be permissible to express. It is only when secular viewpoints are permitted on a subject that religious viewpoints on the same subject must be permitted.

11. Therefore, if the school does not want students giving their viewpoints on subjects that might lead to expressions that some could interpret as discriminatory regarding sex, race,

age, sexual preferences, or others religious beliefs, the school does not have to designate those subjects as ones for discussion. The school has control over what subject is a "permissible subject" for student discussion; but once the school opens the door to a subject by designating it as a "permissible subject" for student discussion, the school cannot then discriminate against and censor the religious viewpoint in favor of the secular viewpoint on the same subject.

12. Also, there may be limited instances in which a school might actually desire for students—in order to advance some instructive, pedagogical or educational purpose--to hear each other's ideas (pro and con) regarding some of these subjects, and therefore want to designate as "permissible subjects" (for the particular discussion) the topics of sex, race, age, sexual preference, and other's religious beliefs. One might see, for instance, such an occasion in a debate or speech class. Under the language of the amendment, a student's expression of a religious viewpoint that might be negative (i.e., viewed as discriminatory) as to any of these subjects would have to be censored from the discussion, debate, or speech. The amendment would censor every student's religious viewpoint that disagreed, for instance, with same-sex marriage, or with radical Islam's doctrine of Jihad, or with the Catholic doctrine allowing men only to become priests, or with the Episcopalian doctrine of ordination of homosexual priests, or with women serving in combat in the military, or with the "sexual preference" of pedophiles (notwithstanding their practices are illegal), or with the "sexual preference" of bestiality (notwithstanding their practices are illegal), and on and on. Also, the scriptures and doctrines of many religions would be censored as impermissible viewpoints that could never be expressed or defended.

13. The Bill does not create any new extra protection for religious student speech simply because the speech is religious. The Bill only says that if students are already being permitted to express a viewpoint on a topic that the school says is a permissible subject for student discussion and expression, then a religious student cannot be censored simply because that student's viewpoint is religious.

14. The Bill would not allow any new Hateful Speech by a student claiming it is their religious viewpoint. Just because a viewpoint is religious rather than secular does not give the student speaker any extra immunity from school rules. Schools are simply required to treat secular and religious viewpoints equally when expressed on the same permissible subjects. And those permissible subjects are controlled by the school.

15. The Bill expressly prohibits "obscene speech" and "vulgar speech" and "offensively lewd and indecent speech." The reason that these categories of speech are specifically proscribed under the Bill is because these are specific forms of speech that the Supreme Court has expressly held that a school can exclude entirely from a school forum. The case of *Ginsberg*

16. There is no similar Supreme Court precedent for the language that is offered in the amendment to the Bill (in fact, the Supreme Court has rejected such viewpoint discrimination).

17. The type of model policy provided in this Bill has already been tried and tested in a number of public schools from Texas to Illinois. A Texas Superintendent whose school has had a 6 year history under an almost identical model policy reports that there has not been a single instance of problems, complaints, threats, lawsuits or misuse of the speaking opportunities by any student. Another Superintendent in Illinois has had a 4 year history of use of the model policy and likewise reports that there have been no problems, complaints, threats, lawsuits or misuse of the speaking opportunities by any student.

18. Conclusion:

It is my legal opinion that if the amendment became part of this Act, the Act could be successfully challenged on constitutional grounds, and the State and school districts would lose. I recommend that the Senate use only the thoroughly researched and constitutionally supported language that has been introduced by Senator Tommy Williams.

Very truly yours,

Kelly Coghlan

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Chief Counsel

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Legal Analysis of Floor Amendment One to HB3678

The Amendment provides that a school district may discriminate against religious speech. If a student were to share their faith with another student or comment regarding their faith's position concerning marriage and morality, the school district would be obligated under Amendment One to ban the speech.

Such a ban is a violation of the Free Speech Clause of the First Amendment to the United States Constitution because it is unlawful viewpoint discrimination. It is a fundamental principle of constitutional law that school officials may not suppress or exclude the speech of private parties simply because the speech is religious or contains a religious perspective. *Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98 (2001); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981). It does not matter that the school disfavored the speech because some other student disliked its religious viewpoint and became offended.

Amendment One is a constitutionally prohibited "heckler's veto." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 33 (2004). It allows any student or parent of a student to impermissibly restrict the speech of another student because they are somehow offended. Thus, if a Muslim student were to say something in reference to "Allah," an anti-Muslim person would be given the power, under Amendment One, to demand discrimination by the government against the Muslim speaker.

Students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506. The Supreme Court has stated that a student's free speech rights apply "when [they are] in the cafeteria, or on the playing field, or on the campus during the authorized hours. . . ." *Id.* at 512-13. The Supreme Court has warned school officials not to trample the rights of students in public schools:

> [S]tate-operated schools may not be enclaves for totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligation to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved.

Id. at 511.

If HB3678 passes with Amendment One, all school districts will be victims to successful lawsuits for enforcing the Amendment One provision, which requires schools to discriminate against, for example, speech supporting the Marriage Amendment that passed in Texas with a 76% majority. Student speech from a minority religious viewpoint, such as Jewish students, Muslim students or Sikh students would face unparalleled discrimination as a result of Amendment One and the Liberty Legal Institute would gladly represent any student of any faith and file lawsuit after lawsuit against school districts as a result of Amendment One.

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May 9, 2007

Texas Senate
Education Committee
Austin, Texas 78711

Re: Testimony in favor of H.B. 3678 (School Children's Religious Liberties Bill)

To Members of the Senate Education Committee:

JOE REYNOLDS TESTIMONY
SENATE EDUCATION COMMITEE HEARING ON H.B. 3678

My name is Joe H. Reynolds. I am testifying in favor of this Bill. In the event I am unable to personally attend the Senate hearing on H.R. 3678, I designate Kelly Coghlan as my agent to speak on my behalf and to read my testimony into the record. I have been asked to give some of my background before I testify. I am a practicing Houston attorney, formerly with Bracewell, Reynolds & Patterson, and founder of Reynolds, Allen & Cook. I am a member of the American College of Trial Lawyers, and former Assistant Attorney General of Texas. I was named one of the 5 best lawyers over 50 years by the Texas State Bar. I was on the Board of Regents of Texas A&M for 16 years, appointed by three different Governors, and Founder and Chairman of the Board of Visitors of the Thurgood Marshall Law School. I have practiced law for more than 50 years.

1. I have been the attorney and legal advisor for many of the major school districts in Texas, including, without limitation, the following:
    a. Aldine I.S.D.
    b. Alief I.S.D.
    c. Alvin I.S.D.
    d. Anahuac I.S.D.
    e. A&M Consolidated I.S.D.
    f. Atlanta I.S.D.
    g. Austin I.S.D
    h. Baytown I.S.D.
    i. Bryan I.S.D.

j. Cleveland I.S.D.
k. Cold Springs I.S.D.
l. Conroe I.S.D.
m. Crosby I.S.D.
n. Cy-Fair I.S.D.
o. Dickinson I.S.D.
p. Fort Bend I.S.D.
q. Friendswood I.S.D.
r. Georgetown I.S.D.
s. Hearne I.S.D.
t. Henderson I.S.D.
u. Houston I.S.D.
v. Liberty I.S.D.
w. Lubbock I.S.D.
x. Madisonville I.S.D.
y. Montgomery I.S.D.
z. Nacogdoches I.S.D.
aa. New Caney I.S.D.
bb. North Forest I.S.D.
cc. Spring Branch I.S.D.
dd. Sulpher Springs I.S.D.
ee. Waller I.S.D.
ff. Warren I.S.D.
gg. Wichita Falls I.S.D.
hh. as well as school districts in Florida and Georgia, and others.

2. I have been the attorney and legally advised school districts in the constitutional area of religious expression in public schools for most of my career.

3. I have been told that no other attorney has represented more Texas school districts than I have over my career. I have spent my life representing school districts.

4. Today, school districts need the Legislature to take a leadership role in codifying current case law into an Act to clearly lay out parameters for school districts to follow in dealing with matters of religious expression by students in public schools.

5. Some school districts in Texas appear to be operating under the assumption that public schools are anti-religion zones. Some schools feel that it is their constitutional duty to cleanse public schools of all religious expression. Over the years, I have seen the pendulum swing way too far in that wrong direction.

6. With schools being threatened by various organizations that are against any religious expression, I have increasingly observed that schools are erring on the side of quashing students' expressions of religious viewpoints.

7. But the First Amendment does not require school officials to become prayer police and to treat religious students like second class citizens or enemies of the state.

8. Voluntary faith-based student speech is just as constitutionally protected as voluntary secular-based student speech on similar permissible subjects:

    a. In *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995), the Supreme Court held: "Private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression."

    b. In *Good News Club v. Milford Central School*, 533 U.S. at 111-12 and 107 n. 2 (2001), the Supreme Court held: "[S]peech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint." And that, excluding a "religious perspective constitutes unconstitutional viewpoint discrimination."

    c. In *Bd. of Education. v. Mergens*, 496 U.S. 226, 250 (1990), the Supreme Court held: "[T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." And also said, "The proposition that public schools do not endorse everything they fail to censor is not complicated." Id.

    d. In *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969), the Supreme Court held: "It can hardly be argued that...students...shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."

    e. In *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313 (2000), the Supreme Court held: "[T]he Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer," but "nothing in the Constitution...prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday."

f. In *Lee v. Weisman*, 505 U.S. at 589 (1992), the Supreme Court said,"[T]he First Amendment does not allow the government to stifle prayers...neither does it permit the government to undertake the task for itself. "Religious expression[s] are too precious to be either proscribed or prescribed by the State."

g. In *Zelman v. Simmons-Harris*, 536 U.S. 639, 653-55 (2002), the Supreme Court held: "We have never found a program of true private choice to offend the Establishment Clause. We believe that the program challenged here is a program of true private choice...neutral in all respects toward religion.... [N]o reasonable observer would think a neutral program of private choice...carries with it the imprimatur of government endorsement."

h. In *Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290, 304-05 n.15, 316 n.23, 321, the Supreme Court indicated in a series of footnotes that if students are speaking in their individual capacities, even before a school organized audience, then government cannot discriminate against them based on the religious content of their speech on an otherwise permissible subject. As examples, the Supreme Court pointed to students whose selection is based on neutral criteria such as the typically elected "student body president, or even a newly elected prom king or queen" as speakers who could use public speaking opportunities to express a religious viewpoint without violating the Establishment Clause.

i. In *Bd. of Educ. v. Mergens,* 496 U.S. 226, 250 (1990), the Supreme Court held: "The proposition that public schools do not endorse everything they fail to censor is not complicated."

9. H.R. 3678 does not require or suggest that students should express religious viewpoints, it just protects the students if they do. This Bill puts school districts in a neutral posture and shows them how to maintain that neutral posture.

10. This Bill eliminates the confusion leading to unnecessary lawsuits by codifying the many constitutional ways students may express their faith at school and at school-sponsored events and outlining what activities will land a school in constitutional hot water.

11. This Bill shows schools how to be **neutral** in these sticky matters and provides them with an optional Model Policy which can be adopted in every school district in Texas.

12. I have carefully analyzed H.B. 3678. The Bill appears to be extremely well researched and reasoned. In my opinion the codification of the law in the Bill and model policy faithfully follow current law.

13. It is also my legal opinion that the Bill is constitutional, as written, and that as long as it is not amended from the form being introduced by Senator Tommy Williams in the Senate (as drafted by Houston attorney Kelly Coghlan of Coghlan & Associates and his team of constitutional legal experts from across the country), this Bill will withstand any lawsuits regarding constitutionality. Because constitutional law is so complex regarding the Establishment, Free Exercise, and Free Speech Clauses of the First Amendment, I would highly advise against adding amendments to this Bill beyond what has been drafted by those constitutional experts.

14. An example of the unintended consequences of adding amendments to this Bill can be seen in the one amendment proposed in the House regarding viewpoints on "sex, race, age, sexual preferences, or differences in religious beliefs." This amendment, while no doubt well intentioned, adds religious viewpoint discrimination into a Bill that is all about banning religious viewpoint discrimination. The amendment would censor every student's religious viewpoint that disagreed, for instance, with same-sex marriage, or with radical Islam's doctrine of Jihad, or with the Catholic doctrine allowing men only to become priests, or with the Episcopalian doctrine of ordination of homosexual priests, or with women serving in combat in the military, or with the "sexual preference" of pedophiles (notwithstanding their practices are illegal), or with the "sexual preference" of bestiality (notwithstanding their practices are illegal), and on and on. Also, expressions borrowed from the scriptures or doctrines of many religions would be censored as impermissible viewpoints that could never be expressed or defended.

15. In *Good News Club v. Milford* this type of religious viewpoint discrimination was held unconstitutional. This amendment would have the government censoring every student's religious viewpoint that differed from the government's preferred viewpoint on subjects that the school was permitting students to otherwise discuss. If this provision were to become a part of this Bill, it is my legal opinion that the provision would be unconstitutional and put the entire Bill into constitutional jeopardy.

16. As an attorney who has devoted much of my life to helping and representing school districts, I whole heartedly recommend passage of this Bill in the form being introduced by Senator Tommy Williams in the Senate and the adoption of the model policy by every school district in Texas. This will give our Texas school districts the

much needed guidance in this sticky area of the law that they have so greatly needed and desired.

17. It is my opinion that this is the best piece of legislation for school districts that has been introduced in the past 50 years.

Very truly yours,

Joe H. Reynolds