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 **1**, 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 **2**, which is incorporated herein by reference, is a legal analysis of the amendment concluding, in part, the following:

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 **3**, 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 **4**, 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."

II. 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

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

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.

EXHIBIT 1

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-

7141 OLD ZION ROAD · COLUMBIA, TN 38401 · PHONE 931-490-0591 FAX 931-490-7989 WEB WWW.TELLADF.ORG

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:

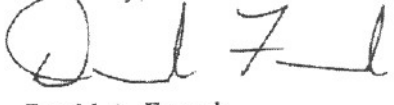
> If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable.

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,



David A. French
Director, Center for Academic Freedom

EXHIBIT 2

COGHLAN & ASSOCIATES
Attorneys At Law
505 Lanecrest, Suite One
Houston, Texas 77024-6716

KELLY J. COGHLAN

Telephone: (713) 973-7475
Telecopier: (713) 468-8888

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):

> 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

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 v. New York*, 390 U.S. 629, 635 (1968) holds that "obscene speech" is not protected by the First Amendment. The case of *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986) holds

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

EXHIBIT 3

LIBERTY LEGAL INSTITUTE

KELLY J SHACKELFORD
Chief Counsel

HEADQUARTERS
903 East 18th St. Suite 230
Plano, Texas 75074
972-423-3131 Fax 972-423-6570
libertylegal@libertylegal.org
www.libertylegal.org

HIRAM SASSER*
Director of Litigation

*Also Licensed in Oklahoma

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.

Mr. Kelly Shackelford, Esq.
Chief Counsel
Liberty Legal Institute

Mr. Hiram Sasser, III, Esq.
Director of Litigation
Liberty Legal Institute

EXHIBIT 4

JOE H. REYNOLDS
Attorney At Law
10724 Memorial Drive
Houston, Texas 77024-7506

JOE H. REYNOLDS

Telephone: (713) 468-3053
Telecopier: (713) 468-8776

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.

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.

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

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.

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.

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