For Legislators Introducing Bill—Overview and Q & A—Religious Viewpoints Antidiscrimination Act

Overview:

Schools are not religion-free zones; school officials are not prayer-police; religious students are not enemies of the state; and the Religious Viewpoints Antidiscrimination Bill (also known as the Schoolchildren's Religious Liberties Bill) makes that clear. The Bill provides much needed guidance for school officials who have sometimes felt compelled to quash students' religious expressions for fear of lawsuits--even when such quashing itself is illegal. The Bill pulls together Supreme Court rulings into a format that is accessible to the public and easy to understand and apply. Houston attorney Joe Reynolds, a 16-year member of the Texas A&M Board of Regents, who has represented more school districts than any other attorney in the United States, said, "This is the best piece of legislation for school districts that has been introduced in the past 50 years."

The legislation does not require or even suggest that any child ever express a prayer or any other type of religious viewpoint, it just protects them if they do. Furthermore, the Bill does not presume that there will ever be a prayer or other religious viewpoint expressed by any student.

The Bill is anti-discrimination legislation protecting students' voluntary expressions of religious viewpoints, if any, to the same degree—no more and no less—as students' voluntary expressions of secular or other viewpoints on otherwise permissible subjects and topics. Religious children do not receive special rights, extra opportunity, preferential treatment or extra protection, just equal rights, equal opportunity, equal treatment and equal protection.

Recent examples of religious discrimination occurring in public schools include:

- A 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 public school, students were reprimanded for talking about "Jesus" during Easter;
- One school banned children from wishing deployed troops a "Merry Christmas" in their letters to the troops;
- 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;

- During the Easter season 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.
- Valedictorians' microphones have been turned off simply because a religious or prayerful viewpoint was being expressed.
- Other instances specific to public schools in _____ include: _____.
- This is just the tip of the iceberg. Since children don't know their constitutional rights and wouldn't normally have the funds or ability to pursue such rights, most events, no doubt, go unreported.
- The Bill protects all children of all faiths.

The Bill accomplishes 4 broad purposes:

1. **FIRST**, it codifies Supreme Court precedent into an accessible and understandable law. *See* **Exhibit 1**—"Summary of the State of the Law Regarding Faith-Based Viewpoints Expressed by Student Speakers in Public Schools (2008)".

    a. The Bill begins with the following provision 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."

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

        i. *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).

ii. *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."

iii. *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."

iv. *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."

v. *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."

vi. *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."

vii. *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."

viii. *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."

ix. *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:

i. Under this Bill, if the subject/topic assigned to a student speaker is "safety and sportsmanship", and one student says, "Let us have a safe game tonight and may we all demonstrate good sportsmanship" and another student says, "God, let us have a safe game tonight and may we all demonstrate good sportsmanship," since both expressions are on the subject/topic, both expressions should be treated with equal dignity. The addition of the word "God" (the expression of a religious viewpoint on the same subject of "safety and sportsmanship) does not disqualify the second student's statement.

ii. Under the Bill, if students are given an assignment to draw "the hero of your choice" and one student draws George Washington and another student draws a picture of Jesus, the Bill would protect the second child's religious expression because both students stuck to the same "permissible subject" assigned. Under the Bill, the drawings of both the secular and religious heroes would have to be treated the same and judged on the same academic bases.

iii. However, if students are given an assignment to draw "a picture of a building" and a 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 expressed on the "permissible subject" assigned. If a non-religious student had drawn a picture of a flower when the topic was to draw a building, that student's expression would fail for the same reason. Both students could equally receive a failing grade for not staying on the "permissible subject" assigned.

2. **SECOND**, the Bill includes 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. This Bill codifies current Supreme Court precedent. *Good News Club v. Milford Central School*, 533 U.S. at 111-12 and 107 n. 2 (2001) speaks in terms of a "limited public forum." To be true to the precise language used by the Supreme Court so as to place the Bill on solid constitutional ground, limited public forums are specified in the Bill.

    b. An additional reason the Bill provides for "**limited public forums**" for student speakers is to assure that schools play fair. This eliminates a ploy used by some schools of turning student speakers into government spokesmen and then telling the students that since they are government spokesmen, they can't mention God. or express any prayerful view. By having a limited public forum, this stops this ploy. A limited public forum is properly restricted as to the "permissible subject(s)" upon which students may speak, but it prohibits discrimination against religious viewpoints expressed by students on the permissible subjects (*Good News Club v. Milford*).

3. **THIRD**, the Bill provides schools with an optional "safe harbor" Model Policy that school districts may choose to adopt and follow 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. The Model Policy is intended to make it easy and inexpensive for schools to comply with the law without having to pay attorneys to draft policies that may or may not comply with the legislation. Most school-law attorneys are not constitutional experts. The model policy gives schools a "safe harbor" to assure legal compliance. Adopting and following the model policy is the safest, least expensive, and only sure way to know that a school district is in 100% compliance with the legislation and immune from lawsuits against it for alleged non-compliance with the legislation.

    b. The type of optional Model Policy of the Bill has been tested in a number of public school districts for up to 7 years from Texas to Illinois, and the schools report that they have not had a student abuse the privilege, embarrass the school district, or in any way misuse or exploit any speaking opportunities. Two of the Superintendents presenting testimony before the Texas Legislature testified as follows:

i. *"Our Texas school district adopted the model policy… and has had it in place for over 6 years. The School Board adopted the policy to try to bring our school district in line with the law. The model policy we adopted is of the same type and structure as the model policy that is part of the new proposed Texas Act. During my entire time as Superintendent of Hamlin ISD, there was never a single instance of any abuse by a student speaker under the policy. Students have been very respectful of the opportunity to publicly speak. And, to my knowledge, there has never been any abuse of the privilege arising out of this right of student expression under the policy. The model policy has allowed our District to be neutral in matters of religion by neither promoting nor prohibiting the voluntary expression of students' religious viewpoints on otherwise permissible subjects. Although there have been students who have elected to publicly express prayerful and other religious viewpoints at graduations and other events, we have had no problems, abuses, or complaints regarding the model policy."* **Curt Parsons, Superintendent, Hamlin Independent School District, Hamlin, Texas.**

ii. *"Our School District adopted the model policy more than four years ago. Although the ACLU is very active in our Illinois community and once successfully sued our school district, the ACLU has expressed no objection to the model policy or to the students' voluntary expressions of faith under the policy. The model policy translates the U.S. Department of Education's 'Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools' into practical terms that can be adopted as a local policy for all school districts. With clear guidance provided by the model policy, it showed us how to remain neutral in matters of student's religious viewpoints and how to assure that the private expression of any such religious viewpoints, if any, were not attributable to the school district. With no prompting from the school, our experience has been that once students realized that they would not be punished for expressing a religious viewpoint on otherwise permissible subjects there were students who elected to voluntarily express prayerful and other religious viewpoints at graduations, opening of morning announcements and other school events. Illinois isn't exactly the Bible Belt, so this was somewhat surprising. We believe that allowing students to publicly speak before school audiences is a valuable educational growth experience for students. After more than four years of experience, we have had no problems concerning the model policy. We have never had a student abuse the privilege, embarrass the school district, or in any way misuse or exploit any speaking opportunities. We have had no complaints regarding the model policy or its implementation. Based upon our excellent four+ year experience operating under the model policy, I can recommend adoption of the model policy by other school districts."* ***Lee Edwards, Superintendent, Washington Community High School District, Washington, Illinois.***

4. **FOURTH**, the Bill codifies the almost identical language in the U.S. Dept. of Education "Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools"--*See* **Exhibit 2** 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 largely ignored by many public schools even though it correctly states the law. Once it becomes an actual law as part of the State's Education Code, the schools should finally comply.

New Supreme Court Case Language Should be Added to Bill:

After the Texas legislation became law, the U.S. Supreme Court decided *Morse v. Frederick* which added a new prohibition in the public school context against student "**speech promoting illegal drug use**." This prohibition should be added to the Bill's other prohibitions of "obscene, vulgar, offensively lewd, or indecent speech."

Floor Amendments Could Make the Bill Unconstitutional**:**

Other than inserting the new Supreme Court language regarding "speech promoting illegal drug use, the Bill, as introduced, 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 invite law suits against the State and school districts. Attempting to randomly guess beyond Supreme Court precedent and going beyond thoroughly researched and constitutionally supported language could put the Bill in constitutional jeopardy.

In Texas, for instance, an amendment to the Bill was introduced that prohibited the expression of students' viewpoints that might be viewed as "promot[ing] discrimination on the basis of another individual's sex, race, age, sexual preference, or religious beliefs." This initially sounded good but was eventually rejected once constitutional experts submitted legal opinions to the Legislature that such an amendment would be unconstitutional. [*See* **Exhibit 3**—Legal Opinions]. Aside from constitutional problems, even if the school asked students to discuss their viewpoints on the subjects of "sex, race, age, sexual preference, or religious beliefs," the amendment would have prohibited a student from expressing a viewpoint in favor of the Marriage Amendment (which Texas and other states have passed), or in favor of the Boy Scout's prohibiting homosexual Boy Scout Leaders (although the Supreme Court has upheld the Boy Scout's rule), or in favor of the Catholic doctrine of men only as priests, or in favor of affirmative action, or expressing a viewpoint that disagreed with same-sex marriage, or disagreed with radical Islam's doctrine of Jihad, or with the Episcopalian's doctrine of ordination of homosexual priests, or disagreed with the "sexual preference" and practice of pedophilia or bestiality (although both practices are illegal), or disagreed with women serving in combat in the military, and on and on.

To keep the Bill on solid constitutional ground, the Bill only includes prohibitions against expressions of viewpoints that the Supreme Court has specifically held can be constitutionally prohibited by schools: *Ginsberg v. New York* holds that "obscene speech" is not protected by the First Amendment; *Bethel School District v. Fraser* holds that "vulgar speech" and "offensively lewd and indecent speech" is not protected by the First Amendment. The Bill contains the exact language used by the Supreme Court thereby codifying Supreme Court precedent.

Two types of Potential Constitutional Legal Challenges to Any Law:

There are two types of potential constitutional legal challenges to any law: (1) a "facial challenge" in which the claim is that the law is unconstitutional on its face as written (i.e., in its wording and/or in the expressed or implied governmental motivation behind the Bill as supported in the record), and (2) an "as applied challenge" in which the claim is that although the law is constitutional on its face, it is not being followed and the errant way in which it is being applied is unconstitutional. Legislators must worry about the first type of challenge.

How Legislators Can Make the Bill Unconstitutional Through What They Say or Write:

This is not a "school prayer bill." Do not let anyone turn it into that type of debate. The opposition will try to bait the proponents of this Bill to say or to imply that this is about getting prayer or religion back into the schools. If a legislator takes the bait and they can prove that this is a legislator's motivation, the Bill will be held unconstitutional (*see Wallace v. Jaffree,* 472 U.S. 38 (1985)). This Bill does not require or even suggest that any student should ever pray or express a religious viewpoint; it just protects the student if they do. It is purely antidiscrimination legislation.

Government officials are required to be **neutral** in matters of religion while acting in an official governmental capacity. The official governmental motivations of a Legislator for supporting this Bill cannot be to get prayer or religious expression back into schools. The Bill does not do that. The Bill does not speak to whether any student should ever express a religious viewpoint whatsoever. The Bill does not imply that students should do so, and neither must you. That would be an unconstitutional motivation.

Whether or not a student would ever use a speaking opportunity to pray or express any other type of religious viewpoint is sheer speculation. So, this must not be interjected into the discussions. If someone attempts to do so, the discussion should to immediately be turned back to the Bill itself: This Bill is merely antidiscrimination legislation to protect religious student's viewpoints, if any (the Bill says "if any" because the Bill does not presume that there will ever be any religious viewpoint expressed), on otherwise allowable subjects/topics upon which the school is permitting students to express secular and other viewpoints.

Points of discussion should stick to secular reasons for the Bill, such as: (1) this Bill codifies present Supreme Court precedent and puts that case law into an understandable law, making the law accessible to everyone (not just to those who can afford to hire an attorney to read all the Supreme Court cases and distill the rules for them); (2) this Bill assures that our public schools are following the law and gives our school administrators needed information and direction on what is and is not permissible; (3) this should eliminate the lawsuits that are having to be filed when students' religious expressions (such as saying "Merry Christmas") are either purposefully or unwittingly being suppressed by schools; (4) this will save taxpayers hundreds of thousands of dollars being spent on such cases. In *Ward v. Santa Fe*, for instance, a Texas school Superintendent told students that if they prayed they would be "disciplined the same as if they had cursed," the school was sued, a judgment was entered against the school, and the school had to pay the child's attorney more than $50,000 in attorney's fees and their own attorneys more than $225,000 in attorney's fees—and the taxpayers, had to pay for that.

Other secular reasons supporting the Bill: There are many educational reasons for having student speakers at school events (as schools have done throughout public school history):

1. Public speaking opportunities for students provide educational opportunities for students in the areas of speech, English, grammar, and civics. Rather than merely learning about speech, English, grammar, and civics, public speaking involves students in the actual practice and application of these subjects. Students involved in speaking at events have to organize their thoughts, author, prepare, practice, and deliver a concise oral presentation before a live audience, providing these students with valuable opportunities for learning and application of public speaking and presentation skills. *See* Emily Shartin, *The Holly Fest: A Time to Speak Clearly*, Boston Globe, Dec. 7, 2000, at 8 (discussing the benefits of public speaking and how the process and practice of articulating one's thoughts before an audience help high school students in other academic areas and in exam taking), 2000 WL 3358387. These speaking opportunities can be as educational and beneficial as any academic class. It would be wasteful to allow these events and activities to pass week after week without the school utilizing them as opportunities for its students to advance their communicative skills—which would surely prove important to them in whatever they choose to do after high school.

2. The speaking opportunities give students a greater sense of ownership in their school's activities/events through student involvement;

3. The speaking opportunities promote a continuation of student maturity, growth, and education by placing additional responsibilities upon students;

4. Introductions of various school events by students provide a method for bringing the audience to order, marking the opening of the event, focusing the audience on the purpose of the event, and providing student participation and involvement;

5. In the case of graduations, certain students have earned the right to speak. A Valedictorian has earned the right to give his/her own speech without government censorship of a religious viewpoint, if any, on otherwise permissible subjects.

QUESTIONS AND ANSWERS:

1. What is the primary purpose of the Legislation?

   The primary purpose is stated in the first paragraph of 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." The remainder of the new law instructs school directs how to properly apply this legal declaration. The law covers the following subjects: Student Expression of Religious Viewpoints, Student Speakers at Non-Graduation Events, Student Speakers at Graduation Ceremonies, Religious Expressions in Class

Assignments, and Freedom to Organize Religious Groups and Activities. The law puts students' religious viewpoints on a level playing field with secular and other viewpoints.

2. Hasn't the U.S. Supreme Court held that public prayers (and other expressions of religious viewpoints) are illegal in public schools?

   No, the Supreme Court has held that government prayers are illegal in public schools. The Court has never held that private prayers, even when spoken publicly, are illegal. Students are not government but are private citizens required to attend public schools. Students do not "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)).

3. Who can legally express a religious viewpoint in a public school?

   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).

4. Can you elaborate on the issue of when religious expression in a public school will be attributable to the government and thereby unconstitutional?

   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).

5. Can you elaborate on the issue of when religious expression in a public school would be attributable to the student rather than to the government?

   If the government (i.e., school) 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.

6. Does the Bill allow a religious student to express a religious viewpoint on any topic at any time <u>whenever</u> the student desires?

   No. The religious expression must be on the permissible subject being discussed and at the time it is being discussed. If the school is not allowing a secular or other viewpoint to be expressed by students on a topic, then neither can a religious viewpoint be expressed on the topic. Religious expression is simply given a level playing field with other expression.

7. Why give students the right to publicly speak in the first place?

   Public speaking fosters numerous educational benefits for students in established pedagogical areas such as Speech, English, Grammar, Drama and Civics. Student speakers must organize their thoughts, author, prepare, practice, and deliver a concise oral presentation before a live audience, providing valuable educational opportunities. What a waste to allow school events to pass without utilizing such events as opportunities for students to advance their communicative skills—important skills for any career. Some districts may be tempted to eliminate student speakers altogether, but this would not only be counter-educational but would likely stir up legal issues rather than avoid them. If a district's motivation for eliminating student speakers is to assure that no religious viewpoint will be expressed, that is an unconstitutional motivation inviting legal challenge.

8. Does this legislation bring prayer back into the public schools?

   No. This legislation does not even include the word "prayer" in the text. The Bill does not endorse, highlight, recommend, or suggest that any student should ever pray or express any other religious viewpoint on any topic or subject in a public school. The Bill is antidiscrimination legislation that is neutral as to whether or not any religious viewpoint will ever be expressed by a student in a public school.

9. In the Bill, the phrase "PERMISSIBLE SUBJECT" appears. Is it the student who designates what a "permissible subject" is that students are permitted to discuss?

   No, it is the school district that designates the permissible subjects upon which students are to speak. With regard to student speakers opening and closing school events and

speaking at graduations, a school district does this by either adopting the safe harbor model policy of the Act (stating subjects) or drafting its own policy. As to homework assignments and other in-class matters, the teacher would normally set the subject parameters.

10. Can you give an example with regard to a class assignment?

    Yes. In an art class, if the assignment is "to draw a picture of your hero of all time" and one student draws George Washington while another student draws Jesus, both students must be treated equally. Just because the second student expressed a religious viewpoint in responding to the assignment is irrelevant since the student's picture responded to the topic assigned.

11. What if the assignment had been to draw a famous building and a student handed in a drawing of Jesus, does the new law require that the teacher allow the religious picture since it is religious in nature?

    No. Although the student expressed a religious viewpoint, the viewpoint was not on the topic assigned. The religious viewpoint is protected when it is expressed on a permissible subject. The "permissible subject" for the class assignment was a building.

12. What about the "captive audience" argument—since students would be a captive audience to another student's expressions, the student's expressions should not be allowed to be expressed?

    The "captive audience" legal argument applies when it is the government speaking. Since it is not government speech, there is no "captive audience" argument to be made. It is simply one student's opinion expressed to others with no imprimatur of the government. Just as in class, students are free to ignore each other's opinions and often do.

13. What about the "majoritarian election" argument—since a student holds a position of honor based on an elected position, that students' religious viewpoints should be censored simply because they were the product of an elected position?

    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 Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 304-05 n.15, 316 n.23, 321, 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. Note that the examples given by the Supreme Court were all elected positions. As long as the selection of student speakers is based on neutral criteria (i.e., the students were not selected based on whether or not they were religious, but on other criteria), then the fact that an election occurred to put them into a position of honor is irrelevant. The Model Policy part of the Bill includes students holding positions of honor having nothing to do with school elections, such as captains of the football team. The fact that a student speaker may or may not be in the "majority" of student thinking is irrelevant. Students finding themselves being in the majority on a given topic have the same constitutional rights as students finding themselves in the minority on a given topic.

14. Can you give an example with regard to a student speaker giving an introduction to a school event?

    Presume the school event is a football game and the "permissible subject" includes good sportsmanship and safety (topics specifically related to the purpose of a football game and honoring the occasion, the participants and those in attendance). If one student steps to the microphone and says, "Let us have a safe game tonight, and may good sportsmanship be exhibited by all" (a secular viewpoint on the topic of safety), and the next game a student steps to the microphone bows her head and says, "God, let us have a safe game tonight and impress on us all how we should exhibit good sportsmanship one to another; in Jesus' name I pray, Amen," (a prayer being a religious viewpoint on the topic of safety), the school must treat both expressions with equality. Both expressions were on topic.

15. So, it is the school--not the student--that has control over the permissible subject that can be discussed or expressed by a student, is that correct?

    Yes.

16. So, if the school does not want a student to give their secular, religious, or other viewpoint on sexual preferences, the war, abortion, or whether religion is good or bad, the school does not have to designate those as topics for student discussion, correct?

    Correct

17. And if a school does not want a student to give their secular, religious or other viewpoint on the pros and cons of sex, race, age, sexual preferences, religion, other's beliefs, the war, abortion or other topics/subjects, then the school is not required to do that under this Act, correct?

    Correct. 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, religion, other's beliefs, the war, abortion or other subjects 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; but once the school designates a subject, the school cannot constitutionally prefer a secular viewpoint and discriminate against a religious viewpoint on the subject. When secular viewpoints are permitted on a subject then religious viewpoints on the same subject must be permitted.

18. Wouldn't this Bill permit additional <u>hate speech</u> under the guise of the speech being an expression of a "religious viewpoint"?

    No. Remember, this legislation only applies to the expression of a religious viewpoint on an "otherwise permissible subject." It is the school that sets the "permissible subjects." If something is impermissible to express from a secular viewpoint, it does not become permissible by expressing it from a "religious viewpoint." The viewpoint is irrelevant with regard to expressing viewpoints on <u>impermissible subjects</u>. If "I hate gays" cannot be permissibly yelled from a secular viewpoint, neither can it be permissibly yelled from a religious viewpoint. Schools always control the topic/subject. But once a subject is permitted for discussion then a school may not selectively discriminate against the religious viewpoint on that same permissible subject. The Bill puts

religious viewpoints and secular viewpoints on a level playing field, and that's all it does.

19. What if for some reason, a school wanted students, for educational purposes, to hear each other's ideas regarding certain topics and said that for this discussion today, we are going to make the topics of one's sex, race, age, sexual preference, the war in Iraq, and other's religious beliefs PERMISSIBLE SUBJECTS for student discussion; would the school have to treat religious viewpoints with equality to secular and other viewpoints expressed on these topics?

    Yes

20. Would it be accurate to say that this 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?

    Yes.

21. Does the Bill create any EXTRA protection for religious student speech simply because the speech is religious?

    No. The Bill only says that if students are already being allowed to speak on a topic that the school says is a PERMISSIBLE SUBJECT for student discussion, then a religious student cannot be censored simply because that student's viewpoint is religious.

22. What about the play ground, between classes, at lunch, and at other free times during school, what are the "permissible subjects" for these times?

    These are generally open forums in which there are no specified topics. These are considered free times for students. During these times, most schools allow students to discuss a wide variety of topics and subjects and to exchange notes, cards, gifts, and other items. To the extent that secular expressions are being permitted, religious expressions must be just as fully permitted as well. If for instance students can gather together around a table to talk at lunch, they can gather around a table and pray at lunch (prayer is simply the expression of a religious viewpoint on the subjects being prayed about). To the extent students are permitted to give out secular items to fellow students, students must be permitted to give out religious items to fellow students. Religious items and secular items must be treated the same. Religious speech and secular speech must be treated the same.

23. The Act outlaws "obscene speech" and "vulgar speech" and "offensively lewd and indecent speech." Why does the Act specifically exclude only these types of speech?

    These are specific forms of speech that the Supreme Court has expressly held that a school can exclude entirely from a school forum on any topic. The case of *Ginsberg v. New York* holds that "obscene speech" is not protected by the First Amendment. The case of *Bethel School District v. Fraser* holds that "vulgar speech" and "offensively lewd and indecent speech" is not protected by the First Amendment. The Bill contains the exact language used by the Supreme Court. Again, the Bill is simply codifying Supreme Court precedent.

24. In a "limited public forum" (such as those in the new law) if the speaker does not stick to the subject/topic that has been designated could that student be disciplined?

Yes, to the same extent that a student could be disciplined for violating any other rule of the school. Whether the student's expression is religious or non-religious, student speakers must stay on the topics designated.

25. What is the reason for including a Model Policy as part of the legislation?

A "safe harbor" Model Policy is included to make it easy and inexpensive for schools to comply with the Act. Before being included as part of the legislation, the Model Policy was field-tested in a number of public school districts for up to 7 years from Texas to Illinois. Before being passed in Texas, the Model Policy underwent the legislative scrutiny of hearings before the Senate Education Committee and House State Affairs Committee and then the full Texas Legislature. The Model Policy covers the following subjects: Student Expression of Religious Viewpoints, Student Speakers at Non-Graduation Events, Student Speakers at Graduation Ceremonies, Religious Expressions in Class Assignments, and Freedom to Organize Religious Groups and Activities. If a school district adopts and follows the Model Policy, the school is automatically assured of compliance with the Act regarding all matters covered in the Model Policy. This is the only way that a school district will have this assurance, and that is one less concern and financial risk for the school district. Since the State's Attorney General is in the business of defending legislation, and the Model Policy is a part of the legislation, if a school is challenged for adopting and following the Act's Model Policy it is an attack on the legislation itself, and a school district should enjoy the assistance of the Attorney General in any such suit.

26. Why does the Model Policy name certain occasions for student speakers and certain student positions of honor to be eligible as public speakers?

For schools that opt to adopt the Model Policy, a student speaker will publicly introduce the beginning of football games and the opening announcements/greetings for the school day (and any other events the school designates). Why are two occasions specifically listed? From the inception of public education and football games, these two identified occasions have traditionally been introduced by student speakers; so nothing new here. Students are required to stick to the subjects/topics enumerated under the policy: "introductions must be related to the purpose of the event and to the purpose of marking the opening of the event, honoring the occasion, the participants, and those in attendance, bringing the audience to order, and focusing the audience on the purpose of the event." Under the Model Policy, the eligible student speakers are student council officers, senior class officers, captain(s) of the football team (and any other neutrally selected student leaders the school designates). Why are three specific student positions listed? These three student categories (to which a school may add) are obvious ones traditionally and universally recognized as positions of honor and student leadership. The fact that some of these students hold elected positions of honor is not pivotal. The Supreme Court has 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 speaking opportunities to express faith-based prayerful views, without violating the Establishment Clause (*see Santa Fe ISD v. Doe*, 530 U.S. at 304-05 n.15, 316 n.23, 321). Senior Class Officers would fall into the same category. And captains of the football team, whose selection is based upon their football prowess and leadership, would similarly be among students whose

selection is based on neutral criteria (rather than based on the sole criteria of whether they will state religious viewpoints publicly). Student speakers have normally been student leaders; so there is nothing novel here. As a logistical matter, having a smaller rather than larger number of speakers proved to be more manageable in the school districts in Texas and Illinois that have been using the Model Policy for a number of years. Just as at graduations, not every student gets to speak. It has always been a great honor to have attained a student leadership position to be allowed to publicly address the school; and the Model Policy maintains that honor.

27. What about the fact that this legislation applies to children of all ages attending public schools?

    The Supreme Court has never held that younger children attending public schools have or should be afforded any less protection under the First Amendment than older children attending public schools. In fact, an argument could be made that younger students should especially be protected against religious discrimination. One of the primary Supreme Court cases codified in this legislation is *Good News Club v. Milford Central School*, 533 U.S. 98 (2001) holding that, "[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." The setting of this case was an elementary school and concerned elementary school students. The disclaimers provided in the legislation and Model Policy were drafted to be clear, straight forward, and uncomplicated so that they could be understood even by a first grader. In the unlikely event that a student does not understand the disclaimer, he/she can ask a teacher to explain it to them—just as students frequently do on a myriad of other subjects.

28. Would it be accurate to say that this legislation is merely an equal-opportunity law?

    Yes, that would be accurate.

29. Does this Bill require or suggest or imply that students should ever pray or express any type of religious viewpoint?

    No.

30. Does this Act give religious students extra rights?

    No; just equal rights

31. Does this Act give religious students special protection?

    No; just equal protection.

32. Does this Act give religious students preferential treatment?

    No; just equal treatment.

EXHIBIT 1

SUMMARY OF THE STATE OF THE LAW REGARDING FAITH-BASED VIEWPOINTS EXPRESSED BY STUDENT SPEAKERS IN PUBLIC SCHOOLS (2022)

(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. CIauson.* 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.

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