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Before the

TEXAS SENATE
COMMITTEE ON EDUCATION

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Madam Chairwoman and members of the Committee, good morning. I appreciate the opportunity to share the Anti-Defamation League's ("ADL") perspectives on H.B. 3678, "Religious Viewpoints Antidiscrimination Act."

Organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial, ethnic, and religious prejudice in the United States, the Anti-Defamation League is today one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism. ADL believes that its stated goals, as well as the general stability of our democracy, are best served through strict separation of church and state and commensurately strict enforcement of the protections of the Free Exercise Clause. ADL emphatically rejects the notion that the separation principle is inimical to religion, and holds, to the contrary, that a high wall of separation is essential to the continued flourishing of religious practice and beliefs in America, and to the protection of minority religions and their adherents. From day-to-day experience serving its constituents, ADL can testify that the more government and religion become entangled, the more threatening the environment becomes for each. In the familiar words of Justice Black: "A union of government and religion tends to destroy government and degrade religion." *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

By way of a brief personal introduction, I am ADL's Southern Area Counsel. In that capacity, I provide legal assistance and guidance to ADL's Regional Offices in the Southern United States, including Texas. As you may know, ADL maintains three offices in Texas, in Dallas, Houston and Austin. ADL's constituents are the numerous Texans who sit on our boards and who participate in the thousands of hours of community programming we provide in Texas.

I am testifying in opposition to this Bill because we believe it will subject students to unwanted proselytizing, will expose schools to liability and will open the doors to characters who we are confident the public schools of Texas will not want to give an open microphone to, including white supremacists and other hatemongers.

The standards by which regulations of speech on government property must be evaluated "differ depending on the character of the property at issue". See *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983). Broadly speaking, there are three types of forum for purposes of First Amendment scrutiny: traditional, nonpublic, and designated. *See id.* at 44-46. Restrictions on speech in traditional public forums, such as streets and parks, receive the strictest scrutiny. Restrictions in nonpublic forums, such as military installations, receive the most forgiving scrutiny.

A public forum is government property on which any citizen can exercise his or her free speech rights without significant government restriction on subject or content (with very narrow circumstances). The most common examples of such an open forum are sidewalks and town squares. A limited public forum is government property and/or time which the government designates as a public forum. In such a forum the government may restrict broad subject matters of speech such as political speech or commercial speech.

When the State establishes a limited public forum, the State need not allow speakers to engage in every type of speech. The State may be justified "in reserving [its forum] for certain groups or for the discussion of certain topics." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). The State's power to restrict speech, however, is not without limits. The restriction must not discriminate against speech on the basis of viewpoint. *Rosenberger*, 515 U.S. at 829. Restrictions must be "reasonable in light of the purpose served by the forum," *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985). In short, in a limited open forum, a government can restrict broad subject areas, but once an area is open to discussion, it can't restrict particular points of view about that area.

HB 3678 seeks to create limited public forums during school sponsored events and activities where " a school district shall treat a student's voluntary expression of a religious viewpoint … in the same manner the district treats a student's voluntary expression of a secular or other viewpoints." However, within these limited public forums a school district is required to limit who can speak, the subject of the speech, the content of the speech, and duration of the speech.

With that background, there are several reasons why this Bill should be rejected:

1. **This Bill will subject Texas schools to litigation.** There is limited conflicting case law on limited public forums within public schools, and HB 3678 is a novel piece of legislation which is bad public policy and constitutionally suspect. Undoubtedly, this legislation will subject Texas' school districts to very expensive lawsuits and legal challenges.

2. **The Bill fails to meets its primary purpose: creating a limited public forum.** Rather, speech within these forums will likely be viewed by the courts as government

Santa Fe concluded that the delivery of a voluntary, student-initiated religious message "delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property," and "over the school's public address system, which remains subject to the control of school officials," would allow an objective observer to conclude that there was "actual or perceived [state] endorsement of the message" in violation of the Establishment Clause

The conduct permitted under this Bill no different. Please allow me read from the decision in *Santa Fe:*

> Once the student speaker is selected and the message composed, the invocation is then delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property. The message is broadcast over the school's public address system, which remains subject to the control of school officials. It is fair to assume that the pregame ceremony is clothed in the traditional indicia of school sporting events, which generally include not just the team, but also cheerleaders and band members dressed in uniforms sporting the school name and mascot. The school's name is likely written in large print across the field and on banners and flags. The crowd will certainly include many who display the school colors and insignia on their school T-shirts, jackets, or hats and who may also be waving signs displaying the school name. . . .
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> In this context the members of the listening audience must perceive the pregame message as a public expression of the views of the majority of the student body delivered with the approval of the school administration. *Santa Fe,* 530 U.S. at 302-08

This Bill is designed (by its very title) to promote religious speech, will allow the use of government facilities and equipment during government functions, and will permit the delivery of religious messages in a context that is unmistakably a government-controlled environment. For the exact reasons articulated in *Santa Fe*, this Bill will be found to be unconstitutional.[1]

Student religious messages, dressed in a cloak of governmental imprimatur, will be found to be unconstitutional. Such messages are not private speech in a limited forum, rather, they are government speech. Such governmental religious speech is unconstitutional, and this Bill invites litigation to that end.

3. **The Disclaimer is ineffective to save the Bill from *Santa Fe* problems.** The Bill appears to rely on the disclaimers to get around some of the problems raised in *Santa Fe*. We appreciate that effort and think it is an important one. However, we do not think it is sufficient.

   Words of disclaimer may help dispel the belief that government does not endorse the speech, however words of disclaimer are not by themselves sufficient to dispel that belief. Rather the whole context, disclaimer included, must lead a reasonable, objective observer to believe that the government does not endorse the religious exercise. See, e.g., *Freiler v. Tangipahoa Parish Bd. of Educ.* 201 F.3d 602 (5th Cir 2005) (disclaimer before teaching of creationism in class is not enough to prevent violation of Establishment clause).

   We believe that even if the Santa Fe school district had disclaimed endorsement, given that all of the other indicia of endorsement were still there -- the use of facilities, the captive student audience, the uniforms, etc – we believe that a reasonable observer would conclude that despite the disclaimer, the government endorsed the messages.

   We believe that schools in Texas who rely on the disclaimer will find themselves surprised as they lose litigation on this issue.

4. **Court cases addressing similar policies provide no support for this Bill.**

   a. Proponents of this bill may cite the 11th Circuit case entitled *Adler v. Duval*, 250 F.3d 1330 (2000). In *Adler*, the Court upheld a school policy which (i) permitted graduating students to vote on whether to have student-led messages at the beginning and/or closing of graduation ceremonies, (ii) permitted the student speaker to be elected by the graduating class, and (iii) permitted the speech to be entirely unrestricted.

      While that policy may, at first glance, appear similar to the bill being discussed here today, it is clearly and significantly distinguishable. Critical to the Court's decision in *Adler* was that the school had absolutely no control of whether there would be a commencement speaker at all, not to mention who would speak and what was said. The Court specifically pointed out that the policy "explicitly divorces school officials from the decision-making process as to whether any message - be it religious or not - may be delivered at graduation at all."

      The legislation discussed today fails to meet this *Adler* standard. Under the proposed policy, the school retains a great deal of control over the commencement address in that it explicitly restricts: (1) who can speak; (2) the subject of the speech; and (3) the content of the speech. Since the student-led address would still be relatively controlled by the school administrators and the policy, whether the content is religious or secular, it would be viewed

      to include religious speech in their address at commencement. Many courts have declared otherwise. *Lassonde v. Pleasanton Unified School Dist.* 320 F.3d 979 (9th Cir. 2003), speaks almost directly to this issue. In *Lassonde*, a California school district demanded that the salutatorian, selected based on academic standing, excise portions of his commencement address that contained proselytizing speech. The student claimed the restriction violated his freedom of religion, speech, and equal protection rights.

      The Ninth Circuit sustained the school district's action – deeming it as a necessity, in fact. The Court held that the school district had to stop the

speech in order to avoid the appearance of government sponsorship of religion because the school district (i) authorized the valedictory speech, (ii) financed the graduation program, and (iii) had supervisory control over the graduation and (iv) had final authority to approve the content of speeches. The Court also pointed out that permitting proselytizing speech at a public school graduation would have had an impermissibly coercive effect on dissenters, requiring them to participate in religious practice even by their silence. In fact, the Court maintained that even if a disclaimer were given, a disclaimer could not address the coerced participation in a religious practice.

The facts in *Lassonde* are unquestionably similar to the case here. With the amount of control, supervision, and sponsorship the administration and school district will have over commencement ceremonies, any silence by the school will signify approval or participation – and thus, any religious speech contained therein, will be a violation of the Establishment Clause.

5. **This policy would permit unconstitutional proselytizing during school functions and during the school day.** HB 3678 would permit a student to give a sectarian prayer or proselytizing message during morning announcements, graduation ceremonies and in-school assemblies – events which require student attendance.

The United States Supreme Court has continually emphasized the danger of the religious coercion of students in public schools resulting from peer and public pressure. *Lee v. Weisman*, 112 S. Ct. 2649 (1992), *Santa Fe ISD. v. Doe*, 530 U. S. 290 (2000). The decisions are an important affirmation of government not endorsing one religion over another or religion over non-religion, particularly when public school children are required to be in attendance. Notably, the Supreme Court has held that the state is constitutionally obligated to see that state-supported activity is not used for religious indoctrination. See *Levitt v. Committee for Public Education & Religious Liberty*, 413 U. S. 472 (1973).

This Bill leaves students unconstitutionally subject to the religious coercion of their peers.[2] For this reason alone, it must not be permitted to become law.

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[2] In fact, this Bill fails to adequately address the problems of coercion. Turning to the statement of legislative intent recorded in the House's Journal, page 2472 contains the following colloquy:

THOMPSON: If a kid is giving an Evangelical Christian prayer or a speech, and a Catholic or Mormon student is offended or feels coerced to conform, what would the school need to do under this bill?

C. HOWARD: I don's think this bill addresses that.

Texas students already have the right to pray individually, voluntarily, and silently pray. This bill is unnecessary and may lead to unlawful results as schools allow speakers who "permit encourage or coerce a student to engage in . . prayer" during a school activity.

7. **The Bill's anti-discrimination provisions are faulty**. Also problematic are the Bill's provisions that student speakers remarks can only 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 event," and that "[t]he subject must be designated, a student must stay on the subject . . ."

   Once the government has opened up a forum to student speakers on a particular topic, it will be unable to limit discussion of that topic from a student's particular point of view. *Good News Club v. Milford Central School*, 533 U.S. 98 (2001). For example, if the purpose of graduation speech is to describe the future, etc., a school district will have no legal authority (and, indeed, will be subject to litigation) if a student wishes to describe a white supremacist's vision of the future. The Bill's authors may suggest that the anti-discrimination provisions will prevent this, but regulating even a discriminatory viewpoint is still regulating viewpoint speech, which is impermissible under the Free Speech Clause of the First Amendment. *Id.*

   In addition, this policy will render districts utterly powerless to stop a student who wishes to speak about religious beliefs that the majority of students find repugnant or disturbing. Similarly, a school will find itself powerless to stop speakers focusing on other controversial social issues, such as immigration, reproductive rights and same sex marriage.

   such speech.

   b. Students who believe they were harassed by student speakers may sue in order to be protected from such harassment.

c. Requiring faculty to endure student religious speech may contribute to District liability by contributing to a hostile work environment based upon religion for faculty.
d. This may expose districts to liability on the basis of claims that students who cannot participate in school events because of their fear of being subject to unwanted religious messages are being denied access to an educational program on account of their religion, in violation of state and federal equal protection law.

9. **These above-criticisms apply to the student assignment provisions of this Bill.** Because the Bill allows students to present assignments to the class orally or have their work displayed, a school district will be powerless to stop a white supremacist from posting or speaking about their point of view. Similarly, students of minority religions may be forced to endure the proselytizing of students in majority religions as they deliver, or post, their assignment.

We believe that this Bill opens a Pandora's Box for any district that adopts a policy under it. It will subject a district to suit, and worse, it will contribute to the kind of sectarian divisiveness that every government and school district is constitutionally and morally obligated to avoid.

Thank you.