SUMMARY OF THE STATE OF THE LAW REGARDING FAITH-BASED VIEWPOINTS EXPRESSED BY STUDENT SPEAKERS IN PUBLIC SCHOOLS (2018)

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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