

## *Americans United for Separation of Church and State*

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### **Testimony of Ronal Madnick, *Americans United for Separation of Church and State* in Opposition to H 369, Promoting Unconstitutional Religious Expression in Public Schools before the Joint Committee on Education May 5, 2015**

On behalf of *Americans United for Separation of Church and State* and its Massachusetts members and chapter, I urge you to oppose H 369. This bill would grant students the right to engage in religious expression at all times in the public school classroom and at school-sponsored events.

Americans United strongly supports the right of students to engage in free speech activities, but this legislation will result in school sanctioned religious speech that is both inappropriate and unconstitutional.

Although public-school students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,”<sup>1</sup> this right is not without limit. Schools must allow most students private, voluntary, personal expression—including student-led and voluntary prayer and religious expression—unless the expression causes a substantial disruption or infringes on the rights of others.<sup>2</sup> However, schools may maintain control of student expression in curricular activities,<sup>3</sup> and indeed, are constitutionally required to prohibit certain types of student religious expression.<sup>4</sup>

#### ***This Bill Is Unnecessary.***

H 369 purports to do nothing more than merely clarify what types of behaviors are allowed under the U. S. Constitution and under federal and state law. Indeed, the Supreme Court has established that students have the right to engage in voluntary, student-initiated prayer that is not coercive and does not disrupt the school’s educational mission and activities.<sup>5</sup> And, Massachusetts law explicitly safeguards the rights of students to engage in voluntary prayer at public schools.<sup>6</sup> Moreover, religious student groups are also guaranteed the same access to campus as any other group. The U.S. Supreme Court has held that religious groups have the right to meet on school campuses during non-instructional time.<sup>7</sup> Additionally, under the federal Equal Access Act,<sup>8</sup> religious student groups must be given the same access to school facilities as all other non-curriculum related student groups.<sup>9</sup>

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1. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

2. *Id.* at 509.

3. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271–73 (1988).

4. *Walz v. Egg Harbor Twp. Bd. of Educ.*, 342 F.3d 271, 279–81 (3d Cir. 2003); see also *Busch v. Marple Newtown Sch. Dist.*, 567 F.3d 89, 99 (3d Cir. 2009); *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 983–85 (9th Cir. 2003); *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1101–04 (9th Cir. 2000).

5. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000); *Wallace v. Jaffree*, 472 U.S. 38, 59 (1985).

6. “The school committee of any city or town may permit any child attending its public schools to participate in voluntary prayer with the approval of such child’s parents before the commencement of each daily school session.” MASS. GEN. LAWS ANN. 71 § 1b (1970).

7. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).

8. 20 U.S.C. §4071 (1984).

9. The Equal Access Act states: It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of religious, political, philosophical, or other content of speech at such meetings.

H 369 claims to seek only to clarify that students engaging in religious speech have the same rights as students engaging in nonreligious speech. Because this type of clarification is so unnecessary, it actually calls into question the legislative intention behind the bill. Because current law already sets out the rights of students to engage in student-led, voluntary prayer and establishes that religious student groups may gather in the same manner as any other non-curricular students group, this bill's reiteration of those rights will serve only to promote religion in public schools. Additionally, provisions of this bill including its protection of religious expression in the classroom and at official school events will likely lead to violations of the U.S. Constitution.

***This Bill Encourages Religious Activity that is Prohibited by the Establishment Clause***

H 369 facilitates students' religious speech at official public school events including graduation ceremonies. *Santa Fe Independent School District v. Doe*,<sup>10</sup> is a case almost directly on point with the type of expression allowed under H 369. In *Santa Fe*, the U.S. Supreme Court struck down a school's policy of allowing student-led religious invocations at public school football games. The Court found that this type of speech was school sponsored rather than private speech, and was therefore not constitutionally permitted.<sup>11</sup> To determine whether the students' expression is attributable to the school or purely private speech, courts will look to whether the school had some control over the event, speaker, and speech.<sup>12</sup> Schools generally decide at which official school functions students will speak, determine the eligible speakers by setting a policy to select student speakers from among those eligible, set the time limit for the speaker, or dictate the subject matter for the student speaker. This bill would simply reinforce already existing policies of many public high schools in Massachusetts that allow the school to determine student speaker eligibility and maintain control over the content of student speeches.<sup>13</sup>

Moreover, nothing in this bill forbids student speeches, including religious expressions and prayer, to take place during school-sponsored events, on school property, and with school equipment; in fact, this bill encourages protection of students' religious viewpoints at official school events. Thus, the type of speech allowed under H 369 would be school-sponsored and not private speech. Given these factors, schools are particularly implicated when they allow religious speeches and prayer at graduation ceremonies – a time when large groups of students and parents are a captive audience at an official school function. Indeed, courts have repeatedly prohibited school prayer in graduation speeches.<sup>14</sup>

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10. *Santa Fe*, 530 U.S. 290.

11. *Id.* at 302.

12. See, e.g., *id.* at 315; *Adler v. Duval Cnty. Sch. Bd.*, 250 F.3d 1330, 1332-33, 11340 n.3 (11th Cir. 2001).

13. See, e.g., Holliston High School, Student-Parent Handbook 2012-2013, available at <http://www.holliston.k12.ma.us/handbooks/HHSHB.htm> (School permits three student speakers at graduation based on three categories of eligibility: academic achievement, membership in the senior class officer corp., and winning a school-wide essay competition); Wakefield Memorial High School Student Handbook 2012-2013, available at [http://wpshigh.learningnetworks.com/pages/wpsHigh\\_Webdocs/hand.pdf](http://wpshigh.learningnetworks.com/pages/wpsHigh_Webdocs/hand.pdf) (stating that graduation speakers are determined by the school based on academic achievement); Belmont High School Student Handbook 2012-2013, available at <http://www.belmont.k12.ma.us/bhs/docs/StudentHandbook2012-2013.pdf> (requiring the school to pre-approve students' graduation speeches).

14 See, e.g., *Lassonde*, 320 F.3d at 984 (Establishment Clause prohibits student religious speech at graduation ceremony because “[f]orcing a dissenter to make the choice between attending [graduation] and participating in a religious practice in which the dissenter does not agree is not constitutionally permissible”); *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1103 (9th Cir. 2000)(Establishment Clause prohibits student proselytizing speech at graduation because allowing speech “would have constituted government endorsement of religious speech”); *ACLU of N.J. v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1479 (3d Cir. 1996) (en banc) (Establishment Clause prohibits school policy allowing students to vote to include a prayer in graduation, because “[d]elegation of one aspect of the ceremony to a plurality of students does not constitute the absence of school officials' control over the graduation”); *Deveney v. Bd. of Educ.*, 231 F. Supp. 2d 483, 486–88 (S.D. W.Va. 2002) (Establishment Clause prohibits student vote on whether to include prayer at graduation in part because “graduation ceremony will take place on public property and will be largely administered by school officials” and “desires of the minority ... are not respected by” student-vote process); *Appenheimer v. Sch. Bd.* 308, No. 01-1226, 2001 WL 1885834, at \*6 (C.D. Ill. May 24, 2001) (school cannot delegate planning of graduation prayers to senior class officers and allow them to select students to pray in part because prayers were delivered “as part of a regularly scheduled, school-sponsored function conducted on school property” and “school officials retain a high degree of control over the ceremony”).)

Just as in Santa Fe, where the prayers took place on school property and were given by speakers specifically chosen by the school board, so too would a similar policy as contemplated by H 369 be attributed as unconstitutional school-sponsored speech.

### ***This Bill Does Not Place Adequate Limitations on Religious Activity in Public Schools***

Another hazard of this bill is its promotion of religious viewpoints in the classroom. Although students have the right to engage in voluntary, student-initiated prayer that is not coercive and does not disrupt the school's educational mission and activities, they may not utilize the classroom to proselytize their fellow students. This bill, however, does not clearly differentiate between student expression that relates to personal observance of religion and student expression that constitutes "outward promotion" of religion or "proselytizes a particular view."<sup>15</sup> The Constitution, at a minimum, guarantees that the government may not coerce anyone to support or participate in religion or its exercise,<sup>16</sup> but this bill fails to recognize this limitation.

Because "[f]amilies entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family," courts are "particularly vigilant in monitoring" whether religious beliefs are taught in public schools.<sup>17</sup> Yet, H 369 fails to provide guidance to the school districts that will be adopting these policies about the requirements to curtail certain constitutionally prohibited student religious expression. The bill states that religious expression would have to be treated the same as nonreligious expression in all instances. Even if a student's work satisfies the confines of the assignment, however, there is a constitutionally significant difference between one student making a persuasive speech about his or her views on global warming and the need to conserve energy and another student making a persuasive speech stating that all students must accept Jesus Christ in order to achieve salvation. Yet, the bill would treat both situations the same. When prayers, evangelism, or anti-religious speech takes place within classrooms or at school activities like graduation, students are a captive audience and thus are coerced to participate in religious exercise. In addition, H 369 would have the effect of making students who believe in minority faiths and who are non-believers feel like outsiders in their own public schools, which is one of the very harms the First Amendment exists to prevent.

### ***This Bill Does Not Distinguish Between Elementary and Secondary School Policy***

A further problem with this bill is its failure to distinguish between policies for religious expression in secondary and elementary schools. Courts applying the Establishment Clause have explained: "In elementary schools, the concerns animating the coercion principle are at their strongest because of the impressionability of young elementary-age children."<sup>18</sup> Elementary school students in particular have difficulty distinguishing "the line between school-endorsed speech and merely allowable speech" because they are so "young" and "impressionable."<sup>19</sup> And, because of this, elementary schools are an especially inappropriate forum for any advancement of religious views.<sup>20</sup> Courts have also held that the free speech rights of elementary school students are limited as compared to secondary school students. Because elementary school students inherently have a lower level of emotional maturity than older students, it is appropriate for school officials to maintain a tighter control of the type of expression allowed within the classroom.<sup>21</sup>

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15. Walz, 342 F.3d at 278.

16. Santa Fe, 530 U.S. at 302 (quoting Lee v. Weisman, 505 U.S. 577, 587 (1992)).

17. Edwards v. Aguillard, 482 U.S. 578, 584 (1987).

18. Peck v. Upshur Cnty. Bd. of Educ., 155 F.3d 274, 287 n.\* (4th Cir. 1998); see also Busch, 567 F.3d at 95–96, 99; Berger v. Rensselaer Cent. Sch. Corp., 982 F.2d 1160, 1170 (7th Cir. 1993).

19. Walz, 342 F.3d at 277.

20. Id.; see also Edwards v. Aguillard, 482 U.S. 578, 596 (1987)

21. See, e.g., Tinker, 393 U.S. at 503; Walker-Serrano ex. rel Walker v. Leonard, 325 F.3d 412, 417 (3d Cir. 2003)(finding that age is crucial factor in the court's analysis of students' First Amendment rights, and that the younger the student, the greater degree of control over student expression that is allowed).

Accordingly, teachers taking into account the age and maturity of their students, may necessarily limit certain forms of expression, without running afoul of the First Amendment.<sup>22</sup> Thus, a teacher in an elementary school classroom may necessarily restrict the types of items that students bring in for show and tell, or may prohibit students from expressing blatantly religious messages in the classroom.<sup>23</sup> Whereas high school students have a greater understanding of the diversity of religious beliefs, this bill as applied to elementary school children, would be an even more potent message of school-sponsored religion.

### ***A Limited Public Forum Policy Cannot Shield Student Speech from School Sponsorship***

The state cannot escape the Establishment Clause merely by proclaiming it has created a public forum. The U.S. Supreme Court has explained: “A conclusion that the District had created a public forum would help shed light on whether the resulting speech is [the school’s or the student’s], but we also note that we have never held the mere creation of a public forum shields the government entity from scrutiny under the Establishment Clause.”<sup>24</sup> Courts do not simply look at a forum’s title, but also at its characteristics, including who can access the forum and whether the government restricts the content of the speaker’s speech. As previously stated, a student’s speech at an official school function such as a graduation ceremony would indicate school approval of that speech.

Moreover, because this bill requires school review of student speeches,<sup>25</sup> it transforms any type of religious expression in a student’s speech into school-sponsored religious expression.<sup>26</sup> Thus, to achieve a scheme that meets constitutional muster, the bill must either allow for expression of all viewpoints by all students at school events, or it must control the content of the speech presented by a select group of students. The school cannot have it both ways – it cannot absolve itself of all liability, while actively encouraging religious expression at school functions. Such action is simply not permitted by the First Amendment.

### ***Conclusion***

Americans United supports the right of students to voluntarily profess their religious beliefs, where that expression falls within the confines of constitutionally-protected speech. However, neither the state legislature nor the public school system should be in the business of promoting speech that violates the First Amendment, nor should they seek to promote policies that would coerce school children into particular beliefs. As noted in *Santa Fe*, “[w]hat to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.”<sup>27</sup> The legislature should not encourage schools to create policies which will lead to unconstitutional state promotion of religion. For the reasons enumerated above, I strongly urge to you oppose H 369.

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22. Walker-Serrano, 325 F.3d at 419 (“There can be no constitutional right, if any, to circulate a petition in an elementary school in class . . .”).

23. See Walz, 342 F.3d at 275.

24. *Santa Fe*, 530 U.S. at 303.

25. The bill requires the school district “ensure that a student speaker does not engage in obscene or indecent speech.”

26. See, e.g., *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1229 (10th Cir. 2009) (when school “instructed [students] on how to organize their speech” and “required the[m] to submit their speeches . . . for review for content,” school created “appear[ance] the school is somehow sponsoring the speech”); *Lassonde*, 320 F.3d at 983 (school’s prevention of a student from delivering a proselytizing graduation speech was necessary “to avoid the appearance of government sponsorship of religion” where school officials had “reviewed and approved” the graduation speeches); *Cole*, 228 F.3d at 1103 (allowing a student to deliver a religious graduation speech, which had been reviewed by school officials, “would have constituted government endorsement of religious speech” because advance review ensured that speech “would have borne the imprint of the District”).

27. *Santa Fe*, 530 U.S. 290, at 312 (quoting *Lee*, 505 U.S. 577, 592).