LIBERTY INSTITUTE

STATEMENT OF

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BEFORE

United States Commission on Civil Rights

Federal Enforcement of Civil Rights Laws to Protect Students Against Bullying, Violence and Harassment

PRESENTED

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Liberty Institute, like other organizations such as the ACLU, seeks to protect the rights of students to express what are sometimes unpopular views at school, even views that reflect particular religious sentiments.[1] Decades ago, students sought to express their opposition to the Vietnam War by wearing armbands,[2] their opposition to forced racial segregation by wearing "freedom buttons,"[3] and their opposition to forced patriotism by quietly refusing to pledge allegiance to the flag.[4] Today, there are other sentiments students express that draw an inordinate amount attention from government school officials seeking to quell those with whom they disagree. The stakes are

[1] *Morgan v. Swanson*, 627 F.3d 170 (5th Cir.), *reh'g en banc granted*, 628 F.3d 705 (5th Cir. 2010), is an example of a Liberty Institute student speech case. It is currently at the *en banc* stage in which the ACLU of Texas filed an *amicus curiae* brief supporting Liberty Institute's position. Likewise, in another student speech case, *Morse v. Frederick*, 551 U.S. 393 (2007), Liberty Institute filed an *amicus curiae* brief supporting the ACLU's position.

[2] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

[3] *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966).

[4] *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

no different now than they were then. The First Amendment protects everybody from forced government indoctrination, even if some, or even many, perceive such indoctrination to be good.

I. It is clearly established law that government school officials may not censor religious speech with which they disagree.

It is clearly established — indeed, in the 1969 *Tinker v. Des Moines Independent Community School District* decision, the Supreme Court declared it to be "the unmistakable holding of this Court for almost 50 years" — that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[5] It is likewise clearly established that non-disruptive student speech during non-instructional time is fully protected by the First Amendment.[6] As the Supreme Court

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[5] 393 U.S. at 506; *see also A.M. ex rel. McAllum v. Cash*, 585 F.3d 214, 221 (5th Cir. 2009) (noting this "axiomatic" and "well-established" principle); *Cason v. Cook*, 810 F.2d 188, 191 (8th Cir. 1987) (principle is "firmly established").

[6] *Morgan v. Swanson*, 627 F.3d 170, 182 (5th Cir.), *reh'g en banc granted*, 628 F.3d 705 (5th Cir. 2010) ("In light of the overwhelming precedent and persuasive authority to the contrary, it is unsurprising that Appellants can point to no case stating that elementary school students are without protection under the First Amendment from religious-viewpoint discrimination, absent evidence of disruption to the classroom or subversion of educational mission. Appellants thus had fair warning that the suppression of student-to-student distribution of literature on the basis of

recognized in its landmark decision in *West Virginia State Board of Education v. Barnette*, the Free Speech Clause must "scrupulous[ly]" protect students in the school setting too, lest we "strangle the free mind at its source."[7]

Tinker was an ACLU case that involved a school banning all armbands in an effort to quell possible disruption caused by the debate over the participation of the United States in the Vietnam War. However, the school's "undifferentiated fear or apprehension of disturbance [was] not enough to overcome the right to freedom of expression."[8] Under *Tinker*, schools may not restrict speech absent a showing that such a restriction is necessary to remedy a material and substantial disruption in the school environment.[9]

"It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys" because to "favor one speaker over another" is presumptively

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religious viewpoint is unlawful under the First Amendment with respect to elementary school students.") (Liberty Institute case).

[7] 319 U.S. 624, 637 (1943).

[8] *Tinker*, 393 U.S. at 508.

[9] *Id.* at 511.

unconstitutional discrimination.[10] That conclusion is reinforced by a long line of decisions recognizing that "it is clearly established that, even in a nonpublic forum, restrictions on speech must be … viewpoint neutral."[11]

The bedrock principle that state officials may not engage in viewpoint discrimination applies with undiminished force when the viewpoint discriminated against is a religious one.[12] To the contrary, it is clearly established that "private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression."[13]

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[10] *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995); *see also Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641–43 (1994); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391–92 (1992); *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983); *Chiu v. Plano Indep. Sch. Dist.*, 339 F.3d 273, 280, 284 (5th Cir. 2003) ("Discrimination against speech because of its message is presumptively unconstitutional.").

[11] *Children First Found., Inc. v. Martinez*, 169 Fed. Appx. 637, 639 (2d Cir. 2006); *Monteiro v. City of Elizabeth*, 436 F.3d 397, 404 (3d Cir. 2006); *Cook v. Gwinnett Cnty. Sch. Dist.*, 414 F.3d 1313, 1321 (11th Cir. 2005).

[12] *See Cox v. Miller*, 296 F.3d 89, 102 (2d Cir. 2002) ("the prohibition of official discrimination against religions is undoubtedly 'clearly established'"); *Madyum v. Campbell*, No. 89-5411, 1990 WL 132250, at *3 (6th Cir. Sept. 13, 1990) (clearly established that state officials may not discriminate "against an individual because of his religious beliefs").

[13] *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995); *see also Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393–94 (1993).

The Supreme Court has never wavered from the principle that government may not "discriminate against particular religious beliefs or against religion in general."[14] Thus, government school officials may not censor religious speech with which they disagree.

II. There is a growing concern that government school officials are increasingly harassing and intimidating students who express religiously motivated sentiments.

We are concerned about the growing intimidation and harassment of students expressing religious sentiments in public schools. The American Psychological Association states that "bullying is commonly characterized as aggressive behavior" that involves, *inter alia*, "an imbalance of power or strength between the aggressor and the victim."[15] In the government school setting, there is an inherent power imbalance between government officials and students, which often sets the stage for harassment

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[14] *Bowen v. Roy*, 476 U.S. 693, 707–08 (1986); *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990) (the government may not "impose special disabilities on the basis of religious views or religious status"); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S 439, 453 (1988) (the "Constitution does not permit government to discriminate against religions").

[15] American Psychological Association, Resolution on Bullying Among Children and Youth (June 2004), http://www.apa.org/about/governance/council/policy/bullying.pdf.

and intimidation in the form of religious censorship. Parents expect teachers to safeguard their children during the school day, but all too often, it is the government school official who ends up needlessly and illegally harassing students. That is bad enough by itself, but it also encourages other students to join in the harassment of their fellow students for their religious views. Indeed, one of the most powerful arguments advanced during the school desegregation struggle was that government discrimination taught kids to discriminate, and that government discrimination needed to end if kids were to learn toleration and respect for the civil rights of all Americans.

The record is replete with examples of government school officials threatening and punishing students for expressing their religion at school, and the examples are not particular to any one faith.

1. Nashala Hearn, a sixth grade student and adherent of the Islamic faith, was prevented from wearing a *hijab* to her public school in Oklahoma. The government school officials suspended Nashala twice and a district administrative hearing

committee upheld the suspension.[16] It was not until Nashala brought a federal lawsuit[17] and the United States Department of Justice intervened that the school district ceased discriminating against Nashala because of her Islamic faith.

2. In a Liberty Institute case, Jonathan Morgan, Michaela Wade, and Stephanie Versher were three elementary school students in Plano, Texas, who were victims of religious viewpoint discrimination. The school principal told Michaela and Jonathan that the "goodie bags" they brought to exchange at their respective class "winter break" parties were banned from the classroom purely because they contained a religious message. Furthermore, a school principal confiscated tickets to a religious play that Stephanie distributed to her classmates during recess. The principal threatened to call police and "kick Stephanie out of school" if she subsequently distributed religious materials on campus, such as pencils bearing a religious message. A federal

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[16] *U.S. to defend Muslim girl wearing scarf in school*, CNN, Mar. 30, 2004, http://articles.cnn.com/2004-03-30/justice/us.school.headscarves_1_dress-code-head-scarf-muslim-head-scarves?_s=PM:LAW.

[17] *Hearn v. Muskogee Sch. Dist. 020*, No. 03-598 (E.D. Okla. filed Oct. 28, 2003).

appellate court ruled that the law is clearly established that school officials may not engage in religious viewpoint discrimination and thus the school officials may be held personally liable.[18]

3. In an ACLU case, a school district would not allow a five-year-old Native American boy to wear his hair in long braids for religious reasons. The school district asked for proof of the child's heritage and sentenced him to in-school suspension where he was not allowed to socialize with other children. A federal lawsuit resulted; the court found in favor of the child.[19]

4. In a Liberty Institute case, a Houston-area school district banned all religious items and certain Valentine's Day cards at school simply because they were religious. That district had a long history of anti-religious acts, including telling one student she could not say the word "Jesus" when asked what

[18] *Morgan v. Swanson*, 627 F.3d 170 (5th Cir.), *reh'g en banc granted*, 628 F.3d 705 (5th Cir. 2010).

[19] *A.A. v. Needville Indep. Sch. Dist.*, 611 F.3d 248 (5th Cir. 2010).

Easter meant to her. A federal lawsuit resulted; again, the court found in favor of the students.[20]

5. Chase Harper, a high school student in California, wore a t-shirt with a Bible verse expressing his view against homosexuality while his school was actively promoting the lifestyle through a "day of silence." Chase was sent to the principal's office where various school security personnel questioned him, including a former coach, a deputy sheriff carrying a sidearm, and the vice principal. The principal told Chase that when he comes to school "he had to leave his faith in the car." He was ultimately suspended for the day because of the religious viewpoint expressed on his t-shirt. A federal lawsuit resulted.[21]

6. At the snack table, kindergartner Kayla Broadus prayed, "God is good. God is great. Thank you, God, for my food," with two classmates at her school in Saratoga Springs, New

[20] *Pounds v. Katy Indep. Sch. Dist.*, 730 F. Supp. 2d 636 (S.D. Tex. 2010) (holding that school district's admitted viewpoint discrimination violated the First Amendment).

[21] *Harper v. Poway Unified Sch. Dist.,* 549 U.S. 1262 (2007).

York. Her teacher silenced the prayer, scolded Kayla and informed the school lawyer. A lawsuit ensued over the child's prayer.[22]

7. A group of high school students started a religious club and handed out candy canes with a religious message (during non-instructional time) advertising their group meetings. After school officials discovered that the candy canes were distributed, they were told that they were suspended. The students were forced to file suit in federal court to protect their rights without facing suspension.[23]

There should be zero tolerance for government officials who harass and intimidate students by censoring their speech because it is "unpopular" with the community, other students, or school officials. Unfortunately, unconstitutional censorship of student speech is commonplace in public schools,[24] and school officials

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[22] Frank J. Murray, *Federal Court Hears Lawsuit Over Kindergarten Christian; New York Schools May Relent, May Let Tot Say Grace at Meals*, THE WASHINGTON TIMES, April 12, 2002.

[23] *Westfield High Sch. L.I.F.E. Club v. City of Westfield*, 249 F. Supp. 2d 98 (D. Mass. 2003).

[24] ACLU, *40 Years After* Tinker v. Des Moines*, School Officials Still Unconstitutionally Censoring Students*, Feb. 23, 2009,

particularly target students expressing statements that advance or comment upon religious issues.

It is unfortunate that government school officials all over the country are spending an inordinate amount of time and public resources harassing and intimidating students who are expressing religious views with which the government school officials disagree. This is even more the case given that these same officials often wind up on the losing end of federal lawsuits, an unnecessary waste of their time and taxpayer provided funds.

The rights of students to express their views on issues, even from a religious viewpoint, are clearly established in the law. If school officials spent less time acting as roving censors of religious speech, they could more effectively resolve other issues. It is incumbent upon the Commission to review these court decisions confirming that censorship of disfavored speech, including religious speech, is no solution and can actually increase tension within the schools rather than addressing any perceived problems.

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http://www.aclu.org/lgbt-rights_hiv-aids/aclu-marks-anniversary-landmark-student-free-speech-decision-new-video.

Many students are vulnerable to government schools demanding orthodoxy in thought and speech. Furthermore, the inherent power imbalance in government schools makes this sort of enforcement all the more dangerous. Religious discrimination threatens civil rights gains for student speech achieved in the past fifty years.

III. Aggressive federal intervention calling for system-wide indoctrination of students to promote a homosexual-friendly environment in schools runs afoul of clearly established law hard won by civil liberties groups.

Groups like the ACLU and Liberty Institute who tend to disagree on many other substantive issues have stood side by side to defend unpopular student speech. In *Morse v. Frederick*, the ACLU represented a student who displayed a banner that read "BONG HiTS 4 JESUS," which was banned by a school official.[25] In that case, Liberty Institute filed a friend of the court brief in support of the student. It is clearly established law that students have a right to express their opinions at school as long as they do so in a way that does not materially and substantially disrupt

[25] 551 U.S. 393 (2007).

classes or other school activities. This means that students can express their opinions orally and in writing, including in leaflets or on buttons, armbands or T-shirts. Furthermore, school officials may not censor only one side of a controversy.[26]

Students enjoy broad First Amendment protection. Their speech is "not to be selectively permitted or proscribed according to official preference."[27] It is tempting to engage in censorship of some students to benefit others, but the cause of freedom is never advanced by selective censorship of those messages with which the government disagrees.

Government school officials across the country already show a propensity for harassing and intimidating students expressing religious sentiments. From the Muslim girl in Muskogee, Oklahoma, to the child handing out candy cane pens in Plano, Texas, government school officials have made plain that they have little tolerance for religious expression. That sort of government harassment is disgraceful and should not be tolerated.

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[26] ACLU, *Do I have a right to express my opinions and beliefs in School?* July 17, 2003, http://www.aclu.org/free-speech/your-right-free-expression.

[27] *Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1070 (4th Cir. 2006).

Furthermore, if these school officials spent less time and resources rooting out religious speech the government intends to ban, such as *hijabs* and candy cane pens, and more time providing for a safe and productive learning environment for all students, it would greatly improve the educational environment of students across the country.

Advocates for more aggressive federal intervention to prevent bullying have also called for system-wide indoctrination of students to counteract a perceived anti-homosexual climate.[28] Such system-wide indoctrination will only worsen matters for the religious liberty and free speech rights of students and will lead to

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[28]Assistant Secretary of Education Russlynn Ali in her October 26, 2010 letter to her Colleague wrote that "training or other interventions" for all students and school staff may be necessary for the school to comply with federal law and regulations. http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf.

PACER Center (a parent training and information center for families of children and youth with all disabilities from birth through 21 years old) recommends that Congress incorporate in the Elementary and Secondary Education Act (ESEA) a requirement that schools provide training on bullying prevention for school administrators, educators, parents, and students. Training, according to PACER, needs to include the entire school community.

PACER also recommends the implementation of schoolwide initiatives such as PBIS (Positive Behavior Interventions and Supports) to prevent bullying. PACER urges that the ESEA be amended to require PBIS at every school.

further attempts to stop religious thought and expression by students.

For example, a common element of many anti-discrimination and sensitivity training programs is to induce the participants, in this case, teachers and students, to affirm or agree with certain propositions. To the extent that the schools and those they employ to conduct the "education" exercise seek to have the teachers and students affirm something that is contrary to their personal beliefs, such action constitutes compelled speech in violation of the First Amendment.[29] Even if such affirmation is not required, such "education" would likely reinforce and exacerbate the religious-based discrimination like that faced by Chase Harper who was told he could not wear a T-shirt with a Bible passage that questioned homosexual practices.

Perhaps no other admonition is more appropriate than the words from the Supreme Court in *Tinker*:

> Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from

[29] *Barnette*, 319 U.S. at 642.

> the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, *Terminiello* v. *Chicago*, 337 U.S. 1 (1949); and our history says that it is this sort of hazardous freedom — this kind of openness — that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

393 U.S. at 508–09.