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MEMORANDUM

RE: First Amendment rights of students to promote and participate in Bring Your Bible to School Day

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On October 16, 2014, students around the United States will participate in Bring Your Bible to School Day—a student-organized, student-led event where students will bring their Bibles to school and tell their fellow classmates about the Bible during non-instructional time. Students have a constitutional right to participate in and promote Bring Your Bible to School Day.

Unfortunately, schools all too often censor religious expression for fear of violating the often misunderstood "separation of church and state," for dislike of religious viewpoints, or for a desire to avoid controversy. But such uninformed censorship violates the First Amendment to the United States Constitution. *See, e.g., Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 107 (2001) (finding impermissible viewpoint discrimination where school district excluded Christian club from after school forum on basis of its religious nature).

In light of the hostility students often face when trying to engage in religious expression, we are providing this memo to clarify the First Amendment rights of public school students to participate in and promote Bring Your Bible to School Day, and to assist school districts and school officials in avoiding needless litigation.

A. STUDENTS MAY BRING THEIR BIBLES TO SCHOOL, DISTRIBUTE BIBLES, AND DISCUSS THE BIBLE WITH FELLOW STUDENTS.

Schools must allow students to bring Bibles to school, distribute Bibles, and discuss the Bible with classmates because these activities will not materially disrupt school activities. The chance of such activities materially disrupting anything is exceedingly low. So long as these activities occur during non-instructional time — during lunch, walking between classes, or before or after school — these activities will not disrupt anything. Indeed, students most likely engage in a host of similar activities unrelated to the Bible during non-instructional time. For example, students probably discuss their favorite television shows or give each other notes or bring books to school all the time. As a result, schools may not single out and censor the Bible when all these other activities continually occur at school during non-instructional time.

In light of these principles, it is no surprise that federal courts have repeatedly upheld the rights of students to bring their Bibles to school, to distribute Bibles at school, and to discuss the Bible at school during non-instructional time. *See, e.g., Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118,* 9 F.3d 1295, 1297 (7th Cir. 1993) (enjoining policy prohibiting distribution of Bibles at elementary school); *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1382 (3d Cir. 1990) (enjoining ban on distribution of Bibles by students); *L.W. v. Knox Cnty. Bd. of Educ.*, 3:05-CV-274, 2006 WL

2583151 (E.D. Tenn. Sept. 6, 2006) (noting that elementary student's "constitutional right to read and study his Bible with friends [during recess] was clearly established."); *Thompson by Thompson v. Waynesboro Area Sch. Dist.*, 673 F. Supp. 1379, 1388-89 (M.D. Pa. 1987) (enjoining ban on students distributing religious newspaper with Bible quotations).

B. STUDENTS MAY DIRECTLY ADVERTISE BRING YOUR BIBLE TO SCHOOL DAY EVENT TO FELLOW STUDENTS.

Just as the Bring Your Bible to School event itself is protected, so also is student expression advertising the event. The First Amendment applies to all student oral expression and literature distribution during non-instructional time, regardless of religious content. School officials may not prohibit this expression out of fear that allowing religious speech will offend some members of the community. As the Supreme Court said, "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 508 (1969). Where a student wishes to peacefully distribute free literature on school grounds during non-instructional time, there simply is nothing which "might reasonably [lead] school authorities to forecast substantial disruption of or material interference with school activities…." *Id.* at 514. In fact, distribution of literature is inherently less disruptive than spoken expression. *United States v. Kokinda*, 497 U.S. 720, 734 (1990). The Supreme Court reasoned that "[o]ne need not ponder the contents of a leaflet or pamphlet in order mechanically to take it out of someone's hand, but one must listen, comprehend, decide and act in order to respond to a solicitation." *Id.*

Several courts have held that the distribution of religious literature by public school students is protected speech under the First and Fourteenth Amendments. *See Morgan v. Swanson*, 659 F.3d 359, 396 (5th Cir. 2011) (en banc) (recognizing that students, regardless of grade level, have "the First Amendment[] right … to express a religious viewpoint to another student without fear"); *J.S. ex rel. Smith v. Holly Area Schools*, 749 F.Supp.2d 614, 623 (E.D. Mich. 2010) (issuing preliminary injunction against "school district's outright prohibition upon [elementary school student's] distribution of religious flyers to his classmates"); *Wright v. Pulaski Cnty. Special Sch. Dist.*, 803 F. Supp. 2d 980, 984 (E.D. Ark. 2011) (E.D. Ark. March, 25, 2011) (granting injunction ordering school officials to "permit [an elementary school student] to distribute flyers for church-sponsored events and activities"); *Westfield High Sch. L.I.F.E. Club v. City of Westfield*, 249 F. Supp.2d 98, 114 (D. Mass. 2003) ("It is now textbook law" that students carry rights of expression, including the right to distribute literature); *Clark v. Dallas Indep. Sch. Dist.*, 806 F.Supp. 116, 119 (N.D. Tex. 1992) ("It is well settled that written expression is pure speech. . . . It is equally true that the guarantee of free speech encompasses the right to distribute written materials peacefully"); *Baughman v. Freienmuth*, 478 F.2d 1345, 1348 (4th Cir. 1973) ("The regulation complained of reaches the activity of pamphleteering which has often been recognized by the Supreme Court as a form of communication protected by the first amendment"); *Slotterback v. Interboro Sch. Dist.*, 766 F. Supp. 280, 288 (E.D. Pa. 1991) ("It is axiomatic that written expression is pure speech," and that "the guarantee of freedom of speech that is enshrined in the first amendment encompasses the right to distribute peacefully"). Thus, school officials may not prohibit the peaceful dissemination of information by students about the Bring Your Bible to School Day event.

C. IF THE SCHOOL ALLOWS STUDENTS AND STUDENT CLUBS TO ADVERTISE EVENTS ON SCHOOL BULLETIN BOARDS, PA SYSTEMS, OR OTHER MEANS, THEY MUST ALLOW STUDENTS TO ADVERTISE THE BRING YOUR BIBLE TO SCHOOL DAY EVENT IN THE SAME FASHION.

It is also well settled that the government may not discriminate against private religious speech when private secular speech is permitted in the same time, place, and manner. *Good News Club*, 533 U.S. at 111-12 ("[W]e reaffirm our holdings in *Lamb's Chapel* and *Rosenberger* that speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint"); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) ("In the realm of private speech or expression, government regulation may not favor one speaker over another"). Again, this principle applies with equal force to religious expression engaged in by students. *See, e.g., Good News Club*, 533 U.S. at 111-12; *Riseman v. Sch. Comm. of City of Quincy*, 439 F.2d 148 (1st Cir. 1971) (striking down an absolute prohibition of student literature distribution at school under First Amendment); *Good News/Good Sports Club v. Sch. Dist. of City of Ladue*, 28 F.3d 1501, 1505-1507 (8th Cir. 1994) (ban on religious expression by student club in junior high school is unconstitutional where student secular expression was allowed).

Any possible misperceptions that the school is "endorsing religion" can be addressed by the school clarifying that the speech is not endorsed by the school, such as through disclaimers. *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 769 (1995) ("If Ohio is concerned about misperceptions, nothing prevents it from requiring all private displays in the Square to be identified as such"); *id.* at 776 ("the presence of a sign disclaiming government sponsorship or endorsement on the Klan cross, would make the State's role clear to the community.") (O'Connor, J.,concurring); *id.* at 784 (disclaimer cures confusion over misperceptions of endorsement) (Souter, J., concurring in part and concurring in judgment). Several Circuits have adopted this position in the school context:

> [I]t is far better to teach students about the first amendment, about the difference between private and public action, about why we tolerate divergent views. The school's proper response is to educate the audience rather than squelch the speaker. Schools may explain that they do not endorse speech by permitting it.

Hills v. Scottsdale Unified Sch. Dist., 329 F.3d 1044, 1055 (9th Cir. 2003) (quoting *Hedges v. Wauconda Cmty. Sch. Dist.*, 9 F.3d 1295, 1299-1300 (7th Cir. 1993)).

Thus, if the school generally allows students or student clubs to advertise events by hanging posters on school walls or bulletin boards, having announcements read over the school's PA system, or using some other method, the school cannot prohibit student organizers of Bring Your Bible to School Day events from advertising in the same way.

D. RELIGIOUS SPEECH LIKE THE BRING YOUR BIBLE TO SCHOOL DAY EVENT IS PROTECTED BY THE FIRST AMENDMENT.

Although the First Amendment clearly protects Bring Your Bible to School Day events, it is also imperative to see why the First Amendment protects these events. It all begins with a fundamental principle of constitutional law: government bodies—including public schools—may not suppress or exclude the speech of private parties—including public school students—just because the speech is religious or contains a religious perspective. *Good News Club*, *supra*; *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263

(1981). This principle cannot be denied without undermining the essential First Amendment guarantees of free speech and religious freedom.

> It is equally true that religious speech is protected by the First Amendment and may not be singled out for discrimination. As the Supreme Court has stated: Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression . . . . Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince.

Pinette, 515 U.S. at 760.

Importantly, the Supreme Court has stated that public schools cannot restrict religious speech simply because it may be perceived by some as "offensive" or "controversial." *Morse v. Frederick*, 551 U.S. 393, 409 (2007) ("Petitioners urge us to adopt the broader rule that Frederick's speech is proscribable because it is plainly 'offensive' as that term is used in *Fraser*. We think this stretches *Fraser* too far; that case should not be read to encompass any speech that could fit under some definition of 'offensive.' After all, much political and religious speech might be perceived as offensive to some") (emphasis added). As the Third Circuit Court of Appeals put it in summarizing Supreme Court case law, "The Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it." *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 215 (3d Cir. 2001).

E. STUDENTS DO NOT ABANDON THEIR CONSTITUTIONAL RIGHTS OF FREE SPEECH WHEN THEY ATTEND PUBLIC SCHOOL.

Nor do First Amendment principles stop applying when students go to school. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506. *See also Shelton v. Tucker*, 364 U.S. 479, 487 (1967) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools"). The Supreme Court has squarely stated that a student's free speech rights apply "when [they are] in the cafeteria, or on the playing field, or on the campus during the authorized hours. . . ." *Tinker*, 393 U.S. at 512-13.

F. *TINKER*'S "MATERIAL AND SUBSTANTIAL DISRUPTION STANDARD"

Because the First Amendment applies in the public school context, the First Amendment requires public schools to overcome a difficult standard when they attempt to silence free speech. As the Supreme Court has explained, student expressive activity cannot be impeded by a public school unless that activity creates a material and substantial disruption to the school's ability to fulfill its educational goals. *See Tinker*, 393 U.S. at 509. Any attempt to restrict such speech is unconstitutional where there has been "no finding and no showing that engaging [in the activity] would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.'" *Id.* (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

Moreover, the Supreme Court has stated that the standard of "material and substantial disruption" cannot be met merely by the *possibility* of disruption. In the Court's words,

"undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id.* at 508.

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are persons under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the state chooses to communicate. They may not be confined to the expressions of those sentiments that are officially approved.

Id. at 511. This fundamental constitutional principle is applicable both inside and outside the classroom. As the *Tinker* Court noted, when a student "is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions[.]" *Id.* at 512-13. Bring Your Bible to School Day speech activities are designed to take place during noninstructional times and so should not disrupt school activities in any way.

As a result, schools may not single out Bibles, clothing promoting the Bring Your Bible to School Day event, or other religious messages for unfavorable treatment. Students may wear such clothing to school to the same extent that other similar articles of dress are permitted. For example, if the school allows students to wear t-shirts with messages on them, they cannot prevent a student from wearing a t-shirt with a message supporting the Bring Your Bible to School Day event. Additionally, the wearing of clothing or jewelry bearing a religious message is considered student speech, which cannot be restricted unless it (1) substantially interferes with the operation of the school, or (2) infringes on the rights of other students. A student may not wear clothing with a religious message if the school requires students to conform to a dress code that does not allow any messages to be displayed on clothing.

G. THE "SEPARATION OF CHURCH AND STATE" CANNOT JUSTIFY OFFICIAL SUPPRESSION OF THE BRING YOUR BIBLE TO SCHOOL DAY EVENT.

Schools and school officials often mistakenly believe that allowing students to engage in religious speech at school would violate the "separation of church and state"—a misunderstood doctrine often cited in connection with the Establishment Clause of the First Amendment. This very argument has been reviewed and rejected by the United States Supreme Court. In *Mergens*, the Supreme Court stated as a general proposition that students' private religious expression within a public school does not present any Establishment Clause problem:

> [P]etitioners urge that, because the student religious meetings are held under school aegis, and because the State's compulsory attendance laws bring the students together (and thereby provide a ready-made audience for student evangelists), an objective observer in the position of a secondary school student will perceive official school support for such religious meetings. . . . **We disagree.**

Bd. of Educ. of Westside Cmty. Schools v. Mergens, 496 U.S. 226, 249-50 (1990) (emphasis added). The Establishment Clause of the First Amendment merely "requires the state to be a neutral in its relations with . . . religious believers and non-believers; it does not require the state to be their adversary." *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947). Likewise, "[s]tate power is no more to be

used so as to handicap religions, than it is to favor them." *Id.* Therefore, the Establishment Clause has no applicability to stop student speech related to the Bring Your Bible to School Day event.

The Supreme Court in *Mergens* explained that a policy of equal access for religious speech conveys a message "of neutrality rather than endorsement; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion." *Mergens*, 496 U.S. at 248. *Accord Good News Club*, 533 U.S. at 110-19 (student religious speech does not violate the Establishment Clause).

As the Supreme Court has said, "there 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." *Santa Fe*, 530 U.S. at 302 (quoting *Mergens*, 496 U.S. at 250). Private student speech does not violate the Establishment Clause. *Id.* Bring Your Bible to School Day speech is private student speech.

CONCLUSION

The Bring Your Bible to School Day annual event is an opportunity for school officials to exemplify constitutional conduct by protecting the ability of students to properly exercise their First Amendment rights. If you think that your rights have been violated as a result of participating in Bring Your Bible to School Day, please contact our Legal Intake Department so that we may review your situation and possibly assist you. You can reach us at 1-800-835-5233, or visit our website at www.AllianceDefendingFreedom.org and select the "Get Legal Help" button to submit a request for legal assistance. Since each legal situation differs, the information provided above should only be used as a general reference and should not be considered legal advice.[1]

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