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Reply to: Orlando

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VIA EMAIL ONLY – donna.bahorich@tea.texas.gov

Donna Bahorich, Chariman
Texas State Board of Education
P.O. Box 79842
Houston, TX 77279

RE: SBOE should adopt *Mexican American Heritage* textbook

Dear Chariman Bahorich:

By way of brief introduction, Liberty Counsel is an international legal, media and policy organization, specializing in First Amendment liberties. With offices in Florida, Virginia, and Washington, D.C., Liberty Counsel has numerous affiliate attorneys around the nation, including Texas. We have had great success on behalf of our numerous clients in federal court. Liberty Counsel's policy initiatives include support for educational materials that provide an accurate perspective on history, including our nation's founding era, and the contribution of various ethnic groups to the unique American experiment on liberty.

Liberty Counsel therefore writes urging the Texas State Board of Education ("SBOE") to adopt the proposed textbook *Mexican American Heritage*, published by Momentum Instruction LLC ("Publisher"). Liberty Counsel has reviewed the text, and both the text and the Publisher have met all state criteria for adoption. Liberty Counsel is deeply concerned over reports that SBOE members may reject the book based on pretextual "errors" claimed by far-Left opposition, thereby ratifying an unconstitutional heckler's veto and viewpoint discrimination, as well as a denial of a government benefit (i.e., a publishing contract) based on the speaker's viewpoint.

While government may speak its own message, where government has established objective criteria for textbook adoption, it may not then go back and reject a submission which has met the objective criteria, based on objections from others as to the text's viewpoint or content, where that viewpoint or content is historically correct. Such gives effect to an unconstitutional "heckler's veto;" the prototypical heckler's veto case is one in which the government silences particular speech or a particular speaker "due to an

anticipated...reaction of the audience." *Rosenbaum v. City & Cnty. of S.F.*, 484 F.3d 1142, 1158 (9th Cir.2007).

As for "viewpoint discrimination," it is "axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 at 828 (1995). Thus, the government may not "favor one speaker over another," "discriminat[e] against speech because of its message," or target "particular views taken by speakers on a subject." *Id.* at 828–29 (citations omitted). Viewpoint discrimination is presumptively impermissible for private speech. *See id.* at 830. ("[V]iewpoint discrimination ... is presumed impermissible when directed against speech otherwise within the forum's limitations." (citation omitted)); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) (explaining that, in a nonpublic forum, the state may not regulate speech in "an effort to suppress expression merely because public officials oppose the speaker's view" (citation omitted)).

Moreover, in *Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993), the United States Supreme Court recognized that a claim of discriminatory treatment, without any showing of actual injury, may be sufficient to establish standing when a defendant creates a barrier to a potential benefit. In *City of Jacksonville*, the Court found that a group of contractors had standing based on the alleged denial of equal footing in a government bidding process. *Id.*

In addition to these legal standards, I understand the following facts to be true: over two years ago, the SBOE voted to reject a "Mexican American Studies" course, and instead voted to adopt a course entitled "Special Topics in Social Studies," along with the "Texas Essential Knowledge and Skills" ("TEKS") for what is required to be included in a Special Topics in Social Studies course. The SBOE then adopted Proclamation 2017 ("Proclamation") that was sent out for Publishers who may wish to bid for adoption. This Proclamation lists detailed expectations of what publishers must do in order for their materials to be adopted for a state contract.

The SBOE's authority regarding textbook adoption is established statutorily in the Texas Education Code ("TEC"). Tex. Educ. Code Ann. § 28.002. In addition, the Texas Administrative Code (19 Tex. Admin. Code §§ 66.15, 66.66) requires that a book must either be free from error, or the publisher must certify that it will be free from error prior to distribution to the districts.

Pursuant to its authority under the TEC, the SBOE adopted Proclamation 2017 which further detailed the specific requirements for the adoption of a Publisher's materials: 1) review panels must show 50% or more TEKS coverage; 2) Publishers must timely verify that they will meet the physical specifications; and 3) Publishers must submit to the Texas Education Agency ("TEA") an affidavit verifying that they will correct all errors prior to distribution to the districts in 2017.

Review panels assessed *Mexican American Heritage* to have 100% TEKS coverage. The Publisher provided every timely documentation to the TEA that it will meet the physical

specifications, and that any errors will be corrected prior to distribution to school districts in 2017. The Commissioner's formal report of errors only listed 29 total errors in *Mexican American Heritage*, while other textbooks being recommended for adoption under this Proclamation had hundreds more errors listed.

The Publisher of *Mexican American Heritage* has already corrected all 29 errors listed in the TEA report, and the current textbook content uploaded for the Board for adoption does not contain any factual errors, even though these corrections were not required to be made under either the TAC or the 2017 Proclamation until the book would be distributed to school districts in 2017.

However, despite these facts, *Mexican American Heritage* has attracted the opposition of revisionist historians. These individuals disagree with the balanced, factual approach to history contained in *Mexican American Heritage*, and continue to claim the book is "full of errors." The types of errors alleged are the absence of content that some politically-motivated individuals apparently want in a "Mexican-American Studies" ("MAS") course, which was rejected by the SBOE.¹

Other types of alleged errors include complaints that *Mexican American Heritage* speaks of Stephen F. Austin and those at the Alamo in a positive light, instead of as alleged "land pirates," a radical and factually incorrect claim. Others have falsely claimed the book is "racist" and "xenophobic," since the book doesn't take the position that Mexico was in the right and that the Texas Revolution was illegal.

Other alleged errors claimed by paid Leftist scholars include the false claim that John Locke, a crucial figure in the founding of our government, did not subscribe to Biblical principles on government, and likewise, that the phrase "laws of nature and nature's God" was simply a phrase used by Deists, and that the "omission of this information indicates the book's purpose of deceiving students about the Biblical roots of our system of government."

These claims are false. The writings of John Locke himself reveal that his thinking was profoundly influenced by the Bible, and primary sources from the Founders reveal that the "laws of nature and nature's God" referenced the God of the Bible. Moreover, it is not an "error" for a history textbook to praise the bravery and patriotism of those who died at the Alamo, or for it to accurately reference the Judeo-Christian underpinnings of our nation.

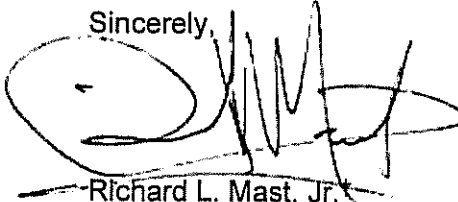
Thus, these types of claimed "errors" are not verified factual errors, but disagreement with the book's viewpoint. The TEA has recommended that the SBOE adopt *Mexican American Heritage*. The SBOE may not reject this book by treating it differently than all others, by specifically pulling it from among the list of all the books recommended for adoption by the TEA, where it has met all objective criteria, and has no errors. The

¹ This testimony is not germane to the question before the State Board, as it is not voting on what TEKS should be included within a MAS course, since the board voted not to adopt a MAS course. Accordingly, the Publisher is NOT required to contain any content outside of the TEKS requirements for Special Topics in Social Studies, for which *Mexican American Heritage* received 100%.

SBOE has no statutorily defensible basis to reject the book, other than a claim of "errors," which falls apart under scrutiny.

In sum, any errors in *Mexican American Heritage* have already been rectified. The Publisher has certified that it will be free from error prior to distribution. The book has fewer listed errors than numerous other books that the SBOE will not be pulling, and the Publisher has already uploaded a copy of the textbook with all stated errors corrected, even though neither the TAC or Proclamation require this.

Therefore, the SBOE must treat *Mexican American Heritage* the same way it treats numerous other books the TEA is recommending for adoption. The SBOE must comply with its adopted Proclamation, and approve the book. It may not reject it based upon subjective political ideology or a "heckler's veto." The only question before the SBOE is "has the Publisher, Momentum Instruction, met the stated requirements within the Proclamation for adoption," and the answer is resoundingly "YES." Liberty Counsel urges the SBOE to follow the law and adopt this textbook.

Sincerely,

Richard L. Mast, Jr.

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