

February 2, 2021

Dear Chairwoman Larson and Members of the Senate Judiciary Committee:

On behalf of the ACLU of North Dakota, we write in opposition to SB 2308, which would confer on school boards the power to “authorize schools within the district to post a copy of the ten commandments in the school and in a classroom.” Simply put, posting the Ten Commandments in public-school classrooms and other school spaces is blatantly unconstitutional. As the U.S. Supreme Court held in *Stone v. Graham*, more than 40 years ago, the Ten Commandments “are undeniably a sacred text” and “the pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature.”¹ Should the Legislature enact SB 2308, it will likely precipitate costly litigation for which public schools will be liable under federal law.

We urge the committee to vote **do not pass** on this bill.

SB 2308 is not only unconstitutional; it is also unnecessary to advance religious freedom in our public schools.² Students’ rights to engage in religious exercise and expression are already well-protected under current law. Students may, for example, voluntarily pray, read religious literature, or engage in other religious activities during their free time, such as recess and lunch. They may express their religious beliefs in school assignments, where relevant, and pass out religious literature to their classmates, in the same manner that they may distribute non-religious materials. Students also may participate in before- or after-school religious events, such as “see you at the pole” activities with other students and student religious clubs, and, if students are allowed to wear clothing with messages, their clothing may include religious messages. The ACLU has long worked to protect the religious-exercise and religious-expression rights of children of all faiths in public schools.³

But there is a stark difference between voluntary, student-initiated religious exercise and expression and school-sponsored promotion of religion. The Establishment Clause of the First Amendment prohibits the latter. The Framers of the Constitution believed that religious freedom only flourishes if the government remains neutral on matters of faith and gives citizens the breathing room to decide for themselves whether, where, and when to pray, and what religious beliefs, if any, to follow. Posting the Ten Commandments in classrooms and other schools spaces contradicts this fundamental principle: “If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and

¹ *Stone v. Graham*, 449 U.S. 39, 41 (1980).

² SB 2308 also authorizes schools “to permit students to recite the pledge of allegiance.” This, too, is unnecessary. While public schools cannot compel students to recite the Pledge of Allegiance, see *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943), there is no law that prohibits schools from allowing students to say the pledge if they want to. Indeed, North Dakota law already provides for such: “A school board may authorize the voluntary recitation of the pledge of allegiance by a teacher or one or more students at the beginning of each schoolday. A student may not be required to recite the pledge of allegiance, stand during the recitation of the pledge of allegiance, or salute the American flag.” N.D. Cent. Code Ann. § 15.1-19-03.1.

³ *ACLU Defense of Religious Practice and Expression in Public Schools*, ACLU, <https://www.aclu.org/aclu-defense-religious-practice-and-expression-public-schools>



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obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause.”⁴

This bill simply cannot be squared with the Supreme Court’s ruling in *Stone*. Nor can it be reconciled with federal precedent in North Dakota. In a lawsuit brought by the ACLU, shortly before the Supreme Court issued its ruling in *Stone*, the U.S. District Court for the District of North Dakota struck down a similar North Dakota law, which required public schools to display the Ten Commandments in classrooms.⁵ Indeed, no federal court has ever upheld the display of the Ten Commandments by public-school officials.⁶

All students, regardless of their faith, should feel safe and welcome in our public schools. Displaying the Ten Commandments in classrooms and other school spaces would convey the opposite message. It would make clear that school officials favor students of certain faiths and that those who do not subscribe to officials’ preferred faith are outsiders.⁷ This exclusionary message would be divisive and constitutionally impermissible.⁸ It could also be costly: SB 2308 purports to grant school officials immunity from “any liability for damages resulting from a school’s decision to post the ten commandments,” but school districts would remain liable for constitutional violations under federal law.⁹ We thus urge the committee and its members to vote do not pass on SB 2308. Today’s hearing should be the end of the line for this bill.

Sincerely,



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⁴ *Stone*, 449 U.S. at 42.

⁵ *Ring v. Grand Forks Pub. Sch. Dist. No. 1*, 483 F. Supp. 272, 275 (D.N.D. 1980)

⁶ See, e.g., *Baker v. Adams County/Ohio Valley Sch. Bd.*, 86 Fed. Appx. 104 (6th Cir. 2004) (holding unconstitutional public school’s display of the Ten Commandments alongside the U.S. Constitution, Declaration of Independence, and the Magna Carta); *ACLU of Ky. v. McCreary County*, 354 F.3d 438 (6th Cir. 2003) (granting preliminary injunction against a school Ten Commandments display alongside “historical documents”); *Freedom from Religion Found., Inc. v. Connellsville Area Sch. Dist.*, 127 F. Supp. 3d 283, 318 (W.D. Pa. 2015) (holding that Ten Commandments monument on outside grounds of junior high school violated the Establishment Clause); cf. *Freedom from Religion Found., Inc. v. New Kensington-Arnold Sch. Dist.*, 919 F. Supp. 2d 648, 661 (W.D. Pa. 2013) (denying school district’s motion to dismiss where plaintiffs challenged Ten Commandments monument placed at front entrance of high school), *settled*, Feb. 15, 2017, <https://ffrf.org/legal/challenges/highlighted-court-successes/item/16972-ffrf-and-parents-seek-removal-of-ten-commandments-monuments-in-front-of-two-penn-public-schools> (monument was removed from school property and school district paid \$163,500 in attorneys’ fees and costs).

⁷ See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309-10 (2000) (“School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”) (internal quotation marks omitted).

⁸ *Id.*

⁹ See 42 U.S.C. § 1983 (civil action for deprivation of rights)



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