Senator Roers and Members of the North Dakota Senate State and Local Government Committee,

My name is Eric Burin. I am offering neutral testimony on HB 1120, and simply urge the committee to adopt two small but important amendments.

Before identifying the two amendments and explaining why they would improve HB 1120, permit me to survey the bill's illuminating history.

Rep. Pat Heinert

The motive force behind HB 1120 is one of its sponsors, Rep. Pat Heinert (R-D32). According to Heinert, while watching some government meetings around North Dakota, he had seen "stuff" that prompted him to sketch out ideas for legislation regarding the Pledge of Allegiance. Additional research revealed to Heinert that the U.S. Supreme Court had ruled that government entities cannot make people say the Pledge against their will.

Gobitis* and *Barnette

In truth, there are two noteworthy Supreme Court cases on this topic. The first was *Minersville School District v. Gobitis* (1940). To understand this case, it's worth remembering that the Pledge prescribes oaths to two things: the U.S. flag and the country for which it stands. Jehovah Witnesses, who are central figures in *Gobitis*, cannot abide by either. To them, the latter oath elevates government above God, while the former constitutes idolatry, the subject of over forty biblical injunctions, as many as any other in the Scriptures.

Witnesses have suffered for living biblically as they understand the matter. In Nazi Germany, Witnesses who eschewed the "Hitler Salute" were targeted for extirpation. In the U.S. during the same era, those who did not say the Pledge were expelled from their schools, fired from their jobs, and attacked by mobs. When the Supreme Court finally heard a case on the subject (*Gobitis*), it ruled against the Witnesses.

Essential to the Court's thinking was the notion that the Pledge is not a religious exercise, but a secular one designed to promote "national cohesion," which, according to the Court majority, was "inferior to none in the hierarchy of legal values." Since the Pledge is not a religious endeavor, the Court majority further reasoned, compelling Witnesses to say it does not violate their rights under the First Amendment's Establishment Clause, which prohibits the national- and state governments from enacting legislation concerning the establishment of religion, and its Free Exercise Clause, which safeguards the free exercise of religion. Even fourteen years later, when the U.S. government officially added the words "under God" to the Pledge, its recitation, according to Court dicta, was still fundamentally a secular undertaking.

Few if any rulings have sparked a more immediate and violent reaction than *Gobitis*. Over the next several months, approximately one thousand Witnesses were brutalized and over two thousand Witness children were kicked out of school (their parents still had to abide by compulsory education laws,

meaning they either had to pay for private schooling or be fined and imprisoned). It was practically open season on Witnesses.

Three years later, the Supreme Court changed course in *West Virginia State Board of Education v. Barnette* (1943). The legal impetus for that course correction was the Court's willingness to examine the case not through the lens of the Establishment and Free Exercise Clauses, but instead through another First Amendment right: freedom of expression, which encompasses the right to eschew speech, including speech one believes is untrue. In the majority opinion, Justice Robert H. Jackson famously wrote, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodoxy in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." In other words, government entities can't make people say things, including things they don't believe.

"Let's Just Go Back to the Way It Was"

This was the legal context in which HB 1120 was drafted. The original version of the bill required sundry government bodies to provide an opportunity to recite the Pledge at their meetings. It also changed a pivotal feature of the existing law: instead of stipulating that 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," it replaced the word "may" with "shall."

School administrators understood the latter change could have momentous consequences for their districts and they told Heinert so. Specifically, they explained that children start their school days at different times (this is especially true for high schoolers). This fact would complicate efforts to comply with a state mandate that the Pledge be offered "at the beginning of each schoolday."

If compliance would be difficult under normal circumstances, what would be done under unusual ones? What happens when schools start late because of inclement weather? Or when they rearrange their schedules for special events? Or when they go to remote learning on account of having exhausted their allotment of snow days? Or when they superintend out-of-town, overnight field trips? The original version of HB 1120 made no exceptions; its mandate was ironclad. Little wonder school administrators asked Heinert to restore the flexibility provided under current law.

Consequently, when HB 1120 came before the House Government and Veterans Affairs (GVA) Committee, Heinert asked that body to amend his bill. Actually, he requested two sets of amendments.

First, Heinert wanted the words "regularly scheduled" to precede allusions to the aforementioned government meetings. This may seem like a minor revision, but it's important because the proposed change was designed to clarify the bill's intent and diminish its reach. The government entities covered under HB 1120 hold many meetings of different types and with different purposes, and Heinert wanted to establish that the bill did not encompass all of them, just the garden variety, "regularly scheduled" ones. In short, Heinert's did not want HB 1120 to unduly burden government officials.

Second, regarding the recitation of the Pledge in schools, Heinert asked the committee to strike the word "shall" and retain the word "may." "[I]t was never the intent to have [a] school board force the saying of the Pledge of Allegiance at the beginning of each day," he professed in his written testimony. In his verbal testimony, Heinert elaborated, explaining that school administrators had "almost a full

page of…amendments they wanted me to introduce, and that's when I just said, 'Let's just go back to the way it was, and leave that section alone.'"

"The Wording Should Be 'Shall'"

When the House GVA Committee took up HB 1120, its deliberations focused on two key considerations: whether it was permissible for the state to mandate that the Pledge be a part of schools' daily routines, and, if so, whether it was wise for the state to do so. The lawmakers were uncertain and in disagreement on both counts. Rep. Mary Schneider (D-D21) suggested the bill be sent to Legislative Council, which could explain the legal issues at hand, particularly regarding the words "may" and "shall." Chair Austen Schauer (R-D13) concurred.

HB 1120 was sent to Legislative Council for clarification; it returned more muddled.

When the House GVA Committee resumed working on HB 1120, Kyra, Legislative Council's intern, reported that Legislative Council "agreed that the wording should be 'shall.'"

This was a curious opinion. The law *permits* "may" or "shall" (or neither); it's up to the state to pick between them. Put another way, the choice between "may" or "shall" as much a policy issue as a legal one. Legislative Council went beyond explaining what the law allows and waded into what the state's policy should be.

I asked Legislative Council about its reasoning. Its Senior Counsel and Assistant Code Revisor, Samantha E. Kramer, replied that both words–"may" and "shall"–were permissible, and that to adopt the latter would be "more consistent with the other new language in the bill which provides other boards 'must' provide for voluntary recitation of the Pledge of Allegiance." Legislative Council's response was thus premised on the idea that there is little difference between (on one hand) the state requiring government entities to incorporate a voluntary recitation of the Pledge into their "regularly scheduled" proceedings, and (on the other hand) the state requiring the same in each classroom in each school in each district "at the beginning of each schoolday." This may come as news to school administrators.

Indeed, consider the magnitude of the bill's prospective mandate. There are 484 public schools in North Dakota. Each offers instruction 175 days per year. That's 84,700 instances in which school administrators must ensure, without fail, that the Pledge is offered "at the beginning of each schoolday" (to say nothing of the challenges they'd face abiding by that specific expression). And that figure does not include programs like summer school. Is such an endeavor really on par with that required of government entities which have "regularly scheduled" meetings perhaps once or twice a month? When comparing the two, it's worth recalling that the bill's impetus was what Heinert saw at government meetings, and that his first set of amendments aimed to diminish its effects on officeholders. When the legislation branched into the daily operations of every school across the state, it assumed an entirely different character. School administrators understood that; so, too, in time, did Heinert, and that's why he asked for his second amendment.

I've heard great things about Legislative Council, but in this instance, its legal reasoning is contestable. Your committee must decide if there's no meaningful difference between once-or-twice-a-month government meetings and the daily and varied operations of nearly 500 schools in the state.

After receiving Legislative Council's report, the House GVA Committee quickly moved forward with HB 1120. The version it passed did not include Heinert's second amendment, the one that would have changed "shall" back to "may." Chair Schauer then tabbed Rep. Vicky Steiner (R-D37) to carry HB 1120 to the House floor.

"There Was No Opposition to the Bill"

When Steiner brought the bill to the House floor, she noted that "there was no opposition to the bill." This was true in the strictest sense. But the statement obscured the legislation's complex history. Its trek began with Heinert's observation of "stuff" at government meetings, his exposure to Pledge jurisprudence; his initial drafting of the bill; his communications with school administrators, and his concomitant amendments; the bill was further subject to uncertain debates and a contestable Legislative Council report; and its journey is not even half complete, as it now awaits action on your committee's part.

Two Amendments

As for the actions that I would encourage your committee to take, my first suggestion is to adopt Heinert's second amendment, and thereby restore the flexibility school administrators have requested and now have under current law.

My second suggestion concerns an item overlooked by Heinert and others. The law declares, "A student *may* not be required to recite the pledge of allegiance…" (emphasis added). The word "may" implies a choice. Under *Barnette* and North Dakota law, the state has no choice; it cannot make people say the Pledge involuntarily. Therefore, the appropriate phrase in this instance is "shall not" (i.e., "A student shall not be required to recite the pledge of allegiance…"). Besides comporting with current jurisprudence and law, the words "shall not" will be a testament to the very liberty that the Pledge trumpets and a bulwark safeguarding the right of free people to live unburdened by compulsory speech.

Eric Burin