Sixty-ninth North Dakota Legislative Assembly
House Judiciary Committee
H.B. 1145
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ACLU AMERICAN CIVIL LIBERTIES UNION North Dakota
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Chair Klemin, Vice Chair Karls, and members of the Committee:

On behalf of the ACLU of North Dakota, I submit testimony in opposition to House Bill 1145, which would require the Ten Commandments to be on display in each state higher education institution classroom and in the classroom and building on school grounds of every public school district.

Posting the Ten Commandments in public-school classrooms is blatantly unconstitutional. As the U.S. Supreme Court held in *Stone v. Graham*, nearly forty-five 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] 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 also required public schools to display the Ten Commandments in classrooms.[2] Indeed, no federal court has ever upheld the display of the Ten Commandments by public-school officials.[3] Most recently, a federal district court enjoined a similar Louisiana law, holding that it violates both the Establishment and Free Exercise Clauses of the First Amendment to the U.S. Constitution.[4]

If enacted, HB 1145 would result in unconstitutional religious coercion of students, who are legally required to attend school and thus comprise a captive audience for school-sponsored religious messages. It also would put public schools in an untenable position—forcing them either to violate state law or students' and parents' constitutional rights, which will no doubt give rise to costly litigation.

The federal courts have repeatedly made clear that government may not impose official religious messages at school because students are a "captive audience"—in other words, they are compelled to be present. For example, in *Ingebretsen on Behalf of Ingebretsen v. Jackson Pub. Sch. District*, the U.S. Court of Appeals for the Fifth Circuit overturned a Texas law that would have allowed "prayers to be given by any person, including teachers, school administrators and clergy at school functions where attendance is compulsory."[5] Citing *Lee*

[1] *Stone v. Graham*, 449 U.S. 39, 41 (1980).
[2] *Ring v. Grand Forks Pub. Sch. Dist. No. 1, 483* F. Supp. 272, 275 (D.N.D. 1980)
[3] 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-courtsuccesses/item/16972-ffrf-and-parents-seek-removal-of-ten-commandments-monuments-infront-of-two-penn-public-schools (monument was removed from school property and school district paid $163,500 in attorneys' fees and costs).
[4] *Rev. Roake v. Brumley*, __ F. Supp. 3d __, No. CV 24-517-JWD-SDJ, 2024 WL 4746342, at *90 (M.D. La. Nov. 12, 2024)
[5] 88 F.3d 274, 279 (5th Cir. 1996).

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v. Weisman,[6] in which the U.S. Supreme Court barred clergy-led prayers at public-school graduation ceremonies, the Fifth Circuit concluded that "[t]he coercion here is even greater" because "students will be a captive audience that cannot leave without being punished by the state or School Board for truancy or excessive absences."[7]

In *Kennedy v. Bremerton School District*, the Supreme Court recently affirmed that it remains "problematically coercive" for public schools to promote religious messages to students who are part of a captive audience.[8] There, the Court upheld the right of a public-school football coach to engage in a quiet and private act of prayer, but only because the religious message was not endorsed by the school; it fell outside the employee's official responsibilities; it did not involve students; and it was not imposed on a captive audience.[9]

Public-school students gathered during the school day in a public-school classroom are the quintessential captive audience,[10] and displays of the Ten Commandments or other religious iconography and messages raise the same risk of coercion. As a federal court of appeals has explained, "[o]nce a school district creates a captive audience, the coercive potential of endorsement can operate."[11] Thus, "[d]isplaying religious iconography . . . in a classroom setting raises constitutional objections because the practice may do more than provide public school students with *knowledge* of Christian tenets[.]"[12] Instead, it "tend[s] to promote religious beliefs, and students might feel pressure to adopt them."[13]

Consistent with these concerns, in *Stone*,[14] the Supreme Court overturned a Kentucky law that, like HB 1145, required public schools to post the Ten Commandments "on the wall of

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[6] 505 U.S. 577 (1992).
[7] *Ingebretsen*, 88 F.3d at 279-80.
[8] 597 U.S. 507, 542. (2022) (citing *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992)).
[9] *See Kennedy*, 597 U.S. at 525-26, 530-31, 538-44 ("The contested exercise before us does not involve leading prayers with the team or before any other captive audience. . . . The prayers for which Mr. Kennedy was disciplined were not . . . recited to a captive audience. Students were not required or expected to participate.").
[10] *Cf. e.g.*, *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 957 (9th Cir. 2011) ("We consider whether a public school district infringes the First Amendment liberties of one of its teachers when it orders him not to use his public position as a pulpit from which to preach his own views on the role of God in our Nation's history to the captive students in his mathematics classroom. The answer is clear: it does not."); *Busch v. Marple Newtown Sch. Dist.*, 567 F.3d 89, 99 (3d Cir. 2009), *as amended* (June 5, 2009) ("Parents of public school kindergarten students may reasonably expect their children will not become captive audiences to an adult's reading of religious texts."); *Berger v. Rensselaer Cent. Sch. Corp.*, 982 F.2d 1160, 1167 (7th Cir. 1993) (enjoining Bible distributions in public school classrooms because "children are a captive audience" and "they are most assuredly not free to get up and leave").
[11] *Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 855 (7th Cir. 2012) (en banc).
[12] *Id.* at 851.
[13] *Id.* ("Such concern was front and center in *Stone* and apparent to one degree or another in the Supreme Court's school prayer cases.").
[14] Some proponents of HB 1145 may claim that because the Supreme Court's decision in *Kennedy* abandoned the "*Lemon* test," and because *Stone* cites the "*Lemon* test," *Kennedy* overruled *Stone*. They are wrong. As a federal district court recently found, *Stone* remains good law. *Rev. Roake*, *supra* n. 2, at *38. *Kennedy* did not even mention *Stone*, let alone overrule it, and Supreme Court cases remain binding on lower courts unless and until the Supreme Court explicitly says otherwise. *See id.* at *42. Moreover, in distinguishing displays of the Ten Commandments in public schools from those in other contexts, the Supreme Court characterized *Stone* as "almost exclusive[ly] rel[ying] upon two of our school prayer cases, . . . *School Dist. of Abington Township v. Schempp*,

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each public classroom in the State."[15] The Court ruled that the statute had an impermissible objective: "to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments."[16] Again, no federal court has upheld the display of the Ten Commandments by public-school officials, regardless of the context.[17]

HB 1145 is not only unconstitutional; it is also unnecessary. Students already have broad access to religious concepts and teachings in public schools thanks to neutral social-studies and world-religion courses, school libraries, and students' existing rights to engage in religious exercise and expression. Students may, for example, voluntarily pray, read religious literature (including the Bible and the Ten Commandments), 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 with other students and student religious clubs. And, if students are allowed to wear clothing with messages, the messages may be religious.

Furthermore, HB 1136 was enacted by the Sixty-eighth Legislative Assembly providing that state or local government cannot substantially burden a person's exercise of religion or treat religious conduct more restrictively than any secular conduct, which should afford individual students' rights to learn in a classroom without being subjected to state endorsed religious teaching.[18]

There is a stark difference between voluntary, student-initiated religious exercise and expression and school-sponsored religious messages imposed on captive students day in and day out. Both the Establishment Clause and the Free Exercise Clause prohibit the latter.[19] The constitutional violations that would occur under HB 1145 would be particularly

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374 U.S. 203 (1963), and *Engel v. Vitale*, 370 U.S. 421 (1962)" and explained that *Stone* "stands as an example of the fact that we have "been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools."
Van Orden v. Perry, 545 U.S. 677, 690–91 (2005) (cleaned up).

[15] *Stone*, 449 U.S. at 39 (1980).

[16] *Id.* at 42.

[17] *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 Cnty.*, 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); *Ring v. Grand Forks Pub. Sch. Dist. No. 1,* 483 F. Supp. 272, 275 (D.N.D. 1980) (striking down North Dakota law that required public schools to display the Ten Commandments in classrooms); *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).

[18] North Dakota Century Code 14-02.4-08.1

[19] *Rev. Roake*, *supra* n. 2, at *65*75.

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egregious because the bill seeks to leverage the captive nature of students' presence to increase the likelihood of religious indoctrination by making the display prominent and ubiquitous throughout buildings and across campuses. Under the bill, the Ten Commandments must be at least 11 inches wide and 14 inches tall, "the central focus of the poster or framed document," and "printed in a large, easily readable font" with a prescribed text based on the King James Version of the Bible.

The Framers of the Constitution would not approve. The First Amendment was inspired by their belief 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. They also believed that, when the government shows favoritism for one set of religious beliefs, it creates the type of religious divisiveness that tears apart communities. HB 1145 would do just that.

Moreover, state law already permits School Boards to authorize schools within a school district to display the Ten Commandments as part of a display of other historical documents in school buildings, including classrooms.[20] A mandated display is, again, unnecessary and wears away at ability of school boards' local decision-making authority in individual communities.

North Dakota's public schools serve families who practice a rich diversity of religions, as well as many families who do not practice any faith. These families "entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family."[21] HB 1145 is an alarming betrayal of that trust and will prevent schools from providing an equal education to all students, regardless of faith.

The ACLU of North Dakota urges the House Judiciary Committee give a Do Not Pass recommendation for HB 1145.

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[20] North Dakota Century Code 15.1-09-33.35
[21] *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987).