



January 14, 2025

Chairman Klemin, Vice-Chair Karls, and esteemed members of the House Judiciary Committee, thank you for the opportunity to submit written testimony in support of HB 1145. This bill would ensure a copy of the Ten Commandments is posted in every classroom in the North Dakota Public School system. The posting of the Decalogue in schools has generated much debate the last few years, so on behalf of First Liberty Institute, I wanted to explain our constitutional analysis in regards to HB 1145.

By way of introduction, First Liberty Institute is the largest legal organization in the nation dedicated exclusively to defending religious liberty for all Americans. In short, we posit that under new U.S. Supreme Court precedents, such as *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507 (2022), the U.S. Supreme Court will likely find that Ten Commandments posters in schools are constitutional. (As a side note, the “Kennedy” in the Kennedy case mentioned above was our client, Coach Joe Kennedy. We were honored to advocate for his constitutional rights all the way up to the Supreme Court. And we were thrilled to have those rights vindicated in the above-referenced opinion from the highest court in the land.)

### **The U.S. Supreme Court’s Previous Rulings on the Ten Commandments**

Over the past fifty years, the U.S. Supreme Court has issued conflicting rulings regarding government displays of the Ten Commandments. Since 1971, the Court has often evaluated the constitutionality of public religious displays under *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In *Lemon*, the U.S. Supreme Court misinterpreted the

Establishment Clause to find that any government action that did not have a wholly secular purpose, that advanced religion in any way, or that even hinted at government “entanglement” with, or endorsement of, religion was unconstitutional. *Id.* at 612-13. The convoluted three-part Lemon test has led to unpredictable legal outcomes, especially in Ten Commandments cases. In 2005, the U.S. Supreme Court upheld a six-foot, multi-ton granite Ten Commandments monument located on the grounds of the Texas state Capitol (*Van Orden v. Perry*, 545 U.S. 677 (2005)). In this case, the Court ignored the Lemon test, arguing that it was not useful in dealing with passive displays like the Texas monument. *Id.* at 677-68. However, on the same day, the Court ruled that a paper display of the Ten Commandments in a Kentucky courthouse was unconstitutional under Lemon. *McCreary County v. ACLU*, 545 U.S. 844 (2005). The divergent outcome of these two cases can be attributed to Justice Breyer, who appeared to seek a middle ground by casting one vote in favor of Ten Commandments displays and one vote against them on the same day. In 1980, the U.S. Supreme Court relied solely on Lemon to issue a narrow, 5-4 opinion prohibiting Kentucky schools from displaying the Ten Commandments. The opinion, *Stone v. Graham*, 449 U.S. 39 (1980), listed no author and was a mere two pages long.

### **A Transformative Shift in Establishment Clause Interpretation**

After five decades of flawed Establishment Clause rulings under Lemon, a major change occurred in the legal landscape through the U.S. Supreme Court’s decisions in *American Legion v. American Humanist Association*, 139 S.Ct. 2067 (2019) and *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507 (2022). (As another side note, the *American Legion* was also a First Liberty Institute client)

In *American Legion*, the Supreme Court held that a one-hundred-year-old veterans memorial, shaped like a cross and displayed on government land, was constitutional. 139 S.Ct. at 2089. The Court stated that Lemon’s three-part framework for Establishment Clause cases was unwieldy and unhelpful, having been “harshly criticized by Members of this Court, lamented by lower court judges, and questioned by a diverse roster of scholars.” *Id.* at 2081. As a result, the Court had repeatedly either “expressly declined to apply the [Lemon] test or has simply ignored it.” *Id.* at 2080. In *American Legion*, the Court overruled Lemon in the context of longstanding monuments, symbols, and practices, opting to measure the constitutionality of such items by assessing their consistency with America’s history and tradition. *Id.* at 2081-82, 2089.

In *Kennedy*, high school football coach Joe Kennedy was fired for kneeling and offering a brief, silent prayer after football games. After years of legal battles, the U.S. Supreme Court not only upheld Coach Kennedy’s constitutional right to pray but overturned the longstanding Lemon test in its entirety. *Id.* at 510. In *Kennedy*, the Court held that courts must measure the constitutionality of government activity under the Establishment Clause through a history and tradition test. *Id.*

Under *American Legion* and *Kennedy*, federal courts must now look to historical practices and understandings – not Lemon – when assessing the constitutionality of public religious displays, including Ten Commandments posters in educational settings.

## **The Constitutionality of Ten Commandments Posters in Schools Today**

From the Stone decision in 1980 until June 2024, no state required the Ten Commandments to be displayed in schools. In that June month, Louisiana enacted HB 71 to require the display of Ten Commandments posters in elementary, secondary, and postsecondary schools. That policy is currently in litigation in federal court. We have every confidence the Fifth Circuit Court of Appeals (of which the state of Louisiana is part of) will uphold the Louisiana law. Since *Stone v. Graham* was decided under *Lemon* and since *Lemon* was overturned, *Stone v. Graham* is no longer a valid test of the constitutionality of Ten Commandments posters in educational settings. Federal courts must now assess such displays under the history and tradition test established in *American Legion* and *Kennedy*. The constitutionality of Ten Commandments posters in educational settings is not yet settled law. Courts in varied jurisdictions may come to different conclusions on this issue. But the United States has a rich history of presenting the Ten Commandments in educational settings. (More documentation on this point can be provided if desired)

For this reason, the U.S. Supreme Court, employing a history and tradition test, has a clear pathway to find that Ten Commandments posters in schools are constitutional.

### **Conclusion**

Recent U.S. Supreme Court decisions, such as *Kennedy* and *American Legion*, have shifted the legal framework for assessing public religious displays. Under a history

and tradition test, the U.S. Supreme Court will likely find that Ten Commandments posters in educational settings are constitutional.

Thank you again to this committee for the opportunity to submit this testimony. First Liberty Institute is ready and willing to answer any other questions the committee might have regarding the constitutionality of HB 1145. First Liberty Institute applauds Rep. Hoverson for bringing this bill forward and several of his colleagues for showing early support for the policy. We look forward to its passage and implementation in this great state.

God bless,

A handwritten signature in black ink that reads "Matt Krause". The signature is written in a cursive, flowing style.

Matt Krause  
Of Counsel