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SB 2308
Testimony of Amy De Kok
Senate Judiciary
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Madame Chair Larson and members of the Senate Judiciary committee, my name is Amy De Kok. I am in-house legal counsel for the North Dakota School Boards Association. NDSBA represents all 178 North Dakota public school districts and their boards. I am here today in opposition to SB 2308.

Display of the Ten Commandments on School Property

SB 2308 seeks to add to the delineated powers of a public school board set forth in NDCC § 15.1-09-33. The first addition would allow a school board to permit the display of the Ten Commandments in the school and in a classroom. NDSBA opposes SB 2308 because it would cause public school districts to violate the Establishment Clause of the First Amendment of the U.S. Constitution and likely subject them to costly litigation and legal challenges. The Establishment Clause is central to the analysis of cases addressing religious instruction or materials in the public schools. It states that "…Congress shall make no law Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…." The Establishment Clause has formed the basis for numerous challenges to school postings of the Ten Commandments, as well as Pledge of Allegiance recitation requirements.

The U.S. Supreme Court directly addressed the posting of the Ten Commandments in public schools in the 1980 case entitled *Stone v. Graham*. In that case, a Kentucky statute required the Ten Commandments to be posted in public school classrooms was challenged as violative of the Establishment Clause of the First Amendment. The statute required the postings to be supported by private contributions, to measure 16 inches by 20 inches, and to include language "in small print" indicating that "the secular purpose of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." In analyzing the constitutionality of the statute, the Court applied the *Lemon* test, first articulated by the Court in 1971 to resolve questions of religious instruction or materials in public schools. Although subsequently revised and refined, the substance of the *Lemon* test remains intact: to pass constitutional muster, the activity in question must: (i) have a secular purpose; (ii) not have the primary effect of either advancing or inhibiting religion; and (iii) not foster excessive governmental entanglement.

Relying on the *Lemon* test, the Court in *Stone v. Graham* found that the statute failed the first prong—that of secular purpose. Specifically rejecting the contention that the "small print" affirmed the postings' secular purpose, the Court stated that the Ten Commandments is "undeniably a sacred text" that is not limited to secular matters. In its reasoning, the Court focused on the nature of the first of the commandments, which address humanity's relationship with—and duties owed to—God. According to the Court, te pre-eminent purpose for the posting was plainly religious.

Interestingly, also in 1980, a 1927 **North Dakota statute was invalidated on a similar basis**. The 1927 North Dakota statute directed local school boards as well as public institutions of higher education to "cause a placard containing the ten commandments of the Christian religion to be displayed in a conspicuous place in every schoolroom, classroom, or other place where classes convene for instruction." The federal district court in that case, as in *Stone*, relied on the *Lemon* test to strike down the challenged statute and found "not even a pretense of a secular purpose in the statute…." The court determined that the statute failed no only the first prong of the *Lemon* test, but also the second prong – that the activity not advance religion.

This issue came before the U.S. Supreme Court again in 2005 in *McCreary v. ACLU of Kentucky*. In that case, the Court analyzed the constitutionality of a gold-framed display of the Ten Commandments in county courthouses, which had been subsequently modified to include other documents, such as the Declaration of Independence, in smaller frames each having a religious theme or element. The Court applied the *Lemon* test and found that the posting's initial solo display especially compelling. While the Court recognized the Ten Commandments have indeed influenced influence civil law, they found that they nonetheless convey a religious statement when displayed alone, in the manner of the original courtroom postings. Only when challenged by legal action did the counties modify the displays, and the modifications themselves highlighted religious themes and included a resolution indicating that the new companion postings must feature Christian references. The Court re-emphasized the need for governmental neutrality in religious matters and concluded that the predominantly religious purpose of the display did not pass constitutional muster.

It is clear that if SB 2308 were to pass and were challenged (as it almost certainly would be), it would suffer the same fate as the handful (or more) of state statutes directed at the same goal. State statutes cannot authorize displays that the U.S. Constitution already forbids. For this reason, NDSBA opposes SB 2308.

Recitation of the Pledge of Allegiance

SB 2308 also seeks to add the power of a school board to permit students to recite the Pledge of Allegiance. NDSBA opposes the bill in this regard because it is unnecessary as students are already permitted to recite the Pledge of Allegiance at school. If SB 2308 passed, however, it could create confusion as to whether students may be forced to recite the Pledge at school. Students cannot be compelled to participate in the

pledge. This has been true since 1943, when the U.S. Supreme Court ruled in the case of *West Virginia State Board of Education v. Barnette* that students could not be forced to salute the US flag or say the pledge because doing so would violate their First Amendment rights.

Based on the foregoing reasons, NDSBA asks the committee to issue a do not pass recommendation on SB 2308. Thank you for your time.