

**2021 SENATE JUDICIARY**

**SB 2308**

# 2021 SENATE STANDING COMMITTEE MINUTES

## Judiciary Committee Peace Garden Room, State Capitol

SB 2308  
2/2/2021

A BILL for an Act to create and enact a new section to chapter 15.1-09 and two new subsections to section 15.1-09-33 of the North Dakota Century Code, relating to school board authority regarding the posting of the ten commandments and the recitation of the pledge of allegiance.

Chairwoman Larson calls the meeting to order all Senators are present: Myrdal, Luick, Dwyer, Bakke, Fors, Heitkamp [9:00]

### Discussion Topics:

- First amendment rights relating to school districts
- Freedom of assembly in regards to individual political subdivisions

**Senator Janne Myrdal**- District 10 [9:00]  
Introduced the bill and provided oral testimony

**Mark Jorritsma**- Family Policy Alliance [9:08]  
Testified in favor #4703

**Karen Two-eagles** [9:13]  
Testimony in opposition

**Senator Luick** moved to DO PASS [9:27]  
**Senator Heitkamp** seconded the motion [9:27]

DO PASS Vote on SB 2038	Vote
Senator Diane Larson	Y
Senator Michael Dwyer	Y
Senator JoNell A. Bakke	N
Senator Robert O. Fors	Y
Senator Jason G. Heitkamp	Y
Senator Larry Luick	Y
Senator Janne Myrdal	Y

Vote Passes 6-1-0  
**Senator Larson** will carry

### Additional written testimony:

**Alida Arengard**- Watford City  
Provided Written Testimony in favor #4825

**Amy De Kok-** North Dakota School Boards Association  
Provided Written Testimony in opposition #4809

**Amber Vibeto-** Minot, North Dakota  
Provided Written Testimony in favor #4800

**Murray Sagsveen-** Bismarck, ND  
Provided Written Testimony in opposition #4774

**Nikolas Nartowicz-** Americans United for Separation of Church and State  
Provided Written Testimony in opposition #4711

**Aimee Copas-** NDCEL  
Provided Testimony in opposition #4700

**Alison Gil-** American Atheists  
Provided Testimony in opposition #4640

**Elizabeth Skarin-** ND ACLU  
Provided Testimony in opposition #4636

Meeting Adjourned at 9:30

*Jamal Omar, Committee Clerk*

**REPORT OF STANDING COMMITTEE**

**SB 2308: Judiciary Committee (Sen. Larson, Chairman)** recommends **DO PASS** (6 YEAS, 1 NAY, 0 ABSENT AND NOT VOTING). SB 2308 was placed on the Eleventh order on the calendar.

## Testimony in Support of Senate Bill 2308

Mark Jorritsma, Executive Director  
Family Policy Alliance of North Dakota  
February 2, 2021

Good morning Chairman Larson and members of the Senate Judiciary Committee. My name is Mark Jorritsma and I am the Executive Director of Family Policy Alliance of North Dakota. I am testifying in support of Senate Bill 2308 and respectfully request that you render a "DO PASS" on this bill.

### Foundation of our Country

Our nation was founded on Judeo-Christian beliefs. There are those who, in today's "socially enlightened" portion of society, claim otherwise. However, all one has to do is read the foundational documents such as the Declaration of Independence or the Federalist Papers to see the truth of this. The following quotes from some of our founding fathers help lay that argument to rest.

*The general principles on which the fathers achieved independence were the general principles of Christianity. I will avow that I then believed, and now believe, that those general principles of Christianity are as eternal and immutable as the existence and attributes of God.*  
— John Adams<sup>1</sup>

*In the chain of human events, the birthday of the nation is indissolubly linked with the birthday of the Savior. The Declaration of Independence laid the cornerstone of human government upon the first precepts of Christianity.* — John Quincy Adams.<sup>2</sup>

*Had the people, during the Revolution, had a suspicion of any attempt to war against Christianity, that Revolution would have been strangled in its cradle... In this age, there can be no substitute for Christianity... That was the religion of the founders of the republic and they expected it to remain the religion of their descendants.* — Congress, U. S. House Judiciary Committee, 1854.<sup>3</sup>

*[O]ur citizens should early understand that the genuine source of correct republican principles is the Bible, particularly the New Testament, or the Christian religion.* — Noah Webster.<sup>4</sup>

...and the list could go on almost indefinitely. Clearly this country was founded upon Christian principles and I would assert that these principles are critical to continued functioning, success, and preservation of the United States into the future.

## Ten Commandments

It is clear from biblical scholars and even the casual observer, that the Ten Commandments form the “map for living” for a country founded on Christian principles. However, more than that, they provide a blueprint for civil society, which forms the important underpinnings of our country. The family and private sphere that compose civil society are critical to establish moral foundations for our society.

To the extent that our country arose from a Judeo-Christian basis and to the extent the Ten Commandments embody the resulting moral principles for living, they should be first and foremost in the minds of our citizens. To do this, posting them as a reminder is a concrete way of honoring them and the nation that sprang from them.

Perhaps more importantly, this bill would authorize the posting of the Ten Commandments in schools that teach our children – children who will need to protect the principles and be moral compass of our country into the future. They must be made aware of the importance of the Ten Commandments in our country’s formation and, indeed, for its continued survival. This has never been more necessary than today, with the rise of social relativism.

## Pledge of Allegiance

I’m sure most if not all of us in this room remember growing up reciting the Pledge of Allegiance at the beginning of every school day. It meant that we were proud to be Americans, proud to stand in the footsteps of those who fought and died to make our country what it was today, and committed to fight for the freedoms it represented. I’m afraid that in our current culture, that is often lost or even viewed with contempt.

The Pledge of Allegiance to the United States flag is a promise or oath of loyalty to the Republic of United States of America. Family Policy Alliance of North Dakota believes that recitation of the Pledge of Allegiance is an important reminder and reinforcement upon the next generation that being committed to the country matters. Are we proud of everything in our country’s history? Certainly not. But we still love her and need to show the respect she deserves. Reciting the Pledge of Allegiance is one important and concrete way of doing that and passing that legacy on to our children and grandchildren.

For these reasons and for the significance of the Ten Commandments and Pledge of Allegiance in the life of our country, I respectfully ask you to vote Senate Bill 2308 out of committee with a “DO PASS” recommendation.

I would now be happy to stand for any questions.

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<sup>1</sup> Thomas Jefferson, *The Writings of Thomas Jefferson* (Washington D. C.: The Thomas Jefferson Memorial Association, 1904), Vol. XIII, p. 292-294. In a letter from John Adams to Thomas Jefferson on June 28, 1813.

<sup>2</sup> John Quincy Adams, *An Oration Delivered Before the Inhabitants of the Town of Newburyport at Their Request on the Sixty-First Anniversary of the Declaration of Independence, July 4, 1837* (Newburyport: Charles Whipple, 1837), pp. 5-6.

<sup>3</sup> *Reports of Committees of the House of Representatives Made During the First Session of the Thirty-Third Congress* (Washington: A. O. P. Nicholson, 1854), pp. 6-9.

<sup>4</sup> Noah Webster, *History of the United States* (New Haven: Durrie and Peck, 1832), p. 6.

Yes to SB 2308!

#4825

Dear Senate Member,

Please vote yes to SB 2308! Please allow our School Board to have the option to keep the Pledge of Allegiance as well as the Ten Commandments in our schools. These documents are incredibly unifying to us and to our students in understanding and honoring our oneness and strength that truly comes from the Lord. Thank you for your time and consideration to this matter.

Sincerely,

Alida Arnegard  
North Dakota Conservative Advocate





**NDSBA**  
NORTH DAKOTA SCHOOL  
BOARDS ASSOCIATION

P.O. Box 7128  
Bismarck ND 58507-7128  
1-800-932-8791 • (701)255-4127  
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**SB 2308**

**Testimony of Amy De Kok**

**Senate Judiciary**

**February 2, 2021**

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, the 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 not 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 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.

#4800

Dear Committee Members,

I support the right of schools to authorize posting the ten commandments and to recite the pledge of allegiance.

Please render a DO PASS out of committee for SB 2308.

Thank you for your leadership and service to our state.

Sincerely,

Amber Vibeto  
Minot, District 3  
701-340-6378  
amvibeto@gmail.com

**Senate Judiciary Committee  
Testimony of Murray G. Sagsveen on Senate Bill 2308**

In 1927, North Dakota mandated the posting of the Ten Commandments in public schools (S.L. 1927, Chap. 247). That law was later amended and codified as N.D.C.C. § 15-47-10:

The school board of every school district, and the president of every institution of higher education in the state which is supported by appropriations or by tax levies, shall 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 superintendent of public instruction may cause such placards to be printed and may charge an amount therefor that will cover the cost of printing and distribution.

In 1979, Benjamin Ring and others sued the Grand Forks Public School District No. 1 seeking declaratory and injunctive relief against the operation and enforcement of this law.

The U.S. District Court, Chief Judge Paul Benson president, conducted a hearing on December 11, 1979, on the parties' cross motions for summary judgment. Following the hearing, the court entered an order that stated, in part: "IT IS FURTHER ORDERED judgment be entered declaring North Dakota Century Code § 15-47-10 to be a violation of the First and Fourteen Amendments to the Constitution of the United States." *Ring v. Grand Forks Public Sch. Dist. No. 1*, 483 F. Supp. 272 (D.N.D. 1980).

I represented the State of North Dakota in that action and attended the December 1979 hearing.

The U.S. Supreme Court has subsequently addressed this and other similar issues in other cases. See, for example, *Stone v. Graham*, 449 U.S. 39 (1980); *McCreary County v. ACLA of Kentucky*, 545 U.S. 844 (2005); *Van Orden v. Perry*, 545 U.S. 677 (2005); and *Pleasant Grove City v. Sumnum*, 555 U.S. 460 (2009).

It is my recommendation that this committee vote a "do not pass" recommendation concerning this bill.

Murray G. Sagsveen  
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February 1, 2021

The Honorable Diane Larson  
Chair  
Judiciary Committee  
North Dakota Senate  
600 East Boulevard  
Bismarck, ND 58505

The Honorable Michael Dwyer  
Vice Chair  
Judiciary Committee  
North Dakota Senate  
600 East Boulevard  
Bismarck, ND 58505

**Re: Oppose SB 2308 – Ten Commandments Displays In Public Schools Are Unconstitutional**

Dear Chair Larson and Vice Chair Dwyer:

On behalf of the North Dakota members and supporters of Americans United for Separation of Church and State, I urge you to oppose SB 2308, which would authorize public school teachers to post the Ten Commandments in classrooms. This bill should be rejected because it is unconstitutional and will likely result in costly litigation that school districts are sure to lose.

**The U.S. Constitution Prohibits Displaying the Ten Commandments in Public Schools**

In *Stone v. Graham*, the Supreme Court held that the Ten Commandments are “undeniably a sacred text in the Jewish and Christian faiths.”<sup>1</sup> Displaying the Ten Commandments in public schools is, therefore, unconstitutional; it “serves no . . . educational function” and serves only to “induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments.”<sup>2</sup> SB 2308 would encourage public schools to defy this clear constitutional command and violate the religious freedom of their students, teachers, and school employees. And North Dakota taxpayers will be forced to foot the bill for the inevitable federal lawsuits that the schools will undoubtedly lose.<sup>3</sup>

**Authorizing Placement of the Ten Commandments Would Be Divisive and Unwise**

Our public schools should respect the religious freedom of all students and all school employees, not just those who follow a particular religion. No one should ever be made to feel unwelcome at school because of their or their families’ faith or because they are

<sup>1</sup> 449 U.S. 39, 41 (1980) (per curiam); see also *Prescott v. Oklahoma Capitol Preservation Com’n*, 2015 OK 54, 373 P.3d 1032, at 1034 (“[T]he Ten Commandments are obviously religious in nature and are an integral part of the Jewish and Christian faiths”); *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 868 (2005) (The Ten Commandments are “a central point of reference in the religious and moral history of Jews and Christians” and “unmistakably rest . . . on the sanction of . . . divinity” and proclaim the existence of god and regulate details of religious obligation).

<sup>2</sup> *Stone*, 449 U.S. at 42.

<sup>3</sup> For example, in *Glassroth v. Moore*, the case holding Roy Moore’s Ten Commandments monument in the Alabama Supreme Court unconstitutional, defendants paid around \$850,000 to the plaintiffs for attorneys’ fees.

nonreligious.<sup>4</sup> Displaying the Ten Commandments, which is sacred only to people of certain religions, however, sends the message to some that they “are outsiders, not full members of the . . . community, and an accompanying message to [only certain] adherents that they are insiders, favored members of the . . . community.”<sup>5</sup>

The Ten Commandments, for example, hold no religious meaning for Muslims, Hindus, Buddhists, Sikhs, or the many North Dakota students who practice other religions or no religion at all. Even adherents to the Ten Commandments have significant disagreements about their text and meaning. The disagreements lie not only among Jews and Christians, but also among Catholics, Lutherans, and other Protestants. Picking any version of the text to display, therefore, necessarily takes a position on a theological debate.

Posting the Ten Commandments, therefore, is divisive and disrespectful of the religious diversity of the students in North Dakota.

### **Government Postings of the Ten Commandments Trivialize and Harm Religion**

Although some may try to claim that posting the Ten Commandments in public schools honors religion, it actually harms religion. The Ten Commandments are a revered religious code. Jews and Christians believe that the Ten Commandments were “inscribed by the finger of God” and represent a covenant between God and his people. Describing and treating the creed as a secular code demeans and trivializes the Commandments.

Perhaps even worse, the bill represents another example of using religion for political gain and purposes. Although passage might be politically expedient, it harms religion, making it yet another pawn in the political process. This is exactly the type of behavior that our Founders tried to prevent when they drafted the Establishment Clause.

### **Conclusion**

Posting the Ten Commandments in public schools is unconstitutional, divisive, and harmful to religion. I urge you to protect religious freedom for all North Dakotans by opposing SB 2308.

Sincerely,



Nikolas Nartowicz  
State Policy Counsel

cc: Members of the Senate Judiciary Committee

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<sup>4</sup> See *Van Orden v. Perry*, 545 U.S. 677, 703 (2005) (controlling concurring opinion of Breyer, J.).

<sup>5</sup> *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309-10 (2000) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)).



#4700

**SB2308 – Authority for 10 Commandments/Pledge in School**

**NDCEL Written Testimony in Opposition**

Chairwoman Larson and members of the Senate Judiciary Committee, for the record my name is Dr. Aimee Copas, serving as the Executive Director for the North Dakota Council of Educational Leaders (NDCEL) representing all school administrators, directors, and leaders in North Dakota.

We are here today to discuss concern we have with SB 2308. Please allow me to address the easy issue between the two – the Pledge of Allegiance. I will address this to put your minds and hearts at ease. There is nothing in law that prohibits our schools from reciting the pledge. In fact, most of our schools in North Dakota still do this on a regular basis at least in our elementary schools. Hence, it is unnecessary to include that permissiveness in North Dakota.

However, as we move the conversation over to the allowing boards the authority to add the Ten Commandments it becomes a little more complicated. During my research on the constitutionality of this authority or doing this in practice, I discovered that a near replica of this bill was offered as a bill in Texas (HB309) in 2019. A constitutional attorney testified at this hearing and ultimately this sister bill was killed in the Texas House of Representatives. What I am going to share with you are portions of his rationale when he recommended a do not pass. The Texas bill had even more flexibility in that the board of a school would not prevent copies of the 10 commandments from being hung. According to this attorney allowing authority to post (or disallowing a district from prohibiting it) can be seen as unconstitutional.

Excerpt from the constitutional attorney: *Exhibiting the Ten Commandments, which begin “I am the Lord your God . . . you shall have no other gods before me,” in public schools violates the First Amendment. The Supreme Court settled this back in 1980, stating that the “pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature” and is “therefore, unconstitutional.”*

*Displaying the decalogue in public schools violates the First Amendment, and so do many of the commandments themselves. The injunctions “I am the Lord your God” and “Have no other gods before me” infringe the core constitutional principle of religious freedom. “Don’t take the Lord’s name in vain” breaches the First Amendment’s protection of free speech, as does the command not to make or worship images or idols.*

The attorney references more examples, but the above two paragraphs encapsulate enough information to establish unconstitutionality. We therefore ask that you follow your legislative peers in Texas and also recommend a Do-Not-Pass of SB 2308.

*NDCEL is the strongest unifying voice representing and supporting administrators and educational leaders in pursuit of quality education for all students in North Dakota.*

*Executive Director: Aimee Copas-----Assistant Director: Russ Ziegler*





# AMERICAN ATHEISTS

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February 1, 2021

The Honorable Sen. Diane Larson  
Chairperson, North Dakota Senate Judiciary Committee  
600 E Boulevard Ave.  
Fort Lincoln Room  
Bismarck, ND 58505

**Re: OPPOSE SB 2308; Posting of “Ten Commandments” displays in public school classrooms, undermining students’ freedom of religion**

Dear Chairperson Larson and Members of the Senate Judiciary Committee:

American Atheists, on behalf of its constituents in North Dakota, writes in opposition to SB 2308, a measure which seeks to authorize “Ten Commandments” displays to be posted in schools and classrooms. “Ten Commandments,” while not defined in the legislation, refers to a set of biblical principles relating to ethics and worship that play a fundamental role in two religions: Judaism and Christianity. This bill is exclusionary and divisive, and most importantly, it represents a direct attack on the religious freedom of North Dakota students. We strongly urge you to reject this unconstitutional measure.

American Atheists is a national civil rights organization that works to achieve religious equality for all Americans by protecting what Thomas Jefferson called the “wall of separation” between government and religion created by the First Amendment. We strive to create an environment where atheism and atheists are accepted as members of our nation’s communities and where casual bigotry against our community is seen as abhorrent and unacceptable. We promote understanding of atheists through education, outreach, and community-building and work to end the stigma associated with being an atheist in America. As advocates for the historical principle of religious freedom, American Atheists believes that no one should be coercively subjected to religious viewpoints by the government.

Authorizing placement of this religious text into public school classrooms undermines students’ constitutionally protected freedom of religion. The U.S. Constitution does not allow North Dakota taxpayer funded schools to legally post Ten Commandments displays in classrooms unless there is an educational reason for doing so. Lacking such an educational context, these displays violate the Establishment Clause, which states that “Congress shall make no law respecting the establishment of religion.” The U.S. Supreme Court has clarified that laws authorizing such displays have “no secular legislative purpose” and are “plainly religious in nature,” and so they are not allowable in public schools.<sup>1</sup>

SB 2308 is no different. The bill does nothing to ensure that these displays are intended to fulfil appropriate secular purposes. In fact, the bill promotes violations of the First Amendment, and the religious freedom of students, by shielding school districts and staff from liability for their knowingly

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<sup>1</sup> *Stone v. Graham*, 449 U.S. 39 (1980).

unconstitutional actions. This removal of liability is, of course, invalid because it directly conflicts with federal law, providing that:

“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”<sup>2</sup>

Public schools in North Dakota would be ill-advised to follow the lead of the legislature in this regard.

Further, these displays are religiously coercive in that they promote certain religious perspectives with apparent state approval. Asserting a particular set of religious beliefs in classrooms this way is exclusionary and unfair. Students and teachers have a variety of beliefs -- Christian, Jewish, Muslim, Buddhist, and atheist, to name a just a few. SB 2308 will set the stage for bullying and harassment against students with differing beliefs.

This bill is especially exclusionary toward the growing number of North Dakotans that do not identify with any religion. Currently, about 23% of adults in the US are religiously unaffiliated, and atheists and agnostics make up about 7% of the total population.<sup>3</sup> In North Dakota, 20% of the population has no religious affiliation.<sup>4</sup> The North Dakota Legislative Assembly should not marginalize this sizeable and growing population by purposefully inserting exclusionary messages into public school classrooms that are meant to serve all the people of North Dakota.

SB 2308 undermines religious freedom for North Dakota students by inserting specific religious beliefs into the classroom that serve no educational purpose. This wasteful bill will certainly result in additional liability for school districts. We strongly urge you to reject this unconstitutional legislation. If you should have any questions regarding American Atheists' opposition to SB 2308, please contact me at 908.276.7300 x309 or by email at [agill@atheists.org](mailto:agill@atheists.org).

Very truly yours,



Alison Gill, Esq.

Vice President, Legal & Policy

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<sup>2</sup> 42 U.S.C. § 1983.

<sup>3</sup> Pew Research Center. A Closer Look at America's Rapidly Growing Religious 'Nones' by Michael Lipka, 2015. Available at: <http://www.pewresearch.org/fact-tank/2015/05/13/a-closer-look-at-americas-rapidly-growing-religious-nones/>.

<sup>4</sup> Pew Research Center. Religious Composition of Adults in North Dakota. Available at: <https://www.pewforum.org/religious-landscape-study/state/north-dakota/>.

February 2, 2021

Dear Chairwoman Larson and Members of the Senate Judiciary Committee:



P.O. Box 1190  
 Fargo, ND 58107  
[aclund.org](http://aclund.org)

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.”<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup>

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

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<sup>1</sup> *Stone v. Graham*, 449 U.S. 39, 41 (1980).

<sup>2</sup> 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.

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

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.”<sup>4</sup>

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.<sup>5</sup> Indeed, no federal court has ever upheld the display of the Ten Commandments by public-school officials.<sup>6</sup>

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.<sup>7</sup> This exclusionary message would be divisive and constitutionally impermissible.<sup>8</sup> 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.<sup>9</sup> 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,



Elizabeth Skarin  
Campaigns Director  
ACLU of North Dakota  
northdakota@aclu.org

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<sup>4</sup> *Stone*, 449 U.S. at 42.

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

<sup>6</sup> 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).

<sup>7</sup> 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).

<sup>8</sup> *Id.*

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



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**2021 HOUSE JUDICIARY**

**SB 2308**

# 2021 HOUSE STANDING COMMITTEE MINUTES

## Judiciary

Room JW327B, State Capitol

SB 2308

3/24/2021

Relating to school board authority regarding the posting of the ten commandments and the recitation of the pledge of allegiance.

**Chairman Klemin** called the hearing at 8:30 AM.

Present: Representatives Klemin, Karls, Becker, Buffalo, Cory, K Hanson, Jones, Magrum, Paulson, Paur, Roers Jones, Satrom, and Vetter. Absent: Christensen

### Discussion Topics:

- Prayer
- Mandates
- Fiscal note

**Senator Myrdal:** Introduced the bill.

**Linda Thorson, State Director for Concerned Women of America:** Testimony #10504

**Mark Jorritisma, Executive Director, Family Policy of Alliance of ND:** Testimony #10556  
8:50

**Alexis Baxley, Executive Director, NDSBA:** Testimony #10633 9:00

**Dr. Aimee Copas, NDCEL Executive Director:** Testimony # 10600 9:18

**Murray Sagsveen; Sagsveen Law Firm:** Testimony # 10598

**Chairman Klemin** closed the hearing at 9:40.

**Chairman Klemin** reopened meeting at 11:49.

**Rep. B. Paulson:** Motion to adopt amendment 21.0952.02001

**Rep. Vetter:** Seconded

**Voice vote carried**

**Rep. Satrom:** Do Pass as Amended

**Rep. Christensen:** Seconded

Roll call vote:

<b>Representatives</b>	<b>Vote</b>
Chairman Klemin	Y
Vice Chairman Karls	Y
Rep Becker	Y
Rep. Christensen	Y
Rep. Cory	Y
Rep T. Jones	Y
Rep Magrum	Y
Rep Paulson	Y
Rep Paur	Y
Rep Roers Jones	N
Rep B. Satrom	Y
Rep Vetter	Y
Rep Buffalo	N
Rep K. Hanson	N

**Motion carried. 11-3-0 Bill Carrier: Rep. T. Jones**

**Additional written testimony:** 10294, 10491, 10552, 10601

Stopped 12:00

DeLores D. Shimek  
Committee Clerk

March 24, 2021

DA 3/27/21  
1 of 1

PROPOSED AMENDMENTS TO SENATE BILL NO. 2308

Page 1, line 3, replace "posting" with "displaying"

Page 1, line 8, replace "post a copy of" with "display"

Page 1, line 8, after "commandments" insert "with a display of other historical documents"

Page 1, line 19, replace "post" with "display"

Renumber accordingly



**REPORT OF STANDING COMMITTEE**

**SB 2308: Judiciary Committee (Rep. Klemin, Chairman)** recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (11 YEAS, 3 NAYS, 0 ABSENT AND NOT VOTING). SB 2308 was placed on the Sixth order on the calendar.

Page 1, line 3, replace "posting" with "displaying"

Page 1, line 8, replace "post a copy of" with "display"

Page 1, line 8, after "commandments" insert "with a display of other historical documents"

Page 1, line 19, replace "post" with "display"

Renumber accordingly

CONCERNED  
WOMEN *for* AMERICA  
LEGISLATIVE ACTION COMMITTEE

March 24, 2021  
House Judiciary Committee  
Testimony in Support of SB 2308

Chairman Klemin and members of the House Judiciary Committee, I am Linda Thorson, State Director for Concerned Women for America of North Dakota, testifying for Concerned Women for America Legislative Action Committee. I am here today on behalf of our North Dakota members in support of SB 2308.

Concerned Women for America, the state's largest public policy woman's organization, has as its mission to protect and promote Biblical values and Constitutional principles through prayer, education, and advocacy. We strongly support the provisions in SB 2308; it meets our goal of providing quality education to a level of excellence in academic achievement. Enabling schools to post a copy of the Ten Commandments in their building and in a classroom and permitting students to recite the Pledge of Allegiance enhances a student's education and is beneficial to communities and the state.

I will address the portion of the bill allowing schools to post the Ten Commandments with immunity.

Summary of the Ten Commandments:

1. You shall have no other gods before God.
2. You shall not make or worship graven images.
3. You shall not take God's name in vain.
4. Remember the Sabbath day and keep it holy.
5. Honor your father and mother.
6. You shall not murder.
7. You shall not commit adultery.
8. You shall not steal.
9. You shall not bear false witness.
10. You shall not covet.

What is the value of enabling schools to post the 10 Commandments? John Witherspoon, one of the signers of the Declaration of Independence, said it best, "The Ten Commandments are the sum of the moral law."

Firstly, education is of little value unless virtue, truth, and integrity are included as part of the learning environment. Best practices in education involve enriching a child's academic skills during a critical time of development of right and wrong.

According to [leading educational researchers](#), learning environments play a significant role in student success. Enhanced learning environments include the setting and posting of goals as well as communicating high expectations.

Comprehensive character education is "the deliberate effort to cultivate virtue."<sup>i</sup> Students spend nearly 900 hours a year in school; schools must develop [respectful environments](#) where students learn core, ethical values. The posting of the universal values found in the Ten Commandments accomplishes the educational goal of establishing comprehensive character education by fostering ethical, responsible, and good character traits.

Secondly, subjects such as early American literature and Ancient literature are vehicles for the study of high character standards through ethically rich content. They include references to the Bible and universal values.

William Bradford's journal [Of Plymouth Plantation](#) is part of the early American literature curriculum in North Dakota's high schools. Bradford's journal, which describes the Virginia company's form of government, includes multiple references to an omnipresent God and signs of God in their daily life.

In early American literature classes, high school students also study Jonathan Edwards sermon, [Sinners in the Hands of an Angry God](#), which expounds on a Bible verse from Deuteronomy 32:35, "It is mine to avenge; I will repay. In due time their foot will slip; their day of disaster is near, and their doom rushes upon them".

Early American literature also includes James Madison's essay, [The Federalist No. 10](#), a highly regarded American political writing about the ratification of the United States Constitution. Madison identifies the dispute over issues such as what religion or regime should be preferred.

High School Ancient literature students study [Odyssey](#), an ancient Greek poem of 24 books attributed to Homer. Students compare Odysseus, the Greek hero, and the parallels of Ithaca's story to the Biblical story of Moses, the Hebrew hero, and his God.

To those who object to the posting of the Ten Commandments in a public school, I ask, "Where will you stop? If you believe allowing a school to post the Ten Commandments is harmful to students, the community, and the state, are you going to censor early American literature, Ancient literature, and early American history curriculum and remove all references to the Bible?"

If so, the curriculum currently taught in North Dakota will look vastly different than it does today. Brian Stoker's 1897 gothic horror novel, [Dracula](#), and Harper Lee's [To Kill a Mocking Bird](#), both of which reference the Bible, must be removed as well as many other literature stories. Shakespeare's writings will have to be eliminated, as there are numerous religious allegories in

[Shakespeare's plays](#). Scholars like Professor [Naseeb Shaheen](#) identify three thousand places where Shakespeare used Biblical quotations in his writings.

Lastly, we should not prevent schools from posting the universal values which are posted in other public places. The [Ten Commandments are in our National Capitol](#). Outside of the U.S. Supreme Court building is Moses and the Ten Commandments. They are engraved on the two oak doors entering the Supreme Court Building and are posted inside the courtroom.

The Ten Commandments hang in our state-owned government building on the wall of the Peace Garden room in the North Dakota State Capitol.

Students should not be prohibited from the same environment the general public, judges, and lawgivers are granted. It defies logic to prohibit educational facilities from posting universal values already part of the curriculum and visible in other government-owned buildings. We fail students when moral absolutes are rejected and hidden from their environment.

Consider the importance James Madison, the fourth president, known as "The Father of Our Constitution," made of the Ten Commandments when you vote to support SB 2308,

"We have staked the whole of all our political institutions upon the capacity of mankind for self-government, upon the capacity of each and all of us to govern ourselves, to control ourselves, to sustain ourselves according to the Ten Commandments of God."

Please vote "Do Pass" on SB 2308.

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<sup>i</sup> Lickona, Thomas (2004), Character matters: How to help our children develop good judgment, integrity, and other essential virtues. New York: Touchstone



## Testimony in Support of Senate Bill 2308

Mark Jorritsma, Executive Director  
 Family Policy Alliance of North Dakota  
 March 24, 2021

Good morning Chairman Klemin and members of the House Judiciary Committee. My name is Mark Jorritsma and I am the Executive Director of Family Policy Alliance of North Dakota. I am testifying in support of Senate Bill 2308 and respectfully request that you render a "DO PASS" on this bill.

### Foundation of our Country

Our nation was founded on Judeo-Christian beliefs. There are those who, in today's "socially enlightened" portion of society, claim otherwise. However, all one has to do is read the foundational documents such as the Declaration of Independence or the Federalist Papers to see the truth of this. The following quotes from some of our founding fathers help lay that argument to rest.

*The general principles on which the fathers achieved independence were the general principles of Christianity. I will avow that I then believed, and now believe, that those general principles of Christianity are as eternal and immutable as the existence and attributes of God.*  
 – John Adams<sup>1</sup>

*In the chain of human events, the birthday of the nation is indissolubly linked with the birthday of the Savior. The Declaration of Independence laid the cornerstone of human government upon the first precepts of Christianity.* – John Quincy Adams.<sup>2</sup>

*Had the people, during the Revolution, had a suspicion of any attempt to war against Christianity, that Revolution would have been strangled in its cradle... In this age, there can be no substitute for Christianity... That was the religion of the founders of the republic and they expected it to remain the religion of their descendants.* – Congress, U. S. House Judiciary Committee, 1854.<sup>3</sup>

*[O]ur citizens should early understand that the genuine source of correct republican principles is the Bible, particularly the New Testament, or the Christian religion.* – Noah Webster.<sup>4</sup>

...and the list could go on almost indefinitely. Clearly this country was founded upon Christian principles and I would assert that these principles are critical to continued functioning, success, and preservation of the United States into the future.

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UNLEASHING CITIZENSHIP

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## Ten Commandments

It is clear from biblical scholars and even the casual observer, that the Ten Commandments form the “map for living” for a country founded on Christian principles. However, more than that, they provide a blueprint for civil society, which forms the important underpinnings of our country. The family and private sphere that compose civil society are critical to establish moral foundations for our society.

To the extent that our country arose from a Judeo-Christian basis and to the extent the Ten Commandments embody the resulting moral principles for living, they should be first and foremost in the minds of our citizens. To do this, posting them as a reminder is a concrete way of honoring them and the nation that sprang from them.

Perhaps more importantly, this bill would authorize the posting of the Ten Commandments in schools that teach our children – children who will need to protect the principles and be moral compass of our country into the future. They must be made aware of the importance of the Ten Commandments in our country’s formation and, indeed, for its continued survival. This has never been more necessary than today, with the rise of social relativism.

## Pledge of Allegiance

I’m sure most if not all of us in this room remember growing up reciting the Pledge of Allegiance at the beginning of every school day. It meant that we were proud to be Americans, proud to stand in the footsteps of those who fought and died to make our country what it was today, and committed to fight for the freedoms it represented. I’m afraid that in our current culture, that is often lost or even viewed with contempt.

The Pledge of Allegiance to the United States flag is a promise or oath of loyalty to the Republic of United States of America. Family Policy Alliance of North Dakota believes that recitation of the Pledge of Allegiance is an important reminder and reinforcement upon the next generation that being committed to the country matters. Are we proud of everything in our country’s history? Certainly not. But we still love her and need to show the respect she deserves. Reciting the Pledge of Allegiance is one important and concrete way of doing that and passing that legacy on to our children and grandchildren.

For these reasons and for the significance of the Ten Commandments and Pledge of Allegiance in the life of our country, I respectfully ask you to vote Senate Bill 2308 out of committee with a “DO PASS” recommendation.

I would now be happy to stand for any questions.

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<sup>1</sup> Thomas Jefferson, *The Writings of Thomas Jefferson* (Washington D. C.: The Thomas Jefferson Memorial Association, 1904), Vol. XIII, p. 292-294. In a letter from John Adams to Thomas Jefferson on June 28, 1813.

<sup>2</sup> John Quincy Adams, *An Oration Delivered Before the Inhabitants of the Town of Newburyport at Their Request on the Sixty-First Anniversary of the Declaration of Independence, July 4, 1837* (Newburyport: Charles Whipple, 1837), pp. 5-6.

<sup>3</sup> *Reports of Committees of the House of Representatives Made During the First Session of the Thirty-Third Congress* (Washington: A. O. P. Nicholson, 1854), pp. 6-9.

<sup>4</sup> Noah Webster, *History of the United States* (New Haven: Durrie and Peck, 1832), p. 6.



# NDSBA

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#10633

## SB 2308

### Testimony of Alexis Baxley House Judiciary Committee

March 24, 2021

Chairman Klemin and members of the House Judiciary committee, my name is Alexis Baxley. I serve as the executive director for the North Dakota School Boards Association. NDSBA represents all 175 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 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. \* Schools = gov't, clause applies

mandate  
or not

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, the 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 not 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 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.

+ Texas

If SB 2308 were to pass and were challenged, it would likely suffer the same fate as the handful 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.

liability clause- cannot be immune from federal lawsuit, schools would have to pay for defense, not state

### **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.

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



## 1 SB2308 – Authority for 10 Commandments/Pledge in School

### 2 NDCEL Written Testimony in Opposition

3 Chairwoman Klemin and members of the House Judiciary Committee, for the record my name is  
 4 Dr. Aimee Copas, serving as the Executive Director for the North Dakota Council of Educational  
 5 Leaders (NDCEL) representing all school administrators, directors, and leaders in North Dakota.

6 We are here today to discuss concern we have with SB 2308. Please allow me to address the easy  
 7 issue between the two – the Pledge of Allegiance. I will address this to put your minds and hearts  
 8 at ease. There is nothing in law that prohibits our schools from reciting the pledge. In fact, most  
 9 of our schools in North Dakota still do this on a regular basis at least in our elementary schools.  
 10 Hence, it is unnecessary to include that permissiveness in North Dakota.

11 However, as we move the conversation over to the allowing boards the authority to add the Ten  
 12 Commandments it becomes a little more complicated. During my research on the constitutionality  
 13 of this authority or doing this in practice, I discovered that a near replica of this bill was offered as  
 14 a bill in Texas (HB309) in 2019. A constitutional attorney testified at this hearing and ultimately  
 15 this sister bill was killed in the Texas House of Representatives. What I am going to share with  
 16 you are portions of his rationale when he recommended a do not pass. The Texas bill had even  
 17 more flexibility in that the board of a school would not prevent copies of the 10 commandments  
 18 from being hung. According to this attorney allowing authority to post (or disallowing a district  
 19 from prohibiting it) can be seen as unconstitutional. Even with the attempt at immunity put into  
 20 the bill, it is questionable whether that would protect a district at a circuit court level outside of  
 21 North Dakota.

22 Excerpt from the constitutional attorney: *Exhibiting the Ten Commandments, which begin “I am*  
 23 *the Lord your God . . . you shall have no other gods before me,” in public schools violates the*  
 24 *First Amendment. The Supreme Court settled this back in 1980, stating that the “pre-eminent*  
 25 *purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature”*  
 26 *and is “therefore, unconstitutional.”*

27 *Displaying the decalogue in public schools violates the First Amendment, and so do many of the*  
 28 *commandments themselves. The injunctions “I am the Lord your God” and “Have no other gods*  
 29 *before me” infringe the core constitutional principle of religious freedom. “Don’t take the*  
 30 *Lord’s name in vain” breaches the First Amendment’s protection of free speech, as does the*  
 31 *command not to make or worship images or idols.*

32 The attorney references more examples, but the above two paragraphs encapsulate enough  
 33 information to establish unconstitutionality. We therefore ask that you follow your legislative  
 34 peers in Texas and also recommend a Do-Not-Pass of SB 2308.

*NDCEL is the strongest unifying voice representing and supporting administrators and educational leaders in pursuit of quality education  
 for all students in North Dakota.*

*Executive Director: Aimee Copas-----Assistant Director: Russ Ziegler*

**House Judiciary Committee**  
**Testimony of Murray G. Sagsveen on Senate Bill 2308**  
**March 24, 2021**

In 1927, North Dakota mandated the posting of the Ten Commandments in public schools (S.L. 1927, Chap. 247). That law was later amended and codified as N.D.C.C. § 15-47-10:

The school board of every school district, and the president of every institution of higher education in the state which is supported by appropriations or by tax levies, shall 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 superintendent of public instruction may cause such placards to be printed and may charge an amount therefor that will cover the cost of printing and distribution.

In 1979, Benjamin Ring and others sued the Grand Forks Public School District No. 1 seeking relief against enforcement of this law. I defended the State of North Dakota in that action.

On December 11, 1979, the U.S. District Court, Chief Judge Paul Benson presiding, conducted a hearing on pending motions. I attended that hearing. Following the hearing, the court entered an order that stated, in part: "IT IS FURTHER ORDERED judgment be entered declaring North Dakota Century Code § 15-47-10 to be a violation of the First and Fourteen Amendments to the Constitution of the United States." *Ring v. Grand Forks Public Sch. Dist. No. 1*, 483 F. Supp. 272 (D.N.D. 1980).

The following year, the U.S. Supreme Court addressed a similar Kentucky statute that required the posting of a copy of the Ten Commandments on the wall of each public classroom in the state. *Stone v. Graham*, 449 U.S. 39 (1980). Although copies of the Ten Commandments were purchased with private funds, the Court ruled that the placement of the Ten Commandments in public classrooms violated the First Amendment.

I fear, if this bill is enacted into law, that school boards will be pressured to again post the Ten Commandments in public classrooms, a school board will yield to the pressure, a school board will be sued and certainly lose, and a school district (and the North Dakota Insurance Reserve Fund) will be paying the plaintiff large legal fees and costs. The solution: kill the bill.

It is my recommendation that this committee vote a "do not pass" recommendation concerning this bill.

Murray G. Sagsveen (representing self)  
1277 Eagle Crest Loop, Bismarck, ND 58503-8849  
[mgsagsveen@gmail.com](mailto:mgsagsveen@gmail.com) 701-426-1905

March 24, 2021

Dear Chairman Klemin and Members of the House 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.”<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup>

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

<sup>1</sup> *Stone v. Graham*, 449 U.S. 39, 41 (1980).

<sup>2</sup> 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.

<sup>3</sup> *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.”<sup>4</sup>

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.<sup>5</sup> Indeed, no federal court has ever upheld the display of the Ten Commandments by public-school officials.<sup>6</sup>

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.<sup>7</sup> This exclusionary message would be divisive and constitutionally impermissible.<sup>8</sup> 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.<sup>9</sup> 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,



Elizabeth Skarin  
Campaigns Director  
ACLU of North Dakota  
northdakota@aclu.org

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<sup>4</sup> *Stone*, 449 U.S. at 42.

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

<sup>6</sup> 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).

<sup>7</sup> 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).

<sup>8</sup> *Id.*

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



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March 22, 2021

The Honorable Lawrence Klemin  
Chair  
Judiciary Committee  
North Dakota House of Representatives  
600 East Boulevard  
Bismarck, ND 58505

The Honorable Karen Karls  
Vice Chair  
Judiciary Committee  
North Dakota House of Representatives  
600 East Boulevard  
Bismarck, ND 58505

**Re: Oppose SB 2308 – Ten Commandments Displays In Public Schools Are Unconstitutional**

Dear Chair Klemin and Vice Chair Karls:

On behalf of the North Dakota members and supporters of Americans United for Separation of Church and State, I urge you to oppose SB 2308, which would authorize public school teachers to post the Ten Commandments in classrooms. This bill should be rejected because it is unconstitutional and will likely result in costly litigation<sup>1</sup> that school districts are sure to lose.

**The U.S. Constitution Prohibits Displaying the Ten Commandments in Public Schools**

In *Stone v. Graham*, the Supreme Court held that the Ten Commandments are “undeniably a sacred text in the Jewish and Christian faiths.”<sup>2</sup> Displaying the Ten Commandments in public schools is, therefore, unconstitutional; it “serves no . . . educational function” and serves only to “induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments.”<sup>3</sup> SB 2308 would encourage public schools to defy this clear constitutional command and violate the religious freedom of their students, teachers, and school employees. And North Dakota taxpayers will be forced to foot the bill for the inevitable federal lawsuits that the schools will undoubtedly lose.<sup>4</sup>

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<sup>1</sup> Although the bill includes a provision to make school boards, districts, and officials immune from liability, the state cannot create immunity from federal lawsuits. As a result, the state would be responsible for any damages that result from the bill.

<sup>2</sup> 449 U.S. 39, 41 (1980) (per curiam); see also *Prescott v. Oklahoma Capitol Preservation Com’n*, 2015 OK 54, 373 P.3d 1032, at 1034 (“[T]he Ten Commandments are obviously religious in nature and are an integral part of the Jewish and Christian faiths”); *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 868 (2005) (The Ten Commandments are “a central point of reference in the religious and moral history of Jews and Christians” and “unmistakably rest . . . on the sanction of . . . divinity” and proclaim the existence of god and regulate details of religious obligation).

<sup>3</sup> *Stone*, 449 U.S. at 42.

<sup>4</sup> For example, in *Glassroth v. Moore*, the case holding Roy Moore’s Ten Commandments monument in the Alabama Supreme Court unconstitutional, defendants paid around \$850,000 to the plaintiffs for attorneys’ fees.

The bill sponsor has made clear that bill's purpose is to convince students to obey the Ten Commandments. During debate on the bill, Senator Myrdal said that "after we took prayer . . . and the 10 Commandments out of the public school" pregnancy and divorce rates rose and that she is "sick and tired of . . . putting band-aids on all the things we see in society that [are] so scary."<sup>5</sup> She believes displaying the 10 Commandments in public schools would fix the "murky" state of society.<sup>6</sup>

### **Authorizing Placement of the Ten Commandments Would Be Divisive and Unwise**

Our public schools should respect the religious freedom of all students and all school employees, not just those who follow a particular religion. No one should ever be made to feel unwelcome at school because of their or their families' faith or because they are nonreligious.<sup>7</sup> Displaying the Ten Commandments, which is sacred only to people of certain religions, however, sends the message to some that they "are outsiders, not full members of the . . . community, and an accompanying message to [only certain] adherents that they are insiders, favored members of the . . . community."<sup>8</sup>

The Ten Commandments, for example, hold no religious meaning for Muslims, Hindus, Buddhists, Sikhs, or the many North Dakota students who practice other religions or no religion at all. Even adherents to the Ten Commandments have significant disagreements about their text and meaning. The disagreements lie not only among Jews and Christians, but also among Catholics, Lutherans, and other Protestants. Picking any version of the text to display, therefore, necessarily takes a position on a theological debate.

Posting the Ten Commandments, therefore, is divisive and disrespectful of the religious diversity of the students in North Dakota.

### **Government Postings of the Ten Commandments Trivialize and Harm Religion**

Although some may try to claim that posting the Ten Commandments in public schools honors religion, it actually harms religion. The Ten Commandments are a revered religious code. Jews and Christians believe that the Ten Commandments were "inscribed by the finger of God" and represent a covenant between God and his people. Describing and treating the creed as a secular code demeans and trivializes the Commandments.

Perhaps even worse, the bill represents another example of using religion for political gain and purposes. Although passage might be politically expedient, it harms religion, making it yet another pawn in the political process. This is exactly the type of behavior that our Founders tried to prevent when they drafted the Establishment Clause.

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<sup>5</sup> 67th North Dakota General Assembly, [Senate Floor Session – 20th Legislative Day](#), 1:33:35-1:34:10, Feb. 3, 2020.

<sup>6</sup> *Id.* at 1:46:50-1:47:07.

<sup>7</sup> See *Van Orden v. Perry*, 545 U.S. 677, 703 (2005) (controlling concurring opinion of Breyer, J.).

<sup>8</sup> *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309-10 (2000) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)).



**Conclusion**

Posting the Ten Commandments in public schools is unconstitutional, divisive, and harmful to religion. I urge you to protect religious freedom for all North Dakotans by opposing SB 2308.

Sincerely,

A handwritten signature in dark ink, appearing to read "Nikolas Nartowicz", with a long horizontal flourish extending to the right.

Nikolas Nartowicz  
State Policy Counsel

cc: Members of the House Judiciary Committee



# AMERICAN ATHEISTS

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March 23, 2021

The Honorable Rep. Larry Klemin  
Chairperson, North Dakota House Judiciary Committee  
North Dakota State Capitol  
600 East Boulevard Avenue  
Bismarck, ND 58505-0360

**Re: OPPOSE SB 2308; Posting of “Ten Commandments” displays in public school classrooms, undermining students’ freedom of religion**

Dear Chairperson Klemin and Members of the House Judiciary Committee:

American Atheists, on behalf of its constituents in North Dakota, writes in opposition to SB 2308, a measure which seeks to authorize “Ten Commandments” displays to be posted in schools and classrooms. “Ten Commandments,” while not defined in the legislation, refers to a set of biblical principles relating to ethics and worship that play a fundamental role in two religions: Judaism and Christianity. This bill is exclusionary and divisive, and most importantly, it represents a direct attack on the religious freedom of North Dakota students. We strongly urge you to reject this unconstitutional measure.

American Atheists is a national civil rights organization that works to achieve religious equality for all Americans by protecting what Thomas Jefferson called the “wall of separation” between government and religion created by the First Amendment. We strive to create an environment where atheism and atheists are accepted as members of our nation’s communities and where casual bigotry against our community is seen as abhorrent and unacceptable. We promote understanding of atheists through education, outreach, and community-building and work to end the stigma associated with being an atheist in America. As advocates for the historical principle of religious freedom, American Atheists believes that no one should be coercively subjected to religious viewpoints by the government.

Authorizing placement of this religious text into public school classrooms undermines students’ constitutionally protected freedom of religion. The U.S. Constitution does not allow North Dakota taxpayer funded schools to legally post Ten Commandments displays in classrooms unless there is an educational reason for doing so. Lacking such an educational context, these displays violate the Establishment Clause, which states that “Congress shall make no law respecting the establishment of religion.” The U.S. Supreme Court has clarified that laws authorizing such displays have “no secular legislative purpose” and are “plainly religious in nature,” and so they are not allowable in public schools.<sup>1</sup>

SB 2308 is no different. The bill does nothing to ensure that these displays are intended to fulfil appropriate secular purposes. In fact, the bill promotes violations of the First Amendment, and the religious freedom of students, by shielding school districts and staff from liability for their knowingly

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<sup>1</sup> *Stone v. Graham*, 449 U.S. 39 (1980).

unconstitutional actions. This removal of liability is, of course, invalid because it directly conflicts with federal law, providing that:

“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”<sup>2</sup>

Public schools in North Dakota would be ill-advised to follow the lead of the legislature in this regard.

Further, these displays are religiously coercive in that they promote certain religious perspectives with apparent state approval. Asserting a particular set of religious beliefs in classrooms this way is exclusionary and unfair. Students and teachers have a variety of beliefs -- Christian, Jewish, Muslim, Buddhist, and atheist, to name a just a few. SB 2308 will set the stage for bullying and harassment against students with differing beliefs.

This bill is especially exclusionary toward the growing number of North Dakotans that do not identify with any religion. Currently, about 23% of adults in the US are religiously unaffiliated, and atheists and agnostics make up about 7% of the total population.<sup>3</sup> In North Dakota, 20% of the population has no religious affiliation.<sup>4</sup> The North Dakota Legislative Assembly should not marginalize this sizeable and growing population by purposefully inserting exclusionary messages into public school classrooms that are meant to serve all the people of North Dakota.

SB 2308 undermines religious freedom for North Dakota students by inserting specific religious beliefs into the classroom that serve no educational purpose. This wasteful bill will certainly result in additional liability for school districts. We strongly urge you to reject this unconstitutional legislation. If you should have any questions regarding American Atheists' opposition to SB 2308, please contact me at 908.276.7300 x309 or by email at [agill@atheists.org](mailto:agill@atheists.org).

Very truly yours,



Alison Gill, Esq.

Vice President, Legal & Policy

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<sup>2</sup> 42 U.S.C. § 1983.

<sup>3</sup> Pew Research Center. A Closer Look at America's Rapidly Growing Religious 'Nones' by Michael Lipka, 2015. Available at: <http://www.pewresearch.org/fact-tank/2015/05/13/a-closer-look-at-americas-rapidly-growing-religious-nones/>.

<sup>4</sup> Pew Research Center. Religious Composition of Adults in North Dakota. Available at: <https://www.pewforum.org/religious-landscape-study/state/north-dakota/>.

House Judiciary Committee

SB 2308

Chairman Klemin and Committee

I urge a DO PASS on SB 2308. This bill passed through the Senate. I believe our students should be allowed to say the Pledge of Allegiance and should be able to read the Ten Commandments in public school

Thank You

Gordon Greenstein

US Navy (Veteran)

US Army (Retired)