LEGAL REVIEW NOTE

BILL No.: SB 114

LC#: LC0046

Short Title: Provide for display of Ten Commandments in public schools

Attorney Reviewer: Todd Everts
Laura Sankey Keip

Date: January 10, 2025

CONFORMITY WITH STATE AND FEDERAL CONSTITUTIONS

As required pursuant to section 5-11-112(1)(c), MCA, it is the Legislative Services Division's statutory responsibility to conduct "legal review of draft bills". The comments noted below regarding conformity with state and federal constitutions are provided to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of jurisdictionally relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of this bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.

This review is intended to inform the bill draft requestor of potential constitutional conformity issues that may be raised by the bill as drafted. This review IS NOT dispositive of the issue of constitutional conformity and the general rule as repeatedly stated by the Montana Supreme Court is that an enactment of the Legislature is presumed to be constitutional unless it is proven beyond a reasonable doubt that the enactment is unconstitutional. See Alexander v. Bozeman Motors, Inc., 356 Mont. 439, 234 P.3d 880 (2010); Eklund v. Wheatland County, 351 Mont. 370, 212 P.3d 297 (2009); St. v. Pyette, 337 Mont. 265, 159 P.3d 232 (2007); and Elliott v. Dept. of Revenue, 334 Mont. 195, 146 P.3d 741 (2006).

Legal Reviewer Comments:

The First Amendment to the United States Constitution provides, "Congress shall make no law respecting an establishment of religion...." Article II, section 5, of the Montana Constitution similarly provides, "The state shall make no law respecting an establishment of religion...." In Stone v. Graham, 449 U.S. 39 (1980), the United States Supreme Court reviewed a statute enacted in Kentucky that required public school districts to display a permanent copy of the Ten Commandments in every elementary and secondary school classroom. The Kentucky statutes also required each display to include a statement that “The secular application 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." Id. at 41.

The Supreme Court first noted that, for a challenged state statute to be upheld under the Establishment Clause, "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion…; finally the statute must not foster 'an excessive government entanglement with religion.' Id. at 40, citing Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971) (citations omitted). A violation of any one of these principles will lead the Supreme Court to strike down the statute. Stone at 40-41.

While Kentucky argued that the inclusion of the purpose statement was sufficient to prove the secular purpose of the law, the Supreme Court found that the purpose statement was insufficient to avoid a conflict with the Establishment Clause. The Supreme Court declared that:

> The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact. The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. See Exodus 20: 12-17; Deuteronomy 5: 16-21. Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day. See Exodus 20: 1-11; Deuteronomy 5: 6-15.

Id. at 41-42. The Supreme Court also stated that posting religious texts on classroom walls did not serve an educational function and thus violated the Constitution, in contrast to the Constitutionally permissible inclusion of the Bible in a study of history, civilization, ethics, or comparative religions. See id. at 42. Ultimately, the Supreme Court held that Kentucky's statute violated the first prong of the Lemon test and struck the statute down as unconstitutional. Id. at 42.

Section 1 of SB114 requires the trustees of a public school district to post a display of the Ten Commandments in each school building and each classroom in the district. Subsection (2) describes the requirements for the display and subsection (3) provides the specific text of the Ten Commandments to be included on the display. As drafted, Section 1 may raise a potential constitutional question as to whether this proposed legislation conflicts with the prohibitions on an establishment of religion in the First Amendment to the United States Constitution and in Article II, section 5, of the Montana Constitution.

Requester Comments:

Two years ago, the Christian flag case argued at the Supreme Court combined with the Coach Kennedy case overturned the 1971 case of Lemon v Kurtzman that was used to infringe on religious liberty for decades with the infamous lemon test, now gone.

The Supreme Court's approach to religious displays has evolved over time.

- **More recently, in Carson v Makin (2002), the Court struck down Makin's exclusion of religious schools from It's tuition assistance program, signaling a shift toward greater accommodation of religious entities in government programs**
- **VanOrden v Perry (2005), The court upheld a Ten Commandments monument on Texas State Capital grounds, emphasizing it's historical context**
- **United States Court of Appeals—7th Circuit 1992, in the case of Doe v Small, 964 F.2d 611,618 (7th Cir. 1999), stated:**

The Supreme Court has refused to find the Establishment Clause to be sufficiently compelling interest to exclude private religious speech even from a limited public forum created by the government.

- **United States Supreme Court 1985, in the case of Wallace v Jafree 472 U.S., 38,99, Associate Justice William Rehnquist rendered the court's decision:**

"It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history…. The Establishment Clause had been expressly freighted with Jefferson's misleading metaphor for nearly 40 years….There is simply no historical foundation for the proposal proposition that the framers intended to build a wall of separation (between Church and State)….The recent court decision are in no way based on either the language or intent of the framers."