Opinion No. 80-29

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OPINION OF: Jeff Bingaman, Attorney General

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TO: Leonard J. DeLayo, Superintendent of Public Instruction, Department of Education, Education Building, Santa Fe, New Mexico 87503

CONSTITUTION - UNITED STATES

A school board may not require the display of the Ten Commandments in every classroom.

FACTS

On March 11, 1980, the Los Lunas Board of Education voted to allow the Ministerial Alliance, a religious organization made up of Christian ministers, to place plaques containing the Ten Commandments in every classroom in the Los Lunas school district. The minutes of the March 11 meeting do not indicate that the placques were intended to serve a secular purpose.

QUESTIONS

May a school board require the display of the Ten Commandments in every classroom?

CONCLUSIONS

No.

ANALYSIS

A local school board decision directing that the Ten Commandments be placed in every classroom in the school district raises the issue of separation of church and state under the First Amendment to the United States Constitution, Article II, Section 11 and Article XII, Section 9 of the New Mexico Constitution, and Section 22-13-15(A) NMSA 1978.

OPINION

The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." This mandate has been made fully applicable to the states and state supported schools by the Fourteenth Amendment, **Illinois ex rel. McCollum v. Board of Education of**

School District No. 71, 333 U.S. 203 (1948), and it governs actions taken by local boards, **Willy v. Franklin,** 468 F. Supp. 133 (E.D. Tenn. 1979).

The federal constitution requires governmental neutrality in religious matters. **Abington School District v. Schempp,** 374 U.S. 203 (1963). In order to preserve this neutrality, the Supreme Court has held that any act of a governing body must meet each of three criteria. It must have a secular legislative purpose, its primary effect must be one that neither advances nor inhibits religion, and it must not foster an excessive government entanglement with religion. **Lemon v. Kurtzman,** 403 U.S. 602, 612-613 (1971).

The particular question of the constitutionality of a statute requiring the posting of the Ten Commandments in classrooms has been recently determined by a federal court. In **Ring v. Grand Forks Public School District No. 1,** 483 F. Supp. 272 (D.N.D. 1980), the Court *{*170}* struck down such a statute as violative of the Establishment Clause of the First Amendment. Although the **Ring** case is not controlling in New Mexico, we find it to be persuasive authority for the question here because of the similarity of circumstances, the consistency with New Mexico Supreme Court decisions regarding the separation of church and state, and the reasoning of the opinion.

The Court addressed the essential dispute as to whether the Ten Commandments are religious or secular by explaining that although commandments four through ten "express moral precepts which, for the most part, reflect the mores of our society and are reflected in our laws . . . the first three commandments . . . are clearly sectarian." 483 F. Supp. at 274. It then found that as the Ten Commandments placard is posted "without explanation, instruction or program relating to the document," it is clearly religious and "serves no secular purpose." 483 F. Supp. at 274. The statute requiring the posting of the Ten Commandments therefore failed to meet a necessary criterion of the **Lemon v. Kurtzman** test in that it did not serve a secular legislative purpose.

The Court further found that the posting of the Ten Commandments served to advance religion, contrary to the second criterion of the **Lemon v. Kurtzman** test and cited **Torasco v. Watkins,** 367 U.S. 488, 495 (1961) to the effect that neither federal nor state government can constitutionally "impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." 483 F. Supp. at 274-275.

The placard provided by the Ministerial Alliance for the Los Lunas classrooms is virtually identical to that considered by the North Dakota federal court in the **Ring** case. There is nothing in the minutes of Los Lunas school board to indicate that the Ten Commandments are posted for any discernible secular purpose. For example, in **Florey v. Sioux Falls School District,** 464 F. Supp. 911 (D.S.D. 1979), a federal district court upheld the validity of a school board rule permitting the display of religious symbols under certain circumstances where the rule expressly stated that such displays must be temporary, clearly educational, and used only as teaching aids to illustrate the religious and cultural heritage of a holiday.

Moreover, the **Ring** decision is consistent with the decision in **Miller v. Cooper,** 56 N.M. 355, 244 P.2d 520 (1952) in which the New Mexico Supreme Court enjoined the distribution of religious pamphlets in the schools even though the teachers did not hand them out or instruct that they be read. It was enough that they were "kept in plain sight in a school room and were available to the pupils." 56 N.M. at 357. See, also, **Zellers v. Huff,** 55 N.M. 501, 236 P.2d 949 (1951).

Although the **Ring** case is persuasive authority for concluding that the Ten Commandments may not be posted in the classrooms in the Los Lunas school district, there is other authority to the contrary. This question has also been recently considered by a state supreme court, which, because its members were equally divided, was required to let stand, without official opinion, the judgment of a trial court upholding a state law requiring the posting of the Ten Commandments. **Stone v. Graham,** Ky. , 599, S.W.2d 157 (1980). Both sides of the question *{*171}* were discussed. A justice supporting the statute wrote:

"Tax money is not involved. Neither the school child nor the faculty member is required to do anything, and the Ten Commandments does have historical as well as religious significance. In my opinion these factors would withstand any First Amendment challenge. 599 S.W.2d at 158."

A justice opposing the statute wrote:

"The religious injunctions of the first three commandments (or four, depending upon the translation selected) plainly refute the prescribed statement of secular purpose . . . their presence can have no purpose but to advance a religious creed. When measured by the tape of the federal constitution this statute is unconstitutional and void. It has no real secular purpose; it advances religion and fosters excessive government entanglement with religion.' 599 S.W.2d at 162.

Because of the split decision of the Kentucky Court, the ruling in **Stone v. Graham** is not persuasive authority.

In another context, the public display of the Ten Commandments was approved in **Anderson v. Salt Lake City Corporation,** 475 F.2d 29 (10th Cir. 1972), a case involving a decision by city and county officials to permit the Fraternal Order of Eagles to erect a three foot by five foot granite monolith on courthouse grounds "inscribed with a version of the Ten Commandments and certain other symbols representing the All Seeing Eye of God, the Star of David, the Order of Eagles, letters of the Hebraic alphabet, and Christ or peace." 475 F.2d at 30. The Court of Appeals reversed a district court decision that the monolith was clearly religious in character and held instead "that the monolith is primarily secular, not religious in character; that neither its purpose or effect tends to establish religious belief." 475 F.2d at 34. The Court explained:

"Although one of the declared purposes of the monolith was to inspire respect for the law of God, yet at the same time secular purposes were also emphasized. It is

noteworthy that the Order of the Eagles is not a religious organization - it is a fraternal order which advocates ecclesiastical law as the temporal foundation on which all law is based, but this creed does not include any element of coercion concerning these beliefs, unless one considers it coercive to look upon the Ten Commandments. 475 F.2d at 33."

While the **Anderson** case sustains the public display of the Ten Commandments, the factual basis of that case is sufficiently different from the situation in Los Lunas as to diminish its precedential value. First, the monolith was not erected by a religious organization and was not devoted solely to the display of the Ten Commandments. Second, and perhaps more importantly, the case did not involve the display of religious material **in the classroom.** Courts are generally more sensitive to the question of the separation of church and state when it arises in context of public schools. For example, there have been several cases where the courts have prohibited the distribution of Gideon bibles in the public schools even where students were not obliged to take them and no religious instruction or exercise was introduced in the classrooms. **Tudor v. Board of Education,** 14 N.J. 31, 100 A.2d 857 (1953), **cert. denied,** 348 U.S. 816; **Brown v.** *{*172}* **Orange County Board of Public Instruction,** 128 So.2d 181 (Fla. App. 1960); **Goodwin v. Cross County School District,** 394 F. Supp. 417 (E.D. Ark. 1973); **Meltzer v. Board of Public Instruction of Orange County,** 548 F.2d 559 (5th Cir. 1977). Essentially, these cases all hold that where the school system is used to distribute these bibles, the children and perhaps their parents may conclude that the school board's stamp of approval has been placed upon a particular religious doctrine and that such an endorsement by the school board is unconstitutional.

In summary, we find that the posting of the Ten Commandments in classrooms in the Los Lunas school district violates the Establishment Clause of the First Amendment to the United States Constitution. Because this conclusion is dispositive of the question, we need not consider it further in the context of the state constitution or state law.

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