



7299 February

The State of South Carolina  
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON  
ATTORNEY GENERAL

January 25, 2002

The Honorable John D. Hawkins  
Member, South Carolina Senate  
606 Gressette Building  
Columbia, SC 29202

Dear Senator Hawkins:

You have asked whether S.793, of which you are the sponsor, is constitutional. It is my understanding that the ACLU contends that the legislation is unconstitutional as violative of the First Amendment's Establishment of Religion Clause. It is our opinion, however, that S.793 is constitutional.

LAW/ANALYSIS

S. 793 would designate September 17 – the anniversary of the ratification of the United States Constitution – as “Respect for Law Day.” This day would be a “special day to declare solemn allegiance to the principles of democracy and respect for ideals of equality and justice under the law.” As part of the observance of “Respect for Law Day,” all public primary and secondary schools would be required to develop a Respect for Law Day curriculum “focusing on the history of law and importance in a modern democracy.” Within this curriculum, schools would have to “establish a permanent display that includes the Ten Commandments, the Magna Carta, the Declaration of Independence, and the United States Constitution.”

As this Office recognized in an opinion dated August 10, 1998, the placement of the Ten Commandments in the public schools is not necessarily unconstitutional. We noted there that “[t]here are a number of factual scenarios where the existence of the Ten Commandments in the public schools would be perfectly legal and constitutional.” Specifically, it was concluded in our

*Rebecca K. Kistner*

earlier opinion that “[w]here the Ten Commandments are part of a legitimate, larger purpose or theme to teach students about law, history or culture, ... such would be constitutional.”

A recent case, ACLU v. McCreary County, Kentucky, 145 F. Supp.2d 845 (E.D. Ky. 2001) also recognized that placement of the Ten Commandments in the public schools is not necessarily violative of the First Amendment’s Establishment Clause. In that case, the Court relying upon Stone v. Graham, 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980) noted that

[t]he Supreme Court has recognized two constitutionally permissible uses of the Ten Commandments within the public arena. The first is where “the Ten Commandments are integrated into the school curriculum, where the Bible may be used in an appropriate study of history, civilization, ethics, comparative religion or the like.” Stone, 449 U.S. at 42, 101 S.Ct. 192 (citing Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 225, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963)) The second is in a display incorporating both religious and secular figures, “signal[ing] respect not for great proselytizers but for great lawgivers,” ... such as the frieze on the wall of the United States Supreme Court.

145 F.Supp. at 852.

In the ACLU case, the Court held that a display in the McCreary and Pulaski County Schools as well as Harlan County schools, entitled “The Foundations of American Law and Government Display” violated the Establishment Clause. The Display included the Ten Commandments, the Magna Carta, the Declaration of Independence, the Constitution of the United States, the National Motto (“In God We Trust”), the Star Spangled Banner and the Mayflower Compact. Applying the three prong test enunciated in Lemon v. Kurtzman, 403 U.S. 602 (1971), the Court found that the display violated the Constitution primarily because the defendants included documents other than the Ten Commandments only after the litigation began. Originally, the Display had contained only the Ten Commandments and nothing else. In the Court’s mind, that fact “tainted” the Display by demonstrating “that the defendants’ overall purpose is religious in nature.” 145 F.Supp. at 848.

Thus, any display of the Ten Commandments in the public schools must meet the test articulated in Lemon v. Kurtzman, *supra*. In essence, the display must serve a secular purpose, must not advance or inhibit religion and there must be no excessive entanglement with religion. More recent authorities have modified the “effect” aspect of the second Lemon prong to a determination of whether a reasonable observer could think the government’s action to be an “endorsement” of religion by the government. 145 F.Supp. at 85.

In upholding Virginia’s Moment of Silence statute, the Fourth Circuit Court of Appeals, in

Brown, et al v. Gilmore, 258 F.3d 265 (4th Cir. 2001), recently stated that in order to have a secular purpose, “we need not find the purpose to be ‘exclusively secular.’” The Court was of the view “[a] statute having dual legitimate purposes — one clearly secular and one the accommodation of religion — cannot run afoul of the first Lemon prong.” 258 F.3d at 275, 276.

Clearly, the other documents included in the permanent display mandated by S.793 would meet the Lemon test as having a nonreligious purpose and as not constituting an “endorsement” of religion by the State..

This is so even though there are clear religious overtones in the other documents included in the display, documents such as the Declaration of Independence and Magna Carta. Both of those documents refer to God. Obviously, however, the Constitution, the Declaration, and the Magna Carta have an important historical and legal purpose wholly apart from any religious connotations which they may possess.

The issue thus is whether the Ten Commandments also serves an independent historical and legal purpose wholly apart from the Biblical context. Together, does this group of documents possess a nonreligious purpose? We believe it does. As we recognized in the August 10, 1998 opinion, there is a growing body of authority which demonstrates that the “Ten Commandments traditionally were used to teach the moral restraint that undergirds the obedience to law.” (citing Kuntz, “The Ten Commandments on School Room Walls ... .” 9 U.Fla. L.J. and Pub. Policy 1,2 (Fall, 1997). Indeed, Circuit Judge John T. Noonan of the Ninth Circuit Court of Appeals has, as a legal historian, concluded that the Ten Commandments “have been the most influential law code in history.” John T. Noonan, Jr. The Believer and the Powers That Are: Cases, History and Other Data Bearing on the Relations of Religion and Government, 4 (1987).

As long ago as 1848, our Court of Appeals of Law of South Carolina in Hiller v. English, 35 S.C.L. 486, 4 Strob. 486 (1848) relied upon the fact that “in the laws of [King] Alfred the ten commandments are recited and confirmed.” Moreover, Henry Laurens of South Carolina, a delegate to the Constitutional Convention of 1787, later stated that “I had the honor of being one among many who framed that Constitution ... In order effectually to accomplish these great ends, it is incumbent upon us to begin wisely and to proceed in the fear of God; and it is especially the duty of those who bear rule to promote and encourage piety and virtue and discourage every degree of vice and immorality. Laurens, Papers, Vol. XI, p.200, March 30, 1776. Thus, the Ten Commandments played an important nonreligious role in the early development of South Carolina law.

Accordingly, we are of the opinion that the proposed legislation is wholly in accord with both the federal and state Constitutions and does not infringe upon the Establishment Clause of the First Amendment. The purpose which the legislation serves is nonreligious in nature – the promotion of respect for the law and history by South Carolina school children. Requiring the United States Constitution, the Declaration of Independence, the Magna Carta, together with the Ten

Senator Hawkins  
Page 4  
January 25, 2002

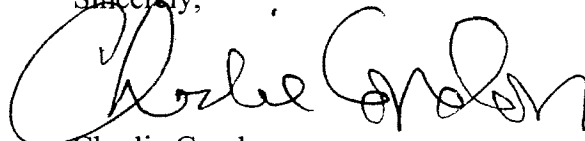
Commandments to be placed in the school display serves that important State purpose. This meets the Lemon test and is in accord with the Fourth Circuit's recent holding in Brown v. Gilmore.

### CONCLUSION

It is our opinion that S.793, which has been reported out favorably by the Senate Judiciary Committee, is constitutional. The purpose of the Bill is to establish the 17th of September of each year as "Respect For Law Day" and to require the public schools to create a curriculum towards that end. As part of the "Respect for Law Day" curriculum, all public schools must establish a permanent display which includes the Ten Commandments, the Magna Carta, the Declaration of Independence and the United States Constitution.

Teaching our school children respect for the law and basic rules governing society is of fundamental importance to the State of South Carolina. The Ten Commandments are one of the most important legal and historical documents known to mankind. The Ten Commandments are the bedrock of moral behavior and the benchmark of conduct which conforms with the law. Thus, including the Ten Commandments as part of the display for "Respect for Law Day" alongside the Constitution, the Declaration of Independence and the Magna Carta, serves the legitimate State purpose of educating our children about the law and encouraging them to respect and conform to the law. Rather than violating the Constitution and law, the Bill teaches children to respect the Constitution and obey the law.

Sincerely,

A handwritten signature in black ink, appearing to read "Charlie Condon". The signature is fluid and cursive, with a large initial "C" and "C".

Charlie Condon  
Attorney General

CC/ph