**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

DAWN SHERMAN, a minor through ROBERT J. SHERMAN, her father and next friend, Plaintiff, v. TOWNSHIP HIGH SCHOOL DISTRICT 214 and DR. CHRISTOPHER KOCH, State Superintendent of Education, in his official capacity, Defendants.	Case No. 07 C 6048 Judge Robert W. Gettleman Magistrate Judge Arlander Keys

***AMICUS CURIAE* THE ACLU OF ILLINOIS' REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, AND RESPONSE TO DEFENDANT SUPERINTENDENT KOCH'S MOTION FOR SUMMARY JUDGMENT**

I. DEFENDANT KOCH HAS NOT ESTABLISHED THAT THE ACT HAS A PREDOMINANTLY SECULAR PURPOSE.

A. Defendant Koch misinterprets the text and history of the Act.

The Illinois Silent Reflection and Student Prayer Act (the "Act") does not simply prescribe "silence." See Koch Mem. in Support of his Mot. for Summ. J. and in Opp. to Pl.'s Mot. for Summ. J. (hereinafter, "Koch Mem.") at 5. Instead, in addition to mandating a period of silence in "each public school classroom," the Illinois General Assembly chose to dictate what students should do or think about during that period of silence: pray silently or reflect silently "on the anticipated activities of the day." 105 ILCS 20/1. Such a mandate cannot withstand scrutiny under the Establishment Clause and should be deemed unconstitutional by this Court.

This Court should not take "at face value" the Act's clause noting that the moment of silence is not to be conducted as a religious exercise. See Koch Mem. at 5. An empty proclamation does not trump true intent in Establishment Clause jurisprudence. To survive, a contested statute must have a sincere secular purpose that is not secondary to a religious

objective. McCreary County, Ky. v. ACLU of Ky., 545 U.S. 844, 864 (2005) (holding that the government cannot act with "the predominant purpose" of advancing religion); Wallace v. Jaffree, 472 U.S. 38, 56 (1985) ("In applying the purpose test, it is appropriate to ask whether government's *actual* purpose is to endorse or disapprove of religion.") (internal quotations and citations omitted; emphasis added); id. at 75 (O'Connor, J., concurring in the judgment) ("It is of course possible that a legislature will enunciate a sham secular purpose for a statute. I have little doubt that our courts are capable of distinguishing a sham secular purpose from a sincere one."). As discussed more fully in our Memorandum in Support of Plaintiff's Motion for Summary Judgment ("Opening Mem."), a review of the legislative history behind the Act beginning in 1969 and culminating with the most recent amendments in 2007 demonstrates the Illinois legislature's unwavering commitment to restoring government-sponsored prayer in the schools. See Opening Mem. at 2-7; Pl.'s Stmt. of Mat. Facts at ¶¶ 5, 7-8. Thus, the legislature's disclaimer of any religious intent is insincere and a sham, in light of 38 years worth of evidence to the contrary. Cf. Brown v. Gilmore, 258 F.3d 265, 287 (4th Cir. 2001) (King, J., dissenting) ("[I]f the Commonwealth of Virginia were truly concerned about subjecting students to undue pressure to engage in or refrain from religious observances during the schoolday, why would it impose a minute of silence in such a manner that students must contemplate daily whether to pray or not?").

Furthermore, Defendant Koch argues that the 2002 insertion of the word "prayer" in the Act's title does not show a religious purpose, because it was added simultaneously with Section 5 of the Act. Koch Mem. at 6; accord Br. of *Amicus Curiae* Alliance Defense Fund in Support of Defs.' Mot. for Summ. J. and in Opp. to Pl.'s Mot. for Summ. J. (hereinafter, "ADF Mem.") at 7.[1] But this only begs the question. Section 5 allows students to "engage in voluntary, non-disruptive, non-government-sponsored prayer in the schools." This is *itself* evidence of the

[1] Defendant's *amicus*, the Alliance Defense Fund ("ADF"), devotes almost one-third of its response to Plaintiff's motion for summary judgment to arguing that Plaintiff lacks standing to maintain this lawsuit. See ADF Mem. at 16-24. This argument was the subject of previous briefing in this case, however, and has already been rejected by this Court. See ADF's Mot. to Dismiss Am. Compl. Based on Pl.'s Lack of Art. III Standing (dated Jan. 29, 2008); Mem. of *Amicus Curiae* the ACLU of Ill. in Opp. to Mot. by ADF to Dismiss Am. Compl. Based on Pl.'s Lack of Art. III Standing (dated Feb. 27, 2008); Minute Entry (dated Mar. 19, 2008) (denying ADF's motion to dismiss). *Amicus* ACLU thus incorporates by reference herein the arguments it previously asserted in its memorandum in opposition to ADF's motion to dismiss based on Plaintiff's lack of standing.

legislature's intention to promote prayer in public schools. In Wallace, the defendants similarly argued that adding the words "voluntary prayer" to the existing statute allowing for "meditation" served to "accommodat[e] the religious and meditative needs of students." 472 U.S. at 57 n.45. The Supreme Court held that there was "no basis" for this contention, however, because it falsely presupposed that "the free exercise of religion of [public school students] was burdened before the [amendatory] statute was enacted." Id. Instead, the Court explained, the right of students to pray in this way was already constitutionally protected and needed no additional statutory protection. Id. at 57 n.45, 59.

So here, Defendant Koch concedes that even without the Act (in any of its iterations), public school students "may choose to pray silently" during any other "moments of quiet during the school day." Koch Mem. at 2; see also id. at 6 (noting that "the Free Exercise Clause . . . already permit[s]" silent prayer by students). Because the addition of the "prayer" language to the Act was unnecessary to protect students' constitutional rights, the superfluous addition serves as further support of the State's intention "to characterize prayer as a favored practice." Wallace, 472 U.S. at 59-60.

B. Defendant Koch's cases do not support the Act.

Defendant Koch and his *amicus* rely heavily on three decisions in which moment of silence laws were upheld: Bown v. Gwinnett County School District, 112 F.3d 1464 (11th Cir. 1997), Croft v. Governor of Texas, 530 F. Supp. 2d 825 (N.D. Tex. 2008), and Brown, 258 F.3d 265. See Koch at 3; ADF Mem. at 3-8. However, the statutes and legislative history in Bown and Croft are easily distinguished from the statute and history here, and the Fourth Circuit's decision in Brown directly contradicts controlling Supreme Court precedent.

In Bown, Georgia legislators *removed* the word "prayer" from the state's moment of silence law. 112 F.3d at 1466. As a result, the amended statute at issue required only "quiet reflection" rather than "silent prayer or meditation." Id. In upholding the amended statute's constitutionality, the court in Bown emphasized that "[t]he deletion of the words 'prayer or meditation' and the substitution of the words 'period of quiet reflection' provides some support for the idea that the Act's purpose is secular and is not to establish a moment of prayer." Id. at 1469 n.3.

In direct contrast, the Illinois legislators amended the Act at issue here to *add* the word "prayer." Thus, Illinois' moment of silence law, which was previously titled "The Silent Reflection Act," became "The Silent Reflection and Student Prayer Act" to better convey the Act's purpose.[2] These facts make this case much more similar to Wallace, in which the Alabama legislature added the words "voluntary prayer" to the State's moment of silence statute. In Wallace the Supreme Court concluded that the legislature's addition of the words "voluntary prayer" to a statute that previously referred only to "meditation" supported a finding that the statute violated the Establishment Clause because it indicated that "the State intended to characterize prayer as a favored practice." Id. at 58-60.

The facts here are also distinguishable from those in Croft. Texas had a statute that allowed school districts to "provide for a period of silence at the beginning of the first class of each school day during which a student may reflect or meditate." 530 F. Supp. 2d at 828. The Texas legislature amended the statute to, among other things: 1) make the moment of silence mandatory; 2) add the word "pray" to the list of designated options; and 3) add a catch-all provision allowing students to "engage in any other silent activity that is not likely to interfere with or distract another student." Id. at 829.

While the court determined that the Texas legislature had a predominantly secular purpose in enacting this amendment, the court acknowledged that this was a "close question." Id. at 847. It was the simultaneous addition of the catch-all provision along with the word "pray" that tipped the balance in favor of constitutionality. Id. (explaining that adding the catch-all provision "counsels against a finding that the statute endorses prayer over the other options"). See also id. at 838 (emphasizing that "the amended statute also made substantive changes to the activities students could engage in . . . during the moment of silence"). In stark contrast, the Illinois General Assembly here simply added the word "prayer" to the State's existing moment of silence law, without adding any religiously-neutral alternative options for students. Indeed, the Illinois statute to this day does not provide a meaningful, religious-neutral option. *Amicus*

[2] *Amicus* ADF contends that the only question is "whether the legislators in 1969 acted with a religious purpose in passing the moment of silence law" (ADF Mem. at 3 n.3), and that the 2002 amendment adding the phrase "student prayer" to the Act's title is "irrelevant to Ms. Sherman's claims" (*id.* at 7). In fact, in an Establishment Clause challenge, the legislature's purpose in amending a statute is just as relevant as its initial purpose. Indeed, the central issue before the Supreme Court in Wallace was whether the Alabama legislature's purpose in amending that state's moment of silence law was predominantly and sincerely secular.

ACLU disagrees with the Croft court's resolution of this issue. In any event, given the reasoning behind the court's decision in Croft, it is doubtful that even the Croft court would uphold the Act at issue here.

Like the amended Texas moment of silence statute in Croft, the Virginia moment of silence statute at issue in Brown also included the catch-all option to "engage in any other silent activity which did not interfere with other pupils in making their own individual choice." 258 F.3d 265, 270. Again, this catch-all option is missing in the Illinois Act.

More fundamentally, Brown is inconsistent with Supreme Court precedent. The Brown majority failed to meaningfully scrutinize the legislature's assertion of a secular purpose, essentially ignoring significant evidence that the legislature's true motive was to encourage prayer. For example, the Brown court did not analyze the legislature's asserted secular purposes of instilling classroom order and reducing student stress in the light of the legislature's contemporaneous joint resolution denouncing the Supreme Court's decision in Engel v. Vitale, 370 U.S. 421 (1962) (holding that state-sponsored prayer in public schools violates the Establishment Clause), and its request that Congress amend the Constitution to permit voluntary prayer in the classroom. Id. at 272 & 284 (King, J., dissenting). The court also ignored the fact that the sponsor of the bill remarked: "This country was based on belief in God, and maybe we need to look at that again." Id. at 271 (King, J., dissenting). The Brown court's superficial approach rests on its erroneous legal premise: that "this first prong of Lemon is 'a fairly low hurdle,' . . . so that a statute fails on this account [only] when 'there is no evidence of a legitimate, secular purpose . . . .'" 258 F.3d at 276 (citation omitted).

To the contrary, the Supreme Court has repeatedly rejected the notion that just *any* stated secular purpose is enough to satisfy the first prong of the Lemon test. See, e.g., McCreary County, 545 U.S. at 864-65 and n.13 (holding that the purpose test is not "a pushover for any secular claim," given "the ease of finding some secular purpose for almost any government action"); Santa Fe Independent School Dist. v. Doe, 530 U.S. 290, 308 (2000) (holding that, although "some deference" is owed a proclaimed secular purpose, "it is nonetheless the duty of the courts to 'distinguis[h] a sham secular purpose from a sincere one'") (citation omitted); Lynch v. Donnelly, 465 U.S. 668, 690-91 (1984) (O'Connor, J., concurring) (observing that the Lemon test's first prong "is not satisfied . . . by the mere existence of some secular purpose, however dominated by religious purposes"). Thus, the Brown court legally erred by concluding

that legislators need only assert *some* secular purpose to survive scrutiny under the first prong of the Lemon test.

Here, careful scrutiny of the secular purposes professed by the Illinois legislature in support of the Act shows that they are insincere and a sham, as explained in our Opening Memorandum. The insincerity of the legislature's asserted secular interest in "uniformity" is further undermined by Defendant Koch's and his *amicus*'s responses to Plaintiff's Motion for Summary Judgment. Specifically, Defendant Koch acknowledges that "[t]here may be variations in how school districts implement the law." See Koch Mem. at 2. Moreover, his *amicus* admits that as to "what is and what is not allowed during the moment of silence, when the moment of silence should occur, and how long the moment of silence should last," "[a]ll these decisions are left to the discretion of school districts . . . ." ADF Mem. at 16. Lack of uniformity is further demonstrated by the responses from the school districts upon which Defendant Koch relies for his own motion for summary judgment. Had the Illinois lawmakers' true purpose been to achieve uniformity, they would have written a law precluding such variation.

II. DEFENDANT KOCH HAS NOT OVERCOME PLAINTIFF'S SHOWING THAT THE ACT PROMOTES RELIGION.

A. Dr. Kraus's report is reliable and relevant to the effects test.

Defendants' *amicus* the ADF asks that this Court disregard the testimony of Plaintiff's expert, Dr. Louis J. Kraus, asserting that "this case presents solely legal issues." ADF Mem. at 8. In fact, a district court's inquiry under the effects prong of the Lemon test requires a hybrid approach that is both legal and factual. See Wallace 472 U.S. at 76 ("'[W]hether a government activity communicates endorsement of religion'" is partially a question of fact, and also "'in large part a legal question to be answered on the basis of judicial interpretation of social facts.'") (quoting Lynch, 465 U.S. at 693-94 (O'Connor, J., concurring)). See, e.g., May v. Cooperman, 780 F.2d 240, 248-49 (3d Cir. 1985) (in determining a statute's effect, relying in part on a pre-litigation letter by a school principal regarding how a moment of silence statute was to be implemented); Duffy v. Las Cruces Pub. Schs., 557 F. Supp. 1013, 1016 (D.N.M. 1983) (relying on testimony of educational expert as to impressionability of children in finding that primary effect of moment of silence statute was religious).

The ADF also claims that this Court should disregard Dr. Kraus's report because the Court should not "rely[] on the misperceptions of young students to strike down [a] moment of silence law." ADF Mem. at 12. But the "objective observers" relevant to whether the Act here would be perceived as a government endorsement of religion are not mature adults, but rather children in various developmental stages who perceive words and actions differently than most adults. The perceptions of this particularly vulnerable audience are central to this Court's inquiry required by the second prong of the Lemon test. See, e.g., Lee v. Weisman, 505 U.S. 577, 592 (1992) (citing cases) ("As we have observed before, there are heightened concerns with protecting freedom of conscience from coercive pressure in the elementary and secondary public schools."); see also Chaudhuri v. State of Tennessee, 130 F.3d 232, 237, 238-39 (6th Cir. 1997) (in upholding the constitutionality of a state university's "moment of silence" during commencement, explaining that the age of an audience is of particular importance).

Defendant Koch suggests that Dr. Kraus's report should be ignored simply because it does not cite to scientific literature. See Koch Mem. at 21. This is not correct. Dr. Kraus's report is based on 15 years of professional experience as a psychiatrist working with children and adolescents, which is more than sufficient to support a finding that his opinion is both relevant and reliable, as required under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). See Bryant v. City of Chicago, 200 F.3d 1092, 1098 (7th Cir. 2000) (admitting expert testimony in an area with no published scientific literature, explaining that "[t]he *Daubert* inquiry is a 'flexible one' and is 'not designed to serve as a definite checklist or test,' . . . but rather to ensure 'that an expert, *whether basing testimony upon professional studies or personal experience*, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field'") (quoting Kumho Tire Co., Ltd v. Carmichael, 526 U.S. 137 (1999) (emphasis added)); Bonner v. ISP Techs., Inc., 259 F.3d 924, 929 (8th Cir. 2001) ("[T]here is no requirement that published epidemiological studies supporting an expert's opinion exist in order for the opinion to be admissible."); Loeffel Steel Products, Inc. v. Delta Brands, Inc., 372 F. Supp. 2d 1104, 1118 (N.D. Ill. 2006) ("[I]n contexts where the Daubert factors were properly applied, the absence of corroborating studies or textual authority was not deemed necessarily to require exclusion of the proposed testimony.").

Finally, the ADF unpersuasively attempts to discredit Dr. Kraus's expert report with the contrary opinions stated in the report submitted by Dr. Trayce L. Hansen, Ph.D. See ADF Mem.

at 9-10 & Ex. A. However, her qualifications as an expert in child/adolescent psychology are questionable at best. In 1997, Dr. Hansen was a post-doctorate forensic fellow whose focus was on incarcerated adults and chronically mentally ill offenders. See id., Ex. A at 15-16. She held that position for just over a year. She abandoned her work as a psychologist for the next five years. Dr. Hansen returned as a licensed psychologist for "[a]dults, [c]ouples and [f]amilies" in 2003. See id., Ex. A at 15. It is unclear how much, if any, of this work focused specifically on the mental health needs of children or adolescents. In 2005, Dr. Hansen again left the profession. She returned in 2007, when she first began to work with adolescents and children, focusing on marital and family conflict. Id. Thus, her experience with children and adolescents—the only relevant population in this case—is extremely limited. On the other hand, Dr. Kraus's expert opinions are based on his clinical examinations of thousands of children and adolescents over more than 15 years. See Opening Mem., Ex. 3A at 1, 3, 5-6. Through this substantial experience, Dr. Kraus has come to understand the cognitive and emotional development of children and adolescents; their comprehension of language, cultural and religious customs; and their response to authority figures. Based on this understanding, Dr. Kraus has successfully treated and supervised the treatment of even more children in both private and public institutional settings, including numerous Illinois school districts. Id.

Moreover, there is a striking difference between Dr. Kraus and Dr. Hansen with regard to their scholarly work. Dr. Kraus has authored two peer-reviewed publications, four books, and six other publications focusing on children and adolescents. See Opening Mem., Ex. 3A at 6-7. On the other hand, Dr. Hansen has published just one article—and it is on the topic of legal citations related to Rorschach tests. See ADF Mem., Ex. A at 18. The extent of Dr. Hansen's "publications" regarding children is limited to three opinion pieces in which she posits that children raised by homosexual parents are both more likely to identify themselves as non-heterosexual and to engage in dangerous sexual experimentation. See http://www.drtraycehansen.com/Pages/writings_home.html (last visited Nov. 6, 2008).

Even if this Court were to find Dr. Hansen's report reliable, her attempt to rebut Dr. Kraus's opinion nevertheless falls short because it is not relevant. Rather than directly addressing Dr. Kraus's core conclusions regarding the effect of the Act on children who are told that the moment of silence should be used for *either silent prayer or silent reflection on the anticipated activities of the day*, Dr. Hansen focuses instead on the supposed benefits of a

general "moment of silence." She appears to incorrectly assume, without support, that schools and teachers would not use the word "prayer" in explaining the moment of silence to students, and she therefore fails to discuss how children might respond to such instruction. Dr. Hansen's assumption is contrary to the text of the Act, to some of the school districts' responses to Defendant Koch's implementation query (see Section II.B, infra), and to this Court's preliminary injunction order. See Memorandum and Order at 5 (dated Nov. 17, 2007) (noting that a "school or teacher, seeking a more faithful adherence to the statute, might read the statutory language to pupils").

In short, this Court should disregard Dr. Hansen's opinion. She lacks meaningful experience as a child or adolescent psychologist, so her opinions are not reliable. Her analysis rests on an assumption at odds with the record, so her opinions are not relevant. Finally, an additional reason to disregard her expert report is that no party has proffered it for this Court's consideration. In the event this Court does credit Dr. Hansen's report, however, it creates at most a factual dispute precluding entry of summary judgment in favor of Defendants on the question of the Act's effect.

B. Defendant Koch's submission regarding school district implementation should be disregarded as biased and unrepresentative.

Defendant Koch attempts to rebut Dr. Kraus's expert opinion on the basis of a deeply flawed submission regarding how school districts supposedly are implementing the challenged statute. Specifically, defendant Koch points to responses from just 15 of the State's 873 school districts, to questions promulgated by his counsel to all of these districts, to make the unfounded generalizations that:

> "The protocols establish . . . how teachers and superintendents carried out the law." Koch Mem. at 13 n.2.
>
> "[T]he protocols bear this out—most school districts are not going to repeat the verbatim text of the law *every day* when school begins." Koch Mem. at 18 (emphasis in original).
>
> "The reality is that most schools will probably just say, 'let's have a moment of silence and recite the Pledge of Allegiance.'" Koch Mem. at 21.
>
> "The school districts were careful to present and implement the moment of silence in a manner that avoids religious indoctrination." Koch Mem. at 21.

The cited school district responses, however, are hearsay (Fed. R. Evid. 803), and they do not comprise a reliable survey that falls within the residual exception to the hearsay rule (Fed. R. Evid. 807). These documents, which Defendant Koch calls "protocol evidence," see Koch Mem. at 20, suffer from at least three serious faults.

First, the query was sent to the school districts by defendants' counsel, in an email advising them that the purpose of the query was to assist in litigation regarding the constitutionality of the Act. See Koch Mem., Ex. E. For this reason alone, this Court should exclude the query responses as unreliable hearsay. See, e.g., United States v. S. Ind. Gas and Elec. Co., 258 F. Supp. 2d 884, 895 (S.D. Ind. 2003) (excluding responses to a questionnaire, due in part to the high level of attorney involvement in the design and administration of the questionnaire, because respondents should be unaware of the purposes of the survey or the litigation); Gibson v. County of Riverside, 181 F. Supp. 2d 1057, 1067-69 (C.D. Cal. 2002) (finding the residual hearsay exception did not apply to responses to questionnaires sent by a county to residents, where the county informed recipients that it had been sued, wanted to defend the ordinance on the residents' behalf, and needed the residents' help in doing so).

Second, surveys with response rates below 50% "should be regarded with significant caution," because "[n]onresponse often is not random." See Shari Seidman Diamond, Reference Guide on Survey Research, REF. MANUAL ON SCIENTIFIC EVID. 245 (2d ed. 2000). See also United States v. Dentsply Int'l Inc., 277 F. Supp. 2d 387, 437 (D. Del. 2003) (holding that "[a] response rate below the 50% level serves as a 'red flag' that the survey possibly is not projectable," and that "it is incumbent upon the survey's proponent to prove that non-response bias does not exist where the response rate is below 70 percent") (rev'd on other grounds). Surveys that fail to satisfy this response rate threshold generally should be excluded from evidence. See, e.g., Dentsply, 277 F. Supp. 2d at 437 (excluding a survey with a response rate below 40%). Even when admitted, such surveys should be afforded very little evidentiary value. See, e.g., Amusement and Music Operators Ass'n v. Copyright Royalty Tribunal, 676 F.2d 1144, 1154 (7th Cir. 1982) (affording "very little weight" to a survey with a 14% response rate); Univ. of Kansas v. Sinks, No. 06-2341-JAR, 2008 WL 755065, at *4 (D. Kan., Mar. 19, 2008) (holding that a survey with a 2% response rate "appears, by any standard, to be quite low"); H & A Land Corp. v. City of Kennedale, No. Civ.A. 4:02-CV-458-Y, 2005 WL 723690, at *6-7 (N.D. Tex. 2005) (criticizing as "shoddy" a survey with a 12% response rate). Here, the total number of

survey respondents is only 61 out of 873 school districts, or seven percent. Defendant Koch's generalizations in his brief rely on an even smaller subset of these responses: only 15 of 873 school districts, or less than two percent. This is far too statistically insignificant to support Defendant Koch's overbroad generalizations.

Third, there is reason to assume that the few school districts that did respond to defense counsel's email query are not representative of the non-respondents. It is likely, for example, that the districts with the implementations most likely to violate the Establishment Clause declined to respond, in order to avoid review. See Reference Guide on Survey Research 246 ("In surveys that include sensitive or difficult questions . . . some respondents may refuse to provide answers or may provide incomplete answers."). See also Friends of Boundary Waters Wilderness v. Bosworth, 437 F.3d 815, 826 (8th Cir. 2006) (concluding that it is "unreasonable to rely exclusively upon survey results, without analyzing the potential for bias or adjusting the data based upon any bias found, when the respondents are aware of the purpose of the survey"); Sinks, 2008 WL 755065, at *4 (finding survey responses unrepresentative where there were no efforts made "to reduce the effect of non-response bias" or "to determine how differently the non-respondents answer compared to those who willingly responded").

In any event, the school districts responding to defense counsel's query include several that implemented the challenged statute in the manner described by this Court and Dr. Kraus. One district, for example, required a daily announcement on the school intercom commanding everyone to pause for 30 seconds "for a moment of silent prayer or silent reflection on the anticipated activities of the day." See Pl.'s Supp. Stmt. of Mat. Facts at ¶ 1; Koch Mem., Ex. H. Four other school districts stated that students were informed on at least one occasion that the purpose of the moment of silence was to pray or reflect. See Koch Mem., Exs. I, J, L; Pl.'s Supp. Stmt. of Material Facts at ¶ 2 & Ex. E. And still another four school districts either did not provide any guidance to their faculty regarding how the Act should be implemented, or provided guidance only with respect to the length of the "moment," leaving implementation in the hands of individual teachers and administrators, many of whom no doubt advised their students of the two statutorily permissible uses of the moment of silence (i.e., prayer or reflection on the anticipated activities of the day). See Pl.'s Supp. Stmt. of Material Facts at ¶¶ 3-4 & Exs. A-D.

III. DEFENDANT KOCH HAS NOT OVERCOME PLAINTIFF'S SHOWING THAT THE ACT FAVORS RELIGIONS THAT PRACTICE SILENT PRAYER OVER THOSE THAT DO NOT.

Neither Defendant Koch nor his *amicus* address the controlling body of Supreme Court case law discussing statutes that explicitly reference religion and favor certain types of religion over others. See Opening Mem. at 17-19. Instead, Defendant Koch erroneously analogizes the Silent Reflection and Student Prayer Act to a wholly inapposite body of case law involving statutes that make no reference to religion whatsoever, such as Sunday closing laws and laws prohibiting larceny, the use of alcohol, and even murder. See Koch Mem. at 11-12.

Despite the presence of the word "prayer" in both the title and body of the Act, Defendant Koch characterizes the Act as a law that "merely happens to coincide or harmonize with the tenets of some . . . religions," Koch Mem. at 11 (quoting McGowan v. Maryland, 366 U.S. 420, 442 (1961)). But prayer—unlike refraining from working, drinking, stealing, or murdering—does not just happen to coincide with the tenets of some religions; prayer has been recognized by courts as a "primary religious activity in itself." Karen B. v. Treen, 653 F.2d 897, 901 (5th Cir. 1981); accord Engel v. Vitale, 370 U.S. 421, 424 (1962) ("There can, of course, be no doubt that [prayer] is a religious activity. It is a solemn avowal of divine faith and supplication for the blessings of the Almighty.") It is, as the Fifth Circuit has noted, "perhaps the quintessential religious practice for many of the world's faiths, and it plays a significant role in the devotional lives of most religious people." Id. But, as discussed more fully in our opening memorandum, not all prayer is silent. See Opening Mem. at 17-25. Thus, a statute that mandates setting aside time in the classroom for *silent prayer* (or silent reflection) favors those religions in which prayers can be conducted silently over religions in which they cannot.

Indeed, Defendant Koch acknowledges that the moment of silence "offer[s] opportunities for silent prayer for religiously-inclined students of some faiths and not others." Koch Mem. at 12. He further concedes that, although students who pray silently may do so at any time of day—including during the statutorily-mandated moment of silence—"[s]tudents of any faith who wish to pray aloud are free to do so [only] at other times before or after the school day or during free periods in the school day when speaking is permitted." Id. Thus, contrary to the assertion made by Defendants' *amicus*, the State is not "protecting the right of all students to pray according to the dictates of their faith." ADF Mem. at 13. Instead, the Act is, on its face, a

violation of the neutrality principle that is central to Establishment Clause jurisprudence, and should therefore be deemed unconstitutional by this Court. See, e.g., Wallace, 472 U.S. at 70 (O'Connor, J., concurring) (noting that the Establishment Clause "preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred"); id. at 93 (Rehnquist, J., dissenting) ("[N]o particular religious sect or society ought to be favored or established by law, in preference to others.") (quoting 3 J. Elliot, DEBATES ON THE FEDERAL CONSTITUTION 659 (1891)).

CONCLUSION

For the reasons set forth above, *Amicus Curiae* the ACLU of Illinois respectfully recommends that this Court grant Plaintiff's Motion for Summary Judgment and deny Defendant Superintendent Koch's Motion for Summary Judgment.

Dated: November 13, 2008

Respectfully submitted:

/s/ Jonathan K. Baum
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing ***AMICUS CURIAE*** **THE ACLU OF ILLINOIS' REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, AND RESPONSE TO DEFENDANT SUPERINTENDENT KOCH'S MOTION FOR SUMMARY JUDGMENT** has been served on all parties of record using the CM/ECF system in the United States District Court for the Northern District of Illinois, Eastern Division, on this 13th day of November 2008.

/s/ Jonathan K. Baum
One of the Attorneys for Plaintiffs