No. 09-1455

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

DAWN S. SHERMAN, a minor, through ROBERT I. SHERMAN, her father and next friend, on behalf of herself and all others similarly situated,

Plaintiff-Appellee,

v.

CHRISTOPHER KOCH, State Superintendent of Education,

Defendant-Appellant.

On appeal from the United States District Court
for Northern District of Illinois,
Eastern Division
Case No. 07 C 6048
The Honorable Robert W. Gettleman

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS AND AMERICAN CIVIL LIBERTIES UNION ON BEHALF OF PLAINTIFF AND IN SUPPORT OF AFFIRMANCE OF THE DISTRICT COURT

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: **09-1455**

Short Caption: **Sherman v. Koch**

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Attorney's Signature: /s/ Jonathan K. Baum Date: December 16, 2009

Attorney's Printed Name: Jonathan K. Baum

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d).
Yes X No __

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

INTEREST OF AMICI CURIAE

Amici the American Civil Liberties Union of Illinois ("ACLU-IL"), and its parent organization the American Civil Liberties Union ("ACLU"), are nonprofit, nonpartisan organizations dedicated to protecting Constitutional rights, including religious liberty.

ARGUMENT

Defendant-Appellant erroneously asserts that the Illinois Silent Reflection and Student Prayer Act (the "Act") "requires no more" than "a period of silence." (Brief of Defendant-Appellant ["Def. Br."] at 41.) In fact, as the district court properly held, the Act also dictates that students must engage in one of only two possible activities during that period: either "silent prayer," or "silent reflection on the anticipated activities of the day." 105 ILCS 20/1; Sherman v. Township High School Dist. 214, 594 F. Supp. 2d 981, 986 (N.D. Ill. 2009). As demonstrated below, the district court correctly held that the Act violates the Establishment Clause, because (1) it lacks a predominant secular purpose, (2) its principal effect is to advance religion, and (3) it favors some religions over others. These infirmities are true on the Act's face, and in every circumstance. Cf. Def. Br. at 20. As also demonstrated below, the district court correctly held that Plaintiff-Appellee has standing.

As the district court held, id., courts are especially vigilant in protecting impressionable schoolchildren from religious endorsements. See, e.g., Edwards v. Aguillard, 482 U.S. 578, 583-584 (1987) ("The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools . . . . Students in such institutions are impressionable and their attendance is involuntary . . . . The State exerts great authority and coercive power . . . because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure."); Lee v. Weisman, 505 U.S. 577, 592 (1992) ("As we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools . . . ."). Cf. Def. Br. at 43 ("[t]he fact that teachers are addressing children does not change the analysis"). The district court appropriately applied this heightened vigilance in striking down the Act.

I. THE ACT LACKS A PREDOMINANT SECULAR PURPOSE.

A. The Act's history shows a predominant religious purpose.

The district court properly concluded that the "true purpose" of the Act was "to promote religion in the public schools." Sherman, 594 F. Supp. 2d at 988. The court found that "[t]he plain language of the Statute . . . suggests an intent to force the introduction of the concept of prayer into the schools" (id. at 986), and also that "the legislative history" shows "a sham secular purpose" (id. at 987).

"When the government acts with the ostensible and predominant purpose of advancing religion, it violates th[e] central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides." McCreary County, Ky. v. ACLU of Ky., 545 U.S. 844, 860 (2005). "By showing a purpose to favor religion, the government 'sends the . . . message to . . . nonadherents "that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members . . . ."'" Id. (quoting Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 309-310 (2000)). This message is most dangerous in the public schools, which impressionable children attend under compulsion of law. See, e.g., Lee, 505 U.S. at 592.

Government actions with the predominant purpose of advancing religion violate the Establishment Clause, without regard to their actual effects. Thus, in Santa Fe, the Court held, in a challenge to a school policy encouraging student-led prayer before football games, that

> the simple enactment of this policy, with the purpose and perception of school endorsement of school prayer, was a constitutional violation. We need not wait for the inevitable to confirm and magnify the constitutional injury . . . . [E]ven if no Santa Fe High School student were ever to offer a religious message, the October policy fails a facial challenge because the attempt by the District to encourage prayer is also at issue. Government efforts to endorse religion cannot evade constitutional reproach based solely on the remote possibility that those attempts may fail.

530 U.S. at 316. The religious purpose of a statute may be discerned from its text and legislative history, including "the historical context of the statute . . . and the specific sequence of events leading to passage of the statute." Edwards, 482 U.S. at 595.

As Defendant-Appellant acknowledges (Def. Br. at 38), the Act was first passed in 1969, soon after the Supreme Court invalidated government efforts to lead public school children in vocal prayer. See Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962). Illinois was one of many states to enact "moment of silence" laws to continue school-led prayer in the wake of those decisions. David Z. Seide, Daily Moments of Silence in Public Schools, 58 N.Y.U. L. Rev. 364, 367-72 and n.43 (1983).

As originally enacted, the Act provided:

> In each public school classroom the teacher in charge may observe a brief period of silence with the participation of all the pupils therein assembled at the opening of every school day. This period shall not be conducted as a religious exercise but shall be an opportunity for silent prayer or for silent reflection on the anticipated activities of the day.

P.A. 76-21 (1969); R. 416 at ¶ 5. The supposed prohibition on "religious exercise" is countermanded by the very language of the Act. The statute, on its face, requires each student to "consider prayer as one of the two options to observe during the period of silence." Sherman, 594 F. Supp. 2d at 988. Indeed, the only statutorily permissible secular alternative to "prayer" is highly circumscribed:

"silent reflection on the anticipated activities of the day." The Act thereby forbids a broad array of silent secular activities, including reading, writing, thinking about events that occurred yesterday or that will occur tomorrow, imagining things that will never occur, or doing nothing. None of these activities would inhibit other students from silently praying. The state has no possible reason to prohibit these silent, non-disruptive, secular activities – except to increase the attractiveness of prayer, as compared to a needlessly narrow secular alternative. The Act is thus "a subtle effort to force students at impressionable ages to contemplate religion." Id. See also Brown v. Gilmore, 258 F.3d 265, 287 (4th Cir. 2001) (King, J., dissenting) (opining that under a moment-of-silence law, "students must contemplate daily whether to pray or not"). And the Act privileges the prayer option by placing it first.

Little legislative history from 1969 survives. However, as Defendant-Appellant acknowledges, "the House adopted an amendment that would have removed all reference to prayer, which amendment was later dropped." (Def. Br. at 38.) Thus, Illinois rejected a neutral moment-of-silence law, instead limiting that period to only "prayer" or "reflection."

In 1979, the Illinois House of Representatives sent a resolution to Congress saying that the Constitution "should" permit "a moment of silent prayer" in public schools, because "belief in God" is "part of the leaven stimulating the growth of

this nation." Resolution No. 28, reprinted in 1979 Cong. Rec. 3655. The next year, the Illinois Senate sent its own resolution to Congress saying that the Constitution "permits a voluntary moment of silent prayer or reflection" in public schools, observing that "[t]he majority of Americans" pray, complaining that the Supreme Court "severely restrict[ed] the practice of any manner of public prayer," and "encourag[ing] the passage of legislation designed to promote the concept of school prayer." Resolution No. 365, reprinted in 1980 Cong. Rec. 19207. These resolutions show that both houses of the Illinois Legislature were determined to return government-sponsored prayer to public schools. Further, the legislators casually interchanged "silent prayer" and "silent reflection," indicating that they understood the two terms to mean essentially the same thing. Compare, e.g., Duffy v. Las Cruces Pub. Sch., 557 F. Supp. 1013, 1015, 1019 (D. N.M. 1983) (holding that inclusion of words "contemplation" and "meditation" in a moment-of-silence law was an attempt to "disguise the religious nature of the bill").

In 1990, the previously untitled Act was named "The Silent Reflection Act." P.A. 86-1324 (1990); R. 416 at ¶ 6. In 2002, the Act was renamed "The Silent Reflection and Student Prayer Act." P.A. 92-0832 (2002); R. 416 at ¶ 7. A statute's title is relevant to its interpretation. See, e.g., Almendarez-Torres v. United States, 523 U.S. 224, 234 (1998). From the analogous addition of the word "prayer" into the Alabama moment-of-silence law, the Supreme Court found an

impermissible religious purpose. Wallace v. Jaffree, 472 U.S. 38 (1985). The Court reasoned that because "the earlier statute refers only to 'meditation' whereas [the amended statute] refers to 'meditation or voluntary prayer,'" the change "indicate[d] that the State intended to characterize prayer as a favored practice." Id. at 58-60.[1/]

Defendant-Appellant argues that the 2002 insertion of the word "prayer" does not show a religious purpose, because it was added simultaneously with a new "Section 5" that purports to allow students to "engage in voluntary, non-disruptive, non-government-sponsored prayer in the schools." (Def. Br. at 34.) But this is *itself* further evidence of the legislature's intention to promote prayer in public schools. In Wallace, the Court rejected the argument that adding the words "voluntary prayer" to a moment-of-silence law "accommodat[d] the religious and meditative needs of students," because that argument falsely presupposed that "the free exercise of religion of [public school students] was burdened before the [amendatory] statute was enacted." 472 U.S. at 57 n.45. So here, Defendant-

1/ In her concurring opinion, Justice O'Connor agreed that the Alabama statute unlawfully "endorse[d] the decision to pray during a moment of silence", and further reflected that inclusion of the word "prayer" in a moment-of-silence statute is not always unlawful. 472 U.S. at 78-79 and n.5. (See Brief of *Amici Curiae* Alliance Defense Fund et al. ["ADF Br."] at 5 (emphasizing this point).) But here, inclusion of the word "prayer" in the Illinois Act is only one troubling factor among many others, including the complete legislative history and the needlessly narrow secular alternative.

Appellant conceded that without the Act, public school students "may choose to pray silently" during any "moments of quiet during the school day." R. 540 at 2.

In 2007, the General Assembly amended the Act to make it mandatory. P.A. 95-680 (2007); R. 417 at ¶ 8. As the district court emphasized, 594 F. Supp. 2d at 988, the sponsors plainly intended that Illinois school children pray. House sponsor Will Davis stated in floor debate:

> [T]o me it's *nothing different* then when we come into this chamber every day and we're observed . . . and we're asked to observe silence while we . . . as we look to begin our day. *Nothing different* than that and we have to do it, so says the Speaker. So we're asking children to do *the same thing*.

R. 589-590 (emphasis supplied; ellipses in original). What Illinois legislators do as they begin their day is *pray*. See Illinois House Rule 31; Illinois Senate Rule 4-4; Van Zandt v. Thompson, 839 F.2d 1215, 1222 (7th Cir. 1988) (Illinois General Assembly "opens its daily sessions with public prayer"). Senate sponsor Kimberly Lightford, in a contemporaneous interview, was even more forthright: "Here in the General Assembly we open every day with a prayer and Pledge of Allegiance. I don't get a choice about that. I don't see why students should have a choice." Sherman, 594 F. Supp. at 988. See also R. 481-82.[2/]

2/ While Defendant-Appellant asserts that "those legislators were simply noting that they benefit from a quiet moment at the start of the session" (Def. Br. at 37), those sessions begin with prayer, not quiet.

B. Any proffered secular purposes are insincere or secondary.

A proffered secular purpose "has to be genuine, not a sham, and not merely secondary to a religious objective." McCreary County, 545 U.S. at 864. Because "[i]t is of course possible that a legislature will enunciate a sham secular purpose," Wallace, 472 U.S. at 75 (O'Connor, J., concurring), it is "the duty of the courts to 'distinguis[h] a sham secular purpose from a sincere one.'" Santa Fe, 530 U.S. at 308. Given "the ease of finding some secular purpose for almost any government action," the Supreme Court has "not made the purpose test a pushover for any secular claim." McCreary County, 545 U.S. at 864, 865 n.13. Accordingly, the courts will not "credit[] any valid purpose, no matter how trivial." Id. at 865 n.13. See also Lynch v. Donnelly, 465 U.S. 668, 690-91 (1984) (O'Connor, J., concurring) (the purpose inquiry "is not satisfied . . . by the mere existence of some secular purpose, however dominated by religious purposes"). This rule applies to moment-of-silence laws. Wallace, 472 U.S. at 56. See also id. at 64 (Powell, J., concurring) (the secular purpose must be "sincere" and not "a sham"). Cf. Def. Br. at 21, 22, 24, 39 (erroneously asserting that the test is whether the secular purpose is "legitimate" or "plausible," or whether "the sole purpose" is religious).

No record exists of any secular purpose for the original Act in 1969, or for its re-enactments in 1990 and 2002. The following supposed secular purposes were proffered for the 2007 amendment: (1) to help children "settle down"; (2) to

reduce school violence; and (3) to achieve "uniformity across the State." R. 574, 587.

No legislator squarely asserted that the moment-of-silence would serve any pedagogical purpose. This is unsurprising given courts' rejections of such claims. See, e.g., May v. Cooperman, 780 F.2d 240, 251 (3rd Cir. 1985) (affirming a district court finding that "the silent minute has no legitimate pedagogical value"); Duffy, 557 F. Supp. at 1016 ("It is unlikely that the moment of silence carries any significant benefits to the educational process"). Indeed, when the district court here gave each of the 869 Illinois school districts an opportunity to state their position before being enjoined not to implement the Act, the only school district that responded opined that the Act "serves no useful educational purpose." Sherman, 594 F. Supp. 2d at 989 n.8; R. 387.

Helping children calm down cannot be a sincere purpose here. Limiting the uses of the moment-of-silence to "prayer" or "reflection on the anticipated activities of the day" adds nothing to whatever calming effect silence might have. As the district court wisely observed: "The availability of a secular alternative is an obvious factor to be considered in deciding whether the government's choice amounts to an endorsement of religion." Sherman, 594 F. Supp. 2d at 989.

There is no evidence in the legislative history or the summary judgment record that requiring a period of silence for prayer or reflection reduces school

violence. Courts will not credit an alleged legislative "purpose" that wholly lacks evidentiary support. See Kimel v. Florida Bd. of Regents, 528 U.S. 62, 89-91 (2000); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 640-41, 646 (1999); City of Boerne v. Flores, 521 U.S. 507, 530 (1997). Thus, reducing school violence cannot be a genuine purpose of the Act.

Finally, because the Act's principal purpose is religious, as shown above, any legislative intent in 2007 to achieve uniformity simply bespeaks a purpose to uniformly require a religious ritual in every school. Moreover, as the district court explained, 594 F. Supp. 2d at 988, the Act still has no (1) definition of the length of a "brief period," (2) instructions on implementation, or (3) penalties for non-observance. Indeed, Defendant-Appellant acknowledged below that "[t]here may be variations in how school districts implement the law." R. 137 at 2. Had the true purpose been uniformity, the Act would preclude such variation.

C. Defendant-Appellant's cases do not support the Act.

Defendant-Appellant relies heavily on three decisions upholding moment-of-silence laws: Bown v. Gwinnett County Sch. Dist., 112 F.3d 1464 (11th Cir. 1997), Brown, 258 F.3d 265, and Croft v. Governor of Tex., 562 F.3d 735 (5th Cir. 2009). (Def. Br. at 27-30.) The district court properly declined to follow these out-of-circuit, factually distinct, and legally erroneous decisions.

In Bown, Georgia legislators *removed* the word "prayer" from the state's moment-of-silence law. 112 F.3d at 1466. In upholding the amended statute, the Bown court emphasized that this deletion "provides some support for the idea that the Act's purpose is secular." Id. at 1470 n.3. In direct contrast, as the district court here emphasized, 594 F. Supp. 2d at 989, the Illinois Act was amended to *add* the word "prayer," as was the Alabama statute struck down in Wallace, 472 U.S. at 58-60.

For all the reasons explained herein, the Fifth Circuit in Croft erroneously upheld the Texas moment-of-silence statute. Further, the Illinois moment-of-silence statute is factually distinct from the one in Texas, which was amended at once to expressly allow both prayer or "any other silent activity." 562 F.3d at 738. The addition of this expansive catch-all provision, along with the word "pray," was critical to the Croft court's conclusion that the statute had a predominantly secular purpose. Id. at 747. In stark contrast, the Illinois General Assembly added the word "prayer" to the Act, and made it mandatory, without adding a meaningful secular alternative. As explained above, Illinois' secular option ("reflection on the anticipated activities of the day") is far narrower than Texas' ("any other silent activity").

Likewise, the Virginia moment-of-silence statute upheld in Brown included the broad catch-all option of "any other silent activity." 258 F.3d at 270. More

fundamentally, the Brown majority failed to meaningfully scrutinize the legislature's assertion of a secular purpose. For example, the Brown court did not consider the legislature's contemporaneous resolution denouncing the Supreme Court's school prayer decision and its request that Congress amend the Constitution to permit school prayer. Id. at 272 n.3 & 284 (King, J., dissenting). The court also ignored the sponsor's assertion: "This country was based on belief in God, and maybe we need to look at that again." Id. at 271. The Brown court's superficial approach rested on its erroneous legal premise: that the "purpose" test is "a fairly low hurdle," which a statute fails only if "there is no evidence of a legitimate, secular purpose." Id. at 276, 285. In fact, the purpose test is not "a pushover for any secular claim." McCreary County, 545 U.S. at 864. See supra at pp. 8-11 (fully explaining the secular purpose test).

II. THE ACT'S PRINCIPAL EFFECT IS TO ADVANCE RELIGION.

The district court properly held that the challenged statute has the principal effect of advancing religion. 594 F. Supp. 2d at 990. In so holding, the district court emphasized (1) the Act's inherent requirement that teachers instruct students to consider praying, see infra Part II(A); (2) the impact of the Act on impressionable children, see infra Part II(B); and (3) the Act's preference for prayer by some faiths over others, see infra Part III.

A statute violates the Establishment Clause where its "principal or primary effect" is to advance or inhibit religion. County of Allegheny v. Greater Pittsburgh Chapter, 492 U.S. 573, 592 (1989); Lee, 505 U.S. at 584-85. In the context of school prayer, the question is "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools." Santa Fe, 530 U.S. at 308; Lynch, 465 U.S. at 692 (O'Connor, J., concurring). Here, the "objective observers" are the impressionable schoolchildren subject to the Act. Courts are especially vigilant in protecting them from religious endorsements. See supra at p. 2.

A. What the Act requires.

The district court correctly determined that the only reasonable manner for school districts and teachers to observe the "brief period of silence" mandated by the Act would be to have each teacher "explain to her pupils at the opening of 'every school day' that they use the period of silence for one of the two permitted purposes" – i.e., prayer or reflection. Sherman, 594 F. Supp. 2d at 986. The district court's conclusion was confirmed by Defendant-Appellant, who advised below that (1) the only information on "how the law should be implemented" was "the statutory language itself," and (2) the Act was to be implemented by "direct[ing] the classroom teacher to comply with the terms of the statute." R. 484, 486. Accord R. 417 at ¶ 9. "The only way a teacher could be assured of

compliance," the district court soundly concluded, was for her to inform the students of the only two statutorily authorized uses of the moment. Sherman, 594 F. Supp. 2d at 986.[3/]

Defendant-Appellant asserts that "the statute does not require teachers to announce that students are limited to either praying or reflecting," because prayer and reflection are only "examples of how students might use the moment." (Def. Br. at 41.) In fact, the plain language of the Act shows that "prayer" and "reflection" are the *only* two authorized uses. 105 ILCS 20/1. A court "will not rewrite a state law to conform it to constitutional requirements." Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 397 (1988).

3/ Indeed, of the few school districts that responded to an informal query from Defendant-Appellant on this issue, several advised that they implemented the Act in this manner. One district required a daily announcement on the school intercom commanding everyone to pause "for a moment of silent prayer or silent reflection on the anticipated activities of the day." In four districts, students were informed at least once that the purpose of the moment-of-silence was to pray or reflect. Another four districts left implementation to individual teachers and administrators, many of whom no doubt advised their students of the two statutorily permissible uses. See R. 785-798 at Nos. 1-4; R. 630-641; R. 645-47.

Like the district court, see 594 F. Supp. 2d at 986 n.6, *amici* do not credit the reliability of Defendant-Appellant's so-called "survey." Nonetheless, as the district court held, id. at 992 n.13, Defendant-Appellant cannot escape the proof he proffered. In any event, even if some schools did not explain to students the statutory limits on the use of the moment-of-silence, many schools plainly did, and thereby violated many students' religious liberty.

Defendant-Appellant contends that even implementing the Act by reading its use limits to the assembled schoolchildren would not endorse religion, because it would merely "introduc[e] the concept of prayer." (Def. Br. at 42.) In fact, telling students they *must* now be silent, and, during this silence either pray or reflect, is accurately characterized by the district court as "forc[ing] the student to choose prayer or reflection," and thus endorsement of religion. Sherman, 594 F. Supp. 2d at 986. This is no detached "introduction of the concept of prayer," as in a comparative religion class.

Defendant-Appellant argues that the Establishment Clause does not "prohibit government from suggesting a religious option in addition to secular ones, provided the choice remains the individual's." (Def. Br. at 42.) In support, he cites decisions involving religious options offered to mature adults. Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (school vouchers for parents); Freedom from Religion Found., Inc. v. McCallum, 324 F.3d 880 (7th Cir. 2003) (halfway house vouchers for parolees). But this case involves impressionable children in a compulsory school environment. See supra at p. 14.

Finally, Defendant-Appellant mistakenly asserts that no activity here is "unquestionably religious," and that the "only activity that is coerced is silence." (Def. Br. at 43-44.) The "prayer" that students must at least contemplate is the *quintessential* "religious activity." Engel, 370 U.S. at 424; Karen B. v. Treen, 653

F.2d 897, 901 (5th Cir. 1981). And a state's promotion of religion need not be coercive to constitute an impermissible endorsement. See, e.g., Santa Fe, 530 U.S. at 314; Engel, 370 U.S. at 430.

B. The impact of the Act on students.

Plaintiffs offered the expert affidavit of Louis J. Kraus, M.D., a psychiatrist who is the head of Child and Adolescent Psychiatry at Rush University Medical Center. See R.418. at ¶¶ 10-12; R. 431-33. He reliably opined regarding the impact of the Act on young people.

1. Elementary school students.

In Dr. Kraus's professional opinion, children in kindergarten through fifth grade will generally understand a teacher's direction to choose between "prayer" and "reflection" as a mandate to pray, because they know the meaning of "prayer," but not "reflection." See R. 418. at ¶ 10; R. 432 at ¶ 3. As a result, they will not understand "prayer or reflection" to represent a choice. Id.

Defendant-Appellant contends that Dr. Kraus's opinions are "pure speculation," because they lack "evidence about how children actually perceived" the moment-of-silence. (Def. Br. at 44.) Such evidence is not necessary. Rather, Dr. Kraus's expert opinions are based on his clinical psychiatric examinations of thousands of children and adolescents. See R. 431-32, R. 436-446. Through this substantial experience, Dr. Kraus understands the cognitive and emotional

development of children and adolescents; their comprehension of language, and cultural and religious customs; and their response to authority figures. Based on this understanding, Dr. Kraus has successfully treated many children, and supervised the treatment of even more children, in both private and public institutional settings, including numerous Illinois school districts. Id. This is more than sufficient to show that his opinion is both relevant and reliable, as required under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Thus, the district court properly found Dr. Kraus' opinions "quite within the range of normal observation," and that "a five or six year old child cannot be expected to understand the nuances between prayer and silent reflection as much as an eighteen year old." Sherman, 594 F. Supp. 2d at 991.

2. Middle school students.

Dr. Kraus explained that for children in sixth through eighth grade, the choice between "prayer" and "reflection" will be dictated by what the majority of their peers are doing. R. 418 at ¶ 11; R. 432 at ¶ 4. Because "the most important component to children this age is typically social acceptance," middle school students "will be more likely to succumb to peer pressure to be part of a group." Id. Accord Lee, 505 U.S. at 593 ("[r]esearch in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity"); Illinois ex rel. McCollum v. Bd. Of Educ., 333 U.S. 203,

227 (1948) (Frankfurter, J., concurring) ("The law of imitation operates, and nonconformity is not an outstanding characteristic of children.").

The daily ritual mandated by the Act must be understood in light of this peer pressure. The Act mandates "the participation of all the pupils therein assembled at the opening of every school day." There are two coercive elements here: a student cannot refuse to be in the room, and all of his peers are present. Further, the Act requires each student to choose, each day, whether to pray or reflect on the anticipated activities of the day. During the collective ritual mandated by the Act, many students will engage in physical behaviors indicating that they are praying (such as closing their eyes, bowing their heads, placing their hands together, and/or moving their lips). All of these critical elements are absent when, as already guaranteed by law without the Act, students on their own initiative choose to pray together in an otherwise empty classroom, or to silently pray alone at their desks. When an impressionable middle school student is forced every day to be in a room with all his peers, where most or all of his peers are visibly praying, and he is commanded by adults to consider whether to pray, he will experience great peer pressure to pray.[4/]

4/ Courts must also protect high school students from (as here) subtle coercive pressure to pray. Lee, 505 U.S. at 592.

III. THE ACT PREFERS SOME RELIGIONS OVER OTHERS.

The district court properly held that the Act unlawfully communicates to students "an official preference for those religions that practice silent prayer over those that do not." Sherman, 594 F. Supp. 2d at 990.

A. Government cannot favor some religions over others.

Government cannot "pass laws which aid one religion, aid all religions, or prefer one religion over another." Everson v. Bd. of Educ. of Ewing Tp., 330 U.S. 1, 15 (1947). See also Wallace, 472 U.S. at 70 (O'Connor, J., concurring) (government cannot "convey a message that religion or a particular religious belief is favored or preferred"). Thus, for example, in Torcaso v. Watkins, 367 U.S. 488 (1961), the Court invalidated a Maryland law requiring notaries to declare a belief in God, because government cannot "aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." Id. at 495 and n.11. Likewise, in McCreary County, when the dissenters claimed that "government may espouse a tenet of traditional monotheism," 545 U.S. at 879, the Court squarely rejected this as "a view that should trouble anyone who prizes religious liberty." Id. at 879-880.

Further, in Larson v. Valente, 456 U.S. 228 (1982), the Supreme Court held that a law that has the *effect* of preferring some religious traditions over others violates the neutrality principle, even if such a law does not discriminate on its

face. The Court struck down a Minnesota law requiring complex registration for religious organizations that received less than half of their contributions from members. Although the statute did not explicitly favor some religions over others, it "set[] up precisely the sort of official denominational preference that the Framers of the First Amendment forbade," by disparately burdening those religions that engage in door-to-door solicitation. Id. at 255, 234. Here, as explained below, the challenged Act has the effect of putting the State's stamp of approval on religions that engage in brief, silent prayer over those that do not.

B. The Act favors religions that embrace momentary, silent prayer.

"In its most common performance, prayer is an act of speech." 10 Encyclopedia of Religion 7368 (Lindsay Jones ed., 2d ed. 2005). Silent prayer is a Judeo-Christian construct absent in many other religions. See, e.g., Michael W. McConnell, Accommodation of Religion, 1985 Sup. Ct. Rev. 1, 43 (1985) (some religions "do not recognize brief, individual, silent prayer"). Not until the post-Platonic period did "the biblical and Jewish-Christian idea that God knows the thoughts of all men" open the door for silent prayer in western religions. Pieter W. van der Horst, Silent Prayer in Antiquity, 41 Numen 1, 18 (1994).

Even within the Judeo-Christian tradition, silent prayer is not always practiced. At "the heart of every service" in Judaism, for example, is a prayer known as the "Amidah" or the "Shemoneh Esrei." Rabbi Hayim Halevy Donin,

To Pray As A Jew 69-70 (BasicBooks 1980). In the "proper norm" for this prayer, "articulation is required and the words must be audible to oneself." Id. at 71. Similarly, audible chants are central to the religious traditions of the Navajo (Encyclopedia of Religion at 6442-43), and the International Society for Krishna Consciousness. See http://www.krishna.com/node/476; http://www.krishna.com/node/642 (last visited Dec. 8, 2009).

Moreover, prayer often contains physical activities incompatible with a moment-of-silence, "such as song, dance, sacrifice, and food offerings." Encyclopedia of Religion at 7369. For example, "Islam contains in its ritual observances a rich and varied repertory of postures and gestures that are mastered by every adherent," including "a combination of standing, bowing, prostration, and sitting postures accompanied by coordinated head, hand, arm, and foot gestures." Id. at 7341-42. Shoes are removed, and the worshipper may unfurl a prayer rug. Id. at 8055-56. Few schools will allow such Islamic prayer during a moment–of-silence.

Likewise, many Asian prayer practices do not fit within a brief moment-of-silence. Spoken *mantras* are integral to many religions, including Buddhism, Hinduism, Jainism, and Sikhism. Id. at 5676-77. *Mantras* "are useful, powerful, or efficacious . . . because the sounds themselves are said to bear their meaning." Id. at 5677. Moreover, religious meditation exceeds the bounds of a "brief"

moment-of-silence, because it involves "a concentrated dwelling in thought." Id. at 5816. And some religions, such as Confucianism, do not embrace prayer at all. The Concise Encyclopedia of Living Faiths 370 (R. C. Zaehner, ed., 1959).

Thus, the challenged Act does not accommodate religious observance generally. Rather, it endorses religious traditions in which momentary, silent prayer is practiced, teaching impressionable schoolchildren that such worship is superior to the different forms many students practice at home.

Defendant-Appellant conceded below that the moment-of-silence "offer[s] opportunities for silent prayer for religiously-inclined students of some faiths and not others." R. 550. He defends this religious favoritism on the basis of a supposed "legitimate secular reason" – "namely, the need for silence." (Def. Br. at 46, citing Nelson v. Miller, 570 F.3d 868, 881 (7th Cir. 2009).) However, any state interest in silence is entirely served by a moment-of-silence law that does not mention prayer. That interest is not advanced by limiting the use of the moment-of-silence to either (1) a form of prayer (silent and brief) that is embraced by some religions and incompatible with others, or (2) a needlessly narrow secular alternative. Further, while this Court held in Nelson that a merely "legitimate" reason is sufficient to justify a denominational preference, the Supreme Court has held that denominational preferences are invalid unless "closely fitted" to "a

compelling governmental interest." Larson, 456 U.S. at 247. For all the reasons explained herein, any state interest in silence cannot satisfy this rigorous test.

C. The Illinois Act is an outlier in this regard.

Amici States contend that if the Act is unconstitutional because it creates a denominational preference, "then *every* state's moment of silence law must be struck down." (Brief of the States of Texas, et al. ["States Br."] at vii; emphasis in original.) This is not so. Of the 33 other state moment-of-silence laws cited by *amici* (States Br. at 2-3), 25 do not remotely resemble the Illinois Act.

Eighteen state laws – including those of *amici* Alabama, Mississippi, North Carolina, South Carolina, and Utah – do not identify "prayer" as a permissible use of the moment of silence. See Ala. Code § 16-1-20.4; Ariz. Rev. Stat. § 15-342(21); Ark. Code § 6-10-115; Conn. Gen. Stat. § 10-16a; Del. Code § 4101a; Ga. Code § 20-2-1050; Me. Rev. Stat. tit. 20-A, § 4805(2); Mass. Gen. Laws Ch. 71, § 1A; Mich. Comp. Laws § 380.1565; Minn. Stat. § 121A.10; Miss. Code § 37-13-8; N.J. Stat. § 18a:36-4; N.Y. Cons. Laws, Educ., Tit. IV, Art. 61 § 3029-a; N.C. Gen. Stat., § 115C-47(29); R.I. Gen. Laws § 16-12-3.1; S.C. Code § 59-1-443; Tenn. Code § 49-6-1004; Utah Code § 53A-11-901.5.

Five more – those of *amici* Indiana, Maryland, Oklahoma, Texas, and Virginia – offer a far broader range of choices than the Illinois Act. See Ind. Code § 20-30-5-4.5 ("any other silent activity"); Md. Code, Educ. § 7-104 (no

limitation); Okla. Stat. Tit. 70, § 11-101.2 ("any other silent activity"); Tex. Educ. Code § 25.082 (same); Va. Code § 22.1-203 (same).

Thus, only eight states join Illinois in confining students to only two narrow alternatives, one of which expresses a preference for one form of prayer over all others. See Fla. Stat. § 1003.45; Kans. Stat. § 72-5308a; La. Stat., Tit. 17, Ch. 10, Part II, Subpart B, § 2115; Nev. Rev. Stat. § 388.075; N.D. Cent. Code, § 15.1-19-03.1; Ohio Rev. Code, § 3313.601; Penn. Stat., Tit. 24, Ch. 1, § 15-1516.1; W.Va. Const., Art. III, § 15a.[5/]

Amici States further argue that the Act's use of the word "prayer" is similar to certain federal actions recognizing students' right to pray in school. (States Br. at 10-11.) But in those federal actions, there is no restriction on the use of students' time, and "silent" prayer is not preferred.[6/]

5/ Of the remaining two state laws cited by *amici* States one has been repealed. N.M. Stat. § 22-5-4.1. The other purports to authorize "recitation of the traditional Lord's prayer," (Ky. Rev. Stat. § 158.175), which *amici* States concede is unconstitutional (States Br. at 1).

6/ *Amici* States also assert that "if the district court is right, then Justice Brennan must be wrong." States Br. at 8, citing Justice Brennan's concurrence in Abington. To the contrary, Justice Brennan in Abington, like the district court here, emphasized that the Establishment Clause "forbid[s] the use of religious means to achieve secular ends where nonreligious means will suffice." 374 U.S. at 280-81. Justice Brennan observed that "a moment of reverent silence at the opening of class" *might* be such "nonreligious means," id. at 281 and n.57, but he did not approve moment-of-silence statutes that, like the Act challenged here, give prayer – and only a particular kind of prayer – a government imprimatur.

IV. SHERMAN HAS STANDING.

Amicus ADF argues that Sherman lacks Article III standing. (ADF Br. at 19-23.) This argument lacks merit. The starting point is Abington, where the Supreme Court succinctly affirmed the standing of public school children to challenge a Pennsylvania statute providing for Bible reading in public schools: "The parties here are school children and their parents, who are directly affected by the laws and practices against which their complaints are directed. These interests surely suffice to give the parties standing to complain." 374 U.S. at 225 n.9. Likewise, the Court held in Lee: "[A] live and justiciable controversy is before us. Deborah Weisman is enrolled as a student at Classical High School in Providence and from the record it appears likely, if not certain, that an invocation and benediction will be conducted at her high school graduation." 505 U.S. at 584. Here, Sherman suffers the same type of injury recognized in Abington and Lee: she attends a public school subject to a government policy which pressures her to engage in and observe a religious ritual.

ADF argues that the challenged Act does not directly expose Ms. Sherman to "government sponsored religious exercise, practices, or words." (ADF Br. at 22-23) But as the district court held, this argument "is directed mainly to the merits of the case, rather than Ms. Sherman's standing." Sherman v. Township High School Dist. 214, 540 F. Supp. 2d 985, 989 (N.D. Ill. 2008). See also Sherman v.

Wheeling School Dist., 980 F.2d 437, 441 (7th Cir. 1992) (a schoolchild had standing to challenge the Pledge of Allegiance: "That school officials do not compel Richard to participate may bear on the merits but does not make the subject less appropriate for decision.").

ADF attempts to distinguish Abington, Lee and Sherman by quoting Valley Forge Christian College v. Americans United, 454 U.S. 464, 482-83, 486 (1982), for the proposition that "psychological consequence presumably produced by observation of conduct with which one disagrees," and "generalized grievances," do not establish standing. (ADF Br. at 20-21.) However, the plaintiffs in Valley Forge were residents of Maryland and Virginia who objected to a transfer of property in Pennsylvania about which they learned through a news release. 454 U.S. at 487. In sharp contrast, the Court held, stood the plaintiffs in Abington. Id. at 487 n.22. Indeed, the Court in Valley Forge quotes the passage from Abington quoted above, to explain why the Valley Forge plaintiffs did not have the standing that the Abington plaintiffs did. Id.

ADF also attempts to distinguish these cases with the claim that a moment-of-silence law, unlike vocal prayer, "does not coerce [Ms. Sherman] – or any student – to do or say anything." (ADF Br. at 21.) But in Santa Fe, the Supreme Court held that no compulsion is necessary to challenge a government effort to promote public school prayer. The school contended that the facial challenge to its

policy was "premature," because the plaintiffs had suffered no "injury," because no invocations had yet been offered pursuant to the policy. The Court rejected this argument, explaining that it

> assumes that we are concerned only with the serious constitutional injury that occurs when a student is forced to participate in an act of religious worship . . . But the Constitution also requires . . . that we guard against other different, yet equally important constitutional injuries. One is the *mere passage* by the District of a policy that has the purpose and perception of government establishment of religion . . . . Our Establishment Clause cases involving facial challenges . . . have not focused solely on the possible applications of the statute, but rather have considered whether the statute has an unconstitutional purpose.

Santa Fe, 530 U.S. at 313-14 (emphasis added). Citing Wallace – the seminal moment-of-silence decision – the Court in Santa Fe found a ripe "case or controversy" because "the attempt by the District to encourage prayer is also at issue." Id. at 316.

Here, Sherman has shown that the Act has an unlawful purpose. Thus, under Santa Fe, Sherman has suffered a "serious constitutional injury," regardless of whether she is compelled to do or say anything.

Finally, *amici* ACLU-IL and ACLU have located no judicial decision questioning the standing of public schoolchildren to challenge moment-of-silence laws. This is true both of decisions invalidating such laws (e.g., Wallace and May) and upholding such laws (e.g., Brown, Bown, and Croft). Indeed, Croft expressly *rejects* ADF's standing argument: "The Crofts have alleged that their children are

enrolled in Texas public schools and are required to observe the moment of silence daily . . . . [W]e can assume that they or their parents have been offended – else they would not be challenging the law. That is enough to establish standing at this stage of the suit." 562 F.3d at 746.

CONCLUSION

Amici ACLU-IL and ACLU respectfully recommend that this Court affirm the judgment below.

Dated: December 16, 2009

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and 32(a)(7)(B) because:

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The undersigned certifies that the digital version of the foregoing *BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS AND AMERICAN CIVIL LIBERTIES UNION ON BEHALF OF PLAINTIFF AND IN SUPPORT OF AFFIRMANCE OF THE DISTRICT COURT* was generated by printing to PDF format from the original word processing file and not by scanning paper documents, pursuant to Circuit Rule 31(e).

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CERTIFICATE OF SERVICE

I, Jonathan K. Baum, hereby certify that on December 16, 2009, I caused two copies of the foregoing *BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS AND AMERICAN CIVIL LIBERTIES UNION ON BEHALF OF PLAINTIFF AND IN SUPPORT OF AFFIRMANCE OF THE DISTRICT COURT* to be served via the United States postal service, first class mail, postage prepaid, or via third-party commercial carrier, upon the following:

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