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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

MEMORANDUM OF *AMICUS CURIAE* THE ACLU OF ILLINOIS IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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Amicus curiae the ACLU of Illinois, by its attorneys, respectfully submits this Memorandum in Support of Plaintiffs' Motion for Summary Judgment. As demonstrated below, the Silent Reflection and Student Prayer Act violates the Establishment Clause of the First amendment because (1) the Act lacks a predominant secular purpose, (2) the principal effect of the Act is to advance religion, and (3) the Act favors some religions over others.

I. THE SILENT REFLECTION AND STUDENT PRAYER ACT IS AN UNCONSTITUTIONAL ESTABLISHMENT OF RELIGION BECAUSE THE ACT LACKS A PREDOMINANT SECULAR PURPOSE.

A. The History of the Act Demonstrates That Its Predominant Purpose Is To Advance Religion.

It is well-settled that "[w]hen 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, 309-10 (2000)). In no setting have our courts been more vigilant in protecting against sending such messages of exclusion and favoritism than in the public schools which impressionable young people attend under compulsion of law. See, e.g., Lee v. Weisman, 505 U.S. 577, 592 (1992) ("there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools"; citing cases).

Governmental actions taken with the predominant purpose of advancing religion violate the Establishment Clause for that reason alone and without regard to their actual effects. Thus, in Santa Fe Indep. Sch. Dist., the Court held, in a challenge to a school district policy permitting, although not mandating, student-led, student-initiated 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.

Santa Fe Indep. Sch. Dist., 530 U.S. at 316. The religious purpose of a statute (or governmental action) may be discerned from several sources. These sources of course include the statutory language itself and its legislative history, but they also include "the historical context of the statute . . . and the specific sequence of events leading to passage of the statute." Edwards v. Aguillard, 482 U.S. 578, 595 (1987).

A review of the history of the Illinois Silent Reflection and Student Prayer Act clearly reveals its predominant religious purpose. The act was first passed in 1969, against the historical

backdrop of the Supreme Court's decisions in that decade invalidating 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 as a way to continue to have government-sponsored religion in the public schools in the wake of the Supreme Court decisions. David Z. Seide, Daily Moments of Silence in Public Schools: A Constitutional Analysis, 58 N.Y.U. L. Rev. 364, 367-72 and n.43 (1983).

As originally enacted in 1969, 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); Pl.'s Local Rule 56.1 Statement of Material Facts at ¶ 5, Sherman v. Township High Sch. Dist. 214, No. 07 C 6048 (N.D. Ill. filed July 25, 2008) (hereinafter "Pl.'s Stmt."). While the Illinois General Assembly prudently disclaimed that the "brief period of silence" – in which **all** pupils were to participate – was a "religious exercise," this disclaimer is belied by the remaining language of the statute. Not only does the statute, on its face, require all pupils to at least consider using the period of silence for prayer, it gives the prayer "option" preferred status by placing it first.

No legislative history for the original 1969 enactment has survived. However, subsequent actions by the Illinois General Assembly make clear its commitment to restoring government-sponsored prayer in the schools. In 1979 and 1980, both houses of the General Assembly sent resolutions to Congress on the issue of school prayer. In 1979, the Illinois House of Representatives sent a resolution saying that it believed that the United States Constitution

"should" permit "a moment of silent prayer in the classrooms of the public schools," noting that "[t]here are many manifestations in our public life of belief in God" and that "[s]uch belief has been part of the leaven stimulating the growth of this nation." Ill. House Resolution No. 28, reprinted in 1979 Cong. Rec. 3655 (Senate, March 1, 1979). The very next year the Illinois Senate sent a resolution saying that it believed that the United States Constitution "permits a voluntary moment of silent prayer or reflection in the classrooms of the public schools," observing that "[t]he majority of Americans have historically sought God's protection and guidance, both in their personal lives and for the good of this nation," complaining that "Supreme Court decisions during the early 1960's have had the effect of severely restricting the practice of any manner of public prayer," and "encourag[ing] the passage of legislation designed to promote the concept of school prayer." Ill. Senate Resolution No. 365, reprinted in 1980 Cong. Rec. 19207 (Senate, July 23, 1980).

These resolutions provide two insights into the mindset of the Illinois General Assembly. First, Illinois legislators were, for explicitly religious reasons, determined to return government-sponsored prayer to Illinois public schools. Second, the legislators made little distinction between "silent prayer" and "silent reflection," as evidenced by their casual interchanging of those terms. It is questionable whether they understood the two terms to differ in meaning at all. If they did, "reflection" was, at best, an afterthought to prayer, and, at worst, an attempt to camouflage the legislators' true religious purpose. Compare, e.g., Duffy v. Las Cruces Public Schools, 557 F. Supp. 1013, 1015, 1019 (D. N.M. 1983) (inclusion of words "contemplation" and "meditation" in statute providing minute of silence for prayer was attempt to "disguise the religious nature of the bill," a "transparent ruse meant to divert attention from the statute's true purpose").

Subsequent amendments to the 1969 Act reinforce that it has been driven by a religious purpose. In 1990, the previously untitled Act was given a name, "The Silent Reflection Act." P.A. 86-1324 (1990); Pl.'s Stmt. at ¶ 6. But in 2002, the General Assembly made clear that this title did not adequately convey what it intended the Act to accomplish. In that year the General Assembly amended the Act to rename it "The Silent Reflection and Student Prayer Act." P.A. 92-0832 (2002); Pl.'s Stmt. at ¶ 7. This is precisely the kind of evidence from which the Supreme Court evinced an impermissible religious purpose in invalidating the Alabama "moment of silence" law in Wallace v. Jaffree, 472 U.S. 38 (1985). The Court noted amendment of a previous Alabama statute and observed that "the earlier statute refers only to 'meditation' whereas [the amended statute] refers to 'meditation or voluntary prayer.'" Id. at 58-59. Observing that this change in language was either made "to convey a message of state endorsement and promotion of prayer" or "for no purpose," the Court easily concluded that "[t]he addition of 'or voluntary prayer' indicates that the State intended to characterize prayer as a favored practice." Id. at 59-60.[1]

The Illinois Silent Reflection and Student Prayer Act was most recently amended in 2007. Pl.'s Stmt. at ¶ 8. Apparently concerned that, despite its previous efforts, Illinois school children were still not praying (or "reflecting") in sufficient numbers, the General Assembly made the provision that teachers were to lead their pupils in such exercises mandatory, substituting "the teacher in charge **shall** observe a brief period of silence" for "the teacher in

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1 That the change in the Illinois Act is in the title of the statute rather than in its text (as in the Alabama statute) does not deprive this change of significance. See, e.g., Almendarez-Torres v. United States, 523 U.S. 224, 234 (1998) ("'the title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute"; quoting Trainmen v. Baltimore & Ohio R. Co., 331 U.S. 519, 528-29 (1947)); Maguire v. Comm'r, 313 U.S. 1, 9 (1941) ("title of an act . . . may be of aid in resolving an ambiguity") (citations omitted).

charge **may** observe a brief period of silence." P.A. 95-680 (2007) (emphasis added); see Pl.'s Stmt. at ¶ 8.

Both inside and outside the legislative halls, sponsors of the 2007 amendment made plain that they intended that Illinois school children "shall" engage in a religious exercise. House sponsor Will Davis stated in floor debate:

> To me it's nothing different then when we come into this chamber every day 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.

Def. Koch's Memorandum of Law in Opposition to Motion for Temporary Restraining Order and In Support of Motion to Dismiss at Ex. D, p.4, Sherman v. Township High Sch. Dist. 214, No. 07 C 6048 (N.D. Ill. filed Nov. 6, 2007) (hereinafter "Def. Memo in Opp."). Of course, what Illinois legislators do as they begin their day – what the Speaker says they "have to do" – is pray. See Illinois House Rule 31 ("Unless otherwise determined by the Presiding Officer, the standing daily order of business of the House is as follows: (1) Call to Order, Invocation . . ."); Illinois Senate Rule 4-4 (same); 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 with a journalist, was more forthright than her House counterpart, saying: "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." Eric Zorn, Mandatory Silence Sends Loud Message, CHI. TRIB., Mar. 27, 2007 (attached hereto as Exhibit 1).

Where a "moment of silence" law is enacted – or re-enacted – for the "purpose of expressing the State's endorsement of prayer activities for one minute [or "moment"] at the beginning of each schoolday," such a law violates the First Amendment. Wallace, 472 U.S. at

60-61. The history of the Illinois Silent Reflection and Student Prayer Act amply demonstrates that it was enacted, and re-enacted, with such an impermissible religious purpose. The Act is therefore unconstitutional.

B. Any Secular Purposes Proffered for the Act Are Insincere, or At Least Secondary to the Religious Purpose.

The Supreme Court has made clear that for a law to withstand Establishment Clause scrutiny on the basis of a proffered "secular purpose" that purpose "has to be genuine, not a sham, and not merely secondary to a religious objective." McCreary County, 545 U.S. at 864. Indeed, in the context of an Establishment Clause challenge, it is "the duty of the courts to 'distinguis[h] a sham secular purpose from a sincere one.'" Santa Fe Indep. Sch. Dist., 530 U.S. at 308 (quoting Wallace, 472 U.S. at 75 (O'Connor, J., concurring in judgment)). 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 864-65 and n.13. Accordingly, "an approach that credits any valid purpose, no matter how trivial, has not been the way the Court has approached government action that implicates establishment." Id. at 865 n.13. See also Lynch v. Donnelly, 465 U.S. 668, 690-91 (1984) (O'Connor, J., concurring) (purpose inquiry "is not satisfied . . . by the mere existence of some secular purpose, however dominated by religious purposes").

The Court's analysis of asserted secular justifications is especially searching in the context of "moment of silence" statutes. As the Court explained in Wallace, "[i]n applying the purpose test, it is appropriate to ask 'whether government's *actual* purpose is to endorse or disapprove of religion.'" 472 U.S. at 56 (emphasis added), quoting Lynch at 690 (O'Connor, J., concurring). See also id. at 64 (Powell, J., concurring) ("[T]his secular purpose must be 'sincere'; a law will not pass constitutional muster if the secular purpose articulated by the

legislature is merely a 'sham.'"); 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. ").

Thus the secular purposes proffered for the Illinois Silent Reflection and Student Prayer Act must be scrutinized for their validity, their sincerity, and their significance relative to the religious purpose demonstrated above. When subjected to this required scrutiny, they cannot save the Act.

No record exists of any substantive secular purpose proffered for the original enactment of the Act in 1969 or its re-enactments in 1990 and 2002. The following supposed secular purposes were put forward in legislative debates on the 2007 re-enactment:

(1) to give school children a break from noise and help them "take a deep breath" and "settle down" at the start of the school day (Statement of Senate Sponsor Meeks, Def. Memo in Opp. at Ex. C, p. 89; Statement of House Sponsor Will Davis, id. at Ex. D, p. 4; Statement of Rep. Monique Davis, id. at Ex. D, p. 8);

(2) to reduce school violence (statement of House Sponsor Will Davis, Opp., Ex. D at p. 10; Statement of Senate Sponsor Lightford, id. at Ex. C, p. 11); and

(3) to achieve "uniformity across the State in all of our schools" in observance of a moment of silence (Statements of Senate Sponsor Lightford, id. at Ex. C, pp. 88, 8).

Significantly, at no point in the proceedings leading to the enactment or re-enactment of the Act did any legislator even squarely assert – much less demonstrate – that requiring school children to observe the period of silence would improve the educational process or serve any pedagogical purpose. This is unsurprising given courts' rejections of such claims in previous "moment of silence" law cases. See, e.g., May v. Cooperman, 780 F.2d 240, 251 (3rd Cir. 1985)

(affirming district court conclusion 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 this Court recently gave each of the 869 Illinois school districts an opportunity to state their position on being enjoined not to implement the Act, the only school district that responded squarely opined that the Act "serves no useful educational purpose." Notice of Filing Statements and Objections of Defendant Class Member School Districts at Ex. A, p.1, Sherman v. Township High Sch. Dist. 214, No. 07 C 6048 (N.D. Ill. filed May 22, 2008).

Helping children calm down before undertaking their schoolwork may be a legitimate objective, but it is plainly not a sincere purpose here. Rather, it is subordinate to the religious purpose driving the Act. Requiring that students use the period of silence solely for the prescribed purpose of "silent prayer or for silent reflection on the anticipated activities of the day" adds nothing to whatever calming effect the period of silence might have. The fact that the legislature could have served the first proffered purpose without restricting how students use the period of silence confirms that this was really not the legislature's purpose at all.

As for reducing school violence, this is, of course, a legitimate legislative objective, but there is absolutely no evidence in either the legislative history of the Act or the record before this Court that requiring a period of silence for prayer or "reflection" has any impact whatsoever on the level of school violence.[2] In assessing the constitutionality of a statute, the courts will not credit an alleged legislative "purpose" that wholly lacks evidentiary support. Compare Kimel v.

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2 The "study" filed with this Court as an exhibit to the Memorandum of Law in Support of Alliance Defense Fund's Motion to Dismiss Amended Complaint Based on Plaintiffs' Lack of Article III Standing is no such evidence. It is both formally and substantively inadequate. It reveals neither its author nor its publisher, and reflects no attempt to isolate the existence of moment of silence laws as a variable, apart from all others, influencing the rate of juvenile crime.

Florida Bd. of Regents, 528 U.S. 62, 649-650 (2000) (where "evidence" of state age discrimination "consists almost entirely of isolated sentences clipped from floor debates and legislative reports," this "confirms that Congress had no reason to believe that broad prophylactic legislation was necessary in this field"); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 640-41, 646 (1999) (where "Congress came up with little evidence of infringing conduct on the part of the States," but acted on "speculation," provisions of Patent Remedy Act "cannot be understood as responsive to, or designed to prevent" the targeted behavior); City of Boerne v. Flores, 521 U.S. 507, 530 (1997) (statutory prohibition on State actions alleged to infringe religious liberty held invalid exercise of Fourteenth Amendment Congressional power where "legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry"). Reducing school violence simply cannot be deemed a true purpose of the Silent Reflection and Student Prayer Act.[3]

Finally, achieving "uniformity" cannot be a secular purpose that saves the Act. First, the Act – even with the mandatory language added in 2007 – does not, indeed cannot, bring about uniformity in observance of the period of silence. Because the Act (1) does not define how long a "brief period" is, (2) neither contains instructions for teachers on how to implement it nor authorizes the issuance of regulations setting forth such instructions, and (3) contains no penalties for non-observance (by either teachers or students), whether, for how long, and how the period of silence will be observed in Illinois public schools will continue to be highly inconsistent. Thus, the claim that the purpose of the Act is to achieve uniformity is a sham.

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3 Of course, even if state-promoted prayer did reduce school violence, the Act would still be unconstitutional because, as demonstrated below, the Act has the impermissible effect of endorsing religion and violates the Establishment Clause prohibition on favoring one religion over another. See Sections II and III, *infra*.

Moreover, even if uniformity were not a sham purpose for the 2007 amendment making the period of silence mandatory, that would still leave the practice to be made uniform – a period of silence for prayer or reflection – without any secular purpose to support it. If there is no secular purpose for a statute that implicates the Establishment Clause, it can hardly be saved by the "secular purpose" of having the statute's religiously-driven requirements more generally observed.

Because there is ample evidence that the Illinois Silent Reflection and Student Prayer Act was enacted with the predominant purpose of promoting that most quintessential of religious activities, prayer, it violates the Establishment Clause of the First Amendment.

II. THE SILENT REFLECTION AND STUDENT PRAYER ACT IS AN UNCONSTITUTIONAL ESTABLISHMENT OF RELIGION BECAUSE ITS PRINCIPAL EFFECT IS TO ADVANCE RELIGION.

A statute that "touches on religion," like the Silent Reflection and Student Prayer Act at issue here, violates the Establishment Clause where its "principal or primary effect" is to advance or inhibit religion. County of Allegheny v. ACLU, 492 U.S. 573, 592 (1989) (citing Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971)); accord Lee, 505 U.S. at 584-85. In the context of school prayer, the Court has recently reaffirmed that the relevant 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 Indep. Sch. Dist., 530 U.S. at 308 (quotations and citation omitted); accord Lynch, 465 U.S. at 692 (O'Connor, J., concurring) (identifying the "crucial" question as whether a government action has the intentional or unintentional effect of "communicating a message of government endorsement or disapproval of religion"). The relevant "objective observers" of the effect of the Silent Reflection and Student Prayer Act include, of course, the school children in whose classrooms the Act is to be implemented.

The effect of the Silent Reflection and Student Prayer Act upon students is shown by how it is implemented. The State of Illinois has recently confirmed that the only information it has on "how the law should be implemented" is "the statutory language itself." See Pl.'s Stmt. at ¶ 9 ("As presently written, the law provides no guidance as to how the period of silence should be implemented."). The State further confirms that the Act is to be implemented by "direct[ing] the classroom teacher to comply with the terms of the statute." Defendant Koch's Interrogatory Answers, Nos. 1, 7 (attached hereto as Exhibit 2). Accordingly, it may properly be assumed (as this Court did in its preliminary injunction ruling, Sherman v. Township High School Dist. 214, No. 07 C 6048, 2007 WL 3446213, at *3, (N.D. Ill. Nov. 15, 2007)) that the Act will be implemented simply by having teachers or other school authorities read the statute to their students. Although a student's response to hearing the Act read by a teacher or principal may vary slightly based on his or her age and maturity level, students of all ages will understand the Act to represent a state endorsement of prayer in school.

A. Because Elementary Students Generally Lack the Abstract Reasoning Ability to Distinguish Between "Prayer," Which is Unquestionably Religious, and "Reflection," the Effect of the Act on These Students is to Promote Prayer.

Children in elementary school, defined as kindergarten through fifth grade, will generally understand a teacher's direction to choose between "prayer" and "silent reflection" as a mandate to pray that children of this age will feel obliged to follow. For these children, the "choice" they are offered is really no choice at all. Most elementary children understand what "prayer" is, but, given their lack of significant abstract reasoning skills, few, if any, understand what it means to engage in "silent reflection." See Pl.'s Stmt. at ¶ 10; Pl.'s Memorandum in Support of Motion for Summary Judgment at Ex. 1, ¶ 3, Sherman v. Township High Sch. Dist. 214, No. 07 C 6048 (N.D. Ill. filed July 25, 2008) (hereinafter "Pl. Memo"); Kraus Affidavit at ¶ 3 (attached hereto as Exhibit 3, hereinafter "Ex. 3"). As a result, children of this age will not understand that "silent

prayer . . . or silent reflection" represents a choice. Pl.'s Stmt. at ¶ 10; Pl. Memo at Ex. 1, ¶ 3; Ex. 3, ¶ 3. In the eyes of these "objective observers," the teacher, acting as an agent of the State, is conveying the message – even if unintended – that the children should use the moment of silence for prayer. Because elementary school children typically aim to please adults, a child who believes a teacher is ordering her to pray will do as she is told. Pl.'s Stmt. at ¶ 10; Pl. Memo at Ex. 1, ¶ 3; Ex. 3, ¶ 3. This is precisely the type of religious endorsement that the Establishment Clause prohibits. See County of Allegheny, 492 U.S. at 593 (opining that the Establishment Clause forbids government from "conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred" (quoting Wallace, 472 U.S. at 70)) (internal quotation marks and emphasis omitted); Wallace, 472 U.S. at 73 (O'Connor, J., concurring) (instructing that, as implemented, a moment of silence statute that conveys the message that "children should use the moment of silence for prayer" will be understood as a message of endorsement).

B. Middle School Students Will Feel Compelled to Pray or Not Pray Based on the Behavior of the Majority of Their Peers.

To the extent that children in middle school, defined as sixth through eighth grade, are able to distinguish between "prayer" and "silent reflection," their choice will be dictated by whether the majority of their peers are praying or silently reflecting. Pl.'s Stmt. at ¶ 11; Pl. Memo at Ex. 1, ¶ 4; Ex. 3, ¶ 4. Children of this age tend to discuss their feelings and share their choices with other students to determine whether their behavior conforms with that of their peers. Pl.'s Stmt. at ¶ 11; Pl. Memo at Ex. 1, ¶ 4; Ex. 3, ¶ 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 as opposed to expressing individual thoughts so as not to be seen as different." See Pl.'s Stmt. at ¶ 11; Pl. Memo at Ex. 1, ¶ 4; Ex. 3,

¶ 4. See also Lee, 505 U.S. at 593 (recognizing that "[r]esearch in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention" (citing authorities in psychology)).

The daily ritual mandated by the challenged Act must be understood in light of this peer pressure that always plays such a dominant role in the lives of middle school students. Specifically, 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 during non-instructional time, or to silently pray alone at their desks in a non-disruptive manner. 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. See Pl. Memo at Ex. 1, ¶ 4 (stating that the "group pressure" to pray will be "quite significant"); Ex. 3, ¶ 4; see also Pl.'s Stmt. at ¶ 11. Similarly, if the majority of students in a classroom pray by folding their hands and bowing their heads, a child who might otherwise desire to pray by kneeling on a prayer rug would instead feel compelled to pray while folding his hands and bowing his head as well. See Illinois ex rel. McCollum v. Bd. of Educ., 333 U.S. 203, 227

(Frankfurter, J., concurring) ("That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and nonconformity is not an outstanding characteristic of children."); cf. Lee, 505 U.S. at 605 n.6 (Blackmun, J., concurring) (noting that "[a]s a practical matter, of course, anytime the government endorses a religious belief there will almost always be some pressure to conform").

With respect to middle school students, therefore, the primary effect of the Act is to either advance religion, if the majority of the students choose to pray, or to inhibit religion if the majority of students choose not to pray. Even if this were not considered direct governmental coercion or religious endorsement or disapproval, such a result nevertheless violates the Establishment Clause. See Engel, 370 U.S. at 430 ("The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not.").

C. High School Students Who Understand the Difference Between Prayer and Reflection Are Also More Likely to Understand the Act as a State Endorsement of Prayer in School.

As the Supreme Court has noted, "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." Lee, 505 U.S. at 592 (citing cases). See also id. ("Our decisions . . . recognize, among other things, that prayer exercises in public schools carry a particular risk of indirect coercion. The concern may not be limited to the context of schools, but it is most pronounced there."). Thus, even a high school student who arguably understands the abstract notion of "silent reflection," see Pl.'s Stmt. at ¶ 12; Pl. Memo at Ex. 1, ¶ 6; Ex. 3, ¶ 6, and is more likely to express a minority opinion than a younger student, see Pl.'s Stmt. at ¶ 12; Pl. Memo at Ex. 1, ¶ 5; Ex. 3, ¶ 5, is

constitutionally entitled to be protected from subtle coercive pressure to pray. This is the type of pressure present in a high school classroom where a nonbeliever is, for example, surrounded by students who have closed their eyes, bowed their heads and folded their hands. As with the high school student in Lee who was required to stand during a time of prayer at graduation ceremonies, the nonobserving Illinois public high school student forced to observe a moment of silence or feign prayer so that others may pray around her may also feel that her compliance is more like an "expression of participation" than a mere showing of respect for her praying peers. 505 U.S. at 592-93 ("What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy. . . . What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it.").

In applying the guarantees of the Establishment Clause, the ground-level reality of the "choice" offered to Illinois public school students by the Silent Reflection and Student Prayer Act must be given great weight. The Supreme Court has squarely held that, even where the plain language of a school practice touching on religion is facially neutral, "the Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions." Santa Fe Indep. Sch. Dist., 530 U.S. at 307 n.21. Like the Court in Santa Fe, this Court must reject any invitation "to pretend that we do not recognize what every . . . student understands clearly – that this policy is about prayer." Id. at 315.

III. THE SILENT REFLECTION AND STUDENT PRAYER ACT IS AN UNCONSTITUTIONAL ESTABLISHMENT OF RELIGION BECAUSE IT PREFERS SOME RELIGIONS OVER OTHERS.

A. The Minimum Requirement of the Establishment Clause is that Government Not Favor Some Religions Over Others.

It is a bedrock principle of Establishment Clause jurisprudence that the State must remain absolutely neutral towards the myriad religious traditions of its citizens, favoring none to the detriment of others. The Supreme Court first declared the neutrality principle in Everson v. United States: "Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another." Everson v. United States, 330 U.S. 1, 15 (1947). While the Supreme Court has long "rejected unequivocally the contention that the Establishment Clause forbids **only** governmental preference of one religion over another," Abington Sch. Dist., 374 U.S. at 216 (emphasis added), **at a minimum**, governments must not favor one lawful form of religious observance over another. See also Wallace, 472 U.S. at 70 (O'Connor, J., concurring) (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) ("no 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)). Indeed, America was founded on the belief that the State must not favor some forms of religious observance to the detriment of others, for our founders came across the ocean seeking freedom from the persecution they themselves faced due to their refusal to conform to the practices mandated by State-sponsored religious sects abroad.

The Supreme Court enunciated and applied the core principle of neutrality among forms of religious worship in Torcaso v. Watkins, 367 U.S. 488 (1961). In Torcaso, the Court invalidated a Maryland constitutional provision requiring notaries to declare a belief in God,

because "neither [a State nor the Federal Government] can 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 (identifying Buddhism, Taoism, Ethical Culture, and Secular Humanism as "[a]mong religions in this country which do not teach what would generally be considered a belief in the existence of God"). Accordingly, in McCreary County, when the dissenters claimed "that the deity the Framers had in mind was the God of monotheism, with the consequence that government may espouse a tenet of traditional monotheism," the Court issued a harsh rebuke, deeming the notion "that government should be free to approve the core beliefs of a favored religion over the tenets of others" to be "a view that should trouble anyone who prizes religious liberty." McCreary County, 545 U.S. at 879-80. The Court's inclusive view of religion clearly conflicts with the notion that the Judeo-Christian tradition should be determinative of what qualifies as a proper prayer practice.

As demonstrated extensively below, just as some religions do not involve belief in a deity, some religions do not observe momentary, individual, silent prayer. A law that evinces a preference for religions that observe brief silent prayers is thus as unconstitutional as a law favoring theistic religions, even if such a law does not discriminate against differing prayer practices on its face. In Larson v. Valente, the Supreme Court held that a law that has the **effect** of preferring some religious traditions over others violates the neutrality principle. In Larson, the Court held that a Minnesota law requiring complex registration requirements for religious organizations that received less than half of their contributions from members or affiliated organizations violated the Establishment Clause. Larson v. Valente, 456 U.S. 228 (1982). Although the statute in Larson did not explicitly favor some religions over others, the Court held that the "fifty per cent rule sets up precisely the sort of official denominational preference that

the Framers of the First Amendment forbade," as it had the effect of favoring those religious traditions that do not engage in "door-to-door and public place proselytizing and solicitation of funds" over those that do. Id. at 255, 234.[4] Similarly, the Silent Reflection and Student Prayer Act violates the neutrality principle because it has the effect of favoring religions that engage in brief, individual, silent prayer over those that do not. Given that all students already have the right to engage in brief, individual, silent prayer during the schoolday, the Act can only serve as a limitation on the prayer practices of some religions, thereby wrongfully favoring others in derogation of the First Amendment.

The assumption behind the Silent Reflection and Student Prayer Act that the State may establish a nonsectarian mode of school prayer was thoroughly rejected by the Supreme Court in Lee v. Weisman. In that case, the Court was "asked to recognize the existence of a practice of nonsectarian prayer" for purposes of a high school graduation invocation in order to avoid a violation of the neutrality principle. 505 U.S. at 589. The Court stated that while finding common forms of expression that could unite the religious traditions of all citizens may be a noble goal, "though the First Amendment does not allow the government to stifle prayers which aspire to these ends, neither does it permit the government to undertake that task for itself." Id. The Silent Reflection and Student Prayer Act is thus an unconstitutional attempt by the State to create a mode of nonsectarian prayer, for "[t]he design of the Constitution is that preservation

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4 In Larson, the Court did allow that a denominational preference might survive Establishment Clause scrutiny if "it is justified by a compelling governmental interest . . . and . . . is closely fitted to further that interest." Larson, 456 U.S. at 247 (citation omitted.) The Silent Reflection and Student Prayer Act, however, serves no compelling governmental interest. As demonstrated in Section I-A above, the true "interest" served by this statute enacting a denominational preference – to promote religion – is not even legitimate, much less compelling. The secular "interests" asserted in support of the Act are not "compelling" – they are insincere and subordinate to the Act's true, religious purpose. (See Section I-B.)

and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission." Id. Just as the State may not constitutionally attempt to compose a nonsectarian prayer for a school ceremony, the State may not attempt to establish a brief, individual, silent mode of prayer for all classrooms without violating the neutrality requirement.

The corollary of faith and belief is expression and observance. Concomitantly, the First Amendment "secures all forms of religious expression, creedal, sectarian or nonsectarian wherever and however taking place, except conduct which trenches upon the like freedoms of others or clearly and presently endangers the community's good order and security." Everson, 330 U.S. at 32 (Frankfurter, J., dissenting). In stark contrast, the Silent Reflection and Student Prayer Act represents a parochial notion of what constitutes prayer, and it is clear from First Amendment precedent that mandating such a narrow form of prayer violates the Constitution. The Constitution forbids the State from passing legislation that has the effect of establishing a favored form of worship over unobtrusive, lawful alternatives, in order to maintain the guarantee of religious freedom for all citizens.

B. The Silent Reflection and Student Prayer Act Discriminates Against Students Who Adhere to Religions that Do Not Embrace the Concept of Momentary, Silent Prayer.

"Intuitively prayer is an act of communication. In its most common performance, prayer is an act of speech." 10 Encyclopedia of Religion 7368 (Lindsay Jones ed., 2d ed. 2005). The concept of momentary, silent prayer is a Judeo-Christian construct that lacks analogues in many of the other religious traditions of the citizens of the United States. Incontrovertibly, there are "religions that do not recognize brief, individual, silent prayer." Michael W. McConnell, Accommodation of Religion, 1985 Sup. Ct. Rev. 1, 43 (1985). Indeed, tracing the history of prayer, "[t]he ancients said their prayers out loud. There can be little doubt that throughout the

ancient world the common practice was to say prayers in a way audible to other persons." Pieter W. van der Horst, Silent Prayer in Antiquity, 41 Numen 1, 1 (1994). The simple reason was that the ancients' "anthropomorphic conception of the deities" meant they believed "the gods had ears that worked in much the same way that human ears did." Id. Not until the post-Platonic period did "the biblical and Jewish-Christian idea that God knows the thoughts of all men" become the majoritarian paradigm, opening the door for brief silent prayer in western religions. Id. at 18.

Even within the Judeo-Christian context, the tradition of "silent" prayer is hardly so clear as the authors of the Silent Reflection and Student Prayer Act may have supposed. 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: A Guide to the Prayer Book and the Synagogue Service 69-70 (BasicBooks 1980). "[T]he Shemoneh Esrei is sometimes referred to as the 'Silent Prayer,'" id. at 71, from the tradition of the Biblical Hannah, who "spoke in her heart; only her lips moved, but her voice could not be heard." I Samuel 1:13. But, in fact, in the "proper norm" for this so-called "silent" prayer, "articulation is required and the words must be audible to oneself." To Pray As A Jew at 71. Whether or not such soft chanting fits within the strictures of the Silent Reflection and Student Prayer Act is one of the many vagaries that plague the statute.

In many significant religious traditions, there is an even greater emphasis that prayer should or must be vocal. For some religions, "the intangible nature of the gods demands a linguistic means to make their presence take on a more concrete reality." Encyclopedia of Religion at 5306. One such religious tradition is that of the Navajo of North America, whose prayer practices have been described by scholars as consisting of "compulsive words" or

"creative words." Id. at 6652. Researchers have identified twenty-four chant complexes engaged in by the Navajo, whose "emphasis on orality and holistic understanding" (id. at 6442-43) is incompatible with the notion of brief silent prayer. Furthermore, devotees of the International Society for Krishna Consciousness, an outgrowth of Vaisnava Hinduism, believe that chanting the Hare Krishna mantra is the most sacred and central form of worship. "The heart of [Krishna consciousness] is to hear about Krishna, because hearing makes us conscious of him." Krishna Consciousness, http://www.krishna.com/node/476 (last visited July 22, 2008). "If we can do only one thing for our ultimate benefit, it should be to chant the Hare Krishna mantra." http://www.krishna.com/node/642 (last visited July 22, 2008). Clearly, the idea that a moment of silence for prayer is non-denominational breaks down further when one steps outside of the Judeo-Christian mindset.

Beyond a mere focus on orality or lack thereof, prayer contains multiple additional dimensions that simply are not encompassed within the "brief period of silence" stricture.

> [A] prayer act, to have effect, to be true and empowered includes not only the utterance of words, but the active engagement of elements of the historical, cultural, and personal setting in which it is offered. It may include certain body postures and orientations, ritual actions and objects, designated architectural structures or physical environments, particular times of the day or calendar dates, specified moods, attitudes, or intentions.

Encyclopedia of Religion at 7369. Several "nonspeech forms are also commonly recognized as essentially prayer, such as song, dance, sacrifice, and food offerings." Id. The act of prayer, then, must not be divorced from its ritual context. "Analogous to ordinary language where familiar words can be ordered according to a single set of grammatical principles in infinite ways to be creative and expressive, prayer passages may be ordered in conjunction with ritual elements to achieve the same communicative capabilities." Id. Much can be conveyed through postures and gestures of the body, in a manner that may not conform to the vague concept of a

"brief period of silence." "Every religious tradition recognizes an intimate relationship between inward dispositions and external postures and gestures of the human body, which is capable of expressing and celebrating a great range of attitudes, moods, motivations, and intentions, whether sacred or profane." Id. at 7341. It is at best highly uncertain at what point such devotional postures and gestures will transgress the silence mandated by the Silent Reflection and Student Prayer Act.

One religious tradition involving deeply expressive postures and gestures is Islam. "Islam contains in its ritual observances a rich and varied repertory of postures and gestures that are mastered by every adherent." Id. at 7341-42. "All Muslims perform the *rak' ahs* (bowing cycles) of each *salāt*, or prayer service, with a combination of standing, bowing, prostration, and sitting postures accompanied by coordinated head, hand, arm, and foot gestures." Id. at 7342. Shoes are removed for *salāt*, and the worshipper may unfurl a prayer rug, facing Mecca. Id. at 8055-56. Even if the practitioner of Islam could engage in the prayer ritual without speaking audibly, the prayer process is still highly communicative. "A Muslim, or a knowledgeable outside observer, can tell at a glance and from a distance when a Muslim is at formal prayer (*salāt*), and moreover at what point in the ritual, just from observing postures and gestures." Id. at 7342. Additionally, due to cultural variations, "[r]eligious postures and gestures serve not only to symbolize and regulate devotion; they also demarcate religious communities and subcommunities." Id. Religious postures and gestures thus can communicate much and divide many along sectarian lines, casting doubt on whether a "brief period of silence" accounts for the wide range of expressive prayer acts students may desire to engage in.

Although other non-Judeo-Christian religious traditions, such as Hinduism and Buddhism, may involve elements of silent observance, many eastern prayer practices still do not

mesh with the "brief period of individual, silent prayer" paradigm. "For those traditions that are not theistic, like Theravāda Buddhism, prayer understood as human-divine communication is not possible. However, a number of kinds of Buddhist speech acts, such as meditational recitations, scriptural recitations, *mantras*, and *bodhisattva* vows, have certain resemblances to prayer, especially in terms of many of its functions." Id. at 7369. Whereas meditation is prone to conceptualization in the western world as an exclusively silent activity, *mantras* are integral to the religious traditions of South Asia, including Sikhism and Jainism along with Hinduism and Buddhism. Id. at 5676-77. As defined in the Encyclopedia of Religion, a *mantra* is "a sacred utterance, incantation, or invocation repeated aloud or in meditation in order to bring about a prescribed effect, such as the calming of the mind or a vision of a deity." Id. at 5676. *Mantras* "are useful, powerful, or efficacious . . . because the sounds themselves are said to bear their meaning" and "because they are said to be transformative to the speaker in ways that ordinary language is not." Id. at 5677. Meditation in Tantric Hinduism, moreover, involves *mantras* as well as *mudrās*; "*Mudrā*, a Sanskrit word meaning 'sign, gesture,' denotes a highly ramified and conceptually sophisticated symbolic hand language developed by . . . Hinduism and Buddhism; it interpenetrates and connects various levels of their belief, behavior, aesthetic sensitivity, and communal life." Id. at 7343. Moreover, even in the absence of *mantras* and *mudrās*, meditation necessarily exceeds the bounds of a "brief period of silence . . . for prayer or reflection." "The English word *meditate* comes from the Latin *meditari*. *Meditari* connotes deep, continued reflection, a concentrated dwelling in thought." Id. at 5816. "Brief meditation" would thus be an oxymoron, entirely detached from religious traditions that necessitate ten minutes or more to reach the proper state of consciousness. Finally, some religions do not embrace the concept of personal prayer at all. For example, Confucianism, the Chinese folk religion, "[does] not provide

for private worship or prayer, nor for rites of atonement, confession and self-mortification to take away sin." The Concise Encyclopedia of Living Faiths 370 (R. C. Zaehner, ed., 1959). The establishment of "brief, individual, silent prayer" thus violates the core principle of neutrality at multiple levels.

Ironically, therefore, the statute at issue in this case does not accommodate religious observance, but rather anoints one form of worship, discriminating against all others. The Silent Reflection and Student Prayer Act favors religious traditions in which momentary, silent prayer is practiced, signaling to impressionable students that such a form of worship is superior to the forms of worship students may observe with their families and in their homes. Such a State endorsement of one exclusive mode of religious worship violates the constitutional principle of neutrality, especially in light of the increasing judicial recognizance that the religious freedom guaranteed by the First Amendment extends to all lawful forms of religious observance.

CONCLUSION

For the reasons set forth above, *Amicus Curiae* the ACLU of Illinois respectfully recommends that this Court grant Plaintiffs' Motion for Summary Judgment.

Dated: July 25, 2008

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

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

NOTICE OF FILING

To: See Attached Certificate of Service

PLEASE TAKE NOTICE that on Wednesday, July 31, 2008 at 9:30 a.m., we shall appear before The Honorable Judge Robert W. Gettleman, or any judge sitting in his stead, in Room 1703 of the Everett McKinley Dirksen United States Courthouse, 219 South Dearborn Street, Chicago, Illinois 60604, and then and there present the foregoing **MEMORANDUM OF *AMICUS CURIAE* THE ACLU OF ILLINOIS IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**, a copy of which is attached hereto and hereby served upon you.

Dated: July 25, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **NOTICE OF FILING** and **MEMORANDUM OF AMICUS CURIAE THE ACLU OF ILLINOIS IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** have been filed and served using the CM/ECF system on this 25th day of July 2008 upon:

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