

No. 09-1455

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

DAWN S. SHERMAN,
a minor through ROBERT I. SHERMAN, her father and next friend,
Plaintiff-Appellee,

v.

DR. CHRISTOPHER KOCH,
State Superintendent of Education, in his official capacity,
Defendant-Appellant.

and

TOWNSHIP HIGH SCHOOL DISTRICT 214,
on behalf of itself and all other school districts similarly situated,
Defendant.

Appeal from the United States District Court
for the Northern District of Illinois
Case No. 07-cv-6048
The Honorable Judge Robert W. Gettleman

BRIEF OF *AMICI CURIAE*,
ALLIANCE DEFENSE FUND AND ILLINOIS FAMILY INSTITUTE,
IN SUPPORT OF DEFENDANT-APPELLANT,
AND SUPPORTING REVERSAL OF THE DISTRICT COURT

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 09-1455

Short Caption: Dawn Sherman v. Christopher Koch

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.

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Amicus Curiae, Illinois Family Institute

Amicus Curiae, Alliance Defense Fund

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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Mauck & Baker

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i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None

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AMICI CURIAE'S IDENTITY, INTERESTS, AND AUTHORITY TO FILE

ALLIANCE DEFENSE FUND (“ADF”) is a non-profit public interest organization devoted to defending, protecting, and advocating religious freedom, goals it pursues by providing strategic planning, training, and funding to attorneys and organizations regarding religious civil liberties. ADF and its allies represent thousands of Americans who desire to maintain their right to religious expression. ADF has been directly or indirectly involved in over 500 legal matters, including numerous religious expression cases before the United States Supreme Court. *See, e.g., Good News Club v. Milford Cent. Schs.*, 533 U.S. 98 (2001); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

This case significantly concerns ADF because it implicates the religious freedom rights of students in Illinois and nation-wide and because it involves the proper interpretation and application of the Establishment Clause to a moment of silence law that permits religious and nonreligious activities. ADF represents thousands of Americans across the nation and in Illinois who desire to preserve the right to religious liberty. Thus, ADF and the thousands of persons it represents have a particular interest in this case's outcome.

The ILLINOIS FAMILY INSTITUTE (“IFI”) is a §501(c)(3) non-profit ministry dedicated to upholding and re-affirming marriage, family, life, and liberty in Illinois. Since 1992, IFI has worked to advance public policies consistent with Judeo-Christian teachings and traditions, educating citizens so they can better influence their local communities and the state. IFI does not participate in any political campaign on behalf of any candidate for public office.

IFI represents thousands of Illinois citizens who desire to maintain religious liberties that America has enjoyed since its founding. This case is of significant concern to IFI because it believes that while the moment of silence law does not establish or endorse a particular religion, it does recognize students' First Amendment right to exercise—or not exercise—their religious liberties. Simply offering students a moment of silence for prayer or reflection each school day in appreciation of that sacred right should not create a constitutional crisis. IFI represents thousands of Illinois citizens who desire to preserve the right to religious liberty. Thus, IFI and the thousands of persons it represents have a particular interest in the outcome of this case

Although ADF participated as *amicus* below without objection, neither party to this appeal consented to the filing of this brief. Therefore, *amici* rely on the attached motion for leave to file an *amicus* brief under FED. R. APP. P. 29(a)-(b).¹

¹ Before the lower court, ADF provided briefing and the rebuttal expert opinion. The court acknowledged ADF's "important contributions" to the "orderly and professional disposition of [the] litigation." (R.164 at 2.)

INTRODUCTION

In this brief, *amici curiae* highlight the lower court's patent legal errors in interpreting and applying the Establishment Clause, vagueness doctrine, and standing doctrine in this facial challenge. The court was required to employ "every reasonable construction" to construe the law constitutionally, *Gonzalez v. Carhart*, 550 U.S. 124, 153 (2007) (citations omitted), which is easily done here. Instead, the court not only ignored this principle, but turned it on its head by straining to construe the law unconstitutionally.

Astoundingly, the lower court charts an entirely new constitutional course. No federal court has ever ruled a moment of silence law unconstitutionally vague. No federal appellate court has held that a moment of silence law violates either the effects or entanglement prongs of the *Lemon* test. And in the *two* instances where federal appellate courts found a violation of *Lemon's* first prong, there was *no* secular purpose.² Illinois's moment of silence statute, however, serves three secular purposes and is constitutionally indistinguishable from moment of silence statutes recently upheld by the Fourth, Fifth, and Eleventh Circuits. Thus, this Court would stand alone among the circuits if it affirmed the lower court. In fact, neither this Court nor the lower court should even reach the merits as Plaintiff's alleged injury is entirely speculative.

² *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985); *May v. Cooperman*, 780 F.2d 240, 253 (3d Cir. 1985).

ARGUMENT

I. THE DISTRICT COURT ERRED IN INTERPRETING AND APPLYING THE ESTABLISHMENT CLAUSE.

The district court—on a purely facial challenge³—invalidated Illinois’s moment of silence statute (“Act”), 105 ILL. COMP. STAT. (ILCS) 20/1, holding that it lacked a secular purpose and had the primary effect of advancing or inhibiting religion. (R.164 at 11-12.) It relied on an easily distinguishable case—*Wallace*—and ignored three federal courts of appeal that rejected Establishment Clause challenges to very similar statutes. Like those statutes, this Act has clear secular purposes, does not advance or inhibit religion, and does not entangle government with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). Rather, it simply allows students to do what they have the constitutional right to do at any given moment of the day—think or pray silently.

In 1997, the Eleventh Circuit upheld Georgia’s amended moment of silence statute. *Bown v. Gwinnett County Sch. Dist.*, 112 F.3d 1464 (11th Cir. 1997). This statute created a mandatory “brief period of quiet reflection,” which could not be used to “prevent student initiated voluntary school prayers” or be conducted as a “religious service or exercise.” *Id.* at 1466.

In 2001, the Fourth Circuit upheld Virginia’s amended moment of silence law. *Brown v. Gilmore*, 258 F.3d 265 (4th Cir. 2001). This law required public schools to

³ By “not relying on anecdotal incidents or instances of school authorities’ conduct of the moment of silence ceremony to support [her] claim that the statute is unconstitutional,” Plaintiff concedes that her challenge is purely facial. (R.141-2 at 19-20; *accord* Pl.’s Mot. for Permanent Inj. at 4 (“Since the statute was challenged on its face, nothing this Court will learn in an answer or discovery will change the way in which the statute is read.”).)

institute a moment of silence during which students could “meditate, pray, or engage in any other silent activity which does not interfere with, distract, or impede other pupils in the like exercise of individual choice.” *Id.* at 271 n.1.

In March (two months after the lower court’s opinion), the Fifth Circuit upheld Texas’s amended moment of silence law, which required schools to “provide for the observance of one minute of silence” during which “each student may, as the student chooses, reflect, pray, meditate, or engage in any other silent activity that is not likely to interfere or distract another student.” *Croft v. Governor of Tex.*, 562 F.3d 735, 738 (5th Cir. 2009).

Conversely, the Supreme Court invalidated Alabama’s moment of silence law in *Wallace v. Jaffree*, 472 U.S. 38 (1985), precisely because it had *no secular purpose*. While this statute required students to observe a period of silence “for meditation or voluntary prayer,” *id.* at 40 n.2, the legislative history and accompanying legislation revealed that it was designed *solely* to endorse prayer in schools. *Id.* at 57. No such evidence exists here.

Hence, the district court’s opinion erroneously relied on an easily distinguishable case—*Wallace*—and directly conflicts with three more recent, more applicable federal appellate cases.

A. THE DISTRICT COURT ERRED BY HOLDING THE ACT HAS NO VALID SECULAR PURPOSE.

A government’s proffered purposes for enacting a statute “will generally get deference,” *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 864 (2005), and will only be questioned in those highly “*unusual cases* where the claim [is] an apparent sham,

or the secular purpose [is] secondary [to a religious purpose],” *id.* at 865 (emphasis added). The crucial question for moments of silence is “whether the State has conveyed or attempted to convey the message that children should use the moment of silence for prayer.” *Wallace*, 472 U.S. at 73 (O’Connor, J., concurring). “If a legislature expresses a plausible secular purpose for a moment of silence statute in either the text or the legislative history, or if the statute disclaims an intent to encourage prayer over alternatives during a moment of silence, then courts should generally defer to that stated intent.” *Id.* at 74-75 (O’Connor, J., concurring).

This is certainly not an “unusual” case. This Act serves three secular purposes: (1) providing students a moment of quiet reflection to calm down and prepare for the day’s educational activities; (2) accommodating religion; and (3) curbing youth violence. The district court should have accepted these clear secular purposes instead of conjuring an imaginary religious objective.

1. SECULAR PURPOSES IN THE TEXT

The Act provides for a period of silence as “an opportunity for silent prayer or for silent reflection on the anticipated activities of the day.” 105 ILCS 20/1. The first secular purpose is plain in the text: providing students a moment of quiet reflection to calm down and prepare for the day’s educational activities. This is clearly a secular purpose. *See Gwinnett*, 112 F.3d at 1469 (holding that a “brief period of quiet reflection” on “the anticipated activities of the day” is a secular purpose); *Croft*, 562 F.3d 747-48 (holding that a brief “period ... of thoughtful reflection” is a permissible purpose); *Brown*, 258 F.3d at 276 (“To the extent that the minute of silence is designed to permit nonreligious meditation, it clearly has a nonreligious

purpose.”). The Act also serves the secular purpose of accommodating religion by allowing students the freedom to pray. *Brown*, 258 F.3d at 276 (“And to the extent [the statute] is designed to permit students to pray, it accommodates religion. [T]he *accommodation* of religion is itself a secular purpose....”).

Furthermore, the Act disclaims any religious purpose. 105 ILCS 20/1 (“This period shall not be conducted as a religious exercise....”). This disclaimer shows that the Act lacks a religious purpose. *See Gwinnett*, 112 F.3d at 1469-70; *Croft*, 562 F.3d at 748 (finding that language stating “a person may not require, encourage, or coerce a student” to pray buttressed the statute’s neutrality). The district court erred by ignoring the facially evident secular purposes and disclaimer.

The crux of the lower court’s holding is that by including the word “prayer,” the legislature crossed the line and intended to “force ... student[s] to choose prayer or reflection.” (R.164 at 6; *accord id.* at 8, 10.) But ensuring that this choice is available is not unconstitutional. Indeed, the court’s reasoning has been patently rejected: “Even if a statute specifies that a student may choose to pray silently during a quiet moment, the State has not thereby encouraged prayer over other specified alternatives.” *Wallace*, 472 U.S. at 73 (O’Connor, J., concurring); *accord Croft*, 562 F.3d at 743; *Brown*, 258 F.3d at 280. The Fourth, Fifth, and Eleventh Circuits all affirmed this principle by upholding moment of silence statutes that expressly included “prayer” among the specified activities. *See Brown*, 258 F.3d at 271 n.1; *Gwinnett*, 112 F.3d at 1466; *Croft*, 562 F.3d at 738.

Rather than endorsing prayer, the Act allows students to use the period to pray

or reflect silently upon *any* aspect of the upcoming day. 105 ILCS 20/1. Like the Georgia, Virginia, and Texas statutes, this Act is facially neutral toward religion by providing students a choice between “religious and nonreligious modes of introspection” during the moment of silence. *Brown*, 258 F.3d at 277; *accord Croft*, 562 F.3d at 749; *Gwinnett*, 112 F.3d at 1470 & n.4. These courts recognized what the district court ignored: that “protecting every student’s right to engage in voluntary prayer during an appropriate moment of silence” is quite different from intending to “return prayer to the public schools.” *Wallace*, 472 U.S. at 59.

2. SECULAR PURPOSES IN THE LEGISLATIVE HISTORY: AMENDMENTS

The district court compounded its error by relying on *Wallace* to coax a wholly religious purpose from the Act’s amendments. But *Wallace* was limited by “unique facts” which are noticeably absent here. *Brown*, 258 F.3d at 279. In a “campaign of defiance” to overturn constitutional precedent, Alabama passed three statutes: one in 1978 authorizing a period of silence for “meditation”; a second in 1981 duplicating the 1978 provision and adding the words “voluntary prayer”; and a third in 1982 allowing teachers to lead students in a prescribed prayer to “Almighty God.” *Id.* at 279. The 1981 enactment’s sponsor and the governor admitted that the enactment’s *only* purpose was to “return voluntary prayer” to the public schools. *Wallace*, 472 U.S. at 57. Because the “State did not present evidence of *any* secular purpose” for adding “voluntary prayer” to the 1981 law, the Court held that it had “no secular purpose.” *Id.* at 56.

The lower court incorrectly compared Alabama’s unconstitutional addition of “voluntary prayer” to Illinois’s 2002 amendment, which changed the Act’s name and

added §5 to describe students’ constitutional right to pray. There is no evidence that the amendment was introduced exclusively to “return[] voluntary prayer” to schools, which alone wholly distinguishes it from *Wallace*. Furthermore, unlike the Alabama law, “prayer” has been in the Act’s *substantive text* since its inception in 1969. 105 ILCS 20/1. So the amendment did not insert prayer into the Act. Adding “and Student Prayer” to the Act’s title does not change anything about the existing period of silence. Rather, it reflects the addition of a whole new subsection—§5—that broadly notifies students of their constitutional right to pray *during the school day*. See 105 ILCS 20/5. Further, Illinois is not encouraging teacher-led prayer or leading an overt campaign to defy constitutional law, rendering this amendment a far cry from *Wallace*.

However, the district court remarkably insists that §5 reveals unconstitutional intent merely because it tells students what is already their constitutional right to do—pray. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313 (2000) (“[N]othing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday.”). The Fourth, Fifth, and Eleventh Circuits implicitly rejected this errant reasoning by all upholding moment of silence statutes with explicit provisions protecting students’ right to pray. *Brown*, 258 F.3d at 271⁴; *Croft*, 562 F.3d at 738⁵;

⁴ VA. CODE ANN. §22.1-203 (“In order that the right of every pupil to the free exercise of religion be guaranteed within the schools and that the freedom of each individual pupil be subject to the least possible pressure from the Commonwealth either to engage in, or to refrain from, religious observation on school grounds....”).

⁵ TEX. EDUC. CODE §25.901 (“A public school student has an absolute right to individually, voluntarily, and silently pray or meditate in school....”).

Gwinnett, 112 F.3d at 1466.⁶ Moreover, the district court’s logic potentially invalidates *any* policy informing citizens of their constitutional rights. The Constitution does not require such outcomes.

The district court found the 2007 amendment making the period of silence mandatory to be the most damning act of legislative intent. However, the Fourth Circuit expressly rejected this argument:

The plaintiffs point to the fact that the 2000 amendments to Virginia’s statute made the minute of silence mandatory throughout the State, therefore rendering it coercive. But we can find no material distinction between the 1976 version of §22.1-203, in which a political subdivision was authorized to impose a minute of silence and the current statute where the State itself imposed the minute of silence. Both are mandatory minutes of silence for the students implicated, *but neither is coercive in that the affected students are left to choose how they will use the minute of silence.*

Brown, 258 F.3d at 281 (emphasis added). Similarly, the Fifth and Eleventh Circuits signaled through silence that a mandatory moment of silence does not affect the secular purpose examination. *See Croft*, 562 F.3d at 747-49 (noting the statute’s mandatory nature but omitting it from the constitutional analysis); *Gwinnett*, 112 F.3d at 1466, 1469 (same). Indeed, no federal court has found this fact to indicate an intent to endorse prayer—except the lower court. The Seventh Circuit need not be the first circuit court to adopt this faulty conclusion.

3. SECULAR PURPOSES IN THE LEGISLATIVE HISTORY: LEGISLATORS’ COMMENTS

The district court also teased an intent to force prayer on impressionable students out of the 2007 amendment’s legislative history. A fair reading of this

⁶ GA. CODE ANN. §20-2-1050(c) (“[T]his Code section shall not prevent student initiated voluntary school prayers at schools or school related events which are nonsectarian and nonproselytizing in nature.”).

history, however, confirms the Act's first secular purpose—providing a moment for reflection to calm students—and reveals a third: curbing youth violence. *Gwinnett*, 112 F.3d at 1467.

The amendment's House sponsor—Representative Davis—reminisced about how, when he was in school, students were rambunctious and “running around” before the school day officially began. (R.21-2 at 21.) He explained that the Act would help teachers get their students “settled down” and that it requires “nothing more than what [teachers] would do, [teachers] would already ... try to get the young people to settle down so that they can begin the school day.” (*Id.*) He also confirmed the purpose of curbing violence:

I'm reminded by my colleague ... of an incident that took place in another state ... that resulted in the unfortunate death of ... a couple of teachers and young students ... and just think if that student had an opportunity maybe to sit and reflect. He even mentioned what he was going to do possibly to a couple of other students. And maybe if those students had an opportunity to sit and reflect, they may have decided to let someone know what that young person was going to do before he did it.... [B]ut probably in the chaos of the day ... because students are moving around, there's a lot of noise, maybe they said “oh, well, I won't worry about that” but nevertheless and that's maybe an extraordinary situation, but to ask that we have this opportunity for young people to settle down for them to reflect on their day, I think it's something that's positive and could bode positive for students in our school system....

(*Id.* at 28.)

The bill's Senate sponsor—Senator Lightford—also explained the importance of having teachers “gather the students to focus on the day's activities” in light of “all the crimes that are taking place on all of our college campuses, as well as our grammar schools and high schools, and [the] bullying ... that leads to violence.” (*Id.* at 17.) She hoped that allowing students to reflect on “[w]hatever [they] deem[]

necessary for them to think about” will curb this trend toward youth violence. (*Id.*)

The lower court improperly created a religious motive from two of the amendment’s *opponents*, without any admissible evidence that amendment *supporters* were pushing prayer. (R.164 at 8-9.) And although absent here, even legislation “motivated in part by a religious purpose” can satisfy *Lemon*. *Wallace*, 472 U.S. at 56; accord *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 249 (1990) (“[W]hat is relevant is the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law.”). Indeed, *Gwinnett*, *Brown*, and *Croft* all upheld statutes where “several reasons, including the return to prayer but also purely secular ones such as a reflective moment, were given in support of the pertinent legislation.” *Croft*, 562 F.3d at 748.

The Act’s legislative history enunciates clear secular purposes—providing a moment of quiet reflection and curbing violence. The lower court erred by “constru[ing] the legislative history to override the express statutory language articulating a clear secular purpose and also disclaiming a religious purpose.” *Gwinnett*, 112 F.3d at 1472.

4. LOWER COURT’S MISAPPLICATION OF *GWINNETT*

By relying on *Gwinnett* as a “perfect blueprint,” the lower court actually undercuts itself because the Illinois and Georgia statutes are similar in significant respects. (R.164 at 10-11.) Like the Act, Georgia’s statute: (1) is mandatory; (2) prohibits using the moment of silence as a religious exercise; and (3) allows

“prayer[]”⁷ as an option. *See Gwinnett*, 112 F.3d at 1466 (quoting GA. CODE ANN. §20-2-1050(a)-(c)). If Georgia’s law survives, so should Illinois’s.

The lower court says Illinois should have deleted “prayer” from the Act, but the Constitution does not require this. (*See supra* Part I.A.1.) Such action would evince hostility to religion that the First Amendment prohibits. *See Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (“[The Constitution] affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.”).

In sum, the lower court failed to defer to the legislature’s stated secular purposes, attributed improper motives where none were found in the legislative history to concoct a “sham” secular purpose, and disregarded contrary circuit court rulings on virtually identical statutes. This Court should not follow suit.

B. THE DISTRICT COURT ERRED BY HOLDING THAT THE ACT HAS THE PRIMARY EFFECT OF ADVANCING OR INHIBITING RELIGION.

“Under *Lemon*’s effects prong, a statute is unconstitutional if its primary effect is to advance or inhibit religion.” *Gwinnett*, 112 F.3d at 1472. This prong “asks whether, irrespective of [the] government’s actual purpose, the practice under review in fact conveys a message of endorsement or disapproval” of religion. *Id.* (quoting *Wallace*, 472 U.S. at 56 n.42).

No federal appellate court has found moment of silence laws to violate the effects prong, *Croft*, 562 F.3d at 749, because they advance silence, not religion. Illinois’s law is no exception. Just like Virginia’s and Texas’s statutes, the Act—by allowing “silent prayer or silent reflection”—is “facially neutral between religious and non-

⁷ The lower court highlights that the “prayers” reference in the Georgia statute is phrased in the negative, but this is a distinction without a constitutional difference.

religious activities that students can choose to engage in during the moment of silence.” *Id.* (citing *Gwinnett*, 258 F.3d at 277).

Nevertheless, the lower court theorized that hypothetical students might be unable to pray because the Act impermissibly “prefer[s] religions that practice silent prayer over those that do not.” (R.164 at 12.) Not only is such speculation inappropriate on a facial challenge, *Croft*, 562 F.3d at 749; *Brown*, 258 F.3d at 275, but it has been soundly defeated:

But as the [Third Circuit] found, this “is a non sequitur. The statute simply does not address the problem of accommodating the beliefs of those whose prayer must be oral or otherwise self expressive. Undoubtedly the school environment requires limitation upon the time, place, and manner of such self expression, even when it is religiously motivated.” The statute provides for a minute of silence and allows any non-disruptive silent activity. This requirement that the activity, including possible prayer, be silent does not discriminate among religious sects.

Croft, 562 F.3d at 749-50 (quoting *May*, 780 F.2d at 248); accord *Gwinnett*, 112 F.3d at 1472 (finding the favoritism argument “unpersua[sive]” because the “statute mandates a moment of quiet reflection, not a moment of silent prayer”). Illinois’s Act does not favor one religion over another or over non-religion; it merely favors silence for all.

The lower court erred further by adopting the conjecture of Plaintiff’s expert, Dr. Kraus, that the prayer option will coerce impressionable students to pray.⁸ (R.164 at 14-15; R.122 at 2-4.) However, “nothing the [Supreme] Court has said ‘suggest[s] that, when the school was not actually advancing religion, the impressionability of

⁸ It also notes Dr. Kraus’s conclusion that high school students “might act out in defiance of the Statute” but does not explain its constitutional significance. If potential disobedience alone can invalidate a regulation, most (if not all) school regulations would be unconstitutional.

students would be relevant to the Establishment Clause issue.” *Brown*, 258 F.3d at 278 (quoting *Good News Club*, 533 U.S. at 116). Because Illinois is not advancing religion, but merely providing a moment for students to engage in silent activity, students’ supposed impressionability is irrelevant and constitutionally inappropriate to consider:

To [strike down a moment of silence law], especially in the context of a facial challenge, would result in the introduction of “a modified heckler’s veto, in which ... religious activity can be proscribed on the basis” of sincere, but utterly mistaken perceptions of state endorsement of religion. Therefore, speculative fears as to the potential effects of this statute cannot be used to strike down a statute that on its face is neutral between religious and nonreligious activity.

Id. at 278 (quoting *Good News Club*, 533 U.S. at 119).

The lower court further erred by wholly adopting Dr. Kraus’ s opinion, while brushing aside the rebuttal report of ADF’s expert, Dr. Trayce Hansen, saying that it was irrelevant and potentially inadmissible under *Daubert v. Merrel Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).⁹ But to any extent that Dr. Kraus’s opinion is relevant and admissible under *Daubert*, so is Dr. Hansen’s because she “propos[es] to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.” *Id.* at 592. Dr. Hansen offered a scientific opinion on the “psychological impact of the [Act] on school-age children” that directly rebuts Dr. Kraus’s points. Indeed, while Dr. Kraus opines—without citing any authority—that the Act is confusing, coercive, and destructive to students (R.122 at 2-4), Dr. Hansen demonstrates that it is easily understandable, non-

⁹ *Amici* maintain that no experts were needed because they have little or no relevance on a facial challenge. The district court should be capable of construing a statute without the aid of experts. *Amici* submitted an expert report to rebut Dr. Kraus’s faulty opinions.

coercive, and beneficial to students, teachers, and the learning environment. (R.141-2 at 6-9.)¹⁰ If Dr. Kraus’s opinion is admissible, so is Dr. Hansen’s. But the district court merely accepted the report that supported its conclusions and dismissed the one that did not.

In sum, the Act does not coerce, pressure, or prefer prayer, and thus, does not facially violate *Lemon’s* effects prong.

C. THE ACT DOES NOT UNLAWFULLY ENTANGLE GOVERNMENT WITH RELIGION.

Moment of silence laws do not entangle government with religion. Entanglement is virtually impossible here because “any prayers during the moment of quiet reflection necessarily must be silent. Thus, the monitoring problem ... is not present in this case *and is not likely to arise in any moment of quiet reflection case.*” *Gwinnett*, 112 F.3d at 1474 (emphasis added). Even teacher enforcement does not create entanglement because “[t]here are many times during any given school day when teachers tell their students to be quiet and when audible activity of any kind is not permitted.” *Croft*, 562 F.3d at 750 (quoting *Gwinnett*, 112 F.3d at 1474).

Nor does informing students of the prayer option entangle the state with religion. *Brown*, 258 F.3d at 278 (“If the students were kept uninformed of that right, they might find it necessary to ask teachers whether the allotted time might be used for prayer, increasing the potential for interactions between teachers and religiously motivated students.”). Hence, *no federal appellate court* has found that a

¹⁰ The lower court incorrectly reduced Dr. Hansen’s report to a mere opinion about the benefits of a moment of silence. (R.164 at 15.) But under that “standard,” Dr. Kraus’s report is no different. And Dr. Hansen’s report does more than that; it directly refutes Dr. Kraus’s contentions that the statute is confusing and coercive. (R.141-2 at 6-8.)

moment of silence excessively entangles government and religion, especially on a facial challenge. *Croft*, 562 F.3d at 750. This Court should not become the first to hold otherwise.

Because the Act satisfies *Lemon*, the lower court's Establishment Clause holding should be reversed.

II. THE DISTRICT COURT ERRED IN INTERPRETING AND APPLYING THE VAGUENESS DOCTRINE.

A. THE DISTRICT COURT ERRED BY ALLOWING PLAINTIFF TO BRING A FACIAL VAGUENESS CHALLENGE TO THE ACT.

Because Plaintiff's vagueness challenge is exclusively facial, she must first demonstrate that her conduct falls within the Act's alleged gray areas. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 n.7 (1982) ("A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others."); *Parker v. Levy*, 417 U.S. 744, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness."). Therefore, this Court must "examine [her] conduct before analyzing other hypothetical applications of the law." *Hoffman*, 455 U.S. at 495.

Plaintiff fails this hurdle because she never alleged any wish to engage in any conduct whatsoever that the Act's supposed ambiguities might chill. Both Plaintiff and the lower court premised their vagueness concerns upon fear that the Act would "inhibit the exercise of constitutionally protected rights." (R.29 at 3; R.164 at 13; accord R.121-3 at 2-4.) But these concerns involve *other students*—not Plaintiff. The unavoidable fact is that Plaintiff alleged neither a desire to do any *expressive*

activities for which the Act is allegedly vague (*e.g.*, praying audibly, kneeling, using a prayer rug, bowing her head) nor any *unprotected* activity (*e.g.*, doing a crossword puzzle, playing computer games, etc.) that might implicate the Act's outer reaches. (R.121-3 at 3.) This is fatal to her facial vagueness challenge.

In *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), appellants maintained that a statute was unconstitutionally vague because it could be construed to prohibit protected political expression such as “the wearing of political buttons or the displaying of bumper stickers.” *Id.* at 609-10. The Supreme Court rebuffed this vagueness challenge because appellants had not engaged in any such activity.¹¹ *Id.* Similarly, Plaintiff here did not engage in any activity that implicates any of the Act's alleged ambiguities. Thus, the district court erred by “conjur[ing] up hypothetical cases” when Plaintiff's duties under the Act are clear—remain silent. *Wiemerslage v. Me. Twp. High Sch. Dist. 207*, 29 F.3d 1149, 1151 (7th Cir. 1994).

B. THE DISTRICT COURT ERRED BY HOLDING THAT THE ACT IS UNCONSTITUTIONALLY VAGUE ON ITS FACE.

Besides lacking the right to bring a facial vagueness challenge, Plaintiff's challenge has no merit. Where a law is not overbroad, a plaintiff may only mount a successful vagueness challenge if it is “impermissibly vague in all of its applications.” *Hoffman*, 455 U.S. at 497. A law is unconstitutionally vague when it fails to “give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.” *Grayned v. City of Rockford*, 408

¹¹ The *Broadrick* Court did entertain the appellants' *overbreadth* challenge. Here, Plaintiff waived her overbreadth challenge by failing to pursue it in her summary judgment motion. *Berry v. Delta Airlines, Inc.*, 260 F.3d 803, 810 (7th Cir. 2001).

U.S. 104, 108 (1972). Vague laws require “men of common intelligence [to] guess at [their] meaning and differ as to [their] application.” *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). The Constitution tolerates more vagueness when the law does not “threaten[] to inhibit the exercise of constitutionally protected rights,” such as the “right of free speech or of association.” *Hoffman*, 455 U.S. at 499.

What’s more, the vagueness principle applies only to the person who must comply directly with a law, ensuring that it provides that person with sufficient notice about how to comply. But here, the Act applies to school districts—not to students like Plaintiff. Students need only comply with their teacher’s instructions, making them twice removed from the Act’s requirements (*i.e.*, state to school; school to teacher; teacher to student). The vagueness principle has no application here.

Furthermore, as Plaintiff waived any overbreadth claims, she must establish that the law is impermissibly vague in *all* its applications, including its application to her. *Fuller v. Decatur Pub. Sch. Bd. of Educ. Sch. Dist. 61*, 251 F.3d 662, 667 (7th Cir. 2001). Because she has not engaged in any conduct which might implicate the Act’s outer edges (*see supra* Part II.A), her claim fails on this ground alone.

Instead, the district court scrutinized the Act, reasoning that its alleged indefiniteness would inhibit the exercise of constitutional rights and implicate the Establishment Clause. (R.164 at 13-14.) However, the law does not inhibit Plaintiff from *exercising* any constitutional rights, and thus does not trigger a stricter vagueness standard. She only asserts a right to be free from an establishment of religion, which is not one that is *exercised* (unlike the “right of free speech or of as-

sociation”). *Hoffman*, 455 U.S. at 499. Indeed, no federal court has invalidated a statute because its vagueness potentially raised Establishment Clause concerns.

Nevertheless, the Act is not vague under any standard. It merely requires students to observe a “brief period of *silence*.” 105 ILCS 20/1 (emphasis added). Silence is a straightforward concept defined as the “absence of sound.” WEBSTER’S II NEW COLLEGE DICTIONARY 1027 (1995). This concept is plain in any context, particularly in our public schools. As the Eleventh and Fifth Circuits explained in upholding similar laws, “[t]here are *many times during any given school day* when teachers tell their students to be quiet and when audible activity of any kind is not permitted.” *Croft*, 562 F.3d at 750 (quoting *Gwinnett*, 112 F.3d at 1474) (emphasis added). Though originally used to defeat an Establishment Clause challenge, this point devastates Plaintiff’s vagueness claim. When students are already asked *multiple times every day* to refrain from audible activity, it strains credulity to suggest that teachers and students do not understand “silence.” It insults Illinois’s teachers and students to suggest that they lack the “ordinary intelligence” necessary to know what the Act prohibits. *Grayned*, 408 U.S. at 108. Its meaning is clear to all—be silent.

The lower court also hypothesizes that school districts could use the Act to discriminate against students wishing to pray audibly or with movement. (R.164 at 13, 16-17.) These speculations are entirely inappropriate in a facial challenge. *Croft*, 562 F.3d at 750 (“[W]e should not engage in such speculation on a facial review of the law.”); *see also Carhart*, 550 U.S. at 150 (sustaining statute from facial

vagueness challenge where “no evidence has been ... introduced to indicate whether the [Act] has been enforced in a discriminatory manner or with the aim of inhibiting [constitutionally protected conduct]” (quoting *Hoffman*, 455 U.S. at 503)). Once again, Plaintiff does not wish to engage in any prayer or speech during the period of silence. Any alleged ambiguity in the Act can be tested as-applied “by someone whom it concerns.” *Broadrick*, 413 U.S. at 609 (citations omitted); *see also Croft*, 562 F.3d at 750.¹²

Illinois’s Act is plain to students, teachers, and—above all—Plaintiff. No moment of silence law has been invalidated for vagueness, and Illinois’s Act is so clear that it should not become the first.

III. THE DISTRICT COURT ERRED BY HOLDING THAT PLAINTIFF HAS STANDING TO BRING AN ESTABLISHMENT CLAUSE CLAIM.

For Article III standing, Plaintiff must demonstrate that: (1) she has suffered an “injury in fact” that is “concrete and particularized” and “actual or imminent, not ‘conjectural’ or ‘hypothetical’”; (2) there is “a causal connection between [her] injury and the conduct complained of”; and (3) it is “‘likely,’ as opposed to merely ‘speculative,’ that [her] injury will be ‘redressed by a favorable decision.’” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations omitted). These elements “are not mere pleading requirements but rather an indispensable part of the plaintiff’s case, [and] each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof.” *Id.* at 561.

¹² The district court also noted that the law does not specify how long the “brief period of silence” should last (R.164 at 13), but fails to explain how the period’s length has any constitutional significance whatsoever.

Plaintiff fails to carry this burden because she has not suffered *any cognizable injury* under the Act.¹³ See *Doe v. County of Montgomery*, 41 F.3d 1156, 1159 (7th Cir. 1994). Her only allegations that arguably pertain to standing simply state legal conclusions that the Act violates the Establishment Clause. (See R.14 ¶¶9, 17.) The lower court erroneously found that these allegations conferred standing for an Establishment Clause claim.

First, the court cited Plaintiff's allegation that she is an "atheist[] who [is] subject to the statute." (R.95 at 2.) Certainly this does not confer standing. Even if her atheism drives her to advocate fervently for the "separation of church and state," such commitment does constitute an injury-in-fact:

It is evident that respondents are firmly committed to the constitutional principle of separation of church and State, but standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy.

Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 486 (1982); accord *Freedom from Religion Found., Inc. v. Zielke*, 845 F.2d 1463, 1468 n.3 (7th Cir. 1988) ("[I]rrespective of the fervor with which a litigant is committed to the principle of separation of church and state, that commitment alone does not satisfy the standing doctrine.").

Likewise, even if the Act clashes with Plaintiff's atheistic beliefs and causes her psychological harm, she would still fall short. Indeed, even plaintiffs who allegedly suffered "a rebuke to their religious beliefs" and "psychological harm" failed to show

¹³ Because Plaintiff, the class representative, lacked standing when she filed the complaint, the entire class action should be dismissed. *Walters v. Edgar*, 163 F.3d 430, 437 (7th Cir. 1998) ("[T]he case was properly dismissed for want of standing, dooming the class action because [the named plaintiffs] lacked standing when they filed the suit...."); see also *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974).

Article III standing. *Zielke*, 845 F.2d at 1468; accord *Valley Forge*, 454 U.S. at 485 (the “psychological consequence presumably produced by observation of conduct with which one disagrees” is “not an injury sufficient to confer standing”). If psychological harm cannot confer standing, then neither can Plaintiff’s allegation that she is an atheist.

Second, Plaintiff’s claim that the Act “violates the Establishment Clause” does not confer standing:

This Court repeatedly has rejected claims of standing predicated on “the right, possessed by every citizen, to require that the Government be administered according to law....” Such claims amount to little more than attempts “to employ a federal court as a forum in which to air ... generalized grievances about the conduct of government.”

Valley Forge, 454 U.S. at 482-83 (citations omitted); accord *In re Navy Chaplaincy*, 534 F.3d 756, 763 (D.C. Cir. 2008) (“A per se rule defining automatic injury-in-fact for every plaintiff who claims an Establishment Clause violation ... would run counter to decades of settled jurisprudence setting forth the requirements for standing in Establishment Clause cases.”). Alleging the Act violates the Establishment Clause is precisely the type of generalized grievance that cannot constitute an injury-in-fact.

The third—and primary—basis of the standing decision below is that the Act forces Plaintiff to “consider using the mandatory moment of silence for prayer.” (R.95 at 3.) But the Act does not coerce her—or any student—to do or say anything; it simply requires silence. See *Brown*, 258 F.3d at 281 (“A moment of silence ... lacks this dispositive element of coercion.”); accord *Gwinnett*, 112 F.3d at 1473. This is not a constitutional injury.

Perhaps the district court believed that *other students'* prayers might coerce Plaintiff into praying. But such an "injury" necessarily *assumes* that other students are praying during the moment of silence. Not only is this not a constitutional injury, but it is too speculative to confer standing. *Lujan*, 504 U.S. at 560 (denying standing for "conjectural" or "hypothetical" injuries). Indeed, Plaintiff cannot presume to read the minds of her fellow students while they are quiet, and any "injury" based on her mindreading is far too conjectural to provide standing.

Finally, the lower court's reliance on *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), *Lee v. Weisman*, 505 U.S. 577 (1992), and *Sherman v. Community Consolidated School District 21*, 980 F.2d 437 (7th Cir. 1992), is inapposite. (R.95 at 3.) These cases involved what is missing here: direct exposure to government sponsored religious exercises, practices, or words.

The *Schempp* complainants had standing to challenge the daily recitation of Bible verses and prayer because students were "subjected to unwelcome *religious exercises* or were forced to assume special burdens to avoid them." *Valley Forge*, 454 U.S. at 487 n.22 (emphasis added). Indeed, the Act here subjects students only to a period of silence and expressly forbids that period from being "conducted as a religious exercise." 105 ILCS 20/1. Exposure to silence is *not* exposure to a religious exercise.

Similarly, *Lee* challenged the clergy-led invocations at public high school graduation ceremonies. *Lee*, 505 U.S. at 581. The Court found standing because the student would be "subjected to state-sponsored *religious exercises*." *Id.* at 592

(emphasis added). Thus, as in *Schempp*, the student’s constitutional injury was the exposure to a state-run religious exercise.

In *Sherman*, the student had standing to challenge the Pledge of Allegiance because he was the “potential object of coercion to participate” in saying religious words—“under God.” *Sherman*, 980 F.2d at 441. Plaintiff here faces no such potential coercion. No one will know what she does with her silent time, and no one can directly or indirectly pressure her to pray.

The common thread in these cases is that the plaintiffs suffered direct and unwelcome exposure to religious exercises, practices, or words. But the Act only subjects Plaintiff to *brief silence*. By overlooking this critical distinction, the lower court errantly concluded that Plaintiff had standing. This ruling should be reversed.

CONCLUSION

The lower court ignored basic canons of statutory construction and constitutional law and went out of its way to construe the Act unconstitutionally by refusing to defer to the legislature’s stated secular purposes and openly speculating about the Act’s potential purposes and applications. Its reliance on *Wallace* is misplaced because—unlike Alabama’s statute—the Act serves three secular purposes. Similarly, the lower court lacks any judicial precedent to buttress its holding that the Act’s primary effect is to advance religion or that it is vague. Finally, because Plaintiff is only exposed to silence and her imagination that others are praying, her “injury” is too speculative to attain standing.

Respectfully submitted the __ day of October, 2009,

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CERTIFICATE OF SERVICE

I hereby certify that on October __, 2009, I sent one original and fourteen copies, along with a computer-readable disk copy, of the foregoing Brief of Amici Curiae, Alliance Defense Fund and Illinois Family Institute, in Support of Defendant-Appellant, and Supporting Reversal of the District Court to the Clerk of Court via UPS Next Day Air. I also hereby certify that I served via UPS Next Day Air two copies, along with a computer-readable disk copy, of the foregoing upon:

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CERTIFICATE OF COMPLIANCE
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Dated: October __, 2009