

**NO. 09-1455**

**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

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<b>DAWN S. SHERMAN</b> , a minor, through	) Appeal from the United States
<b>ROBERT I. SHERMAN</b> , her father and	) District Court for the Northern
next friend, on behalf of herself and all	) District of Illinois, Eastern Division
others similarly situated,	)
	) No. 07 C 6048
Plaintiff-Appellee,	)
v.	)
	)
<b>DR. CHRISTOPHER KOCH</b> , State	)
Superintendent of Education,	)
	)
Defendant-Appellant,	)
	)
and	)
	) The Honorable
<b>TOWNSHIP HIGH SCHOOL</b>	) <b>ROBERT W. GETTLEMAN</b> ,
<b>DISTRICT 214</b> , on behalf of itself and	) Judge Presiding.
all other school districts similarly situated,	)
	)
Defendant.	)

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**BRIEF OF THE PLAINTIFF-APPELLEE,  
DAWN S. SHERMAN, a minor, through  
ROBERT I. SHERMAN, her father and next friend**

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Appellate Court No: 09-1455

Short Caption: Sherman v. Koch

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

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Attorney's Signature: \_\_\_\_\_ Date: December 9, 2009

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## **JURISDICTIONAL STATEMENT**

The jurisdictional statement provided in Appellant's Brief is complete and correct.

## ISSUES PRESENTED FOR REVIEW

1. Does the Silent Reflection and Student Prayer Act violate the Establishment Clause under the principles set forth in Lemon v. Kurtzman, 403 U.S. 603 (1971)?
2. Is the Silent Reflection and Student Prayer Act unconstitutionally vague?

## STATEMENT OF THE CASE

Plaintiff Dawn S. Sherman, a minor, through Robert I. Sherman, her father and next friend, led a class action complaint for declaratory and injunctive relief under 42 U.S.C. § 1983 against Dr. Koch, the State Superintendent of Education, and Township High School District 214 alleging that the Silent Reflection and Student Prayer Act is unconstitutional under the Establishment Clause as interpreted in Lemon v. Kurtzman, 403 U.S. 602 (1971) and the Fourteenth Amendment because it is vague. The court certified a plaintiff class of all students in public schools in the State of Illinois and a defendant class of all public school districts in the State. The court thereafter granted the Students' motion for summary judgment, declared the Silent Reflection and Student Prayer Act unconstitutional under the First and Fourteenth Amendments, and permanently enjoined the defendants from implementing or enforcing the law. Dr. Koch appealed.

## STATEMENT OF FACTS

On April 16, 1969, Governor Richard Ogilvie signed into law an act providing for a brief period of silence in public schools at the beginning of every school day. A verbatim transcription of the Act is as follows:

Section 1. 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.

See Appendix, Doc. 1.

On September 6, 1990, the Act was given a name: “The Silent Reflection Act”.

On August 22, 2002, the Illinois General Assembly amended the Act to add the words “and Student Prayer” to the title and to add an entirely new section 5 to the Act introduced by the descriptive phrase “Student Prayer”. A verbatim transcription of the amendatory Act is as follows:

(105 ILCS 20/0.01) (from Ch. 122, ¶ 770)

Sec. 0.01. Short title. This Act may be cited as the Silent Reflection and Student Prayer Act.

(Source: P.A. 86-1324.)

(105 ILCS 20/5 new)

Sec. 5. Student prayer. In order that the right of every student to the free exercise of religion is guaranteed within the public schools and that each student has the freedom to not be subject to pressure from the State either to engage in or to refrain from religious observation on public school grounds, students in the public schools may voluntarily engage in individually initiated, non-disruptive prayer that, consistent with the Free Exercise and Establishment Clauses of the United States and Illinois Constitutions, is not sponsored, promoted, or endorsed in any manner by the school or any school employee.

See App., Doc. 2.

In early 2007, the Illinois General Assembly passed a bill amending the law once again to make the period of silence law mandatory by changing the word “may” [observe] to “shall” [observe]. See App., Doc. 3.

However, on August 28, 2007, then Governor Blagojevich vetoed the bill. See App. Doc. 4.

On October 11, 2007, the General Assembly overrode the Governor's veto. See App., Doc 5.

After the Amendment and at present, the Silent Reflection and Student Prayer Act reads as follows:

(105 ILCS 20/0.01) (from Ch. 122, ¶ 770)

Sec. 0.01. Short title. This Act may be cited as the Silent Reflection and Student Prayer Act.

(Source: P.A. 92-832, eff. 1-1-03.)

(105 ILCS 20/1) (from Ch. 122, ¶ 771)

Sec. 1. In each public school classroom the teacher in charge shall 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.

(Source: P.A. 95-680, eff. 10-11-07.)

(105 ILCS 20/5)

Sec. 5. Student prayer. In order that the right of every student to the free exercise of religion is guaranteed within the public schools and that each student has the freedom to not be subject to pressure from the State either to engage in or to refrain from religious observation on public school grounds, students in the public schools may voluntarily engage in individually initiated, non-disruptive prayer that, consistent with the Free Exercise and Establishment Clauses of the United States and Illinois Constitutions, is not sponsored, promoted, or endorsed in any manner by the school or any school employee.

(Source: P.A. 92-832, eff. 1-1-03.)

See Appendix, Doc. 6

Plaintiff accepts the rest of Defendant's Statement of Facts.

## SUMMARY OF THE ARGUMENT

The Silent Reflection and Student Prayer Act violates the first two prongs of Lemon v. Kurtzman, 403 U.S. 602 (1971). First, the statute lacks a sincere secular legislative purpose. The addition of the words “and Student Prayer” to the title and the creation of an entirely new section intended to protect public school students’ right to pray violates the Establishment Clause for many of the same reasons the United States Supreme Court invalidated the law under consideration in Wallace v. Jaffree, 472 U.S. 38 (1985). As in Wallace, there was no secular purpose that was not already served by existing law, because there was no restriction on student prayer, which was already protected by Supreme Court precedent.

Additionally, the District Court was correct in finding that the specific language of the statute, limiting the activities that could be pursued during the period of silence to two and only two: pray or reflect on the events of the coming day, bespeaks a legislative intent to introduce and unduly emphasize the concept of prayer to impressionable youngsters. The Court believed that the only way a teacher implementing the command of the statute (given that there are only two alternatives during

the period of silence) could discharge her duty was to inform the children that they could pray or do something else, which would force the children to think about praying. Plaintiff submits that the Court was correct, and that the unusual statutory language coupled with the lack of a sincere secular purpose violates the first prong of Lemon.

The District Court was also correct in finding that the Silent Reflection and Student Prayer Act violated the second prong of Lemon because its primary effect was to favor some types of prayer over others—(those traditions which are not limited to silent prayer). Such favoritism sends a message to non-adherents that they are not as valued as others in the polity.

Finally, the Silent Reflection and Student Prayer Act is unconstitutionally vague such that there is a substantial possibility that the uncertainty induced by the statute threatens important First Amendment rights.

## ARGUMENT

### I.

#### Introduction

No one disputes the proposition enunciated by Justice O'Connor in Wallace v. Jaffree, 472 U.S. 38 (1985), that the Establishment Clause is not "so hostile to religion that it precludes the States from affording schoolchildren an opportunity for voluntary silent prayer." 472 U.S. at 61 (O'Connor, J. concurring).

Many state statutes permitting voluntary silent prayer in the classroom can and have passed constitutional muster, and there will undoubtedly be others that do so in the future. The question in this case, as it is in every "moment or period of silence" case, is whether the State has "intentionally crossed the line between creating a quiet moment during which those so inclined may pray, and affirmatively endorsing the particular religious practice of prayer". Wallace, *supra*, 472 U.S. at 61. After a careful analysis, the District Court concluded that the State had

crossed the line in enacting the “Silent Reflection and Student Prayer Act” because its legislative history and its wording manifested a governmental purpose of introducing the religious practice of prayer into the schoolroom. Additionally, the Court found that the statute’s primary effect is to endorse one type of religious practice and not others. Finally, the Court ruled that the statute is unconstitutionally vague. Plaintiff respectfully submits that the District Court’s reasoning was correct and should be upheld, as she demonstrates below.

## II.

### **Defendant Has Inaccurately Quoted The Subject Statute and Has Wrongly Suggested That It Is Named “The Period of Silence Law”**

At the outset in this case, where context is all, it is important to know precisely the statutory language with which we are dealing. Defendant makes a glancing reference to the fact that the Legislature named the law “the Silent Reflection and Student Prayer Act” (Brief for Defendant, p. 6) and then adopts the name “Period of Silence Law” for the Act, which is then used throughout the Brief. To be clear, the statute has never been known as the “Period of Silence Law”, a name which sounds antiseptically

neutral. Nor has the law under consideration ever employed the words “period of silence” in bold to introduce the statutory language or as a heading, as alleged by Defendant. Plaintiff attaches copies of the actual law, in its various incarnations, certified by the Secretary of State of Illinois, of which this Court can take judicial notice. The words “period of silence” as a heading or introductory phrase are nowhere to be found. The District Court determined and so held that the Legislature quite purposefully changed the name of the law from the Silent Reflection Act to The Silent Reflection and Student Prayer Act, not from The Silent Reflection Act to The “Period of Silence Law”. (See Mem. Op. pp. 7-8, Rec. pp. 917-18). Defendant’s use of the term “The ‘Period of Silence Law’” is either misleading or disingenuous or both. Nor does the statute employ the words “Period of Silence” as a heading or introductory phrase as Defendant asserts.

### III.

#### **The Unique Language Of The Silent Reflection and Student Prayer Act Sets The Statute Apart From Other "Moment of Silence" Laws**

As the District Court construed the statute, perhaps the greatest problem with it in Establishment Clause terms, is the precise wording of the statute. The specified alternatives for silent activity in the statute are two and two only: "prayer", which is listed first, and "silent reflection on the anticipated activities of the day". In every other "moment of silence" case after Wallace to make it to the reporters, the statutory options either do not include prayer (Bown v. Gwinnet County School District, 112 F.3d 1464 (11<sup>th</sup> Cir. 1997)), or include a "catchall" phrase such as "or engage in any other silent activity" (Brown v. Gilmore, 258 F.3d 265 (4<sup>th</sup> Cir. 2001)) or "engage in any other silent activity that is not likely to interfere with or distract another student" (Croft v. Gov. of Texas, 562 F.3d 735 (5<sup>th</sup> Cir. 2009)).

Putting aside for the moment the suggestivity of listing prayer first, the District Court found that there was no rational way for the teacher to

inform her young (and impressionable) charges of what was supposed to happen during the period of silence except to tell them that they could first, pray, or second, reflect on what would happen the rest of the day. Practically speaking, the mere announcement of a period of silence (however long that is) does not appear to fulfill the direct command of the statutory language—either pray or think about the rest of the day.

Defendant contends that the statute has a benign secular purpose—to calm the children down before the start of the school day, and we are to know this because that is what the legislators (or some of them) said in passing the statute. (Brief for Defendant, pp. 31-39). The problem is that purpose proffered by the State is not evident in the actual language of the statute. The District Court, and Plaintiff submits, any rational observer, could see in the statutory language only a compelled, binary choice—either pray or reflect on the upcoming day. Accordingly, the District Court found that the statute forced the teacher to communicate that there are only two options and that one of them is prayer. The Court thus perceived that despite the professed secular purpose, the legislative purpose as revealed by the language was to compel the concept of prayer to be introduced into the classroom, with all the difficulties that implies. (What is the difference

between prayer and reflection? And can that difference be perceived by impressionable 8 year olds? Is it appropriate for a first grade teacher even to be discussing such a subject with students?).

In short, the precise statutory language of the Silent Reflection and Student Prayer Act limiting as it does the options for silent activity—either pray or do some other specific thing—make this statute different than all the other “moment of silence” statutes previously construed by the Supreme Court or other Federal Courts.

#### IV.

**The Silent Reflection and Student Prayer Act  
Violates The First Prong of *Lemon v. Kurtzman*,  
403 U.S. 602 (1971) Because It Does Not Have  
A True Secular Legislative Purpose**

The fountainhead for moment of silence cases is, of course, the United States Supreme Court’s decision in Wallace v. Jaffree, 472 U.S. 38 (1985). There, the Court examined a statute and an amendatory process that was not that different from the one in this case. That is, in Wallace, *supra*, there was a statute which provided that a “period of silence, not to exceed one minute in duration, shall be observed for meditation....” in public school classrooms. The Alabama Legislature then amended the law

to provide that the moment of silence should be used for “meditation or *voluntary prayer*” (Emphasis added). The Court found that the addition of the words “or voluntary prayer” had no secular purpose, to wit:

“[T]he only significant textual difference [between the original law allowing meditation and the amendment adding “or voluntary prayer”] is the addition of the words “or voluntary prayer”

....

The 1978 statute already protected that right, containing nothing that prevented any student from engaging in voluntary prayer during a silent minute of meditation. Appellants have not identified any secular purpose that was not fully served by § 16-1-20 before the enactment of § 16-1-20.1. Thus, only two conclusions are consistent with the text of § 16-1-20.1: (1) the statute was enacted to convey a message of state endorsement and promotion of prayer; or (2) the statute was enacted for no purpose. No one suggests that the statute was nothing but a meaningless or irrational act.”

472 U.S. at 59.

The Court also noted that:

If the conclusion that the statute had no purpose were tenable, it would remain true that no purpose is not a secular purpose. But such a conclusion is inconsistent with the common-sense presumption that statutes are usually enacted to change existing law. Appellants do not even suggest that the State had no purpose in enacting § 16-1-20.1.

*Id.* At 59, fn 48.

The same must be said about the statute here and the amendatory process that led to its existence. As detailed by the District Court, there has been a statute in Illinois since 1969 permitting a “brief period of silence” to be observed daily in public schools. It was given the name “The Silent Reflection Act” in 1990. But in 2002, the Legislature changed the name from “The Silent Reflection Act” to “The Silent Reflection and Student Prayer Act”. Additionally, an entirely new section was added describing the rights of students to voluntarily pray on public school grounds. The final 2007 amendment made the period of silence mandatory.

As in Wallace, the addition of the words “and Student Prayer Act” and the inclusion of a whole new section describing the rights of students to pray, manifests the Legislature’s endorsement of a particular religious

practice – prayer. The Court in Wallace found that there was no secular purpose behind the addition of the words “or voluntary prayer” because:

“there was no governmental practice impeding students from silently praying for one minute at the beginning of each schoolday; thus, there was no need to “accommodate” or to exempt individuals from any general governmental requirement because of the dictates of our cases interpreting the Free Exercise Clause.”

472 U.S. at 57.

Similarly here, the addition of a whole new section drawing attention to and emphasizing the rights of students to pray, could not have any secular purpose because, as the Court stated, that right was already protected by the “dictates of [the Supreme Court’s] cases interpreting the Establishment Clause”. This is particularly so after the Wallace Court’s pronouncement that laws providing for voluntary prayer during a moment of silence are unnecessary because that right is already protected by Supreme Court precedent. Recognizing that statutes are enacted “to change existing law”, this statute either had no purpose (something even Defendant does not argue) or was an impermissible endorsement of prayer.

Defendant does not address the effect of the new “student prayer” section of the law enacted in 2002 except to observe that the new section merely “recognized every student’s right to voluntary prayer”. (Brief for Defendant, pp. 38-39). But the District Court found that the enactment of section 5 was significant in terms of legislative intent. Defendant fails to offer any secular alternative purpose for a section of the law announcing what was already enshrined in our Constitutional jurisprudence.

In Edwards v. Aguillard, 482 U.S. 578 (1987), the Court found that despite the profession by the State of a seemingly innocuous secular purpose (i.e., “to protect academic freedom”) the law actually failed to advance any goal that was not already protected under existing law because schools already had the right to teach “creation” theory. Said the Court:

The Alabama statute held unconstitutional in Wallace v. Jaffree, *supra*, is analogous. In Wallace, the State characterized its new law as one designed to provide a 1-minute period for meditation. We rejected that stated purpose as insufficient, because a previously adopted Alabama law already provided for such a 1-minute period. Thus, in this case, as in Wallace, “appellants have not identified any

secular purpose that was not fully served by [existing state law] before the enactment of [the statute in question].” 472 U.S., at 59.

Edwards, supra, 482 U.S. at 587-88.

So here, Defendant has failed to identify any purpose for a law emphasizing the rights of students to pray on public school grounds that was not already served by existing law.

The best that can be said for the legislative history underlying the enactment of the mandatory period of silence is that it is not quite as blatant as the legislative history supporting the law declared unconstitutional in Wallace v. Jaffree, supra. Although, Defendant produces statements from Legislators on both sides of the question, and some of the Legislators in favor of the mandatory period of silence opined that the moment of silence had legitimate pedagogical value, the Court found it significant that the chief Senate sponsor was quoted as 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.” (See Mem. Op., R. 919); *See also*, H.R. Proceedings, 95<sup>th</sup> Ill. Gen. Assem., May 31, 2007, at 65 (A. 69), (Statement of Senator Kimberly Lightford).

In any event, “[a] court’s finding of improper purpose behind a statute is appropriately determined by the statute on its face, its legislative history or its interpretation by a responsible administrative agency. The plain meaning of the statute’s words, enlightened by their context and the contemporaneous legislative history can control the determination of legislative purpose.” Edwards, *supra*, 482 U.S. at 594. (Citations omitted). Given that the Legislature enacted a law re-titled to add the words “and Student Prayer”, and which added a statutory provision emphasizing the right to pray in public school although existing law already protected that right, the District Court was certainly justified in concluding that the Legislative purpose was endorsement of prayer.

Moreover, as Plaintiff noted above, the statutory language, which the Court found required the teacher to instruct the students to pray or reflect on the day’s activities, reinforces the finding of an improper legislative purpose. That is, the law essentially *forces* schoolchildren to contemplate praying or (secondarily) doing one other thing, thus introducing prayer into the schoolhouse in an “approbative” manner and imprinted with the State’s seal of approval. Without repeating the argument (Section III above) here, Plaintiff submits that the Court’s finding that the

government's stated secular purpose is not the true one demonstrates that it took seriously its "duty to distinguish a sham secular purpose from a sincere one". Santa Fe Independent School District v. Doe, 530 U.S. 290, 308 (2000) quoting Wallace, 472 U.S. at 75 (O'Connor, J., concurring).

Under Lemon v. Kurtzman, 403 U.S. 602 (1971), a statute is violative of the Establishment Clause if the statute fails to 1) have a secular legislative purpose, 2) have a primary effect that neither advances nor inhibits religion or 3) not foster an excessive government entanglement with religion. *Id.* At 273. Government action violates the First Amendment if it fails any one of the three prongs. Books v. Elkhart County, 401 F.3d 857, 862 (7<sup>th</sup> Cir. 2005). Because the statute's legislative history bespeaks a non-secular purpose of endorsement, the Act is unconstitutional.

Defendant defends the Act primarily by asserting that other courts have upheld moment of silence laws after Wallace, *supra*, citing Bown v. Gwinnet County School Dist., 112 F.3d 1464 (11<sup>th</sup> Cir. 1997), Brown v. Gilmore, 258 F.3d 265 (4<sup>th</sup> Cir. 2001) and Croft v. Perry, 562 F.3d 735 (5<sup>th</sup> Cir. 2009). It should be noted that another court has invalidated a moment of silence law after Wallace (i.e., May v. Cooperman, 780 F.2d 240 (3d Cir. 1985). This merely points up the cardinal tenet of Establishment Clause

jurisprudence that “every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion”. Lynch v. Donnelly, 465 U.S. 668, 693 (1984) (O’Connor, J., concurring).

One of the cases cited by Defendant, Bown v. Gwinnet, *supra*, was offered by the District Court as “a perfect blueprint” for a constitutional moment of silence law. The statute there did not contain any overt reference to prayer (in fact, it had been amended to remove a reference to prayer), and, though mandatory, simply provided for a “moment of quiet reflection”. 112 F.3d at 1470 fn 3. The fact that the Court was able to uphold such a law is not surprising and supports the unassailable principle that moment of silence laws are neither per se constitutional nor per se unconstitutional. It depends on the circumstances.

Brown v. Gilmore, *supra*, is more difficult to square with Wallace, and indeed drew a vigorous and lengthy dissent from Judge King on the ground that the Virginia moment of silence statute was unconstitutional on the principles enunciated in Wallace. The majority viewed the inclusion of the word “prayer” as “a minor and non-intrusive” accommodation of the religious views of students who wished to pray. 258 F.3d at 279.

(Although Judge King observed that it was questionable in light of the fact that it was an accommodation only of “those students whose belief systems embrace engaging in prayer while sitting and while remaining silent”. 258 F.3d 265, 287 fn. 5). In any event, Brown stands for the proposition that a moment of silence law that even uses the word “pray” *may* be constitutional under certain circumstances (a proposition acknowledged by both Justices O’Connor and Powell in Wallace itself). 472 U.S. at 73. But the Fourth Circuit did not find enough other evidence, in the unique circumstances of the case, that the Virginia Legislature acted with an improper purpose under Lemon’s first prong. Brown thus does not save the statute here, where, in the unique circumstances of this case, the District found that the Legislature had no valid secular purpose on grounds that included more than the fact that the statute employs the word “prayer”.

Similarly, in Croft v. Perry, *supra*, another case in which the moment of silence law employed the word “prayer”, the Court held that in the *context* of the circumstances leading to its enactment, the law did not violate the “purpose” prong of Lemon. Specifically, the Court ruled that, as opposed to Wallace, where the *only* substantive change was the addition

of the word “prayer”, in Croft, the Texas Legislature had made numerous substantive changes to the law, including new text providing that students could also “engage in any other silent activity that is not likely to interfere with or distract another student”. Thus the statute did not bespeak a religious or non-secular purpose. 562 F.2d 735, 747-48. While frankly, the Plaintiff does not find the distinction compelling, it is not risible. The larger principle to be distilled from the holding is that context is all.

The point is that the context here is different. The legislative history is different, and the statutory language is different. The District Court’s holding that the declared legislative purpose was not legitimate when filtered through the actual statutory language, and that the circumstances of its amendatory history indicated an intent to endorse prayer is justified on the facts. Plaintiff therefore urges this Court to affirm the holding of the District Court finding the statute unconstitutional as violative of the Establishment Clause under principles enunciated in Lemon v. Kurtzman, 403 U.S. 602 (1971).

V.

**The Silent Reflection and Student Prayer Act  
Also Violates The Second (“Primary Effect”)  
Prong of *Lemon***

The District Court also determined that the statute violated the second prong of Lemon. That is, the Court found that the primary effect of the statute was to advance or inhibit religion. More particularly, the Court determined that by mandating a period of silence and limiting the activities during that period to prayer or reflection, the statute favors those religious groups whose definition of prayer is limited to silent devotional activity. (Mem. Op. p. 12, R. 922).

Although Plaintiff has challenged the statute on its face, and the evidence is limited, there does not need to be much evidentiary support for the proposition that a law of statewide application, permitting only silent prayer, will inevitably trench on the rights of some schoolchild whose religious traditions include prayer that is neither silent nor still, nor momentary. In other words, because the statutory language compels the teacher to limit the silent activity to prayer or reflection, some children will

receive the message that the form of prayer dictated by their religious tradition is not as “valuable” or as favored as those of other religions, or in short, that the favored forms of prayer are “endorsed” by the State. This endorsement is complicated also by the fact that some of these children will be seven, eight or nine years old, impressionable enough not to be able to distinguish between the teacher’s apparent endorsement of prayer, and the neutrality which Defendant argues should be the natural result of a statute that permits either silent prayer or silent reflection. See affidavit of Dr. Kraus ¶¶ 2-4, (R. 431-433).

The following oft-quoted passage from Edwards v. Aguillard, describes the heightened Establishment Clause concerns in the schoolhouse context:

“The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is

involuntary. The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure.

482 U.S. 583-84.

Defendant Koch is dismissive of these concerns, and states that "the fact that teachers are addressing children does not change the analysis". (Brief for Defendant, pp. 43-45).

Respectfully, what the Lemon Court sought to protect against by requiring a statute to have a primary effect that neither advances nor inhibits religion, is the danger not of actual coercion, but the *perception* that the State is endorsing a particular religion or religious practice. Lynch v. Donnelly, 465 U.S. 668, 692 (O'Connor, J., concurring) ("What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion").

Perhaps adults can perceive the subtle distinctions and understand the sophisticated legal arguments in favor of the view that such a statute does not endorse prayer, but to ask an impressionable child of tender years to do so borders on the absurd.

Plaintiff urges this Court to uphold the District Court's finding that the Silent Reflection and Student Prayer Act violates the second prong of Lemon, supra, and is therefore unconstitutional.

## VI.

### **The Silent Reflection and Student Prayer Act Is Unconstitutionally Vague**

The District Court found that the Silent Reflection and Student Prayer Act was unconstitutionally vague. As Plaintiff argued below, no one, including the teacher, knows the length of the period of silence. This gives State authorities (i.e., the teacher) complete discretion to hold a ceremony of unknown duration. The fact that no penalty is prescribed does not mean that one will not be imposed by a given teacher for "violating" the statute (whatever that means). The fact that no guidelines are provided might permit a teacher, even unconsciously or in good faith, to lead her charges to believe that bowing one's head or folding one's hands is the proper way to observe the period of silence.

Defendant Koch first claims that the District Court used a standard less exacting than "impermissibly vague in all of its applications". (Brief for Defendant, p. 47, 49). The District Court, however, adverted to the

principle that a vague law is especially troublesome when “the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights” *citing* Colautti v. Franklin, 439 U.S. 379, 391 (1979), which itself cited, *inter alia*, Keyishian v. Bd. of Regents, 385 U.S. 589 (1967). Because Defendant could find no right inhibited by the vagueness of the Silent Reflection and Student Prayer Act, he concluded that the District Court’s analysis is wrong for failure to prove “vagueness in each of its applications”. But the principle is broader than Defendant posits. It generally refers to the fact that the Court will protect constitutional rights from infringement, even if there is no actual “exercise” component. For instance, in Keyishian, *supra*, the law under consideration required teachers to sign a certificate stating they were not members of the Communist Party or be dismissed. In overturning the law for vagueness, the Court stated that even where the governmental purpose is substantial “that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved”. 385 U.S. 589, 603.

Defendant also contends that the Due Process Clause “does not demand perfect clarity” and that one can always pose “a hundred nice

questions” about the operation of a statute. (Brief for Defendant, p. 48). But that is no defense where important constitutional rights are at stake.

Plaintiff submits, and the District Court found that, this statute is fraught with the possibility that its textual imprecision will result in its being implemented in a manner that leads young students into believing that the “proper” thing to do during the period of silence is to *pray*. A teacher-led, ten-minute period of silence (one person’s “brief” is another’s “lengthy”) immediately before or after the Pledge of Allegiance (which is also required each school day (Dec. 105 ILCS 5/27-3)), during which a significant number of students and/or the teacher, have their heads bowed, and/or their hands held in the “Durer-like” position (or where students are kneeling or using prayer rugs—the statute merely requires silence—it does not proscribe open displays of worship) has the potential to convey the message to impressionable children that school, the Flag, patriotism, and learning are all inextricably linked with prayer. It is this possibility that is the reason that the statute’s “vagueness” is dangerous and not trivial. It is also the reason that the statute is unconstitutional. Plaintiff urges the Court to so hold.

## Conclusion

Plaintiff does not seek to impose some wild-eyed, absolutist regime dictating an impenetrable barrier between state and religion in this lawsuit. Rather, Plaintiff contends that, considering the statutory terms and the context of the amendatory process that led up to its enactment, the Silent Reflection and Student Prayer Act conflicts with forty years of well-recognized principles of Establishment Clause jurisprudence, mandating government neutrality in religious matters, particularly in the schoolhouse. Accordingly, Plaintiff urges this Court to affirm the District Court's conclusion that the law is unconstitutional.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)**

The undersigned, counsel for the Plaintiff-Appellee, DAWN S. SHERMAN, a minor, through ROBERT I. SHERMAN, her father and next friend, hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7) of the Federal Rules of Appellate Procedure because the brief contains 5,971 words, excluding the parts of the brief exempted by F.R.A.P. 32(a)(B)(iii). The brief is written in 14-point font and is proportionally spaced.

Respectfully submitted,

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## CIRCUIT RULE 31(e) CERTIFICATION

The undersigned, counsel for the Plaintiff-Appellee, DAWN S. SHERMAN, a minor, through ROBERT I. SHERMAN, her father and next friend, hereby certifies that I have filed electronically, pursuant to Circuit Rule 31(e), versions of the brief that are available in non-scanned PDF format.

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## CERTIFICATE OF SERVICE

The undersigned, counsel for the Plaintiff-Appellee, DAWN S. SHERMAN, a minor, through ROBERT I. SHERMAN, her father and next friend, hereby certifies the original and fourteen (14) copies, along with a digital version of the foregoing Brief of Plaintiff-Appellee, were filed with the Clerk of the United States Court of Appeals for the Seventh Circuit, and three (3) copies, as well as a digital version containing the brief, were served upon counsel for the Defendant-Appellant, by depositing the same in the U.S. Mail, first-class postage prepaid on the 9th day of December, 2009:

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