

No. 09-1455

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

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

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**BRIEF OF DEFENDANT-APPELLANT**

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## JURISDICTIONAL STATEMENT

Plaintiff-Appellee Dawn S. Sherman, a high school student, through Robert I. Sherman, her father, filed a class action complaint for declaratory and injunctive relief under 42 U.S.C. § 1983 against Defendant-Appellant Dr. Christopher Koch, in his official capacity as Superintendent of the Illinois State Board of Education, and Defendant Township High School District 214 (“District 214”) alleging that 105 ILCS 20/1 (2008) (the “Period of Silence Law”) is facially invalid under the First and Fourteenth Amendments. (Doc. 14).<sup>1</sup> As the complaint raised a federal question, the district court had subject matter jurisdiction over Sherman’s claims pursuant to 28 U.S.C. § 1331.

The court certified a plaintiff class of all students in public schools in the State of Illinois (the “Students”) and a defendant class of all public school districts in the State of Illinois (the “School Districts”). (Doc. 95). On January 21, 2009, the court entered a final order granting the Students’ motion for summary judgment and permanently enjoining Dr. Koch and the School Districts from implementing or enforcing the Period of Silence Law. (Doc. 164) (A.1). The court entered a final judgment pursuant to Federal Rule of Civil Procedure 58 on the same day. (Doc. 165) (A.18). The defendants did not file any motion to alter or amend the judgment. On February 20, 2009, Dr. Koch timely filed a notice of appeal. (Doc. 172). As this

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<sup>1</sup> References to the numbered documents in the record on appeal shall read “Doc. \_\_ at \_\_”; references to the hearing transcripts shall read “[Date] Trans. at \_\_”; references to documents reproduced in the Appendix shall read “A. \_\_.”

appeal is from a final judgment that disposes of all claims against all parties, this Court has jurisdiction under 28 U.S.C. § 1291.

### ISSUES PRESENTED FOR REVIEW

The Students challenge the constitutionality of the Period of Silence Law, which provides:

**Period of silence.** § 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.

105 ILCS 20/1 (2008).

The questions presented are:

1. Whether the Period of Silence Law is facially valid under the Establishment Clause of the First Amendment because it serves the neutral purpose of giving all public school children an opportunity to calm down and quietly collect their thoughts before they start the day and has neither the purpose nor effect of endorsing prayer?
2. Whether the Period of Silence Law is facially valid under the Due Process Clause of the Fourteenth Amendment because ordinary students of common intelligence understand well enough what it means to remain silent for a brief period of time?

## STATEMENT OF THE CASE

Sherman filed a class action complaint for declaratory and injunctive relief under 42 U.S.C. § 1983 against Dr. Koch and District 214 alleging that the Period of Silence Law is facially invalid under the First Amendment because it effects an establishment of religion 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 Period of Silence Law facially invalid under the First and Fourteenth Amendments, and permanently enjoined the defendants from implementing or enforcing the law. Dr. Koch appeals.

## STATEMENT OF FACTS

### I. Background on the Period of Silence Law

#### A. 1969 Enactment

The Illinois General Assembly enacted the Period of Silence Law in 1969, as follows:

An Act to authorize the observance of a brief period of silence in public school classrooms at the opening of each school day.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

**Period of silence.** § 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.

Ill. Rev. Stat. 1969, ch. 122, par. 771 (A.38).

The law was introduced as Senate Bill 55 in January 1969 and passed by the Senate in February 1969. Legislative Synopsis & Digest, 76th Ill. Gen. Assem., 1969 Sess., at 53 (A.39); S.J., 76th Ill. Gen. Assem., 1969 Sess., at 42, 183 (A.40, 41).<sup>2</sup> In March 1969, the House passed the bill with an amendment. The version adopted by the House read:

An Act to authorize the observance of a brief period of silence in public school classrooms ~~at the opening of each school day.~~<sup>3</sup>

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<sup>2</sup> This Court may take judicial notice of documents in the public record. *520 S. Michigan Ave. Assocs., Ltd. v. Shannon*, 549 F.3d 1119, 1137 n.14 (7th Cir. 2008).

<sup>3</sup> ~~Strikeouts~~ indicate deletions.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

**Period of silence.** § 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.~~

Legislative Synopsis & Digest, 76th Ill. Gen. Assem., 1969 Sess., at 53 (A.39);

H.R.J., 76th Ill. Gen. Assem., 1969 Sess., at 446, 579 (A.43, 45). Later that month, the Senate voted to non-concur with the House in the adoption of the amendment.

Legislative Synopsis & Digest, 76th Ill. Gen. Assem., 1969 Sess., at 53 (A.39); S.J., 76th Ill. Gen. Assem., 1969 Sess., at 440 (A.42). The House then voted to recede from its amendment. Legislative Synopsis & Digest, 76th Ill. Gen. Assem., 1969 Sess., at 53 (A.39); H.R.J., 76th Ill. Gen. Assem., 1969 Sess., at 667 (A.46). The bill was signed into law on April 16, 1969. Legislative Synopsis & Digest, 76th Ill. Gen. Assem., 1969 Sess., at 53 (A.39). No legislative debates survive.

## **B. 1990 and 2002 Amendments**

The law remained unchanged until 1990, when, as part of an act that assigned short titles to hundreds of statutes, it was given the short title, “the Silent Reflection Act.” Pub. Act 86-1324, § 933, eff. Sept. 6, 1990 (A.49). Then, in 2002, the General Assembly added a new section to the Act, which reads:

**Student prayer.** § 5. 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.

Pub. Act 92-832, eff. Jan. 1, 2003 (A.50), codified at 105 ILCS 20/5 (2008). At that time, the General Assembly also amended the short title of the Act to “the Silent Reflection and Student Prayer Act.” *Id.*

The student prayer section was introduced in January 2002 and signed into law in August 2002. Status of H.B. 4117, 92nd Ill. Gen. Assem., 2002 Sess. (A.51-52). According to the sponsors, the bill was intended to “clarif[y] what student-initiated prayer is and where that can occur without disruption to the school day and to others.” S. Proceedings, 92nd Ill. Gen. Assem., May 9, 2002, at 36 (statements of Sen. Burzynski) (A.57); *see also* H.R. Proceedings, 92nd Ill. Gen. Assem., April 1, 2002, at 26-27 (statements of Rep. Wright) (A.53-54). The legislators did not mention the period of silence section at any time during discussion of the student prayer section. *See id.*

### **C. 2007 Amendment**

In 2007, the General Assembly amended the Period of Silence Law to its current form by changing the word “may” in the first sentence to “shall.” Pub. Act 95-680, § 5, eff. Oct. 11, 2007 (A.58). The law now reads:

**Period of silence.** § 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.

105 ILCS 20/1 (2008).

This amendment was introduced as Senate Bill 1463 in March 2007. Status of S.B. 1463, 95th Ill. Gen. Assem., 2007 Sess. (A.59). The Senate sponsor, Senator Lightford, explained that, under the 1969 version of the law, some teachers were observing a period of silence, but others – often in the same school – were not. S. Proceedings, 95th Ill. Gen. Assem., March 21, 2007, at 88 (A.64). Her intent in amending the law was to “create uniformity across the State in all of our schools,” so that all public school students would be given the same opportunity for “meditation, moment of silence, reflection.” *Id.* She emphasized that the moment “should not be conducted as a religious exercise,” but rather was “a neutral act which affords students the opportunity to reflect on whatever they wish, whether religious or not.” *Id.* at 86 (A.61).

During debate on the bill, three Senators rose in support. Two supported a mandatory moment of silence to “instill a little meditative exercise” at the beginning of the day, however students may choose to use it. *Id.* at 87, 88 (statements of Sens. Cronin & Sieben) (A.63, 64). A third noted that the Illinois General Assembly and the United States Congress begin each session by pausing “for a religious prayer,” and that students who arrive at school in a “hyper” state of mind “should take a moment before the day starts . . . just to take a deep breath to reflect upon the things that are coming up throughout the day.” *Id.* at 89 (statements of Sen. Meeks) (A.65).

The bill passed the Senate and was sent to the House. Status of S.B. 1463, 95th Ill. Gen. Assem., 2007 Sess. (A.59). The House sponsor, Representative Will

Davis, explained that the bill amended the law “to require teachers to observe a period of silence,” which was “not a religious exercise but simply a time for reflection as students begin their day.” H.R. Proceedings, 95th Ill. Gen. Assem., May 31, 2007, at 63-64 (A.67-68). He stated that the bill required “nothing more than what [the teacher] . . . would already do in the morning to try to get the young people settled down so that they can begin their school day.” *Id.* at 67 (A.71).

During debate, three Representatives rose in opposition to the bill. Two were concerned about imposing a meaningless mandate that would take away from class time. *Id.* at 64, 67 (statements of Reps. Bassi & Fritchey) (A.68, 71). And a third worried that “[t]he only reason [she] can see for requiring this silent moment is to encourage prayer in the public schools.” *Id.* at 64 (statements of Rep. Currie) (A.68). She noted that “the Senate Sponsor was widely quoted in the press as saying, ‘We have to pray before we begin our legislative day, so should the school children of the State of Illinois.’” *Id.* at 65 (A.69).

Other Representatives stated their general support for passage of the bill. *Id.* at 65, 68 (statements of Reps. Bost & Lyons) (A.69, 72). Some rose to sing new lyrics to the Simon & Garfunkel song “The Sound of Silence”: “Hello school prayer, our old friend, it’s time to vote on you again, in our school house without warning, you seek a moment in the morning, and the outcome at the end of this debate, in our State, should be the sound ssshhh of silence.” *Id.* at 68 (statements of Rep. Lyons) (Doc. 21-2 at 22) (A.72).

In summation, Representative Davis reiterated that the bill was not asking a teacher to do anything other than what she “essentially already does in the morning when young people come in.” *Id.* at 68 (A.72). To his mind, this was “nothing different than when we come into this chamber every day and . . . we’re asked to observe silence . . . as we look to begin our day. . . . [W]e have to do it . . . [s]o we’re asking children to do the same thing.” *Id.* at 68-69 (A.72-73). The House then voted to pass the bill. Status of S.B. 1463, 95th Ill. Gen. Assem., 2007 Sess. (A.60).

In August 2007, then-Governor Rod Blagojevich vetoed the amendment, stating that he believed the statute providing for a discretionary period of silence already struck the “right balance between the principles echoed in our constitution, and our deeply held desire to practice our faith.” Governor’s Message to 95th Ill. Gen. Assem. on S.B. 1463, Aug. 28, 2007 (A.74).

On October 3, 2007, Senator Lightford filed a motion to override the Governor’s veto. Status of S.B. 1463, 95th Ill. Gen. Assem., 2007 Sess. (A.60). She said she understood the Governor’s rationale, but explained that the law currently in place already provided that teachers “may” observe a period of silence, and the bill “simply changed it to ‘shall’” to obtain uniformity. S. Proceedings, 95th Ill. Gen. Assem., Oct. 3, 2007, at 8 (A.75).

Two Senators rose in opposition, stating that making the period of silence mandatory seemed “somewhat coercive,” and “provide[d] a bridge towards formalized prayer . . . in public educational settings,” and urging that local officials be left with discretion to determine whether a moment of silence was appropriate.

*Id.* at 9-10 (statements of Sens. Schoenberg & Rutherford) (A.76-77). Another Senator rose to support the override, noting: “We take a moment of prayer here in the Senate to calm some of you all down because you’re a little hyper when you’re coming from your district and just got off 55, off the highway. This is just a moment of silence.” *Id.* at 10 (statements of Sen. Hendon) (A.77).

In closing, Senator Lightford reminded the Senate “that this Act does not alter the portion that states that the silent period not be conducted as a religious exercise.” *Id.* at 11 (A.78). She then explained why the amendment was needed:

I think it’s really important that we look across this country and see all the crimes that are taking place on all of our college campuses, as well as our grammar schools and high schools, and acknowledge that there’s bullying by far that leads to violence. And I believe that in these critical times, it’s important for the teacher to gather the students to focus on the day’s activities. Whatever that child deems necessary for them to think about and reflect on, I think it’s very important that we do it, and we do in a unity. If one classroom is doing it and the other class isn’t and these are the same children that are rotating classes, then they’re not all fully getting the impact on peace for the day and learning it in – in an academic environment. And so anything above that is just taking this bill way out of proportion.

*Id.* The Senate then voted to override the veto. Status of S.B. 1463, 95th Ill. Gen. Assem., 2007 Sess. (A.60).

On October 11, 2007, Representative Davis filed a motion in the House to override the veto. *Id.* Three Representatives rose in opposition. H.R. Proceedings, 95th Ill. Gen. Assem., Oct. 11, 2007, at 86-94 (statements of Reps. Black, Lang, & Fritchey) (A.79-87). Two Representatives stated that they did not believe the bill was about religion, but questioned why a period of silence needed to be mandated

when it already was permitted and suggested that requiring every school to observe a period of silence every day would waste valuable class time. *Id.* at 87-88, 92-94 (statements of Reps. Black & Fritchey) (A.81-81, 85-87). Another Representative opined that, although the bill “doesn’t mandate prayer, . . . that’s what it’s about to many who are pushing this.” *Id.* at 90 (statements of Rep. Lang) (A.83). He noted that “the only calls [he] received about this Bill were . . . people who are interested in having prayer in the public schools,” and concluded that the bill was “wrong from the point of view of the constitutional separation of church and state.” *Id.* at 90-91 (A.83-84).

One Representative rose in favor of the override. *Id.* at 94 (statements of Rep. M. Davis) (A.87). She suggested that the “rushed, exciting world in which [children] live . . . helps to create the violence that they’re perpetuating because they’re not allowed a time to reflect,” and urged that they be “given a moment to breathe what their own thoughts may be.” *Id.* at 95 (A.88).

In closing, Representative Davis stated that having “this opportunity for young people to settle down, for them to reflect on their day” would be “positive for students in our school system” and might help avoid school shootings. *Id.* at 99 (A.92). The House then voted to override the veto. Status of S.B. 1463, 95th Ill. Gen. Assem., 2007 Sess. (A.60). The amendment became effective on October 11, 2007. *Id.*

## II. District Court Proceedings

On October 26, 2007, Sherman filed a complaint for declaratory and injunctive relief under 42 U.S.C. § 1983 against District 214 (which includes Sherman's high school), then-Governor Blagojevich, and District 214 officials alleging that the Period of Silence Law is facially invalid under the First Amendment. (Doc. 1). Sherman immediately moved for a temporary restraining order and/or preliminary injunction, and the court held a hearing on October 29, 2007. (Doc. 9 at 1).

At the hearing, counsel for District 214 represented that the district planned to implement the law by adding an announcement to the school-wide morning announcements prior to the Pledge of Allegiance. (10-29-07 Trans. at 19-20) (A.95-96). The announcement would state: "We will now have a brief period of silence." (*Id.* at 20) (A.96). Then, after fifteen seconds had passed, the announcer would begin the Pledge. (*Id.*). There would be no mention of prayer, meditation, or silent reflection. (*Id.*). The court found that the balance of harms did not favor Sherman "because the school is going to have a neutral moment of silence without any hint or other mention of any type of religious activity." (*Id.* at 29) (A.97). The court therefore denied the motion for a temporary restraining order without prejudice. (Doc. 9 at 2).

On November 1, 2007, Sherman filed an amended class action complaint for declaratory and injunctive relief under 42 U.S.C. § 1983 against District 214 and Dr. Koch alleging that the Period of Silence Law is facially invalid under the First

Amendment because it effects an establishment of religion and the Fourteenth Amendment because it is vague. (Doc. 14). Dr. Koch moved to dismiss on the grounds that the complaint failed to state a claim and he was not a proper defendant. (Doc. 21). On November 15, 2007, the court denied Dr. Koch's motion to dismiss and preliminarily enjoined the defendants from implementing or enforcing the Period of Silence Law. (Docs. 29, 88).

Sherman thereafter moved for certification of a bilateral class action. (Doc. 30). On March 28, 2008, the court certified a plaintiff class of all students in public schools in the State of Illinois, represented by Sherman, and a defendant class of all public school districts in the State of Illinois, represented by the District. (Doc. 95). On June 2, 2008, the court extended the preliminary injunction to all defendant class members. (Doc. 107).

The Students, with the support of the American Civil Liberties Union (the "ACLU") as *amicus curiae*, then moved for summary judgment. (Docs. 121, 122). They argued that the Period of Silence Law is unconstitutionally vague because it does not specify how the silent period is to be observed and contains no penalties for failing to comply. (Doc. 121-3 at 2-4). They also contended that the law violates the Establishment Clause because it has the purpose and effect of endorsing prayer. (Doc. 121-3 at 4-8). The ACLU additionally argued that the law discriminates against those students whose beliefs do not embrace the concept of momentary, silent prayer. (Doc. 122 at 21-29). In support, the Students and the ACLU submitted an affidavit from Dr. Louis J. Kraus, a child and adolescent psychiatrist, about the effect of the law on students in different age groups. (Doc. 121-4 at 2)

(A.98).

Dr. Kraus stated that, because elementary school students do not have the ability to engage in abstract reasoning, “being told that they have ‘the opportunity for silent prayer or for silent reflection’ will essentially have the meaning of silent prayer,” because “[a] child this age is not going to have an understanding of silent reflection.” (*Id.* at 3) (A.99). He further opined that middle school students are concerned about social acceptance and would be susceptible to peer pressure. (*Id.*) He believed that “by putting the phrase ‘silent prayer’ and ‘silent reflection’ together, one is essentially expressing to these young teenagers that the focus is on silent prayer,” and that “group pressure” to pray would have a significant impact. (*Id.*) Dr. Kraus also was concerned that elementary and middle school students whose beliefs do not include silent prayer would be confused or harassed. (*Id.* at 3, 4) (A.99, 100). Finally, Dr. Kraus opined that, although high school students would not be confused by the difference between prayer and reflection, “a relatively large number of high school children” would challenge the period of silence, thus “potentially subjecting themselves to disciplinary actions” or harassment. (*Id.* at 4) (A.100). In sum, it was his opinion that the Period of Silence Law was not in “the child’s best interest, nor would it assist with their basic educational needs.” (*Id.*)

Dr. Koch, with the support of the Alliance Defense Fund (“ADF”) as *amicus curiae*, also filed a motion for summary judgment.<sup>4</sup> (Docs. 136, 141). He argued

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<sup>4</sup> Additionally, ADF filed a motion to dismiss the complaint (Doc. 70) and the School Districts filed a motion for summary judgment (Doc. 130), both of which were denied (Docs. 94, 163), and are not at issue in this appeal.

that the Period of Silence Law serves the secular purpose of providing a uniform moment of quiet reflection to calm school children before they start the day. (Doc. 137 at 7-10). Although the law could conceivably be misapplied to endorse prayer, it is neutral on its face and offers secular benefits to all students. (*Id.* at 12-13). Dr. Koch also contended that the law was not unconstitutionally vague in all its applications, as many school districts had encountered no trouble in implementing the law. (*Id.* at 13-20). Finally, he attacked Dr. Kraus's report as lacking probative value, because it was premised on speculative assertions about how the law might be implemented. (*Id.* at 20-21). In support, Dr. Koch submitted the legislative history of Public Act 96-680, directives he received from a number of school districts describing how they had implemented the Period of Silence Law, and the affidavit of Dr. Trayce L. Hansen, a licensed psychologist. (Docs. 137-2, 137-3).

Dr. Hansen stated that Dr. Kraus's opinion about the impact of a moment of silence on schoolchildren was "extreme" and the potential coercive scenarios he cited "highly unlikely." (Doc. 137-3 at 53) (A.102). In Dr. Hansen's view, it was "highly improbable" that young students would be confused by a moment of silence because even young children "already have multiple experiences being told to be quiet under certain circumstances," such as when they are in a theater or library, during a teacher's lecture, or to honor national tragedies. (*Id.* at 53-54) (A.102-03). She also disagreed that a moment of silence would cause some children to stand out or feel pressure to pray, because "all children will be doing the same thing – sitting silently," and no one would know what was going on inside the other children's

minds. (*Id.* at 54-55) (A.103-04). Dr. Hansen further rejected the notion that older students would be penalized for speaking out against the moment of silence. (*Id.* at 54) (A.103). In her view, teachers would encourage such students to express their opinions in respectful and appropriate ways. (*Id.*). Finally, Dr. Hansen opined that a moment of silence at the beginning of the school day helps students begin the day “in a calm and peaceful manner” that benefits the learning process and offers schoolchildren of all backgrounds “a valuable and constructive socio-educational and psychological experience.” (*Id.* at 57) (A.106).

On January 21, 2009, after the parties filed replies (Docs. 143, 148, 153), the court granted Sherman’s motion for summary judgment, denied Dr. Koch’s motion for summary judgment, declared the Period of Silence Law facially invalid under the First and Fourteenth Amendments, and permanently enjoined the defendants from implementing or enforcing the law (Doc. 164) (A.1). In coming to its decision, the court accepted the two expert opinions, but rejected as hearsay Dr. Koch’s submissions showing how various school districts implemented the law. (*Id.* at 6 n.6, 14-15) (A.6, 14-15).

The court first determined that the plain language of the statute “compels each classroom teacher to ensure that the period of silence is used by each student *only* for prayer or reflection on the activities of the day ahead.” (*Id.* at 5) (A.5) (emphasis added). In the court’s view, to ensure students’ thoughts do not stray from those two topics, each teacher must instruct her pupils “about prayer and its meaning as well as the limitations on their ‘reflection.’” (*Id.*). The court concluded

that forcing a teacher to introduce the concept of prayer requires that teacher to endorse religion in violation of the Establishment Clause. (*Id.* at 6) (A.6).

In the court's view, the legislative history also demonstrated that the statute has no legitimate secular purpose. (*Id.*). The court opined that, prior to 2002, the Period of Silence Law likely was constitutional because it simply gave teachers "the option to observe a moment of silence and, consequently, the option of how to observe it" without the need to mention prayer. (*Id.* at 7) (A.7). In 2002, however, the legislature added section 5, which guarantees students the right to engage in or refrain from religious observance on school grounds, and simultaneously changed the name of the overall Act to "the Silent Reflection and Student Prayer Act." (*Id.* at 7-8) (A.7-8). The court concluded that the addition of "and Student Prayer" to the title of the Act conveyed "the true intention of the legislature to endorse and encourage prayer." (*Id.* at 8) (A.8).

Further, the court determined that the 2007 amendment, which made the period of silence mandatory, "clearly indicate[d] an intention to ensure that school children would use the period of silence either for prayer or to contemplate prayer," by compelling every classroom teacher to introduce prayer as one of two permissible options during the period of silence. (*Id.* at 8-9) (A.8-9). The court rejected the idea that a desire for uniformity motivated the amendment, finding that the law promotes irregular application because it does not specify the duration of the period of silence or provide for enforcement. (*Id.* at 9) (A.9). The court then opined that, "if

the legislature sincerely wanted to adopt a period of silence for reflection,” it should have eliminated all references to prayer. (*Id.* at 10-11) (A.10-11).

The court also determined that the Period of Silence Law violates the Establishment Clause because it demonstrates an official preference for those religions that practice silent prayer over those that do not. (*Id.* at 12) (A.12). The court explained that “[b]y mandating a ‘period’ of silence in which each student is given the opportunity to pray or ‘reflect,’ the state has denied the opportunity of students whose prayer is not ‘silent’ from exercising their right to pray during this period.” (*Id.*). The statute therefore “tells those that do not [practice silent prayer] that they are ‘nonadherents’ or ‘outsiders’ who must find a different time to pray.” (*Id.*).

Finally, the court held that the law is void for vagueness because it does not provide sufficient direction “as to how the ‘period’ of silence should be implemented, how long the period should last, and whether pupils would be permitted to pray in a manner that was either audible or required movement.” (*Id.* at 13) (A.13). The court concluded that the law gives too much discretion to teachers and may too easily be used to impose religious views on impressionable students. (*Id.* at 14) (A.14).

Dr. Koch appeals. (Doc. 172).

## SUMMARY OF ARGUMENT

The Period of Silence Law is not facially invalid under either the First or Fourteenth Amendment to the United States Constitution. First, the law does not effect an establishment of religion in violation of the First Amendment. The Supreme Court and other Courts of Appeals have recognized that moment of silence laws with secular purposes and neutral effects are constitutional. Illinois's Period of Silence Law is a quintessential example of such a permissible statute. The text and legislative history establish that it has the secular purpose of giving all school children an opportunity to calm down and quietly collect their thoughts before beginning the day. The statute expressly prohibits teachers from conducting the silent moment as a religious exercise. And the law does not inevitably have the effect of endorsing prayer or discriminating against those who choose a different silent activity. The district court's judgment declaring the statute facially invalid under the First Amendment therefore should be reversed and judgment entered in favor of Dr. Koch.

Nor is the Period of Silence Law impermissibly vague in violation of the Due Process Clause of the Fourteenth Amendment. Although one could pose hypothetical questions about the outer limits of "a brief period of silence," an ordinary student exercising common sense will understand perfectly well what that entails. This Court therefore should reverse the district court's judgment declaring the law facially invalid under the Fourteenth Amendment and enter judgment in favor of Dr. Koch.

## ARGUMENT

### **I. This Court Reviews *De Novo* Whether the Students Have Overcome the Significant Barriers to Enjoining State Law in a Facial Challenge.**

This Court reviews *de novo* the district court's entry of a permanent injunction in the context of summary judgment. *U.S. E.E.O.C. v. Target Corp.*, 460 F.3d 946, 954 (7th Cir. 2006). Summary judgment should be granted only if the record, viewed in the light most favorable to the non-moving party, shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

Additionally, because the Students raise a facial challenge to the Period of Silence Law, they must demonstrate that “no set of circumstances exists under which the [law] would be valid, *i.e.*, that the law is unconstitutional in all of its applications.” *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1190 (2008) (internal quotation marks omitted). “A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully.” *United States v. Salerno*, 481 U.S. 739, 745 (1987). First, facial challenges “often rest on speculation,” and thus “raise the risk of premature interpretation of statutes on the basis of factually barebones records.” *Wash. State Grange*, 128 S. Ct. at 1191 (internal quotation marks omitted). Second, they “run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of

constitutional law broader than is required by the precise facts to which it is to be applied.” *Id.* (internal quotation marks omitted). “Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution.” *Id.*

Here, the Students have failed to establish as a matter of law that the Period of Silence Law necessarily effects an establishment of religion or is unconstitutionally vague in every application. This Court therefore should reverse the district court’s judgment declaring the law facially invalid.

## **II. The Period of Silence Law Does Not Effect an Establishment of Religion.**

The Period of Silence Law does not violate the Establishment Clause because it has legitimate secular purposes and does not inevitably endorse prayer or discriminate against those who choose a different silent activity. This Court should reverse the district court’s judgment declaring the law facially invalid under the First Amendment and enter judgment in favor of Dr. Koch.

### **A. The Establishment Clause Permits Moment of Silence Laws with Secular Purposes and Neutral Effects.**

The Establishment Clause of the First Amendment states that “Congress shall make no law respecting an establishment of religion.” U.S. Const. amend. I, cl. 1. “The Fourteenth Amendment imposes those substantive limitations on the legislative power of the States and their political subdivisions.” *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000). In evaluating an Establishment Clause

claim, “[t]he touchstone for [the Court’s] analysis is the principle that the First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion.” *McCreary County v. ACLU*, 545 U.S. 844, 859 (2005) (internal quotation marks omitted).

### 1. The *Lemon* Test

This neutrality principle forms the basis for the three-part test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which provides that “a government policy or practice violates the Establishment Clause if (1) it has no secular purpose, (2) its primary effect advances or inhibits religion, or (3) it fosters an excessive entanglement with religion.” *Vision Church, United Methodist v. Vill. of Long Grove*, 468 F.3d 975, 991 (7th Cir. 2006). Although several Justices have criticized the *Lemon* test, *see, e.g., Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring), it has not been overruled and remains controlling law, *Books v. Elkhart County, Ind.*, 401 F.3d 857, 862-63 (7th Cir. 2005); *see also McCreary*, 545 U.S. at 859 (reaffirming *Lemon*’s “three familiar considerations for evaluating Establishment Clause claims”).

The first question in the *Lemon* analysis “asks whether the government’s actual purpose is to endorse or disapprove of religion,” rather than to advance a legitimate secular purpose. *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O’Connor, J., concurring)). As with other questions of statutory interpretation, the purpose analysis turns on the “plain meaning of the statute’s words, enlightened by their context and the

contemporaneous legislative history [and] the historical context of the statute, . . . and the specific sequence of events leading to [its] passage.” *McCreary*, 545 U.S. at 862 (internal quotation marks omitted). Courts generally defer to the government’s articulation of a secular purpose, provided such purpose is “sincere and not a sham.” *Edwards*, 482 U.S. at 586-87. An action is unconstitutional only where “openly available data support[ ] a commonsense conclusion that a religious objective permeated the government’s action.” *McCreary*, 545 U.S. at 863.

The second question in the *Lemon* analysis “asks whether, irrespective of government’s actual purpose, the practice under review in fact conveys a message of endorsement or disapproval” of religion such that the “principal or primary effect” is to advance or inhibit religion. *Books*, 401 F.3d at 866 (quoting *Lynch*, 465 U.S. at 679). The effect of government action “is evaluated against an objective, reasonable person standard, not from the standpoint of the hypersensitive or easily offended.” *Books*, 401 F.3d at 867. Although government may not favor religion, it may permissibly provide religious options in addition to secular ones, provided the choice among the options remains the individual’s. *Freedom from Religion Found., Inc. v. McCallum*, 324 F.3d 880, 883 (7th Cir. 2003). “Suggestion is not a synonym for coercion.” *Id.*

The third question is “whether the [government] has entangled itself excessively with religion.” *Vision Church*, 468 F.3d at 994. This prong is not relevant here, as the Students did not argue, the district court did not find, and “no court has ever accepted – especially on a facial challenge – that a moment of silence

statute is excessive government entanglement with religion.” *Croft v. Perry*, 562 F.3d 735, 750 (5th Cir. 2009). Dr. Koch’s opening brief therefore will focus on the first two prongs of *Lemon*.

**2. The Supreme Court and Other Courts of Appeals Have Recognized that Moment of Silence Laws with Secular Purposes and Neutral Effects Pass the *Lemon* Test.**

The Supreme Court long has recognized that “the observance of a moment of reverent silence at the opening of class” may serve “solely secular purposes . . . without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and government.” *Sch. Dist. of Abington Tp. v. Schempp*, 374 U.S. 203, 281 (1963) (Brennan, J., concurring). This is not to say that moment of silence legislation is unassailable; as with any statute challenged under the Establishment Clause, the question is whether the law has the predominant purpose or effect of endorsing religion. See *Lynch*, 465 U.S. at 690 (O’Connor, J., concurring). Applying this test, the Supreme Court and other Courts of Appeals have invalidated moment of silence laws where clear record evidence established that the laws were enacted with the *sole* purpose of advancing prayer, see *Wallace v. Jaffree*, 472 U.S. 38 (1985); *May v. Cooperman*, 780 F.2d 240 (3d Dist. 1985), while upholding others that, like Illinois’s, have secular purposes and neutral effects, see *Croft*, 562 F.3d 735; *Brown v. Gillmore*, 258 F.3d 265 (4th Cir. 2001); *Bown v. Gwinnet County Sch. Dist.*, 112 F.3d 1464 (11th Cir. 1997).

In *Wallace*, the Supreme Court struck down an Alabama statute that amended an earlier moment of silence law by adding an option for prayer because there was no “evidence of *any* secular purpose” whatsoever for the amendment. 472 U.S. at 57, 61 (emphasis in original). Alabama’s original moment of silence law required observation of “a period of silence . . . for meditation” at the beginning of the school day. *Id.* at 40 n.1 (quoting Ala. Code § 16-1-20 (Supp. 1984)). The legislature amended the statute by adding the words “or voluntary prayer” after “meditation.” *Id.* at 40 n.2 (quoting Ala. Code § 16-1-20.1 (Supp. 1984)). At an evidentiary hearing on the constitutionality of the amendment, the sponsor testified that the bill had “no other purpose” than “to return voluntary prayer to public school.” *Id.* at 43. Additionally, in his answer to the complaint, the Governor admitted that the amendment “was intended to clarify [the State’s] intent to have prayer as part of the daily classroom activity.” *Id.* at 57 n.44 (internal quotation marks omitted). During the entire course of litigation, the State presented no evidence of *any* secular purpose. *Id.* at 57.

The Court held that the amendment violated the first prong of the *Lemon* test because it had but one purpose: to “express[ ] the State’s endorsement of prayer activities.” *Id.* at 60. The Court found Alabama’s “intent to return prayer to the public schools” to be “quite different from merely protecting every student’s right to engage in voluntary prayer during an appropriate moment of silence during the schoolday.” *Id.* at 59. As the original “statute already protected that right, containing nothing that prevented any student from engaging in voluntary prayer

during a silent minute of meditation,” the amendment served no legitimate secular purpose. *Id.* Because the amendment failed the first prong of *Lemon*, the Court found it unnecessary to address whether it also had the actual effect of pressuring students to pray. *Id.* at 61.

Justices Powell and O’Connor wrote concurrences that were necessary to the judgment. *Id.* at 62, 67. They explained that, although Alabama’s statute had an impermissible purpose, “moment of silence laws in other States do not necessarily manifest the same infirmity.” *Id.* at 67 (O’Connor, J., concurring); *see also id.* at 62 (Powell, J., concurring). Justice Powell stated that he “would vote to uphold the Alabama statute if it also had a clear secular purpose” alongside its religious one, and noted that, although the Court did not reach the other two prongs of the *Lemon* test, “the effect of a straight-forward moment-of-silence statute is unlikely to advanc[e] or inhibi[t] religion, . . . [n]or would such a statute foster an excessive government entanglement with religion.” *Id.* at 66 (internal quotation marks omitted).

In her concurrence, Justice O’Connor focused on whether moment of silence laws endorse religion. *Id.* at 70. She explained that decisions prohibiting devotional exercises in schools were not dispositive, for “[a] state-sponsored moment of silence in the public schools is different from state-sponsored vocal prayer or Bible reading.” *Id.* at 71-72. In contrast to those exercises, “a moment of silence is not inherently religious” and does not require a student to “compromise his or her beliefs.” *Id.* The fact that a State mandates a moment of silence, and even

“specifies that a student may choose to pray” during that moment, does not mean that the State has “thereby encouraged prayer over other specified alternatives.” *Id.* at 73. Rather, “[t]he crucial question is whether the State has conveyed or attempted to convey the message that children *should* use the moment of silence for prayer.” *Id.* (emphasis added).

Justice O’Connor cautioned that, in answering that question, “the inquiry into the purpose of the legislature in enacting a moment of silence law should be deferential and limited.” *Id.* at 74. “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. Because “there is arguably a secular pedagogical value to a moment of silence in public schools, courts should find an improper purpose behind such a statute only if the statute on its face, in its official legislative history, or in its interpretation by a responsible administrative agency suggests it has the primary purpose of endorsing prayer.” *Id.* at 75. She concluded that “[a] moment of silence law that is clearly drafted and implemented so as to permit prayer, meditation, and reflection within the prescribed period, without endorsing one alternative over the others, should pass [the purpose] test.” *Id.* at 76.

Following *Wallace*, three Courts of Appeals have upheld moment of silence statutes where – unlike in that case – the evidence showed that the laws were not enacted for a predominantly religious purpose. In 1997, the Eleventh Circuit

upheld a Georgia statute requiring a “brief period of quiet reflection” that was not to “be conducted as a religious service or exercise,” but rather “considered as an opportunity for a moment of silent reflection on the anticipated activities of the day.” *Bown*, 112 F.3d at 1466 (quoting O.C.G.A. § 20-2-1050 (1996)). The court held that the statutory text “expressly articulate[d] a clear secular purpose and also expressly disclaim[ed] a religious purpose.” *Id.* at 1469. The legislative history supported this interpretation. *Id.* at 1471. Although some legislators “indicated a desire to reinstitute school prayer,” others “indicated that they did not believe that the bill had anything to do with prayer,” and the sponsor himself stated that he introduced the bill as one way of addressing school violence. *Id.* The court held that such mixed legislative motives “cannot be construed to override the express statutory language articulating a clear secular purpose and also disclaiming a religious purpose.” *Id.* at 1472.

The court also held that the statute did not have the effect of advancing religion or excessively entangle government with religion. *Id.* at 1473-74. Like Illinois’s law, the text itself stated that the moment was not to be conducted as a religious exercise, and there was no evidence that any teacher encouraged prayer, or that any students were pressured to pray. *Id.* at 1472. Further, the court rejected the argument that the statute favored silent prayer over other forms of prayer, explaining that the statute mandated only that students be silent, not that they engage in silent prayer. *Id.* at 1472-73.

In 2001, the Fourth Circuit upheld a Virginia statute making mandatory what had previously been a permissive moment of silence during which students could “meditate, pray, or engage in any other silent activity.” *Brown*, 258 F.3d at 270 (quoting Va. Code Ann. § 22.1-203 (Michie 2000)). The court held that the text and legislative history showed two legitimate purposes: to permit nonreligious meditation and to accommodate those students who wished to pray. *Id.* at 276. It concluded that “[a] statute having dual legitimate purposes – one clearly secular and one the accommodation of religion – cannot run afoul of the first *Lemon* prong, which requires only that there be a secular purpose.” *Id.* at 277. The court also held that the statute did not have the effect of endorsing religion because, like Illinois’s law, it was facially neutral between religious and nonreligious activities. *Id.* In so doing, it rejected the argument that the statute could create the perception among “young, impressionable school children” that the State endorsed prayer, explaining that such “speculative fears” could not be used to strike down a statute that was neutral on its face. *Id.* at 277-78.

Most recently, in 2009, the Fifth Circuit upheld a Texas statute that amended an earlier law, which authorized a moment of silence for reflection or meditation, by making the moment mandatory, adding the words “pray” and “any other silent activity” to the list of permitted activities, and adding pledges to the U.S. and Texas flags. *Croft*, 562 F.3d at 738-39 (quoting Tex. Educ. Code § 25.082(d) (2003)). The court held that the text and legislative history showed that the amendment was intended “to foster patriotism and provide for a period . . . of

thoughtful contemplation.” *Id.* at 748. Although acknowledging that “there were references by some legislators to returning prayer to schools,” the court concluded that such religious motives did not overcome “the secular purposes contained in the plain text of [the statute] and espoused by the legislature to justify the [amendment].” *Id.* at 749.

The court also held that the statute did not have the primary effect of advancing or inhibiting religion or excessively entangle government with religion. *Id.* at 749-50. Although the amendment specifically added prayer to the list of permissible activities, the court found that it did not privilege prayer above the other options. *Id.* at 749. The word “pray” by itself does not “connote an endorsement of” a particular religion. *Id.* The court also rejected the argument that the amendment discriminated against religions that do not practice silent prayer, explaining that “[t]he statute simply does not address the problem of accommodating the beliefs of those whose prayer must be oral or otherwise self expressive”; rather, it “provides for a minute of *silence* and allows any non-disruptive *silent* activity.” *Id.* at 750 (emphasis in original). Such requirement that students “be silent does not discriminate among religious sects.” *Id.*

Only one Court of Appeals has invalidated a moment of silence law after *Wallace*, and that was only because it deferred to the district court’s finding, after an evidentiary hearing, that the sole purpose of the law was religious. *May*, 780 F.2d at 252. In that case, the Third Circuit struck down a New Jersey statute that provided for a “period of silence to be used solely at the discretion of the individual

student . . . for quiet and private contemplation or introspection.” *Id.* at 241 (quoting N.J.S.A. 18A:36-4 (1984)). The court held that the statute neither had the primary effect of advancing or inhibiting religion nor fostered an excessive entanglement with religion. *Id.* at 247-50. But it deferred to the district court’s factual finding that the “tendered secular purpose – to provide a transition from nonschool life to school life – was . . . pretextual,” and the law’s only purpose was to permit prayer. *Id.* at 252. Judge Becker dissented, urging that the law should not be held unconstitutional absent “extremely clear proof that [it] is devoid of a secular purpose.” *Id.* at 254.

In sum, the Supreme Court and other Courts of Appeals have recognized that the Establishment Clause does not prohibit all moment of silence laws. Rather, it bars only those whose dominant purpose – as evidenced by openly available data – is to advance prayer, *see Wallace*, 472 U.S. at 60; *May*, 780 F.2d at 252, while allowing those with legitimate secular purposes and neutral effects, *see Croft*, 562 F.3d at 750; *Brown*, 258 F.3d at 282; *Bown*, 112 F.3d at 1474. Because Illinois’s Period of Silence Law has such legitimate purposes and neutral effects, it is not facially invalid.

**B. The Period of Silence Law Has Secular Purposes and Neutral Effects.**

Like the moment of silence laws upheld in *Croft*, *Brown*, and *Bown*, and unlike those stricken in *Wallace* and *May*, Illinois’s Period of Silence Law represents a legitimate effort to provide students with a uniform, calming moment to start their day and does not send the message that the State prefers prayer over

other silent activities. The district court therefore erred in declaring the law facially invalid and enjoining its enforcement.

**1. The Text and Legislative History Establish that the Period of Silence Law Has Sincere Secular Purposes and Is Not Intended to Endorse Prayer.**

Both the plain language and legislative history of the Period of Silence Law evidence legitimate secular purposes and disclaim any intent to endorse religion. In determining the purpose of a statute, the Court's inquiry "should be deferential and limited." *Wallace*, 472 U.S. at 73 (O'Connor, J., concurring). The Court begins with the "text and assume[s] that the ordinary meaning of that language accurately expresses the legislative purpose." *Middleton v. Chicago*, 578 F.3d 655, 658 (7th Cir. 2009) (internal quotation marks omitted). "If a legislature expresses a plausible secular purpose for a moment of silence statute . . . , 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." *Wallace*, 472 U.S. at 74-75 (O'Connor, J., concurring). Such deference reflects the Court's "reluctance to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the state's program may be discerned from the face of the statute." *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983).

While the Court accords deference to the legislature's stated purpose, because this appeal comes to the Court on summary judgment, the Court does not defer to the district court's finding that the stated purpose is pretextual. *Target Corp.*, 460 F.3d at 954. Unlike in *May*, where the appellate court accepted the district court's

factual finding of an illegitimate purpose after an evidentiary hearing, 780 F.2d at 252, here, the Court reviews the record *de novo* and makes an independent assessment of whether the Students have established a predominant religious purpose as a matter of law.

Illinois's Period of Silence Law reads:

**Period of silence.** § 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.

105 ILCS 20/1 (2008). Contrary to the district court's analysis, this statute is a perfect example of the kind of neutral moment of silence law endorsed by the Supreme Court. *See Wallace*, 472 U.S. at 76 (O'Connor, J., concurring); *Schempp*, 374 U.S. at 281 (Brennan, J., concurring). The plain language establishes an intent to provide a period of silence for all public school children at the beginning of every day, which must not be conducted as a religious exercise. Although the statute lists prayer as one option, it does not indicate any preference for prayer over nonreligious reflection. It does not "convey the message that children should use the moment of silence for prayer." *Wallace*, 472 U.S. at 73 (O'Connor, J., concurring). It simply provides two equally permissible activities.

The fact that prayer is listed first does not mean it is favored. Something had to go first. Indeed, the Supreme Court implicitly rejected the notion that listing a religious option first evidences an intent to endorse religion, holding that the Equal Access Act, which prohibits discrimination "on the basis of the religious,

political, philosophical, or other content” of speech, 20 U.S.C. § 4071(a), is facially neutral, despite the fact that “religious” speech is listed first. *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 248 (1990). Indeed, if word order indicated preference, then listing prayer second would be equally problematic, for one could then argue that the legislature intended to *disfavor* prayer in violation of the Free Exercise Clause. *See, e.g., Widmar v. Vincent*, 454 U.S. 263, 276 (1981) (holding that school cannot discriminate against religious speech in open forum). The legislature’s decision about where to place prayer vis-à-vis reflection thus cannot be read as an expression of preference.

Nor, as the district court suggested (Doc. 164 at 8) (A.8), does the Act’s general title (covering sections 1 and 5) establish that the Period of Silence Law (contained in section 1) was intended to encourage prayer. As explained above, in 2002, the legislature added the new section 5 to “the Silent Reflection Act” that recognized every student’s right to voluntary prayer, and, at the same time, amended the title of the overall Act to “the Silent Reflection and Student Prayer Act.” Pub. Act 92-832, eff. Jan. 1, 2003 (A.50). The most logical conclusion is that the change in title was intended to reflect the addition of the student prayer section, not to alter the meaning of the previously existing period of silence section. Indeed, the latter was never mentioned during the legislative debates on the student prayer section. *See* H.R. Proceedings, 92nd Ill. Gen. Assem., April 1, 2002, at 26 (A.53); S. Proceedings, 92nd Ill. Gen. Assem., May 9, 2002, at 36 (A.57). The district court’s

reliance on the general title of the Act as evidence of legislative intent with respect to the specific period of silence section therefore is misplaced.

Given the plain expression of secular intent and disavowal of any religious purpose in the text of the law itself, this Court need look no further to find a legitimate purpose sufficient to satisfy the first prong of the *Lemon* test. *See Middleton*, 578 F.3d at 658 (“Unless [the legislature] expressed a clear intention to the contrary, a statute’s language is conclusive.”). But even if the Court turns to legislative history, this history only further demonstrates the secular purposes behind the statute.

As stated above, the sponsors of the 2007 amendment that made the period of silence mandatory articulated a clear secular purpose: ensuring that all public school children have an opportunity at the beginning of the school day to focus, with the hope that a silent moment will help calm them down and reduce school violence. *See* S. Proceedings, 95th Ill. Gen. Assem., March 21, 2007, at 86 (statements of Sen. Lightford) (A.62); H.R. Proceedings, 95th Ill. Gen. Assem., May 31, 2007, at 64 (statements of Rep. Davis) (A.68); S. Proceedings, 95th Ill. Gen. Assem., Oct. 3, 2007, at 11 (statements of Sen. Lightford) (A.78); H.R. Proceedings, 95th Ill. Gen. Assem., Oct. 11, 2007, at 99 (statements of Rep. Davis) (A.92). The sponsors sought to make the period of silence mandatory to ensure that every child receives its benefits, not just those in certain school districts that decide to observe it. *See* S. Proceedings, 95th Ill. Gen. Assem., March 21, 2007, at 88 (statements of Sen. Lightford) (A.64); S. Proceedings, 95th Ill. Gen. Assem., Oct. 3, 2007, at 8 (statements of Sen.

Lightford) (A.75). As Senator Lightford stated, “anything above that is just taking this bill way out of proportion.” S. Proceedings, 95th Ill. Gen Assem., Oct. 3, 2007, at 11 (A.78).

Unlike in *Wallace*, where the only reason legislators proffered for amending Alabama’s moment of silence law was to return prayer to schools, none of the legislators supporting Illinois’s amendment expressed such an intent. In fact, the history here is even less suspect than in *Croft* and *Bown*, where the courts upheld moment of silence legislation despite statements by some legislators that their support for the statute was motivated by such a purpose. *See Croft*, 562 F.3d at 749; *Bown*, 112 F.3d at 1472. Here, not one legislator mentioned religion as a motivating factor, and the sponsors emphasized that the period of silence was *not* to be conducted as a religious exercise. *See* S. Proceedings, 95th Ill. Gen. Assem., March 21, 2007, at 86 (statements of Sen. Lightford) (A.62); H.R. Proceedings, 95th Ill. Gen. Assem., May 31, 2007, at 64 (statements of Rep. Davis) (A.68); S. Proceedings, 95th Ill. Gen Assem., Oct. 3, 2007, at 11 (statements of Sen. Lightford) (A.78).

To be sure, some legislators expressed concern that the bill in fact was intended to encourage prayer, *see* H.R. Proceedings, 95th Ill. Gen. Assem., May 31, 2007, at 64-65 (statements of Rep. Currie) (A.68-69); S. Proceedings, 95th Ill. Gen Assem., Oct. 3, 2007, at 9-10 (statements of Sens. Schoenberg & Rutherford) (A.76-77); H.R. Proceedings, 95th Ill. Gen. Assem., Oct. 11, 2007, at 90-91 (statements of Rep. Lang) (A.83-84), but such statements were pure speculation, unsupported by

anything in the legislative record. Contrary to the district court's opinion (Doc. 164 at 8) (A.8), such conjecture about the hidden motives of other legislators does not justify facially invalidating the law. "[A]n understanding of official objective" must "emerge[ ] from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts." *McCreary*, 545 U.S. at 862. "A secret motive stirs up no strife and does nothing to make outsiders of nonadherents." *Id.* at 863.

The district court also erred in concluding that statements by some legislators likening the period of silence to the opening of legislative sessions, which include prayer, *see* S. Proceedings, 95th Ill. Gen. Assem., March 21, 2007, at 89 (statements of Sen. Meeks) (A.65); H.R. Proceedings, 95th Ill. Gen. Assem., May 31, 2007, at 65 (statements of Rep. Currie) (A.69); *id.* at 69 (statements of Rep. Davis) (A.73); S. Proceedings, 95th Ill. Gen. Assem., Oct. 3, 2007, at 10 (statements of Sen. Hendon) (A.77), evidenced an intent to encourage prayer in schools. (Doc. 164 at 9) (A.9). Rather, those legislators were simply noting that they benefit from a quiet moment at the start of the session, and that children also would benefit from a quiet moment at the start of classes. They were not suggesting that prayer was essential to that goal.

Likewise, it is immaterial that some members of the public who supported the amendment may have been motivated by their religious beliefs. (Doc. 164 at 8) (A.8); *see* H.R. Proceedings, 95th Ill. Gen. Assem., Oct. 11, 2007, at 90 (statements of Rep. Lang) (A.83). If, as the Supreme Court has held, "the possibly religious motives of the legislators who enacted the law" do not invalidate a statute with a

clearly secular purpose, *Mergens*, 496 U.S. at 249, then the possibly religious motives of members of the public who support a law are of even less moment.

Nor does the legislature's original decision not to remove the reference to prayer undermine the secular purpose. As noted above, during passage of the original bill in 1969, the House adopted an amendment that would have removed all reference to prayer, which amendment was later dropped. *See* Legislative Synopsis & Digest, 76th Ill. Gen. Assem., 1969 Sess., at 53 (A.39); H.R.J., 76th Ill. Gen. Assem., 1969 Sess., at 446, 667 (A.43, 46). At most, this history reveals a legislative intent to ensure that students understand they have a right to pray during this time if they choose, a constitutionally permissible purpose. As the Supreme Court has explained, although legislators may not act with an "intent to return prayer to the public schools," they may "protect[ ] every student's right to engage in voluntary prayer during an appropriate moment of silence during the schoolday." *Wallace*, 472 U.S. at 59. Given the Supreme Court's then-recent decision barring state-sponsored school prayer, *see Engel v. Vitale*, 370 U.S. 421 (1962), legislators may have feared that, without express permission, students would believe they were prohibited from engaging in *any* prayer while in school.

This is quite unlike *Wallace*, where the Supreme Court held that the *addition* of prayer to an already existing moment of silence law served no purpose except endorsing prayer. *Wallace*, 472 U.S. at 59. In contrast, here, when legislators chose to include prayer as a permissible activity there was no "statute already protect[ing]" students' right to pray. *Id.* Before passage of the Period of Silence

Law in 1969, there was no silent time set aside in which students might reflect or pray. Nor had the legislature passed section 5 of the Act, which recognizes every students' right to voluntary prayer during the school day. The inclusion of prayer as a permissible activity in 1969 is best read to clarify students' rights at a time of legal uncertainty, not to "encourage[ ] prayer over other specified alternatives." *Id.* at 73 (O'Connor, J., concurring); *see also Croft*, 562 F.3d at 747 (holding that addition of prayer to list of permissible activities did not amount to endorsement of prayer); *Brown*, 258 F.3d at 277 (holding that statute including prayer as permissible activity did not endorse prayer).

In sum, because the legislature expressed a plausible secular purpose – providing all public school children a moment of quiet reflection, with the hope that such reflection would calm them down and help them focus at the start of the school day – and because the text of the statute itself disclaims any intent to make the moment a religious exercise, this Court should defer to this stated intent, rather than attempting to search the legislators' "heart of hearts" for some hidden, illegitimate purpose. *See McCreary*, 545 U.S. at 862; *Wallace*, 472 U.S. at 74-75 (O'Connor, J., concurring). There simply is no "openly available data support[ing] a commonsense conclusion that a religious objective permeated the government's action." *McCreary*, 545 U.S. at 863. The Court therefore should reverse the district court's decision that the Period of Silence Law lacks any legitimate secular purpose.

**2. The Period of Silence Law Does Not Have the Effect of Endorsing Prayer.**

The Court also should reverse the district court's decision that the Period of Silence Law is facially invalid because it necessarily requires teachers to mention prayer as an available activity. The court's analysis is flawed for two reasons: First, nothing in the plain language of the statute requires teachers to announce that the only activities in which students may engage during the period of silence are prayer or reflection on the anticipated activities of the day. Second, even if the statute did impose such a requirement, introducing the concept of prayer to students does not amount to endorsement. As the Students have not demonstrated that every teacher necessarily will use the period of silence to encourage prayer, their facial challenge fails.

Because the Students challenge the Period of Silence Law on its face, they must demonstrate that "no set of circumstances exists under which the [law] would be valid." *Wash. State Grange*, 128 S. Ct. at 1190 (internal quotation marks omitted). A facial challenge is especially difficult to mount where, as here, there is little evidence of the statute's application. *Id.* at 1191. Because of this difficulty, every Court of Appeals that has examined a moment of silence statute, including the one that struck down such a law, has held that facially neutral moments of silence do not by themselves advance religion. *See Croft*, 562 F.3d at 749; *Brown*, 258 F.3d at 277; *Bown*, 112 F.3d at 1474 n.13; *May*, 780 F.2d at 248-50. Even the Supreme Court has suggested that "the effect of a straight-forward moment-of-

silence statute is unlikely to advanc[e] or inhibi[t] religion.” *Wallace*, 472 U.S. at 66 (Powell, J., concurring) (internal quotation marks omitted).

Here, as discussed above, the Period of Silence Law not only is facially neutral between religious and nonreligious activity, but it expressly disclaims any intent to promote religion. 105 ILCS 20/1. Given the text of the statute, no objective observer could perceive that the State intends to endorse prayer. *See Croft*, 562 F.3d at 749; *Brown*, 258 F.3d at 277; *Bown*, 112 F.3d at 1474 n.13.

Furthermore, contrary to the district court’s strained interpretation (Doc. 164 at 5, 9) (A.5, 9), the statute does not require teachers to announce that students are limited to either praying or reflecting on the anticipated activities of the day. It simply states that teachers are to “observe a brief period of silence” with the participation of their students. 105 ILCS 20/1. It then explains that 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.” *Id.* This second sentence prohibits teachers from conducting the moment as a religious exercise, and provides some examples of how students might use the moment, but it does not force teachers to announce the permissible activities. Indeed, as counsel for District 214 represented at the preliminary injunction hearing, that district planned to implement the law by stating, “We will now have a brief period of silence.” (10-29-07 Trans. at 19-20) (A.95-96). Such announcement, which does not mention prayer or reflection, properly implements the mandate that teachers observe a period of silence. The law requires no more.

In any event, even if teachers were required to read the text of the statute *verbatim* when observing the period of silence (and they are not), they would not be endorsing religion merely by introducing the concept of prayer to their students. The Establishment Clause does not prohibit “official acknowledgment . . . of the role of religion in American life.” *Lynch*, 465 U.S. at 674. If that were so, States could not close their offices on Good Friday, towns could not display the Ten Commandments or erect crèches at Christmastime, and schools could not refer to God in the Pledge of Allegiance or use the Bible to study the history of civilization. All of these actions involve religious concepts, yet none has been found necessarily to endorse religion. *See id.* at 679 (“the Bible may constitutionally be used in an appropriate study of history”); *id.* at 682 (inclusion of crèche in holiday display does not advance religion); *Books*, 401 F.3d at 868 (inclusion of Ten Commandments in “Foundations” display does not advance religion); *Bridenbaugh v. O’Bannon*, 185 F.3d 796, 800 (7th Cir. 1999) (closing state offices on Good Friday does not advance religion); *Sherman v. Comm’y Consol. Sch. Dist. 21*, 980 F.2d 437, 447 (7th Cir. 1992) (reference to God in Pledge does not advance religion). By the same token, a teacher may neutrally introduce the concept that some students may wish to use the period of silence for prayer, without thereby indicating that all students should do so.

Nor does the Establishment Clause prohibit government from suggesting a religious option in addition to secular ones, provided the choice remains the individual’s. *McCallum*, 324 F.3d at 883. For example, a city may give “parents

vouchers that they can use to purchase private school education for their children, even if most of the private schools in the city are parochial schools” so long as “the parents are not required to use the vouchers to attend a parochial school rather than a secular school.” *Id.* at 882 (citing *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002)). Further, “a public school guidance counselor” may “recommend that a student apply to a Catholic college . . . if the counselor thought that the particular college would be the best choice for the particular student,” and a parole officer may recommend a religious halfway house to parolees. *McCallum*, 324 F.3d at 883. If none of these actions amounts to an endorsement of religion, then neither would a teacher presenting students with the option of praying during a moment of silence, while also giving them the choice to reflect on nonreligious matters. Even if the Period of Silence Law required teachers to list prayer as an option (and it does not), the choice of activity would remain the students’.

The fact that teachers are addressing children does not change the analysis. The Supreme Court has recognized that children are more susceptible to peer pressure than adults, and that religious activity in schools thus poses a greater threat of coercion. *See Santa Fe Indep. Sch. Dist.*, 530 U.S. at 311-12; *Lee v. Weisman*, 505 U.S. 577, 592 (1992); *Edwards*, 482 U.S. at 584. But what concerns the Court is protecting children from activities that are unquestionably religious: the teaching of a “religious belief that a supernatural creator was responsible for the creation of humankind,” *Edwards*, 482 U.S. at 592; an “invocation of God’s blessings” at a graduation ceremony, *Lee*, 505 U.S. at 603; or a student-led prayer

before a football game, *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 312. In contrast, “a moment of silence is not inherently religious.” *Wallace*, 472 U.S. at 72 (O’Connor, J., concurring). The only activity that is coerced is silence. *Brown*, 258 F.3d at 281. Students are left to their own thoughts, not compelled to listen to or participate in any religious activity. The Supreme Court never has “suggest[ed] that, when the school was not actually advancing religion, the impressionability of students would be relevant to the Establishment Clause issue.” *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 116 (2001).

Nor does Dr. Kraus’s affidavit about the potential effects of the Period of Silence Law on young school children prove as a matter of law that the statute coerces prayer in every application. Dr. Kraus opined that, because the law mentions prayer, elementary and middle school students will feel coerced to pray, and high school students will challenge the law, leading to discipline or harassment. (Doc. 121-4 at 3-4) (A.99-100). In his view, the law does not assist with children’s educational needs. (*Id.* at 4) (A.100).

Dr. Kraus’s opinions are pure speculation, not founded on any evidence about how children actually perceived Illinois’s period of silence during the brief time in which it was implemented, or how children have reacted to moments of silence in other States. Speculative fears about the possible misperceptions of school children that the State is encouraging them to pray do not support facial invalidation, which requires proof that the law fails in every conceivable application. *See Wash. State Grange*, 128 S. Ct. at 1191; *Good News Club*, 533 U.S. at 118-19. And Dr. Kraus’s

opinion that the law does not benefit children's development is immaterial to the constitutional analysis. The Illinois legislature was entitled to pass a law that it believed had pedagogical value, regardless of whether Dr. Kraus, or the district court, thought the law wise. In sum, Dr. Kraus's views on the law, given without personal knowledge of the law's effects, simply are not probative.

Nor may the statute be invalidated because some teachers might attempt to use the period of silence to encourage prayer. Any such attempt would directly violate the Period of Silence Law, which states that the "period shall not be conducted as a religious exercise." 105 ILCS 20/1. Furthermore, such misapplications of the law could be challenged on an as-applied basis. *See, e.g., Holloman v. Harland*, 370 F.3d 1252, 1289 (11th Cir. 2004) (holding that teacher violated Establishment Clause by leading class in prayer, rather than simply announcing moment of silence). Without evidence that the statute on its face inevitably coerces children to pray, the Students' facial challenge fails. *See Wash. State Grange*, 128 S. Ct. at 1191.

For all of these reasons, the district court's decision that the Period of Silence Law inevitably has the effect of advancing religion by endorsing prayer should be reversed.

**3. The Period of Silence Law Does Not Impermissibly Favor Religions that Practice Silent Prayer Over Those that Do Not.**

The district court also erred in holding that the Period of Silence Law violates the Establishment Clause because it favors those religions that practice

silent prayer over those that do not. Although the law may make it easier for adherents of some religions to pray during the period set aside at the beginning of the school day, there is a secular justification for such difference in treatment: the desire that the period be silent.

The Establishment Clause “prohibits the government from favoring one religion over another without a legitimate secular reason.” *Nelson v. Miller*, 570 F.3d 868, 881 (7th Cir. 2009). Here, there is a legitimate secular reason for allowing silent prayer and silent reflection, but not audible activity, namely, the need for silence. As discussed above, the purpose of the Period of Silence Law is to provide a moment of silence, in the hopes that such moment will calm students down and help them focus before they start the school day. It is not a time for verbal expression or distracting movement, whether religious or nonreligious. Of course, under section 5 of the Act, 105 ILCS 20/5, all students have the right to pray in a non-disruptive manner during the school day, but such right is subject to reasonable time, place, and manner restrictions. *See May*, 780 F.2d at 248 (holding that moment of silence law represents a legitimate “limitation upon the time, place, and manner of [religious] self expression” in schools). Those who wish to engage in any non-silent activity simply cannot do so during the mandated period of silence.

Following this reasoning, every Court of Appeals to address the issue has held that moment of silence laws do not discriminate against students whose religious beliefs involve non-silent prayer. *See Croft*, 562 F.3d at 750; *Bown*, 112 F.3d at 1473; *May*, 780 F.2d at 248-50. This Court should reject the district court’s

novel decision that imposing silence discriminates against certain religions and hold that, to the extent the law makes it easier for some students to pray during a brief period at the start of the day, such difference is justified by the secular need for silence.

### **III. The Period of Silence Law Is Not Unconstitutionally Vague on Its Face.**

The district court's decision that the Period of Silence Law is unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment also should be reversed. The law is sufficiently clear to advise an ordinary student exercising common sense that she must remain silent for a short period at the beginning of the school day as directed by her teacher. The Due Process Clause does not demand additional precision.

"A law is void for vagueness" only "if it fails to give fair warning of what is prohibited, if it fails to provide explicit standards for the persons responsible for enforcement and thus creates a risk of discriminatory enforcement, and if its lack of clarity chills lawful behavior." *Anderson v. Milwaukee County*, 433 F.3d 975, 978 (7th Cir. 2006) (citing *Grayned v. City of Rockford*, 408 U.S. 104 (1972)). Further, a law, like this one, that does not chill constitutionally protected rights survives a facial challenge unless "the complainant [can] demonstrate that the law is impermissibly vague in all of its applications," including in its application to her. *Fuller v. Decatur Public Sch. Bd.*, 251 F.3d 662, 667 (7th Cir. 2001) (quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982)).

The nature of the law also affects the analysis. “An enactment imposing criminal sanctions demands more definiteness than one which regulates economic behavior, or as is relevant in [this] case, one which regulates the conduct of students in the school setting.” *Fuller*, 251 F.3d at 667 (citation omitted). Given a school’s need to impose discipline for a wide range of conduct that is disruptive of the educational process, school rules “need not be as detailed as a criminal code.” *Id.* (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 686 (1986)).

And the Due Process Clause does not demand “perfect clarity and precise guidance,” in any event. *Anderson*, 433 F.3d at 978 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989)). A law is valid where an “ordinary person exercising ordinary common sense knows perfectly well what [it] mean[s].” *Anderson*, 433 F.3d at 978 (internal quotation marks omitted). No matter how clear a statute seems, one could always pose “a hundred nice questions” about its operation. *Id.* But “the Constitution does not require [the government] to answer each of these before it may enforce the law.” *Id.* at 978-79. “Common sense must not be and should not be suspended when judging the constitutionality of a rule or statute.” *Id.* at 978.

Applying this analysis, this Court recently rejected a facial vagueness challenge to a rule prohibiting travelers from “distributing any form of advertising or literature” on county buses. *Id.* at 977. A woman who wanted to hand out copies of a religious book argued that the law was vague because it was “unclear what ‘distributing’ means.” *Id.* at 978. She posed several hypothetical questions, such as

whether handing out a single book or handing out one item per day for multiple days fell within the rule. *Id.* The Court rejected her “examples of the outer limits of the possible meanings of the word ‘distributing,’” in favor of “common sense,” finding that an ordinary person of common intelligence would understand well enough what the rule meant. *Id.* at 978-79.

Here, the district court held that the Period of Silence Law is impermissibly vague on its face because it does not provide sufficient direction “as to how the ‘period’ of silence should be implemented, how long the period should last, and whether pupils would be permitted to pray in a manner that was either audible or required movement.” (Doc. 164 at 13) (A.13). The court’s analysis is wrong.

The threshold problem is that the court did not require the Students to prove that the law is vague in every application. Rather, the court determined that the law “threatens to inhibit the exercise of constitutionally protected rights,” and therefore applied the less-stringent vagueness standard appropriate where rights may be chilled. (*Id.*). But the court does not explain what the Students have been inhibited from doing. The Students’ argument is not that the Period of Silence Law *inhibits* them from exercising some right, but rather that it violates their right to be free from a government-sponsored religious exercise. Because there is no threatened inhibition of rights, the district court applied the wrong vagueness standard.

Given that the Period of Silence Law does not inhibit the exercise of any constitutional right, the Students’ vagueness challenge fails because they have not,

and cannot, prove that it is vague in every application. Indeed, the law is not even vague as applied to Sherman, the named plaintiff. As explained above, District 214, which includes Sherman's school, planned to implement the law by making a school-wide morning announcement that would state: "We will now have a brief period of silence." (10-29-07 Trans. at 19-20) (A.95-96). Then, after fifteen seconds had passed, the announcer would begin the Pledge. (*Id.*). A student of common intelligence in District 214 can clearly understand that she is to remain silent for the fifteen seconds between the announcement and the beginning of the Pledge. The Students therefore cannot complain of the vagueness of the law in every situation.

And even if the district court were correct that the Students need not prove the law is vague in every application, the court's decision is wrong because it is contrary to common sense. Although one could pose a hundred questions about how long a "brief period" is, and what exactly constitutes "silence," an ordinary student of common intelligence can understand well enough what a "brief period of silence" entails. The word "brief" means "not enduring long, markedly limited in duration." *See Webster's Third New Int'l Dictionary* 277 (1993). "Silence" means "forbearance from speech or noise." *Id.* 2116. Children have no trouble understanding these concepts. They often are told to be silent, for example, in theaters or libraries, or while their teacher is giving a lecture, and also have experience with brief moments of silent contemplation, such as to honor national tragedies.

Nor does the lack of clarity in the law threaten discriminatory enforcement. The law requires teachers to “observe *a* brief period of silence with the participation of all” assembled students. 105 ILCS 20/1 (emphasis added). It does not provide for different types of silence or periods of different lengths of time for different students. Teachers cannot punish one student for being silent only for one minute, or for quietly whispering, while allowing other students to start talking after fifteen seconds, or whisper amongst themselves. The law provides that whatever brief period of silence is observed must be uniform for the entire class. If a student refuses to participate in such observation in the same manner as the other students, that student may be punished. As with discipline in other matters, the punishment is left to the teacher’s discretion. But the law is sufficiently definite to “regulate[ ] the conduct of students in the school setting,” *Fuller*, 251 F.3d at 667, where any discipline imposed would fall far below criminal sanction.

Of course, it is conceivable that a teacher may discriminately enforce the Period of Silence Law, but the mere possibility that an otherwise clear law could be abused does not support facial invalidation. *Id.* The district court’s decision that the Period of Silence Law is impermissibly vague on its face therefore should be reversed and judgment entered in favor of Dr. Koch.

## CONCLUSION

For the reasons stated above, Defendant-Appellant Dr. Christopher Koch respectfully requests that this Court reverse the judgment of the district court and enter judgment in his favor declaring that the Period of Silence Law is not facially invalid under the First or Fourteenth Amendment.

October 8, 2009

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH TYPE VOLUME LIMITATION,  
TYPE FACE REQUIREMENTS, and TYPE STYLE REQUIREMENTS**

The undersigned attorney hereby certifies that the attached brief complies with

1. the type volume limitation of Fed. R. App. P. 32(a)(7)(B), because the brief, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), contains 13,898 words of text; and

2. the type face requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because the brief has been prepared in a proportionally spaced type face using WordPerfect 11.0, in 12 point Century Schoolbook font.

/s/ Rachel Murphy  
Rachel Murphy  
Attorney for Defendant-Appellant

Dated: October 8, 2009

**APPELLANT'S SHORT APPENDIX**

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**CIRCUIT RULE 30(d) STATEMENT**

Pursuant to Circuit Rule 30(d), counsel certifies that all of the materials required by Circuit Rule 30(a) and (b) are included in Appellant's Short Appendix and Separate Appendix.

/s/ Rachel Murphy  
Rachel Murphy  
Attorney for Defendant-Appellant

Dated: October 8, 2009

**CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 31(e)**

I certify that the material contained in Appellant's Short Appendix is not available in non-scanned PDF format.

/s/ Rachel Murphy  
Rachel Murphy  
Attorney for Defendant-Appellant

Dated: October 8, 2009

STATE OF ILLINOIS )  
 )  
COUNTY OF COOK ) SS.

**PROOF OF SERVICE**

The undersigned, being first duly sworn upon oath, deposes and states that two (2) copies of the foregoing Brief and Short Appendix of Defendant-Appellant, and one diskette containing a digital version of the brief, were served upon the below-named party by depositing the same in the United States mail at 100 West Randolph Street, Chicago, Illinois, in an envelope bearing sufficient postage on October 8, 2009, before 5:00 p.m.

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SUBSCRIBED and SWORN to before me  
this 8th day of October, 2009.

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NOTARY PUBLIC