

No. 09-1455

**In the United States Court of Appeals
for the Seventh Circuit**

DAWN S. SHERMAN, A MINOR, THROUGH ROBERT I. SHERMAN,
HER FATHER AND NEXT FRIEND, ON BEHALF OF HERSELF
AND ALL OTHERS SIMILARLY SITUATED,
Plaintiff-Appellee,

v.

CHRISTOPHER KOCH, STATE SUPERINTENDENT OF EDUCATION,
Defendant-Appellant.

On Appeal from the Northern District of Illinois,
Eastern Division (No. 1:07-cv-06048)

**BRIEF OF THE STATES OF TEXAS, ALABAMA, FLORIDA, IDAHO, INDIANA,
LOUISIANA, MISSISSIPPI, NEVADA, NORTH CAROLINA, NORTH DAKOTA,
OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, UTAH,
VIRGINIA, AND WASHINGTON, AS AMICI CURIAE IN SUPPORT OF
DEFENDANT-APPELLANT AND SEEKING REVERSAL**

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**STATEMENT OF THE IDENTITY, INTEREST,
AND SOURCE OF AUTHORITY OF AMICI CURIAE**

Amici States file this brief pursuant to Federal Rule of Appellate Procedure 29(a). *See* FED. R. APP. P. 29(a) (“a State . . . may file an amicus-curiae brief without the consent of the parties or leave of court”).

Amici States have a strong interest in reversing the district court judgment striking down the Illinois moment of silence law. If that ruling is left intact, it will threaten the authority of every other State to enact and administer moment of silence laws. Thirty-one States currently provide for a moment of silence during the school day—while the other States remain free to adopt such a provision.

By enabling students to begin each school day with a moment of thoughtful contemplation, moment of silence laws serve numerous secular purposes, without infringing on the religious liberty of any student—consistent with the vision articulated by Justice William Brennan in *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963).

But if the court below is correct—and the Illinois moment of silence law is invalid because it permits silent prayer while excluding audible prayer—then *every* State’s moment of silence law must be struck down, notwithstanding previous rulings of the U.S. Supreme Court and federal courts of appeals across the country.

ISSUE PRESENTED

May States open every school day with a moment of silent contemplation—or do moment of silence laws inherently violate the Establishment Clause, because they allow for silent prayer, but not audible prayer?

ARGUMENT

The judgment of the district court striking down the Illinois moment of silence law threatens the validity of moment of silence laws across the country—in conflict with previous rulings of the U.S. Supreme Court and numerous federal courts of appeals. Accordingly, the judgment below should be reversed.

I. STATES HAVE ACCEPTED JUSTICE BRENNAN’S SUGGESTION OF MOMENT OF SILENCE LAWS AS AN APPROPRIATE MEANS OF ENSURING THAT EACH SCHOOL DAY STARTS ON THE RIGHT NOTE, WITHOUT INFRINGING ON THE RELIGIOUS FREEDOM OF ANY STUDENT.

In *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), the Supreme Court invalidated laws requiring public schools to begin each day with either a recitation of the Lord’s prayer or audible readings from the Bible.

In the course of this emotionally charged litigation, however, a compromise solution emerged: one that balanced the desire of States to begin each school day with a moment of thoughtful contemplation—but without the constitutional baggage accompanied by laws mandating audible prayer and devotional activities.

In his concurring opinion, Justice William Brennan suggested that States adopt laws requiring “the observance of a moment of reverent silence at the opening of class.” *Id.* at 281 (Brennan, J., concurring). Such laws enable students to “commenc[e] the school day ‘with a quiet moment that would still the tumult of the

playground and start a day of study.” *Id.* at 281 n.57 (quoting Editorial, WASHINGTON POST, June 28, 1962, at A22).

Under Justice Brennan’s vision, moment of silence laws would serve at least three important secular purposes: (1) “fostering harmony and tolerance among the pupils,” (2) “enhancing the authority of the teacher,” and (3) “inspiring better discipline.” *Id.* at 280. Moreover, such laws would not trigger Establishment Clause concerns, because they would allow States to provide “a solemn exercise at the opening assembly or the first class of the day,” yet do so “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.” *Id.* at 280-81.

Justice Brennan’s vision was not only echoed by legal commentators as well as mainstream media outlets¹—it was quickly adopted by States around the country. In the wake of his concurring opinion in *Schempp*, no fewer than 34 States enacted moment of silence laws. *See* ALA. CODE § 16-1-20.4; ARIZ. REV. STAT. § 15-342(21); ARK. CODE § 6-10-115; CONN. GEN. STAT. § 10-16a; DEL. CODE tit. 14, § 4101A(b);

1. *See, e.g., Schempp*, 374 U.S. at 281 n.57 (Brennan, J., concurring) (citing Editorial, WASHINGTON POST, June 28, 1962, at A22; NEW YORK TIMES, Aug. 30, 1962, at 18) (attached as Appendix); 2 ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES 571 (1950); Jesse H. Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 MINN. L. REV. 329, 370-71(1963); Paul G. Kauper, *Prayer, Public Schools, and the Supreme Court*, 61 MICH. L. REV. 1031, 1041 (1963); PAUL FREUND, RELIGION AND THE PUBLIC SCHOOLS: THE LEGAL ISSUE 23 (1965); LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW, § 14-6, 829 (1978).

FLA. STAT. § 1003.45; GA. CODE §§ 20-2-1050, -1051; 105 ILL. COMP. STAT. 20/1; IND. CODE § 20-30-5-4.5; KAN. STAT. § 72-5308a; KY. REV. STAT. § 158.175(5); LA. REV. STAT. § 17:2115(A); ME. REV. STAT. tit. 20-A, § 4805(2); MD. CODE, EDUC. § 7-104; MASS. GEN. LAWS ch. 71, § 1A; MICH. COMP. LAWS § 380.1565; MINN. STAT. § 121A.10; MISS. CODE § 37-13-8; NEV. REV. STAT. § 388.075; N.J. STAT. § 18A:36-4; N.M. STAT. § 22-5-4.1 (repealed by law, ch. 226, § 54, eff. July 1, 1993); N.Y. EDUC. LAW § 3029-a; N.C. GEN. STAT. § 115C-47(29); N.D. CENT. CODE § 15.1-19-3.1(3); OHIO REV. CODE § 3313.601; OKLA. STAT. tit. 70, § 11-101.2; 24 PA. STAT. § 15-1516.1; R.I. GEN. LAWS § 16-12-3.1; S.C. CODE § 59-1-443; TENN. CODE § 49-6-1004; TEX. EDUC. CODE § 25.082(d); UTAH CODE § 53A-11-901.5; VA. CODE § 22.1-203; W. VA. CONST. art. III, § 15-a.²

2. Three of these provisions were subsequently struck down. See N.J. STAT. ANN. § 18A:36-4, invalidated by *May v. Cooperman*, 780 F.2d 240 (3d Cir. 1985); N.M. STAT. § 22-5-4.1, invalidated by *Duffy v. Las Cruces Pub. Schs.*, 557 F. Supp. 1013 (D.N.M. 1983); W. VA. CONST. art. III, § 15-a, invalidated by *Walter v. W. Va. Bd. of Educ.*, 610 F. Supp. 1169 (S.D. W. Va. 1985). The district court decisions striking down the New Mexico and West Virginia laws pre-date *Wallace v. Jaffree*, which concluded that a moment of silence law enacted with a secular purpose is constitutional. See *Wallace v. Jaffree*, 472 U.S. 38, 59 (1985); *id.* at 62 (Powell, J., concurring); *id.* at 72-73, 76 (O'Connor, J., concurring); *id.* at 89-90 (Burger, C.J., dissenting); *id.* at 90 (White, J., dissenting); *id.* at 113-14 (Rehnquist, J., dissenting). In both *Walter* and *Duffy*, by contrast, the courts held that only a religious purpose was advanced for the statutes. See *Walter*, 610 F. Supp. at 1176; *Duffy*, 557 F. Supp. at 1020. And as discussed below, the Third Circuit in *May* expressly recognized that a moment of silence law enacted with a secular purpose would be constitutional, consistent with *Wallace*. See *infra* p. 7 (citing *May*, 780 F.2d at 251-52). Since *May*, federal courts of appeals have consistently upheld moment of silence laws against constitutional challenges, as detailed above.

In enacting these laws, the States faithfully executed the vision articulated by Justice Brennan in *Schempp*. To begin with, States enacted these provisions to further the same secular purposes articulated by Justice Brennan. *See Schempp*, 374 U.S. at 280. For example, Georgia believed that, by providing a moment for students to collect their thoughts and focus on the day, the law would help develop student self-respect and discipline and reduce youth violence. *Bown v. Gwinnett County Sch. Dist.*, 112 F.3d 1464, 1467, 1471 (11th Cir. 1997). Virginia likewise believed that its moment of silence law would help begin the school day with a period of calm, maintain order and discipline, focus students on the day's activities, and lessen school violence. *Brown v. Gilmore*, 258 F.3d 265, 271-72 (4th Cir. 2001). The Illinois moment of silence law serves similar secular purposes. *See Appellant's Br.* at 35 (stating interest in helping children focus and calm down before the start of the school day and reducing school violence).

In addition, these laws provide a moment of thoughtful contemplation without infringing on the religious liberties of any student, because the touchstone of these laws is student choice—including but not limited to the choice to pray—again, consistent with Justice Brennan's vision. *See, e.g.*, DEL. CODE tit. 14, § 4101A(b) (“all students in the public schools in Delaware may be granted a brief period of silence . . . to be used according to the *dictates of the individual conscience of each student*”)

(emphasis added); 105 ILL. COMP. STAT. 20/1 (providing “*an opportunity* for silent prayer or for silent reflection on the anticipated activities of the day”) (emphasis added); IND. CODE § 20-30-5-4.5 (“each student may, in the exercise of the *student’s individual choice*, meditate, pray, or engage in any other silent activity”) (emphasis added); TEX. EDUC. CODE § 25.082(d) (“each student may, *as the student chooses*, reflect, pray, meditate, or engage in any other silent activity”) (emphasis added). Of course, no moment of silence law requires any student to engage in any form of religious activity—and indeed, many state laws expressly guarantee that no religious activity shall be required. *See, e.g.*, GA. CODE § 20-2-1050(b); 105 ILL. COMP. STAT. 20/1; KAN. STAT. § 72-5308a; LA. REV. STAT. § 17:2115(A); MISS. CODE § 37-13-8(2); N.Y. EDUC. LAW § 3029-a; 24 PA. STAT. § 15-1516.1.

Because States have dutifully implemented Justice Brennan’s vision—ensuring that public schools begin each day on the proper note, with a period of thoughtful contemplation, without violating religious freedom—the enactments are entitled to judicial deference. As Justice O’Connor once explained, where “a legislature expresses a plausible secular purpose for a moment of silence statute in either the text or the legislative history, or [where] the statute disclaims an intent to encourage prayer over alternatives during a moment of silence, [] courts should generally defer to that stated intent.” *Wallace v. Jaffree*, 472 U.S. 38, 74-75 (1985) (O’Connor, J.,

concurring). A court's review of the legislative purpose behind moment of silence laws should be "deferential and limited," and "a court has no license to psychoanalyze the legislators." *Id. See also Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 249 (1990) (plurality) ("Even if some legislators were motivated by a conviction that religious speech in particular was valuable and worthy of protection, that alone would not invalidate the Act, because what is relevant is the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law."); *Croft v. Governor of Tex.*, 562 F.3d 735, 749-50 (5th Cir. 2009) (courts "should generally defer to the stated legislative intent" when evaluating secular purpose).

II. THE RULING BELOW CANNOT BE SQUARED WITH PREVIOUS DECISIONS OF THE U.S. SUPREME COURT AND FEDERAL COURTS OF APPEALS ACROSS THE COUNTRY, BECAUSE IT EFFECTIVELY CONDEMNS EVERY MOMENT OF SILENCE LAW AS INHERENTLY UNCONSTITUTIONAL.

As Justice Brennan's concurring opinion in *Schempp* made clear, moment of silence laws serve valid and important secular purposes. Accordingly, courts have generally upheld moment of silence laws under the Establishment Clause.

For example, in *Wallace v. Jaffree*, 472 U.S. 38 (1985), every member of the U.S. Supreme Court concluded that moment of silence laws are constitutional when they are enacted to serve a secular purpose. *See id.* at 59; *id.* at 62 (Powell, J.,

concurring); *id.* at 72-73, 76 (O'Connor, J., concurring); *id.* at 89-90 (Burger, C.J., dissenting); *id.* at 90 (White, J., dissenting); *id.* at 113-14 (Rehnquist, J., dissenting). The Court invalidated the Alabama law challenged in that case, but only because Alabama expressly *disclaimed* any secular legislative purpose. *Id.* at 56-57.

Accordingly, numerous federal courts of appeals since *Wallace* have upheld moment of silence laws against constitutional attack. *See Croft*, 562 F.3d at 746-50 (upholding Texas moment of silence law); *Brown*, 258 F.3d at 276-77 (upholding Virginia moment of silence law); *Bown*, 112 F.3d at 1469-72 (upholding Georgia moment of silence law). *See also Gaines v. Anderson*, 421 F. Supp. 337, 341-45 (D. Mass. 1976) (upholding Massachusetts moment of silence law). To date, the only federal court of appeals to strike down a moment of silence law did so because it found that the stated secular purpose was pretextual—and notably, even that court reiterated that moment of silence laws are constitutional when they are enacted to further a secular purpose. *See May v. Cooperman*, 780 F.2d 240, 251-52 (3d Cir. 1985).

In light of these rulings, the district court plainly erred in invalidating the Illinois moment of silence law. Moreover, its reasons for doing so threaten moment of silence laws in virtually every other State.

For example, the district court concluded that the Illinois law is invalid because it allows silent prayer but does not allow audible prayer, kneeling, or other physical movements that would disrupt the moment of silence. To quote the court below: “By 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. Although many religions, including the predominant Christian religion, embrace the notion of silent prayer, many religions do not.” *Sherman ex rel. Sherman v. Twp. High Sch. Dist. 214*, 594 F. Supp. 2d 981, 990 (N.D. Ill. 2009). The court further noted that “*Webster’s Unabridged Dictionary* defines ‘silence’ as including not merely the absence of sound, but ‘stillness’ as well,” and that “the ACLU has identified a number of religious practices that are neither silent nor still.” *Id.*

But if the district court is right, then Justice Brennan must be wrong—and every moment of silence law must be unconstitutional—contrary to established authority. *See Croft*, 562 F.3d at 749-50; *Brown*, 258 F.3d at 281; *Bown*, 112 F.3d at 1472-73; *May*, 780 F.2d at 248. Indeed, this very same argument was made by the plaintiff in *Wallace*, see Brief of Appellees at 46-48, *Wallace v. Jaffree*, 472 U.S. 38 (1985) (Nos. 83-812, 83-929), 1984 U.S. S. Ct. Briefs LEXIS 967—yet was completely ignored by

the Court, which struck down the Alabama law on narrow grounds because it had no secular purpose.

The attack is meritless, because moment of silence laws preserve student choice to engage in *any* silent, nondisruptive activity of their choosing—whether religious or otherwise. If schools may require silence during an hour-long examination, or even throughout the entire day in a school library, without violating the Establishment Clause—even though, during that time, some students might choose to silently pray, while others would not be allowed to audibly pray—then *a fortiori* schools may require a brief moment of silence at the beginning of each school day. *See, e.g., Bown*, 112 F.3d at 1474 (“The fact that a teacher must stop a student who prays audibly or otherwise makes noise during the moment of quiet reflection does not result in excessive government entanglement with religion. There are many times during any given school day when teachers tell their students to be quiet and when audible activity of any kind is not permitted.”); *Croft*, 562 F.3d at 749-50 (quoting *May*, 780 F.2d at 248) (“[T]he school environment requires limitation upon the time, place, and manner of [student] self expression, even when it is religiously motivated.”).

The district court also invalidated the Illinois moment of silence law because it expressly included the word “prayer.” *See Sherman*, 594 F. Supp. 2d at 989 (“[T]he sponsors . . . could have easily removed all references to prayer and all requirements

that students be told that prayer is one of two options. That they did not is telling.”). But like the argument about audible prayer, this rationale, if accepted, would threaten numerous moment of silence laws across the country that likewise refer to “prayer.”

The word “prayer” may be included in a moment of silence statute, for one simple reason: There is nothing wrong with making abundantly clear to school administrators, teachers, parents, and students what they can do during the moment of silence. The enactment of clear laws is good government. And that is especially true here, because when it comes to the Establishment Clause, the law is confusing to many Americans.

Confusion about the Establishment Clause is so extensive that, in 1995, President Clinton issued a “Memorandum on Religious Expression in Public Schools” in which he explained that he “share[d] the concern and frustration that many Americans feel about situations where the protections accorded by the First Amendment are not recognized or understood,” and that “[t]his problem has manifested itself in our Nation’s public schools.” Memorandum on Religious Expression in Public Schools, 2 PUB. PAPERS 1083 (July 12, 1995). Likewise, in 2003, the U.S. Department of Education issued specific guidance to “clarif[y] the rights of students to pray in public schools.” Guidance on Constitutionally Protected

Prayer in Public Elementary and Secondary Schools, 68 Fed. Reg. 9645 (Feb. 28, 2003).

Indeed, confusion about the Establishment Clause has grown so pervasive that numerous federal laws have been enacted to ensure that schools do not trample upon the Free Exercise rights of students to engage in purely voluntary prayer. *See, e.g.*, 20 U.S.C. § 6061 (prohibiting the appropriation of funds to States with policies that prevent voluntary prayer and meditation in schools); 20 U.S.C. § 7904(a)-(b) (directing the Secretary of Education to provide guidance to States on constitutionally protected voluntary prayer in public schools, and requiring States to certify they have no policy that prevents voluntary prayer as a condition of receiving federal funds).

If Congress can take steps to protect student choice to engage in “prayer” by name, so too can States. After all, if anything, by expressly including the word “prayer,” States can help avoid the need for unnecessary, awkward conversations about whether prayer is indeed allowed during the moment of silence. *See, e.g., Brown*, 258 F.3d at 278 (“If the students were kept uninformed of that right [to pray during a moment of silence], they might find it necessary to ask teachers whether the allotted time might be used for prayer, increasing the potential for interactions between teachers and religiously motivated students.”).

Not surprisingly, then, courts have rejected the notion that an otherwise valid moment of silence law suddenly becomes unconstitutional if the word “prayer” is added to the statute. For example, as Justice O’Connor explained in her concurrence in *Wallace*, a moment of silence law “has not thereby encouraged prayer over other specified alternatives” just by mentioning it by name. 472 U.S. at 73, 78 n.5. Likewise, in his *Wallace* dissent, Justice White concluded that, if students are indeed permitted to pray during a moment of silence, surely a statute that simply alerts them of that fact must be constitutional. *See id.* at 91 (“[I]f a student asked whether he could pray during that moment [of silence], it is difficult to believe that the teacher could not answer in the affirmative. If that is the case, I would not invalidate a statute that at the outset provided the legislative answer to the question ‘May I pray?’”). Additionally, the Fourth and Fifth Circuits have so held. *See Croft*, 562 F.3d at 746-49; *Brown*, 258 F.3d at 281-82 (finding that striking down a moment of silence statute solely because “pray” was used “would manifest a hostility to religion that is plainly inconsistent with the religious liberties secured by the Constitution.”).

Finally, the district court committed a similar error when it found the Illinois moment of silence law unconstitutional based on the existence of section 5 of the Illinois statute, which provides a general guarantee that students may engage in voluntary, nondisruptive prayer at any time during the school day. The district court

suggested that the general statement in section 5 is sufficient, and that the more specific protection of prayer during moments of silence is therefore unnecessary and redundant. *Sherman*, 594 F. Supp. 2d at 987. But it is entirely constitutional, not to mention beneficial, for legislators to speak with a clear voice, particularly in an area that has long confused school districts, educators, parents, and students. Indeed, both the federal government and other States have recognized the benefits of providing *both* a general statement about the right to engage in voluntary prayer throughout the school day *and* a more specific statement about the right to engage in voluntary prayer during moments of silence. *See* Guidance on Constitutionally Protected Prayer , 68 Fed. Reg. at 9647; ALA. CODE § 16-1-20.3(c); ARIZ. REV. STAT. § 15-110(c); GA. CODE § 20-2-1050(c); LA. REV. STAT. § 17:2115.3; N.D. CENT. CODE § 15.1-19-3.1(1); OHIO REV. CODE § 3313.601; OKLA. STAT. tit. 70, § 11-101.1; TENN. CODE § 49-6-1004(b); TEX. EDUC. CODE § 25.901; VA. CODE § 22.1-203.1 (voluntary prayer provisions for States that also have moment of silence statutes).³

3. The district court also erred in construing Illinois law to permit *only* “silent reflection” and “silent prayer” during moments of silence. *Sherman*, 594 F. Supp. 2d at 986. That list is suggestive, not exhaustive—as another federal court of appeals has noted in construing Georgia’s substantially similar moment of silence statute. *See Bown*, 112 F.3d at 1472-73 (noting that Georgia’s “opportunity for a moment of silent reflection on the anticipated activities of the day” did not force students to think only on that topic or to reflect at all, but rather allowed students to “use the moment of quiet reflection as they wish, so long as they remain silent”).

CONCLUSION

For these reasons, the judgment below should be reversed.

Respectfully submitted,

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