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.

DR. CHRISTOPHER KOCH, State Superintendant of Education,
Defendant-Appellant,

and

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

On Appeal From The United States District Court
For The Northern District Of Illinois, Eastern Division
Case NO. 07-cv-6048
The Honorable Judge Robert W. Gettleman

BRIEF *AMICUS CURIAE* OF WALLBUILDERS, INC.

in support of Defendant-Appellant
Urging reversal

Steven W. Fitschen
Counsel of Record for Amicus Curiae
The National Legal Foundation
2224 Virginia Beach Blvd., St. 204
Virginia Beach, VA 23454
(757) 463-6133

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 09-1455
Short Caption: *Sherman v. Koch*

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

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3): WallBuilders, Inc.

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

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and: None

ii) List any publicly held company that owns 10% or more of the party's or amicus' stock: None

Attorney's Signature: _____ Date: 10/20/09
Attorney's Printed Name: Steven W. Fitschen

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes X No ___**

Address: The National Legal Foundation
2224 Virginia Beach Blvd., Ste. 204
Virginia Beach, VA 23454
Phone Number: (757) 463-6133
Fax Number: (757) 463-6055
Email Address: nlf@nlf.net

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INTEREST OF THE *AMICUS CURIAE*

Amicus Curiae, WallBuilders, Inc., is a non-profit organization that is dedicated to the restoration of the moral and religious foundation on which America was built. WallBuilders' President, David Barton, is a recognized authority in American history and the role of religion in public life. As a result of his expertise in these areas, he works as a consultant to national history textbook publishers. He has been appointed by the State Boards of Education in states such as California and Texas to help write the American history and government standards for students in those states. Mr. Barton also consults with Governors and State Boards of Education in several states, and he has testified in numerous state legislatures on American history. Much of his knowledge is gained through WallBuilders' vast collection of rare, primary documents of American history, including more than 70,000 documents predating 1812. Lastly, due to his expansive work and knowledge in American history, Mr. Barton has received numerous national and international awards that have distinguished him as a leading scholar in his field.

Furthermore, WallBuilders encourages citizens all across America to continue the tradition of bringing religious perspectives to bear in public life. While the role of religion in America's public schools has changed significantly over the years, and while historical practices no longer govern there, WallBuilders desires to see religion treated neutrally, rather than with hostility.

WallBuilders, Inc. submits its brief pursuant to the accompanying Motion for Leave to File a Brief *Amicus Curiae*.

SUMMARY OF THE ARGUMENT

This brief makes four arguments not made by Superintendant Koch. Specifically, several of the District Court's conclusions of law and holdings are marred by containing errors of logic and internal inconsistencies. These problems constitute error on the part of the District Court. The first and second errors relate to points made by Superintendant Koch, but contain specific arguments not made by him. The third and fourth errors constitute additional *reasons* (without raising new *issues*) why the District Court's analysis is incorrect.

First, the District Court misconstrued the plain meaning of the Period of Silence statute by concluding that only prayer or reflection on the school day is permitted under the statute. The District Court ignored or misunderstood that the "opportunity" to pray or reflect on the school day can be declined by students. Those students will then be able to do use the period of silence to engage in any thoughts they may desire.

Second, the District Court erred in concluding that the statute requires teachers to endorse religion by requiring that teachers instruct pupils about prayer. The statute requires daily observation of the period of silence, not daily instruction about itself. Furthermore, the District Court's concerns about the need for instruction are ill conceived for two reasons: 1) parents will likely give whatever instruction to their children that they deem appropriate about using the period of silence; and 2) even should a teacher decided that instruction about *what prayer is* is necessary, such instruction does not violate the Establishment Clause.

Third, the District Court erred when it concluded that some religions would be discriminated against because they do not engage in silent prayer. The Court came to this conclusion because various religions have *some* prayer practices that are not silent. However, each of the religions mentioned in the District Court's opinion also engage in silent prayers.

Fourth, the District Court's opinion is internally inconsistent because it held up Georgia's "Moment of Silent Reflection in Schools Act" as a model of constitutionality, yet held an identical aspect of Illinois's Period of Silence statute unconstitutional. Specifically, both statutes lack an enforcement provision.

ARGUMENT

I. THE DISTRICT COURT ERRED BY COMMITTING MULTIPLE ERRORS OF LOGIC AND BY BEING INTERNALLY INCONSISTENT.

Several of the District Court's conclusions of law and holdings are marred by containing errors of logic and internal inconsistencies. These problems constitute error on the part of the District Court and constitute reasons in addition to those pointed out by Superintendent Koch why the District Court's judgment should be reversed and why judgment should be entered for Superintendent Koch, declaring that the Period of Silence law is not facial unconstitutional.

A. The District Court's conclusion that the Period of Silence can be used only for prayer or reflection is incorrect in light of the plain meaning of the statute.

The District Court erred in concluding that "[t]he plain meaning of the statute . . . suggests an intent to force the introduction of the concept of prayer into the schools." *Sherman v. Koch*, 594 F. Supp. 2d 981, 986 (N.D. Ill. 2009). The

District Court came to this conclusion after rejecting Superintendent Koch's submissions of responses to his questionnaire concerning the uses to which the period of silence is actually put. *Id.* at 986 n.6. However, the District Court need not have considered the responses to have realized that the period of silence can be used for innumerable purposes. The District Court claimed to be relying on the statute's plain language, but only errors of logic can explain the District Court's conclusion about that language.

In reality, the plain meaning leads to the exact opposite conclusion. As the District Court correctly pointed out, all students must participate in the period of silence. *Id.* at 986. However, the District Court missed—or misconstrued—a key word in the statute: the word "opportunity." The statute provides each student with "an opportunity for silent prayer or for silent reflection on the anticipated activities of the day." 105 ILCS 20/1 (2008). Opportunities may, of course, be accepted or declined. Since each student must participate in the period of silence, but may decline the opportunity to use the period for prayer or for reflection on the day ahead, they are free to use the period for any silent thoughts whatsoever, including thoughts "about a professional sporting event or a family vacation," thoughts the District Court considered off limits under the statute, *Sherman*, at 986.

B. The District Court erred in concluding that the statute requires teachers to endorse religion by requiring that teachers instruct pupils about prayer.

Building on the error described in Section A. above, the District Court concluded that since prayer was one of only two permissible activities, teachers would have to explain the two purposes on a daily basis and would have to instruct their pupils about prayer. *Id.* This conclusion is wrong for at least two reasons. First, it disregards the fact that any parent who desires for his or her child to accept the prayer opportunity can, and likely will, instruct his or her child on prayer. Second, students are subject to many rules and regulations throughout the school year and often on a daily basis, many of which are derived directly from state statutes. Yet, such rules are not explained daily. *See, e.g.*, 105 ILCS 5/10-20.5; 105 ILCS 5/10-20.5b; 105 ILCS 5/10-20.8; 105 ILCS 5/10-20.9a; 105 ILCS 5/10-20.30. There is nothing on the face of the Period of Silence statute that indicates that it requires a daily explanation of the daily observation.

Furthermore, even were teachers required to teach about prayer, *i.e.*, to teach what prayer is, that would not constitute an unconstitutional endorsement of religion. It is hard to imagine how schools could teach a course in comparative religion—which the Supreme Court and this Court have opined that schools may do, *see*, *e.g.*, *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984); *Ind. Civ. Liberties Union v. O'Bannon*, 259 F.3d 766, 771 (7th Cir. 2001)—without teaching what prayer is. Even under the District Court's construction of the statute, nothing more than teaching what prayer is is required. Contrary to the District Court's assertion, no

student is coerced to support or participate in religion or its exercise . . . ." *Sherman*, 594 F. Supp. 2d at 986. (internal quotation and citation omitted).

C. The District Court erred when it opined that some religions would be discriminated against because they do not engage in silent prayer.

The District Court held that the Period of Silence Statute violates the Establishment Clause because it favors those religions that engage in silent prayers over those that do not engage in silent prayer. *Id.* at 990. Superintendent Koch has provided the most important answer to this holding: "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." (Brief of Def.-Appellant 46.)

However, it is worth pointing out that the District Court's statement is likely incorrect factually. While there may be some religion somewhere that requires that *all* prayers be spoken, your *Amicus* is not aware of any such religions. At a minimum, the statement is not true of any of the religions mentioned by the District Court. *See* J. Simcha Cohen, *How Does Jewish Law Work?* 265-66 (1993); Cyril Glasse, *The New Encyclopedia of Islam*, *Dua'a'* 125 (rev. ed., reprinted 2002); Lois J. Einhorn, *The Native American Oral Tradition* 97 (2000); *The Uddhava Gita: The Final Teaching of Krishna*, 119, 221 (*Swami Ambikananda Saraswati*, trans., Ulysses Press, 2002). Although the District Court relied upon non-silent practices of various religions that had been identified by the ACLU, *Sherman*, 594 F. Supp. 2d at 990, it jumped from that fact to the conclusion that *none* of the prayer

practices of those religions could be done in silence. As just noted, that conclusion is incorrect.

D. The District Court's opinion is internally inconsistent because it held up Georgia's "Moment of Silent Reflection in Schools Act" as a model of constitutionality, yet held an identical aspect of Illinois's Period of Silence statute unconstitutional.

The District Court opined that "if the legislature sincerely wanted to adopt a period of silence for reflection there was a simple way to do it. *Id.* at 889. The way to do it, according to the District Court, would be to treat Georgia's "Moment of Silent Reflection in Schools Act" as "a perfect blueprint." *Id.*

Yet, elsewhere in its opinion, the District Court found an aspect of Illinois's statute which is identical to an aspect of Georgia's statute to be unconstitutional. Specifically, the District Court held that the Illinois statute was vague because, among other reasons, it "provides no direction as how the 'period' of silence should be implemented . . . ." *Id.* at 990. Yet this is equally true of the Georgia statute. *See id.* at 899 (quoting the Georgia statute). The question naturally arises, "When was the District Court correct. In light of the fact that the Georgia statute was upheld, the District Court was wrong in this aspect of its vagueness analysis (and Superintendant Koch addressed other problems with the District Court's vagueness analysis). (Brief of Def.-Appellant 47-51.)

CONCLUSION

Because the District Court's opinion contains significant logical errors and internal inconsistencies and for other reasons stated in Superintendent Koch's Brief, *Amicus Curiae* respectfully requests that the judgment of the District Court

be reversed and that judgment be entered in favor of Superintendent Koch, declaring that the Period of Silence law is not facial unconstitutional.

Respectfully submitted,
this 20th day of October, 2009.

_____

Steven W. Fitschen
Counsel of Record for *Amicus Curiae*,
2224 Virginia Beach Blvd., St. 204
Virginia Beach, VA 23454
(757) 463-6133

CERTIFICATE OF COMPLIANCE

Pursuant to F.R.A.P. 32.2.7(C), the undersigned certifies that this brief complies with the type-volume limitations of F.R.A.P. 32.2.7(B). Exclusive of the exempted portions, this Brief contains 1,838 words in 12 point Century font. This total was calculated with the Word Count function of Microsoft Office Word 2007.

_____

Steven W. Fitschen
Counsel of Record for *Amicus Curiae*

CERTIFICATE OF SERVICE

I hereby certify that I have duly served the attached Motion for Leave to File a Brief *Amicus Curiae* of WallBuilders, Inc. in the case of *Sherman, v. Koch, et al.*, No. 09-1455, on all required parties by depositing one paper copy in the United States mail, first class postage, prepaid on October 20, 2009, addressed as follows:

Rachel Murphy
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
Counsel for the *Defendant-Appellant*

Gregory E. Kulis
KULIS & ASSOCIATES
Suite 2140
30 North LaSalle Street
Chicago, Illinois 60602
Counsel for *Plaintiff-Appellee*

Steven W. Fitschen
Counsel of Record for *Amicus Curiae*
The National Legal Foundation
2224 Virginia Beach Boulevard, Ste. 204
Virginia Beach, Virginia 23454
(757) 463-6133
nlf@nlf.net