Case No. 08-10092

DAV ID WALLACE CROFT;	)	
SHANNON KRISTINE CROFT,	)	US Court of Appeals 5th Circuit
as Parents and Next Friend	)	
of minor Children	)	
Plaintiffs – Appellants	)	
v.	)	
GOVERNOR OF THE	)	
STATE OF TEXAS, Rick Perry;	)	
CARROLLTON-FARMERS	)	
INDEPENDENT SCHOOL DISTRICT	)	
Defendants - Appellees	)	
	)	
Appeal from the Northern	)	
District of Texas, Dallas Division	)	

APPELLANT'S BRIEF

Filed By:

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APPELLANTS

David Wallace Croft and	)	
Shannon Kristine Croft,	)	5th Circuit Court of Appeals
As Parents and Next Friend	)	
of their minor Children (Appellants)	)	
v.	)	
Rick Perry, Governor of the	)	08-10092
State of Texas (Appellee)	)	
and	)	
Carrollton-Farmers Branch	)	
Independent School District (Appellee)	)	
	)	
Appeal from the Northern	)	
District of Texas, Dallas Division	)	

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

David Wallace Croft

Shannon Christine Croft

3 Croft Minor Children

Rick Perry, Governor of Texas

Carrollton Farmers Brach Independent School District

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Request for Oral Argument

This case involves important Constitutional issues. Appellants believe oral argument would be useful because this case should be freely reviewed by the Appellate Court, which need not defer to the District Court under the clearly erroneous rule. (See "Standard of Review" below for details on proper standards of review in this case.) The Appellate Court should reconsider the evidence that is part of the appellate record, as well as the arguments of counsel in this case without the need to defer to the District Court's opinion or its findings.

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Table of Authorities

I. Statement of jurisdiction:

The District Court issued a MEMORANDUM OPINION AND ORDER dated in this action on the 2nd day of January, 2008 (see Record on Appeal – USCA5 584-619), as well as a JUDGMENT dismissing the case with prejudice and taxing costs of court against Plaintiffs, dated January 7, 2008 (see Record on Appeal –USCA5 620). Plaintiff's Notice of Appeal was timely filed with the District Clerk for the Northern District of Texas on 1-24-2008 (see Record on Appeal –USCA5 622). This appeal is from a final order or judgment that disposes of all parties claims.

The Northern District of Texas had jurisdiction under: (1) 28 USC §1331 because this case questions the constitutionality of a State statute, and therefore arises under the Constitution of the United States, and creates original jurisdiction in a US District Court; (2) 42 USC §1983 because Congress has created a cause of action against state officials for deprivations of constitutional rights. This includes the right to seek prospective injunctive relief against state officials who act under color of any state law in violation of the First Amendment to the US Constitution. Governor Perry as the chief executive official of the State of Texas can therefore be enjoined to obey the First Amendment. Carrollton Farmer's Branch ISD, as a state actor, and as the school district that Plaintiff's minor children attend, can be

enjoined to obey the Constitution for similar reasons. And, (3) 28 USC §2201, because an actual controversy exists regarding Texas Education Code, Section 25.082(d) because Plaintiff's minor children, as public school children attending Carrollton-Farmer's Branch ISD schools in Texas, have been, and currently are, subject to that Texas statute. As such, Plaintiff's were entitled to seek declaratory relief in the Northern District of Texas regarding the Constitutionality of Texas Education Code, Section 25.082(d). The 5th Circuit Court of Appeals has jurisdiction under: (1) 28 USC 1291, because a final decision has been reached in the Northern District of Texas trial court on all issues, and, as such, this case is ready for appeal; and (2) 28 USC 1294, because this case was originally filed in the Northern District of Texas, Dallas division. The 5th Circuit Court of Appeal includes the Northern District of Texas within its jurisdiction.

II. Statement of the issues presented for review:

Whether Texas Education Code, Section 25.082(d) violates the Establishment Clause of the First Amendment of the United States Constitution.

III. Standard of Review:

A final conclusion that is constitutionally decisive will be freely reviewed by the Appellate Court, which need not defer to the District Court under the clearly erroneous rule. (See Guzick v. Drebus, 431 F.2d 594, 599(6th Cir. (1970).) The

facts themselves, sometimes labeled "legislative" or "constitutional" facts, are not "provable" in the usual sense and are part and parcel of the constitutional judgment the appellate court must make. (See Fortin v. Darlington Little League, Inc., 514 F2d 344, 348-349 (1st Cir. 1975).) Furthermore, mixed questions of law and fact, that require the consideration of legal concepts and involve the exercise of judgment about the values underlying legal principles, are reviewable de novo. (See Falls v. Nesbitt, 966 F.2d 375, 377 (4th Cir. (1992)) A determination of whether a given conduct is constitutionally protected or permissible is a legal question, as is analysis of the legislation's constitutionality. (See Brantly v. Surles, 718 F2d 1354, 1359 n.6 (5th Cir. 1983).) In essence, a District Court's constitutional law conclusions are reviewed de novo. (See Doe v. Tangipahoa, 473 F.3d 188, 197 (5th Cir. 2006).)

IV. Statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below:

This case involves an Establishment clause challenge of a Texas statute, Texas Education Code, Section 25.082(d), that requires all Texas public school children to observe a moment of silence. Appellants ("Croft") are parents of minor children attending Texas public schools located in Defendant-Appellee Carrollton-Farmer's Branch Independent School District ("CFBISD"). Defendant-Appellee, Governor Rick Perry ("Perry"), as the chief executive official of the State of Texas

is responsible for the execution of all laws of the State of Texas, including Texas Education Code, Section 25.082(d).

Crofts filed suit seeking injunctive and declaratory relief under 28 USC §1331, 42 USC §1983, and 28 USC §2201. After Perry and CFBISD answered, some discovery was conducted by all parties. Then, each side filed various motions for summary judgment and cross-motions for summary judgment on the issue of whether Texas Education Code, Section 25.082(d) violates the Establishment clause of the First Amendment, as understood by US Supreme Court precedent, and the opinions of various circuit and district courts, and legal scholars around the nation. Oral argument was held on Croft's, Perry's, and CFBISD's various motions and cross-motions for summary judgment, and the Responses and Replies to these motions. (See Record on Appeal –"Transcript of Motion Hearing Before The Honorable Barbara M.G. Lynn United States District Judge".) After taking into consideration the different parties motions and oral argument, the District Court judge issued a "Memorandum Opinion and Order" (see Record on Appeal –USCA5 584-619), granting Perry's Cross Motion for Summary Judgment, Denying Croft's Motion for Summary Judgment, and Denying CFBISD's Motion for Summary Judgment as moot. Since there were no remaining issues of fact to be resolved and the court had determined all issues of law, the court then issued a

Judgment (see Record on Appeal –USCA5 620), dismissing Croft's case with prejudice.

V. Statement of Facts Relevant to the issues submitted for review with appropriate references to the record:

From May 30, 1995 to September 1, 2003, Texas Education Code, Section 25.082 said, in subsection (b):

> "A school district may provide for a period of silence at the beginning of the first class of each school day during which a student may reflect or meditate." (Tex. Ed. Code §25.082(b), effective from May 30, 1995 to September 1, 2003, see also, Record on Appeal –USCA5 11)

On September 1, 2003, Texas Education Code, Section 25.082 was amended to say, in subsection (d):

> "The board of trustees of each school district shall provide for the observance of one minute of silence at each school in the district following the recitation of the pledges of allegiance to the United States and Texas flags under Subsection (b). During the one-minute period, each student may, as the student chooses, reflect, **pray**, meditate, or engage in any other silent activity that is not likely to interfere with or distract another student. Each teacher or other school employee in charge of students during that period shall ensure that each of those students remains silent and does not act in a manner that is likely to interfere with or distract another student." (Tex. Ed. Code § 25.082(d), emphasis added, see also, Record on Appeal –USCA5 11)

Appellant's children attend Texas public school. (See Record on Appeal – USCA5 552-560.) One of Appellant's minor children was told the moment of silence was for prayer by his teacher. (See Record on Appeal USCA5 552-560.)

VI. Summary of the argument

Texas Education Code § 25.082(d) violates the Establishment Clause of the First Amendment of the United States Constitution. The challenged statute fails all three prongs of the test enunciated in Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971), (the "Lemon Test"), and it fails the reinterpreted Lemon Test, the so-called "Endorsement test", as set forth in Lynch v. Donnelly, 465 U.S. 668, 687 (1984).

The statute has no secular legislative purpose, as evidenced by its text and also by its legislative history. The fact that the text of Texas Education Code § 25.082(d) contains the word "pray" is sufficient, standing alone, under Wallace v. Jaffree, 472 US 38 (1985), to show that the statute has no secular legislative purpose, and that any alleged secular legislative purpose proposed by Appellees and the State of Texas is a sham. The lack of secular legislative purpose is also shown in the transcripts of the legislative history of Texas Education Code § 25.082(d), and the fact that a pre-existing Texas moment of silence statute, Texas Education Code §25.082(b), effective from May 30, 1995 to September 1, 2003, that did not mention the religious word "pray", was already in existence prior to its enactment. Although the trial court rightly rejected two of Governor Perry's three proposed secular purposes for Texas Education Code § 25.082(d) (promoting patriotism and the accommodation of religion), it was mistaken to accept the Governor's third justification of providing for a period of thoughtful contemplation

because this was fully provided for under the pre-existing Texas moment of silence statute that did not use the word "pray", namely, Texas Education Code §25.082(b), effective from May 30, 1995 to September 1, 2003. Furthermore, the legislature was not merely making explicit what was already implicitly allowed under the prior moment of silence statute, because Texas Education Code § 25.901, "EXERCISE OF CONSTITUTIONAL RIGHT TO PRAY", which is still in effect today, already made explicit a child's right to pray silently in school.

The principal or primary effect of the 2003 changes to the pre-existing, 1995, Texas Education Code §25.082(b), which resulted in Texas Education Code § 25.082(d), was to advance certain forms of mainstream Protestant Christian religion, while inhibiting less mainstream religions. The addition of the word "pray" had the primary effect of advancing religion by providing extra legal guidance to religious parents in the text of the statute. The Texas legislature did not include the right to "not pray" within the text of Texas Education Code §25.082(d), which means non-religious parents and children are likely to need to engage the services of an attorney to determine if their children may "not pray" under the statute. The moment of silence statute as currently written therefore conveys a benefit on religious parents and children in the form of extra legal guidance as to what the law allows them to do during the moment of silence. The State of Texas also admitted at the trial level that Texas Education Code

§25.082(d) has the effect of advancing religion in the form of the October 10, 2006 letter from Shirley J. Neeley.

Texas Education Code §25.082(d) creates an excessive government entanglement with religion. The text of the 2003 version of Texas Education Code §25.082(d), by requiring teachers to ensure that students act in a manner that doesn't distract other students, creates entanglement by granting a standardless delegation of legislative power to public school teachers. This entanglement with religion was recognized as a potential problem by Texas State legislators and has in fact caused a problem with regard to one of the Croft's minor children, who heard his teacher declare that the moment of silence was a time for prayer during class.

The statute also fails the non-discrimination principle set forth in Larson v. Valente, 456 U.S. 228, 244 (1981), because it discriminates amongst religious groups, and such discrimination is not closely fitted to a compelling state purpose. Evidence of religious discrimination is found in the legislative history of Texas Education Code §25.082(d). The State of Texas has presented no evidence to suggest that there is a compelling purpose for such religious discrimination.

VII. The Argument Containing Appellant' s Contentions and Reasoning

A. Relevant Establishment Clause Principles

There are at least three different, interrelated, tests that are relevant in this case. First, there is a basic, three-part test (the so-called "Lemon test") used for analyzing challenges under the Establishment Clause of the First Amendment: (1) The statute must have a secular legislative purpose; (2) the statute's principal or primary effect must be one that neither advances nor inhibits religion, and (3) the statute must not create an excessive government entanglement with religion. (See Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971).) Furthermore, under the first prong of Lemon, the "…secular purpose must be 'sincere'; a law will not pass constitutional muster if the secular purpose articulated by the legislature is merely a 'sham.'" (See Wallace v. Jaffree, 472 US 38, 64 (1985).) In addition to passing all three parts of the Lemon test, the challenged statute must not discriminate amongst religious sects. This is a recognition of the fact that if the Establishment clause stands for anything, it must stand for the principle that the government may not discriminate amongst religious groups, unless such discrimination is closely fitted to a compelling state purpose. (See Larson v. Valente, 456 U.S. 228, 244 (1981).)

The third relevant test associated with an Establishment clause challenge of a statute is the so-called "Endorsement test". Justice O'Connor asserted in Lynch that the basic purpose of the Establishment Clause in the Constitution is to prohibit "…government from making adherence to a religion relevant in any way to a

person's standing in the political community…" (See Lynch v. Donnelly, 465 U.S. 668, 687 (1984).) She then goes on to say that government can run afoul of the Establishment clause prohibition

> "…in two principal ways. One is excessive entanglement with religious institutions, which may interfere with the independence of the institutions, give the institutions access to government or governmental powers not fully shared by nonadherents of the religion, and foster the creation of political constituencies defined along religious lines…The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message…" (See Id at 688.)

In other words, the Establishment clause can be violated in two ways:

(1) Excessive entanglement with religious institutions; **or**

(2) Government endorsement or disapproval of religion.

The first standard described above, the "excessive entanglement" part, is the third prong of the Lemon test, discussed earlier in this brief. The second form of Establishment clause violation described above is the so-called "endorsement test". O'Connor then goes on to say in her Lynch concurrence that there are two ways that government can "endorse or disapprove of religion":

> "…[t]he purpose prong of the Lemon test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under

> review in fact conveys a message of endorsement or disapproval." (See Id at 690).

In other words, the first two prongs of the Lemon test (secular legislative purpose and principal or primary effect of the statute) are two factors to be considered in the "endorsement test". Additionally, Justice O'Connor incorporated the "no sect preference" rule found in Larson[1], into the "endorsement test" by saying that such sect preference gives rise to a presumption of government endorsement of religion that must be overcome by the government showing a compelling interest and a "close fit": "The Larson standard, I believe, may be assimilated to the Lemon test in the clarified version I propose…" (See Lynch v. Donnelly, 465 U.S. 668, 689 (1984) (O'Connor, J., concurring).)

It should also be noted that there must be a higher level of scrutiny in the public school context when examining the alleged secular purpose of legislation:

> "Moreover, this Court has noted that '[when] the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.' *Id., at 431*. This comment has special force in the public-school context where attendance is mandatory. Justice Frankfurter acknowledged this reality in *Illinois ex rel. McCollum v. Board of Education, 333 U.S., at 227* (concurring opinion):
>
> 'That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children.'" (See Wallace v. Jaffree, 472 U.S. 38, 61, footnote 51 (1985).)

[1] See Larson v. Valente, 456 U.S. 228, 244 (1981)

B. Prior Moment of Silence Cases

The US Supreme Court has addressed the issue of public school moments of silence once before, and three US Circuit Courts of Appeal have also addressed the issue. The US Supreme Court invalidated an Alabama moment of silence statute whose evolution almost exactly mirrors the evolution of Tex. Ed. Code § 25.082(d):

> "…(1) § 16-1-20, enacted in 1978, which authorized a 1-minute period of silence in all public schools "for meditation"; [FN1] (2) § 16-1-20.1, enacted in 1981, which authorized a period of silence "for meditation or voluntary prayer"; [FN2](See Wallace v. Jaffree, 472 US 38, 40 (1985).)

Similar to the statute at issue in Wallace, Tex. Ed. Code § 25.082(d) started out as Tex. Ed. Code §25.082(b), which said, in relevant part: "A school district may provide for a period of silence at the beginning of the first class of each school day during which a student may reflect or meditate." (Tex. Ed. Code §25.082(b), effective from May 30, 1995 to September 1, 2003.) Just as Alabama Statute §16-1-20 in Wallace made no mention of the word "prayer" or "pray", neither did the pre-2003 Texas Education Code. However, the word "pray" was subsequently added into the Texas Education code in 2003, just as the word "prayer" was added to § 16-1-20.1 of the Alabama statutes in Wallace. The US Supreme Court in Wallace considered a change to include the word "prayer" to be

significant in its analysis of why Alabama Statute § 16-1-20.1 was unconstitutional:

> "The wholly religious character of the later enactment is plainly evident from its text. When the differences between § 16-1-20.1 and its 1978 predecessor, § 16-1-20, are examined, it is equally clear that the 1981 statute has the same wholly religious character. There are only three textual differences between § 16-1-20.1 and § 16-1-20: (1) the earlier statute applies only to grades one through six, whereas § 16-1-20.1 applies to all grades; (2) the earlier statute uses the word 'shall' whereas § 16-1-20.1 uses the word 'may'; (3) the earlier statute refers only to 'meditation' whereas § 16-1-20.1 refers to 'meditation or voluntary prayer.' The first difference is of no relevance in this litigation because the minor appellees were in kindergarten or second grade during the 1981-1982 academic year. The second difference would also have no impact on this litigation because the mandatory language of § 16-1-20 continued to apply to grades one through six. [FN46] Thus, the only significant textual difference is the addition of the words 'or voluntary prayer'. The legislative intent to return prayer to the public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the school day. The 1978 statute already protected that right, containing nothing that prevented any student from engaging in voluntary prayer during a silent minute of meditation. [FN47] Appellants have not identified any secular purpose that was not fully served by § 16-1-20 before the enactment of § 16-1-20.1. Thus, only two conclusions are consistent with the text of § 16-1-20.1: (1) the statute was enacted to convey a message of state endorsement and promotion of prayer; or (2) the statute was enacted for no purpose. No one suggests that the statute was nothing but a meaningless or irrational act.[FN48]" (See Wallace v. Jaffree, 472 US 38, 58-59 (1985).)

After Wallace v. Jaffree was decided in 1985, the US Supreme Court, in another opinion, described the holding in Wallace v. Jaffree as being based solely on the fact that the State of Alabama included the word "prayer" in a subsequent

moment of silence statute when the previous moment of silence statute had no mention of the word prayer:

> "The Alabama statute held unconstitutional in Wallace v. Jaffree, supra, is analogous. In Wallace, the State characterized its new law as one designed to provide a 1-minute period for meditation. **We rejected that stated purpose as insufficient, because a previously adopted Alabama law already provided for such a 1-minute period**…"(See Edwards v. Aguillard, 482 US 578, 587-588 (1987), emphasis added.)

The US Supreme Court again interpreted Wallace in the same way more recently:

> "The cases with findings of a predominantly religious purpose point to the straightforward nature of the [first prong of the Lemon] test. In Wallace, for example, **we inferred purpose from a change of wording from an earlier statute to a later one**, each dealing with prayer in schools…" (See McCreary v. ACLU 545 U.S. 844, 862 (2005), emphasis added.)

Words like "prayer" have been recognized by this Court as clearly religious in meaning:

> "Prayer is perhaps the quintessential religious practice for many of the world's faiths, and it plays a significant role in the devotional lives of most religious people." (See Karen B. v Treen, 653 F.2d 897, 901 (5th Cir. 1981).)

Furthermore, the quote from Edwards and McCreary, above, shows that Wallace has been interpreted by the US Supreme Court as standing for the proposition that a moment of silence statute that includes religious language like "prayer" violates the Establishment clause, and that such a violation can be found on the face of the statute, without the need to look to extrinsic evidence like the legislative history of the statute. This is especially true when there was already a prior moment of

silence statute on the books that did not mention the words "prayer" or "pray", and it was subsequently amended to include such religious language.[2]

The trial court believed that Appellants were making "…mountains out of molehills…" by pointing to the legislative inclusion of the word "pray" in the text of Texas Education Code, Section 25.082(d) (see Record on Appeal –USCA5 602), but Wallace and the subsequent US Supreme Court cases mentioned above show that inclusion of religious language like "pray" in the text of the statute is enough, standing alone, to find non-secular legislative purpose under the first prong of the Lemon test.

Three circuit courts of appeal have considered moment of silence statutes subsequent to the Supreme Court decision in Wallace. In May v. Cooperman, 780 F.2d 240 (3rd Cir. 1985), which was decided soon after Wallace, the 3rd Circuit invalidated a New Jersey moment of silence statute, even though the statute did not contain religious language such as "prayer" (as in Wallace) or "pray" (as in this

[2] Respected legal scholars have noted that examining the evolution of a statute is an appropriate method for determining whether a statute violates the secular-purpose prong of Lemon:

> "The Court has also held that it is appropriate to examine the evolution of a statute in determining if its true purpose is to further religion. This past term, the Santa Fe Court [Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 309 (2000).] determined that a statute that permitted student-initiated nonsectarian prayers at football games was unconstitutional. What the Court found "most striking" was the evolution of the district's policy and the fact that the policy was passed in response to a constitutional challenge to the district's previous practice of having a student chaplain offer a prayer." (See Debbie Kaminer, *Bringing Organized Prayer In Through The Back Door: How Moment-of-Silence Legislation For the Public Schools Violates The Establishment Clause*, 13 Stan. L. & Pol'y Rev. 267, 309 (2002).)

case). The New Jersey statute challenged in May spoke only of a period of silence for "…quiet and private contemplation or introspection…" (See May v. Cooperman, 780 F.2d 240, 241 (3rd Cir. 1985).) Despite the fact that there was no express mandate or suggestion that public school children pray in the text of the challenged statute in May, the 3rd Circuit held the law as unconstitutional because there was evidence, other than the text of the statute, that showed no secular purpose behind the law. (See May v. Cooperman, 780 F.2d 240, 252 (3rd Cir. 1985).) The 3rd Circuit interpreted Wallace as standing for the proposition that moment of silence statutes that expressly mention religious words like "prayer" show, on their face, a non-secular purpose by the legislature. (See May v. Cooperman, 780 F.2d 240, 250-252 (3rd Cir. 1985).) The Third Circuit in May quoted Justice White's dissent from Wallace, in which Justice White interpreted the majority opinion from Wallace as standing for the legal principle that the Supreme Court might approve of statutes that provided for a moment of silence, but only if they did not mention prayer. (See Wallace v. Jaffree, 472 US 38, 91 (1985), Justice White dissent, quoted in May v. Cooperman, 780 F.2d 240, 251 (3rd Cir. 1985).)

In 1997, the 11th Circuit Court of Appeals examined a Georgia moment of silence statute called "The Moment of Quiet Reflection in Schools Act", which became effective on July 1, 1994. The Act amended another Georgia statute, which

had allowed teachers to conduct a brief period of "silent prayer or meditation" at the beginning of each school day. The new Georgia statute spoke only of a "…brief period of quiet reflection…" (See Bown v. Gwinnett County School District, 112 F.3d 1464, 1466 (11th Cir.1997).) This makes the Bown case more like May and Wallace in terms of its analytical framework: first see if the text shows non-secular purpose by the use of religious language, then look to extrinsic evidence of non-secular purpose such as the legislative history of the statute. In Bown, there was no use of religious words such as "prayer" or "pray" –the statute spoke only of "quiet reflection":

> "This Act amended the former version of *§ 20-2-1050*, which provided for a moment of "silent prayer or meditation." The deletion of the words "prayer or meditation" and the substitution of the words "period of quiet reflection" provides some support for the idea that the Act's purpose is secular and is not to establish a moment of prayer. *Cf. Jaffree, 472 U.S. at 58-60, 105 S. Ct. at 2490-91* (where Alabama already had a moment of silence statute, the fact that the new statute established a period of silence 'for meditation or voluntary prayer' conveyed a message of endorsement and promotion of prayer)." (See Bown v. Gwinnett County School District, 112 F.3d 1464, 1470, fn.3 (11th Cir.1997).)

After looking to see if the text of the statute contained religious language, the 11th Circuit looked to extrinsic evidence, such as legislative history, to determine if the statute was enacted for a non-secular purpose, even though it was facially neutral. The 11th Circuit, decided that the legislative history was conflicting in that some legislators expressed non-secular purpose for the law, while others appeared not to. However, this does not mean that Bown can be construed as meaning that when the

legislative history is conflicting that the legislature should be given "the benefit of the doubt" on secular purpose. The 11th Circuit noted that the evidence of legislative history was, in its opinion, simply not sufficient to overcome the fact that the text of the statute in Bown contained no religious language:

> "Although some Georgia legislators expressed religious motives for voting for the Act, the fact remains that the language of the statute as enacted reveals a clearly secular legislative purpose: to provide students with a moment of quiet reflection to think about the upcoming day.…we readily conclude at the very least that the legislative history cannot be construed to override the express statutory language articulating a clear secular purpose and also disclaiming a religious purpose." (See Bown v. Gwinnett County School District, 112 F.3d 1464, 1472 (11th Cir.1997).)

The 11th Circuit's reasoning in Bown, is very similar to May and Wallace, even if the result was different. May and Wallace stood for the legal principle that a moment of silence statute that does not use religious language, like the word "prayer", in its text, does not evidence non-secular purpose on its face, although it may still be struck down if the legislative history evidences non-secular legislative purpose. The only difference between Bown and May is that the 11th Circuit decided that evidence of non-secular legislative purpose was *not* found in sufficient quantity in the legislative history of the Georgia, facially neutral, statute, while in May, the 3rd Circuit found sufficient evidence of non-secular purpose in the legislative history of a facially neutral New Jersey statute.

The final circuit court to consider a moment of silence statute in light of Wallace was the 4th Circuit Court of Appeals. In 1976, Virginia enacted into law § 22.1-203. This provision authorized, but did not require, local school boards to establish a minute of silence in their classrooms for the expressly stated purpose of allowing students to meditate, pray, or engage in any other silent activity. In 2000, the Virginia legislature amended § 22.1-203 to require that every school division provide a minute of silence. (See Brown v. Gilmore, 258 F.3d 265, 270 (4th Cir. 2001).) In some ways, Brown had a more innocuous factual background than does the factual background associated with Texas Education Code, Section 25.082(d):

> "…Virginia directed a memorandum to all teachers, admonishing them not to permit the minute of silence to become a religious observance. There is no evidence in this record that Virginia teachers have used the minute of silence, or any other occasion, to lead their students in collective prayer, as was the case in Wallace…" (See Brown v. Gilmore, 258 F.3d 265, 281 (4th Cir. 2001).)

In this case, no evidence was presented that any memorandum was directed to Texas teachers prior to Appellant's filing suit in this case. The October 10, 2006 letter from Texas Education Agency Commissioner Shirley J. Neeley[3] regarding Texas Education Code §25.082(d), written after Appellants had filed their motion for summary judgment[4] in the Northern District of Texas, was a cynical attempt to create evidence of legislative purpose after the fact, and was rightfully disregarded

[3] See Record on Appeal –USCA5 404-405.
[4] See Record on Appeal –USCA5 74-77.

by the trial court. (Appellants also disagree that a memorandum from a state agency is evidence of secular **legislative** purpose.) Furthermore, there is evidence that at least one teacher in Texas attempted to turn the moment of silence into a prayer period. CFBISD admitted in response to interrogatories and requests for admission that one of Appellant's children's teachers had declared that the moment of silence was a time for prayer. (See Record on Appeal –USCA5 554)

Brown is also an anomaly in comparison to the moment of silence decisions found in Wallace, Bown, and May because the 4th Circuit said a moment of silence statute that uses religious language, like "pray" or "prayer", in its text does not necessarily show non-secular purpose by the legislature:

> "Based on this textual analysis, we conclude that the statute has at least two purposes, one of which is clearly secular and one of which may be secular even though it addresses religion. To the extent that the minute of silence is designed to permit nonreligious meditation, it clearly has a nonreligious purpose. And to the extent it is designed to permit students to pray, it accommodates religion." (See Brown v. Gilmore, 258 F.3d 265, 276 (4th Cir. 2001).)

The reasoning shown by the 4th Circuit here is poor. A moment of silence statute can allow for "nonreligious meditation" without expressly mentioning prayer, as the moment of silence statutes at issue in May and Bown, discussed above, did. As has already been discussed, using religious language in the text of the statute shows that the legislature did not have secular purpose in enacting the law. The accommodation of religion is also not a proper secular purpose in this context.

First, accommodations of religion are normally aimed at exempting some minority religious group from a secular law of general application, because the law unnecessarily burdens that group's religious practices. The accommodation may be necessary in such instances because the religious majority that tends to control the legislative agenda does not understand or care about the practices of such religious minorities[5]. An example of such an accommodation would be Congress' enactment of 42 USCS § 1996a, which legalizes the use, possession, or transportation of peyote[6], a controlled substance, by an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion. (See 42 USCS § 1996a.) A moment of silence statute is not a necessary accommodation of religion because the majority of people are religious and already engage in some form of ritual similar to prayer. They are therefore not a minority group in need of some special accommodation to ensure that they can pray. A moment of silence statute is also not necessary as an accommodation of religion because there was no preexisting statute prohibiting prayer[7]. This

[5] Such exemptions from secular laws of general application also have their limits. No one would seriously argue that a religious minority advocating cannibalism or human sacrifice should be given an exemption. Generally such exemptions are granted in the case of "victimless crimes", such as the 42 USCS § 1996a exemption for Indians using peyote for religious rituals, discussed below, where the crimes do not involve an initiation of physical force against the life, liberty, or property of others.

[6] "Peyote" is a controlled substance, whose use, possession, and transport generally is illegal at both the state and federal levels.

[7] In the case of Texas law, there was, in fact, a specific State statute that ensured every child's right to pray before Texas Education Code §25.082(d), the moment of silence statute being

distinguishes a moment of silence statute from the Federal law legalizing peyote use for religious Indians. In the case of the Federal accommodation of Indian peyote use, there were already preexisting state and Federal statutes prohibiting individuals from consuming or possessing peyote, for any reason.

Calling a moment of silence statute a "religious accommodation" also has another disturbing implication. It implies that the state can coerce non-believers into engaging in some activity in order to accommodate a religious group. In the case of 42 USCS § 1996a, the Indian peyote statute discussed above, individuals who are not interested in participating in Shamanic drug rituals are not forced to do so. In the case of Texas Education Code §25.082(d), the moment of silence statute, atheists such as Plaintiff's children are forced to participate in the moment of silence.[8]

US Supreme Court case law supports Appellant's view regarding religious accommodation:

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challenged in this case, was adopted. See Texas Education Code § 25.901. "EXERCISE OF CONSTITUTIONAL RIGHT TO PRAY", which was enacted almost 8 years before Texas Education Code §25.082(d).

[8] If the Texas legislature were truly interested in some sort of non-coercive accommodation of prayer, and if such an accommodation were truly needed, then it could pass a law allowing religious students, with prior, written parental approval, to come to school 1 minute early so that they can sit in their classroom, when other students are not present, in a moment of silence and engage in voluntary, unorganized, non-teacher-initiated prayer. This way, any students that did not wish to participate would not be present and forced to participate in the moment of silence. Whether such a law would be constitutional would still be an open question, but the State could then honestly say that the law was for purposes of religious accommodation.

> "All of these cases, however, involve legislative exemptions that did not, or would not, impose substantial burdens on nonbeneficiaries while allowing others to act according to their religious beliefs, or that were designed to alleviate government intrusions that might significantly deter adherents of a particular faith from conduct protected by the Free Exercise Clause. New York City's decision to release students from public schools so that they might obtain religious instruction elsewhere, which we upheld in Zorach, was found not to coerce students who wished to remain behind to alter their religious beliefs, nor did it impose monetary costs on their parents or other taxpayers who opposed, or were indifferent to, the religious instruction given to students who were released. The hypothetical Air Force uniform exemption also would not place a monetary burden on those required to conform to the dress code or subject them to any appreciable privation. And the application of Title VII's exemption for religious organizations that we approved in Corporation of Presiding Bishop, though it had some adverse effect on those holding or seeking employment with those organizations (if not on taxpayers generally), prevented potentially serious encroachments on protected religious freedoms." (See Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 17, n.8 (1989).)

Furthermore, the US Supreme Court has been clear that:

> "While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to *anyone*, it has never meant that a majority could use the machinery of the State to practice its beliefs."(See School District of Abington v. Schempp, 374 U.S. 203, 226 (1963).)

Thus, the state may not enact legislation with the aim of assisting the majority in the practice of its beliefs, and any moment of silence statute cannot be regarded as a proper legislative accommodation of religion, especially when it would not accommodate certain minority religions.[9]

[9] As will be discussed below, with regard to why Texas Education Code §25.082(d) discriminates amongst religious sects, there is ample legislative history showing that the law was enacted despite the fact that it wouldn't allow certain non-Christian or non-Protestant religious groups to pray during the moment of silence because they must make noise, or pray in positions or postures that teachers might regard as distracting.

The Fourth Circuit also cited Justice O'Conner's concurrence opinion from Wallace v. Jaffree to support its mistaken holding that accommodation of religion can be a secular purpose for enacting a moment of silence statute. (See Brown v. Gilmore, 258 F.3d 265, 276 (4th Circuit (2001)).) The Fourth Circuit took this statement out of context. In reality, Justice O'Connor said:

> "While this 'accommodation' analysis would help reconcile our Free Exercise and Establishment Clause standards, it would not save Alabama's moment of silence law. If we assume that the religious activity that Alabama seeks to protect is silent prayer, then it is difficult to discern any state-imposed burden on that activity that is lifted by Alabama Code § 16-1-20.1 (Supp.1984). **No law prevents a student who is so inclined from praying silently in public schools**." (See Wallace v. Jaffree, 472 US 38, 83 (1985); emphasis added.)

Justice O'Connor was clear that a moment of silence statute is not necessary to protect the right to silently pray, and even if such a statute could be a legitimate accommodation of religion, one that explicitly mentions prayer could not be justified as an accommodation of religion.

Since the Brown decision is an anomaly, when considered in light of Wallace, Bown, and May, it should be disregarded as being out of step with the majority of American courts on this issue.

C. Texas Education Code, Section 25.082(d) Has No Secular Purpose

In light of the reasoning found in Wallace, Bown, and May, the proper test for determining whether a moment of silence statute evidences secular legislative

purpose is essentially a two-step endeavor. First, a reviewing court should look to the text of the statute. If the text of the statute contains religious language, like "pray" or "prayer", then it evidences non-secular legislative purpose on its face, and fails prong one of the Lemon test without further inquiry. Allowing a statute to withstand Establishment clause scrutiny, despite the fact that it contains religious directives for public school children like "pray" in its text would encourage state legislatures to enact public school prayer statutes without debate or comment so that an evidentiary record couldn't be established for the courts to rule them unconstitutional.

If the text of a moment of silence statute is facially neutral because it contains no religious language, then a reviewing court should next look to other extrinsic evidence, like legislative history. If the legislative history shows non-secular legislative purpose, then even a facially neutral moment of silence statute has a non-secular legislative purpose and fails the first prong of Lemon. Only if a moment of silence statute is: (1) facially neutral, i.e., contains no religious language like "pray" or "prayer", and (2) there is no extrinsic evidence, such as legislative history, of non-secular purpose, should a reviewing court regard it as

evidencing secular legislative purpose, such that is passes the first prong of the Lemon test.[10]

Since there is religious language contained in the text of Texas Education Code, Section 25.082(d) (the word "pray"), it is not facially secular, and fails prong one of Lemon with no further inquiry being necessary. Furthermore, the legislative history of Texas Education Code, Section 25.082(d) is also sufficient extrinsic evidence of non-secular purpose to cause it to fail prong one of Lemon. An examination of the transcripts[11] of the legislative committee meetings and floor debates in the Texas legislature, regarding the bill (SB 83) that would eventually be enacted into law as Texas Education Code §25.082(d), demonstrates that the legislature lacked a secular purpose.

On April 9, 2003, Committee Substitute of Senate Bill 83 was debated on the floor of the Texas State Senate. CSSB 83 was the bill that would eventually become Texas Education Code §25.082(d). During this debate, an Amendment was offered by Texas State Senator Juan Hinojosa to remove the word "pray" from the text of the proposed bill. (See See Record on Appeal –USCA5 120-123.) In

[10] A prohibition on the use of religious language like "pray" or "prayer" in the text of a moment of silence statutes will also create a "bright-line" rule that will make it easier for courts and legislators to know what activity is prohibited, and therefore serve an important policy function by preventing constant litigation on this issue.

[11] These transcripts produced from recordings of the legislative floor debates associated with what would become Texas Education Code, Section 25.082(d) are part of the appellate record, and were originally part of Appellant's motion for summary judgment in the trial court. (See Record on Appeal –USCA5 80-243.)

opposing this amendment, Senator Wentworth, the sponsor of the bill, was unable to give a coherent *secular* reason for the inclusion of the word "pray":

> "[SENATOR WENTWORTH] Mr. President, I oppose the amendment… But **I want to give in statute a recognition** -- my guess is that in those schools that are allowed and those school boards that do take advantage of it allowed to have the 60 seconds of meditation or reflection, we don't know what those students are doing in that 60 seconds of silence, and my guess is that some of them are already praying. **But it's not in the statute. I just want to include it in the statute**. They can still meditate or reflect or do something else, but I'd like it in there." (See Record on Appeal –USCA5 122, emphasis added.)

In sponsoring the bill, Senator Wentworth was not merely attempting to protect the right of students to pray[12], since he had already stated, earlier during the same proceeding, that the bill was not intended to protect an individuals' right to pray:

> "[SENATOR HINOJOSA] So you think that this would protect all religions in our country, whether you're Muslim, Buddhist, Catholic, or Jewish? [SENATOR WENTWORTH] Senator, **this is not a school prayer amendment and it's not designed to protect religions…**" (See See Record on Appeal –USCA5 88-89, emphasis added.)

When pressed during the Senate Floor debate on why he opposed the removal of the word "pray" from what would become Texas Education Code §25.082(d), Senator Wentworth eventually, mistakenly, claimed that because the

[12] In fact, Senator Wentworth exhibited a shockingly cavalier attitude when it came to the rights of non-Christians. When he was asked by Senator Hinojosa whether Buddhists would be allowed, in accordance with the dictates of their religion, to hum while they prayed under CCSB 83, Senator Wentworth said that they would not, and that Buddhists would have to "…pray at home or someplace else, but they won't be doing it in the classroom." (See Record on Appeal – USCA5 87-88.)

Texas State Senate starts its sessions with a prayer, then inclusion of the word "pray" in the text of the proposed school statute was constitutional:

> "[Senator Wentworth] **And I'd like to point out, we begin each session…**But -- But I disagree, respectfully, with you about prayer should only be at home and in the church. Prayer can be wherever we are. We can pray driving our cars, we can pray in school. **In fact, we open every session of this body in this chamber not with silent prayer but in audible prayer.** In any case, Mr. President, I respectfully urge a no-vote on Senator Hinojosa's amendment." (See Record on Appeal –USCA5 122-123, emphasis added.)

Senator Wentworth was mistaken to reason that prayer undertaken in a legislative body such as the Texas State Senate is the same as mandating prayer in public schools. The courts have been clear that special care must be taken to ensure that the First Amendment's Establishment Clause is not violated in the public school context because children are highly impressionable. (See Wallace v. Jaffree, 472 US 38, 61, footnote 51 (1985), see also, School Dist. v. Schempp, 374 U.S. 203, 290-291 (1963).) This indicates that Senator Wentworth had no understanding of the constitutional impact of the Texas moment of silence statute.

Throughout SB 83's movement through the Texas State Senate, its sponsor, Senator Jeff Wentworth, and his supporters, made it clear that the moment of silence provision of Texas Education Code § 25.082(d) was not enacted for any secular purpose. During a Texas State Senate Education Committee Meeting on Senate Bill 83, Senator Wentworth said that he believed there had been a

"…coarsening of society…" (See Record on Appeal –USCA5 186) that had been brought about by "…the lack of prayer in schools…" (See Record on Appeal – USCA5 186.) Senator Wentworth also made it clear that he was not speaking of voluntary, individual prayer by students, but organized, forced prayer: "[Senator Wentworth]…we all know it's helpful to encourage children. Sometimes we have to nudge them into doing things." (See Record on Appeal –USCA5 187.) Senator Wentworth went on to admit that the current Texas moment of silence statute would encourage organized prayer in school:

> "[Senator Staples] And so would you think that this measure would be viewed as a collective or an individual activity…[Senator Wentworth] Well, the technical answer to your question…if more than one student silently prays, then I guess it's a collective activity." (See Record on Appeal – USCA5 195.)

Senator Wentworth was not alone in believing that SB 83 was about governmental encouragement of prayer in public schools:

> "[Senator Averitt] I think that, you know, you and I and all these Members up here would agree that having a moment of silence, **prayerful reflection**, is a positive thing that's going to help those folks grow up to be good citizens, **servants of their Lord**…"(See Record on Appeal –USCA5 198, emphasis added.)
>
> "[Senator Janek] It is worth trying. When we say grace before every meal, I get the kids to focus and put their hands together and all that. Maybe we won't achieve that entire minute, but it's probably a worthwhile exercise for the kindergarten teacher and first grade teacher to try and do that."(See Record on Appeal –USCA5 219.)
>
> "[Speaker] **Eliminating the word 'prayer', eliminating the word 'reflection' or 'mediation'**? [Senator Janek] A moment of silence. If you

> required a minute of silence at the start of every school day. **Not questioning motives, not questioning what could be done**. Every school must have a minute of silence at the start of the school day. Would you still be opposed?"(See Record on Appeal –USCA5 230, emphasis added.)

In the Texas State House of Representatives, there was very little opposition to the enactment of the text of Texas Education Code § 25.082(d). The only apparent opposition came from State Representative Suzanna Hupp, who primarily opposed the enactment of the Texas moment of silence statute because it made the law mandatory on school districts rather than permissive.[13] At several points, Representative Hupp, an opponent of the bill, reminded her fellow legislators that she was not opposed to moment of silence statutes nor did she think that such statutes might violate the Establishment clause of the US Constitution[14]:

> "[Representative Hupp]…Mr. Branch, I want to – I want to make sure that you understand – I'm sure you do – that this is not an argument over whether or not saying the pledge of allegiance or having a moment of silence is a good idea. You do understand that's not what the argument is about correct?...Because I think –I certainly think it is a good idea." (See Record on Appeal –USCA5 141.)

[13] "The amendment [to SB 83, the bill that would become Texas Education Code §25.082(d)] changes all of the 'shalls' to 'may'. It simply makes it permissive. Now my little school district, they have a moment of silence, they say the pledge. But I believe in local control folks, and I just – I couldn't live with just letting this bill go through." (See Record on Appeal –USCA5 133.)

[14] Representative Hupp did appear somewhat concerned, on apparently pragmatic grounds, with the possibility of lawsuits, but not on Establishment clause grounds. Instead, she was concerned that the law might violate the Free Exercise of Religion Clause of the First Amendment: "…and that is one of my concerns…It suddenly limits it to silent prayer as opposed to what we actually have now, where children – it has been stated in –with a U.S. Supreme Court decision that they [public school students] can pray out loud." (See Record on Appeal –USCA5 135.)

Apparently, no one in the Texas State House of Representatives, unlike some of their colleagues in the Texas Senate, was concerned enough about any possible Establishment clause issues to even raise this as a possibility during floor debate.

The State Representatives in favor of the bill that would become Texas Education Code § 25.082(d) seemed to be not only passively disinterested in the possible Establishment Clause concerns raised by the bill, but to be motivated by an explicit agenda to reinstitute organized, involuntary prayer in Texas public schools. State Representative Edwards discussed with Representative Hupp his efforts over the years to "…get people to support prayer back in school…"(See Record on Appeal –USCA5 135.) because he believed that "…a number of undesirable things happened when we took prayer out of school…" (See Record on Appeal –USCA5 135.) To which Representative Hupp, one of the bill's few opponents, said: "I'm in complete agreement with you." (See Record on Appeal – USCA5 135.) Representative Edwards then went on to say that he wished "…that we [public school students] really could pray aloud." (See Record on Appeal – USCA5 136.)

Texas State Representative Casteel was even more brazen in expressing a non-secular purpose behind the moment of silence provision of Texas Education

Code § 25.082(d). In a debate with Representative Hupp, she asked whether Ms. Hupp agreed that it was:

> "…important to set the tone in your home at the dinner table or…to set the tone at school or to set the tone in the House of Representatives…or to set the tone in a public school?" (See Record on Appeal –USCA5 136.)

At first what Representative Casteel meant by "setting the tone" is not clear, however, she then went on to make her point more explicit. She went on to say, in apparent disregard of atheist public school students:

> "[Representative Casteel]…And I think it's good for the children of the State of Texas to know that we are a reverent society, regardless of religion." (See Record on Appeal –USCA5 137.)

Finally, Representative Casteel made her meaning explicit:

> "[Representative Casteel] Wouldn't you agree with me that we have an obligation to determine what is best for the public schools in the State of Texas, including how much math, how many credits they have to have and **to set the tone for the public schools each morning with a prayer and the two pledges?**" (See Record on Appeal –USCA5 138-139, emphasis added.)

In the end, Representative Casteel didn't even pretend that the moment of silence provision of Texas Education Code § 25.082(d) was for a secular purpose, instead she simply described the law as requiring public school students to say the US Pledge of Allegiance, the Texas Pledge of Allegiance, and to say a prayer.[15]

[15] Representative Hupp one of the bill's few opponents, apparently did not disagree with Representative Casteel: "Ms. Casteel I want you to know I completely dis- -- or, excuse me, I completely agree with you. I just feel that it should be done –those decisions should be made at the local level…Those decisions should be made at the local level, absolutely at the local level." (See Record on Appeal –USCA5 137.)

She had completely jettisoned any pretense at a secular moment of silence, and no one in the Texas House of Representatives rose to speak out or oppose what Representative Casteel had said regarding the non-secular purpose behind Texas Education Code § 25.082(d).

Not only was there no opposition to Representative Casteel's desire to "…set the tone for the public schools…with a prayer…" (see Record on Appeal – USCA5 139), but the bill's House sponsor, State Representative Dan Branch, seemed to adopt Representative Casteel's "tone-setting" doublespeak:

> "[Representative Branch]…but it does **set the tone** for the day that this is serious business…But we already – to sort of sum up my point on this, we already tell schools what to do in all kinds of areas, as mentioned by Representative Casteel." (See Record on Appeal –USCA5 140, emphasis added.)

Texas State Representative Christian noted that making the moment of silence mandatory on all school districts was necessary because the State of Texas, unlike many local school districts, would have the financial resources to fight establishment clause lawsuits such as this one:

> "…when the responsibility [of having a moment of silence for prayer] is left on that local school board's shoulders for potential lawsuits, that they advocate [sic] the responsibility by saying no, we won't allow prayer here…But understand, I think a lot of our school boards that I'm familiar with are opting out of allowing the prayer**, requiring the prayer**, whatever." (See Record on Appeal –USCA5 146-147, emphasis added.)

Once again, a State legislator speaks of Texas Education Code § 25.082(d) not as a moment of silence provision, serving some unspecified secular purpose, but as a bill "…requiring the prayer…" (See Record on Appeal –USCA5 147.)

After the debate in the Texas House on 5/6/2003, Senate Bill 83, which would become Texas Education Code § 25.082(d), was passed with 132 ayes, 4 nays, and 1 person not voting. (See Record on Appeal –USCA5 162.) The sentiments of the above-quoted Representatives, and the lack of opposition to their statements by their colleagues, makes it clear that "…the statute was enacted to convey a message of state endorsement and promotion of prayer...." (See Wallace v. Jaffree, 472 US 38, 59 (1985).)

D. The Trial Court Opinion Regarding the State's Proposed Secular Purpose

The trial court in this case addressed the three purported secular purposes articulated by Governor Perry for Texas Education Code § 25.082(d) in its MEMORANDUM OPINION AND ORDER dated on January 2, 2008 (see Record on Appeal –USCA5 584-619), and rejected two of them. The trial court rejected "promotion of patriotism" as a secular purpose for the moment of silence portions of Texas Education Code § 25.082(d). The trial court noted in its 1-2-08 opinion that the addition of the words "pray" was not designed to prompt patriotic thoughts or displays in school children. The Crofts agree with this reasoning of the trial

court. The trial court also rejected the accommodation of religion as justifying Texas Education Code § 25.082(d). The Crofts also agree with this reasoning.

The final reason asserted by Governor Perry for Texas Education Code § 25.082(d) at the trial level was to provide for a period of thoughtful contemplation. The trial court's reasoning regarding this third purported secular purpose for Texas Education Code § 25.082(d) is mistaken. The trial court asserted in its opinion that the addition of the language "pray" and "…engage in any other silent activity…" in Texas Education Code § 25.082(d) was for a secular purpose because it would give children an "…opportunity for silent contemplative thought, of whatever kind…" (See Record on Appeal –USCA5 617). However, this reasoning make no sense in light of the fact that Texas already had a moment of silence statute that allowed "…for a period of silence at the beginning of the first class of each school day during which a student may reflect or meditate." (Tex. Ed. Code §25.082(b), effective from May 30, 1995 to September 1, 2003, see also, Record on Appeal – USCA5 11) Just as in Wallace v. Jaffree, this prior statute fully allowed for an opportunity for silent contemplative thought, of whatever kind:

> "The Alabama statute held unconstitutional in Wallace v. Jaffree, supra, is analogous. In Wallace, the State characterized its new law as one designed to provide a 1-minute period for meditation. **We rejected that stated purpose as insufficient, because a previously adopted Alabama law already provided for such a 1-minute period**…"(See Edwards v. Aguillard, 482 US 578, 587-588 (1987), emphasis added.)

In fact the trial court contradicted itself because it had already noted that promotion of patriotism was not a secular purpose in this context because "…the opportunity to contemplate those matters was fully provided for by the prior statute's moment of silence…"(See Record on Appeal –USCA5 615), yet the opportunity for silent contemplative thought, of whatever kind, was also fully allowed under the prior Texas moment of silence statute that did not expressly mention the word "pray". This purported secular purpose also looks like a sham when it is remembered that the State of Texas already had a statute that ensured a child's right to silently pray in the form of Texas Education Code § 25.901., "EXERCISE OF CONSTITUTIONAL RIGHT TO PRAY", which was enacted almost 8 years before Texas Education Code §25.082(d):

> "A public school student has an absolute right to individually, voluntarily, and silently pray or meditate in school in a manner that does not disrupt the instructional or other activities of the school. A person may not require, encourage, or coerce a student to engage in or refrain from such prayer or meditation during any school activity." (See Texas Education Code § 25.901)

The fact that the Texas legislature had already noted that a child could pray under the prior Texas moment of silence statute (Texas Education Code §25.082(b), effective from May 30, 1995 to September 1, 2003) means that it was not merely motivated by a desire to "…make explicit what was already implied and justified by another state law…" (See Record on Appeal –USCA5 617) because this option already was explicit, in the form of Texas Education Code § 25.901. This fact

makes the legislative desire to include the word "pray" in Texas Education Code § 25.082(d) entirely non-secular in purpose.

Appellants also disagree with the trial court that the legislative record reveals a secular purpose, as has already been noted in this brief by frequent and numerous quotes of Texas State legislators evidencing a non-secular purpose.[16]

E. Texas Education Code, Section 25.082(d) Has A Principal or Primary Effect that Advances Some Religions and Inhibits Other Religions

As has been noted, in addition to having a secular legislative purpose, a statute's principal or primary effect must be one that neither advances nor inhibits religion, (See Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971).) The principal or primary effect of the 2003 changes to the pre-existing, 1995, Texas Education Code §25.082(b), which resulted in Texas Education Code § 25.082(d), was to advance certain forms of mainstream Protestant Christian religion, while inhibiting less mainstream religions. For purposes of this analysis, it is important to keep in mind that Texas already had a moment of silence statute that said: "A school district may provide for a period of silence at the beginning of the first class of each school day during which a student may reflect or meditate." (Tex. Ed. Code §25.082(b), effective from May 30, 1995 to September 1, 2003.) In 2003, the

[16] See Record on Appeal –USCA5 80-242 for the complete transcripts regarding the legislative history of what would become Texas Education Code § 25.082(d).

Texas state legislature, among other things, added the word "pray" to the moment of silence statute. The addition of the word "pray" had the primary effect of advancing certain types of religion. Although Appellees may argue that Texas Education Code §25.082(d), taken as a whole, has some, possibly even many, secular effects, these effects were the result of either the pre-existing, 1995, version of the law, which only spoke of meditation and reflection, or were the result of other changes to the law, such as requiring the pledge of allegiance, whose constitutionality is not at issue in this litigation. Once this basic framework is understood, it becomes clear that the principle or primary effect of the 2003 version of Texas Education Code §25.082(d), insofar as it relates to the moment of silence portion of that law, is to advance certain types of religion.

By including extra legal guidance within Texas Education Code § 25.082(d) that a student may "pray", the state has given some religious people a benefit because they do not have to consult a lawyer to know that their children can pray during a moment of silence. The opposite of "pray" isn't "mediation" or "reflection". The exact opposite of "pray" would be "not pray". Texas Education Code § 25.082(d) does **not** say: "During the one-minute period, each student may, as the student chooses, reflect, pray, **not pray**, meditate…". Since the child's right to "not pray" isn't included in the list of permissible activities, the parents of atheist children would have to consult a lawyer in order to determine if their

children can choose to "not pray", much less "think about the logical reasons why god doesn't exist" or "the fact that evolution is correct while creationism isn't", during the moment of silence. An atheist child couldn't simply ask his teacher if he could "not pray" during the moment of silence because the average teacher isn't a lawyer, and would probably be violating Texas unauthorized practice of law statutes if he or she were to give an opinion on the matter.[17] Since the atheist child's parents probably aren't lawyers either, they would have to consult with an attorney, which costs money. The religious families, or at least the families whose religion doesn't require audible prayer, could simply consult the text of Texas Education Code §25.082(d), and see that their child is allowed to pray during the moment of silence. By amending Texas Education Code §25.082(d) to include the word "pray", the legislature, whether intentionally or otherwise, has advanced religion. It makes no difference that requiring atheists to spend money and consult a lawyer to interpret Texas Education Code §25.082(d) may be a relatively minor encroachment on the First Amendment because the

> "…breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.' Memorial and Remonstrance Against Religious Assessments, quoted in Everson, supra, at 65." (See School Dist. v. Schempp, 374 U.S. 203, 224 (1963).)

[17] See TEXAS GOVERNMENT CODE, SUBTITLE G. ATTORNEYS, CHAPTER 81. STATE BAR, § 81.101, DEFINITION; and § 81.102, STATE BAR MEMBERSHIP REQUIRED.

Appellants find the October 10, 2006 letter from Shirley J. Neeley[18] to be relevant in showing the effect of Texas Education Code §25.082(d) in advancing religion. Although Appellants agree with the District Court's 1-2-2008 Opinion[19] regarding the irrelevance of this letter for showing secular purpose under the Lemon test, the fact that the Texas Education Agency needed to promulgate the letter to all public school administrators shows that the State of Texas believed that the law was advancing religion. Of special note is the fact that the letter includes, in a footnote, the remark that: "Under no circumstances should a teacher begin the moment of silence with phrases such as 'let us pray', end the moment of silence with phrases such as 'amen', or solicit prayer requests before the moment of silence." (See Record on Appeal –USCA5 405.) This evidence should be seen as an admission by the State that the 2003 law had the effect of advancing religion in certain Texas school districts.

F. Texas Education Code, Section 25.082(d) Fosters An Excessive Government Entanglement with Religion

In addition to having a secular legislative purpose and having a principal or primary effect that neither advances nor inhibits religion, a statute must also not foster an excessive government entanglement with religion. (See Lemon v.

[18] See Record on Appeal –USCA5 404-405.
[19] See Record on Appeal –USCA5 599.

Kurtzman, 403 U.S. 602, 612-613 (1971).) Most "entanglement cases" involve government funding to religion, but that doesn't mean the entanglement prong of Lemon doesn't apply in non-funding cases:

> "'Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, Board of Education v. Allen, 392 U.S. 236, 243 [88 S.Ct. 1923, 1926, 20 L.Ed.2d 1060] (1968); finally, the statute must not foster 'an excessive government entanglement with religion.' Walz [v. Tax Comm'n, 397 U.S. 664, 674 [90 S.Ct. 1409, 1414, 25 L.Ed.2d 697] (1970)].'" (See Wallace v. Jaffree, 472 US 38, 55-56 (1985), quoting Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971).)

The Supreme Court has considered three factors in deciding whether excess government entanglement with religion exists:

> "…a consideration of three factors: (1) the character and purposes of the benefited institutions, (2) the nature of the aid provided, and (3) the resulting relationship between the State and the religious authority." (See Roemer v. Bd. of Public Works, 426 U.S. 736, 748 (1976).)

None of these factors appears to be directly relevant in cases that don't involve actual money given by government to religious institutions, however, the Court did go on to note that the impressionability of young children is relevant in making this determination: "The schooling [in Lemon v Kurtzman, 403 U.S. 602 (1971)] came at an impressionable age."(See Roemer v. Bd. of Public Works, 426 U.S. 736, 749 (1976).)

The U.S. Supreme Court has also been clear that a violation of the entanglement prong of Lemon occurs when the state must excessively involve itself in religious affairs in order to ensure that an establishment of religion **does not** occur with respect to a particular government program:

> "A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church." (See Lemon v. Kurtzman, 403 U.S. 602, 618-619 (1971).)

The text of the 2003 version of Texas Education Code §25.082(d), by requiring teachers to ensure that students act in a manner that doesn't distract other students, creates entanglement. This is revealed in the language of the 2003 version of Texas Education Code §25.082(d), especially when compared to the 1995 version. From May 30, 1995 to September 1, 2003, Texas Education Code, Section 25.082 said, in subsection (b):

> A school district may provide for a period of silence at the beginning of the first class of each school day during which a student may reflect or meditate. (Tex. Ed. Code §25.082(b), effective from May 30, 1995 to September 1, 2003.)

As of September 1, 2003, Texas Education Code, Section 25.082 was amended to say, in subsection (d):

> "The board of trustees of each school district shall provide for the observance of one minute of silence at each school in the district following the recitation of the pledges of allegiance to the United States and Texas flags under Subsection (b). During the one-minute period, each student may, as the student chooses, reflect, pray, meditate, or engage in any other silent activity that is not likely to interfere with or distract another student. Each teacher or other school employee in charge of students during that period shall ensure that each of those students remains silent and does not act in a manner that is likely to interfere with or distract another student."(Tex. Ed. Code § 25.082(d), underline added.)

The language was changed from a (relatively) clear instruction to teachers and school administrators in the 1995 version to the complex, almost Byzantine, 2003 version. The underlined portion of the 2003 version delegates legislative authority to teachers by placing the burden upon them of interpreting and implementing this statute, which means that teachers, as state-actors, must become involved in determining whether or not a particular activity undertaken by a child during the moment of silence is "…likely to interfere with or distract another student." The US Supreme Court regards the risk of entanglement between state and religion to be high where there is a delegation of legislative power. In Larkin v. Grendel's Den, 459 U.S. 116 (1982), a city delegated the power to "veto" liquor licenses in certain areas, if local churches opposed it. Although this case involved a delegation of legislative power to a non-state actor, whereas the present case involves delegation to a public school teacher, who is a state-actor, it still provides some relevant guidance on why delegations of legislative power to teachers could be problematic:

> "The churches' power under the statute is standardless, calling for no reasons, findings, or reasoned conclusions. That power may therefore be used by churches to promote goals beyond insulating the church from undesirable neighbors; it could be employed for explicitly religious goals, for example, favoring liquor licenses for members of that congregation or adherents of that faith." (See Larkin v. Grendel's Den, 459 U.S. 116, 125 (1982).)

Similarly, the legislative delegation to teachers, under the 2003 version of Texas Education Code § 25.082(d), to make the determination of whether a student is acting "…in a manner that is likely to interfere with or distract another student..." is also "…standardless, calling for no reasons, findings, or reasoned conclusions... *"* and the teacher's power may therefore be "…employed for explicitly religious goals..."(See Id.)

This standardless delegation of legislative power to public school teachers in the 2003 version of Texas Education Code § 25.082(d) has already led to problems. As Appellants pointed out in their Original Complaint, and as already admitted by Appellee-Defendant Carrollton Farmer's Branch ISD in its Original Answer[20], one of the Croft children informed his parents that his teacher once told her students that the moment of silence was a time for prayer when they wouldn't

[20] See Defendant-Appellee CFBISD's Original Answer, paragraph 9 (Record on Appeal – USCA5 27-28), see also CFBISD's responses to Plaintiff-Appellant's Discovery (Record on Appeal USCA5 552-560)

be quiet.[21] In other words, the 2003 version of Texas Education Code § 25.082(d) has, in fact, been "…employed for explicitly religious goals..."(See Id.)

The possibility of excess government entanglement with religion was also revealed as a concern by the bill's original sponsor in the Texas Senate, Jeff Wentworth. Senator Wentworth originally introduced the bill with language that would have required the student to remain seated during the moment of silence.

> "[Senator Wentworth] Remain seated and silent and does not act in a manner that's likely to interfere with or distract another student, yes."(See Record on Appeal –USCA5 190.)

The bill was subsequently amended through the legislative process so that the "remain seated" language was removed. (See Record on Appeal –USCA5 167.) As a result, the determination of what is and isn't permissible behavior under the 2003 Texas Education Code, Section 25.082 lies with public school teachers. Senator Wentworth seemed to recognize this delegation to public school teachers would be problematic because he initially resisted the removal of the "remain seated" language from the bill that would become the 2003 version of Texas Education Code, Section 25.082:

> "[Senator Wentworth] **I don't think that'd be upheld by the U.S. Supreme Court.** I think we would put at risk the upholding of this as a – as a constitutional act."(See Record on Appeal –USCA5 190, emphasis added.)

[21] See Plaintiff-Appellant's Original Complaint, paragraph 9 (Record on Appeal –USCA5 12)

Senator Wentworth also admitted that the delegation of legislative power to public school teachers would be arbitrary and standardless. During the Senate floor debate, after the "remain seated" language was removed from what would become the 2003 version of Texas Education Code, Section 25.082, he admitted that different teachers could make different decisions on whether students could take certain actions during the moment of silence:

> "[Senator Barrientos] What if a religion requires them to kneel or get on the floor? Will they [Senator Wentworth] Senator – [Senator Barrientos] -- be allowed to do that?[Senator Wentworth] I'm not -- I'm not sure that any of this is particularly pertinent, because I think **some teachers may say that if you wind up kneeling, you may distract other students, and some teachers may not allow you to do anything other than stand silently for 60 seconds**." (See Record on Appeal –USCA5 96-97, emphasis added.)

And, in another exchange with another state Senator:

> "[Senator West] Okay. Now, when we say pray, if that child customarily prays on his or her knees, they will be able to do that during that particular minute; is that correct? [Senator Wentworth] **I'm not sure that that is correct**, Senator. My -- My answer to Senator Barrientos was that if -- if that is not considered by the teacher distracting to other students, then that student would be allowed to do so." (See Record on Appeal –USCA5 103, emphasis added.)

G. Texas Education Code, Section 25.082(d) Discriminates Amongst Religious Sects

The trial court did not address the issue of religious discrimination in its MEMORANDUM OPINION AND ORDER dated on January 2, 2008 (see Record on Appeal –USCA5 584-619), although this issue was raised by Appellants (see

Record on Appeal –USCA5 266). As has been noted earlier in this brief, in addition to passing all three parts of the Lemon test, a challenged statute must not discriminate amongst religious sects. This is a recognition of the fact that if the Establishment clause stands for anything, it must stand for the principle that the government may not discriminate amongst religious groups, unless such discrimination is closely fitted to a compelling state purpose. (See Larson v. Valente, 456 U.S. 228, 244 (1981).) Texas Education Code § 25.082(d) does in fact discriminate amongst religious sects.

During the debate in the Texas State Senate regarding the bill that would become Texas Education Code, Section 25.082(d), the following exchange occurred between Senator Juan Hinojosa, who opposed the bill, and Senator Jeff Wentworth, the bill's sponsor:

> "[SENATOR HINOJOSA] Well, now, if I'm a Buddhist, can I pray and hum under your bill? [SENATOR WENTWORTH] If you're making noise, no, sir, you're not allowed to do that. [SENATOR HINOJOSA] Well, isn't that discrimination against certain religions? [SENATOR WENTWORTH] No, sir, it's not, because they still have that 60 seconds during which they can reflect or meditate or do anything else that's quiet. We're not -- That's a good example, Senator, of why this bill does not mandate prayer. [SENATOR HINOJOSA] Well, again, I disagree, because some religions -- some religions do -- do require noise, they do require humming, they do require some type of articulation of their faith. [SENATOR WENTWORTH] Fine. They can pray at home or someplace else, but they won't be doing it in the classroom." (See Record on Appeal –USCA5 87-88.)

At another point during legislative debate another exchange between the bill's sponsor Senator Jeff Wentworth and another state Senator occurred:

> "[Senator Gallegos] I guess my concern is if -- if I go to a corner, and let's say I'm in -- I'm in class, third, fourth grade, and I'm in class and I go to a corner, once I'm allowed under your presumption, under your bill that that teacher, that volunteer is going to allow me, as a third grade or fourth grader, to go to a corner and pray in silence, what if I have a rosary or what if I have a picture of Our Lady Guadalupe or what if I have – the Jewish faith puts the -- what is it? -- yarmulke on, and I decide to put that on? Now, let's go back to what you were talking about, presume. Now, I'm not there in that classroom. That teacher is, or that volunteer or that substitute or that aide or whoever. Are you guaranteeing me under this bill that either that teacher, that substitute, that aide, that volunteer is going to allow me to go to a corner, break out my -- Our Lady of Guadalupe or my rosary and then pray in silence, you know? Is that what you're guaranteeing me under this bill, under the word shall? Is that -- any one of those four is going to allow me to do that? [Senator Wentworth] No, sir, I'm not going to guarantee that. [Senator Gallegos] Well, then, I have a problem with that, because if I'm the only one that decides to go, under your bill – [Senator Wentworth] Well, I'd vote no, then, Senator Gallegos." (See Record on Appeal –USCA5 107-108.)
>
> "[Senator Janek]…I agree with you that the student whose prayer posture may require kneeling, facing a certain direction won't have that opportunity during your minute, but they will have that opportunity at other times of the day as long as it doesn't disrupt instructional or other activities at the school." (See. Record on Appeal –USCA5 207)

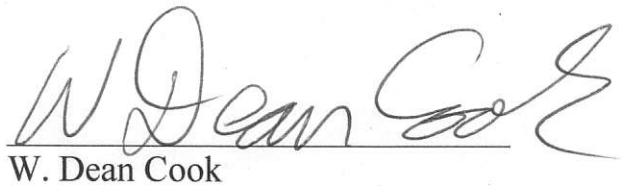
This evidence shows a total disregard of non-Christian and even non-Protestant religious sects in favor of Protestant sects in the legislative history of the challenged statute. This is precisely the sort of religious discrimination that the

Establishment clause seeks to avoid, and is an independent grounds, standing by itself, for Texas Education Code, Section 25.082(d) to be held unconstitutional.

VIII. Conclusion

Appellants request that this court render an opinion consistent with the arguments in Appellant's brief; reverse the District Court's grant of Governor Perry's motion for summary judgment in its MEMORANDUM OPINION AND ORDER dated on January 2, 2008 (see Record on Appeal –USCA5 584-619); reverse the District Court's denial of Croft's motion for summary judgment found in the same memorandum and order; reverse the District Court's 1-7-2007 Judgment dismissing Plaintiff's case with prejudice (see Record on Appeal-USCA5 620); remand this case to the district court for entry of an injunction consistent with this brief; and grant Appellant's all other relief in law and equity that this Court deems appropriate.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

This is to certify that on 5-27, 2008 Appellants have served the appeal brief and all associated documents by (check one) ✓ mail or _____ by third-party commercial carrier for delivery within 3 calendar days. The following attorneys of Appellee's have been served:

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Shannon Kristine Croft,	)	5th Circuit Court of Appeals
As Parents and Next Friend	)	
of their minor Children (Appellants)	)	
v.	)	
Rick Perry, Governor of the	)	08-10092
State of Texas (Appellee)	)	
and	)	
Carrollton-Farmers Branch	)	
Independent School District (Appellee)	)	
	)	
Appeal from the Northern	)	
District of Texas, Dallas Division	)	

Appellants' Brief : Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of FED. R. APP. P.32(a)(7)(B) because this brief contains **13,213** words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in size 14 (size 12 for footnotes), Times New Roman.

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