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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DAVID WALLACE CROFT	(CIVIL ACTION NUMBER
	(
Plaintiff,	(
	(3:06CV-00434-M
VERSUS	(
	(
GOVERNOR OF THE STATE OF TEXAS	(August 7, 2007
et al.	(
Defendant.	(

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE BARBARA M.G. LYNN
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

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13:21:21 1 P R O C E E D I N G S
2 August 7, 2007
3 MOTION HEARING

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4 (Judge enters the courtroom.)

5 (Court opening.)

6 THE COURT: Good afternoon. I'm terribly sorry for
7 keeping everyone. I am off my schedule, and I am sorry for
8 that.

9 All right. The Court has scheduled oral argument in the
10 case of Croft versus Rick Perry, Governor, and
11 Carrollton-Farmers Branch Independent School District.

12 I have appearing for the plaintiff Mr. Cook, and for the
13 defendant Mr. Cruz. I'm sorry, is it Ms. Dokupil? Did I
14 pronounce that correctly?

13:53:14 15 MS. DOKUPIL: Dokupil.

16 THE COURT: You can correct me.

17 MS. DOKUPIL: It's Dokupil.

18 THE COURT: Well, I know federal judges are deemed
19 correct, whatever errors they might make, at least at the
20 trial level. I'm willing to be corrected. Dokupil.

21 Okay. For the school district Mr. Brandt and Mr.
22 Skinner; is that correct?

23 MR. BRANDT: Yes.

24 THE COURT: Who will be arguing, please, for the
25 plaintiff? Mr. Cook obviously for the plaintiff.

13:53:41 1 For the governor?

2 MR. CRUZ: Your Honor, I will. Ted Cruz

3 THE COURT: Thank you. For the school district?

4 MR. BRANDT: I will, Tom Brandt.

5 THE COURT: All right. Thank you. I think that the
6 appropriate way for us to proceed is in connection with the
7 plaintiff going forward first. Everyone has moved for
8 judgment in connection with the matter, so everyone is of the
9 view that the Court should resolve the issue as a matter of
10 law based upon the evidence that is before the Court. In
11 light of that I think we will just begin with the plaintiff.

12 Let me just get everything I need within arm's reach,
13 Mr. Cook.

14 Okay. Thank you.

13:54:47 15 MR. COOK: Your Honor, I am Dean Cook. I represent
16 the plaintiffs.

17 I consider four cases to be especially relevant in this
18 matter. Wallace v. Jaffree, Lemon versus Kurtzman, Larson v.
19 Valente, and Edwards v. Aguillard. These are all U.S. Supreme
20 Court cases.

21 The relevant legal principal set forth by these cases are
22 as follows:

23 First, as set forth in Larson, the statute must not
24 prefer one religion over another. This is the no-sex
25 preference test. If a statute discriminates between religious

13:55:18 1 sects, this alone is enough to strike the law down as
2 unconstitutional unless the state can show a compelling state
3 interest.

4 Second, the statute must pass the three-part test set
5 forth in Lemon versus Kurtzman, the Lemon test.

6 First, the statute must have a sexual legislative
7 purposes. The statutes principal or primary effect must be
8 one that neither advances nor inhibits religion.

9 Third, it must not create an excessive entanglement
10 between government and religion.

11 The Supreme Court held an Alabama moment of silence
12 statute unconstitutional in Wallace v. Jaffree using the Lemon
13 test.

14 It is our contention that the proper interpretation of
13:55:55 15 Wallace is that moment of silence statute that mention the
16 word "pray" or "prayer" are facially unconstitutional, and can
17 be struck down as a -- for non-secular intent of the first
18 prong of Lemon.

19 THE COURT: Where does Wallace say something as
20 broad as that?

21 Obviously the Court concluded that the statute at issue,
22 which had with it some legislative history that was much more
23 pointed and direct and challenging of the authority of the
24 Court than what I have in this case is. So what is the basis
25 for your conclusion that the Wallace says, which has the

13:56:43 1 advantage of being a Supreme Court case that invalidated a
2 moment of silence statute. So in that regard I understand why
3 you embrace the case. But what in the case, other than the
4 holding, causes you to conclude that it stands for the
5 proposition that all moment of silence statutes which
6 expressly authorize prayer are unconstitutional?

7 MR. COOK: Several sources.

8 First of all, the actual text of the opinion. They
9 basically discuss the history of the Alabama statute where
10 they went from a moment of silence statute that did not
11 contain the word "prayer" to a moment of silence statute that
12 did contain the word "prayer." And that seemed to be -- or
13 that was determinative to the majority in deciding that there
14 was no secular intent for that statute.

13:57:37 15 Furthermore --

16 THE COURT: Well, just a minute. Let me interrupt
17 you for a minute.

18 Would you be of that -- are you of the view that the case
19 stands for that proposition when considering the statute
20 without the legislative history?

21 MR. COOK: Yes.

22 THE COURT: If we had in this case legislative
23 history such as that which existed in the Wallace case, then
24 the state would be having a much more difficult -- I'm not
25 saying whether it's difficult or not, but a much more

13:58:12 1 difficult burden here than they do without similar legislative
2 history.

3 Don't you think that the legislative history in Wallace
4 is key to the Court's decision?

5 MR. COOK: I think that the opinion is a little bit
6 ambiguous. I admit that. But if you look at the beginning --
7 I think that the -- they wouldn't have discussed the
8 legislative evolution of the statute if it hadn't been
9 relevant to their decision.

10 I also think if you look at Justice White's dissent in
11 Wallace, he actually says that as he reads the majority of the
12 opinion for the majority that they stand for the proposition
13 that moment of silence statutes that do not mention prayer --
14 or that do mention prayer are unconstitutional. That's right
13:59:00 15 at the beginning of Justice White's dissent.

16 Also, the U.S. Supreme Court in *Edwards v. Aguillard*,
17 which was one of those four important cases, I believe,
18 essentially interpreted Wallace and said that they rejected
19 the states purpose of the state, because Alabama already had a
20 moment of silence law that did not mention prayer.

21 THE COURT: All right. Go ahead, Counselor.

22 MR. COOK: If you look at the relevant principals
23 under the first principle I set forth the no-sex preference
24 test, the Texas moment of silence statute discriminates
25 against by some religions by allowing those that can pray

13:59:40 1 silently to do so, while prohibiting from those that must make
2 noise or engage in other activity which is regarded as
3 distracting by the teacher.

4 This discrimination against most non-Christian and
5 non-Protestant religions was recognized by the bill's sponsor
6 in the Texas Legislature, but the bill was passed anyway.

7 THE COURT: Well, I have read that history. I want
8 to make sure that you and I are clear on what it stands for.
9 If I have missed something in the appendix, you will point it
10 out to me, please.

11 Do I have any evidence that any religion, that members of
12 any religion -- let me phrase this differently.

13 Is there evidence that members of any particular religion
14 cannot pray silently?

14:00:30 15 MR. COOK: Yes, your Honor.

16 THE COURT: What's the evidence of that?

17 MR. COOK: In our first motion plaintiff's brief
18 setting forth their contentions of fact and law and argument
19 and authorities of plaintiff's motion for partial summary
20 judgment against defendant Rick Perry on page 23 we quote
21 where the statute sponsor in the Texas State Senate in
22 response to a question basically said that Buddhist or someone
23 else would have to pray at home or someplace else because they
24 won't be doing it in the classroom.

25 THE COURT: I don't think that's a fair summary of

14:01:00 1 what was said. Senator Hinojosa was saying, "If I'm a
2 Buddhist, can I pray and hum under your bill?"

3 And Senator Wentworth said, "If you are making noise,
4 you're not allowed to do that."

5 That's not evidence that a Buddhist cannot pray silently.
6 That's what I'm asking you.

7 You're asking me to assume, as you just said, that
8 certain non-Christian -- subscribers to non-Christian
9 religious faiths cannot pray silently. I don't know where I
10 have evidence of that.

11 MR. COOK: Do you mean in terms of evidence of
12 actual religions that don't pray silently?

13 THE COURT: Well, yes. Put another way, that they
14 cannot pray silently, that they do not pray silently.

14:01:52 15 I can't take judicial notice of that. This exchange
16 between Senator Hinojosa and Wentworth doesn't establish that.

17 I don't know the -- I don't know the facts with respect
18 to whether a Buddhist can pray silently, or does pray
19 silently. I don't have those facts before me in the record.

20 MR. COOK: Well, your Honor, I thought the
21 legislative history with Senator Wentworth saying that would
22 be sufficient.

23 I mean, we all know that there are religions where people
24 don't pray silently, and need to make noise in order to pray.

25 THE COURT: Well, you may know that. I don't. I

14:02:31 1 don't. I'm not going to take judicial of something that I
2 can't. I'm not going to take -- I'm not going to assume facts
3 that I don't know.

4 If you are asking me am I familiar with the fact that
5 members of certain faiths accompany prayers with audible
6 sounds, the answer is, yes, I have observed that.

7 If you're asking me to assume that that is the way
8 Buddhist always pray, and audible sounds are necessary for
9 them to pray, I don't know that.

10 MR. COOK: Your Honor, I think we would have to
11 assume that, because otherwise you are saying this is a valid
12 religion, or this is not a valid religion. It would be an
13 imposition by the state to assume that a particular -- that a
14 religious group does or doesn't do something. That is a
14:03:21 15 matter of conscious. An individual could have a religion that
16 would require noise.

17 THE COURT: Well, I don't know if that theoretical
18 prospect gives you standing to complain about the statute.
19 Does it?

20 MR. COOK: I think that -- well, the -- well, we do
21 have standing, because the plaintiff's children are in public
22 schools in Texas. I mean --

23 THE COURT: Well, I'm not asking about global
24 standing.

25 You're making an argument now that the statute

14:03:51 1 discriminates against members of certain faiths who -- I think
2 you're arguing cannot pray silently. If your clients are not
3 members of such faith, do they have standing to complain about
4 that?

5 MR. COOK: That's not my understanding of standing,
6 your Honor. My understanding is that it's like you said, it's
7 just a global issue of whether the plaintiff is subjected to
8 the law and is harmed by the law.

9 THE COURT: Well, your client wouldn't be any more
10 or less harmed by the law if sound were associated with this.
11 Of course, it wouldn't be a moment of silence. It would be
12 calling it something else.

13 I'm going to ignore that obvious issue, and say that if
14 the statute permitted near silence audible sounds for those
14:05:02 15 who needed to accompany their prayers with that, your client
16 wouldn't be any more or less damaged by that.

17 So I'm raising a question of whether your client has
18 standing to raise the issue.

19 MR. COOK: Like I said, that's not my understanding
20 of standing, so I didn't really research it.

21 THE COURT: All right. Thank you.

22 MR. COOK: At any rate, that's the first test.

23 Then we move to the Lemon test, under the first prong of
24 Lemon, and as I have mentioned before, inclusion under the no
25 secular legislative purpose test, the first prong, inclusion

14:05:43 1 of the word "pray" among the list of activities a student may
2 undertake makes the -- causes the statute to fail under
3 Wallace v. Jaffree in accordance with our interpretation.

4 The governor has set forth several alleged secular
5 justifications under the first prong. The first, and this is
6 the most common, is the accommodation of religion issue. This
7 cannot be a valid secular purpose in this context, because
8 there was no law of general application preventing school
9 children from praying silently in the first place.

10 In fact, if you look at Justice O'Connor's concurrence in
11 Wallace, she rejected this accommodation argument.

12 The second secular legislative purpose of encouraging
13 thoughtful contemplation of patriotism would have been served
14 by the Texas Education Code prior to the current one that did

14:06:32 15 not mention prayer or pray. So these must be sham
16 justifications.

17 THE COURT: Let me come back to that.

18 My recollection is that the statute in its prior
19 iteration didn't say anything about the pledge.

20 MR. COOK: Right. But the pledge isn't the issue
21 here. We're not challenging the pledge.

22 THE COURT: Well, but the inclusion of the pledge
23 relates to the subject of patriotism.

24 MR. COOK: Right.

25 THE COURT: The subject of the pledge was not in the

14:07:07 1 former version of the statute.

2 So I'm not following your argument about why it is a sham
3 to argue that it serves a patriotic purpose when the pledge --
4 I understand you have challenged the pledge effective today in
5 another court. That issue is not before me, so I'm not
6 addressing that question. I'm going to assume that away for
7 the sake of discussion.

8 But the inclusion of a reference to the pledge supports
9 the argument that there is secular legislative purpose in the
10 form of patriotism, doesn't it?

11 MR. COOK: Inclusion of the pledge, for the sake of
12 argument, the pledge would encourage patriotism, but the issue
13 here is the language in the statute concerning the moment of
14 silence.

14:07:57 15 So let's say they had just passed a statute that said
16 students are going to say the pledge, that would be fine, but
17 that's not what they did. They included -- I believe they did
18 in that legislative session have a law saying students are
19 going to say the pledge, but also included this language about
20 the moment of silence and then including extra language
21 regarding that.

22 So to me it's a bit disingenuous to say that the moment
23 of silence is for the purpose of patriotism. It's kind of
24 hiding -- in that sense it's like they are hiding the moment
25 of silence behind the pledge and patriotism.

14:08:39 1 THE COURT: Well, if the pledge has a patriotic
2 purpose to it, and I think it's fair to conclude that it does,
3 it isn't a long leap to attribute to secular legislative
4 purpose to a moment of silence than following immediately
5 thereafter.

6 I mean, I think it's reasonable to assume that one can
7 think about, reflect upon, meditate over something that just
8 happened.

9 MR. COOK: Right. But the issue here is that they
10 already had a moment of silence statute, and they changed it
11 in 2003 to explicitly include the word "pray."

12 THE COURT: But that's not the only change they
13 made, and I'm not going to assume that's the only change that
14 they made. There were a number of changes, including
14:09:29 15 specifically requiring it, and requiring it at a time
16 immediately following the taking of the pledge.

17 MR. COOK: If you look at Wallace, the opinion
18 there, this was a lot of this -- there was the same kind of
19 analysis that the majority went through regarding the
20 operative language and the changes in the operative language
21 there. The Court essentially said that the inclusion of the
22 word "pray," is the issue, and that shows the non-secular
23 purpose of the legislature.

24 I don't know if they specifically included the pledge in
25 the Alabama one, but I know they included some other language

14:10:11 1 about other things.

2 THE COURT: I'm just going to read you one reference
3 in Wallace. This is at 472 U.S. at 59.

4 The legislative intent to return prayer to the public
5 schools, which was absolutely clear from the legislative
6 history, much more clearer here. I think even you would
7 concede that. Your argument is going to be it's clear here
8 too, but they had much more compelling evidence of that than
9 we have here.

10 MR. COOK: Because the State of Alabama essentially
11 stipulated that that was their purpose.

12 THE COURT: Right. The State of Texas does not.
13 The legislative intent to return prayer to public schools is,
14 of course, quite different from merely protecting every
14:11:07 15 student's right to engage in voluntary prayer during an
16 appropriate moment of silence during the school day.

17 Now, they do say the old statute protected that, but
18 the -- I keep coming back to the issue of what the legislative
19 history was in Alabama, because it was quite clear that the
20 Alabama legislature was attempting to protect the right of
21 prayer in schools. That's what the legislative history
22 revealed.

23 MR. COOK: Are you talking about the Alabama
24 legislature?

25 THE COURT: I'm sorry. If I said Texas, I misspoke.

14:11:47 1 The Alabama legislature.

2 MR. COOK: That their intent was to protect the
3 right to pray?

4 THE COURT: Yes.

5 MR. COOK: My -- well, my impression of Wallace was
6 essentially the sponsor of the bill said that he wanted to
7 return voluntary prayer to the schools.

8 THE COURT: Well, that's another way to put it. I
9 don't see the distinction between the way you put it, and the
10 way I did, but I'll take your phrasing of it.

11 That legislative history revealing that intention, if
12 present here, is in a much more ambiguous state.

13 MR. COOK: Well, I agree that the -- because the
14 State of Alabama essentially stipulated what their intent was,
14:12:30 15 that it is more ambiguous in this case, but I think if you
16 look at the legislative history that we have produced in the
17 appendix to our first brief, and I have extensively quoted the
18 intent to the non-secular intent of the statute was clear.

19 THE COURT: Okay.

20 MR. COOK: I don't even -- quite frankly, I don't
21 even think that that's necessary. If you look at simply the
22 text of the statute that the inclusion of religious terms
23 facially is going to make it fail the first prong of Lemon.

24 THE COURT: Well, for me to buy that argument I have
25 to ignore what the Eleventh Circuit did and the Fourth Circuit

14:13:14 1 did, both of which you think is wrong.

2 MR. COOK: Well, I wrote on those in my briefs, your
3 Honor. If you want me to, I can kind of go over it.

4 THE COURT: Well, you can if you like. Those -- I
5 mean, to me -- I don't know if this is pronounced Boned
6 (Phonetic) or Boned, but the Eleventh Circuit case, I'll call
7 it Boned and the Fourth Circuit case of Brown and the Supreme
8 Court case of Wallace, those are the key cases on the
9 particular subject. I'm not saying -- Lemon obviously is
10 critical, and I know you believe Larson and Aguillard are also
11 very important here, and I'm not suggesting they're not, but
12 those are the cases on the same subject.

13 MR. COOK: There is one other in the Third Circuit,
14 May v. Cooperman.

14:14:02 15 THE COURT: Yes.

16 MR. COOK: I actually think if you are going to be
17 looking at other circuits you should look at May v. Cooperman,
18 because it's the closest to what we believe.

19 THE COURT: Well, I'm going to look at other
20 circuits, because I don't have anything from the
21 Fifth Circuit.

22 MR. COOK: Right.

23 THE COURT: I don't think Wallace by itself is
24 dispositive, so I'm going to look at Boned, Brown, and May.

25 MR. COOK: Okay. The other purpose put forward by

14:14:29 1 Governor Perry was the thoughtful contemplation. It's kind of
2 the same thing as the patriotism. That was already served by
3 the pre-existing moment of silence statute, so I don't see how
4 that can be a justification for the change that they made to
5 the statute.

6 Under the second effects prong of Lemon, I believe that
7 the Texas moment of silence statute both advances some
8 religions and inhibits others. We have kind of already gone
9 over this with regard to the discrimination issue.

10 The statute sponsored admitted that students that have to
11 make noise or movement to pray will have to do so at home or
12 some place else, because they won't be doing it in the
13 classroom.

14 I would also argue that inclusion the word "pray" in the
14:15:13 15 moment of silence statute gives religious parents and students
16 extra legal guidance for what they can do under the law.

17 It doesn't say in there that non-religious students may
18 not pray in the text of the statute. So this would tend to
19 cause non-religious parents to seek out the assistance and
20 legal advice of an attorney, whereas religious parents can
21 simply look at the statute and know that their children can
22 pray, and this has the effect of advancing religion under the
23 second prong.

24 THE COURT: Could the students pray under the old
25 statute?

14:15:47 1 MR. COOK: Sure.

2 THE COURT: So --

3 MR. COOK: Students could pray even before the old

4 statute. They always had the right to silently pray in

5 school.

6 THE COURT: So the statute is now saying that they

7 can do what they were able to do before?

8 MR. COOK: Even before the first moment of silence

9 statute.

10 THE COURT: They just used words that had to be

11 interpreted by someone to authorize what they're now told they

12 can do silently now, and that's what creates the problem?

13 Your position is, I think, Mr. Cook, that if I had

14 nothing but a brand new statute -- I'm going to press you on

14:16:27 15 this, because I want to know what the boundaries are. Assume

16 I had a brand new statute. Assume Texas had nothing before.

17 Assume I had no legislative history at all, and the statute

18 said you could have a mandatory moment of silence during which

19 time you could meditate, contemplate, think, and pray --

20 and/or pray. Would that be unconstitutional?

21 MR. COOK: I think it would be unconstitutional

22 specifically under -- specifically for the reason I just said.

23 It's giving religious students and parents extra legal

24 guidance from the legislature about what they can do while

25 non-religious students and parents do not have that same

14:17:04 1 benefit of guidance from the legislature about what they can
2 do.

3 THE COURT: Why does that follow? It doesn't just
4 say pray. It says -- in the example I'm giving you, you can
5 pray, think, contemplate, reflect, meditate, or pray.

6 MR. COOK: If it said not pray in addition to those,
7 perhaps it would.

8 THE COURT: Well, the legislative construction,
9 rules of construction, statutory construction would say that
10 those terms all have a different meaning. So rules of
11 statutory construction would say if a statute says you can
12 pray or A, B, C, D, E, that A, B, C, D, E are not pray.
13 Something other than pray.

14 MR. COOK: Right, your Honor. But it's still
14:17:55 15 requiring a certain amount of logical thinking and legal
16 thinking that I don't know that the average student -- or the
17 average parent, much less the average student is going to
18 recognize.

19 If they are getting -- if the religious parents and
20 students are getting a benefit that the non-religious students
21 are not, even if it admittedly is a small benefit, I think
22 that causes it to fail under the second prong of Lemon.

23 THE COURT: But your view in the example that I gave
24 you, it is not clear that a person who is not praying is not
25 violating the terms of a moment of silence? If the statute

14:18:37 1 were to say think, meditate, contemplate -- I don't remember
2 the other example, I'll stick with those, think, meditate,
3 contemplate, reflect, or pray, that it's not clear that they
4 don't have to pray?

5 MR. COOK: No, your Honor. In fact, I would say
6 it's not, because both counsel for CFBISD and Governor Perry,
7 when they spoke of meditation, spoke of secular meditation, or
8 non-religious meditation in their briefs, if they felt the
9 need to qualify meditation in that way, and they are
10 sophisticated lawyers, I don't think that a child or a
11 non-lawyer parent is going to be able to grasp that.

12 THE COURT: Well, I don't think we need to go too
13 far down this road, but meditation and prayer are not
14 necessarily the same thing. I could be thinking about the
14:19:30 15 meaning of life, and whether there is a higher being or not
16 without praying. So that distinction is not illogical, that
17 there is meditative -- religious meditation and non-religious
18 meditation, neither of which are prayer. Prayer has a
19 different connotation to it.

20 MR. COOK: Right, your Honor. But to me -- I admit
21 that it's a small benefit, but it's still a benefit that's
22 being conferred to religious people.

23 THE COURT: All right.

24 MR. COOK: Under the third entanglement prong of
25 Lemon I think the statute causes an excessive entanglement

14:20:08 1 between government and religion by delegating to teachers what
2 sorts of prayer will be regarded as likely to interfere with
3 or distract another student. This is the later part of the
4 statute. Originally the 2003 bill said that students
5 would remain seated during the moment of silence. The bill
6 was then amended into its present form, and the bill sponsor,
7 Jeff Wentworth, initially said he didn't think the amended
8 statute was going to be held constitutional.

9 I think that this inclusion of -- or cause of having
10 teachers look at what a student is doing during this moment of
11 silence and deciding whether it is distracting or not is
12 exactly the kind of entanglement that is the concern, and is
13 why we have the entanglement prong of Lemon.

14 As I mentioned already, I think the facts of this case
14:20:59 15 and Wallace are pretty close. I mean, in both in this case
16 and in Wallace you had a moment of silence statute that did
17 not include pray or prayer, and then later on you had the
18 legislature coming back and including that term in its
19 subsequent statute. I think that on the idea that a similar
20 case should be decided similarly, this case should be decided
21 the same way as Wallace.

22 Finally, I would like to note that the legislative
23 history that I have produced in my appendix, and that I have
24 quoted extensively in my brief, I think shows that even if you
25 want to assume that it's not enough just from the text of the

14:21:39 1 statute to hold the Texas moment of silence statute
2 unconstitutional, I think the legislative history makes it
3 clear that there was a non-secular purpose when the Texas
4 legislature enacted the statute in 2003. The subsequent
5 moment of silence statute.

6 I'll leave it to you to read over those.

7 Did you want -- I can also kind of go over the Fourth
8 Circuit and the Eleventh Circuit opinions.

9 THE COURT: Sure. You may.

10 Give me just a second.

11 Okay. Thank you.

12 MR. COOK: The Fourth Circuit's reasoning in Brown
13 v. Gilmore, which is probably the most recent Circuit Court to
14 decide this moment of silence issue, I think relied on two
14:23:13 15 cases that just simply didn't say what they said it said. I
16 think they took them out of context.

17 The first is Brown v. Texas Monthly v. Bullock, which is
18 cited by the Fourth Circuit for justification. This case
19 involved an exemption from Texas sales and use taxes for
20 religious magazines. The Supreme Court said this exemption
21 violated the establishment clause because it lacked a secular
22 purpose.

23 The Fourth Circuit in Brown quoted the majority in Texas
24 Monthly out of context to justify its decision. In reality
25 the Supreme Court in Texas Monthly said that tax exemptions

14:23:46 1 for charities, whether secular or religious, were
2 constitutional because charity is a secular purpose, and that
3 thereby distinguished an earlier case in Texas Monthly.

4 The second of the Fourth Circuit relied on Justice
5 O'Connor's concurrence in Wallace v. Jaffree. As I have
6 already noted, she says in there that accommodation of
7 religion is not a justification for a moment of silence
8 statute.

9 The Eleventh Circuit, Don v. Quinette (Phonetic), the
10 Court had a misplaced reliance on Board of Education -- the
11 Board of Education of West Side Community Schools v. Mergens.
12 Mergens involved the Federal Equal Access Act, which says that
13 public schools receiving federal money could not discriminate
14 against religious groups merely meeting on school property if
14:24:36 15 other secular groups were allowed to do.

16 But this is different from a moment of silence statute
17 because it does not coerce school students to do anything. It
18 merely says that schools must treat all student groups the
19 same in terms of access to rooms and facilities on campus
20 regardless of their philosophical or political beliefs.

21 That's the substance of my argument, your Honor.

22 THE COURT: Thank you, Mr. Cook.

23 Mr. Cruz, before you begin I want to address with you
24 what I regard as the most troublesome aspect of the
25 defendant's position.

14:25:30 1 The timing of this letter providing the secular purposes
2 is troublesome to me. This comes right after the plaintiff's
3 file their motion for summary judgment.

4 One of the things that the Court has to determine, and it
5 is infrequent in constitutional cases such as this one for the
6 Court -- for a court to determine that a stated secular
7 legislative purpose is a sham. I'm not suggesting that I have
8 reached any conclusion about that at all. But the timing of
9 this explanation is troublesome, and the legislative history,
10 although in my view, very dissimilar from the legislative in
11 the Wallace, doesn't cry out either with a compelling secular
12 explanation for the amendment.

13 MR. CRUZ: Your Honor, with respect to the letter
14 you're referring to that had issued from the Commissioner of
14:26:43 15 Education in October of 2006, that was issued at the beginning
16 of the 2006 school year, or shortly thereafter. It was issued
17 as a result of conversations between the Commissioner of
18 Education and members of the legislature that wanted to ensure
19 the school districts were aware of the legislation and were
20 complying with it.

21 Given that, the Commissioner drafted this in consultation
22 with the Attorneys General's Office. The Commissioner wanted
23 to make every effort to provide guidance to ensure that the
24 way the statute was implemented was consistent with the
25 constitutional parameters the U.S. Supreme Court has laid out.

14:27:21 1 The Court has said repeatedly in looking to establish in
2 a clause challenges, that the way a statute is implemented,
3 the way it is actually applied, is relevant for assessing the
4 overall context of whether it violates the establishment
5 clause.

6 THE COURT: How was it applied for the three years
7 before that?

8 MR. CRUZ: We have no evidence one way or the other
9 on that.

10 THE COURT: Are you asking me to assume that the
11 timing of this letter is coincidental with respect to the
12 activities in this litigation?

13 MR. CRUZ: I won't disagree that it was -- it
14 occurred at the same time as this litigation, but this
14:28:02 15 litigation was commenced immediately after the statute was
16 passed.

17 The conversations that led to this letter --

18 THE COURT: Well, hold on a moment. I don't believe
19 that statement is correct.

20 Am I remembering wrong when the statute was passed?

21 MR. CRUZ: 2003.

22 THE COURT: This lawsuit was filed in 2006.

23 MR. CRUZ: Okay. I don't know have the date of the
24 complaint in front of me.

25 THE COURT: Well, 2006 is a material distinction.

14:28:26 1 The statute was rocking along for three years, and the
2 expressed concern about how it would be implemented and
3 guidance that would be given to school districts was
4 apparently not on the radar for three years until, eureka,
5 this case gets filed, plaintiff files a motion for summary
6 judgment, and in October, which as far as I know is about two
7 months into the school year, all the sudden there is a letter
8 from the Commissioner trying to get a secular legislative
9 purpose stated right after motion for summary judgment is
10 filed.

11 I'm not a cynical person by nature, but that timing is
12 suspect.

13 MR. CRUZ: What led to it was a combination of two
14 things.

14:29:16 15 One, a conversation between the bill sponsors in the
16 legislature, and the Commission of the Texas Education Agency
17 asking the TEA to send a letter to the districts to ensure
18 that they're complying with the statute. That occurred
19 separately from this litigation.

20 In addition, as the Attorney General's Office was
21 examining both the Brown and the Boned case there was guidance
22 in both of those cases in terms of how to apply and implement
23 the statute constitutionally.

24 So it was the judgment of the Attorney General's Office
25 that if TEA was going to send a communication, that it was an

14:29:52 1 opportunity to ensure that the way it was implemented remained
2 constitutional.

3 I would point out we don't suggest that the guidelines
4 are independent evidence of the legislative purpose. Rather
5 what we suggest is two-fold.

6 One, they reflect and reiterate the legislative purpose
7 that was already manifest.

8 And two, they serve as safeguards to make sure that the
9 way that the statute is implemented is in fact consistent with
10 the Supreme Court's constitutional guidance.

11 The Court has indicated in establishment clause cases
12 that the actual implementation is relevant. It's not
13 simply an inquiry, but the implementation is relevant.

14 So there was a very careful endeavor in drafting these to
14:30:43 15 be consistent with both the letter and the spirit of the U.S.
16 Supreme Court's guidance.

17 THE COURT: Well, there is nothing that anybody is
18 arguing about how the statute is implemented that would assist
19 the Court in the inquiry I have to make here. If I have
20 missed it, you will point me to it, please.

21 But because it's a moment of silence, because the
22 teachers can't read the minds of the students, it seems
23 apparent that no one can prove whether students are praying or
24 not praying. And the as applied challenge, which I think was
25 asserted only against the school district, as I recall, that I

14:31:39 1 knocked out because there wasn't any evidence, so that claim
2 is gone.

3 I think I understand what you're saying, but the nature
4 of a moment of silence makes the argument about how the
5 statute is implemented less relevant than it might be in
6 another context, because what implementation issues might play
7 a part in my deciding this case.

8 MR. CRUZ: Well, the plaintiffs are arguing under
9 the second prong of Lemon that there is an unconstitutional
10 effect.

11 The way that the statute is administered, and in
12 particular the guidelines make clear that teachers in
13 conducting the moment of silence should neither encourage nor
14 discourage prayer. That they should do nothing to favor one
14:32:25 15 side or the other, but they should be absolutely neutral.

16 That, we would suggest, is quite relevant to the question
17 particularly of the facial challenge of the unconstitutional
18 fact. How it is in fact being implemented, and those
19 guidelines serve as an important prophylactic.

20 THE COURT: Okay.

21 MR. CRUZ: The central issue before this court, we
22 would submit, is precisely how the Court characterized it
23 earlier. It is a question whether the facts and circumstances
24 surrounding the Texas statute are more like the facts and
25 circumstances of the Alabama statute that was at issue in

14:33:02 1 Wallace, or are more like the facts and circumstances of Boned
2 and Brown. By any measure, this case is more like Brown and
3 Boned than it is like Wallace.

4 THE COURT: Mr. Cruz, let me interrupt you for just
5 a minute.

6 Wallace is the case that the plaintiffs most embrace,
7 because the result is the result they want here.

8 Boned and Brown are your best cases because the result is
9 what you want here.

10 Wallace is different from this case because you have --
11 I'm going to use the term that is not a legal term, but an
12 in-your-face kind of legislative history. Is that fair?

13 MR. CRUZ: I think that's precisely right.

14 THE COURT: We don't really have that here. But in
14:33:56 15 Boned and Brown we have a better legislative history than we
16 have here explaining the purpose of the statute.

17 MR. CRUZ: I'm not sure I would agree with that
18 second characterization.

19 THE COURT: Okay.

20 MR. CRUZ: If I may, I would like to focus on
21 Wallace for a moment, and then I'm glad to turn to the
22 specific facts of Texas.

23 THE COURT: Okay.

24 MR. CRUZ: But I think your Honor put your finger
25 precisely on what Wallace was about. The other key purpose

14:34:25 1 case recently is or McCreary County. That's the most recent
2 significant purpose case. I think both of them have something
3 in common. Both of them dealt with governmental units that
4 were in open defiance of the Court.

5 I think if you look at what was going on in those cases,
6 that's what underlay the Court's conclusion and reasoning.

7 Focusing specifically on Wallace, I think there are seven
8 unique facts of Wallace.

9 First of all, there was an explicit statement in the
10 legislative history, quote, apparently without dissent, so no
11 one took issue with it, that the statute was, quote, an effort
12 to return voluntary prayer to the public schools. That is a
13 remarkable statement of legislative intent.

14 Secondly, the religious purpose was expressly confirmed
14:35:12 15 by direct testimony of the bill sponsor who said, quote, no, I
16 did not have any other purpose in mind. So we affirmatively
17 disclaim any secular purpose.

18 Third, the religious intent was explicitly conceded by
19 the governor, Fob James, in his answer where he characterized
20 it as, quote, intent to have prayer as part of the daily
21 classroom activity.

22 Fourth, the state in litigating the case, quote, did not
23 present evidence of any secular purpose. All of these build
24 up to a remarkable facts and circumstances governing purpose.

25 Fifth, the legislature also passed as part of the package

14:35:58 1 of statutes that the Court was looking at a blatantly
2 unconstitutional statute that required teachers to lead
3 audible prayer that the legislature then sat down and wrote
4 and it provided "Almighty God, the creator and supreme judge
5 of the world," and that was in direct defiance of the Supreme
6 Court.

7 Sixth, the District Court found as a factual matter that
8 each of the minor plaintiffs' teachers had led the class in
9 prayer activities even after being informed of their
10 objections, and that they were ostracized for not
11 participating in that.

12 So there was statewide defiance and lawlessness in the
13 face of U.S. Supreme Court precedent.

14 Seventh, the District Court in that case made a
14:36:51 15 remarkable holding that the establishment clause did not apply
16 to the states, and that Alabama could constitutionally
17 establish its own religion. And indeed the District Court
18 concluded, quote, the United States Supreme Court has erred.

19 Given that context --

20 THE COURT: I'm not going to be doing that.

21 MR. CRUZ: I have no doubt of that.

22 Given that context, I think the result in Wallace is
23 unsurprising. I think the result in Wallace was driven by the
24 same thing that the result in McCreary County was.

25 In McCreary County the counties there were in open

14:37:31 1 defiance declaring publicly that Jesus Christ was the Prince
2 of Ethics, declaring publicly that the Ten Commandments were
3 the foundation for the law in that state, and were the
4 foundation -- the moral foundation for the Declaration of
5 Independence.

6 That open defiance, much along the lines of the situation
7 with then Chief Justice Roy Moore, which I think similarly had
8 the Supreme Court considered that case, it would equally have
9 found the purpose in that case to be problematic.

10 We have none of that defiance in this case. In contrast
11 to Wallace in this case we have three secular purposes, and
12 I'll elaborate on those shortly.

13 We have quite contemplation in preparation for the day of
14 school, and in terms of settling and avoiding violence, we
14:38:24 15 have promoting patriotism, and we have protecting religious
16 liberties.

17 THE COURT: Now, are you drawing these from the
18 letter?

19 MR. CRUZ: No. The letter recites these, but the
20 letter draws them from the text of the statute, and from the
21 legislative history. So I'm not suggesting the letter is what
22 creates those purposes.

23 THE COURT: What was the second justification that
24 you gave me?

25 MR. CRUZ: Promoting patriotism.

14:38:56 1 THE COURT: Where are these secular legislative
2 purposes apparent, either on the face of the statute, or in
3 the legislative history?

4 Before you answer that, Mr. Cruz, let me make sure I am
5 following you.

6 Are you directing these secular legislative purposes to
7 the statute in its entirety as amended, or to the particular
8 portion of the statute that relates to what occurs -- what the
9 options are to occur during the moment of silence?

10 MR. CRUZ: In its entirety. Although I intend to
11 address the plaintiff's arguments focusing in particular on
12 the word "pray," because I think very quickly their case boils
13 down to that.

14 THE COURT: So if I had no letter from the
14:39:45 15 Commissioner, these would be the secular legislative purposes
16 that you are arguing. Your argument is that these are not
17 post hoc justifications that you are giving me, but that they
18 are drawn from the circumstances that occurred at the time the
19 statute was passed?

20 MR. CRUZ: That's correct.

21 THE COURT: Is that required?

22 In other words, let's assume I had little legislative
23 history. I don't have much actually, but assume I had none.
24 Could you justify the statute with secular legislative
25 purposes that you as a well-skilled advocate came up with?

14:40:32 1 MR. CRUZ: Yes. Although the case law is not
2 transparently clear on that.

3 The Court has said that purpose may be inferred from
4 text, and from the legislative history. Meaning not just the
5 statements on the floor and that sort of thing, but the
6 legislative history in terms of what led to the introduction
7 of the statute.

8 So based on the text I think you could derive these
9 purposes, but I think the discussion of the legislative
10 history we have actually underscores them amply.

11 I would note that the Supreme Court has also been quite
12 clear that the state's asserted purpose should be given
13 deference unless they are demonstrated to be a sham. But it's
14 the plaintiff's burden to demonstrate that they are a sham.

14:41:18 15 They have done -- other than assertion, they have done
16 very little to demonstrate that these motives, these purposes
17 were a sham in this case.

18 The legislative history is clear that the idea for this
19 statute came to Senator Jeff Wentworth when he read about the
20 Brown case. He's an attorney, he practices, he read about the
21 Brown case, and the Virginia statute had been upheld, that it
22 had gone to the Supreme Court, and the Supreme Court had
23 denied cert. Based on that decision in 2001 in the next
24 legislative session he introduced this bill.

25 He in a rather extended colloquy said he was doing this

14:41:57 1 because the Fourth Circuit had upheld it, and it was his
2 intent -- and he explained it in some considerable detail, it
3 was not his intent to defy the Court in any means. He wanted
4 to do what was permissible and acceptable, and given the Brown
5 case he copied the language very closely from the Virginia
6 statutes that was upheld in Brown.

7 Patriotism, the second purpose -- well, the first purpose
8 of quiet contemplation, both Senator Wentworth and
9 Representative Branich (Phonetic) explained in considerable
10 detail that in an age where students are exposed to images of
11 violence, that a time of quiet contemplation, an air of
12 solemnity, beginning the day with a full minute of silence,
13 which is one of the changes the statute did, was prescribing
14 that it must be 60 seconds, that that --

14:42:48 15 THE COURT: Well, that -- and that it must be given.

16 MR. CRUZ: Yes. Making it mandatory was one of the
17 changes, and prescribing that it was a minute rather than a
18 moment, those are two of the changes in the statute.

19 THE COURT: But this purpose does not address the
20 question of the addition to the word "prayer."

21 MR. CRUZ: It does not, but I'm speaking of the
22 statute as a whole right now, because the way the Court has
23 looked at these cases, it's looked at the statute as a whole
24 and what's happening.

25 THE COURT: But what -- Mr. Cruz, excuse me -- you

14:43:18 1 probably did a little bit of intelligence work on me, and were
2 told that I would interrupt you with abandon.

3 MR. CRUZ: I welcome the questions, your Honor.

4 THE COURT: My understanding, though, is that when I
5 have a circumstance such as this, and this is why there is a
6 little bit in each case that is relevant here, when I have a
7 situation where a statute is amended, I have to try to
8 unbundle the secular purposes that were already extant with
9 the former statute. And true, the former statute did not
10 mandate a period of silence; and two, did not provide for a
11 minimum period of time, but the statute provided for -- to the
12 extent it was implemented -- a period of quiet contemplation.
13 That's already in the old version of the statute.

14 MR. CRUZ: Correct.

14:44:21 15 THE COURT: When you talk to me about considering
16 the statute in its entirety, I understand your point, but I
17 have to be mindful of the fact that I had a statute that
18 served many of these purposes and changes are made to it and I
19 have to look at those changes to see if the secular
20 legislative purpose was already there, or whether it is -- I
21 wouldn't call it a sham, but whether it is a reasonable
22 justification for the change.

23 MR. CRUZ: Right. The Court has said when you look
24 at a statute, you look at the entirety of the statute. You
25 don't simply excise out. What the plaintiffs have attempted

14:45:02 1 to do, when they shift from their global argument that all
2 moments of silence are unconstitutional, they fall back to
3 their second argument, which is really their principal
4 contention, which is that adding the word "pray" is
5 unconstitutional, demonstrates an unconstitutional purpose.

6 With respect to that we would have six responses.

7 The first is that that is an improper method of statutory
8 analysis, to disaggregate one word from the rest of the
9 statute.

10 In Wallace against Jaffree that was the only change that
11 was made, was the addition of the phrase "or voluntary
12 prayer." There was no other change made that was relevant,
13 and that's what the Court concluded.

14 Under that same level of analysis, that one desegregates
14:45:51 15 the smallest piece that is the most religious, and analyze
16 just that, for example, the Van Orden versus Perry case, which
17 the state litigated successfully in the U.S. Supreme Court,
18 would have come out differently. Because on the Ten
19 Commandments monument that sits outside the state capitol the
20 first commandment begins with, "I am the Lord thy God," if the
21 analysis was what was the purpose behind posting those words,
22 and nothing else, you can take anything and cut it down to the
23 smallest level of generality in which one cannot assess the
24 purpose. But the way the Court has said purpose analysis
25 should be done is looking to the purpose overall.

14:46:35 1 This statute, when it was amended, made a series of
2 changes.

3 First of all, it changed it from permissive to mandatory.
4 It's clear from the legislative history and discussions that
5 was an important change at the legislature. Many school
6 districts were not having moments of silence, and the
7 legislature believed it was important to provide that they
8 have it, and that it be given uniform.

9 Secondly, it added the pledges, and it specified that the
10 moment of silence must occur following the recitation of the
11 pledges, which is directly connected with the secular purpose
12 of promoting patriotism.

13 There is an extensive record of that secular purpose,
14 including the statements of both Senator Wentworth and
14:47:17 15 Representative Branich, including a contemporaneous Op-Ed
16 Representative Branich wrote in the paper explaining his
17 motivation. That occurred contemporaneously with the passage
18 of this bill.

19 In addition to adding the word "prayer," unlike in
20 Wallace, the legislature also added the phrase, "or engage in
21 any other silent activity that is not likely to interfere with
22 or distract another student." That is a very important
23 addition.

24 THE COURT: What does it add -- I'm sorry. Let me
25 say this differently.

14:47:54 1 If that were added without the word "prayer," wouldn't it
2 be clear that one could pray.

3 MR. CRUZ: Not necessarily.

4 Let me say two things.

5 Let me actually agree with you, and then disagree with
6 you in, if I might.

7 Beginning by agreeing with the question, I agree that it
8 is necessarily implied, if the statute said reflect, meditate,
9 or any other silent activity, it is necessarily implied as a
10 federal constitutional matter that you could pray.

11 Indeed, it would be unconstitutional if the legislature
12 said reflect, meditate, or anything else, but no prayer.

13 I would submit if it's already implied, and in fact
14 required by the Constitution, it is a fairly remarkable thing
14:48:40 15 to say it is therefore unconstitutional to make explicit what
16 is necessarily implied.

17 So with respect to that, I agree with you, but now let me
18 explain the extent to which I disagree with you.

19 Which is that in practice there is considerable
20 uncertainty, questions of church and state are surrounded by
21 confusion. There has been past practice in schools across the
22 country restricting students' endeavors to play -- our brief
23 goes through a number of litigations of schools where school
24 administrators, trying to do the right thing, aren't sure
25 where the lines are, but they have been told that prayer and

14:49:22 1 religious -- they are concerned it is problematic.

2 It's omission -- nobody would think the omission of the
3 word "prayer" was accidental. Everyone would understand that
4 the omission of the word "prayer" was deliberate.

5 What it would suggest is that there is something wrong
6 with prayer. Leaving prayer out would suggest -- it's not
7 just -- if you leave reflect or meditate out, no one takes
8 that inference, but everyone understands this is a subject of
9 extensive litigation, leaving prayer out is understood as
10 reflecting that there is something disfavored about prayer.

11 One of the best indications of that is the plaintiff's
12 rather remarkable argument on page 7 of their response to our
13 motion for summary judgment, which plaintiff's counsel
14 repeated at the podium that, quote, this gives some religious
14:50:11 15 people a benefit, because they do not have to consult a lawyer
16 to know that their children can pray during a moment of
17 silence.

18 That's a very interesting concession that this statute
19 without the word "pray" would lead parents looking at it to
20 not know if they could pray.

21 Because of the uncertainty of this issue parents might
22 well be afraid there is something wrong about prayer. That
23 point demonstrates, I think quite powerfully, the reason why
24 the legislature included prayer as one of the options.

25 To make clear that the legislature was not favoring or

14:50:52 1 disfavoring prayer, to make clear that they're not disfavoring
2 prayer, they included it as an option, to make clear that they
3 are not favoring it, they say "or any other silent activity,"
4 anything you can do, which makes clear the entire range of
5 options are there.

6 I think it's worth, as a frame of reference, comparing
7 what Texas has done to the rest of the country.

8 According to our research fully half of the states, 25 of
9 the states, have a moment of silence statutes on the books.

10 Of those a slight majority, 13, explicitly note that pray
11 or prayer is one of the options students can choose.

12 The plaintiff's argument would necessarily entail that at
13 least those 13 states, all of those statutes are
14 unconstitutional. Indeed, their broader argument is that all
14:51:47 15 25 states their statutes are unconstitutional.

16 That argument is fundamentally inconsistent with Wallace
17 against Jaffree, which is the central case upon which they
18 rely.

19 In Wallace the majority was explicit that, first of all,
20 a moment of silence statute without the word "prayer," in
21 Wallace the Court -- one of the reasons it struck down the
22 Alabama statute was there was the prior statute without the
23 word "prayer." No party in Wallace was challenging at that
24 point the prior statute. The Court did not suggest any
25 infirmity with the prior statute. Indeed, no justice

14:52:32 1 disagreed with the majority on this proposition.

2 But on the specific question of a statute that includes
3 the word "pray," the majority stated, as your Honor read
4 earlier, that the legislative intent to return prayer to the
5 public schools is, of course, quite different from merely
6 protecting every student's right to engage in voluntary prayer
7 during an appropriate moment of silence.

8 That at least suggests, although I will admit it's not
9 clear, but it at least suggests that it is possible to include
10 prayer in the list of options.

11 But if one looks beyond the majority, the other opinions
12 are far more clear on that.

13 Justice Powell, who was the necessary fifth vote, there
14 was to majority without Justice Powell, was explicit. He said
14:53:22 15 on page 62, "I agree fully with Justice O'Connor's assertion

16 that some moments of silence statutes may be constitutional."

17 He further said, "Justice O'Connor is correct in stating
18 moment of silence statutes cannot be treated in the same
19 manner as those providing for vocal prayer."

20 He goes on to quote her opinion. "It is difficult to
21 discern a serious threat to religious liberties from a room of
22 silent, thoughtful school children."

23 THE COURT: Is the only justice that is on the
24 Wallace case still on the court Justice Stevens.

25 MR. CRUZ: I believe that's correct, yes.

14:53:57 1 Justice Powell is even more clear than that however. At
2 page 66 of the opinion he says, quote, I would vote to uphold
3 the Alabama statute if it also had a clear secular purpose.

4 That is about as explicit as one could get. The Alabama
5 statute say pray or voluntary prayer, and he said I would vote
6 for it if it also had a clear secular purpose. So if it
7 didn't have this horrible legislative history of defiance, I
8 would vote to uphold. Powell was the necessary fifth vote.

9 O'Connor, who was the sixth vote concurring in the
10 judgment, O'Conner is also explicit at page 73. "Even if a
11 statute specifies that a student may choose to pray silently
12 during a quiet moment, the state has not thereby encouraged
13 prayer over other specified alternatives."

14 In fact, she says further on page 76, "A moment of
14:54:55 15 silence law that is clearly drafted and implemented so as to
16 permit" -- this is all verbatim quote -- "prayer, meditation,
17 and reflection within the prescribed period, without endorsing
18 one alternative over the others, should pass this test."

19 So there were five justices in Wallace against Jaffree
20 that were explicit: Powell, O'Connor, and the three
21 dissenters, that a statute that specifically referenced prayer
22 could be constitutional, and would be constitutional absent
23 the sort of terrible legislative history and purpose evidence
24 that was at issue in Wallace.

25 THE COURT: Well, remind me of when was the former

14:55:40 1 statute passed? The old substitute.

2 MR. CRUZ: 1995. Yes. 1995.

3 Then this was 2003. Senator Wentworth from the floor of
4 the Senate said he had read about the Brown case, he saw that
5 Virginia had a statute, it was upheld.

6 Indeed, not only the Fourth Circuit uphold Virginia's
7 statute, but the plaintiffs in that case asked the Supreme
8 Court to stay the judgment there. Chief Justice Rehnquist
9 wrote a short opinion denying the stay explaining that in his
10 judgment there was considerable question as to whether the
11 plaintiffs could prevail on the merits.

12 The court denied cert with no dissent. So no justice,
13 including Justice Stevens, who is certainly not reluctant to
14 dissent from denials of certiori, no justice dissented from
14:56:32 15 denial of certiori.

16 In the past two decades the only two Federal Courts of
17 Appeals to have considered moment of silence statutes, the
18 Fourth Circuit and the Eleventh Circuit, both concluded based
19 on the specific facts and circumstances that the statutes were
20 constitutional.

21 The plaintiffs are urging this court to adopt the
22 position that both of those Federal Courts of Appeals are
23 simply wrong.

24 That position, I would suggest, is inconsistent with
25 Supreme Court precedent and is inadvisable.

14:57:08 1 May, the one other Court of Appeals opinion they cite to
2 that is now 22 years old, May was a case where the Third
3 Circuit deferred to findings of the District Court the
4 particular secular purposes there were a sham. The Court of
5 Appeals said we're going to defer to these findings.

6 Furthermore, the Court of Appeals concluded that any
7 accommodation is necessarily religious, and therefore
8 unconstitutional.

9 Which I would suggest is a very strange conclusion given
10 the Supreme Court's long body of case law actually requiring
11 accommodations to say that -- the consequence of the
12 May decision is every one of those Supreme Court decisions
13 requiring accommodation is wrong, and that clearly cannot be
14 the case.

14:57:54 15 And since 1985 when May was decided, the Supreme Court
16 case law and the establishment clause has changed
17 significantly. I do not believe May would be decided the same
18 way today.

19 Judge Becker in May wrote a powerful dissent. Judge
20 Becker was obviously a deeply respected jurist on that court,
21 and wrote a powerful dissent. In the last 20 years there has
22 been no Court of Appeals that has followed May. I think
23 May was an agonistic and inconsistent with the U.S. Supreme
24 Court.

25 If one looks at the jurisprudence of the U.S. Supreme

14:58:31 1 Court today, the Court has made abundantly clear that each of
2 these cases depends on the facts and circumstance, the
3 particular context of what's going on, and it is the
4 plaintiff's burden to demonstrate that it is a sham.

5 They have not demonstrated that promoting patriotism is a
6 sham. Indeed, it's difficult to suggest that it is given the
7 abundance evidence on the record that that was a central
8 motivation for the legislature.

9 They have not demonstrated the quiet contemplation, and
10 its efforts to aid and discipline to avoid school violence.
11 They have not demonstrated that that's a sham.

12 They have especially not demonstrated protecting
13 religious liberty is a sham.

14 I want to spend just a moment talking about the
14:59:15 15 difference between protecting religious liberty and
16 accommodation, because the case law has talked about this
17 some. I actually agree that accommodation is ill described
18 for what we are talking about.

19 Judge Becker does a nice job in his dissent in May of
20 explaining why this is not really accommodation.

21 Accommodation typically speaks of a general rule from
22 which a religious group is being given an exception.

23 What the legislature was doing here was not that.

24 What they were doing rather was making clear that
25 religion is not disfavored, that it stands on an equal footing

14:59:54 1 with irreligion, that it is not discriminated against, that
2 the legislature is absolutely neutral.

3 The Court has said that the government should not
4 manifest a hostility to faith, a hostility to religion.

5 What the legislature was doing here was making clear, and
6 the clearest indication of that is by adding "or anything else
7 silent."

8 Which gets to the final point I want to address, which is
9 the plaintiff's argument that this discriminates against
10 verbal prayer.

11 I would suggest four responses to that.

12 First of all, it's not accurate as to what the statute is
13 doing. The statute allows everything that's silent, and it
14 disallows everything that is verbal. It is not a religious
15:00:43 15 distinction. It is making a distinction of whether it makes a
16 noise or not.

17 Secondly, it is not true, because school districts
18 already allow voluntary prayer, and indeed verbal prayer at
19 other times during the school day.

20 For example, Muslims. The plaintiffs refer in their
21 brief to Muslims who pray on their knees facing Mecca at a
22 specified times in the day. Many school districts throughout
23 the state allow Muslim students to go and pray at those
24 specified times out loud.

25 There is nothing in this record suggesting that Muslim

15:01:20 1 students or Buddhist students or any other students are
2 prevented from praying in whatever manner they choose to pray.

3 All that this statute says is during this one minute at
4 the beginning of class everyone has to be silent. So during
5 that minute, that is not the minute that is provided for those
6 who wish to pray out loud to pray, but schools are not
7 preventing them from praying at other times.

8 THE COURT: Can counsel raise that argument, this
9 issue that I have called standing? Does counsel have standing
10 to say -- again, I have a problem with this, because I don't
11 have anything in the record about it, but I'm going to assume
12 for the sake of discussion that Buddhist cannot pray silently.
13 I don't believe that's the case, but let's assume that for the
14 sake of discussion.

15:02:08 15 Does counsel have standing to assert that the statute
16 discriminates -- I understand what you are saying there are
17 other times of day that others can pray audibly or with
18 physical gestures, or whatever, but does counsel have standing
19 to raise that question of distinction between religions when
20 his clients would not claim an entitlement to do any of that?

21 MR. CRUZ: No, your Honor, the plaintiffs do not
22 have standing here. There is no allegation in the complaint
23 that the plaintiffs are a member of a faith that believes they
24 must engage in verbal prayer, or engage in any physical
25 manifestation of prayer.

15:02:45 1 This is a facial challenge. If they -- in order to have
2 standing to raise an establishment clause claim, you must have
3 a discrete injury.

4 Now, that injury can be with respect to, say, the Ten
5 Commandment monument, the offense of seeing it if it's
6 impermissible.

7 But here with a facial challenge these plaintiffs cannot
8 say we can think of somebody, not us, but somebody against
9 whom this discriminates.

10 If there is a somebody, that case could be brought as an
11 applied challenge. If there is an instance of a particular
12 student who has these religious beliefs, and believes he or
13 she is being discriminated against, that might serve as the
14 basis for the as-applied challenge. But the plaintiffs don't
15:03:30 15 have the ability to raise a third-party claim when they
16 haven't identified anyone with these claims in a facial
17 challenge.

18 Finally, this argument is deliberately designed to be a
19 catch twenty-two. Their argument is, well, you're
20 discriminating against those who pray verbally, but yet
21 everyone knows that the statute said you can pray verbally
22 during the one minute at the beginning of class.

23 The plaintiff would be in here saying that's really an
24 establishment to listen to the child next to you praying
25 verbally.

15:04:04 1 There is no suggestion their objective is to allow the
2 children to pray verbally. What they want is you cannot have
3 moments of silence, which they are very candid about.

4 But that catch twenty-two situation cannot be the law,
5 because Wallace was explicit that at least some moment of
6 silence statutes could be constitutional.

7 THE COURT: Well, at least some moments of silence
8 statutes that mention the word "prayer"?

9 MR. CRUZ: Correct.

10 THE COURT: I'm not sure that the plaintiff is
11 arguing that a moment of silence statute that do not mention
12 the word "prayer" is unconstitutional.

13 MR. CRUZ: But with respect to the Larson argument,
14 the word "prayer" has nothing to do with the Larson argument.

15:04:50 15 He argues that -- even without prayer the plaintiff would
16 say, well, silent benefits the silent prayer, but not those
17 who must be out loud.

18 It can't be right that there is no way to do this
19 constitutionally, that it's simply a catch twenty-two.

20 What the Texas legislature here endeavored to do was very
21 carefully follow a case that had been litigated, had gone to a
22 Court of Appeals, been unanimously upheld, the Court had
23 denied cert, and it tried to model that in a way that ensured
24 neutrality.

25 Given that extensive record, the plaintiffs have not come

15:05:31 1 remotely close to carrying their burden to demonstrating that
2 the secular purposes of the legislature were a sham.

3 If the Court has no further questions --

4 THE COURT: Well, I just want to ask you a final
5 question.

6 MR. CRUZ: Sure.

7 THE COURT: Where in the legislative history, or in
8 the text statute -- it may be that you made this argument
9 already, but where do I find these secular legislative
10 purposes, particularly the latter, protection of legislative
11 history.

12 MR. CRUZ: We cite them in our brief, and
13 apparently -- I will refer you to the appropriate page.

14 In addition, the text of the statute, if one looks at D
15:06:16 15 of the statute, which is the principal operative provisions,
16 with respect to patriotism the text specifies that the one
17 minute of silence shall be following the recitation of the
18 pledges. Which is explicitly part of -- explicitly furthering
19 the patriotism objective.

20 THE COURT: I have got that part, and that was the
21 subject of a fair amount of comment by Senator Wentworth.

22 What I'm pressing you on is the latter, and your
23 principal citation for that is the guidelines. I have got the
24 problem with the guidelines that I mentioned at the beginning,
25 that they come late in the history of this. The timing of it

15:07:14 1 is suspect.

2 So I'm looking for guidance with respect to the statute
3 itself, and the legislative history with respect to the
4 protection of religious liberties.

5 MR. CRUZ: With respect to the three secular
6 purposes, I would agree with you the legislature was more
7 explicit regarding patriotism and regarding quiet
8 contemplation.

9 But the legislature also on the text of it by adding
10 prayer or any other silent activity, the face of that
11 indicates a desire to neither favor, nor disfavor prayer.

12 If they just added prayer alone, one might possibly infer
13 that prayer was intended to be favored. But by adding the
14 catch-all of "or anything else," that indicates an intention
15 to be neutral, to neither favor nor disfavor.

15:08:09

16 That intention follows from -- indeed, as the Supreme
17 Court said, the best traditions, because the principal of
18 neutrality of neither favoring nor disfavoring, but not having
19 a hostility, not excising the word "prayer," not treating
20 somehow prayer as if it is -- it is on a lesser footing than
21 reflection or mediation, but rather that the state is neutral.
22 That's what the Texas statute indicates, and that's consistent
23 with U.S. Supreme Court precedent.

24 THE COURT: All right. Thank you very much,
25 Mr. Cruz.

15:08:49 1 Would you like to take a five-minute break here?
2 (Nodding heads up and down.)
3 THE COURT: All right. We'll just be in recess
4 until 3:15.

5 (Brief recess.)
6 (Judge enters the courtroom)

7 THE COURT: Be seated, please.
8 Mr. Brandt.

9 MR. BRANDT: Yes. May it please the Court.
10 Tom Brandt. I represent Carrollton-Farmers Branch
11 Independent School District.

12 I would like to direct your Honor's attention to a little
13 distinction that we have between the State of Texas and the
14 Carrollton-Farmers Branch Independent School District; and
15:18:32 15 that is, that whereas the state has an ability to generate a
16 legislative history just as a matter of course, and does that
17 with every piece of legislation that comes down the pike,
18 there is debate, it is recorded, it is transcribed.

19 I represent many school districts, cities, counties who
20 do not typically have the ability or the -- do not generate
21 legislative histories and who did get sued and are challenged
22 on their ordinances as being unconstitutional.

23 In those cases, for example, when a city passes an order
24 that regulates sexually-oriented businesses, those have
25 presumptive First Amendment Rights, those ordinances have been

15:19:28 1 upheld as constitutional, and the presumption has been that
2 there was a constitutional purpose for that.

3 The legislative history, the Court's -- the Fifth Circuit
4 has said that those cities or school districts or those local
5 governmental entities could even posit the reasons for those
6 secular purposes after the fact, and could actually put on
7 evidence after the fact. We have done that, and it has been
8 successful.

9 The reason I mention that is because in this particular
10 case, and with reference to the Wallace v. Jaffree decision,
11 and Justice O'Connor's concurrence in there, she states -- and
12 I am quoting from Justice O'Connor, "Even if the text and the
13 official history of the statute expressed no secular purpose,
14 the statute should be held to have an improper purpose only if
15:20:24 15 it is beyond purview that endorsement of religious or of a
16 religious belief was and is the law's reason for existence."

17 While it is absolutely appropriate for us to go in great
18 detail on this issue of legislative history, it is important
19 for us not to lose sight of where the burden lies. The burden
20 does not lie on the school district, for example, or for that
21 matter, on the state, to prove that its purpose was not a
22 sham.

23 It is the burden of the plaintiff to prove otherwise.
24 The presumption is that the State of Texas legislature, and
25 the board of trustees of the school district, both were

15:21:18 1 operating in good faith when they passed respectively the
2 statute, and the policy that enacted the statute.

3 THE COURT: Well, it's your burden to prove the
4 secular legislative purpose. It's their burden to prove it's
5 a sham.

6 MR. BRANDT: But it will not be concluded that it's
7 a proper purpose. We have to come up with a secular purpose,
8 and we have to articulate one, but we do not have to have it
9 set out ahead of time in some extensive legislative history.

10 For example, this case, our legislative history for the
11 school district is sparse and routine. It is routinely
12 sparse.

13 What happened was there was a statute passed by the
14 legislature. Then as a matter of course the school districts,
15:22:09 15 Carrollton-Farmers Branch, like every school district in the
16 State of Texas, subscribed to a policy service, which then
17 organized and codified the legislature's actions and put them
18 in policies.

19 THE COURT: But you're required to do it. This
20 isn't optional.

21 MR. BRANDT: That's right.

22 THE COURT: Are you suggesting to me, Mr. Brandt --
23 I might buy this if the statute was as it was before,
24 optional, that you would necessarily rise or fall with the
25 legislative history of the State of Texas.

15:22:47 1 MR. BRANDT: We don't.

2 THE COURT: Just a second.

3 Because this statute is mandatory, are you of the view
4 that the State of Texas could lose on this summary judgment,
5 and you could win?

6 MR. BRANDT: Yes.

7 THE COURT: Okay. Well, convince me.

8 MR. BRANDT: We would not have an operating -- as a
9 matter of practical, we wouldn't have any policy -- if this
10 statute, the state statute is declared unconstitutional, then
11 we would have to rescind the policy. But if the -- if the
12 state statute was declared unconstitutional because of an
13 improper purpose of the legislature, and that all of the
14 secular purposes that have been posited by the Attorney
15 General were in fact a sham, if that is what this Court were
16 to determine, that is a circumstance in which the school
17 district would not be -- have participated in an
18 unconstitutional act.

19 Ours is a separate and distinct secular purpose which the
20 state doesn't have.

21 Our purpose is in addition to all those purposes
22 articulated by the state, it is the purpose to obey state law.
23 Which is the State of Texas tells us we must have a moment of
24 silence and therefore we will obey the state law and we will
25 have a moment of silence.

15:24:12 1 So in that circumstance, and in that one only, there
2 would be a distinction between the two.

3 There is no evidence at all in the record as to an
4 improper purpose by the board of trustees.

5 THE COURT: Well, let me interrupt you for a minute,
6 because I'm not -- this is, I think, an interesting academic
7 discussion you and I are having. Because so what?

8 If I concluded, and I'm not predicting my ruling in any
9 way here, but if I concluded that the statute was
10 unconstitutional because there was no secular legislative
11 purpose, and that the school district did nothing more than
12 comply with the state mandate, so what? The moment of silence
13 at Carrollton is gone.

14 MR. BRANDT: There is a very practical difference,
15:25:13 15 your Honor. That is, if there is a judgment against
16 Carrollton-Farmers Branch Independent School District for
17 having participated, or made an unconstitutional policy, then
18 Mr. Cook will be coming to you after your judgment and saying,
19 by the way, I want Carrollton-Farmers Branch Independent
20 School District to pay my legal fees.

21 THE COURT: Are you to be arguing that? When they
22 adopted this because they were required by the state to do so?

23 MR. COOK: No. I think the state has the burden of
24 paying my attorney's fees if I was to win.

25 MR. BRANDT: Well, then --

15:25:52 1 THE COURT: Just a minute. I may be getting you a
2 waiver. Don't interrupt me.

3 Are you stipulating that you are not seeking attorney's
4 fees from the city?

5 MR. COOK: Your Honor, I haven't thought about it
6 extensively, but my position is that if we win against the
7 governor, we win against everybody basically, and the
8 injunction will apply to all school districts. So in that
9 sense --

10 THE COURT: Well, that's not disputed. I believe
11 that if you won an injunction would have the effect of
12 preventing any school district from having such a policy.

13 The issue is would you be claiming that
14 Carrollton-Farmers Branch school district is responsible for
15 your attorney's fees when they are doing no more than
16 complying with a state directive.

17 If you're not agreeing with that, then that's a
18 prescription for anarchy, because every school district in
19 every case where someone might bring a challenge of this type
20 would have to be saying to the state, sorry, I know you're
21 telling me I have to do it, but I just can't, go litigate the
22 constitutionality of this first.

23 MR. COOK: I will stipulate that the State of Texas
24 has the obligation to pay my attorney's fees, then
25 Carrollton-Farmers Branch does not have that obligation.

15:27:23 1 THE COURT: Well, it may be that nobody has the
2 obligation to pay your attorney's fees, even under those
3 circumstances. I'm not predicting that.

4 I'm going to ask it differently.

5 Can you envision a circumstance where you would be
6 pursuing a claim for attorney's fees against Farmers Branch
7 Carrollton school district?

8 MR. COOK: No, your Honor, I cannot, because the as
9 applied challenge was already dismissed.

10 MR. BRANDT: That shortens my remarks actually. I
11 don't want to waste the Court's time or be redundant. I think
12 the Attorney General has done a fine job of defending its
13 statute, and I think you can see that our purpose was solely
14 to obey the law.

15:28:10 15 Thank you, your Honor.

16 THE COURT: You're welcome. Thank you.

17 All right. Mr. Cook, you will have the last word.

18 MR. COOK: Basically the governor, his counselor
19 argues that the facts in Wallace v. Jaffree were so interfaced
20 that they had to find against the state.

21 My issue with that reasoning is that it basically leads
22 to the idea that the State of Alabama today can pass a statute
23 with the exact same language that was found unconstitutional
24 in Wallace v. Jaffree, and as long as they are completely
25 silent on why they're doing it in the legislative history, it

15:29:02 1 will be held constitutional.

2 To me that essentially means that Wallace v. Jaffree no
3 longer has any legal force even in the State of Alabama. I
4 think that's a logically absurd result.

5 My recollection, and I admit that it could be faulty,
6 that in Wallace there were other changes besides the inclusion
7 of the term voluntary prayer in the statute, and that the
8 majority -- the opinion goes over that -- those and says that
9 they aren't relevant. So I would encourage your Honor to take
10 a look at that.

11 The other issue --

12 THE COURT: My recollection, and I think I'm
13 confirming it here, is that the statute was amended from
14 authorizing a one-minute period of silence, quote, for
15 meditation, to authorizing a period of silence for, quote,
16 mediation or voluntary prayer.

17 MR. COOK: My recollection is that the justice who
18 wrote -- I don't remember who it was who wrote the opinion --

19 THE COURT: Stevens.

20 MR. COOK: -- said something to the effect of -- he
21 went through this analysis, is my recollection, of saying that
22 these provisions are not relevant to the inquiry, and broke
23 out several other changes that were made in the law. I think
24 something about maybe going from allowing a teacher to do it,
25 maybe to requiring the teacher to have a moment of silence, or

15:30:35 1 something along those lines. My recollection could be wrong,
2 but that's my recollection.

3 THE COURT: I'll look at that.

4 MR. COOK: Another -- the accommodation seems to
5 be -- accommodation of religion, and whether that's a secular
6 purpose seems to be a major issue in this case.

7 I would like to note that Texas already had a statute
8 even before the first moment of silence statute was passed
9 specifically that's called exercise of constitutional right to
10 pray enacted eight years before the current Texas Education
11 Code which specifically guarantees the constitutional right of
12 students to pray in school.

13 So how much accommodation do they need in the statutory
14 law?

15:31:15 15 I would also note that in *Abington v. Schempp*, the Court
16 there said that while the free exercise clause clearly
17 prohibits the use of state action to deny the right of free
18 exercise to anyone, it has never meant that a majority could
19 use the machinery of the state to practice its beliefs. I
20 think that's exactly what's going on here. They are using the
21 machinery of the state to try to practice the majority's
22 beliefs.

23 That's all I have, your Honor. Thank you.

24 THE COURT: Thank you.

25 I will take the matter under advisement. I will do my

15:31:49 1 best to get a decision out so that it will be timely for the
2 school year, but I'm not considering this to be a matter that
3 is terribly urgent given that the statute was in effect for
4 three years before the plaintiff challenged it. Nobody seemed
5 in a big hurry to get me to hold this hearing from the time it
6 was filed last year. So I'm going to do my very best to get
7 it decided within this month, but is there anything more
8 compelling timewise that I need to know?

9 MR. COOK: Nothing that I know of, your Honor.

10 THE COURT: I assume your clients are still in
11 school?

12 MR. COOK: Yes, your Honor. Their children still
13 attend Texas public schools. Carrollton specifically.

14 THE COURT: Okay. Very fine argument. Thank you
15:32:32 15 very much.

16 MR. WILLIAMS: All rise.

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I, P. Sue Engledow RPR/CSR, certify that the foregoing is a transcript from the record of the proceedings in the foregoing entitled matter.

I further certify that the transcript fees format comply with those prescribed by the Court and the Judicial Conference of the United States.

This the 13th day of September, 2007.

P. SUE ENGLEADOW RPR/CSR No. 1170
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