Case No. 08-10092

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DAVID WALLACE CROFT; SHANNON KRISTINE CROFT, as Parents and Next Friend of minor Children

Plaintiffs – Appellants

v.

GOVERNOR OF THE STATE OF TEXAS, Rick Perry

Defendants – Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

APPELLANT'S REPLY TO PERY'S RESPONSE BRIEF

Filed By:

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Table of Contents

Table of Authorities

The Clearly Erroneous Standard Is Not the Proper Standard of Review

Governor Perry asserts in his response brief that the proper standard of review in this appeal is the clearly erroneous standard. To support his argument, Perry cites two cases: Lynch v. Donnelly, 465 US 668, 681 (1984), and May v. Cooperman, 780 F.2d 240, 252 (3rd Cir. 1985). The court in Lynch was considering whether there was a secular purpose for the city of Pawtucket's display of a crèche during Christmas time. The district court inferred, drawn from the religious nature of the creche, that the city had no secular purpose. The US Supreme Court said this inferrence was, on the record, clearly erroneous. However, this does not mean that the clearly erroneous standard is necessarily the correct standard of review. Since the clearly erroneous standard of review is a more deferential standard of review than de novo review, the Supreme Court in Lynch merely meant that even under the highly deferential clearly erroneous standard, the trial court was mistaken in determining that the city of Pawtucket had no secular purpose. Croft's interpretation of what the Court meant in Lynch is bolstered when one looks at other US Supreme Court cases discussing the proper standard of review in Constitutional cases:

> "*…all those matters which are usually termed issues of fact are for conclusive determination by the State courts and are not open for reconsideration by this Court. Observance of this restriction in our review of State courts calls for the utmost scruple. But 'issue of fact' is a coat of many colors.* ***It does not cover a conclusion drawn from uncontroverted***

> ***happenings****, when that conclusion incorporates standards of conduct or criteria for judgment which in themselves are decisive of constitutional rights. Such standards and criteria, measured against the requirements drawn from constitutional provisions, and their proper applications, are issues for this Court's adjudication…"* (See Watts v. Indiana, 338 U.S. 49, 50-51 (1949), emphasis added.)

In the trial court below, there was no real dispute regarding what had occurred. Governor Perry did not call into question the transcripts of legislative history presented by the Crofts. There is no question that the text of the Texas moment of silence law says what the Crofts say it says. These were all uncontroverted happenings.

Supreme Court case law regarding the proper standard of review in Constitutional appeals led the 6th Circuit to say, in the specific context of a First Amendment case:

> "*We believe that the Supreme Court has commanded that, when dealing with questions of constitutional magnitude, we are not at liberty to accept the fact trier's findings merely because we consider them not "clearly erroneous" as that term is employed in Rule 52(a) F.R.Civ.P. We must make our own examination of the material from which decision is made…*" (See Guzick v. Drebus 431 F.2d 594, 599 (6th Cir. 1970).)

The First Circuit also appears to agree with the 6th Circuit. In an equal protection case involving gender discrimination, the 6th Circuit said:

> "*The parties were evidently of the opinion that the district court's assessment of the relevant physical differences between boys and girls, as well as its conclusion that these differences provided "rational" support for Darlington's exclusion of girls, were findings of fact within the meaning of*

> *Fed. R. Civ. P. 52(a). It was argued that if there is substantial evidence in the record supporting them, we must affirm. However, assessing such matters is not like reviewing a judgment in a personal injury case. The facts themselves, sometimes labelled "legislative" or "constitutional" facts, are not "provable" in the usual sense and are part and parcel of the constitutional judgment we ourselves must make…Cf. Drope v. Missouri, 420 U.S. 162, 95 S. Ct. 896, 43 L. Ed. 2d 103, 43 U.S.L.W. 4248, 4252, & n. 10 (1975) (quoting Watts v. Indiana, 338 U.S. 49, 51, 93 L. Ed. 1801, 69 S. Ct. 1347 (1949))…*" (See Fortin v. Darlington Little League, Inc., 514 F2d 344, 348-349 (1st Cir. 1975).)

Importantly, the Third Circuit Court of Appeals also appears to agree that the standard of review in Constitutional cases is de novo:

> " *'When constitutional rights turn on the resolution of a factual dispute we are duty bound to make an independent examination of the evidence in the record. See, e.g., Edwards v. South Carolina, 372 U.S. 229, 235, 83 S. Ct. 680, 9 L. Ed. 2d 697; Blackburn v. State of Alabama, 361 U.S. 199, 205, n. 5, 80 S. Ct. 274, 4 L. Ed. 2d 242.' Brookhart v. Janis, 384 U.S. 1, 4, n. 4, 86 S. Ct. 1245, 1247, 16 L. Ed. 2d 314 (1966)*." (See United States v. Baker, 364 F.2d 107, 111, n.4 (3rd Cir. 1966).)

The fact that the Third Circuit itself does not regard the clearly erroneous standard as the correct standard in Constitutional cases, plus the fact that most other circuits, as well as the US Supreme Court, also do not regard the clearly erroneous standard as the correct standard in a case such as this, suggests that Perry's reliance on the clearly erroneous standard is incorrect.

This does not mean that May is otherwise wrong in terms of the legal principles it used to judge the constitutionality of the moment of silence statute at issue in that case. It simply means it *may* have been too deferential to some of the

trial court's factual determinations, which, in any case, were not agreed upon by the parties in that case. The New Jersey Legislature did not preserve a transcription of its committee hearings or floor debates in May. (See May v. Cooperman, 780 F.2d 240, 246 (3rd Cir. 1985).) For this reason, the legislative history of the New Jersey statute, i.e., what was actually said by members of the legislature, was in dispute. In this case, there is no dispute as to what the legislative history says regarding the Texas Moment of Silence statute because there were video and audio recordings of hearings and floor debates, which were transcribed by a certified court reporter, and are now part of the undisputed record on appeal. The clearly erroneous standard might have application if there were a dispute regarding any of the underlying evidence at the trial level in this case, but there was no such dispute, therefore the use of the clearly erroneous standard has no applicability in this case, even if it did in May.

Van Orden v. Perry Was a Mere Plurality Opinion Whose Holding Should Be Interpreted Narrowly

Both Perry[1] and the District Court[2] cite Van Orden v. Perry[3] with approval. However, the opinions expressed in Van Orden have little or no precedential value[4] because there was no majority opinion.

Van Orden was a close decision. Although the Ten Commandments display on the Texas Capital Building grounds was upheld, by a 5-4 majority of the US Supreme Court, only 4 Justices joined in the judgment of the Court. Rehnquist announced the judgment, and Scalia, Kennedy and Thomas joined in that opinion. Breyer wrote a separate opinion in which he merely concurred in the judgment, and described the issue as "…a borderline case…" (See Van Orden v. Perry, 545 U.S. 677, 700 (2005).)

Breyer found the Ten Commandments monument in Van Orden different from other Ten Commandments display cases such as Stone v. Graham, 449 U.S. 39 (1980), because it did not involve public school children:

> "*This case, moreover, is distinguishable from instances where the Court has found Ten Commandments displays impermissible. The display is not on the*

[1] See Appellee's Brief, page 17, "As Justice Breyer emphasized in *Van Orden*, the Court must distinguish between a real threat and a mere shadow…"
[2] See Croft v. Perry, 530 F. Supp. 2d 825, 838 (ND Texas, 2008), "In Van Orden v. Perry, Justice Breyer, in his concurrence, cautioned courts not to create mountains out of molehills when looking at government actions under the Establishment Clause…"
[3] See Van Orden v. Perry, 545 U.S. 677 (2005).
[4] See Marks v. United States, 430 U.S. 188, 193 (1976), "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds….' Gregg v. Georgia, 428 U.S. 153, 169 n. 15 (1976)".

grounds of a public school, where, given the impressionability of the young, government must exercise particular care in separating church and state." (See Van Orden v. Perry, 545 U.S. 677, 703 (2005).)

The plurality opinion in Van Orden also expressed the idea that public schools are subject to heightened scrutiny regarding Establishment clause issues:

"*…we held unconstitutional a Kentucky statute requiring the posting of the Ten Commandments in every public schoolroom. Stone v. Graham, 449 U.S. 39, 66 L. Ed. 2d 199, 101 S. Ct. 192 (1980) (per curiam). In the classroom context, we found that the Kentucky statute had an improper and plainly religious purpose…we have 'been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools,' Edwards v. Aguillard, 482 U.S. 578, 583-584, 96 L. Ed. 2d 510, 107 S. Ct. 2573 (1987).*"(See Van Orden v. Perry, 545 U.S. 677, 690-691 (2005).)

The Crofts Have Standing

Constitutional standing requires that the plaintiff personally suffered some actual or threatened injury that can fairly be traced to the challenged action and is redressable by the courts. (See Doe v. Tangipahoa Parish Sch. Bd., 494 F.3d 494, 496 (5th Cir. 2007).) "Injury in fact" is generally loosened in the First Amendment context. For instance, the courts have granted "taxpayer standing" to sue in certain Establishment clause cases. (See Flast v. Cohen, 392 U.S. 83 (1968).) Furthermore, loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury. (See Elrod v. Burns, 427 US 347, 373 (1976), see also, Ingebretsen v. Jackson Pub. Sch. Dist., 88 F.3d 274, 280 (5th

Cir. 1996), "*Ingebretsen has shown that the School Prayer Statute represents a substantial threat to his First Amendment rights. Doe I, 994 F.2d at 166. Loss of First Amendment freedoms, even for minimal periods of time, constitute irreparable injury. Elrod v. Burns, 427 U.S. 347, 373, 96 S. Ct. 2673, 2689, 49 L. Ed. 2d 547 (1976)*").

Furthermore, this injury (loss of First Amendment rights) is traceable to the challenged action because Governor Perry is the chief executive of the State of Texas, and therefore is ultimately responsible for the execution of all laws passed by the Texas legislature, including the moment of silence statute. The Crofts have been injured because their children are Texas public school students subject to the moment of silence law, which, as discussed, is ultimately enforced by Governor Perry. Finally, the Croft's injury will be redressed by a favorable ruling because they are asking for injunctive relief, which will bar enforcement of the current Texas moment of silence statute.

Perry Has Mischaracterized Croft's Proposed Analytical Framework for Moment of Silence Statutes

In their appellate brief, the Crofts proposed a framework[5] for analyzing whether a particular moment of silence statute violates the secular legislative

[5] See Appellant's Brief, pages 24-26.

purpose prong of Lemon[6]. Perry has suggested that the Crofts are "…Wrong and Extreme…"[7] for suggesting this analytic framework, even though it leaves open the possibility that a facially secular moment of silence statute with no extrinsic evidence in the legislative history or other sources of non-secular purpose might be found to pass the first prong of the Lemon test. Also, Perry has misunderstood the purpose of the analytical framework proposed. It is not suggested by Appellants that any statute that references the word "pray" or "prayer" is per se unconstitutional. Appellants are suggesting a method of analysis for any moment of silence statute that involves a captive audience, required by law to attend, such as public school children. This distinguishes the Texas moment of silence statute from the other statutes noted in Perry's response brief to this Court.[8] For instance, Texas Education Code Section 25.901, regarding the "…absolute right [of a student] to individually, voluntarily, and silently pray…" involves no element of coercion. Students desiring to silently pray can do so, while other students are free to go about their own activities without participation. So, for instance, a child at recess is free to silently pray under Texas Education Code Section 25.901, while

[6] See Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971).

[7] See Appellee's Brief, page 20, "Plaintiff's Contention That the Establishment Clause Bars Any Statutory Reference to the Word "Pray" or "Prayer" Is Wrong and Extreme and Would Nullify Countless Federal and State Laws".

[8] Perry claims, in his brief, and in an often-quoted press-release, that "Plaintiff's argument…would turn the First Amendment on its head, by condemning any law that expressly protects 'prayer' or the right to 'pray' –including laws enacted in recent years in response to fears that school districts have become unduly (and unconstitutionally) hostile to religion." See Governor Perry's Brief, page 22.

the other children noisily run and play. The freedom of other children is in no way impinged by the child that wants to silently pray at recess by the existence of Texas Education Code Section 25.901[9]. This is completely different from the Texas moment of silence statute, which coerces participation by children, and then singles out prayer in the text of its statute as a preferred activity.

It should also be noted that the Texas moment of silence statute was not enacted to protect religion. Perry claims in his brief to this Court that "…the Senate sponsor…simply wanted to ensure that the statute did not discriminate against religious activities…" (See Brief of Governor Rick Perry, page 6.) But, Senator Jeff Wentworth, the sponsor of the Texas moment of silence statute actually said: "…this is not a school prayer amendment and it's not designed to protect religions…" (See See Record on Appeal –USCA5 88-89.)

The Texas Moment of Silence Statute Is Not Patriotic or Contemplative

Perry claims in his brief that the Texas moment of silence statute "…specifically sets a patriotic and contemplative context for the minute of silence by providing for a voluntary recitation of the Pledge of Allegiance prior to the

[9] Whether Texas Education Code Section 25.901 is a necessary or particularly useful statute is another question. Appellant's counsel tends to think that the Christian religious right –the majority religion of Texas and of America, are not being entirely honest when they attempt to portray themselves as a persecuted religious minority group, but that debate is best left for another time.

minute of silence." (See Brief of Governor Rick Perry, page 11.) This argument has been often made by Perry in the press and in the trial court below. In essence, Perry believes that by including arguably constitutional provisions (the Pledge of Allegiance) in a statute that has unconstitutional provisions (the moment of silence), it will somehow dilute or diminish the unconstitutional moment of silence provisions until they are "de minimus"[10]. This effort to re-characterize moment of silence statutes as about patriotism is similar to the efforts of creationists to re-characterize their unscientific notions about the origin of species as "intelligent design theory".[11] If Perry is correct, and an unconstitutional statute can be made constitutional if it is included within the provisions of other, constitutional provisions, then the State of Texas can establish a state church if the fiscal appropriation for the state church is included in a sufficiently large enough omnibus spending bill.

The Slippery Slope to Theocracy

Assume that this Court allows the Texas Moment of Silence statute challenged in this case to stand. Since Appellants believe this law is just the proverbial "camel's nose in the tent", they would like to point to a possible result

[10] "…[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).)

[11] See Kitzmiller v. Dover Area Sch. Dist., 400 F. Supp. 2d 707 (MD Pennsylvania 2005).

of not ruling in their favor. Imagine that a few years from now, the legislature of Texas passes the following hypothetical statute:

> "(a) Between the hours of 8 am and 10am every Sunday, every resident of Texas must go to a building that contains at least 100 other people, said building to contain pews or other appropriate furniture for sitting in rows, allowing all people to face in one direction. A police officer shall be present at each such building to maintain order and discipline, and to see that the remaining subsections of this statute are carried into effect.
>
> (b) All persons in attendance under subsection (a) shall engage in the observance of two hours of silence, following the voluntary recitation of the pledges of allegiance to the United States and Texas flags. (Those not wishing to participate in the pledges may remain silent and seated during the recitation.) During the two-hour period, each person may, as the person chooses, reflect, pray, meditate, or engage in any other silent activity that is not likely to interfere with or distract another person. The police officer in charge of persons at each building mentioned in subsection (a) during that period shall ensure that each of those residents remains silent and does not act in a manner that is likely to interfere with or distract another person.
>
> (c) Failure to obey this statute shall be a class C misdemeanor."

Upon passage of the new (hypothetical) law, the Governor of Texas declares that this law will promote patriotism, accommodate people in the practice of their religion, and allow for thoughtful contemplation by the residents of Texas. The Governor denies that this is an establishment of religion, because the statute was passed without comment or debate by the legislature. Furthermore, the governor says that the mere fact that the statute mentions that people may pray during the 2 hour period of silence doesn't mean that is their only option, and nowhere does the statute say that the building people must attend for 2 hours every Sunday must be a church. Opponents of the hypothetical statute point out that the use of the word "pray" in the statute evidences a non-secular legislative purpose, but the governor says that the law merely makes explicit what would be implied if the word "pray" were not used, and the governor says that the "…Texas law specifically sets a patriotic and contemplative context…"[12] for the two hour period of silence, "…by providing for a voluntary recitation of the Pledge of Allegiance prior to…"[13] the two hour period of silence. Furthermore, the governor notes, anyone who says that the fact that the (hypothetical) two hour moment of silence statute mentions "pray" shows non-secular purpose on its face, without need for further analysis, is "…Wrong and Extreme…"[14].

[12] See Appellee's Brief, at 11.
[13] See Appellee's Brief at 11.
[14] See Appellee's Brief at 20.

The governor says that the law accommodates religion because the hectic and long hours that people must work in order to make a living, and also be able to pay all of their taxes, means that some people will not take such a two hour period for voluntary prayer unless they know that they will not be fired from their jobs for refusing to work on Sunday. The governor does not agree with the US Supreme Court when it said:

> "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).)

Unlike the US Supreme Court, the governor **does** believe that a majority can use the machinery of the state to help it practice its beliefs, and therefore defends the (hypothetical) 2-hour moment of silence statute as Constitutional because it helps Christians, the majority religion, to be able to go to church on Sunday without having to worry that their jobs will be threatened because they are unwilling to work on Sunday. Otherwise, the governor believes that Christians will be put at a competitive disadvantage in the job market.

During subsequent litigation, the governor reiterates his arguments mentioned above in his briefs to the courts. A legion of organizations submit

amicus briefs in support of the (hypothetical) two-hour moment of silence statute. One such organization contends that nobody has standing to challenge the (hypothetical) statute, even though the Plaintiffs challenging the (hypothetical) statute are required by law to attend and participate in the (hypothetical) two-hour moment of silence.[15] Another organization claims that the accommodation of religion, apparently even when there is no law of general application that prohibits the free exercise of religion, is constitutionally permissible under the Establishment Clause[16], and that a prior (hypothetical) two-hour moment of silence statute that did not mention the word "pray" was insufficient to ensure accommodation of religion[17]. Furthermore, this organization, the "Liberty Legal Institute", implies in its amicus brief that it wants to stop not just "religious discrimination" by government officials, but also by other private individuals and groups. This organization's amicus brief cites as an instance of religious discrimination, a first grade student at Pattison Elementary in Katy ISD, and how she "…attempted to pray once, only to be told by a peer that prayer was disallowed in school."[18] Since

[15] See Amicus brief of "Alliance Defense Fund", especially, page 13, footnote 3.
[16] See Amicus brief of "Kevin and Michael Shell, et. al.", page 17, "The Supreme Court has continually affirmed that government accommodation of religion is constitutionally permissible under the Establishment Clause…". **Note that this amicus brief will be referred to in the rest of this brief as the amicus brief of "Liberty Legal Institute" since this is the organization that actually wrote and presented this amicus brief to the court, as evidenced by the signature of the counsel for Amici Curiae on the cover page.**
[17] See Amicus brief of "Liberty Legal Institute", page 22, "The [prior] Statute did not provide for prayer…"
[18] Se Amicus of "Liberty Legal Institute", page 15.

another student is not a state actor, a student being (mistakenly) told by a peer that she isn't allowed to pray in school is not a First Amendment violation.

Furthermore, the "Liberty Legal Institute" cites in its amicus brief a hyperlink to a paper published by it, titled "Examples of Hostility to Religious Expression in the Public Square"[19]. This article by the "Liberty Legal Institute" says as a preamble that: "*Religious expression in public is attacked daily across our country. This document contains an extensive list of disturbing assaults on such freedoms…*" (See *Examples of Hostility to Religious Expression in the Public Square*", LIBERTY LEGAL INSTITUTE (2008), available at http://www.libertylegal.org/Img/Hostility%20to%20Religious%20Expression%202008.pdf.) However, this article does not just point to alleged instances of violations of religious freedom by government and government officials, it also cites to instances of "religious discrimination" by private business, groups, and persons, which are not state actors, and therefore cannot violate the First Amendment:

> "*Girl Barred from Singing Kum Ba Yah, Washington Post, Aug. 14, 2000 at A2 An eight year old girl was barred from singing 'Kum Ba Yah' at camp in a talent show because the song included the words 'My Lord.' The camp*

[19] See Amicus of "Liberty Legal Institute", page 16, footnote 5, citing, *Examples of Hostility to Religious Expression in the Public Square*", LIBERTY LEGAL INSTITUTE (2008), available at http://www.libertylegal.org/Img/Hostility%20to%20Religious%20Expression%202008.pdf.

director said, '...you have to check your religion at the door.'" (See Id at 8.) (No indication that the camp is publicly funded or supported.)

"*Gray, Jeremy. 'Man Fired Over Lapel Pin Garners Support', Birmingham News, June 27, 2004 The Hoover Chamber of Commerce fired employee Christopher Word because he wore a Ten Commandments lapel pin*." (See Id. at 22) (No indication that the Chamber of Commerce is publicly funded or supported.)

"*From Timberville, Virginia An employee of an agricultural foods company was fired over the display of a sign on his private vehicle. The sign said 'please vote for marriage on November 7.' The statement reflected the employee's religious conviction that marriage should remain a union of one man and one woman. The company tried to force him to remove the hand-painted sign from his rear window after other employees claimed to be offended.*" (See Id. at 40-41.) (An "agricultural foods company" is likely not a state actor, and therefore not subject to the First Amendment.)

"*Falun Gong The Department of Justice investigated religious discrimination concerning Falun Gong members who were refused hotel accommodations because of their religious beliefs*." (See Id. at 43.) (A hotel

is likely a private entity, and therefore not a state actor to which the First Amendment applies.)

"*…A manufacturer in Virginia told employees to only use 'Happy Holiday' as a telephone greeting, not 'Merry Christmas*.'" (See Id. at 55) (A "manufacturer" is likely a private business, and therefore not a state actor to which the First Amendment applies.)

"*A clothing store worker in Virginia was advised by her supervisor that the company mandates that the employees use 'Happy Holidays' as their greeting over the phone*." (See Id. at 56.) (A "clothing store" is likely a private business, and therefore not a state actor to which the First Amendment applies.)

"*From Miami, Florida The NFL demanded that Fall Creek Baptist Church in Indianapolis, Indiana, cancel its advertised Super Bowl party. In addition to objecting to the church's use of the words "Super Bowl" in promotions, the league objected to use of a screen larger than 55 inches and disliked the church's plans to show a video highlighting the Christian testimonies of Colts coach Tony Dungy and Chicago Bears coach Lovie Smith. The NFL freely admits it routinely makes exceptions for bars and other commercial establishments to show its games with big screen televisions and projection*

systems." (See Id. at 68) (The NFL is likely a private business and therefore not a state actor to which the First Amendment applies.)

Since the "Liberty Legal Institute" clearly believes that any "discrimination" by private individuals and groups against religion is tantamount to a First Amendment violation, it would have no problem believing that private employers, and even just society in general, are "discriminating" against religious people by making them work on Sundays, and that the (hypothetical) two-hour moment of silence law is a necessary religious accommodation, and that the "…accommodation of religion is constitutionally permissible under the Establishment Clause and may be mandated by the Free Exercise Clause…"[20], said Free Exercise Clause allegedly not being limited to state actors.

Another organization supporting this (hypothetical) 2-hour moment of silence statute notes in its amicus brief that moment of silence statutes that mention prayer in public schools have already been upheld as constitutional, because they contain "…no coercive elements whatsoever…"[21], despite the fact that a student is mandated, by Texas compulsory attendance law, to attend school[22]. Therefore, this

[20] See Amicus brief of "Liberty Legal Institute", page 17.
[21] See Amicus brief of "National Legal Foundaion/Wall Builders, Inc.", page 8.
[22] A child failing to attend school during the Texas moment of silence would be guilty of truancy under another section of the Education Code, § 25.094, "FAILURE TO ATTEND SCHOOL", which says that "An offense under this section is a Class C misdemeanor.".(See Tex. Ed. Code Sec. 25.094(e).)

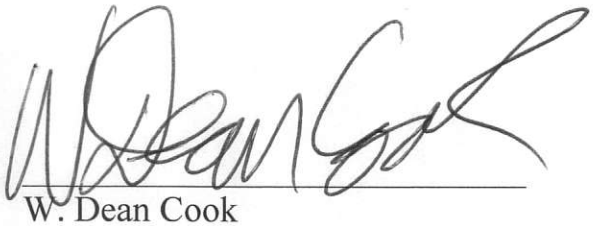
organization opines, the (hypothetical) two hour moment of silence statute would be constitutional -so long as the "coercive elements" (the criminal penalty section) is contained in a separate statutory section under Texas law. Another organization notes in its amicus brief regarding the (hypothetical) two-hour moment of silence law that it doesn't even believe that the First Amendment applies against the States, and that there is a "…compelling argument that the Establishment Clause, with its restriction upon only 'Congress', should not be 'incorporated' against the states and local governments through the guise of the Fourteenth Amendment…"[23] This organization also notes that Plaintiffs in the (hypothetical) two-hour moment of silence law court challenge "…did not, and could not, argue, however, that…" the (hypothetical) two-hour moment of silence "…statute was a law respecting an 'establishment' of religion…" because the law "…does not set up an official Texas denomination or support a particular religious sect with discriminatory financial assistance or unique legal protection."[24] After all, Texas residents can attend the church of their choice during the (hypothetical) 2-hour moment of silence every Sunday, so there is no promotion of a particular religious sect, and there is no financial assistance or unique legal protection being given to any church.

Conclusion

[23] See amicus brief of "Foundation for Moral Law", page 7, footnote 2.
[24] See amicus brief of "Foundation for Moral Law", page 11.

For the foregoing reasons, the reasons in the record on appeal, and Appellant's Brief, the judgment below should be reversed.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

This is to certify that on 8-18-2008, Appellants have served the reply brief and all associated documents by (check one)__X__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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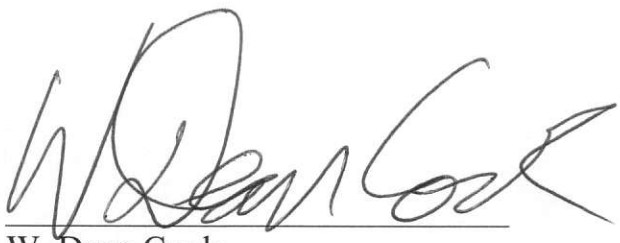

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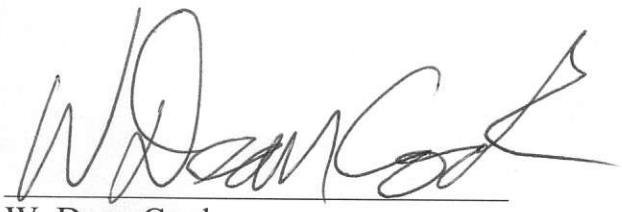

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