No. 08-10092

In the United States Court of Appeals for the Fifth Circuit

DAVID WALLACE CROFT AND SHANNON KRISTINE CROFT,
AS PARENTS OF THEIR MINOR CHILDREN,
Plaintiffs-Appellants,

v.

GOVERNOR OF THE STATE OF TEXAS, RICK PERRY,
Defendant-Appellee.

On Appeal from the United States District Court
Northern District of Texas, Dallas Division

BRIEF OF GOVERNOR RICK PERRY

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CERTIFICATE OF INTERESTED PERSONS

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

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STATEMENT REGARDING ORAL ARGUMENT

Defendant Governor Rick Perry does not object to oral argument in the event that this Court determines that it would aid in the resolution of this case.

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INTRODUCTION

At the outset of every Texas public school day, students listen to (and at their option, recite) the Pledge of Allegiance, first to the United States, and then to Texas. These patriotic acts are followed by a period of thoughtful contemplation, which schools facilitate by providing a minute of silence. These opening exercises give students the opportunity to start each day on a proper footing. Some students will use this moment to recall those who died for our freedoms and think of duty and country. Some will take time to prepare mentally for the day ahead. And others may use this opportunity to exercise their faith through silent, nondisruptive prayer.

In so doing, Senate Bill 83 fosters patriotism and contemplation. In addition, it promotes nondiscrimination by making clear that students may spend the minute of silence by engaging in any form of silent, nondisruptive activity of their choice, whether or not religiously motivated—including prayer. In short, it simply "mak[es] explicit what was already implied," *Croft v. Governor*, 530 F. Supp. 2d 825, 847 (N.D. Tex. 2008)—and indeed, guaranteed by the Constitution.

Nothing in the Establishment Clause forbids moments of silence in public schools—let alone the broader series of opening exercises described in Senate Bill 83. To the contrary, States may "protect[] every student's right to engage in voluntary prayer during an appropriate moment of silence during the school day." *Wallace v. Jaffree*, 472 U.S. 38, 59 (1985). As Justice O'Connor has observed,

"[d]uring a moment of silence, a student who objects to prayer is left to his or her own thoughts, and is not compelled to listen to the prayers or thoughts of others. . . . It is difficult to discern a serious threat to religious liberty from a room of silent, thoughtful schoolchildren." *Id.* at 72-73 (O'Connor, J., concurring). Similarly, Justice Brennan has noted that "the observance of a moment of reverent silence at the opening of class" may serve "solely secular purposes . . . without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and government." *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 281 (1963) (Brennan, J., concurring). And numerous courts of appeals have so held. *See, e.g.*, *Brown v. Gilmore*, 258 F.3d 265 (4th Cir. 2001) (upholding Virginia minute of silence law); *Bown v. Gwinnett County Sch. Dist.*, 112 F.3d 1464 (11th Cir. 1997) (upholding Georgia minute of silence law); *May v. Cooperman*, 780 F.2d 240, 251 (3rd Cir. 1985) (noting that moment of silence laws may be constitutional). *See also Doe v. Beaumont Indep. Sch. Dist.*, 240 F.3d 462, 495 (5th Cir. 2001) (Wiener, J., concurring and dissenting) ("*Jaffree* . . . expressed the view that moments of silence generally have a legitimate secular purpose.").

Senate Bill 83 is even easier to defend, because the voluntary recitation of the Pledge of Allegiance ensures that the context for the subsequent minute of silence is patriotic and contemplative, not religious. In fact, of the twenty-six States that

currently have moment-of-silence laws on the books, only Texas law specifically provides for the recitation of the Pledge of Allegiance prior to the minute of silence.

Plaintiffs' opening brief on appeal only further illustrates that Senate Bill 83 is constitutional. Their request for relief is based primarily on the following extreme premise: that Texas law is invalid simply because it "contains the word 'pray'"—a fact that, "standing alone," purportedly condemns the statute. Pltfs' Br. at 6. *See also id.* at 14-20, 24-26, 26 n.10 (same). But this sweeping proposition finds no support in either the Constitution or case law. Plaintiffs nevertheless invite this Court to create a clear split on this issue amongst the courts of appeals. *See id.* at 24 (urging this Court to "disregard" the Fourth Circuit's ruling in *Brown*). This Court should decline the invitation, because there is nothing wrong with protecting the right to "pray." Indeed, in *Jaffree*, Justice O'Connor specifically "disagree[d]" with the notion that the Establishment Clause "invalidates any moment of silence statute that includes the word 'prayer.'" *Jaffree*, 472 U.S. at 78 n.5 (O'Connor, J., concurring). By merely enacting a statute that "specifies that a student may choose to pray silently during a quiet moment, the State has not thereby encouraged prayer over other specified alternatives." *Id. See also Brown*, 258 F.3d at 276-77.

What's more, Plaintiffs' argument turns the First Amendment on its head, by condemning *any* law that expressly protects "prayer" or the right to "pray." That

includes numerous federal and state laws enacted in recent years in response to fears that school districts have become unduly (and unconstitutionally) hostile to religion—including one cited by Plaintiffs themselves. *See, e.g.*, 20 U.S.C. §6061; 20 U.S.C. §7904; TEX. EDUC. CODE §25.901 (cited in Pltfs' Br. at 7, 22 n.7, 36).

Plaintiffs' remaining contentions are even weaker. They claim that the principal or primary effect of Senate Bill 83 is to provide "extra legal guidance" to students who want to engage in silent, nondisruptive prayer, while forcing others to hire an attorney to determine their rights. But the statute expressly states that "any . . . silent activity" is permitted, "as the student chooses"—and in any event, the purported benefit is, at most, a picayune, rather than principal or primary, effect of the statute. Plaintiffs also claim that the statute excessively entangles teachers with religion by requiring them to police a silent classroom for a brief period of time. Yet far more is required of any kindergarten teacher who enforces silence during an hour of naptime, or any librarian who insists on silence throughout the school day—none of which implicates religion in any way. Finally, Plaintiffs claim that the law is discriminatory because it forbids audible and disruptive activities. But Plaintiffs never explain how sixty seconds of enforced silence constitutes discrimination.

For these reasons, the judgment below should be affirmed.

ISSUE PRESENTED

Whether Texas law providing for certain patriotic and contemplative exercises at the outset of each school day—beginning with voluntary recitation of the Pledge of Allegiance and ending with a minute of silence—violates the Establishment Clause, just because the law also promotes nondiscrimination by specifically allowing students to engage in any silent, nondisruptive activity of their choice during the minute of silence, including the right to "pray."

STATEMENT OF THE CASE

I. SENATE BILL 83

As amended in 2003, Texas Education Code §25.082 sets out a series of opening exercises for public schools throughout the State. Specifically, Senate Bill 83 requires schools to lead students in a voluntary recitation of the Pledge of Allegiance, first to the United States and then to Texas, followed by an observance of one minute of silence. During the minute of silence, "each student may, as the student chooses, reflect, pray, meditate, or engage in any other silent activity that is not likely to interfere with or distract another student." TEX. EDUC. CODE §25.082(d). "Each teacher or other school employee in charge of students during that period shall ensure that each of those students remains silent and does not act in a manner that is likely to interfere with or distract another student." *Id.*

During the legislative debate over Senate Bill 83, certain themes emerged. The sponsors of the legislation sought to foster patriotism and promote thoughtful contemplation at the outset of each school day, while also promoting nondiscrimination by protecting the right of any student who wished to use the minute of silence to engage in silent, nondisruptive prayer. Bill sponsors repeatedly acknowledged their desire to comply with the requirements of the Constitution, and disclaimed any desire to defy Supreme Court precedent. Some supporters of the bill added that they saw certain benefits from permitting voluntary individual silent prayer in public schools on a nondiscriminatory basis.

Others argued in favor of local control and opposed additional state mandates on public school districts. One senator asked whether it was necessary to include the word "pray" in the statute and suggested its deletion; the Senate sponsor responded that he simply wanted to ensure that the statute did not discriminate against religious activities, and to make clear that students would have the option to pray. Finally, some members asked why the statute did not accommodate students who wished to engage in religious activities other than silent, nondisruptive prayer; supporters countered that the purpose of the bill was to provide a minute of *silent*, thoughtful contemplation, and that more distracting activities (both religious and nonreligious alike) would obviously conflict with that plainly secular purpose.

The bill was eventually approved by a 27-4 vote in the Senate and a 132-4 vote in the House. R.127; R.162.

II. PROCEEDINGS BELOW

Plaintiffs filed suit in the Northern District of Texas, challenging Texas Education Code §25.082(d) under the Establishment Clause and 42 U.S.C. §1983, on the ground that Senate Bill 83 permits students to engage in any silent, nondisruptive activity of their choice, including the right to "pray."[1]

Originally, Plaintiffs pursued not only a facial challenge against Governor Rick Perry to invalidate Texas Education Code §25.082(d), but also an as-applied challenge against the implementation of that law by the public school district attended by their children. But the district court subsequently dismissed the as-applied challenge in November 2006, and in August 2007, "Plaintiffs agreed to a dismissal of their claims against the School District, since Plaintiffs are only challenging the constitutionality of the statute as it was enacted by the state legislature, not the policy as enacted by the School District." *Croft v. Governor*, 530 F. Supp. 2d 825, 828 (N.D. Tex. 2008). *See also Croft v. Governor*, No. 3:06-CV-434-M, 2006 WL 3151521 (N.D. Tex. 2006). On appeal, Plaintiffs' opening brief does not attempt to

1. Plaintiffs have also challenged the recitation of the Texas Pledge of Allegiance because it includes the same phrase—"under God"—that appears in the U.S. Pledge of Allegiance. But those issues remain pending in a separate lawsuit. In that suit, the court below denied Plaintiffs' motion for a preliminary injunction on August 28, 2007. Cross motions for summary judgment are now pending in that court.

revive any of their claims against the school district. Nor do the circumstances of the school district's implementation of the law bear any relevance to Plaintiffs' facial challenge, the only issue on appeal. Accordingly, on August 1, this Court granted the Governor's motion to dismiss the school district as a party on appeal. *See, e.g.*, *Eglin Nat'l Bank v. Home Indem. Co.*, 583 F.2d 1281, 1283 (5th Cir. 1978).

On cross-motions for summary judgment, Judge Barbara Lynn granted summary judgment to the Governor and upheld the statute against Plaintiffs' facial challenge. After reviewing the legislative history, she found that the legislature had the sincere, legitimate secular purpose of fostering thoughtful contemplation at the outset of the school day. *Croft*, 530 F. Supp. 2d at 846-47. She also found that the legislators had an "honest objective to comply with the Constitution" and did not seek to defy Supreme Court precedent. *Id.* at 846. She concluded that the Establishment Clause and Supreme Court precedent permits the inclusion of the word "pray" in a minute of silence provision. As she explained:

> A reasonable observer would not find the addition of the word "pray" to operate as an endorsement of religion or prayer in the classroom. Prayer was already an implied option under the prior statute, and making explicit what was already implied and justified by another state law should not cause the modification to be struck down. As Justice Breyer emphasized in *Van Orden*, the Court must distinguish between a real threat and a mere shadow, and the Court finds this change to be the latter.

Id. at 847 (citing *Van Orden v. Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring)).

STANDARD OF REVIEW

A district court finding that a statute was motivated by a particular legislative purpose (secular or otherwise) must be affirmed on appeal unless "clearly erroneous." *See, e.g.*, *Lynch v. Donnelly*, 465 U.S. 668, 681 (1984); *May*, 780 F.2d at 252. Conclusions of law are, of course, subject to *de novo* review.

SUMMARY OF ARGUMENT

As courts have repeatedly acknowledged, States are permitted to conduct moments of silence in public schools, so long as they are motivated by a secular purpose. Senate Bill 83 furthers a series of secular purposes. Voluntary recitation of the Pledge of Allegiance promotes patriotism. That recitation is followed by a minute of silence, which enables students to engage in a period of thoughtful contemplation. In addition, the statute promotes nondiscrimination against religion by making explicit what is already implied—that students may, at their option, spend their minute of silence by engaging in prayer.

By providing a patriotic and contemplative context for the minute of silence, Senate Bill 83 makes clear that it serves secular rather than religious purposes. Plaintiffs' primary contention on appeal—that no statute can serve a secular purpose

that even mentions the word "pray" or "prayer"—is both extreme and thoroughly rejected by case law, and their remaining contentions are similarly meritless.

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE JUDGMENT BECAUSE THE PURPOSE OF SENATE BILL 83 IS CLEARLY SECULAR—TO PROMOTE PATRIOTISM, THOUGHTFUL CONTEMPLATION, AND NONDISCRIMINATION.

Plaintiffs' primary contention on appeal is that Senate Bill 83 "has no secular legislative purpose, as evidenced by its text and also by its legislative history," Pltfs' Br. at 6, and therefore violates the first element of the three-prong test set out in *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). *See also McCreary County v. ACLU*, 545 U.S. 844, 860 (2005) ("When the government acts with the ostensible and predominant purpose of advancing religion, it violates the central Establishment Clause value of official religious neutrality."). Judge Lynn rejected this argument and held that the minute of silence provision serves the legitimate secular purpose of providing a period of thoughtful contemplation. *Croft*, 530 F. Supp. 2d at 847. This conclusion was plainly correct—and certainly not "clearly erroneous." *See Lynch*, 465 U.S. at 681; *May*, 780 F.2d at 252.

On appeal, as in the court below, Plaintiffs focus on four rulings that address the constitutionality of moment of silence statutes—*Jaffree*, *May*, *Bown*, and *Brown*. Each of those cases confirms that States may conduct moments of silence in public

schools, so long as they are motivated by a secular purpose. *See Jaffree*, 472 U.S. at 59 (States may "protect[] every student's right to engage in voluntary prayer during an appropriate moment of silence during the school day"); *Brown*, 258 F.3d 265 (upholding Virginia minute of silence law); *Bown*, 112 F.3d 1464 (upholding Georgia minute of silence law); *May*, 780 F.2d at 251 (noting that moment of silence laws may be constitutional). *See also Doe*, 240 F.3d at 495 (Wiener, J., concurring and dissenting) ("*Jaffree* . . . expressed the view that moments of silence generally have a legitimate secular purpose.").

Senate Bill 83 easily satisfies this standard. The moment of silence statutes challenged in *Jaffree*, *May*, *Bown*, and *Brown* lack one essential trait of Senate Bill 83. In fact, of the twenty-six States that currently have moment-of-silence laws on the books, only Texas law 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 minute of silence.[2] As the House sponsor of Senate Bill 83 explained, "[t]he primary purpose of S.B. 83 is to promote the core values of

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2. *See* ALA. CODE §16-1-20.4; ARIZ. REV. STAT. §15-342(21); ARK. CODE §6-10-115; CONN. GEN. STAT. §10-16a; DEL. CODE tit. 14, §4101A; FLA. STAT. §1003.45; GA. CODE §20-2-1050; GA. CODE §20-2-1051; ILL. COMP. STAT. §105-20/1; IND. CODE §20-30-5-4.5; KAN. STAT. §72.5308a; LA. REV. STAT. §17:2115a; ME. REV. STAT. tit. 20-A, §4805; MD. EDUC. CODE §7-104a; MASS. GEN. LAWS ch. 71, §1a; MICH. COMP. LAWS §380.1565; N.J. STAT. §18A:36-4 (invalidated by *May*, 780 F.2d 240); N.Y. EDUC. LAW §3029-a; N.C. GEN. STAT. §115C-47(29); N.D. CENT. CODE §15.1-19-03.1; OHIO REV. CODE §3313.601; 70 OKLA. STAT. §11-101.2; PA. STAT. tit. 24, §15-1516.1; R.I. GEN. LAWS §16-12-3.1; TENN. CODE §49-6-1004; VA. CODE §22.1-203.

patriotism and establish a contemplative period that underscores the seriousness of the education endeavor." Debate on Tex. S.B. 83 on the Floor of the House, 78th Leg., R.S. (May 5, 2003) (audiotapes available from House Video/Audio Services Office); R.400. This setting, unique to Senate Bill 83, guarantees that the reasonable observer would construe the opening exercises performed in Texas schools as a patriotic and contemplative, rather than religious, exercise.

A. Opening the School Day With a Voluntary Recitation of the Pledge, Followed by a Minute of Silence, Fosters Patriotism and Thoughtful Contemplation.

Senate Bill 83 sets out a uniform series of opening exercises for public schools in Texas, beginning with the voluntary recitation of the pledges of allegiance to both the United States and Texas, and ending with a minute of silence. *See* TEX. EDUC. CODE §25.082(b)-(d). The purpose of these exercises is plain—to foster patriotism and provide an opportunity for students to engage in thoughtful contemplation.

As Judge Lynn correctly observed, "[t]he addition of the pledge requirements" serves the "secular purpose of inculcating patriotism in Texas public school students." *Croft*, 530 F. Supp. 2d at 846. *See also Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 6 (2004) ("[R]ecitation [of the Pledge of Allegiance] is a patriotic exercise designed to foster national unity and pride in those principles."); *id.* at 31 (Rehnquist, C.J., dissenting) ("Reciting the Pledge, or listening to others recite

it, is a patriotic exercise, not a religious one; participants promise fidelity to our flag and our Nation, not to any particular God, faith, or church."). This interest is consistent with one of the principal purposes of public education as expressly enumerated in Texas law: "A primary purpose of the public school curriculum is to prepare thoughtful, active citizens who understand the importance of patriotism and can function productively in a free enterprise society with appreciation for the basic democratic values of our state and national heritage." TEX. EDUC. CODE §28.002(h).

The minute of silence that follows the voluntary recitation of the pledges of allegiance likewise furthers secular purposes—namely, to promote thoughtful contemplation, foster discipline, and help students to focus for the day. Courts of appeals have upheld moment of silence laws for precisely these reasons. *See Brown*, 258 F.3d at 276; *Bown*, 112 F.3d at 1469-70. After all, moments of silence "solemnize public occasions, express confidence in the future, and encourage the recognition of what is worthy of appreciation in society." *County of Allegheny v. ACLU*, 492 U.S. 573, 625 (1989) (O'Connor, J., concurring). *See also Chaudhuri v. Tennessee*, 130 F.3d 232, 237 (6th Cir. 1997) (moment of silence at university functions "afford dignity and formality to the event" and "solemnize the occasion") (internal quotation marks omitted).

The legislative history further confirms what the text of Senate Bill 83 already makes amply clear—that the legislation was designed to foster patriotism and promote thoughtful contemplation. As House sponsor Representative Dan Branch explained, Senate Bill 83 "sets in the Education Code . . . the requirements that core values of our nation-state be practiced on a daily basis." Hearings on Tex. H.B. 793 Before the House Comm. on Pub. Educ., 78th Leg., R.S. (Apr. 1, 2003), *available at* http://www.house.state.tx.us/committees/audio78/broadcasts.php?session=78&committeeCode=400. "The primary purpose of S.B. 83 is to promote the core values of patriotism and establish a contemplative period that underscores the seriousness of the education endeavor." Debate on Tex. S.B. 83 on the Floor of the House, 78th Leg., R.S. (May 5, 2003) (audiotapes available from House Video/Audio Services Office); R.400. The bill "sets up a tone of seriousness, and I think will make our school institutions more reflective and more reverent." *Id.* As he further explained in a press release:

> As Texans, we live in a unique state and are part of a special nation . . . . There is great value in remembering the sacrifices that allow us to live in freedom—sacrifices that continue to this very hour. This bill would create daily opportunities for students to consider the state and nation in which they live. . . . Many members of this Legislature recognize that principles of respect and gratitude for state and nation should endure . . . . This bill ensures the passage of these core values to succeeding generations.

Press Release, Texas House of Representatives, House Public Education Committee Passes Rep. Branch's Pledges, Minute of Silence Bill (Apr. 1, 2003); R.411. Representative Branch echoed these themes in a Dallas newspaper article published later that same year:

> This legislation reminds students that they reside in the beacon state of a blessed union. Throughout generations, Americans and Texans have sacrificed greatly, often completely, to lay the foundation upon which our nation and state now stand. This legislation invites our children to remember that crowd of witnesses and to join in their story.
>
> The minute of silence facet of the legislation creates a vacuum period into which parents can pour their values of choice.

Dan Branch, *Pledge, Minute of Silence Legislation Sets Forth Core Values,* DALLAS MORNING NEWS, July 4, 2003; R.413.

The interest in fostering patriotism was similarly reflected in the Senate debates. Senator Wentworth, for example, asked: "Do we need this bill? In order to inculcate patriotism and love of country and loyalty to our students, I believe it would be helpful." Debate on Tex. S.B. 83 on the Floor of the Senate, 78th Leg., R.S. (Apr. 9, 2003) (audiotapes available from Senate Staff Services Office); R.398. And Senator Lucio noted that Senate Bill 83 would encourage students "to be thankful that they live in the greatest country in the world." *Id.*; R.399.[3]

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3. These purposes were further reinforced by the TEA Guidelines promulgated in 2007 to instruct teachers on the administration of Senate Bill 83. As the Guidelines noted:

* * *

The district court found that the particular act of adding the word "pray" to the minute of silence provision did not specifically further the purpose of fostering patriotism. *Croft*, 530 F. Supp. 2d at 846. But that is beside the point. By providing a patriotic context for the subsequent minute of silence, Senate Bill 83 ensures that the reasonable observer would regard the opening exercises as a patriotic and contemplative exercise, rather than a religious act—and would perceive the exercises as such regardless of what individual students choose to do during the silence. As Judge Lynn herself recognized, the Legislature included the word "pray" as part of a package of improvements to the school day. *Croft*, 530 F. Supp. 2d at 829. Judge

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> By beginning each day with a moment of quiet contemplation, the statute promotes a sense of calm and civility among the schoolchildren. That calm moment can then enhance concentration, allow students to peacefully collect their thoughts, and serve to decrease student stress. Particularly in this age where students are confronted regularly with images of violence and disorder, a quiet moment underscores the importance of the learning process on which the students are about to embark by adding an air of solemnity, which can also foster classroom discipline.
>
> Moreover, the moment of silence directly follows the recitation of the pledges of allegiance to the United States and Texas flags, which allows students the opportunity to reflect on the sacrifices that allow us to live in freedom. Quietly contemplating our nation's heritage, and the lives of the men and women who have died to ensure our liberty, in turn promotes patriotism, which is a longstanding objective of the Texas curriculum. Thus, Texas Education Code §28.002(h) provides that "[a] primary purpose of the public school curriculum is to prepare thoughtful, active citizens who understand the importance of patriotism and can function productively in a free enterprise society with appreciation for the basic democratic values of our state and national heritage.

Letter from Shirley J. Neeley, Commissioner, Tex. Educ. Agency, to School Administrators (Oct. 10, 2006), at 1; R.404.

Lynn was thus plainly correct, and certainly not clearly erroneous, when she upheld Senate Bill 83 based on her finding that the minute of silence provision furthers the secular purpose of "provid[ing] for a period of thoughtful contemplation." *Id.*

B. Making Explicit That Students May Pray During the Minute of Silence Prevents Discrimination and Protects Religious Freedom, a Permissible Secular Purpose—Indeed, a Constitutional Right.

In addition to providing for a minute of silent contemplation following the voluntary recitation of the pledge, Senate Bill 83 also made clear that students could "choose[]" to engage in "any . . . silent activity that is not likely to interfere with or distract another student"—including the right to "pray." TEX. EDUC. CODE §25.082(d). Combating discrimination against religion by expressly permitting students to use the minute of silence to engage in prayer is, of course, a permissible secular purpose and does not offend the Establishment Clause. As the district court correctly noted, the statute was simply "making explicit what was already implied"—that students were obviously allowed to use the minute of silence to engage in any silent, nondisruptive activity of their choice, including prayer. *Croft*, 530 F. Supp. 2d at 847. This purpose "should not cause the modification to be struck down. As Justice Breyer emphasized in *Van Orden*, the Court must distinguish between a real threat and a mere shadow, and the Court finds this change to be the latter." *Id.* (citing *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring)).

The legislative history confirms that the purpose of Senate Bill 83 was to promote nondiscrimination against religion. The Senate sponsor of the legislation, Senator Wentworth, emphasized that Senate Bill 83 "[wa]s not a prayer bill. It's an opportunity to give people a chance to spend sixty seconds on a daily basis to reflect or meditate or pray." Hearings on Tex. S.B. 83 Before the Senate Comm. on Educ., 78th Leg., R.S. (Feb. 11, 2003) (audiotapes available from Senate Staff Services Office); R.199, 391. The bill simply ensured that students would realize that they would have the option to "pray": "There's no requirement of praying. . . . They can still meditate or reflect or do something else, but I'd like it in there." Debate on Tex. S.B. 83 on the Floor of the Senate, 78th Leg., R.S. (Apr. 9, 2003) (audiotapes available from Senate Staff Services Office); R.122. Opposing an amendment to strike the word "pray" from the bill, Senator Wentworth responded: "I disagree, respectfully, . . . [that] prayer should only be at home and in the church. *Prayer can be wherever we are*"—including, of course, public school campuses. *Id.* (emphasis added); R.122-23.

Indeed, to hold the opposite—that is, to permit all silent activity *except* prayer during the minute of silence—would violate the Free Exercise Clause. States may not treat the same activity differently based on its religious motivation. There is no difference between using the minute of silence to "reflect" or "meditate," and using

that same period of time to "pray," other than the fact that prayer is a religious activity. Amending Senate Bill 83 to permit "any silent activity other than prayer" would accordingly violate the Free Exercise Clause. *See, e.g.*, *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 538 (1993) (invalidating statute that "singled out" a religious practice "for discriminatory treatment" by prohibiting animal sacrifice by religious believers while allowing animal slaughter by secular operators). Put simply, "students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate'"—a principle that applies no less to freedom of religion. *Morse v. Frederick*, 127 S.Ct. 2618, 2621 (2007) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

* * *

Plaintiffs contend that the sponsors of Senate Bill 83 were attempting to impose "organized, forced prayer," and not just "voluntary, individual prayer," on public school students. Pltfs' Br. at 29. *See also id.* at 31 (alleging "an explicit agenda to reinstitute organized, involuntary prayer in Texas public schools"). The proposition is plainly meritless. That the sponsors could not possibly have held such an intention is clear on the face of Senate Bill 83 itself. Under that legislation, students may use the minute of silence—"as the student chooses"—to "reflect, pray, meditate, or engage in any other silent activity that is not likely to interfere with or distract another

student," and nothing more. TEX. EDUC. CODE §25.082(d). And nothing in the legislative history suggests to the contrary. *See, e.g.*, Debate on Tex. S.B. 83 on the Floor of the Senate, 78th Leg., R.S. (Apr. 9, 2003) (audiotapes available from Senate Staff Services Office); R.122 ("There's no requirement of praying. . . . They can still meditate or reflect or do something else."). The statements cited by Plaintiffs demonstrate only that some supporters of the bill believed that social benefits would result from allowing students to engage in voluntary individual silent prayer on a nondiscriminatory basis—a right not only permitted by the Establishment Clause, but required under the Free Exercise Clause.

C. Plaintiffs' 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.

Plaintiffs' primary argument on appeal is as simple as it is sweeping: "The fact that the text of Texas Education Code 25.082(d) contains the word 'pray' is sufficient, standing alone, . . . to show that the statute has no secular legislative purpose, and that any alleged secular legislative purpose proposed . . . is a sham." Pltfs' Br. at 6. *See also id.* at 14-20, 24-26, 26 n.10 (same).

Courts have rejected Plaintiffs' extreme notion that the Establishment Clause forbids express statutory references to "prayer" or the right to "pray." In *Jaffree*, the Supreme Court noted that States may "protect[] every student's right to engage in

voluntary prayer during an appropriate moment of silence during the school day." 472 U.S. at 59. Moreover, in her concurring opinion, Justice O'Connor expressly rejected any notion that the Establishment Clause "invalidates any moment of silence statute that includes the word 'prayer.'" *Id.* at 78 n.5. "[E]ven if a statute specifies that a student may choose to pray silently during a quiet moment, the State has not thereby encouraged prayer over other specified alternatives." *Id.* Likewise, Justice Powell indicated that there was nothing wrong with a statute that includes the word "prayer" so long as it has "a clear secular purpose." *Id.* at 66 (Powell, J., concurring). Notably, not a single justice in *Jaffree* remotely suggested that merely uttering the word "pray" or "prayer" in a moment of silence statute would render the statute unconstitutional.

Thus, the Fourth Circuit has upheld a moment of silence statute that expressly protected the right to "pray." As did the district court below, the Fourth Circuit observed that inclusion of the word "pray" was motivated by a secular legislative purpose: "To the extent the minute of silence is designed to permit nonreligious meditation, it clearly has a nonreligious purpose. And to the extent that it is designed to permit students to pray, it accommodates religion . . . [which] is itself a secular purpose in that it fosters the liberties secured by the Constitution." *Brown*, 258 F.3d at 276. *See also Croft*, 530 F. Supp. 2d at 847. Plaintiffs admit that their case is

precluded by *Brown*, and instead simply urges that "*Brown* . . . should be disregarded" and invites the Fifth Circuit to create a circuit split accordingly. Pltfs' Br. at 24.

Plaintiffs' argument is not only wrong as a matter of law. It 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.

For example, Congress has enacted a number of statutes in recent years to protect the right of students to pray in public schools—all of which would apparently be struck down under Plaintiffs' incorrect interpretation of the Establishment Clause. For example, in the Goals 2000: Educate America Act, enacted in 1994, Congress specifically directed that "[n]o funds authorized to be appropriated under this Act may be used by any State or local educational agency to adopt policies that prevent voluntary *prayer* and meditation in public schools." Pub. L. No. 103-227, §1011, 108 Stat. 125, 265 (codified at 20 U.S.C. §6061) (1994) (emphasis added). Later that same year, Congress enacted the Improving America's Schools Act, providing that "[a]ny State or local education agency" found by a federal court "to have willfully violated a Federal court order" involving "the constitutional right of any student with respect to *prayer* in public schools" shall be "ineligible to receive Federal funds under

this Act." Pub. L. No. 103-382, §101, 108 Stat. 3906 (codified at 20 U.S.C. §8900) (1994) (repealed by Pub. L. No. 107-110, §1011(5)(c), 115 Stat. 1986 (2002)) (emphasis added). Congress subsequently replaced this provision with a different one when it enacted the No Child Left Behind Act in 2002. In the new provision, Congress directed the Secretary of Education to provide guidance every two years "to State educational agencies, local educational agencies, and the public on constitutionally protected *prayer* in public elementary schools and secondary schools." Pub. L. No. 107-110, §901, 115 Stat. 1425 (codified at 20 U.S.C. §7904(a)) (2002) (emphasis added). No Child Left Behind further provides that, "[a]s a condition of receiving funds under this Act, a local educational agency shall certify in writing to the State educational agency involved that no policy of the local educational agency prevents, or otherwise denies participation in, constitutionally protected *prayer* in public elementary schools and secondary schools." *Id.* (codified at 20 U.S.C. §7904(b)) (emphasis added). *See also Croft*, 530 F. Supp. 2d at 844 (noting Congressional protection of "voluntary student prayer" in the federal No Child Left Behind Act).[4]

4. Congress also enacted legislation creating the National Day of Prayer in 1998, and directing the President to "issue each year a proclamation designating the first Thursday in May as a National Day of Prayer on which the people of the United States *may turn to God in prayer* and meditation at churches, in groups, and as individuals." 36 U.S.C. §119 (emphasis added).

Similarly, various State statutes expressly aimed at protecting religious practices against discrimination would be unconstitutional under Plaintiffs' theory. A Kentucky statute allows students to "pray," "express religious viewpoints," "distribute religious literature," and "observe religious holidays" "to the same extent and under the same circumstances as" their secular equivalents. KY. REV. STAT. §158.183. A Louisiana statute protects a student's right to "participat[e] in voluntary, student-initiated, student-led prayer on school property before or after school or during free time." LA. REV. STAT. §2115.5. Neither statute would survive Plaintiffs' extreme view of the Establishment clause. Indeed, Plaintiffs' proposed rule would even invalidate the very Texas law cited by Plaintiffs themselves: "A public school student has an absolute right to individually, voluntarily, and silently *pray* or meditate in school in a manner that does not disrupt the instructional or other activities of the school." TEX. EDUC. CODE §25.901 (cited in Pltfs' Br. at 36) (emphasis added).

* * *

Amici take a virtually identical position as Plaintiffs, with one minor twist: They contend that Senate Bill 83 violates the Establishment Clause, not just because it includes the word "pray" (as Plaintiffs contend), but because it does so as an amendment to a preexisting law, rather than as part of a statute as originally enacted. But of course, nothing in the Establishment Clause turns on such distinctions. The

fact that a provision arises out of a new statute, rather than out of an amendment to an older statute, is purely an accident of the legislative process, and nothing more.

Notably, Amici themselves do not appear to believe in this distinction. In this case, they observe that Virginia's moment of silence law was upheld in *Brown* because it included the word "pray" when it was first enacted in 1976, and that "the statutory amendment [in 2000] merely made this moment of silence mandatory rather than permitted." Amici Br. at 12-13. But in *Brown* itself, the ACLU of Virginia sang a very different tune. There, they urged the Fourth Circuit to invalidate the Virginia statute, notwithstanding the fact that it had contained the word "prayer" since its original enactment in 1976. *See* ACLU Br. in *Brown*, 258 F.3d 265, at 7-8, 13-17 & n.6 ("While it is true that the earlier version of Va. Code §22.1-203 also contained the word 'pray,' that statute predated [*Jaffree*] by nearly ten years, and its inclusion of prayer cannot save the 2000 enactment from First Amendment enquiry.").[5]

D. Nothing in *Wallace v. Jaffree* Alters This Result.

Plaintiffs and Amici alike claim that *Jaffree* requires reversal of the judgment below. But *Jaffree* is plainly distinguishable on multiple grounds. The law

5. To support their theory, Amici cite *Karen B. v. Treen*, 653 F.2d 897, 901 (5th Cir. 1981) and *Doe v. School Board of Ouachita Parish*, 274 F.3d 289 (5th Cir. 2001). But both of those cases involve *verbal* prayer, which presents fundamentally different concerns under the Establishment Clause from silent prayer.

challenged in *Jaffree* involves different statutory text, different legislative intent, and different circumstances.

In *Jaffree*, the Supreme Court noted that the "*only* significant textual difference" between Alabama's current and previous moment of silence laws was "the addition of the words 'or voluntary prayer.'" 472 U.S. at 59 (emphasis added). In this case, by contrast, Judge Lynn correctly noted that the Texas Legislature "made *five* changes to the earlier" law:

> (1) it made the provision of a moment of silence mandatory rather than discretionary; (2) it changed "period of silence" to "one minute of silence"; (3) it added the word "pray" to the list of designated options; (4) it added the catch-all "or engage in any other silent activity that is not likely to interfere with or distract another student"; and (5) it added a provision for teachers or other school employees to maintain discipline during the one-minute period.

Croft, 530 F. Supp. 2d at 829 (emphasis added).

Jaffree also involved "unrebutted evidence of legislative intent" to do one thing and one thing only, in the words of the sponsor of the legislation: "'to return voluntary prayer' to the public schools." 472 U.S. at 57-58. *See also id.* at 43. Furthermore, Governor Fob James admitted in the trial court that the revised Alabama statute was designed for no other reason than to "clarify [the State's] intent to have prayer as part of the daily classroom activity." *Id.* at 57 n.44. Here, by contrast, Judge Lynn specifically found that the legislative history provides extensive evidence

of secular legislative purpose—a finding that is plainly correct, and certainly not "clearly erroneous." To be sure, Plaintiffs dispute Judge Lynn's analysis of legislative intent. But that dispute only confirms that this case presents precisely the opposite of the "*unrebutted* evidence" in *Jaffree*. *Id.* at 58 (emphasis added). Legislative intent also distinguishes *Jaffree* from this case in yet another way: Whereas the Alabama Legislature enacted their statute for the express purpose of defying the U.S. Supreme Court, *id.* at 43-44 n.22, 45-47 n.25, 57 n.43, *see also Croft*, 530 F. Supp. 2d at 829, the sponsors of Senate Bill 83 made clear that they had crafted their legislation carefully and specifically to *comply* with Establishment Clause precedent. *Croft*, 530 F. Supp. 2d at 840, 846.

Finally, in *Jaffree*, the Court observed that "nothing . . . prevented any student from engaging in voluntary prayer" at school. 472 U.S. at 59. The Texas Legislature enacted Senate Bill 83 against the backdrop of very different circumstances, however—namely, the widespread fears of school district hostility to voluntary individual religious activities that, as previously noted, motivated Congress and various State legislatures, including in Texas, to enact various statutes protecting the religious liberties of students. *See, e.g.*, 20 U.S.C. §6061; 20 U.S.C. §7904; TEX. EDUC. CODE §25.901.

II. PLAINTIFFS' REMAINING CLAIMS ON APPEAL ARE LIKEWISE MERITLESS.

Plaintiffs' remaining contentions on appeal are meritless on their face—and unsurprisingly, Plaintiffs are unable to cite a single specific case to support them.

They urge this Court to invalidate Senate Bill 83 on the remaining two prongs of the three-prong *Lemon* test. 403 U.S. at 612. Specifically, they argue that the principal or primary effect of Senate Bill 83 is to provide "extra legal guidance" to students who engage in silent, nondisruptive prayer, while forcing others to hire an attorney to determine their rights. Pltfs' Br. at 7, 38-39. They base this argument on their claim that Senate Bill 83 refers only to the right to "pray," without also mentioning the right to "not pray." *Id.* at 7, 38. But this misstates both Texas law and Supreme Court precedent. Senate Bill 83 expressly states that "*any* . . . silent activity" is permitted, "as the student chooses." TEX. EDUC. CODE §25.082(d) (emphasis added). And in any event, the purported benefit is, at most, a picayune effect of the statute—not the principal or primary effect required by *Lemon*.

Plaintiffs also claim that the statute excessively entangles teachers with religion by requiring them to police a silent classroom for a brief period of time. Pltfs' Br. at 8, 42-43. But of course, far more effort is required of any kindergarten teacher who enforces silence during an hour of naptime, or any librarian who insists on silence throughout the school day—and none of these efforts implicates religion in any way.

See Bown, 112 F.3d at 1474 (concluding that "[t]he fact that this particular period of silence is mandated statewide does not create entanglement problems," and noting that "[t]here are many times during any given school day when teachers tell their students to be quiet and when audible activity of any kind is not permitted").

Finally, Plaintiffs allege that the law discriminates against certain religions, because Senate Bill 83 does not permit audible and disruptive activities of any kind during the minute of silence. Pltfs' Br. at 8, 47-49. But they do not cite a single case to support the notion that sixty seconds of silence somehow constitutes religious discrimination. And the claim fails on the face of the statute in any event. Senate Bill 83 does nothing more than permit *any* manner of "silent activity that is not likely to interfere with or distract another student" during the minute of silence, while forbidding any activity that does not meet that same standard—without regard to the existence or absence of any religious motivation behind the activity. TEX. EDUC. CODE §25.082(d). This no more discriminates against religion than would a requirement that public observers remain silent during courtroom proceedings.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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