No. 08-10092

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DAVID WALLACE CROFT,
Plaintiff-Appellant,
v.
GOVERNOR OF THE STATE OF TEXAS,
Rick Perry, and CARROLLTON-FARMERS BRANCH INDEPENDENT SCHOOL DISTRICT,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Texas, No. 3:06-cv-00434

Brief of Americans United for Separation of Church and State, American Civil Liberties Union, and American Civil Liberties Union Foundation of Texas as *Amici Curiae* in Support of Plaintiff-Appellant and Reversal

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Croft v. Governor of Texas, No. 08-10092.

Amici Curiae Americans United for Separation of Church and State, the American Civil Liberties Union ("ACLU"), and the American Civil Liberties Union Foundation ("ACLUF") of Texas are 501(c)(3) nonprofit corporations. Americans United, the ACLU, and the ACLUF of Texas have no corporate parents, and no publicly-held corporation owns any part of any of these organizations.

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

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IDENTITY AND INTERESTS OF *AMICI CURIAE*

Americans United for Separation of Church and State is a national, nonsectarian, public-interest organization that has more than 120,000 members and supporters, including thousands within the jurisdiction of this court. Since its founding in 1947, Americans United has been dedicated to defending the constitutional principles of religious liberty and separation of church and state. Americans United regularly serves as a party, as counsel, or as an *amicus curiae* in leading church-state cases before the U.S. Supreme Court, this Court, and other federal and state courts nationwide.

The ACLU is a nationwide, non-profit, nonpartisan organization with more than 500,000 members dedicated to the defense of constitutional rights and civil liberties. The ACLUF of Texas is one of its statewide affiliates, with over 16,000 supporters and members across the state. Since its founding in 1920, the ACLU has frequently advocated in support of the religious liberty guaranteed by the First Amendment, both as direct counsel and as *amicus curiae*. In 2005, the ACLU established the Program on Freedom of Religion and Belief to specialize in religious liberty issues and to safeguard the delicate balance of laws that neither promote religion nor interfere with its free exercise.

All parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The question before this Court is not whether it is constitutional for a state to require its schools to begin the day with a moment of silence. Nor is this Court being asked to consider the constitutionality of a statute that listed, from its inception, prayer as one of several possible activities permitted to students during a moment of silence. Rather, this Court is presented with a challenge to a legislature's decision to *amend* an existing moment-of-silence statute, TEX. EDUC. CODE § 25.082(d), to include an entirely gratuitous reference to prayer.

As such, this case is materially indistinguishable from the Supreme Court's decision in *Wallace v. Jaffree*, 472 U.S. 38 (1985). Here, as in *Wallace*, a legislature amended an existing moment-of-silence statute — under which prayer was already permissible — to explicitly include the word "pray." In each case, the amendment was entirely unnecessary to allow students to pray during the moment of silence, and thus the only conceivable purpose for the amendment was to *encourage* prayer — a purpose that was found in *Wallace* to run afoul of the First Amendment's Establishment Clause. Accordingly, just as in *Wallace*, the amended Texas statute should be struck down.

Because the face of the amendment bespeaks an unconstitutional religious purpose, this Court need not address the amendment's legislative history. But to the

extent that the history is relevant, comments by the amendment's sponsor and other legislators likewise show that the amendment had an impermissibly religious purpose. And the alleged secular purposes the government has proffered — conforming Texas law to a moment-of-silence law upheld in Virginia, inculcating patriotism, protecting individual religious freedom, inducing contemplation, and fostering discipline — are shams that fail to justify the addition of the word "pray" to the statute. For these reasons, this Court should reverse the judgment of the district court.

ARGUMENT

I. The *Primary* Purpose of a Legislative Act Determines Whether It Violates the Establishment Clause.

The Supreme Court has articulated a three-part test for determining the constitutionality of a statute under the Establishment Clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (internal citations omitted). The first prong of this analysis is a "straightforward" inquiry into whether the legislature acted with a "predominantly religious purpose." *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 862 (2005); *see also id.* at 860 ("When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of

official religious neutrality." (citation omitted)); *Edwards v. Aguillard*, 482 U.S. 578, 599 (1987) (holding government action unconstitutional where religious purpose "predominate[d]").

Importantly, the legislature need not act with an *exclusively* religious purpose for a court to hold its action unconstitutional — indeed, *McCreary* explicitly rejected the proposition that the purpose inquiry is satisfied so long as *any* secular purpose is apparent. 545 U.S. at 865 n.13. Rather, "in those unusual cases where the [government's claimed secular purpose] was an apparent sham, or the secular purpose secondary, the unsurprising results have been findings of no adequate secular object, as against a predominantly religious one." *McCreary*, 545 U.S. at 865; *see also Lynch v. Donnelly*, 465 U.S. 668, 691 (1984) (O'Connor, J., concurring) (explaining that purpose inquiry "is not satisfied . . . by the mere existence of some secular purpose, however dominated by religious purposes").

In direct contravention of this authority, the government asserts that "a single legitimate secular purpose" suffices to satisfy the Establishment Clause. (Rec. 350.) It mistakenly relies on *Lynch* for the proposition that legislation may be invalidated for lack of a secular purpose only when the challenged statute "was motivated wholly by religious considerations." 465 U.S. at 680. *McCreary*, however, directly clarified that such a restrictive reading of the quoted language is inappropriate. 545 U.S. at

865. The Court explained that a reading of the purpose prong to invalidate only statutes with solely religious purposes "would leave the purpose test with no real bite, given the ease of finding some secular purpose for almost any government action." *Id.* at 865 n.13.[1]

In ascertaining whether the government has acted with a "predominantly religious" purpose (*McCreary*, 545 U.S. at 865), it is appropriate for the court to consider "the statute on its face, its legislative history, or its interpretation by a responsible administrative agency" (*Edwards*, 482 U.S. at 594). Such evidence is evaluated through the eyes of a hypothetical objective reasonable observer (*see, e.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)), who, because the "world is not made brand new every morning . . . [is] presumed to be familiar with the history of the government's actions and competent to learn what history has to show" (*McCreary*, 545 U.S. at 866). Although the government's characterization of its purpose is "entitled to some deference," it is "the duty of the courts to 'distinguish a sham secular purpose from a sincere one.'" *Santa Fe*, 530 U.S. at 308 (quoting

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[1] The articulation of the purpose standard in *Wallace v. Jaffree*, 472 U.S. 38 (1985), which was decided the year after *Lynch*, is entirely consistent with *McCreary*. There, the Court held that "a statute must be invalidated if it is entirely motivated by a purpose to advance religion." *Wallace*, 472 U.S. at 56. That language simply means that an exclusively religious purpose is *sufficient* to invalidate a statute, not that an exclusively religious purpose is *necessary* for invalidation.

Wallace, 472 U.S. at 75 (O'Connor, J., concurring in judgment) (internal alterations omitted)); *see also McCreary*, 545 U.S. at 864 ("[T]he secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective."); *Edwards*, 482 U.S. at 586-87 ("[I]t is required that the statement of such purpose be sincere and not a sham.").

II. The Plain Language of the Amendment Demonstrates an Impermissible Religious Purpose.

A. Amending a Statute to Single Out Prayer for Special Emphasis Betrays a Religious Motivation.

"There can, of course, be no doubt that [prayer] is a religious activity. It is a solemn avowal of divine faith and supplication for the blessings of the Almighty." *Engel v. Vitale*, 370 U.S. 421, 424 (1962); *accord Karen B. v. Treen*, 653 F.2d 897, 901 (5th Cir. 1981) ("Prayer is perhaps the quintessential religious practice for many of the world's faiths."). A legislative act singling out prayer therefore demonstrates an impermissible religious purpose. *See, e.g.*, *Santa Fe*, 530 U.S. at 309 (holding policy authorizing only one kind of message — an "invocation" — at school football games furthers no secular purposes); *Karen B.*, 653 F.2d at 901 (where statute explicitly allowed schools to authorize students or teachers to lead prayer, "the plain language [of the statute and guidelines] ma[de] apparent [its] predominantly religious purpose" because "prayer is a primary religious activity in itself").

Acknowledging the inherent religiosity of prayer, the Supreme Court has held that amending an existing moment-of-silence statute to include prayer evinces an impermissible religious purpose. In *Wallace*, the Court struck down an amendment to an Alabama statute providing for a moment of silence at the beginning of the school day. While the original statute stated that the moment would be used for "meditation," the legislature amended the statute to provide for "meditation or voluntary prayer." 472 U.S. at 58-59. The Court explained: "[T]he only significant textual difference is the addition of the words 'or voluntary prayer.'" Thus, there were "only two conclusions [ ] consistent with the text [of the amended statute]: (1) the statute was enacted to convey a message of state endorsement and promotion of prayer; or (2) the statute was enacted for no purpose." *Id.* at 59. Because the latter conclusion was inconsistent with "the common-sense presumption that statutes are usually enacted to change existing law," the Court reasoned that the legislature's purpose must have been to endorse and promote prayer. *Id.* at 59 n.48. *Wallace*, therefore, stands for the proposition that the plain text of a statutory amendment demonstrates a legislative purpose to promote religion if the amendment fails to advance a secular purpose that was not already fully served by the statute. *See McCreary*, 545 U.S. at 862 ("In *Wallace*, for example, we inferred purpose from a

change of wording from an earlier statute to a later one, each dealing with prayer in schools.").

This Court has similarly struck down a statute based on a change in statutory language that served only to advance an unconstitutional, religious purpose. In *Doe v. School Board of Ouachita Parish*, this Court invalidated a statutory amendment that deleted the word "silent" from a clause allowing students and teachers to begin the school day with a "brief time in silent prayer or meditation." 274 F.3d 289, 291 (5th Cir. 2001) (citation omitted). The Court characterized the circumstances as "indistinguishable" from and "virtually identical" to *Wallace*, explaining: "In this case, there is no doubt that the [ ] amendment was motivated by a wholly religious purpose. It accomplished only one thing — the deletion of the word 'silent' from a statute that authorized 'silent prayer or meditation.' The purpose of the amendment is clear on its face — it is to authorize *verbal* prayer in schools." *Id.* at 294. This Court emphasized that the amendment was entirely lacking in any secular justification, explaining that, "[a]s in *Wallace*, the preexisting statute here already protected silent prayer." *Id.*

Another federal court recently granted a preliminary injunction against implementation of an Illinois moment-of-silence statute that the legislature had amended both by changing the statute's name from "The Silent Reflection Act" to

"The Silent Reflection and Student Prayer Act," and by adding a substantive section emphasizing that public-school students may engage in "individually initiated, non-disruptive prayer." *Sherman v. Twp. High Sch. Dist. 214*, No. 07-C-6048, 2007 WL 3446213, at *1 (N.D. Ill. Nov. 15, 2007). Citing *Wallace*, the court held that it "must be mindful . . . of the Illinois legislature's decision to add the word 'prayer' to both the title and text of an existing statute . . . . A period of silence that forces children to consider prayer crosses the line by 'convey[ing] or attempting to convey the message that children should use the moment of silence for prayer.'" *Id.* at *3 (quoting *Wallace*, 472 U.S. at 73).[2]

B. This Case Is Controlled by *Wallace*.

Here, the legislature made only two substantive statutory changes relating to permissible activities during the moment of silence. First, it added the word "pray" to the list of permissible activities. *Croft v. Governor of Tex.*, 530 F. Supp. 2d 825, 828 (N.D. Tex. 2008). But because the pre-amendment statute already allowed students to "reflect or meditate," "nothing," as in *Wallace*, "prevented . . . student[s]

[2] Other courts have also acknowledged, in the context of moment-of-silence statutes, that inclusion of the word prayer favors a finding of religious purpose. *See Walter v. W.V. Bd. of Educ.*, 610 F. Supp. 1169, 1176 (S.D. W. Va. 1985) ("The inclusion of the word 'prayer' is likewise indicative of the lack of a secular purpose . . . ."); *Duffy v. Las Cruces Pub. Schs.*, 557 F. Supp. 1013, 1015 (D.N.M. 1983) ("Obviously, inclusion of the word 'prayer' is a clear indication of the legislative purpose. Indeed, it could hardly be more clear.").

from engaging in voluntary prayer" during the moment of silence. 472 U.S. at 59. Indeed, the statute's sponsor acknowledged this point, saying that he thought that some students were already praying during the existing moment of silence. (Rec. 122.) As in *Wallace*, "[t]he addition of [the word "pray"] indicates that the State intended to characterize prayer as a favored practice." 472 U.S. at 60.

Moreover, even if, hypothetically, there were uncertainty about whether prayer had been covered under the previous statute, the second substantive amendment — which added a "catch-all" phrase explaining that students could "engage in any other silent activity that is not likely to interfere with or distract another student" (*Croft*, 530 F. Supp. 2d at 828) — would remove all doubt. Therefore, the fact that the legislature explicitly mentioned prayer *despite* the addition of the catch-all provision *doubly* singles prayer out for special treatment, and necessarily demonstrates an intent to endorse prayer. *See Wallace*, 472 U.S. at 60.

The district court attempted to distinguish this case from *Wallace* on the grounds that

> the addition of the word 'pray' should not be independently dispositive of the constitutionality of the statute, when the amended statute also made substantive changes to the activities students could engage in, both prior to, and during, the moment of silence. Since before the amendment, prayer was already authorized by Texas law, its explicit addition to the list of authorized conduct should not taint an amendment that substantially modified prior law in several ways.

Croft, 530 F. Supp. 2d at 838. But such reasoning is unpersuasive: An amendment whose only conceivable purpose is to promote religious activity is not redeemed merely because it was passed at the same time as other amendments with plausible secular justifications. In *Wallace*, for instance, the Court singled out an amendment to add the phrase "or voluntary prayer" as "the only significant textual difference," despite contemporaneous changes applying the statute to all grade levels and making the moment of silence mandatory. 472 U.S. at 58.

Indeed, to the extent that the other alterations to the statute affect the assessment of the statute's constitutionality, they reinforce that the purpose of adding the word "pray" was to promote religion. The amendment's other changes affecting the moment of silence were to make the moment mandatory and to impose a required one-minute length. *Croft*, 530 F. Supp. 2d at 829. In conjunction with the addition of the word "pray," casting the moment of silence as a required activity only supports the conclusion that the amendments were intended to promote prayer, while the mandatory one-minute length effectuates no material change to the statute.[3]

Moreover, as in *Wallace*, acknowledging that the addition of the word "pray" promotes prayer is the only interpretation of the amendment consistent with well-

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[3] The amendment also added a separate subsection on daily recitation of the pledges of allegiance to the United States and Texas flags before the moment of silence. *See* TEX. EDUC. CODE § 28.082(b)-(c) (2003). The pledge provisions are not relevant to the constitutionality of adding the word "pray." *See* Section IV.B *infra*.

established principles of statutory construction. If possible, all parts of a statute must be assigned meaning. *See, e.g.*, *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307-08 (1961) (holding that if a "statute admits a reasonable construction which gives effect to all of its provisions," a court "will not adopt a strained reading which renders one part a mere redundancy."); *Wash. Mkt. Co. v. Hoffman*, 101 U.S. 112, 115-16 (1879) (affirming the "cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. . . . [A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant. This rule has been repeated innumerable times." (internal quotations omitted)). Here, unless the addition of the word "pray" performs no function at all, it must mean that prayer is a favored activity. *See Wallace*, 472 U.S. at 59. There is no question that the statute allowed prayer even before the amendment, and, independently, that the "catch-all" phrase would include prayer. Consequently, there is no way to give effect to the amendment adding the word "pray" without concluding that the legislature intended to promote prayer.

The fact that the word "pray" was included through an *amendment* to the statute clearly distinguishes this case from the two moment-of-silence cases on which the government relies. In *Brown v. Gilmore*, the challenged Virginia statute had included the phrase "meditate, pray, or engage in any other silent activity" for over twenty

years; the statutory amendment merely made this moment of silence mandatory rather than permitted. 258 F.3d 265, 270-72 (4th Cir. 2001). No intent to single out prayer for emphasis existed in *Brown*. And in *Bown v. Gwinnett County School District*, legislators actually *removed* the word "prayer" from the challenged portion of the statute: while the statute initially allowed "silent prayer or meditation," it was amended to require "quiet reflection," and a separate provision was added noting that the statute should not be construed to limit voluntary prayer. 112 F.3d 1464, 1469 n.3, 1470 (11th Cir. 1997).

III. The Legislative History Confirms the Amendment's Religious Purpose.

Although, as discussed above, the statute's plain language amply demonstrates the law's unconstitutional religious purpose, the legislative history bolsters that conclusion. In evaluating the legislative history of a statute, courts consider comments made in committee and during floor debates. *See, e.g.*, *Edwards*, 482 U.S. at 587, 591 (relying on statements at legislative hearings); *Alexander v. Choate*, 469 U.S. 287, 295, 297 (1985) (relying on floor statements and committee reports). Courts have singled out the stated purpose and other comments of the statute's sponsor for special consideration. *See Wallace*, 472 U.S. at 57 & n.43; *Edwards*, 482 U.S. at 587, 592; *Bown*, 112 F.3d at 1467; *Ouachita*, 274 F.3d at 294; *Karen B.*, 653 F.2d at 900. Courts also have considered the statements of other legislators, although the individual

comments of any one non-sponsoring legislator cannot be determinative. *See Edwards*, 482 U.S. at 592 n.13; *Bown*, 112 F.3d at 1471; *Ouachita*, 274 F.3d at 294; *Karen B.*, 653 F.2d at 901. An analysis of the legislative record in this case confirms the impermissible religious motivation underlying the amendment.

A. The Legislative History of the Amendment Demonstrates that the Texas Legislature Acted with the Purpose of Promoting Prayer.

Statements by Senator Wentworth, the bill's sponsor, evince a religious purpose for the amendment. Such history weighs heavily in favor of a court finding an unconstitutional religious purpose. *Compare Edwards*, 482 U.S. at 591-92 (statute struck down after sponsor explained that he did not believe in evolution on ground that it conflicts with his own religious beliefs), *with Bown*, 112 F.3d at 1471, *and Brown*, 258 F.3d at 280 (moment of silence statutes upheld where sponsors did not mention religion as a motivation for bill).

In committee, Senator Wentworth introduced S.B. 83 by stating that the Supreme Court "over four decades ago, ruled that audible prayer in public schools is unconstitutional. And most Texans disagreed with that Supreme Court decision then and still disagree with it." (Rec. 182.) Wentworth reemphasized this theme in his concluding remarks: "This bill was drafted in response to the United States Supreme Court's upholding a Virginia state statute on an issue that has been a burr under the saddles of Texans for over four decades. It is not, frankly, what most Texans would

like. Most Texans, at least in my senate district, would like to see a return of the kind of audible prayer that's nondenominational that existed when a lot of us grew up. That, however, has not been allowed . . . ." (Rec. 241.)

These opening remarks — particularly the emphasis on the disagreement of "most Texans" with the Supreme Court's purported prohibition on "audible prayer in public schools" — demonstrates that promoting prayer was central to Wentworth's motivation for introducing S.B. 83. Wentworth also stated, "I just think it's common sense that a combination of a sort of deteriorating standards in the media in terms of entertainment, movies, television, lyrics to songs, *the lack of prayer in schools*, all of those things, the violent videos that kids can and do rent . . . . This has been such a controversial issue for so long that I believe it's probably better for us to say statewide that every school child has the opportunity to have 60 seconds of meditation or reflection or prayer." (Rec. 186-87 (emphasis added).) This equation of a lack of prayer in schools with "deteriorating standards" in society further demonstrates Wentworth's agenda of promoting student prayer.

When Senator Hinojosa pressed Wentworth during the subsequent floor debates about why it was necessary to include the word "pray," Wentworth said:

> There's no requirement of praying. But I want to give in [the] statute a recognition — my guess is that in those schools that are allowed and those school boards that do take advantage of it allowed to have the 60 seconds of meditation or reflection, we don't know what those students

> are doing in that 60 seconds of silence, and my guess is that some of them are already praying. But it's not in the statute. I just want to include it in the statute. They can still meditate or reflect or do something else, but I'd like it in there.

(Rec. 122.) Wentworth's recognition that students were already praying under the pre-amendment statute highlights that the only reason to include the word "pray" was to elevate prayer for special emphasis.

This view is only reinforced by the fact that Hinojosa introduced a bill that would have modified Wentworth's proposed bill simply by removing the word "pray." (Rec. 121, 126.) In support of his bill, Hinojosa raised the concern that "what you're doing is . . . a back-door way of bringing prayer to our schools. I don't think that's right. Prayer belongs at home, in our churches, in the synagogues, not in a public school system." (Rec. 121.) Hinojosa therefore proposed to remove the word "pray" on the ground that "leav[ing] the word prayer shows that your intent is trying to bring prayer back in the school system." (Rec. 123.) But rather than allaying Hinojosa's concerns by providing a secular reason for including the word "pray," Wentworth stated: "I disagree, respectfully, with you about prayer should only be at home and in the church. Prayer can be wherever we are. We can pray driving our cars, we can pray in school." (Rec. 122-23.) After consideration of these comments, the Senate rejected Hinojosa's proposed amendment by a voice vote — demonstrating that they

viewed the word "pray" as essential to the bill and revealing their religious motivations.

Other senators were even more explicit about their prayer-advancing agenda, and while their statements alone cannot dictate the outcome of the case, they may be factored into a determination of purpose. *See Edwards*, 482 U.S. at 591 n.13 ("Besides [the sponsor], several of the most vocal legislators also revealed their religious motives for supporting the bill in the official legislative history."). Representative Edwards stated that he had "been an advocate [of the bill] because I grew up in schools where we had prayer." (Rec. 134.) He continued that, by "pushing this bill and going around the state trying to get people to support prayer back in school, we found that a number of undesirable things happened when we took prayer out of school," and he even vocalized his desire that students should be able to pray aloud if they wished. (Rec. 135.) Senator Lucio also expressed approval of having a "moment of silence to be able to pray." (Rec. 113.) And in a press release announcing the passage of S.B. 83, Representative Hopson stated: "Other states have successfully implemented school prayer, and it is about time that Texas step up." Press Release, Rep. Chuck Hopson Supports School Prayer Bill (May 8, 2003), *available at* http://www.house.state.tx.us/news/release.php?id=304.

In sum, the sponsor's repeated discussions of prayer, as well as the even more explicit statements of other legislators, strengthen the conclusion that the purpose of the amendment was to promote prayer.

B. Scattered Affirmations of Secular Intent Cannot Override Obvious Indications of Religious Purpose.

In *Stone v. Graham*, the Court rejected the Kentucky legislature's explanation that it mandated posting the Ten Commandments in classrooms because the Commandments are a "fundamental legal code" of Western Civilization, holding that "such an 'avowed' secular purpose is not sufficient to avoid conflict with the First Amendment." 449 U.S. 39, 41 (1980). Likewise, in *Karen B.*, this Court rejected two sponsors' claims that the purpose of a school-prayer program "was to increase religious tolerance by exposing school children to beliefs different from their own and to develop in students a greater esteem for themselves and others by enhancing their awareness of the spiritual dimensions of human nature." 653 F.2d at 900. The Court explained that "testimonial avowal of secular legislative purpose is not sufficient to avoid conflict with the Establishment Clause" and that "the plain language [of the statute] makes apparent the[] predominantly religious purpose." *Id.*

Like the statements rejected in *Stone* and *Karen B.*, the scattered claims of secular purpose present here cannot override the overwhelming evidence of religious intent. Wentworth claimed on the Senate floor that "this is not a school prayer

amendment," as prayer is merely one of many activities in which students might engage. (Rec. 82, 89.) Representative Branch, the House sponsor of the bill, asserted on the House floor that the proposed bill allows students to "have this minute of silence when they can do anything they want, but it does set the tone for the day that this is serious business, education and that they can contemplate what they plan to do with their day." (Rec. 140.) But Wentworth's and Branch's assertions cannot eclipse the clear and specific evidence of religious purpose in the text of the amendment and its legislative history. And they do not explain how the amendment accomplishes Wentworth's and Branch's claimed non-religious aims, given that prayer was already permitted under the predecessor statute.

IV. The State's Proffered Secular Purposes Are Shams.

The legislature's predominantly religious purpose is again highlighted by the fact that the government is unable to articulate any reasonable and legitimate secular basis for the amendment. *See Karen B.*, 653 F.2d at 900.

A. Replicating the Moment-of-Silence Statute Upheld in Virginia Does Not Justify the Amendment.

Wentworth asserted that he initiated the bill to model the statute after a moment-of-silence statute upheld in Virginia. (*See, e.g.*, Rec. 183.)[4] The district court

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[4] In fact, the legislative history reveals that Wentworth incorrectly thought (continued...)

appeared to credit this assertion to some extent, explaining that "[i]n evaluating whether an advanced secular purpose is a 'sham,' the Court is mindful that these legislators had an honest objective to comply with the Constitution." *Croft*, 530 F. Supp. 2d at 846. But simply modeling a bill after a statute upheld in another state cannot, in itself, supply a secular purpose. Rather, the legislature must advance an independent secular purpose for desiring to model its own bill after that of the other state. Indeed, "the same government action may be constitutional if taken in the first instance and unconstitutional if it has a sectarian heritage." *McCreary*, 545 U.S. at 865 n.14; *see also Duffy v. Las Cruces Pub. Schs.*, 557 F. Supp. 1013, 1015 (D.N.M. 1983). The Virginia statute had an entirely different history than the amendment at issue here. Specifically, the Virginia statute involved neither an isolated addition of the word "pray" nor religious remarks during legislative proceedings on the part of the sponsor. *Brown*, 258 F.3d at 271, 281. Here, in contrast, the text of the amendment, in conjunction with Wentworth's discussion of his motivation to introduce S.B. 83 after learning that the Virginia statute had been upheld, reveals only an intent to latch

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[4] (...continued)
that the Virginia statute had been upheld by the Supreme Court, and that he repeatedly conveyed his misconception to the other senators during debate. (Rec. 90, 168, 185 (claiming, incorrectly, that the Supreme Court "refused to hear the case" and that "by doing that, they upheld the state statute").)

onto the Virginia statute as a means of promoting prayer in schools. *See* Section III.A, *supra*.

B. The Amendment Does Not Promote the Purpose of Inculcating Patriotism.

The government also contends that the moment of silence serves to instill patriotism in students by imposing sixty seconds of silent contemplation following the recitation of the United States and Texas pledges of allegiance. As the district court held, however, there is no connection between the addition of the word "pray" and inculcation of patriotism. *Croft*, 530 F. Supp. 2d at 846. If anything, the addition of the word "pray" might encourage students to think religious thoughts instead of patriotic ones during the moment of silence.

It is thus not surprising that, in debating the bill, no legislator drew a connection between the addition of the word "pray" and the promotion of patriotism. Although both Wentworth and Branch referenced patriotism in their statements regarding the amendment, their statements focused on the pledge recitation portion of the bill rather than the moment-of-silence portion. (*See* Rec. 93, 139.)

As the district court acknowledged, "although patriotism is an admirable and critical value to impart to schoolchildren, it cannot as a matter of law function as a proxy for a secular purpose supporting the presence of the word 'pray' in the statute." *Croft*, 530 F. Supp. 2d at 846. Indeed, "the opportunity to contemplate [patriotic

topics] was fully provided for by the prior statute's moment of silence," and therefore "[t]he addition of the word 'pray' was unnecessary to achieve a secular purpose." *Id*.

C. The Amendment Does Not Promote the Purpose of Protecting Individual Religious Freedom.

Under Texas law, "[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 (1995). Before the district court, the government contended that "[m]entioning prayer as one example of acceptable silent, non-distracting activity simply ensures that § 25.901's protection of individual religious freedom carries over into the minute of silence." (Rec. 359.) Like the district court, this Court should reject accommodation as a valid secular purpose for the amendment.

The bill's sponsor disclaimed any religious-accommodation purpose during debate on the bill. (*See* Rec. 89 ("[T]his is not a school prayer amendment and it's not designed to protect religions.").) A secular purpose proffered during litigation that contradicts the sponsor's statements during legislative debate is paradigmatically a sham. *See Edwards*, 482 U.S. at 587 (rejecting claimed purpose of promoting academic freedom for statute requiring teaching of creationism if evolution was taught, where sponsor stated that "[m]y preference would be that neither [creationism

nor evolution] be taught"). Moreover, no other senator or representative voiced the theory that the bill's purpose was to accommodate religious belief.[5]

What is more, accommodation of religion is a valid purpose under the Establishment Clause only where the government is lifting a government-imposed burden on religion. *See County of Allegheny v. ACLU*, 492 U.S. 573, 613 n.59 (1989) (holding that a permissible "accommodation of religion . . . must lift 'an identifiable burden on the exercise of religion'" (quoting *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring)); *see also Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005). Thus, in *Wallace*, the Court rejected accommodation of religion as a genuine purpose, explaining: "[I]t is undisputed that at the time of the enactment [ ] there was no governmental practice impeding students from silently praying for one minute at the beginning of each schoolday; thus, there was no need to 'accommodate' or to exempt individuals from any general governmental requirement because of the dictates of our

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[5] The fact that the moment of silence is far better suited to the practices of certain religions further confirms that neither Wentworth's nor the other legislators' purpose was accommodation. During the Senate floor debate, Senators Hinojosa, Barrientos, and West all raised the concern that certain modes of prayer, such as chanting or kneeling, would not be permissible under the statute. (*See* Rec. 87, 96, 103.) Wentworth conceded that such practices might not be permissible under the amended version of the statute (*see* Rec. 87, 103), confirming that accommodation of religious activity was not the motivation for the amendment.

cases interpreting the Free Exercise Clause." 472 U.S. at 57 n.45; *see also McCreary*, 545 U.S. at 864 ("[T]he [*Wallace*] Court declined to credit Alabama's stated secular rationale of 'accommodation' for legislation authorizing a period of silence in school for meditation or voluntary prayer, given the implausibility of that explanation in light of another statute already accommodating children wishing to pray.").

Likewise, here Texas already had a statute protecting the religious freedom of students. *See* TEX. EDUC. CODE § 25.901 (1995). This statute remained on the books after the passage of the amended moment-of-silence statute. Moreover, the pre-amendment moment-of-silence statute also already allowed for prayer by permitting a period of silence, as discussed above. *See Croft*, 530 F. Supp. 2d at 846 (rejecting alleged purpose of accommodating religion because legislators cited "no evidence that the prior law was unclear or hindered the religious practice of students"). And, if all that were not enough, the amendment of the statute to include the catch-all phrase "any other silent activity" further ensured that prayer would be permitted, so amending the statute to explicitly mention prayer was wholly unnecessary.

Finally, to the extent that the government puts forward "allowing" prayer as a purpose separate from "accommodating" prayer, the government's arguments fail for similar reasons. The government suggests that without the amendment, students would not have been *allowed* to pray, arguing that the addition of the word "prayer"

to the statute was intended to correct a "not terribly subtle indication that prayer was a disfavored activity," and that "[b]y ensuring that prayer was a permitted activity during the minute of silence, [the statute] offers students an opportunity to exercise" a right to pray. (Rec. 361.) But because prayer was not forbidden under the pre-amendment version of the statute, and was already explicitly protected under section 25.901, the government's suggestion is untenable.

D. The Amendment Does Not Promote the Purpose of Inducing Contemplation.

The government argues that the amendment advances the secular goal of promoting individual contemplation, explaining that "[a] period of thoughtful contemplation — even if some students individually choose to use that time for silent prayer — serves the purely secular ends of fostering discipline and helping students to focus for the day." (Rec. 353.) The district court found this justification persuasive, holding that "[t]he addition of the word 'pray' directly furthers the purpose of encouraging students to engage in individual contemplative activity." *Croft*, 830 F. Supp. 2d at 847. It explained: "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." *Id.* at 847.

This argument fails, however, because the addition of the word "pray" does not further the secular goal of contemplation in any way that was not already

accomplished by the existing statute. The language "reflect or meditate" in the pre-amendment version of the statute *already* promoted contemplative activity — indeed, it is difficult to conceive of wording that would do so more clearly. Adding the word "pray" to the statute therefore did nothing to further induce contemplative activity. Because courts have held that every part of a statute must be given effect (*see Wallace*, 472 U.S. at 59; *Jarecki*, 367 U.S. at 307-08), the inevitable conclusion is that the only reason the legislature could have added the word "pray" was to promote religious activity — and, as already explained, this is not a permissible purpose (*see* Section II, *supra*).

The district court also erred in concluding that "adding the catch-all option contemporaneously with the addition of 'pray' counsels against a finding that the statute endorses prayer over the other options." *Croft*, 530 F. Supp. 2d at 847. The contemporaneous addition of the catch-all provision actually *emphasizes* the religious rationale underlying the explicit textual mention of prayer by independently rendering this mention entirely unnecessary. In addition, "pray" was not added as merely one in a list of examples, such as "focus," "think," "ruminate," "plan," — or, indeed, "contemplate." Only "pray" was chosen for inclusion. By amending the statute to list prayer explicitly, the legislature singled out religious activity for emphasis over all other silent, contemplative activities that might be undertaken during a moment of

silence. The amendment, therefore, does not advance contemplation — it advances prayer alone.

E. The Amendment Does Not Promote the Purpose of Fostering Classroom Discipline.

The government also argues that the amendment helps to improve standards of behavior in a troubled society. It contends that, "[p]articularly in this age where students are confronted regularly with images of violence and disorder, a quiet moment underscores the importance of the learning process . . . by adding an air of solemnity, which can also foster classroom discipline." (Rec. 352 (citation and internal quotation marks omitted).)

Similar purposes, however, have been rejected by the Supreme Court and other courts as justifications for religious activities. *See, e.g.*, *Santa Fe*, 530 U.S. at 298 n.6 (striking down policy that allowed students to offer pregame prayer for the secular purposes of "solemniz[ing] the event, [] promot[ing] good sportsmanship and student safety, and [] establish[ing] the appropriate environment for the competition"); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223 (1963) (rejecting school's defense that reading of Bible and recitation of Lord's Prayer had secular purposes such as "the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature"); *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1285-86 (11th Cir. 2004)

(rejecting teacher's claim that encouraging students to pray during moment of silence served secular goal of promoting compassion because, "[w]hile promoting compassion may be a valid secular purpose, teaching students that praying is necessary or helpful to promoting compassion is not"); *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824, 829-30 (11th Cir. 1989) (in challenge to practice of preceding high school football games with prayer, rejecting claimed secular purposes of continuing longstanding tradition, solemnizing occasion, and emphasizing sportsmanship, because secular pregame speech would serve same goals); *see also Karen B.*, 653 F.2d at 900-01 (rejecting cited purpose of "exposing school children to religious beliefs different from their own" because "the state cannot employ a religious means to serve otherwise legitimate secular interests").

Here, the legislative history reveals that legislators raised the purpose of instilling discipline only as a pretext for promoting prayer. Wentworth's remarks implied that the lack of prayer in schools was itself the social standard that needed improvement. He commented in committee: "I just think it's common sense that a combination of a sort of deteriorating standards in the media in terms of entertainment, movies, television, lyrics to songs, *the lack of prayer in schools*, all of those things, the violent videos that kids can and do rent . . . . This has been such a controversial issue for so long that I believe it's probably better for us to say statewide

that every school child has the opportunity to have 60 seconds of meditation or reflection or prayer." (Rec. 186 (emphasis added).) It is thus a sham for the government to claim that the legislature's predominant purpose was to foster discipline; the legislature's predominant purpose, reflected so plainly in the language of the amendment and the statements of the amendments' sponsors, was to promote prayer.

Conclusion

Because both the text and the legislative history of the amendment to section 25.082(d) of the Texas Education Code clearly evince a predominant religious purpose for the addition of the word "pray," the amendment violates the Establishment Clause, and *amici* respectfully request that this Court reverse the judgment of the district court.

Respectfully submitted,

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CERTIFICATE REGARDING
FED. R. APP. P. 32(a) AND 5TH CIR. R. 32.3

I certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6772 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in 14-point Times New Roman type — a proportionally spaced typeface — using WordPerfect 12.

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Date: June 7, 2008

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of June 2008, I caused to be served by first-class U.S. Mail, postage pre-paid, two bound paper copies and one diskette containing an electronic copy of the foregoing *Brief of* Amici Curiae *Americans United for Separation of Church and State, American Civil Liberties Union, and American Civil Liberties Union Foundation of Texas in Support of Plaintiff-Appellant and Reversal*, to each of the following addresses:

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