No. 08-10092

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DAVID WALLACE CROFT and SHANNON KRISTINE CROFT,
As Parents and Next Friend of their Minor Children,
Plaintiffs-Appellants,

v.

GOVERNOR OF THE STATE OF TEXAS, Rick Perry, and
CARROLTON-FARMERS BRANCH INDEPENDENT
SCHOOL DISTRICT,
Defendants-Appellees.

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

BRIEF *AMICUS CURIAE* OF WALLBUILDERS, INC.,

in support of *Defendants-Appellees*
Supporting affirmance.

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Fifth Circuit Rule 28.2.1, the undersigned counsel of record certifies that the following listed individuals and entities have an interest in the outcome of this case. None of the following individuals and entities, including *Amicus Curiae* WallBuilders, Inc., are a corporation that issues shares of stock to the public. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. David Wallace Croft, Plaintiff-Appellant;
2. Shannon Kristine Croft, Plaintiff-Appellant;
3. Dean W. Cook, Counsel for Plaintiffs-Appellants;
4. Rick Perry, Governor of Texas, Defendant-Appellee;
5. Texas Solicitor General, Counsel for Defendant-Appellee Governor;
6. Texas Attorney General and Assistants, Counsel for Defendant-Appellee Governor;
7. Carrollton-Farmers Branch Independent School District, Defendant-Appellee;
8. Thomas P. Brandt, Lead Counsel for Defendant-Appellee School District;
9. Joshua A. Skinner, Counsel for Defendant-Appellee School District
10. Steven W. Fitschen, Counsel of Record for *Amicus Curiae*, WallBuilders, Inc.;
11. Douglas E. Myers, Counsel for *Amicus Curiae*, WallBuilders, Inc.;
12. WallBuilders, Inc., *Amicus Curiae* on behalf of Appellees

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Steven W. Fitschen
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INTEREST OF *AMICUS CURIAE*

Amicus Curiae, WallBuilders, Inc., is a non-profit corporation dedicated to the restoration of America's moral and religious heritage. Based in Texas and possessing one of the largest privately held libraries in the nation with more than 70,000 documents predating 1812, it specializes in conducting research using primary source documents. This expertise in America's history and religious heritage causes this organization to take significant interest in the present case.

WallBuilders, Inc. submits its brief by consent of all parties.[1]

SUMMARY OF THE ARGUMENT

This Brief makes one argument not made by the Appellees[2] and expands upon two arguments made by the Appellees. Your *Amicus* argues that Appellants (hereinafter collectively referred to as the "Crofts") incorrectly advocate an overly narrow view of religious accommodation which is not supported by the Constitution or current Supreme Court precedent. *Amicus* further argues that this Court should ignore *May v. Cooperman*, 780 F.2d 240 (3d Cir. 1985), a Third Circuit moment of silence case because its unique factual and legal setting casts doubt on the correctness its holding. Alternatively, *Amicus* argues that if this Court

[1] *Amicus* received consent from Counsel for the Plaintiffs and Counsel for the Defendant Governor and the Defendant School District. By order of this Court dated August 1, 2008, the Defendant School District was dismissed from the instant appeal.

[2] Appellee Governor of Texas will hereinafter be referred to as the "State," and Appellee Carrollton-Farmers Branch Independent School District will hereinafter be referred to as the "School District."

is inclined to accept *May* as correct, then its holding requires affirmance of the court below. *Amicus* finally argues that there are significant factual differences that distinguish the instant case from *Wallace v. Jaffree*, 472 U.S. 38 (1985).

As to the first argument, the Brief explains that the Crofts understanding of religious accommodation and legislative exemptions is inappropriately narrow and that the government may, without Establishment Clause violation, include the word "pray" in the challenged Texas Education Code § 25.082 (2003) (hereinafter referred to as the "Statute").

As to the second argument, the Brief argues that *May* should be ignored because of serious evidentiary problems casting doubt on the correctness of the holding. Alternatively, the Brief argues that if *May* is considered as persuasive that its standard of review and other factual determinations cut against the Crofts and require affirmance of the court below in the instant case.

Finally, the Brief expands on the argument that *Wallace* is clearly distinguishable from the instant case because in *Wallace* the legislators and even a lower federal district court acted in defiance of the Supreme Court, whereas in the instant case the legislators at all times attempted to comply with the law.

ARGUMENT

I. THE STATUTE'S INCLUSION OF THE WORD "PRAY" IS AN APPROPRIATE EXAMPLE OF A LEGISLATURE ACCOMMODATING RELIGION IN THAT IT DOES NOT REQUIRE THE NON-RELIGIOUS OR THE RELIGIOUS TO PARTICIPATE.

The Crofts argue that "accommodation of religion is . . . not a proper secular purpose" when used to justify the use of words like "pray" or "prayer" in a statute. (Appellants' Br. 20.) The Crofts further attempt to pigeon-hole religious accommodation to cases in which a religious minority seeks exemption from a "secular law of general application." (Appellants' Br. 21.) This narrow view of accommodation is not supported by Supreme Court precedent nor by historical legislative practice.

As then Chief Justice Burger explained in *Lynch v. Donnelly*,

> [n]o significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government. "It has never been thought either possible or desirable to enforce a regime of total separation . . . ." Nor does the Constitution require complete separation of church and state; it affirmatively mandates *accommodation*, not merely tolerance, of all religions, and forbids hostility toward any. Anything less would require the "callous indifference" we have said was never intended by the Establishment Clause. Indeed, we have observed, such hostility would bring us into "war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion."

465 U.S. 668, 673 (1984) (citations omitted) (emphasis added). Chief Justice Burger went on to elaborate:

> There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789. Seldom in our opinions was this more affirmatively expressed than in Justice Douglas' opinion for the Court validating a program allowing release of public school students from classes to attend off-campus religious exercises. Rejecting a claim that the program violated the Establishment Clause, the Court asserted pointedly: "We are a religious people whose institutions presuppose a Supreme Being."

Id. at 674-75 (citations omitted).

The *Lynch* Court reversed the First Circuit's ruling that a city's ownership and erection of a nativity scene in an annual holiday display violated the Establishment Clause. 465 U.S. at 671-72. Finding that the city's desire to celebrate the Christmas holiday season and its origins were sufficient secular purposes under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Court refused to "mechanically invalidat[e] all governmental conduct or statutes that confer benefits or give special recognition to religion in general or to one faith." *Lynch*, 465 U.S. at 678, 681.

Yet that is what the Crofts attempt to do here: mechanically invalidate a statute that confers a benefit on students desiring to pray, albeit ever so slight a benefit and albeit one that names one religious activity in addition to two other non-religious ones.[3] The Crofts' position ignores the very practical and legitimate

[3] The Statute instructs the student that he or she may "reflect, pray, meditate, or engage in any other silent activity that is not likely to interfere with or distract another student." The Crofts

reasons the legislature may have desired to include the word "pray." The State and the School District have adequately briefed the reasons from the record why the word prayer was included, but perhaps most compelling is the language used by the court below.

> The addition of the word "pray" directly furthers the purpose of encouraging students to engage in individual contemplative activity. Testimony was repeatedly given on the usefulness of such a period of silent contemplation. Again and again, the law was said to give students an opportunity to "do whatever they want," to introduce "a ritual of reverence and respect," to provide "a neutral space," to prepare children for "seriousness," to create "a common moment of preparation, deliberation, and meditation," to allow students to think about the "seriousness of the day," to "underscore the seriousness of the education endeavor," to make schools institutions that are "more reflective and more reverent," and to "set the tone for the day." . . . .
>
> In these circumstances, the Court concludes that 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 v. Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring)], the Court must distinguish between a real threat and a mere shadow, and the Court finds this change to be the latter.

Croft v. Governor of Tex., 530 F. Supp. 2d 825, 847 (N.D. Tex. 2008). This is accommodation in its least invasive form—mere words indicating that a religious act is acceptable during an otherwise neutral moment of silence. Nothing in the Constitution or the case law compels restricting this kind of accommodation to

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concede by inference that the words "reflect" and "meditate" are non-religious words. (*See* Appellants' Br. 17-18, 20 (discussing "religious" and "non-religious" language).)

exemptions for minority religions; furthermore, accommodation of this sort is entirely appropriate. *See City of Boerne v. Flores*, 521 U.S. 507, 521 (1997) (O'Connor, J., dissenting) (quoting George Washington writing that "in my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness; and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard to the protection and essential interests of the nation may justify and permit.").

The Crofts further misrepresent the state of the law concerning accommodation by making strong assertions with little to back them up. The Crofts first note that the Supreme Court has regularly allowed legislative exemptions to accommodate religious beliefs or practices provided that the exemption "'did not, or would not, impose substantial burdens on nonbeneficiaries while allowing others to act according to their religious beliefs . . . .'" (Appellants' Br. 23 (quoting *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 17 n.8 (1989).) The same footnote 8 in *Texas Monthly* cites several Supreme Court decisions that permitted legislative exemptions accommodating religion.[4]

[4] The Court cited *Zorach v. Clauson*, 343 U.S. 306 (1952) (permitting student release time from the public school to receive religious instruction), and *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987) (exempting a religious organization from discrimination prohibition under Title VII of the Civil Rights Act of 1964), as two examples of legislative exemptions accommodating religious practices or beliefs. *Texas Monthly*, 489 U.S. at 17 n.8.

The Crofts then make the leap of logic that because the Supreme Court's accommodation rulings permit legislative exemptions that do not "impose substantial burdens on nonbeneficiaries," the State is foreclosed from including the word "pray" in a moment of silence statute. (Appellants' Br. 23 (quoting *Texas Monthly*).) But the Crofts have assumed in their premise that which they have set out to prove—that is, they have assumed that inclusion of the word "pray" in a moment of silence statute is *per se* a substantial burden on nonbeneficiaries and therefore impermissible under *Texas Monthly*. Proof of the substantial burden by the addition of the word "pray" is lacking in the Crofts argument. They do attempt to show that those desiring to pray are less likely to need a lawyer to interpret the Statute, (*see* Appellants' Br. 38), but the language of the Statute is plain on its face. A student may "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 (LEXIS through 2008 Sess.). This clearly includes not praying.

The Crofts also attempt to bolster their claim of a substantial burden by a type of bait and switch. They argue that "[c]alling a moment of silence statute a 'religious accommodation' also has another disturbing implication. It implies that the state can coerce non-believers into engaging in some activity in order to accommodate a religious group." (Appellants' Br. 22.) In support, the Crofts attempt an analogy to the federal government's having passed legislation to exempt

certain ritual use of peyote from the nation's drug laws. (Appellants' Br. 22.) They argue that just as "individuals who are not interested in participating in Shamanic drug rituals are not forced to do so," neither should atheists be "forced to participate in the moment of silence." (Appellants' Br. 22.)

The Crofts comparison to the peyote statute, however, is inapposite. The Statute contains no coercive elements whatsoever. But this is where the switch has occurred. Elsewhere the Crofts have objected to the word "pray," but now the Crofts show their hand more fully in letting their true objection known: they actually object to the moment of silence itself.[5] The peyote analogy could possibly work if the Statute required the Crofts' children to pray during a time of prayer. Yet that is not reality. The Statute does not create a time of prayer, but rather creates a moment of silence. Students are not asked to do anything different from what they may be asked at other times of the day, that is, to be silent for a minute. An accommodation of this sort not only accommodates the religious student who desires to pray, but also the irreligious student who desires to quietly think non-

[5] Perhaps tellingly, the Crofts cite with approval a law review article entitled *Bringing Organized Prayer in Through the Back Door: How Moment-of-Silence Legislation for the Public Schools Violates the Establishment Clause*. A major thesis of the article is that all moment of silence legislation within the public school setting is unconstitutional, a view clearly not rooted in the Constitution or current Supreme Court precedent. (*See* Appellants' Br. 15 n.2 (citing Debbie Kaminer, *Bringing Organized Prayer in Through the Back Door: How Moment-of-Silence Legislation for the Public Schools Violates the Establishment Clause*, 13 Stan. L. & Pol'y Rev. 267 (2002)).)

religious thoughts. And it does so exactly in the manner intended by the Framers of the First Amendment under the law. *See Lynch*, 465 U.S. at 673-75.

II. THE INSTANT CASE IS MOST CLOSELY ANALOGOUS TO *BROWN* AND *BOWN*, WITH *MAY* BEING THE OUTLIER BECAUSE OF ITS UNIQUE FACTS AND HOLDING.

In attempting to draw distinctions between and among the various moment of silence cases, the Crofts argue as follows:

> The only difference between *Bown* [*v. Gwinnett County Sch. Dist.*, 112 F.3d 1464 (11th Cir. 1997)] and *May* [*v. Cooperman*, 780 F.2d 240 (3d Cir. 1985)] is that the 11th Circuit decided that evidence of non-secular legislative purpose was *not* found in sufficient quantity in the legislative history of the Georgia, facially neutral, statute, while in *May*, the 3rd Circuit found sufficient evidence of non-secular purpose in the legislative history of a facially neutral New Jersey statute.

(Appellants' Br. 18 (emphasis in original).) Furthermore, the Crofts claim *Brown v. Gilmore*, 258 F.3d 265 (4th Cir. 2001), is an "anomaly" when compared to *Wallace*, *Bown* and *May*. (Appellants' Br. 20.) Their assertions about the foregoing cases are incorrect, although those assertions will not be reviewed here in light of their comprehensive treatment by the State and the School District. Rather, Subsection A. below will demonstrate that *May* is the anomalous case and is either (1) simply wrong in its holding or (2) harmful, rather than helpful, to the Crofts' case. Subsection B. will then briefly discuss an aspect of the instant case that clearly distinguishes it from *Wallace*.

A. The Crofts' reliance on *May* is misplaced because the holding in *May* may be incorrect and, even if it is correct, applying *May* to the instant case demonstrates the Statute's constitutionality.

1. This Court should discount *May*'s persuasiveness because its holding may simply be wrong.

The Crofts attempt to categorize *Wallace*, *Bown*, and *May* as analytically distinct from *Brown*, in an effort to paint *Brown* as an outlier. (Appellants' Br. 18.) As alluded to above, such a categorization is incorrect, and the instant case and *Brown* are, for all intents and purposes, indistinguishable. The Crofts' problems are compounded, however, when it comes to *May*. Not only is *it* the outlier, the holding may simply be wrong and should be ignored by this Court.

In order to properly evaluate the *May* court's analysis, an expanded recitation of the facts and holding is appropriate.

New Jersey Statute 18A:36-4 (LEXIS through 2008) was passed in 1983 over the governor's veto and provided for the following:

> Principals and teachers in each public elementary and secondary school of each school district in this State shall permit students to observe a 1 minute period of silence to be used solely at the discretion of the individual student, before opening exercises of each school day for quiet and private contemplation or introspection.

Within weeks after its passage, multiple plaintiffs filed suit, seeking declaratory and injunctive relief and alleging the law to be unconstitutional on its face and as-applied. *May*, 780 F.2d at 241. Named as defendants were the Commissioner of the New Jersey Department of Education and two local boards of

education. *Id.* The district court promptly issued a temporary restraining order enjoining the law from being enforced, and, because the Attorney General refused to defend against the suit, the court ordered the Commissioner to "notify the school districts" that the restraining order had been issued. *Id.* at 241-42.

Shortly thereafter, representatives from both houses of the legislature intervened, and these legislators were ultimately the only party to defend the action through to completion.[6] *Id.* at 242. Because of the timing of the passage of the law and the rapidity with which the court enter the restraining order, little evidence existed as to the "actual operation" of the law. *Id.* at 243. The court specifically noted the "arid circumstances" in which the case was litigated. *Id.* Further limiting the factual record, the New Jersey legislature did not keep a transcription of either committee hearings or floor debates. *Id.* at 246.

Much of the evidence the court did use to determine the legislature's intent was dubious, at best. *See id.* at 261-65 (Becker, J. dissenting). The least problematic testimony came from three people who attended legislative hearings. *Id.* at 261 (Becker, J. dissenting). Two of the witnesses testified that one assemblyman referenced a "religious purpose" for the law, and the third witness made a similar claim concerning a different assemblyman. *Id.* (Becker, J. dissenting). This paucity of testimony came in spite of the fact that the law had

[6] The other defendants only filed answers to the Complaint. *May*, 780 F.2d at 242.

been fully debated by both houses of the legislature, and itself was equivocal. *Id.* (Becker, J. dissenting). All three witnesses testified that other legislators—in additional to one who referenced a "religious purpose"—specifically made statements naming secular purposes for the law. *Id.* at 261-62 n.7 (Becker, J. dissenting).

A second source of evidence in *May* came from newspaper articles "describing the legislative hearings" on the law. *Id.* at 262 (Becker, J. dissenting). The district court admitted the articles under the "residual hearsay exception" to the Federal Rules of Evidence, in light of the facts that the New Jersey legislature does not keep a record of its hearings and debates and that it had already ruled that the legislators were excused from testifying. *Id.* (Becker, J. dissenting). The newspaper reports "suggested that the purpose behind the statute was to return prayer back into the public schools, surreptitiously." *Id.* (Becker, J. dissenting).

Another source of evidence used by the district court to evaluate the secular purpose prong under *Lemon* was "citizens' perceptions of the [moment of silence] statute." *Id.* at 264 (Becker, J. dissenting). The district court reasoned that "it is significant what those who opposed the Bill conceived its purposes and effects to be, because in many instances they were among those most directly affected by it." *Id.* (Becker, J. dissenting).

A fourth source of testimony came from a few experts regarding the "effectiveness of the minute of silence as a teaching device." *Id.* at 264-65 (Becker, J. dissenting). Despite the experts' lack of agreement on the "pedagogical merit of the statute," the district court viewed the evidence as probative of *lack of secular purpose*. *Id.* at 265 (Becker, J. dissenting) (emphasis added).

Finally, the district court looked to prior unsuccessful attempts within New Jersey to pass similar moment of silence legislation. *Id.* (Becker, J. dissenting). These attempts were made by different legislatures and had little in common, one to the other, in terms of sponsors and supporters. *Id.* (Becker, J. dissenting).

As the dissent in *May* persuasively argues, each of these evidentiary categories is fraught with problems. The witnesses from the hearing who testified as to statements of religious purpose for the law also testified to those same assemblymen and others having made clear statements of secular purpose. *Id.* at 261-62 (Becker, J. dissenting). The district court did find itself in a quandary (one eventually inherited by the Court of Appeals) in attempting to consider evidence in the matter. First, the lack of a legislative record meant obtaining evidence of legislative intent would have to come from third parties. *Id.* at 252 n.9. Second, the district court had excused the legislators from testifying. *Id.* The first problem, however, was one largely created by the plaintiffs and their failure to secure more witnesses from the debates. *Id.* at 263 (Becker, J. dissenting). In a rather lengthy

discussion of the "residual hearsay exception" to the Federal Rules of Evidence, the dissent explained that the district court's admission of newspaper articles was error in that the plaintiffs did not show that they were unable to "locate observers who attended the legislative debates about the statute," and the articles did not have the "requisite 'circumstantial guarantees of trustworthiness.'" *Id.* at 263 (Becker, J. dissenting) (citations omitted). The dissent noted that a second problem with the newspaper articles was that they too were ambiguous (similar to those who testified about the legislative debate), containing "descriptions of legislators' secular purposes, as well as statements about returning prayer to the schools." *Id.* at 264 (Becker, J. dissenting).

It almost goes without saying that testimony of "citizens' perceptions of the statute" is "very weak." *Id.* (Becker, J. dissenting). As the dissent described,

> [c]ommunity perception is simply too amorphous and unreliable to provide the ground for constitutional decisions. The opinions and perceptions of the community are shaped by many factors—editorials, personal biases, gossip, news broadcasts, and peer pressure, for example. Such perceptions are thus unreliable indicators of what the legislative *purpose of the statute in fact was*.

Id. (Becker, J. dissenting) (emphasis added). Further, because the district court valued the "perceptions of those who *opposed* the statute," the evidence considered by the district court was "likely skewed." *Id.* (Becker, J. dissenting) (emphasis in original).

As for the expert testimony, as mentioned above, the experts were not agreed as to the pedagogical value of a moment of silence at the start of the day. Such disagreement gives the testimony little probative value. *Id.* at 265 (Becker, J. dissenting). Further, it told the court little about the *secular purpose* of the statute, but rather presented evidence as to the wisdom of the moment of silence and not its constitutionality. *Id.* (Becker, J. dissenting).

Finally, the dissent persuasively argued that evidence from past attempts to pass moment of silence laws was ineffective to discern the secular purpose behind the law that eventually passed. *Id.* (Becker, J. dissenting). The prior bills that failed "were submitted by different legislatures with significantly different memberships." *Id.* (Becker, J. dissenting). Further, the "overlap between the sponsors and supporters of the [disputed] statute and the sponsors and supporters of the previous bills is minimal." *Id.* (Becker, J. dissenting). "Earlier drafts of the *same* bill can shed light on the intent behind the final formulation, but the histories of completely separate bills have no such relevance." *Id.* (Becker, J. dissenting) (emphasis in original).

The purpose of the above argument is not to conclusively demonstrate the Third Circuit's error in *May*; rather, the purpose is to suggest that the court's error there is likely, and that the dissent may well have had the better of the argument. Much of the evidence was likely inadmissible, and most of legal reasoning the

majority did do resulted in reversing the district court (finding the court had clearly erred in its evaluation of the second and third prongs under *Lemon*). Thus, because the holding and analysis in *May* are suspect, at best, this Court should ignore it in disposing of the instant matter.

2. Even if this Court believes *May* was rightly decided, its holding and logic require affirmance of the court below.

Should this Court choose to consider *May*, such consideration would harm, not help, the Crofts' case. Although the *May* court found the New Jersey statute unconstitutional, a careful reading of *May* reveals several significant factual differences, all of which cut against Crofts' assertions in the instant case.[7]

The first and most critical component of *May* is its unremarkable holding—"[b]ecause we cannot say that [the district court's] finding [that the one and only secular purpose proffered by the legislators was a sham] is clearly erroneous, . . . we accept the trial court's finding that the legislature's purpose in enacting N.J.S.A. 18A:36-4 was religious." *Id.* at 252. In other words, the court never viewed the record with the type of scrutiny often afforded the parties in First Amendment cases. *See, e.g., Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984).[8] Rather, it simply reviewed the district court's findings under

[7] It is worth noting that *May* is absent from the brief of Crofts' *Amici*, in spite of its otherwise fairly comprehensive nature.

[8] Although this Court has never applied *Bose* to an Establishment Clause case, a recent case from the Tenth Circuit noted *Bose*'s application to a wide variety of constitutional cases, including the Establishment Clause. *United States v. Friday*, 525 F.3d 938, 950 (10th Cir. 2008) ("Although

Lemon and *Wallace* using a "clearly erroneous" standard as set out in Rule 52(a) of the Federal Rules of Civil Procedure. *May*, 780 F.2d at 252. The legislators had offered one secular purpose for the law ("to provide a transition from nonschool life to school life"), the district court did not believe them (the "tendered secular purpose" was "rejected as pretextual"), and the Third Circuit did not feel at liberty to say the district court had clearly erred. *Id.* at 251-52.

Such a situation is devastating to the Crofts' position. If the *May* court is correct, and the appropriate standard of review of the district court's factual determination as to the satisfaction of the three prongs of *Lemon* is clearly erroneous, then the district court's findings in the instant case must stand. The court below used approximately 7,500 words to carefully digest and analyze the arguments and testimony surrounding the State's secular purpose for enacting the Statute. *See Croft*, 530 F. Supp. 2d at 834-47. In the end, it variously agreed and disagreed with the proffered secular purposes, ultimately finding a legitimate secular purpose of "allowing for all types of thoughtful contemplation," and that this purpose is "supported by the legislative history" and is "sufficient to withstand

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this Circuit has not yet considered whether *Bose* extends to the Free Exercise Clause, we have already applied *Bose* review not only to a litany of free speech claims but also to analysis under the Establishment Clause." (citing *Synder v. Murray City Corp.,* 159 F.3d 1227, 1230 n.7 (10th Cir. 1998)).

the *Lemon* test." *Id.* at 847. The court's measured analysis can hardly be rejected as "clearly erroneous."[9]

A second distinctive feature of *May* is what it did with *Lemon* in spite of the highly deferential standard—namely, it found the district court had clearly erred concerning the second and third prongs of *Lemon*, and that the primary effect of the moment of silence law did not advance or inhibit religion, nor did it foster excessive entanglement between the government and religion. *May*, 780 F.2d at 247-50. Put differently, but for the deferential standard of review that doomed the law on the purpose prong, the Third Circuit had little, if any, concern as to its constitutionality. As the court opined,

> [i]t is clear, therefore, that in the abstract a statute such as N.J.S.A. 18A:36-4 would not, in the opinion of the Supreme Court, be deemed invalid under the purpose leg of *Lemon v. Kurtzman*. But unlike *Wallace v. Jaffree* the moment of silence statute *is not before us in the abstract*. The plaintiffs continue to challenge it. They have made a record in support of that challenge, and the district court has made findings as to the legislative purpose. . . .
>
> . . . The legislators' tendered secular purpose—to provide a transition from nonschool life to school life—was rejected as pretextual. . . .
>
> Because we cannot say that this finding by the district court is clearly erroneous, . . . we accept the trial court's finding that the legislator's purpose in enacting [the law] was religious. . . .

[9] Your *Amicus* does not agree with the court below in its rejection of certain secular purposes offered by the State. That topic, however, has been more fully and sufficiently briefed by the State and the School District.

Id. at 251-52 (citations omitted) (emphasis added). If the Crofts look to *May* for support, they must take it for all it is worth, deferential standard and all. In the instant matter, deference to the court below suggests certain victory for the State and the School District.

A final noteworthy feature from *May* is the court's reason for not finding the district court's analysis of the secular purpose prong from *Lemon* clearly erroneous. The *May* court looked to the fact that the legislators' proffered reason for instituting the moment of silence was to "provid[e] a calm transition from nonschool life to school work." *Id.* at 244. The Third Circuit noted that the motivation for "a calm transition . . . would be plausible only if the minute of silence were mandated for all pupils." *Id.* Thus, the court then felt at liberty to accept the district court's determination that the proferred secular purpose was an "after-the fact rationalization and a pretext" as not being clearly erroneous. *Id.*

In light of the Third Circuit's reasoning in *May*, the mandatory nature of the instant Statute suggests a more clearly secular purpose than if the law had been permissive. *See id.* How could a moment of silence have the calming, reflective effect if everyone is not required to be silent? The obvious answer is that the moment of silence becomes one in name only, and any effort to meditate, pray or reflect becomes hampered by whatever else may be going on in the students'

midst. Thus, under *May*, the mandatory nature of Texas's Statute strengthens the secular purpose rather than weakens it.

B. The instant case is distinguishable from *Wallace* because the Texas legislators sought to uphold the law rather than defy it.

The State and the School District have comprehensively explained how the instant case appropriately follows the requirements set out in *Wallace*, and are closely analogous to both *Brown* and *Bown*. Your *Amicus* will therefore not recount those arguments here. Rather, your A*micus* will briefly highlight one point not as explicitly laid out in the Appellees' briefs.

First, as the State correctly noted, the facts in *Wallace v. Jaffree*, 472 U.S. 38 (1985), clearly distinguish it from the instant matter. (*See* Appellee Governor's Br. 25-27.) The Crofts' *Amici* make much of the statements of Senator Wentworth, the primary sponsor of the bill, concerning his (and his constituents') disagreement with the Supreme Court rulings on prayer in public schools. (Ams. United for the Separation of Church and State's Br. 14-15.) But disagreement with a precedent that one then goes to great pains to adhere to is quite different from defiance of precedent.

Here, as the court below noted, Senator Wentworth and the legislature "attempted to pass a constitutional law, and [the] legislators were not acting in defiance of Supreme Court precedent." *Croft*, 530 F. Supp. 2d at 846. These actions are in stark contrast to the uncontradicted testimony of the chief sponsor of

the moment of silence bill in *Wallace*. (*See* Appellee Governor's Br. 26.) As the *Brown* court aptly stated, "[a] fair reading of *Wallace* compels the conslucion that its holding was based on the unique facts presented in that litigation." 258 F.3d at 279. And those unique facts were a combination of a legislature's openly defying the Supreme Court and a federal district court willing to ignore clear Supreme Court precedent. *See Wallace*, 472 U.S. at 41, 43.

Here, however, Senator Wentworth clearly went out of his way to attempt to follow a law with which he did not agree. *See Croft*, 530 F. Supp. 2d at 846. Simply put, to view disagreement as defiance as the Crofts' *Amici* do is illogical. For example, a child may disagree with his or her parents' curfew. But whether that child obeys or defies that curfew is a completely separate question.

Conclusion

For the foregoing reasons, and for the reasons put forth in Appellees' Briefs, this Court should affirm the District Court's grant of summary judgment.

Respectfully submitted,
this 12th day of August, 2008

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CERTIFICATE OF SERVICE

I hereby certify that I have duly served the attached Brief *Amicus Curiae* of WallBuilders, Inc., in the case of *Croft, et al. v. Governor of Texas, et al.*, No. 08-10092, on all required parties by depositing one paper copy and one electronic copy in the United States mail, first class postage, prepaid on August 12, 2008 addressed as follows:

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