

No. 08-10092

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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DAVID WALLACE CROFT, *et al.*,

Plaintiffs-Appellants,

vs.

GOVERNOR OF THE STATE OF TEXAS, RICK PERRY,

Defendant-Appellee.

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

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**BRIEF FOR *AMICUS CURIAE* FOUNDATION FOR MORAL LAW  
ON BEHALF OF DEFENDANT-APPELLEE,  
SUPPORTING AFFIRMANCE**

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August 12, 2008

**CERTIFICATE OF INTERESTED PERSONS**

No. 08-10092

DAVID WALLACE CROFT, *et al.*,  
Plaintiffs-Appellants,

vs.

GOVERNOR OF TEXAS, RICK PERRY,  
Defendant-Appellee.

The undersigned counsel of record certifies that no persons in addition to those listed by the parties to this case have an interest in the outcome of the case. *Amicus curiae* Foundation for Moral Law is a designated IRS Code 501(c)(3) non-profit corporation. *Amicus* has no parent corporations, and no publicly held company owns ten percent (10%) or more of *amicus*. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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**STATEMENT OF IDENTITY AND INTERESTS  
OF *AMICUS CURIAE***

*Amicus curiae* Foundation for Moral Law (the Foundation), is a national religious-liberties organization based in Montgomery, Alabama, dedicated to defending the inalienable right to acknowledge God. The Foundation promotes a return in the judiciary (and other branches of government) to the historic and original interpretation of the United States Constitution, and promotes education about the Constitution and the Godly foundation of this country's laws and justice system. The Foundation has an interest in this case because it believes this Court should rule in this case, and all others similarly situated, based upon the original understanding of the Establishment Clause.

## **SOURCE OF AUTHORITY TO FILE**

Pursuant to Fed. R. App. P. 29(a), all parties have granted consent to the filing of this *amicus curiae* brief.

## SUMMARY OF ARGUMENT

Amicus encourages this Court to decide this case based upon the plain and original text of the Constitution, the “supreme Law of the Land.” U.S. Const. art. VI. Accordingly, the controlling “test” to be applied to the facts of this case is the text of the Establishment Clause as understood at the time it was adopted.

The text of the Establishment Clause states that “Congress shall make no law respecting an establishment of religion.” U.S. Const. amend. I. When these words of the law are applied to Texas moment of silence statute at issue, Texas Educ. Code § 25.082(d), it becomes evident that a 60-second moment of silence, during which a student is free to do anything silent and non-disruptive (or nothing at all) is not a law respecting an “establishment” of “religion,” as those words were commonly understood in the founding era. For these reasons, the district court below came to the correct conclusion in upholding the constitutionality of the Texas statute.

## ARGUMENT

### I. THE CONSTITUTIONALITY OF THE TEXAS MOMENT OF SILENCE STATUTE SHOULD BE DETERMINED BY THE TEXT OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

Plaintiffs brought the instant suit “alleging that the Texas moment of silence law is unconstitutional under the Establishment Clause of the First Amendment.” *Croft v. Governor of the State of Texas*, 530 F. Supp. 2d 825, 828 (N.D. Tex. 2008). In its analysis of the challenged statute, however, the court below never applied, or even quoted, the words of the Establishment Clause, considering itself bound by the Supreme Court’s “framework for analyzing challenges under the Establishment Clause . . . in *Lemon v. Kurtzman*,” 403 U.S. 602 (1971). The court ultimately concluded that “Texas Educ. Code § 25.082(d) is constitutional under the Establishment Clause *because it satisfies the Lemon test.*” *Croft*, 530 F. Supp. 2d at 848 (emphasis added). *Amicus* Foundation for Moral Law agrees with the conclusion of the court below but contends that the lower court and this Court ought to decide questions of constitutional law based upon the words of that law, in this case the Establishment Clause.

Our Constitution dictates that the Constitution and all federal laws pursuant thereto are the “supreme Law of the Land.” U.S. Const. art. VI. All “judicial Officers” are “bound by Oath or Affirmation, to support *this Constitution*” and not a person, office, government body, or judicial opinion. *Id.* (emphasis added); *see*

also 28 U.S.C. § 453 (oaths of justices and judges). This Constitution and the solemn oath thereto are still relevant today and should control, above all other competing powers and influences, the decisions of federal courts.

As Chief Justice John Marshall observed, the very purpose of a written constitution is to ensure that government officials, including judges, do not depart from the document's fundamental principles. "[I]t is apparent that the framers of the constitution contemplated that instrument, as a rule of government of *courts* . . . . Why otherwise does it direct the judges to take an oath to support it?" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179-80 (1803).

James Madison insisted that "[a]s a guide in expounding and applying the provisions of the Constitution . . . the legitimate meanings of the Instrument must be derived from the text itself." J. Madison, Letter to Thomas Ritchie, September 15, 1821, in *3 Letters and Other Writings of James Madison* 228 (Philip R. Fendall, ed., 1865). "The object of construction, applied to a constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself." *Lake County v. Rollins*, 130 U.S. 662, 670 (1889).

A textual reading of the Constitution, according to Madison, requires "resorting to the sense in which the Constitution was accepted and ratified by the nation" because "[i]n that sense alone it is the legitimate Constitution." J.

Madison, Letter to Henry Lee (June 25, 1824), in *Selections from the Private Correspondence of James Madison from 1813-1836*, at 52 (J.C. McGuire ed., 1853).

As men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.

*Gibbons v. Ogden*, 22 U.S. 1, 188 (1824). The words of the Constitution are neither suggestive nor superfluous: “In expounding the Constitution . . . every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added.”

*Holmes v. Jennison*, 39 U.S. (14 Peters) 540, 570-71 (1840).

Less than two months ago, the U.S. Supreme Court reaffirmed the idea that the meaning of the Constitution was not solely the province of federal judges and lawyers:

In interpreting this text,<sup>1</sup> we are guided by the principle that “[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.”

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<sup>1</sup> By “this text” the *Heller* Court meant the Second Amendment to the United States Constitution, although the principle articulated here is hardly limited to that Amendment: *e.g.*, the *United States v. Sprague* case quoted dealt with Article V of the Constitution.

*District of Columbia v. Heller*, 554 U.S. \_\_\_, No. 07-290, Slip op. at 3 (June 26, 2008) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)). Justice Joseph Story, an “important founding-era legal scholar[],” *id.* at 32, succinctly summarized the principles of constitutional interpretation:

[The Constitution] is to be interpreted, as all other solemn instruments are, by endeavoring to ascertain the true sense and meaning of all the terms; and we are neither to narrow them, nor enlarge them, by straining them from their just and natural import, for the purpose of adding to, or diminishing its powers, or bending them to any favorite theory or dogma of party. It is the language of the people, to be judged according to common sense, and not by mere theoretical reasoning. It is not an instrument for the mere private interpretation of any particular men.

Joseph Story, *A Familiar Exposition of the Constitution of the United States* § 42 (1840).

## **II. THE TEXAS MOMENT OF SILENCE STATUTE IS NOT A “LAW RESPECTING AN ESTABLISHMENT OF RELIGION.”**

Applying the Constitution as it was understood at the time of its ratification, rather than judicial “tests,” would not only render a decision that is more faithful to the “supreme Law of the Land” but would also prevent such cases from being the “difficult and close question” that the district court thought this was. *See Croft*, 530 F. Supp. 2d at 845; *see also id.* at 828, 848 (repeating that this case presents “a close question”). The First Amendment provides, in relevant part, “Congress<sup>2</sup> shall

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<sup>2</sup>*Amicus* will not address herein the compelling argument that the Establishment Clause, with its restriction upon only “Congress,” should not be

make no law respecting an establishment of religion.” U.S. Const. amend I. When the Texas moment of silence statute, Texas Educ. Code § 25.082(d), is applied to the law it is said to violate, it becomes a rather easy question to answer: the statute is not a “law<sup>3</sup> respecting an establishment of religion.”

### **A. The Definition of “Establishment”**

The Establishment Clause does not broadly prohibit all governmental activity that touches religion or religious activity. Rather, it proscribes “laws[] respecting an *establishment* of religion.” *Id.* (emphasis added). An “establishment” of religion, as it was widely understood at the time of the adoption of the First

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“incorporated” against the states and local governments through the guise of the Fourteenth Amendment. Such an argument is a worthy pursuit for another brief (or book), but is hardly necessary to the textual arguments raised in this section.

<sup>3</sup> At the time of the ratification of the First Amendment, “law” was defined as “a rule of civil conduct . . . commanding what is right and prohibiting what is wrong.” I William Blackstone, *Commentaries on the Laws of England* 44 (U. Chi. Facsimile Ed. 1765); *see also* N. Webster, *American Dictionary of the English Language* (Found. for Am. Christian Educ. 2002) (1828) (defining “law” as “*imperative* or *mandatory*, commanding what shall be done; *prohibitory*, restraining from what is to be forboren; or *permissive*, declaring what may be done without incurring a penalty”).

It is essential to the idea of a law, that it be attended with a sanction; or in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws will in fact amount to nothing more than advice or recommendation.

*The Federalist No. 15* (Alexander Hamilton), at 72 (Carey & McClellan eds. 2001). Although Texas Educ. Code § 25.082(d) is not an act of “Congress” for First Amendment purposes, it certainly falls within the proper understanding of the term “law.”

Amendment, involved “the setting up or recognition of a state church, or at least the conferring upon one church of special favors and advantages which are denied to others.” Thomas M. Cooley, *General Principles of Constitutional Law*, 213 (Weisman pub. 1998) (1891). Justice Joseph Story explained in his *Commentaries on the Constitution* that “[t]he real object of the amendment was . . . to prevent any national ecclesiastical establishment, which should give to an [sic] hierarchy the exclusive patronage of the national government.” II Joseph Story, *Commentaries on the Constitution* § 1871 (1833). In the congressional debates concerning the passage of the Bill of Rights, James Madison stated that he “apprehended the meaning of the [Establishment Clause] to be, that *Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience.*” 1 *Annals of Cong.* 757 (1789) (Gales & Seaton’s ed. 1834) (emphasis added). The House Judiciary Committee in 1854 summarized these thoughts in a report on the constitutionality of chaplains in Congress and the Army and Navy:

What is an establishment of religion? It must have a creed, defining what a man must believe; it must have rites and ordinances, which believers must observe; it must have ministers of defined qualifications, to teach the doctrines and administer the rites; it must have tests for the submissive, and penalties for the non-conformist. *There never was an established religion without all these.*

H.R. Rep. No. 33-124 (1854) (emphasis added).

At the time of its adoption, therefore, “[t]he text [of the Establishment Clause] . . . meant that Congress could neither establish a national church nor interfere with the establishment of state churches as they existed in the various states.” Michael W. McConnell, *Accommodation of Religion: An Update and Response to the Critics*, 60 Geo. Wash. L. Rev. 685, 690 n.19 (1992).

“[E]stablishment involved ‘coercion of religious orthodoxy and of financial support *by force of law and threat of penalty.*’” *Cutter v. Wilkinson*, 544 U.S. 709, 729 (Thomas, J., concurring) (quotations and citations omitted).

In 2001, the U.S. Court of Appeals for the 6th Circuit *en banc* upheld the Ohio’s State Motto, “With God All Things Are Possible,” against a claim that the Motto was a violation of the Establishment Clause. *ACLU of Ohio v. Capitol Sq. Review and Advisory Bd.*, 243 F. 3d 289 (6th Cir. 2001) (*en banc*). The Court’s rejection of the claim is illustrative here because it held that the Ohio Motto

involves no coercion. It does not purport to compel belief or acquiescence. It does not command participation in any form of religious exercise. It does not assert a preference for one religious denomination or sect over others, and it does not involve the state in the governance of any church. It imposes no tax or other impost for the support of any church or group of churches.

*Id.* at 299.

In the present case, the Texas legislature passed a law requiring “the observance of one minute of silence at each school,” during which “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). Among other revisions to existing law, this statute added the word “pray” to the list of designated options for the moment of silence. *See Croft*, 530 F. Supp. 2d at 829. Plaintiffs argued below that “all moment of silence laws are unconstitutional” and that “the Texas statute is unconstitutional under the *Lemon test*” because “pray” is one of the suggested activities. *Id.* at 834-35.

Plaintiffs below did not, and could not, argue, however, that the Texas moment of silence statute was a law respecting an “establishment” of religion. The law does not set up an official Texas denomination or support a particular religious sect with discriminatory financial assistance or unique legal protection. There is no “coercion of religious orthodoxy” in a 60-second moment of silence. As the court found below, the moment of silence statute is only “the encouragement of a period of thoughtful contemplation,” *id.* at 847.

Again and again [in the legislative history], 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 educational endeavor,” to make schools institutions that are “more reflective and more reverent,” and to “set the tone for the day.”

*Id.*

The mere inclusion of prayer as an *option* of things that Texas students may do during the moment of silence is, by its merely suggestive nature, not coercive at

all. Indeed, since all activity during this moment is to be done *in silence*, not one of the options listed *could* be enforced by any school official or state legislator. The only thing “established” by the Texas statute is 60 seconds of student silence, against which there is no law.

### **B. The Definition of “Religion”**

Just as it is important to properly define “establishment,” a court ought to define “religion” before it may determine whether a law respects an establishment of it. The original definition of “religion” as used in the First Amendment was provided in Article I, § 16 of the 1776 Virginia Constitution; it was quoted by James Madison in his *Memorial and Remonstrance* in 1785; it was referenced in the North Carolina, Rhode Island, and Virginia ratifying conventions’ proposed amendments to the Constitution; and it was echoed by the United States Supreme Court in *Reynolds v. United States*, 98 U.S. 145 (1878), and *Davis v. Beason*, 133 U.S. 333 (1890). This definition was repeated by Chief Justice Charles Evans Hughes in his dissent in *United States v. Macintosh*, 283 U.S. 605 (1931), and the influence of Madison and his *Memorial* on the shaping of the First Amendment was emphasized in *Everson v. Board of Education*, 330 U.S. 1 (1947).<sup>4</sup> In each instance, “religion” was defined as follows:

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<sup>4</sup> The U.S. Supreme Court later reaffirmed the discussions of the meaning of the First Amendment found in *Reynolds*, *Beason*, and the *Macintosh* dissent in *Torcaso v. Watkins*, 367 U.S. 488, 492 n.7 (1961).

**The duty which we owe to our Creator, and the manner of discharging it.**

Va. Const. of 1776, art. I, § 16 (emphasis added); *see also* James Madison, *Memorial and Remonstrance Against Religious Assessments*, June 20, 1785, *reprinted in* 5 *The Founders' Constitution* 82 (Phillip B. Kurland & Ralph Lerner eds. 1987); *The Complete Bill of Rights* 12 (Neil H. Cogan ed. 1997); *Reynolds*, 98 U.S. at 163-66; *Beason*, 133 U.S. at 342; *Macintosh*, 283 U.S. at 634 (Hughes, C.J., dissenting); *Everson*, 330 U.S. at 13. According to the Virginia Constitution, those duties “can be directed only by reason and conviction, and not by force or violence.” Va. Const. of 1776, art. I, § 16.

In *Reynolds*, the United States Supreme Court stated that the definition of “religion” contained in the Virginia Constitution was the same as its counterpart in the First Amendment. *See Reynolds*, 98 U.S. at 163-66. In *Beason*, the Supreme Court affirmed its decision in *Reynolds*, reiterating that the definition that governed both the Establishment and Free Exercise Clauses was the aforementioned Virginia constitutional definition of “religion.” *See Beason*, 133 U.S. at 342 (“[t]he term ‘religion’ has reference to one’s views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will”). In *Macintosh*, Chief Justice Hughes, in his dissent to a case which

years later was overturned by the Supreme Court,<sup>5</sup> quoted from *Beason* in defining “the essence of religion.” See *Macintosh*, 283 U.S. at 633-34 (Hughes, C.J., dissenting). Sixteen years later in *Everson*, the Supreme Court noted that it had

previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute [Jefferson’s 1785 Act for Establishing Religious Freedom].

*Everson*, 330 U.S. at 13.

In 1947, the *Everson* Court emphasized the importance of Madison’s “great *Memorial and Remonstrance*,” which “received strong support throughout Virginia,” and played a pivotal role in garnering support for the passage of the Virginia statute. *Id.* at 12. Madison’s *Memorial* offered as the first ground for the disestablishment of religion the *express definition of religion* found in the 1776 Virginia Constitution. See Madison, *Memorial and Remonstrance*. For good measure, Justice Rutledge attached Madison’s *Memorial* as an appendix to his dissent in *Everson* which was joined by Justices Frankfurter, Jackson, and Burton. See 330 U.S. at 64. Thus, the United States Supreme Court has repeatedly recognized that the constitutional definition of the term “religion” is “[t]he dut[ies]

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<sup>5</sup> *Macintosh* was overturned by the United States Supreme Court in *Girouard v. United States*, 328 U.S. 61 (1946).

which we owe to our Creator, and the manner of discharging [them].” Va. Const. of 1776, art. I, § 16.

The Texas moment of silence statute in the present case does not rise to the level of an establishment of “religion” under the First Amendment. As much as students may opt to pray during the moment of silence, they may just as freely choose to reflect, meditate, or engage in *any other* silent activity, including—as Representative Hupp noted—“star[ing] at their shoelaces.” *Croft*, 530 F. Supp. 2d at 844. School officials are unlikely to *know* which student is doing what and are utterly incapable of requiring the student to pray, dictating what the content of his or her prayer should be, or steering the prayers to a particular God. Prayer is undoubtedly a religious activity, but here *the student alone* decides whether and how to exercise his option to pray. The Texas statute merely mentions the option of prayer but provides no direction as to the manner of discharging such a duty to God.

Neither the Texas legislature, Governor, or schools are dictating to students the duties that they owe to the Creator and the manner in which they should discharge those duties by providing a 60-second moment of silence at the beginning of the school day. Instead they are, through the most passive and unobtrusive means possible, accommodating the unfettered *choice* of a religious

duty. Consequently, the Texas moment of silence statute does not respect an establishment of “religion.”

### **CONCLUSION**

The district court’s decision below should be affirmed because the Texas statute requiring a 60-second moment of silence—but nothing more—is not a “law respecting an establishment of religion” under the First Amendment of the United States Constitution.

Dated this 12th day of August, 2008.

RESPECTFULLY SUBMITTED,

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

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Dated this 12th day of August, 2008.

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of this Brief of *Amicus Curiae* have been served on counsel (listed below) for each party, in paper and electronic form, and that an original and seven (7) copies of this Brief of *Amicus Curiae* have been dispatched to the Clerk of the United States Court of Appeals for the Fifth Circuit, by certified U.S. mail, on this 12th day of August, 2008.

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