No. 09-10347

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DAVID WALLACE CROFT, As Parent and Next Friend of their minor Children; SHANNON KRISTINE CROFT, As Parents and Next Friend of their minor Children; JOHN DOE, As Parents and Next Friend of their minor Children; JANE DOE, As Parents and Next Friend of their minor Children,
Plaintiffs-Appellants,

v.

RICK PERRY, Governor of the State of Texas,
Defendant-Appellee.

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

BRIEF *AMICUS CURIAE* OF WALLBUILDERS, INC.

in support of *Defendant-Appellee*
Urging affirmance

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CERTIFICATE OF INTERESTED PERSONS

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

Plaintiffs-Appellants
David Wallace Croft and Shannon Kristine Croft, as parents and next friends of their minor children

Unknown parties, referenced in the caption as John and Jane Doe, as parents and next friends of their minor children

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INTEREST OF *AMICUS CURIAE*

WallBuilders, Inc., is a non-profit organization that is dedicated to the restoration of the moral and religious foundation on which America was built. WallBuilders' President, David Barton, is a recognized authority in American history and the role of religion in public life. As a result of his expertise in these areas, he works as a consultant to national history textbook publishers. He has been appointed by the State Boards of Education in states such as California and Texas to help write the American history and government standards for students in those states. Mr. Barton also consults with Governors and State Boards of Education in several states, and he has testified in numerous state legislatures on American history. Much of his knowledge is gained through WallBuilders' vast collection of rare, primary documents of American history, including more than 70,000 documents predating 1812. Lastly, due to his expansive work and knowledge in American history, Mr. Barton has received numerous national and international awards that have distinguished him as a leading scholar in his field.

Furthermore, WallBuilders encourages citizens all across America to continue the tradition of bringing religious perspectives to bear in public life. While the role of religion in America's public schools has changed significantly over the years, and while historical practices no longer govern there, WallBuilders desires to see religion treated neutrally, rather than with hostility. Even if the

Texas Pledge is seen merely as an acknowledgement of the historical role of religion, WallBuilders believes it is important to permit such acknowledgement.

Finally, WallBuilders is headquarted in Texas. Thus, the organization has a direct interest in seeing that Texas students are allowed to say the full and official version of the Texas Pledge of Allegiance in their schools. WallBuilders has a large base of supporters who are equally concerned with this issue.

This Brief is filed pursuant to the consent of the counsel of record for Governor Perry and pursuant to the attached Motion for Leave to File a Brief *Amicus Curiae*.

SUMMARY OF THE ARGUMENT

The Brief makes one argument not made by Governor Perry and expands upon another argument the Governor makes. First, the Brief demonstrates that the Plaintiffs (hereinafter "the Crofts") are incorrect when they assert that the prior precedents of the United States Supreme Court that declare the United States Pledge of Allegiance are mere *dicta*. Second, the Brief expands upon Governor Perry's explanation of why, contrary to the Crofts' assertions, the school setting does not alter the conclusion that the Texas Pledge is constitutional.

As to the first, the Crofts erroneously argue that the Supreme Court's *dicta* regarding the constitutionality of the United States Pledge of Allegiance must be categorized as either *obiter dicta* or judicial *dicta*. The Crofts are correct that two

such types of *dicta* exist. However, all *dicta* should be seen as being on a continuum between these two extremes. If the Supreme Court's *dicta* is not judicial *dicta*—and it may well be—it is certainly closer to being judicial *dicta* than it is to being *obiter dicta*. The Crofts compound their mistake by incorrectly asserting that issue of the Pledge's constitutionality was not briefed or argued in prior Supreme Court cases and by not addressing the near-precedential or precedential nature of judicial *dicta*.

As for the second argument, Governor Perry briefly counters the Crofts' argument that the opt-out provision is insufficient to avoid constitutional problems in the school setting. This Brief will expand upon the reasons why the Crofts' school-setting-based arguments are incorrect. Specifically, the Crofts mischaracterize the Supreme Court's teachings in *Lynch v. Donnelly,* 465 U.S. 668, (1984), and *Lee v. Weisman*, 505 U.S. 577 (1992), when they rely upon them to argue that the Texas Pledge of Allegiance is unconstitutional when recited in public schools. A proper understanding of *Lynch* shows that the use of the Texas Pledge in public schools is constitutional. Furthermore, the Crofts failed to recognize *Lee's* self-limiting principles and mischaracterized and thus mischaracterized the effect of *Lee's* holding on the present case. There are several significant factual differences between *Lee* and the present case that the Crofts ignored.

ARGUMENT

The Crofts seem to argue both that the Texas Pledge is unconstitutional *per se* and that its recitation is unconstitutionally required in Texas schools. *Cf.* Appellants' Br. 2 (Statement of Issues Presented) *with* Appellants' Br. 6 *et passim* (writing on page 6, "they are subject to Texas Government Code §3100.101 through Texas Education Code §25.082(b)" and making arguments throughout their Brief that concentrate on the school setting). Recognizing the importance of litigation over the constitutionality of the United States Pledge of Allegiance, the Crofts rely heavily upon such litigation in the United States Court of Appeals for Ninth Circuit. However, they fail to mention that the Ninth Circuit originally held both that the U.S. Pledge was unconstitutional *per se* and that it could not constitutionally be recited in the defendant school district, *Newdow v. United States Cong.,* 292 F.3d 597, 612 (9th Cir. 2002) (withdrawn), then modified its opinion to limit it to the latter holding, *Newdow v. United States Cong.*, 328 F.3d 466, 490 (9th Cir. 2002).[1] Thus, the Crofts' reliance on the *Newdow* opinion for the proposition that the U.S. Pledge has been found unconstitutional *per se* is misplaced. Furthermore, the Crofts' argument dismissing other cases that have addressed the constitutionality of the Pledge are equally unconvincing. The

[1] The Crofts do cite both *Newdow* opinions*, see. e.g.,* Appellant's Brief 22, but do not explain the significance of the two opinions.

Croft's primary argument against these cases is that they contain or rely upon *obiter dicta*. Therefore, after demonstrating why the cases do not contain *obiter dicta* and that, therefore, the constitutionality of the U.S. Pledge is a settled matter, this Brief will go on to show why using the Texas or U.S. Pledges in the public school setting is also constitutional.

I. THE CROFTS' ARGUMENT SHOULD BE REJECTED BECAUSE IT FAILS TO GIVE DEFERENCE TO THE *DICTA* OF THE UNITED STATES SUPREME COURT WHICH HAS STATED THAT THE PLEDGE OF ALLEGIANCE IS CONSTITUTIONAL.

In the *Newdow* litigation, the debate between the majority and minority opinions, as well as Judge O'Scannlain's dissent from denial of rehearing was very largely over whether to decide the issue of the constitutionality of the U.S. Pledge of Allegiance by trying to extend the logic of the Supreme Court's Establishment Clause precedents from other contexts or by using the Court's *dicta* regarding the Pledge of Allegiance. *Newdow v. United States Cong.,* 328 F.3d 466, 471-82 (9th Cir. 2003) (O'Scannlain, J., dissenting from denial of rehearing *en banc*); *id.* at 482-90 (majority opinion); *id.* at 490-93 (minority opinion).[2]

In the present case, the Crofts follow in the footsteps of the *Newdow* majority. They dismiss—incorrectly (as will be demonstrated below)—the Court's *dicta* as mere *obiter dicta* (Appellants' Br. 24-27) and instead attempt to analyze

[2] This was also true of the original, now withdrawn opinion, *Newdow v. United States Cong*., 292 F.3d 597 (2002).

the constitutionality of the Texas Pledge under a myriad of tests (*id.* 14-21, 31-41).

The problem with trying to apply the Supreme Court's precedent in a new context is that the Court's Establishment Clause jurisprudence has often been unpredictable, as various Justices of the Court have acknowledged. *See, e.g., Wallace v. Jaffree*, 472 U.S. 38, 107-12 (1985) (Rehnquist, J., dissenting) (stating that the application of the Establishment Clause since the late 1940s has little value because it has no basis in history and "is difficult to apply and yields unprincipled results."). With this type of unpredictable Establishment Clause jurisprudence, this Court should adopt the approach of the *Newdow* dissent, which has also been employed in by the United States Court of Appeals for the Seventh Circuit's decision in *Sherman v. Community Consolidated School District 21*, 980 F.2d 437, 439 (7th Cir. 1992). Following the Court's *dicta* would have been the best alternative for the Ninth Circuit and is the best alternative for this Court. As the Seventh Circuit aptly stated, "[a]n inferior court had best respect what the majority [of the United States Supreme Court] says rather than read between the lines. If the Court proclaims that a practice is consistent with the establishment clause, we take its assurances seriously. If the Justices are just pulling our leg, let them say so." *Id.* at 448.

Furthermore, the United States Court of Appeals for the Fourth Circuit, in another U.S. Pledge of Allegiance case, faced the same dilemma. However, it was

fortunate enough to be able to wrestle with the question after the Supreme Curt had decided the recent Ten Commandments cases. Thus, the Fourth Circuit was able to adopt the approach instructed by the Supreme Court's controlling opinion in one of those cases:

> There is "no single mechanical formula that can accurately draw the constitutional line in every case." *Van Orden v. Perry*, 125 S. Ct. 2854 (June 27, 2005) (Breyer, J., concurring in the judgment). Instead, in "borderline cases," there can be no "test-related substitute for the exercise of legal judgment." Id. at 3[sic]. The history of our nation, coupled with repeated dicta from the Court respecting the constitutionality of the Pledge guides our exercise of that legal judgment in this case.

Myers v. Loudoun County Pub. Schs., 418 F.3d 395, 402 (4th Cir. 2005).

The *Newdow* majority and the Crofts recognized that the Supreme Court has stated in *dicta* that the words "one nation under God" in the Pledge of Allegiance are constitutional. *Newdow,* 328 F.3d at 489; Appellants' Br. 24-26. However, both the Ninth Circuit and the Crofts failed to give deference to the Supreme Court's *dicta*. The Ninth Circuit failed to do so because it did not think the *dicta* reached the school setting. *Newdow,* 328 F.3d at 489. The Crofts embrace the same view. (Appellants' Br. 26.) However, the Crofts also dismiss the significance of the Court's *dicta* because they believe that it is *obiter dicta* and that this Court should therefore ignore it. In this contention, they are mistaken.

Part of what the Crofts write about *dicta* is correct. For example, it is true that *dictum* is "[a]n opinion expressed by a court, but which, not being necessarily

involved in the case, lacks the force of adjudication . . . ." Michael Sean Quinn, *Argument and Authority in Common Law Advocacy and Adjudication: An Irreducible Pluralism of Principles*, 74 Chi.-Kent L. Rev. 655, 710 (1999). And it is true that judges and attorneys often divide *dicta* into *obiter dicta* and judicial *dicta* to determine the precedential value of individual *dictum*. *Id.* at 712-13. *Obiter*, or mere, *dicta* is an opinion expressed in passing and has less persuasive value. *Id.* at 713. Judicial *dicta* are "court's reasoned consideration and elaboration upon a legal norm" and have much more persuasive authority. *Id.* at 713-14.

In fact, some courts, including the United States Supreme Court, give judicial *dicta* great weight. In *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), the Court adhered to judicial *dicta* which was regarded as a "well-established rationale upon which the Court based the results of its earlier decisions." *Id.* at 67. Similarly, the Court has stated that the "principle of *stare decisis* directs us to adhere not only to the holdings of . . . prior cases, *but also* to . . . explications of the governing rules of law." *County of Allegheny v. ACLU,* 492 U.S. 573, 668 (1989) (emphasis added). It is ironic that this statement comes from *County of Allegheny*, one of the cases whose *dicta* the Crofts would have this Court ignore.

Likewise, the Third Circuit Court of Appeals has noted that "[a] . . . distinction has been drawn between 'judicial *dictum'* and '*obiter dictum'*: Judicial

dicta are conclusions that have been briefed, argued, and given full consideration even though admittedly unnecessary to decision. A judicial *dictum* may have great weight." *Cerro Metal Prods. v. Marshall*, 620 F.2d 964, 978 n.39 (3d Cir. 1980). Indeed, judicial *dicta* are of such serious consequence that some courts consider judicial *dicta* issued by supreme courts to be binding precedent: "A Wisconsin court has stated it thus: 'When a court of last resort intentionally takes up, discusses, and decides a question germane to, though not necessarily decisive of, the controversy, such decision is not a *dictum* but is a judicial act of the court which it will thereafter recognize as a binding decision.'" *Id*. (citation omitted).

Furthermore and most importantly for understanding the flaw in the Crofts' argument, the distinction between *obiter dictum* and *judicial dictum* is not a bright line. Michael Sean Quinn, *Argument and Authority in Common Law Advocacy and Adjudication: An Irreducible Pluralism of Principles*, 74 Chi.-Kent L. Rev. 655, 717-18 (1999). Hard and fast divisions "are probably wrong" and can lead to "intellectual chicanery." *Id.* at 730, 776. It is not easy to determine what constitutes judicial *dictum*. *Id.* at 735. In fact, *dicta* are better thought of as being on a continuum. *Id.* at 740. Under this view, *obiter dicta*, in which a court has not deliberated over what it has said, *see id.*, rest at the lower end of the continuum; judicial *dicta* rest at the upper end of the spectrum and should guide future litigation, *id.* at 730; but other "shades" of *dicta* exist between the two extremes

and should be given various degrees of weight. Therefore, it is important under this view to realize that *dicta*, even *dicta* other than that which is *technically* judicial *dicta*, can lie very close to that end of the continuum and can be worthy of receiving precedential or near-precedential value. Certainly, the Fourth Circuit and the Seventh Circuit, unlike the Crofts and possibly the Ninth Circuit, considered the Supreme Court's Pledge *dicta* either to be judicial *dicta* or to be sufficiently close to that end of the spectrum to guide the litigation before them.

Ironically, the Ninth Circuit itself has placed *dicta* issued by the Supreme Court on the upper end of the continuum. *See United States v. Baird*, 85 F.3d 450, 453 (9th Cir. 1996). According to the Ninth Circuit, Supreme Court *dicta* is to be treated "with due deference." *Id.* One Ninth Circuit judge has stated that the supreme Court's *dicta* must not be discarded lightly. *Navajo Nation v. U.S. Dept. of Health and Human Services*, 285 F.3d 864, 877 (9th Cir. 2002) (Fletcher, J., dissenting). Another stated, "*[d]icta* of the Supreme Court have a weight that is greater than ordinary judicial *dicta* as prophecy of what the Court might hold. We should not blandly shrug it off because they were not a holding." *Zal v. Steppe*, 968 F.2d 924, 935 (9th Cir. 1992) (Noonan, J., concurring in part and dissenting in part). The Ninth Circuit, therefore, has placed Supreme Court *dicta* high on the continuum giving it great weight—*even when* that the *dictum* is not judicial *dictum*. For example, the Supreme Court's *dicta* at issue in *Zal* must be considered *obiter*

dicta, yet Judge Noonan pointed out the weight that even they deserved. *See id*.

And the Fourth, Seventh, and Ninth Circuits are not alone in this deference to Supreme Court *dicta,* no matter where on the continuum it may be located. For example, writing after the conclusion of the *Newdow* litigation, the Eleventh Circuit summarized the view of many federal courts of appeals:

> We have previously recognized that "dicta from the Supreme Court is not something to be lightly cast aside." *Peterson v. BMI Refractories,* 124 F.3d 1386, 1392 n. 4 (11th Cir.1997); *United States v. Becton,* 632 F.2d 1294, 1296 n. 3 (5th Cir.1980) ("We are not bound by dicta, even of our own court . . . . Dicta of the Supreme Court are, of course, another matter.") (citation omitted); *see United States v. City of Hialeah,* 140 F.3d 968, 974 (11th Cir.1998) ("Even though that statement by the Supreme Court . . . was dictum, it is of considerable persuasive value, especially because it interprets the Court's own precedent.").
>
> Other "inferior courts" have expressed similar sentiments. *See Wynne v. Town of Great Falls,* 376 F.3d 292, 298 n. 3 (4th Cir.2004) ("[W]ith inferior courts, like ourselves, ... carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative."); *Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery,* 330 F.3d 548, 561 (3d Cir.2003) (en banc) ("Although the Committee is doubtless correct that the Supreme Court's dicta are not binding on us, we do not view it lightly."); *United States v. Montero-Camargo,* 208 F.3d 1122, 1132 n. 17 (9th Cir.2000) (en banc) ("We do not treat considered dicta from the Supreme Court lightly. Rather, we accord it appropriate deference . . . . As we have frequently acknowledged, Supreme Court dicta have a weight that is greater than ordinary judicial dicta as prophecy of what that Court might hold; accordingly, we do not blandly shrug them off because they were not a holding.") (quotation marks and citation omitted); *Wright v. Morris,* 111 F.3d 414, 419 (6th Cir.1997) ("Where there is no clear precedent to the contrary, we will not simply ignore the [Supreme] Court's dicta."); *Bangor Hydro-Elec. Co. v. FERC,* 78 F.3d 659, 662 (D.C.Cir.1996) ("It may be dicta, but Supreme Court dicta tends to have somewhat greater force-

> particularly when expressed so unequivocally."); *Gaylor v. United States,* 74 F.3d 214, 217 (10th Cir.1996); *City of Timber Lake v. Cheyenne River Sioux Tribe,* 10 F.3d 554, 557 (8th Cir.1993); *McCoy v. Mass. Inst. of Tech.,* 950 F.2d 13, 19 (1st Cir.1991) ("We think that federal appellate courts are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when ... a dictum is of recent vintage and not enfeebled by any subsequent statement."); *Nichol v. Pullman Standard, Inc.,* 889 F.2d 115, 120 n. 8 (7th Cir.1989) ("This Court should respect considered Supreme Court dicta.").

Schwab v. Crosby, 451 F.3d 1308, 1326-27 (11th Cir. 2006).

It is true that the *dictum* at issue in Schwab was more extensive than the Supreme Court's *dicta* regarding the constitutionality of the Pledge. *Cf*. *id*. at 1325 (describing the *dictum* at issue there) *with* Appellant's Br. 25-28 (describing the Supreme Court's Pledge *dicta*). However, several points are worth remembering: First, *all* Supreme Court *dicta* are worthy of weighty consideration, and second, *dicta* are on a continuum—*dicta* need not technically be judicial *dicta* to be worthy of precedential or near-precedential value.

Certainly, the Court's *dicta* regarding the Pledge of Allegiance are worthy of great weight since they are—at a minimum—close to the judicial *dicta* end of the continuum. The Crofts are simply wrong to dismiss the *Lynch dictum* because "there is no evidence from the opinion in *Lynch* that the constitutionality of the national pledge was '. . . *briefed, and argued by counsel* . . . '" (Appellants' Br. 26 (emphasis original, citation omitted)) and to dismiss the *County of Allegheny dictum* because it "was, in effect, dictum about dictum, and has even less

value . . . .” (Appellants’ Br. 28.)

In reality, the constitutionality of the Pledge was briefed in both cases and discussed at oral argument in *Lynch*. Brief of Petitioners at 22, n.4, *Lynch v. Donnelly*, 464 U.S. 668 (1984) (No. 82-1256), 1983 U.S. S. Ct. Briefs LEXIS 1220; Brief of Respondents at 42, n.18, *Lynch v. Donnelly*, 464 U.S. 668 (1984) (No. 82-1256), 1983 U.S. S. Ct. Briefs LEXIS 1547; Brief of United States as *Amicus Curiae* at 17-18, *Lynch v. Donnelly*, 464 U.S. 668 (1984) (No. 82-1256, 1983 U.S. S. Ct. Briefs LEXIS 1217; Brief of Respondent Malik Tunador at 107-08, *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) Nos. 87-2050, 88-96, and 88-90, 1988 U.S. S. Ct. Briefs LEXIS 791; Brief of The National Legal Foundation as *Amicus Curiae* at 3, 10-11, *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) No. No. 87-2050, 1988 U.S. S. Ct. Briefs LEXIS 790*;* Brief of The Concerned Women for America as *Amicus Curiae* at 40, *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) No. No. 87-2050, 88-90, and 88-96, 1988 U.S. S. Ct. Briefs LEXIS 798; Trans. of Oral Argument at 16, 18, *Lynch v. Donnelly*, 464 U.S. 668 (1984) (No. 82-1256), 1983 U.S. Trans. LEXIS 44.

Furthermore, the pertinent Establishment Clause *tests* and *principles* were briefed and argued in the cases in which the Pledge was used as an illustration. For example, the Court stated, “Our previous opinions have considered in *dicta* the motto and the pledge, characterizing them as consistent with the proposition that

government may not communicate an endorsement of religious belief." *County of Allegheny v. ACLU*, 492 U.S. 573, 602-03 (1989). Furthermore, the Supreme Court's teaching on the U.S. Pledge demonstrates that one's "religiously based refusal" to recite the Pledge should not interfere with the right of others to recite it. *See Newdow*, 328 F.3d at 492 (Fernandez, J., concurring in part and dissenting in part) (citing *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

In short, the Crofts' attempt to dismiss the Supreme Court's *dicta* as *obiter dicta* with no bearing on the instant case is unavailing.

II. THE CROFTS' ARGUMENT SHOULD BE REJECTED BECAUSE IT MISCHARACTERIZES THE SUPREME COURT'S RULINGS IN *LYNCH V. DONNELLY* AND *LEE V. WEISMAN* BY CLAIMING THAT THEY SUPPORT HOLDING THE RECITATION OF THE PLEDGE UNCONSTITUTIONAL IN PUBLIC SCHOOLS.

Just as the Supreme Court's *dicta* indicate the constitutionality of the U.S. Pledge *per se*, so it indicates the constitutionality of the Pledge in the public school setting. (And as ably argued by Governor Perry, these realities also demonstrate the constitutionality of the Texas Pledge.) Indeed, the Ninth Circuit, whose lead the Crofts have tried to follow, admitted as much and attempted, albeit unpersuasively, to deal with this fact. The Ninth Circuit wrote,

> Our opinion, however, is not inconsistent with this *dicta*. In *Allegheny*, the Court noted that it had "considered in *dicta* the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief." 492 U.S. at 602-03. And in *Lynch,* the Court observed that students recited the pledge daily, but only to support its point that

> there is a long tradition of "official acknowledgment" of religion. 465 U.S. at 674, 676. Neither of these two references speaks to the issue here. We may assume *arguendo* that public officials do not unconstitutionally endorse religion when they recite the Pledge, yet it does not follow that schools may coerce impressionable young school children to recite it, or even to stand mute while it is being recited by their classmates.

Newdow v. United States Cong., 328 F.3d at 489.

Even on the face of this assertion, one might believe that the Ninth Circuit had come to the exact opposite conclusion from the one justified by the Court's pronouncement in *Lynch*. One might logically conclude that the Court had given the Pledge's use in public schools a clean bill of health and that the Ninth Circuit's use of the word "coerce" was gratuitous—especially in light of the record in the *Newdow* case (which clearly indicated that the student participants were willing participants).

However, were one inclined not to come to this conclusion merely on the face of the Ninth Circuit's assertion, one need merely look at the larger context of the *Lynch* quotation to see that the Ninth Circuit's characterization of it is not accurate. It is true that the Court in *Lynch* noted the recitation of the Pledge "by many thousands of school children every year," as an example of official acknowledgement of religion." 465 U.S. at 676. However, the Court said much more that is germane to the present analysis—things that the Ninth Circuit and the Crofts ignored.

The Court went on to characterize school children's recitation of the Pledge as one of the "illustrations of the Government's acknowledgment of our religious heritage and governmental sponsorship of graphic manifestations of that heritage" that it had summarized. *Id.* at 677. The Pledge would constitute the latter—"a governmental sponsorship of graphic manifestations of that heritage." *Id*. Furthermore, the Court also used the Pledge and the other examples to explain why actions, which explicitly recognize or benefit religion, do not always violate the Establishment Clause:

> This history may help explain why the Court consistently has declined to take a rigid, absolutist view of the Establishment Clause. We have refused "to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective *as illuminated by history.*" In our modern, complex society, whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas, an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court.
>
> Rather than mechanically invalidating all governmental conduct or statutes that confer benefits or give special recognition to religion in general or to one faith—as an absolutist approach would dictate—the Court has scrutinized challenged legislation or official conduct to determine whether, in reality, it establishes a religion or religious faith, or tends to do so. Joseph Story wrote a century and a half ago: "The real object of the [First] Amendment was . . . to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government."

Id. at 678 (citations omitted).

Thus, had the Ninth Circuit and the Crofts read *Lynch* correctly, they would have understood that the Supreme Court has characterized the

recitation of the Pledge by school children as a "governmental sponsorship of graphic manifestations of [our religious] heritage" that "confer[s] benefits or give[s] special recognition to religion," but that nonetheless does not violate the Establishment Clause. *Id*. at 677-78.

Furthermore, *Lynch* and *Lee* are in complete agreement that each Establishment Clause case must be decided based upon its own unique characteristics. Immediately after the passages quoted above, the *Lynch* Court noted that

> [i]n each case, the inquiry calls for line-drawing; no fixed, *per se* rule can be framed. The Establishment Clause like the Due Process Clause is not a precise, detailed provision in a legal code capable of ready application. The purpose of the Establishment Clause "was to state an objective, not to write a statute." The line between permissible relationships and those barred by the Clause can no more be straight and unwavering than due process can be defined in a single stroke or phrase or test. The Clause erects a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."

465 U.S. at 613 (citations omitted).

Similarly, the *Lee* Court wrote that "our jurisprudence in this area is of necessity one of line-drawing . . . ." 505 U.S. at 598. It both distinguished its case from other Establishment Clause cases, *id*. at 596-96, and emphasized the unique features of its case, noting that

> [t]hese dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even

> for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma.

Id. at 586. Thus, *Lee* is self-limiting. The *Lee* Court went on to stress that "[e]veryone knows that in our society and in our culture high school graduation is one of life's most significant occasions." *Id*. at 594. The Court also explicitly pointed out that its holding did not apply to all state action involving religion:

> We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation. We know too that sometimes to endure social isolation or even anger may be the price of conscience or nonconformity.

Id. at 597-98.

Because significant differences exist between the daily recitation of the U.S. or Texas Pledge of Allegiance and a "formal religious exercise" at one's once-in-a-lifetime high school graduation ceremony, there is no incompatibility between *Lynch's* strong support for the constitutionality of the daily recitation of the Pledge and *Lee's* holding of unconstitutionality of graduation prayers. First, there is a difference between the Pledge which retains some religious content and a formal religious ceremony including corporate prayer to the God that the Pledge merely acknowledges. Second, while the *Lee* Court believed that in a "fair and real sense" the graduation ceremony was obligatory, the daily recitation of the Texas Pledge is

voluntary, as the Crofts admit by discussing the opt-out provisions. (Appellants' Br. 38.)

This latter point deserves some clarification. At first blush, one might think the opposite is true. As the *Lee* Court pointed out, at least in *some sense*, participation in the graduation ceremony was voluntary, 505 U.S. at 583, whereas attendance at school is compulsory (and for many students, public schools are the only option). However, such an analysis would miss the point. What made the *Lee* graduation ceremony obligatory "in a fair and real sense" was that it was a stand-alone ceremony of great significance in the life of the graduates. They did not have to attend the ceremony to receive their diploma, but to fail to do so would have deprived themselves and their families of participation in a significant "rite of passage."

On the other hand, while school students enrolled in Texas' public schools are obligated to attend those schools, they are freely permitted to decline to participate in the Pledge. Thus, there is no obligatory ceremony at all, religious or otherwise. At worst, non-participating students might suffer "social isolation or . . . anger," which the *Lee* Court declared to be "the price of conscience or non-conformity." *Id*. at 598.

Because *Lynch* has so clearly spoken to the constitutionality of the use of the U.S. Pledge in public schools and because *Lynch* and *Lee* are easily

reconcilable, the Texas Pledge's use of the phrase "under God" does not render its recitation in public schools unconstitutional.

CONCLUSION

For the foregoing reasons and for other reasons stated in Governor Perry's Brief, your *Amicus* respectfully requests this Court to affirm the judgment of the District Court.

Respectfully submitted,
This 10th day of December 2009

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CERTIFICATE OF SERVICE

I hereby certify that I have duly served the attached Motion for Leave to File a Brief *Amicus Curiae* of WallBuilders, Inc., in the case of *Croft, et al., v. Perry,* No. 09-10347, on all required parties by depositing one paper copy in the United States mail, first class postage, prepaid on December 10, 2009, addressed as follows:

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