No. 21-20279

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FREEDOM FROM RELIGION FOUNDATION, INC.; JOHN ROE,

Plaintiff-Appellees

v.

WAYNE MACK, Individual Capacity,

Defendants-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

BRIEF OF AMICI CURIAE THE COALITION FOR JEWISH VALUES, THE TEXAS CATHOLIC CONFERENCE OF BISHOPS, RABBINICAL ALLIANCE OF AMERICA, AND THE ISLAM AND RELIGIOUS FREEDOM ACTION TEAM OF THE RELIGIOUS FREEDOM INSTITUTE SUPPORTING DEFENDANT-APPELLEE

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, I hereby certify that in addition to the persons and entities listed in the Appellant's Certificate of Interested Persons, the following persons and entities have an interest in the outcome of the case under Rule 28.2. These representations are made so judges may evaluate potential recusal.

Amici Curiae

The Coalition for Jewish Values

The Texas Catholic Conference of Bishops

Rabbinical Alliance of America

The Islam and Religious Freedom Action Team of the Religious Freedom Institute

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Dated: September 29, 2021

/s/ Richard D. Salgado
Richard D. Salgado

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INTEREST OF *AMICI CURIAE* [1]

The Coalition for Jewish Values (CJV) is the largest Rabbinic Public Policy organization in America. CJV articulates and advances public policy positions based upon traditional Jewish thought, and does so through education, mobilization, and advocacy, including participating in amicus curiae briefs in defense of equality and freedom for religious institutions and individuals. Representing over 1,500 traditional Orthodox rabbis, CJV has an interest in protecting religious liberty and religious practice against government attempts to restrict them.

The Texas Catholic Conference of Bishops ("the Bishops") is an unincorporated association consisting of the bishops of the fifteen Catholic Dioceses in Texas and the Ordinariate of the Chair of St. Peter. Through this association, the various bishops speak with one voice on issues facing the Catholic Church in Texas. The TCCB serves as the public policy arm of the Bishops before the Texas Legislature, the Texas delegation in Congress, and state agencies. The Texas bishops support religious liberty

[1] In accordance with Federal Rule of Appellate Procedure 29(a)(2), Amici Curiae file this brief with the consent of all parties.

Additionally, in accordance with Rule 29(a)(4), Amici Curiae assert that:

No party's counsel authored the brief in whole or in part;

No party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and

No person—other than the amici curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

especially as it pertains to human life, marriage, and the family, as well as supporting conscience protection for individuals and organizations.

Rabbinical Alliance of America is an Orthodox Jewish rabbinical organization with more than 1000 members that has, for many years, been involved in a variety of religious, social and educational causes affecting Orthodox Jews.

The Islam and Religious Freedom Action Team ("IRF") of the Religious Freedom Institute amplifies Muslim voices on religious freedom, seeks a deeper understanding of the support for religious freedom inside the teachings of Islam, and protects the religious freedom of Muslims. To this end, the IRF engages in research, education, and advocacy on core issues including freedom from coercion in religion and equal citizenship for people of diverse faiths. The IRF explores and supports religious freedom by translating resources by Muslims about religious freedom, fostering inclusion of Muslims in religious freedom work both where Muslims are a majority and where they are a minority, and by partnering with the Institute's other teams in advocacy.

SUMMARY OF ARGUMENT

On its surface, this case concerns the practice of a single justice of the peace in southeast Texas who invites volunteer chaplains of various different faiths—including Protestantism, Catholicism, Buddhism, Hinduism, Judaism, Islam, and any other faith-based community that would like to participate—to offer prayer before his court proceedings. The district court's overreaching application of the Establishment Clause, however, is a dangerous stride toward the total eradication of religion from the public square. That's not what our nation's founders meant. Nor is it what the text they wrote and enacted demands. The district court's decision is a departure from any correct understanding of the Establishment Clause, poses a serious threat to religious freedom for all, and should be reversed.

First, the district court and Freedom From Religion Foundation fundamentally misapply the Establishment Clause. The free exercise of religion protects more than just the privilege of worshipping in the protected space of homes, churches, synagogues, or mosques. Opponents of religion in public spheres contend that religious believers and their organizations have no First Amendment protection outside those protected spaces—not even normal free speech guarantees—because they claim that religious voices are an unconstitutional effort to impose religious beliefs on others. But that is a far cry from what our nation's founders meant in enacting the First Amendment, as demonstrated by the history of religious establishment—and *dis*establishment—at the time of the nation's founding.

Second, there is no meaningful difference between prayers by a justice of the peace's chaplains and prayers by a legislature's chaplains that the Supreme Court already upheld in *Town of Greece v. Galloway*, 572 U.S. 565, 574–75 (2014). Both practices have historical support dating back to before our nation's founding and the district court erred by finding otherwise. More still, allowing a diversity of faiths to be represented by chaplains, as Judge Mack does, provides access to those who are not of the majority faith and thus less likely to be represented by elected officials—whether legislators or judges. Freedom From Religion would instead shut those faiths out and thereby deny minority faiths the ability to participate in the public forum.

As Appellant argues, and as a panel of this Court already observed, there is an "abundant history and tradition of courtroom prayer." *Freedom From Religion Found., Inc. v. Mack*, 4 F.4th 306, 313–14 (5th Cir. 2021). But that's only the start. Our nation's judicial heritage is intertwined with religion—from practices such as a witness raising his or her right hand, to the common invocation that "God save this Honorable Court." This case thus falls in the heartland of acceptable religious exercise approved by *Town of Greece*.

ARGUMENT

The Establishment Clause does not and has never required religion "to be strictly excluded from the public forum." *McCreary Cty., Kentucky v. Am. Civil Liberties Union of Kentucky*, 545 U.S. 844, 886 (2005) (Scalia, J., dissenting). Far from it, the Supreme Court has made clear: "We are a religious people whose institutions presuppose a Supreme Being" and "[w]hen the state encourages religious instruction or cooperates with religious authorities . . . , it follows the best of our traditions." *Zorach v. Clauson*, 343 U.S. 306, 313–14 (1952).

The district court erred in at least two significant ways: (1) fundamentally misunderstanding the Establishment Clause as a prohibition on anything but pure secularism; and (2) failing to recognize the full history of judicial prayer and religiosity in judicial practice generally in its haste to distinguish this case from *Town of Greece*.

I. THE ESTABLISHMENT CLAUSE IS MEANT TO SECURE EQUAL ACCESS TO AN OPEN RELIGIOUS FORUM AND PROTECTS FREE EXERCISE RIGHTS OF RELIGIOUS MINORITIES.

The Supreme Court's legislative prayer cases provide a clear path to reversal by "carving out an exception to the Court's Establishment Clause jurisprudence" by looking to history and tradition. *Town of Greece*, 572 U.S. at 575 (internal quotations omitted); *see also Marsh v. Chambers*, 463 U.S. 783, 790 (1983) ("[H]istorical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress."). But the *Town of Greece* analysis does not have to stand alone; instead, the

historical record also sheds light on the original meaning of "establishment" and the purposes of the Establishment Clause.

A. Historically, Religious Establishments Resulted in Unequal Treatment and Violated the Free Exercise Rights of Religious Minorities.

The Founders' understanding of the Establishment Clause was rooted in the history that they and their ancestors had personally experienced. That history begins with the founding of the Church of England. Supremacy Act of 1534, 26 Hen. 8, ch. 1 (Eng.) (establishing the monarch as "the supreme [head] of the Church of England"). Over the next two centuries, Parliament enacted a series of ecclesiastical laws that consolidated church control in the Crown and decimated the free exercise rights of dissenters. The Act of Uniformity, for example, instituted the Anglican Book of Common Prayer as the only lawful form of worship, with punishments of up to life imprisonment for leading unorthodox services. Act of Uniformity, 1549, 2 & 3 Edw. 6, ch. 1 (Eng.). Similarly, the Corporation Act of 1661 restricted public office to members of the Church of England, 13 Car. 2, ch. 1 (Eng.), and the Test Act of 1673 required all public servants take an oath of allegiance to the Church and denounce key tenets of Roman Catholicism. 25 Car. 2, ch. 2 (Eng.). Some laws focused on internal control of the Church, while others ensured Anglican influence over the state. No matter the subject, these laws were clear—Catholics, Protestant, and other religious minorities were second-class citizens.

These reforms were not well-received by England's citizens. Indeed, a "large proportion of the early settlers of [the United States] came here from Europe to escape the bondage of laws which compelled them to support and attend government favored churches." *Everson* v. *Bd. of Ed. of Ewing Tp.*, 330 U.S. 1, 8 (1947).[2] But even in the colonies, establishments soon developed in two forms: statewide Anglican establishments in the South and local Puritan establishments in New England. Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2115 (2003). Such colonial establishments imposed the same restrictions on minority religious practice that colonists emigrated to avoid.

Take Virginia's Anglican establishment as an example. Protestant dissenters and Catholics were theoretically forbidden from entering the colony. *Id.* at 2117. The first codified laws of the colony mandated the erection of Anglican churches and set penalties for missing Anglican worship services. 1 William Waller Hening, *The Statutes at Large, Being a Collection of All the Laws in Virginia*, 122–23 (New York, R. & W. & G. Bartow 1823). Quakers were prohibited from gathering to worship altogether. *Id.* at 532. Colonial law fixed the salary of Anglican ministers and forced taxpayers to bear

[2] *See also Mayflower Compact: Agreement Between the Settlers at New Plymouth: 1620*, Yale Law School: The Avalon Project (2008), https://avalon.law.yale.edu/17th_century/mayflower.asp (confirming the religious motivations of the first colonists).

the cost of the salary and church maintenance expenses. *Establishment and Disestablishment*, *supra*, at 2152. Such expenses were typically borne equally by all male colonists—regardless of whether they were members of the Church of England. *Id.* And in 1756, Virginia passed a law disarming Catholics. 7 William Waller Hening, *The Statutes at Large, Being a Collection of All the Laws in Virginia*, 36–38 (1820).

The tension between establishment and free exercise was even more pronounced in the New England colonies, which were founded specifically to secure the rights of religious dissenters.[3] Massachusetts banned public preaching without approval from four local churches, thus outlawing evangelism for everyone but the Puritan orthodoxy. *Establishment and Disestablishment*, *supra*, at 2135. Despite purportedly guaranteeing "liberty of conscience . . . to all Christians," Massachusetts law mandated church attendance, banned proselytizing by Quakers and Catholics, and castigated atheism as a criminal activity. *See id.* at 2124, 2145, 2162.

Virginia and Massachusetts' establishment laws were not alone. South Carolina's Anglican establishment laws stipulated that only members of the Church of England could serve as legislators. 2 Thomas Cooper, *The Statutes at Large of South Carolina*, 232–

[3] *The General Fundamentals*, 1636, in 1 Ebenezer Hazard, *Historical Collections; Consisting of State Papers and other Authentic Documents; intended as Materials for an History of the United States of America* 408–09 (Philadelphia, T. Dobson 1792) ("That whereas the great and known end of the first *comers* in the year of our Lord 1620, leaving their native country, and all that was dear to them there; transporting of themselves over the vast ocean, . . . they . . . might, with the liberty of good conscience enjoy the pure scriptural worship of God.").

35 (Columbia, A. S. Johnston 1837). Almost every colony enacted a law limiting the franchise to favored religious adherents. *Establishment and Disestablishment*, *supra*, at 2177. From religious convictions to civil rights, colonial establishments comprehensively worsened the lives of religious minorities.

B. The Establishment Clause was Enacted to Protect Religious Minorities, Not to Prohibit Religiosity in the Public Sphere.

After the Revolution, founding-era citizens drafted potential statutes and constitutional provisions that prohibited establishment laws, thus confirming that the Founders hoped to protect the rights of religious minorities by disestablishing state churches. The Virginia Declaration of Rights of 1776, for example, stated "[t]hat religion . . . can be directed only by reason and conviction, not by force or violence, and therefore all men are equally entitled to the free exercise of religion."[4] 1 Hening, *supra*, at 49. Similarly, Article 19 of the New Jersey Constitution of 1776 stated that "there shall be no Establishment of any one religious Sect in this Province in Preference to another;" and "no Protestant Inhabitant of this Colony shall be denied the Enjoyment of any civil Right merely on Account of his religious Principles; but that all Persons . . . shall fully & freely enjoy every Privilege & Immunity enjoyed by others their Fellow-

[4] Unlike the revolutionary constitutions of other states, Virginia's constitution did not fully effect disestablishment. Compulsory taxation supporting churches continued even after outright religious persecution was banned by law. *Establishment and Disestablishment*, *supra*, at 2120.

Subjects." Peter Wilson, *Acts of the General Assembly of the State of New Jersey* viii (Trenton, Isaac Collins 1784).

These types of state provisions sparked debates about legislation and the role religion would play in the new federal government. Patrick Henry's 1785 Assessment Bill provides an excellent example. *See, e.g.*, *Everson*, 330 U.S. at 36 (Rutledge, J., dissenting) (characterizing the bill as "the climax [of] the legislative struggle"). The bill "required every taxpayer to support the Christian denomination of his choice, or failing that, to direct his contribution to the general treasury for support of public education." *Establishment and Disestablishment*, *supra*, at 2155. James Madison, however, opposed the bill because it "violate[d] that *equality* which ought to be the basis of every law. . . . Above all, are [citizens] to be considered retaining an '*equal* title to the free exercise of religion according to the dictates of Conscience.'" *Madison's Memorial*, in William Addison Blakely, *American State Papers Bearing on Sunday Legislation* 30–31 (New York, 1891).[5]

[5] Similarly, George Washington was of the opinion that "the conscientious scruples of all men should be treated with great delicacy and tenderness," and that "the laws may always be as extensively accommodated to them, as a due regard for the protection and essential interests of the nation may justify and permit." Michael W. McConnell, *Freedom from Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 819, 840 (1998) (quoting Letter from George Washington to the Religious Society Called Quakers (Oct. 1789), in George Washington on Religious Liberty and Mutual Understanding 11, 11 (Edward Frank Humphrey ed., 1932)).

Settling on the language of the Establishment Clause, "the Constitution's commitment to religious freedom" reflected "a spirit of tolerance, combined with recognition that church and state should separate." Deborah Jones Merritt & Daniel C. Merritt, *The Future of Religious Pluralism: Justice O'Connor and the Establishment Clause*, 39 ARIZ. ST. L.J. 895, 905 (2007). Disestablishment was thus left to the states. *See Establishment and Disestablishment*, *supra*, at 2109 (explaining that the First Amendment "did not disestablish anything," but rather "prevented the newly formed federal government from establishing religion or from interfering in the religious establishments of the states").

In their revolutionary constitutions, at least four states compromised by permitting, but not creating "multiple establishments." *See* Leonard Levy, *The Establishment Clause: Religion and the First Amendment* 52–53 (2d ed., University of North Carolina Press 1994). Other states went further—the constitutions of New Jersey, Pennsylvania, Delaware, and North Carolina all contained explicit clauses banning establishments.[6] Several state establishment clauses, like North Carolina's, were

[6] *See* Wilson, *supra*, at viii (New Jersey Constitution of 1776); Thomas McKean, *Acts of the General Assembly of the Commonwealth of Pennsylvania* viii–ix (Philadelphia, Francis Bailey 1782) (Pennsylvania Constitution of 1776); 1 *Laws of the State of Delaware* xxviii–xxix (Newcastle, S. & J. Adams 1797) (Delaware Constitution of 1776); Frederick Nash, 1 *The Revised Statutes of the State of North Carolina* 16 (Raleigh, Turner & Hughes 1837).

While not as explicitly anti-establishment as other state constitutions, the drafting history of New York's constitution provides an interesting insight on religious freedom around the time of ratification. John Jay "made repeated unsuccessful attempts to

explicitly premised on the notion of avoiding preferential treatment. *See* Nash, *supra*, at 16 (providing "[t]hat there should be no establishment of any one religious church or denomination in [North Carolina] in preference to any other"). Likewise, New Jersey and Delaware's constitutions contained similar language.[7] *E.g.*, Wilson, *supra*, at viii.

From the ascendancy of the Church of England to the revolutionary constitutions, establishments were onerous for two reasons: they resulted in unequal treatment and trampled on the civil rights of religious minorities. These were the evils the Establishment Clause was written to remedy—not religiosity in the public sphere. The states, left to their own devices, proceeded with disestablishment. As such, a guarantee of non-preferential free exercise was the *end* to be achieved; disestablishment was the selected *means* to achieve that end.

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exclude Catholics from protections of the state's free exercise provision." *Freedom from Persecution*, *supra*, at 842. The drafting committee, however, rejected Jay's attempt at limiting Catholic's right, "proposing instead that 'the free Toleration of religious profession and worship be forever allowed within this State to all mankind,' without limitation." *Id.* at 843 (citation omitted). *See also* 1 *Laws of the State of New York* 17 (Albany, C.R. and G. Webster 1802) (New York Constitution of 1777).

[7] The construction of the New Jersey Constitution of 1776 is also informative. The drafters placed the free exercise and establishment clauses back to back, but their respective titles are noteworthy. Wilson, *supra*, at viii. The free exercise clause is appropriately entitled "Free Exercise of Religion," but the establishment clause is entitled "How Preserved." This often-overlooked detail is critical to understanding the Founder's perception of religious liberty.

C. Judicial Prayer is not an Establishment.

Given their history, the Founders had a deep and even personal understanding of establishments of religion. They knew them from the centuries-old establishment in England, and from the established churches in nine of the thirteen colonies. While each had its own unique aspects, these establishments all had one unifying feature in common: the use of government power to coerce religious belief or observance. Indeed, seminal work on the Establishment Clause has classified six categories of establishment laws: (1) controlling church governance; (2) compelling church attendance; (3) providing financial support; (4) prohibiting worship in dissenting churches; (5) mandating the church perform civil public functions; and (6) restricting political participation to members of the established church. *Establishment and Disestablishment*, *supra*, at 2131. In sum, an "establishment of religion" had a very specific meaning for the Founders. Laws imposing these elements created an established church, whereas laws that avoided these elements did not.

Judicial prayer fits none of these categories—especially here, in light of the safeguards adopted by Judge Mack.

There is no concern about interference with church governance. This consideration has been repeatedly addressed by the Supreme Court in ways that have no implication here. An example of this type of violation is *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171 (2012), in which a religion teacher at a church school brought a retaliation claim against her former employer under the

Americans with Disabilities Act. The Supreme Court held that a court cannot overrule the church's decision about a ministerial employee without impermissibly interfering with a church's "ecclesiastical decisions." *Id.* at 189; *see also Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020) ("The First Amendment protects the right of religious institutions 'to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'"). In other words, in ecclesiastical matters, the government may not interfere with church decisions. This element of establishment is completely absent here, as it was absent in *Town of Greece*.

There is also no valid concern about coercion of individuals to engage in religious practice contrary to their own beliefs—which would be factors (2) and (6) above. Examples of coercion struck down by the Supreme Court include *Torcaso v. Watkins*, rejecting a requirement that individuals declare belief in the existence of God as a test for public office. 367 U.S. 488, 496 (1961). Similarly, the Court struck down coercive policies in *Engel v. Vitale*, 370 U.S. 421 (1962), *School District of Abington v. Schempp*, 374 U.S. 203 (1963), *Lee v. Weisman*, 505 U.S. 577 (1992), and *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), that were sponsored by public schools, on the ground that minor students would feel compelled to participate.

In contrast, those concerns simply do not exist here. When a chaplain offers a judicial prayer, no individual is compelled to listen to, acknowledge, or participate in the prayer. Nor is the chaplain exercising authority over schoolchildren or anyone else

present. More still, the opening invocation does not prefer one religion to another, nor does it impinge on the free exercise rights of any religious minorities.

Judicial prayer merely provides a space for religion in a public forum, which the Supreme Court has said time and again is not an Establishment Clause violation.[8] *See, e.g.*, *Van Orden v. Perry*, 545 U.S. 677, 681 (2015) (constructing a Ten Commandments display on the grounds of the Texas State Capitol does not violate the Establishment Clause); *see also Good News Club v. Milford Cent. Sch.*, 533 U.S. 102 (2001) (allowing religious school groups to use school facilities does not violate the Establishment Clause).

II. THERE IS A ROBUST HISTORY AND TRADITION OF JUDICIAL PRAYER AND RELIGIOSITY.

Prayer is common in adjudicatory proceedings. Beginning with the earliest known instances of judicial prayer and tracing its development in the periods before, during, and after the Founding, a historical review illustrates that judicial prayer has at least the same pedigree as the legislative prayer detailed in *Town of Greece* and *Marsh*. Given the Supreme Court found that "legislative prayer, while religious in nature, has

[8] In contrast, Freedom From Religion is seeking to deny minority religions the ability to participate in this public forum. This is particularly troubling since elected officials are most likely to be of majority religious views. Without the opportunity for minority religions to participate, majority religious views will inherently prevail. *See Faith on the Hill: The Religious Composition of the 117th Congress*, Pew Research Center (Jan. 4, 2021), https://tinyurl.com/cz8nx6p (explaining that nine-in-ten member of Congress describe themselves as Christian, composing 88.1% of the congressional body).

long been understood as compatible with the Establishment Clause," the fact that judicial prayer contains a heritage of comparable vigor demonstrates that it, too, causes no offense to the Establishment Clause. *Town of Greece*, 572 U.S. at 575. "[P]rayer practice in [the courtroom] fits within the tradition long followed," *id.* at 577, especially when it operates to provide a secular value.

A. Many Common Judicial Practices Have A Religious Origin or Purpose.

Judicial prayer has served many secular functions.[9] It consecrated witness testimony, offered parting advice to convicted defendants, and solemnized adjudicatory proceedings. These important ends undoubtedly contributed to the widespread and continued use of prayer in courtrooms.[10] Confirming this point, the history of well-

[9] The record of judicial prayer is too immense to adequately detail in this brief. *See generally* 2 *The Documentary History Of The Supreme Court Of The United States, 1789–1800* (Maeva Marcus ed., 1988) (collecting examples of chaplain prayer). For example during the Founding era in Massachusetts, members of the clergy routinely prayed in judicial proceedings. *See, e.g.*, *id.* at 232 ("After the charge, the Rev. Mr. Belknap addressed the Throne of Grace in prayer"); *id.* at 276–77 ("The prayer was made by the Rev. Dr. Parker."). Founding era court proceedings in New Hampshire and Rhode Island are also replete with examples. *See id.* at 192 (prayer "by the Rev. Dr. Haven" in New Hampshire); *id.* at 331 ("[T]he Throne of Grace was addressed in Prayer by the Rev. Dr. Hitchcock" then Judge Wilson charged the jury in Rhode Island). *See also* William H. Hackett, *The Circuit Court of the New Hampshire District One Hundred Years Ago*, 2 Green Bag 262, 264 (1890) (describing Justice Paterson's prayer while riding circuit in New Hampshire that "pleasingly inculcated" both "[r]eligion [and] [m]orality" and Rev. Mr. Alden's "excellent and well-adapted prayer" delivered after the charge).

[10] In addition to the examples of chaplain-provided prayer during the Founding, many examples of judge-provided prayer also exist. *See, e.g.*, 3 *The Documentary History Of The Supreme Court Of The United States, 1789–1800* 60 (Maeva Marcus ed., 1988) (prayer by Justice Paterson in his charge to the Delaware grand jury that stated, "May the God

known legal practices exemplifies how judicial actors used prayer for secular reasons despite its simultaneous religious character. In large-part owing to the nation's own history, these examples generally arise from Judeo-Christian belief systems but point to a broader and more universal embrace of religious faith as an inextricable part of judicial history and practice.

1. *Raising the right hand before testifying.*

Raising the right hand before testifying is an iconic and common practice in the courtroom. Society views this gesture as a symbolic statement of truthfulness, integrity, and reverence for the law. Before its use in American courts, this gesture was similarly employed in seventeenth-century England as a way to ascertain the credibility of a witness. Indeed, the English justice system permanently branded the palms of convicts with the letter that corresponded to their crimes—"T" for theft, "F" for felony, and "M" for murder.[11] This practice enabled the court and general public to instantly make

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of Heaven be our protector and guide, and enable us all to discharge our official, relative, and social duties with diligence and fidelity"); *id.* at 294 (prayer in Vermont in 1798 that stated, "May the God of Heaven enable us all to discharge our official, relative, and social duties with diligence, fidelity, and honest zeal!"); *id.* at 350–51 (prayer by Justice Iredell in Pennsylvania in 1799 when charging a grand jury that stated, "May that God whose peculiar providence seems often to have interposed to save these United States from destruction, preserve us from this worst of all evils!"). To be sure, either class of examples on its own would most likely feature sufficient frequency to qualify as a custom. But when combined, these examples assuredly qualify judicial prayer as a custom.

[11] *Punishment Sentences at the Old Bailey*, The Proceedings of the Old Bailey, London's Central Criminal Court, 1674 to 1913 (Mar. 2018), http://www.oldbaileyonline.org/static/Punishment.jsp.

credibility determinations about the convicted criminal's testimony.[12] Like many traditions, this seemingly secular practice has religious origins.[13]

As early as 2,000 years ago, raising one's hand accompanied the swearing of an oath. Indeed, the Old Testament makes this connection. *E.g.*, Daniel 12:7 (when he "lifted his right hand and his left hand toward heaven, [he swore] by Him who lives forever."); Isaiah 62:8 ("The Lord has sworn by His right hand."). Biblically, the right-hand gesture is a reference to God's strength as exemplified by Jacob, who placed his right hand on Ephraim to indicate he was the strongest of the sons and grandsons and therefore fit to lead. Genesis 14:22–23 ("With raised hand I have sworn an oath to the Lord, God Most High, Creator of heaven and earth . . . ."). Other Biblical passages similarly refer to the use of the right hand to swear an oath. *See, e.g.*, Psalm 144:8 ("Whose mouth speaketh vanity, and their right hand is a right hand of falsehood."); Exodus 6:8 ("And I will bring you to the land I swore with uplifted hand to give to Abraham, to Isaac and to Jacob."); Deuteronomy 32:40 ("For I lift up my hand to heaven and swear, As I live forever. . . .").

American courts participate in the rich history of this religious tradition. Often accompanying the raising of one's right hand is a prayer that invokes a divine being to

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[12] *Why Do We Raise Our Right Hands When Testifying Before the Court*, NWSidebar (Oct. 21, 2013), https://tinyurl.com/y59n3zux.

[13] The Talmud, for example, documents one of the earliest uses of the gesture in this manner. See Babylonian Talmud, Nazir 3b ("Isn't 'right' an expression of an oath?").

solemnize the forthcoming testimony. As Chief Justice Jay explained to a grand jury, perjury is an "abominable Insult . . . to the divine Being" that jeopardizes "our dearest and most valuable Rights." 2 *Documentary History*, *supra*, at 284. To safeguard against this pernicious result in which "oaths [w]ould cease to be held sacred," witness "[t]estimony is . . . given under those solemn obligations which an appeal to the God of Truth impose." *Id.* To solemnize this duty in modern American courts, witnesses routinely repeat a prayer for divine assistance that contains a version of the words "so help [me] God."' *See, e.g.*, TEX. R. CIV. P. 236 (Oath to Jury); *Zorach*, 343 U.S. at 312–13 (explaining that oaths invoking a prayer to God do not violate the Establishment Clause). Likewise, judges and attorneys raise their right hands and say "[s]o help me God" when reciting the oath of office.[14] The history and tradition behind raising your right hand suggests that the Establishment Clause does not require the absence of all religion and prayer from government functions.

[14] "Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: 'I, ___ ___, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ___ under the Constitution and laws of the United States. *So help me God*.'" 28 U.S.C. § 453 (emphasis added). Of course, this language is optional. *See* U.S. CONST. art. VI, § 3.

Similar oaths are recited by attorneys. Thirty-one states feature an oath with some variation of the phrase "[s]o help me God." *See* Texas Attorney's Oath, available at https://tinyurl.com/24fjxmxv (ending with "So help me God").

2. *Reciting "God save your soul" or "God have mercy on your soul."*

As with the religious underpinnings of raising your right hand, judicial prayer has also historically been a part of sentencing proceedings. Before the Founding, English judges prayed for defendants after imposing the death penalty, stating "may the Almighty God have mercy on your souls." Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1182 (1991). American courts continued this tradition. The South Carolina Constitutional Court of Chancery, for example, echoed the sentiment during its first sentencings. In 1791—the year of the First Amendment's ratification—defendants sentenced to death in South Carolina heard the invocation "pray[ing] that the Lord might have mercy on his soul!" *See, e.g.*, *State v. Washington*, 1 S.C.L. (1 Bay) 120, 156–57 (S.C. 1791) (praying also that the defendant "employ that little interval of life which remained, in making his peace with that God whose law he had offended"). While riding circuit, Justice Wilson regularly invoked religion to justify the delay in carrying out capital punishments. 2 *Documentary History*, *supra*, at 170 (explaining that non-capital sentences "should be inflicted with much expedition," but capital sentences require a delay to "render the language of political expediency consonant to the language of religion"). Similarly, Justice Story concluded his pronouncement of the sentence imposed on a convicted pirate with an "earnest prayer" that stated:

> I earnestly recommend to each of you to employ the intermediate period in sober reflections upon your past life and conduct, and *by prayer and penitence, and religious exercise*, to seek the favor and forgiveness of Almighty God for any sins and crimes which you may have committed . . . . And in bidding you, so far as I can presume to know, an eternal farewell, *I offer up my earnest prayers that Almighty God may in his infinite goodness have mercy on your souls*.

United States v. Gibert, 25 F. Cas. 1287, 1317 (C.C.D. Mass. 1834) (emphasis added).

Sentencing prayers were not limited to the Founding era and have continued well into the Twentieth Century. *See, e.g.*, *Commonwealth v. Davis*, 110 A. 85, 87 (Pa. 1920) (acknowledging the prayer "may God in His infinite goodness have mercy on your soul" as "the usual invocation"); *Tunget v. Commonwealth*, 198 S.W.2d 785, 789 (Ky. 1946) ("[W]e now say, as courts customarily and very properly say in the face of duty's commanding necessity, 'May God have mercy on his soul.'"). Even modern jury instructions feature similar prayers. *See, e.g.*, North Carolina Pattern Jury Instructions for Criminal Cases, Sentence in a Capital Case, N.C.P.I-Crim. § 107.10 (1997) ("May God have mercy on his soul.").[15] Again, the history and tradition of judicial prayer at sentencing proceedings suggests that the Establishment Clause does not prohibit all prayer from the courtroom.

3. *Opening oral argument with "God save this Honorable Court."*

During John Marshall's tenure as Chief Justice, the Supreme Court opened its sessions with some variant of "God save this Honorable Court." Charles Warren, 1 *The*

[15] Available at https://ncpro.sog.unc.edu/manual/800-1.

Supreme Court in United States History 469 (1923). Moreover, various justices riding circuit authorized ministers to open judicial proceedings with prayer. *See* 2 *Documentary History*, *supra*, at 13–14, 331 (describing the prayer-authorization practices of Chief Justice Jay, Justice Iredell, and Justice Wilson).

The Supreme Court has favorably cited these practices in its legislative prayer cases. In *Marsh*, the Supreme Court referenced its use of "God save the United States and this Honorable Court." 463 U.S. at 786; *see also McCreary Cty.*, 545 U.S. at 886 (Scalia, J., dissenting) (acknowledging the Supreme Court has "opened its session with the prayer, 'God save the United States and this Honorable Court'" since the Marshall Court). The same is true of state and federal courts, including the Supreme Court of Texas. *See, e.g.*, Transcript of Oral Arguments, *Royston, Rayzor, Vickery, & Williams, LLP v. Lopez*, 467 S.W.3d 494 (Tex. 2015) (Nos. 13-1026, 14-0109) (opening oral arguments with the prayer of "God save the State of Texas, this Honorable Court"); *United States v. Odiodio*, Nos. 399-cr-0236-D(02), 3:03-cv-0896-D, 2005 WL 2990906, at *29 (N.D. Tex. Nov. 7, 2005) (describing the invocation in federal court of "Let us pray. God save the United States and this Honorable Court" as an "opening prayer"). Thus, the Supreme Court, the federal courts, and Texas state courts all invoke religion in opening court proceedings. The history and tradition of "God save this Honorable Court" suggests that the Establishment Clause does not prohibit prayer in judicial proceedings.

Like the history and tradition of legislative prayer, these examples indicate that prayer in judicial proceedings, while religious in nature, "has long been understood as compatible with the Establishment Clause." *See Town of Greece*, 572 U.S. at 575.

B. Judicial Prayer Fits Within the History and Tradition Long Followed in This Country.

Freedom From Religion's attempts at revisionism notwithstanding, historical evidence confirms that judicial prayer was ubiquitous before and after the Founding and remains a part of many court systems today. Those actually present when our judicial system was built—including Justices Marshall, Jay, and Iredell, and countless English jurists before them—paint a picture that fatally undermines Freedom From Religion's claims about the Establishment Clause. Indeed, Chief Justice Jay even referred to the "custom" of judicial prayer as an "ancient usage[]" that "should . . . be observed and continued." 2 *Documentary History*, *supra*, at 13.

Looking at the history and traditions of judicial proceedings, it is clear that the practice of religious invocations in judicial proceedings "was accepted by the Framers and has withstood the critical scrutiny of time and political change." *Town of Greece*, 572 U.S. at 577. Ignoring this history, as the district court erroneously did, does not defeat it. Indeed, "[o]ne cannot simply ignore the historical record and then pretend it's silent." *Mack*, 4 F.4th at *314. To the contrary, judicial prayer "fits within the tradition long followed" and, accordingly, does not offend the Establishment Clause. *Town of Greece*, 572 U.S. at 577.

Moreover, the existence of a religious character, purpose, or origin does not dilute the secular value an opening invocation provides. *See Van Orden*, 545 U.S. at 690 ("Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the establishment clause."). The opening invocation, like the tradition of raising one's right hand, "serve[s] to solemnize the occasion" and has "not [been] 'exploited to proselytize or advance any one, or to disparage any other, faith or belief.'" *Town of Greece*, 572 U.S. at 583 (quoting *Marsh*, 463 U.S. at 794–795). And, as the Supreme Court has previously explained, "[t]hat a prayer is given in the name of Jesus, Allah, or Jehovah, or that it makes passing reference to religious doctrines, does not remove it from that tradition." *Id.*

If anything, this peaceful coexistence of religious and secular aims serves the exact purposes of the Establishment Clause. As such, efforts to include minority faiths in the invocations "acknowledges our growing diversity not by proscribing sectarian content but welcoming ministers of many creeds." *See id.* at 579. Ultimately, beginning court proceedings with an opening invocation epitomizes the goals of the Founders: continuing the robust tradition of religious practices facilitating secular ends while ensuring equal access to an open forum for religion.

CONCLUSION

The history of American establishments—and their subsequent disestablishment—shows the true purposes of the Establishment Clause are to effect equal treatment among religious groups and ensure their free exercise rights. The

Clause accomplishes those purposes by forbidding governments from giving preferential treatment to favored groups. Judge Mack's chaplaincy program is not only consistent with the history and tradition of the American judiciary system, it also furthers the original purposes of the Establishment Clause. For the foregoing reasons and for the reasons set forth in Appellant's brief, the Court should reverse the district court's decision and correct its misapplication of the Establishment Clause.

Dated: September 29, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2021, I electronically filed a true and correct copy of the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit, using the CM/ECF system of the Court. The electronic case filing system sent a "Notice of Electronic Filing" to all attorneys of record who have consented in writing to accept this notice as service of this document by electronic means.

Dated: September 29, 2021

/s/ Richard D. Salgado
Richard D. Salgado

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

I hereby certify that: (1) this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,323 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f); and (2) this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in a 14-point Garamond font in the text.

Dated: September 29, 2021

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