IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

FREEDOM FROM RELIGION FOUNDATION, INC., and JOHN ROE, *Plaintiffs*, v. JUDGE WAYNE MACK, in his personal capacity and in his official capacity on behalf of the State of Texas, *Defendant*.	§ § § § § § § § § § § §	CIVIL ACTION NO. 4:19-cv-1934

DEFENDANT JUDGE WAYNE MACK'S MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT

Judge Wayne Mack, in his individual capacity, moves for summary judgment under Federal Rule of Civil Procedure 56(a). Summary judgment is warranted because there are no genuine issues of material fact and because the practice about which plaintiffs complain—Judge Mack's opening ceremony, including an invocation offered by volunteer chaplains from an array of faiths on a rotating basis—is constitutionally permissible. The brief accompanying this motion further sets out the reasons for summary judgment in favor of Judge Mack.

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INTRODUCTION

In case after case, the Supreme Court has rejected Establishment Clause challenges to traditional practices rooted in the Nation's history—including invocations delivered by chaplains at legislative sessions and municipal government meetings. *See Marsh v. Chambers*, 463 U.S. 783 (1983); *Town of Greece v. Galloway*, 572 U.S. 565 (2014). Judge Mack's opening ceremony—which often includes a brief invocation by a volunteer chaplain drawn from an array of faiths—differs in no meaningful way from the practices upheld in these cases.

There is no evidence that Judge Mack's practice is coercive, discriminatory, or proselytizing. The U.S. and Texas Supreme Courts both open their sessions with a prayer—and courts across the country have long invited chaplains to provide brief invocations. Judge Mack's practice comports with this tradition and passes constitutional muster. Summary judgment should be granted to Judge Mack.[1]

[1] Plaintiffs seek only declaratory relief against Judge Mack in his individual capacity—consistent with his absolute judicial immunity and section 1983's prohibition on injunctive relief against judges. *See* Compl. 18; *see also* 42 U.S.C. § 1983 ("injunctive relief shall not be granted . . . in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity" unless "declaratory relief [is] unavailable").

Plaintiffs seek fees and costs only against the State, which has been dismissed from this action. *See* Dkt. 50; Compl. 18 (seeking "attorneys' fees and costs against Judge Mack in his *official capacity only*") (emphasis added); *see also Kentucky v. Graham*, 473 U.S. 159, 166–67 (1985) (explaining that official-capacity claims "represent only another way of pleading an action against an entity of which an officer is an agent" and that "a suit against a government official in his or her personal capacity cannot lead to imposition of fee liability upon the governmental entity"); 42 U.S.C. § 1988(b) ("in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer *shall not be held liable for any costs, including attorney's fees*, unless such action was clearly in excess of such officer's jurisdiction") (emphasis added).

And plaintiffs have not pleaded any colorable official-capacity claims in all events. *See Graham*, 473 U.S. at 166 ("in an official-capacity suit the entity's '*policy or custom*' must have played a part in the violation of federal law") (emphasis added) (quoting *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978)); *cf.* Compl. (no policy or custom allegations).

FACTUAL BACKGROUND

I. Judge Mack begins his courtroom sessions with an opening ceremony that often includes an invocation by volunteer chaplains on a rotating basis.

Judge Wayne Mack is a Justice of the Peace in Montgomery County, Texas. Statement of Undisputed Facts (SUF) ¶ 1. In addition to hearing misdemeanor criminal matters punishable by a fine and civil matters involving less than $20,000, Judge Mack serves as a county coroner. SUF ¶ 2.

In June 2014, in his role as coroner, Judge Mack responded to a tragic accident that took the life of a young woman. SUF ¶¶ 2–4. The scene at the hospital was chaotic. SUF ¶ 4. Law enforcement had directed her family to the hospital, but hadn't been able to notify her family that the young woman had passed away. SUF ¶ 4. The family had requested a chaplain, but the hospital chaplain wasn't available. SUF ¶ 4. After trying in vain to find a volunteer chaplain to provide counsel and comfort to the young woman's family, Judge Mack resolved to establish a comprehensive Justice Court Chaplaincy Program so he would have "more than just . . . phone numbers of people to call" in times of need. SUF ¶¶ 4–5.

Later that month, Judge Mack started his new chaplaincy program to "assist the Court System and Law Enforcement with grieving families on tragic death scenes or death call notifications." SUF ¶ 6. As the Justice Court Chaplaincy Handbook explains, the "Mission of the Justice Court Chaplaincy Program" is three-fold:

(1) to provide "care and counseling" to first responders and their families;

(2) to comfort and provide resources to victims; and

(3) to assist law enforcement in notifying next of kin and providing comfort to the grieving family.

SUF ¶ 7; *see also* Ex. 3 (chaplaincy handbook).[2] The Chaplaincy Program comprises a diverse coalition of clergy and lay persons who subscribe to a variety of belief systems, faiths, and denominations, including Protestantism, Catholicism, Buddhism, Hinduism, Judaism, and Islam. SUF ¶ 8. Since the program's inception, Judge Mack has not only "welcome[d] any member of the faith based community to participate," but has also actively sought diverse participation. SUF ¶¶ 8–15; *see also* SUF ¶¶ 10–14; Exs. 7–8 (Judge Mack instructed that local Jewish and Muslim leaders be invited to participate in the chaplaincy program); Ex. 9 (Judge Mack inquired whether court staff had invited members of the Church of Jesus Christ of Latter-day Saints and Jehovah's Witnesses).

To honor the volunteer chaplains' service and solemnize the proceedings in his courtroom, Judge Mack regularly invites one of the chaplains to be recognized before the first case is called. SUF ¶¶ 16–17, 28–29. The opening ceremony serves to honor the chaplains who are "willing to be on call" and to thank them for "giving their time, talent, [and] resources" to the community. SUF ¶ 17. When they are recognized, many chaplains offer a prayer, but others simply offer "encouraging words." SUF ¶¶ 18–20. Chaplains do not proselytize during the opening ceremony. SUF ¶ 21 (proselyting "has never happened" and "would absolutely not happen"). Nor is there ever any denigration of other beliefs (or unbelief). SUF ¶¶ 21–23.

An opening invocation offered by a guest chaplain "solemnizes the event" and "sets [the] tone . . . [f]or everybody that's in the courtroom" by "speak[ing] to the fact that this is a court of law" and the "rule of law will be applied and respected." SUF ¶ 28. A "moment of silence or prayer often helps people center themselves emotionally" in what can be an "emotionally-charged atmosphere." SUF ¶ 29.

[2] All exhibit references are to the Declaration of Matthew Scorcio unless otherwise noted.

When he first started inviting the chaplains, Judge Mack would provide the courtroom with a brief introduction of the new chaplaincy program before introducing the volunteer chaplain and inviting attendees to stand for the invocation. SUF ¶ 30. Judge Mack would then advise the attendees that they were free to leave if they didn't wish to attend the opening invocation and their case would not be affected. SUF ¶ 31. Judge Mack would then take his seat and the docket would be called. SUF ¶ 33.

In September 2014, plaintiff Freedom from Religion Foundation wrote to Judge Mack, complaining that the opening ceremony, including the invocation, violated the Establishment Clause. SUF ¶ 34; *see also* Ex. 12, at 4–5 (letter to Judge Mack). In response, Judge Mack wrote an open letter defending his program. SUF ¶ 35; *see also* Ex. 12, at 6 (Judge Mack's response letter).

Although Judge Mack didn't believe invocations by volunteer chaplains ran afoul of the Constitution in any way—especially not after the Supreme Court's decision in *Town of Greece*, which issued in May 2014—he nonetheless made changes to the opening ceremony to make even clearer that no one was required to participate in any way. SUF ¶ 36. He installed signs outside the courtroom and a TV screen at the back of the courtroom describing the invocation and its procedures to attendees:

> It is the tradition of this court to have a brief opening ceremony that includes a brief invocation by one of our volunteer chaplains and pledges to the United States and Texas state flag[s].
>
> You are not required to be present or participate. The bailiff will notify the lobby when court is in session.

SUF ¶ 37 (capitalization altered); *see also* Judge Mack Decl. Ex. 1 (courtroom slide); Compl. ¶¶ 76–77.

Instead of Judge Mack himself, the bailiff now explains that attendance is voluntary and that leaving the courtroom will not affect anyone's case: "You are NOT required to be present during the opening ceremonies, and if you like, you may step out of the Court Room before the Judge comes in. Your participation will have no effect on your business today or the decisions of this court." SUF ¶ 38; Ex. 13 (bailiff instructions).

Before summoning Judge Mack, the bailiff instructs attendees that "at this time before court begins please take this opportunity to use the facilities, make a phone call, or not participate in the opening ceremonies. You may exit the Court Room at this time. I will notify the lobby when court will be called into session." SUF ¶ 38; *see also* Ex. 13 (bailiff instructions). People routinely enter and exit the courtroom during this time. SUF ¶¶ 39–40. One of Judge Mack's clerks testified that although she has "seen people leave" after the bailiff's instructions, neither she nor anyone else knows "if they're leaving because of the prayer or because they are using the facilities or . . . their cell phones"—no one knows "what their motivation was for leaving." SUF ¶ 40; *see also* Ex. 15, at 105 (Lopez Dep.).

After the bailiff's announcement, Judge Mack enters, briefly explains the Chaplaincy Program, and introduces the volunteer chaplain if one is present that day. SUF ¶ 41. Judge Mack then turns around to face the flags (with his back toward the courtroom) while the chaplain addresses the courtroom and often (but not always) offers a brief invocation. SUF ¶ 42. The bailiff then leads the courtroom in pledging allegiance to the U.S. and Texas flags before announcing to those in the lobby: "If you have business before court today you need to be in the court room at this time." SUF ¶¶ 43–44; *see also* Ex. 13 (bailiff instructions). The bailiff announces the rules of the court and the first case is called. SUF ¶¶ 45–46; *see also* Ex. 13 (bailiff instructions).

II. Roe's experiences in Judge Mack's courtroom and relationship with Freedom from Religion Foundation.

Plaintiff Roe is an attorney who primarily handles landlord-tenant cases. SUF ¶ 47. He appeared in Judge Mack's courtroom and witnessed the opening ceremony several times between fall 2014 and summer 2017. SUF ¶¶ 48–50. He heard the bailiff announce the opportunity to leave the courtroom during the invocation—including the reminder that leaving will have no impact on any of the cases—but never did so. SUF ¶¶ 51–53.

Roe doesn't have any suits currently pending before Judge Mack and hasn't appeared before him since summer 2017. SUF ¶¶ 49–50, 55–56. Freedom from Religion Foundation is unaware of any other members who have ever appeared before Judge Mack in the past, nor is it "aware of any members scheduled to appear in Judge Mack's court" in the future. SUF ¶¶ 57–58.

III. This suit is the latest in a series of challenges brought by Freedom from Religion Foundation to Judge Mack's opening ceremony.

In October 2014, Freedom from Religion Foundation filed a complaint against Judge Mack with the Texas State Commission on Judicial Conduct. SUF ¶ 59; *see also* Ex. 12 (judicial conduct record). The Commission declined to issue any form of discipline against Judge Mack. SUF ¶ 60. The Commissioner's Executive Director did, however, ask the Texas Attorney General to issue an opinion regarding the constitutionality of Judge Mack's opening ceremony. SUF ¶ 61; *see also* Exs. 18–19 (letters to Texas Attorney General). The Attorney General concluded that neither Judge Mack's volunteer chaplain program nor his permitting an opening ceremony violates the Establishment Clause. *See* SUF ¶ 62; Tex. Att'y Gen. Op. No. KP-0109, 2016 WL 4414588, at *4 (2016) (Ex. 20).

Undeterred, Freedom from Religion Foundation and three pseudonymous plaintiffs filed suit in March 2017 against Judge Mack in his *official* capacity. SUF ¶ 50. This Court dismissed the case for lack of Article III standing because the County lacks the power "to control the judicial

or administrative courtroom practices of justices of the peace" and thus the requisite element of redressability couldn't be satisfied. *Freedom from Religion Found., Inc. v. Mack*, 2018 WL 6981153, at *3, *5 (S.D. Tex. Sept. 27, 2018) (Ex. 72); *see also* Order at 1–2, *Freedom from Religion Found., Inc. v. Mack*, No. 4:17-cv-00881 (S.D. Tex. Dec. 20, 2018), ECF No. 94 (Ex. 73).

Plaintiffs have now brought this suit against Judge Mack in his *individual* capacity. This Court previously denied Judge Mack's motion to dismiss, ruling that plaintiffs' "pleadings satisfy the minimum requirements of Rule 12(b)(6)." Dkt. 38 at 6. Now that discovery is complete, Judge Mack moves for summary judgment.

STATEMENT OF THE ISSUE

Whether Judge Mack is entitled to judgment as a matter of law because there are no genuine issues of material fact and because Judge Mack's opening ceremony—which often includes invocations delivered by volunteer clergy and lay persons of various faiths—comports with the Establishment Clause. *See* Fed. R. Civ. P. 56(a).

SUMMARY OF THE ARGUMENT

In *Town of Greece*, the Supreme Court rejected an Establishment Clause challenge to a practice materially indistinguishable from the one plaintiffs challenge here. There, as here, invocations were delivered on a rotating basis by volunteer clergy and lay persons drawn from a wide array of faiths. There, as here, the practice was rooted in a rich historical tradition of opening government proceedings with prayer to solemnize those proceedings. There, as here, the practice was non-coercive, non-proselytizing, and non-denigrating. The practice challenged in *Town of Greece* didn't violate the Establishment Clause, and the one challenged here doesn't either.

ARGUMENT

I. Our Nation has a rich historical tradition of opening government proceedings—including judicial proceedings—with solemnizing invocations.

As the Supreme Court has made clear, "the Establishment Clause must be interpreted 'by reference to historical practices and understandings.'" *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014). So the relevant inquiry in analyzing an Establishment Clause challenge like this one is "whether the prayer practice" at issue "fits within the tradition long followed" by federal and state government officials. *Id*. at 577.[3] Our Nation has a long tradition—predating the ratification of the Constitution—of invocations that solemnize government proceedings. Because the "prayer practice" under challenge "fits within th[at] tradition," it complies with the Establishment Clause. *Id.*

Indeed, the opening ceremony specifically approved by the Supreme Court in *Town of Greece* is the same in all material respects as the opening ceremony challenged here:

- "a local clergyman" was invited "to the front of the room to deliver an invocation," 572 U.S. at 570; *see* SUF ¶¶ 16–20;
- the prayer was intended to foster "a solemn and deliberative frame of mind, invoke divine guidance in town affairs, and follow a tradition practiced by Congress and dozens of state legislatures," 572 U.S. at 570; *see* SUF ¶¶ 27–29;
- the prayer did "not coerce participation by nonadherents," 572 U.S. at 591–92; *see* SUF ¶¶ 21–27, 31, 37–38, 51–52;
- clergy were thanked for their service and presented with a commemorative plaque, 572 U.S. at 570; *see* SUF ¶ 17; and
- the town had only recently adopted its invocation practice, unlike the Nebraska legislature's century-old practice. 572 U.S. at 570, 576; *see* SUF ¶¶ 30, 36.

[3] As a result, the analysis here doesn't focus myopically on the history of prayer in Montgomery County courthouses, but on the history of prayer to solemnize court proceedings throughout our Nation's history.

To be sure, "the *specific* practice challenged in *Town of Greece*"—invocations at the beginning of *municipal* government proceedings—"lacked the very direct connection, via the First Congress, to the thinking of those who were responsible for framing the First Amendment." *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2088–89 (2019) (plurality) (emphasis added). But "what mattered" to the Supreme Court "was that the town's practice 'fi[t] within the tradition long followed in Congress and the state legislatures.'" *Id.* (alteration in original) (quoting *Town of Greece*, 572 U.S. at 577). That practice, "while religious in nature, has long been understood as compatible with the Establishment Clause." *Town of Greece*, 572 U.S. at 575. The Supreme Court upheld the town's particular prayer practice because it "on the whole reflects and embraces our tradition." *Id*. at 585.

That same result should obtain here because Judge Mack's opening ceremony is materially indistinguishable from the one upheld in *Town of Greece*. The only difference is that the opening ceremony takes place in a courtroom. But that is of no moment. It did not matter in *Town of Greece* that it was a town board, rather than Congress or a state legislature. *Am. Legion*, 139 S. Ct. at 2088–89 (plurality) (citing *Town of Greece*, 572 U.S. at 577); *see also Am. Humanist Ass'n v. McCarty*, 851 F.3d 521, 527 (5th Cir. 2017) (rejecting Establishment Clause challenge to school board's invocation policy even though "[s]chool board prayer presumably does not date back to the Constitution's adoption, since 'free public education was virtually nonexistent at the time'") (citing *Marsh v. Chambers*, 463 U.S. 783, 787–88 (1983), and *Town of Greece*, 572 U.S. at 576–77).

Regardless, our Nation has a long tradition of judicial invocations as well as legislative ones. The opening ceremony challenged here fits comfortably within that tradition and thus within the bounds of the Establishment Clause. As the Supreme Court recently explained in *American Legion*, where, as here, religious "practices with a longstanding history follow" in the tradition of

"respect and tolerance for differing views, an honest endeavor to achieve inclusivity and nondiscrimination, and a recognition of the important role that religion plays in the lives of many Americans" begun by the First Congress, "they are likewise constitutional." 139 S. Ct. at 2089 (plurality). The summary judgment record establishes that the prayer practice here, just like the one in *Town of Greece*, fits that description to a "T."

Indeed, prayer has long been a fixture in American courtrooms. The Supreme Court has opened its sessions with the prayer "God save the United States and this honorable Court" since the time of Chief Justice John Marshall. 1 Charles Warren, *The Supreme Court in United States History* 469 (rev. ed. 1926) (Ex. 23); *see also* SUF ¶ 115. And jurists have been inviting guest chaplains to open court proceedings with brief invocations since the Founding era. In 1790, when Chief Justice John Jay was riding circuit, he was asked whether he would like a clergyman to attend the court proceedings as a chaplain—and he replied that the "custom in New England of a clergyman's attending, should in my opinion be observed and continued." 2 *The Documentary History of the Supreme Court of the United States, 1789–1800* 11–13 (Maeva Marcus ed., 1988) (Ex. 24); *see also id.* at 331 (noting a prayer was offered by a minister at the opening of the Rhode Island federal court in 1792); SUF ¶¶ 63–80.

By 1835, the practice of inviting a guest chaplain to give a brief invocation had become so engrained that Alexander Griswold, the presiding bishop of the Episcopal Church, published a ministerial handbook that included a model prayer for opening court sessions. *See* Alexander V. Griswold, *Prayers Adapted to Various Occasions of Social Worship: For Which Provision Is Not Made in the Book of Common Prayer* 149–51(1835) (Ex. 32) ("A Prayer for Courts of Justice");

see SUF ¶ 81. That practice continued through the antebellum period,[4] Reconstruction,[5] the Gilded Age,[6] the Progressive era,[7] both World Wars,[8] the Post-War era,[9] and up to today.[10]

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[4] *Judge Woodbury Takes His Seat on the Bench*, The New Era (Portsmouth, Va.) (Oct. 22, 1845), https://chroniclingamerica.loc.gov/lccn/sn86071753/1845-10-22/ed-1/seq-2 (Ex. 33) (Massachusetts court opened with "a prayer . . . offered up by the Rev. Mr. Kirk"); *The Supreme Court of Vermont*, Burlington Free Press (Burlington, Vt.) (July 30, 1858), https://chroniclingamerica.loc.gov/lccn/sn84023127/1858-07-30/ed-1/seq-2 (Ex. 35) (at the "first general term of the Supreme Court of Judicature of the State of Vermont . . . the Rev. J. H. Worcester opened the Court with prayer"); *see also* SUF ¶¶ 82–84.

[5] *Circuit Court*, Herald & Tribune (Jonesborough, Tenn.) (Aug. 10, 1871), http://chroniclingamerica.loc.gov/lccn/sn85033429/1871-08-10/ed-1/seq-3 (Ex. 36) (Tennessee "court was opened with prayer by Rev. John P. Holtsinger"); *A Verified Dream*, Superior Times (Superior, Wash.) (June 7, 1879), http://chroniclingamerica.loc.gov/lccn/sn85040344/1879-06-07/ed-1/seq-3 (Ex. 37) (Methodist minister opened court with prayer); *see* SUF ¶¶ 85–86.

[6] *St. Johnsbury*, Orleans Cty. Monitor (Barton, Vt.) (June 13, 1881), http://chroniclingamerica.loc.gov/lccn/sn84022871/1881-06-13/ed-1/seq-3 (Ex. 38) (Vermont county court opened with prayer by minister); *Federal Court*, The Daily Chieftain (Vinita, Okla.) (Apr. 6, 1901), http://chroniclingamerica.loc.gov/lccn/sn93050700/1901-04-06/ed-1/seq-1 (Ex. 39) (recounting how Methodist minister opened first federal court in Oklahoma in prayer in 1889); *see also* SUF ¶¶ 87–91.

[7] *To Open Court with Prayer*, Atlanta Const. (Atlanta, Ga.) (Nov. 12, 1901) (Ex. 43) (Georgia legislator introduced bill to "require the several judges of the superior and city courts of th[e] state to have their respective courts, when sitting in regular session, opened with prayer every day" and "to fix such compensation for the preacher"); *Opens Court with Prayer*, The Quincy Daily J. (Quincy, Ill.) (Feb. 22, 1908) (Ex. 44) (Oklahoma district court "convened court . . . by having a minister present to open court with prayer"); *Minister Refuses Fee*, Norwich Bull. (Norwich, Conn.) (June 11, 1909), https://chroniclingamerica.loc.gov/lccn/sn82014086/1909-06-11/ed-1/seq-6 (Ex. 45) (minister returned fee for opening court); *Murder Trial for Superior Court Next Week*, Bridgeport Evening Farmer (Bridgeport, Conn.) (Sept. 6, 1912), https://chroniclingamerica.loc.gov/lccn/sn84022472/1912-09-06/ed-1/seq-2 (Ex. 47) (reporting that murder trial would open with a pastor-led prayer); *see* SUF ¶¶ 92–97.

[8] *Open Court with Prayer: Judge Holton Presides in the Circuit Court at Brookhaven*, Macon Beacon (Macon, Miss.) (Sept. 18, 1914), https://chroniclingamerica.loc.gov/lccn/sn83016943/1914-09-18/ed-1/seq-7 (Ex. 50) ("Prayer was asked before court convened" in a Mississippi county court); *Putnam*, Norwich Bull. (Norwich, Conn.) (Oct. 9, 1919), https://chroniclingamerica.loc.gov/lccn/sn82014086/1919-10-09/ed-1/seq-9 (Ex. 54) (Methodist minister opened Connecticut court with prayer); *25 Moonshiners Confess*, The Morning Tulsa Daily World (Tulsa, Okla.) (Apr. 30, 1922), http://chroniclingamerica.loc.gov/lccn/sn85042345/1922-04-30/ed-1/seq-6 (Ex. 55) (moonshiners confessed after "a prayer in a crowded courtroom by an aged minister"); *Who Is Governor of Georgia?*, The Carthage Citizen (Carthage, Ind.) (Feb. 21, 1947) (Ex. 58) (reporting that a clergyman "prayed for Divine guidance for the leaders of the nation, and the several states" at opening of Georgia court); *see also* SUF ¶¶ 98–106.

[9] *Murder Trial Is Opened in Madison Court*, Fayetteville Nw. Ark. Times (Fayetteville, Ark.) (Mar. 7, 1955) (Ex. 59) (reverend opened murder trial with prayer); *Baptist Judge Has Pastor Open First Court with Prayer*, Kan. City Word & Way (Kan. City, Mo.) (Feb. 3, 1955) (Ex. 60) (reporting that a North Carolina superior court judge "brought his pastor, George Tunstall, with him to pray the opening prayer" at first court session); *Court to Open with Prayer on Feb. 4th*, Gastonia Gazette (Gastonia, N.C.) (Jan. 22, 1963) (Ex. 61) (Methodist minister opened North Carolina court with a prayer); *Judge Cooper Opens Court with Prayer*, Burlington Daily Times (Burlington, N.C.) (Apr. 5, 1972) (Ex. 63) (county judge asked reverend to open court with a prayer and instructed audience that "[i]f it offends any of you, you may leave"); *see also* SUF ¶¶ 107–11.

[10] *Minister Turns into Surprise Witness*, Hous. Chron. (Hous., Tex.) (Apr. 1, 1985), 1985 WLNR 1239288 (Ex. 64) (minister volunteered after South Carolina "judge asked if there was a pre[a]cher in the courtroom to lead the customary opening prayer"); *Judge William Bivens Jr. Begins Court with Prayer*, Bluefield Daily Tel. (Bluefield, W.

Just as the practice upheld in *Town of Greece* "on the whole reflect[ed] and embrace[d]" the tradition of legislative prayer, 572 U.S. at 585, so too does the practice challenged here reflect and embrace the tradition of judicial prayer. Our Nation has a rich history and tradition of solemnizing government proceedings with clergy-led invocations and other prayers "meant to lend gravity to the occasion and reflect values long part of the Nation's heritage." *Id.* at 583. This history and tradition embraces not only legislative prayer but also judicial prayer. Judge Mack's practice of solemnizing the proceedings in his courtroom with a brief invocation fits within this long tradition and thus comports with the Establishment Clause. *See id.* at 577.

II. Judge Mack's opening ceremony is non-coercive, non-proselytizing, and non-denigrating.

The Supreme Court has explained that to come within the Nation's history and traditions, a prayer practice cannot coerce, proselytize, or denigrate other beliefs (or unbelief). *Town of Greece*, 572 U.S. at 582–83, 585. So long as the "prayer opportunity as a whole" is consistent with those principles, an Establishment Clause challenge cannot succeed. *Id.* at 585.

As an initial matter, there is no evidence of legal coercion here. *See id.* at 608 (Thomas, J., concurring) ("The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty."); *see also Marks v. United States*, 430 U.S. 188, 193 (1977); *Bormuth v. Cty. of Jackson*, 870 F.3d 494, 515–16 (6th Cir. 2017) (en banc).

Moreover, a prayer practice isn't coercive even if an attendee feels "subtle pressure to participate in prayers that violate [his] beliefs in order to please [a government official] from whom

Va.) (Mar. 20, 1988) (Ex. 65) (judge routinely opened court with prayer and announcement that "I do not require anyone to be in the courtroom when I pray. Everyone can wait until my short prayer of about 10 seconds is over before coming in, depending on the way they feel."); *Court Holds First Session*, St. Petersburg Times (St. Petersburg, Fla.) (July 30, 1996), 1996 WLNR 2378937 (Ex. 66) (priest prayed at first session in new Florida courthouse); *see also* SUF ¶¶ 112–14.

[he is] about to seek a favorable ruling." *Town of Greece*, 572 U.S. at 586 (Kennedy, J., joined by Roberts, C.J., and Alito, J.). Subjective concerns about "social pressures" don't amount to coercion. *Id.* at 577–78 (majority); *id.* at 587 (Kennedy, J.) ("That many appreciate these acknowledgments of the divine in our public institutions does not suggest that those who disagree are compelled to join the expression or approve its content."); *id.* at 609–10 (Thomas, J., concurring) ("[p]eer pressure, unpleasant as it may be, is not coercion") (alteration in original). Instead, there must be evidence that government officials "directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity." *Id.* at 588 (Kennedy, J.). The summary-judgment record is devoid of any such evidence here.

To the contrary, Judge Mack has gone above and beyond in ensuring that attendees are aware that participation in the opening ceremony is entirely voluntary. Signs posted throughout the courthouse make that clear, as do the bailiff's remarks and invitation for attendees to leave if they'd rather not participate—all before Judge Mack enters the courtroom. SUF ¶¶ 37–41; *see also* Ex. 13 (bailiff instructions); Judge Mack Decl. Ex. 1 (courtroom slide); Compl. ¶¶ 76, 66. Even after Judge Mack enters the courtroom, he makes a concerted effort to ensure that attendees don't feel coerced to participate: After introducing the chaplains, he turns to face the flags, with his back toward the courtroom, while the chaplain addresses the courtroom and offers a brief invocation. SUF ¶ 42.

Judge Mack doesn't "single[ ] out . . . for opprobrium" those who don't participate, and never has. *Town of Greece*, 572 U.S. at 588; *see* SUF ¶¶ 23–26, 31. Here, as in *Town of Greece*, attendees "are 'free to enter and leave with little comment and for any number of reasons.'" 572 U.S. at 590; SUF ¶¶ 31, 37–40. In inviting attendees to leave the courtroom before the invocation,

the bailiff gives several reasons—in addition to avoiding the invocation—why attendees might want to briefly step into the hallway: "at this time before court begins please take this opportunity to use the facilities, make a phone call, or not to participate in the opening ceremonies. You may exit the Court Room at this time." SUF ¶¶ 38, 51–52; *see also* Ex. 13 (bailiff instructions); SUF ¶¶ 39–40 (people routinely enter and exit the courtroom for a variety of reasons after the bailiff's invitation to do so—no one knows why any individual leaves).

Judge Mack has repeatedly made clear that participation (or non-participation) in the opening ceremony would not "affect[ ] the outcome of [any] cases." Compl. ¶¶ 34, 66, 76; *see also* SUF ¶¶ 31, 37–40, 51 . Here, as in *Town of Greece*, there is no evidence that Judge Mack "allocated benefits and burdens based on participation in the prayer, or that citizens were received differently depending on whether they joined the invocation or quietly declined." 572 U.S. at 589. "In no instance did [Judge Mack] signal disfavor toward nonparticipants or suggest that their stature in the community was in any way diminished." *See id.*; *see also* SUF ¶¶ 23–26, 31, 37–38.

Plaintiff Roe acknowledges that he "never witnessed any particular direct religious discrimination at the bench against a litigant for failing to participate, or for expressing their religion in some overt or covert way." SUF ¶ 23; *see also* Ex. 11, at 152 (Roe Dep.). And he is unable to point to a single "specific action taken by Judge Mack in response to . . . participation in the courtroom opening routine." SUF ¶¶ 24–25; *see also* Ex. 10 (Roe RFA Nos. 1–2); SUF ¶ 34; Ex. 12, at 4–5 (letter from Freedom from Religion Foundation to Judge Mack) ("we are not claiming that you are actually biased against those who choose not to participate in your courtroom prayers"). Here, as in *Town of Greece*, there is no evidence that the challenged practice "classified citizens based on their religious views." 572 U.S. at 589.

Nor is there any evidence that the prayer opportunity has been misused to proselytize. Judge Mack testified without contradiction that the chaplains are "not there to promote themselves or their faith. They're there to bring hope and help and peace to the storm, and anybody that would . . . in any way promot[e] anything other than holding somebody's hand and offering hope and help would not be a part of the chaplaincy program." SUF ¶ 27. And he explained, without contradiction, that it's "never happened" that anyone has used the opening invocation to proselytize. SUF ¶ 21; *see also* Ex. 1, at 129–30 (Judge Mack Dep.).

Nor has the invocation ever been used to denigrate anyone. SUF ¶¶ 26–27; *see also* Judge Mack Decl. ¶ 5. The opening ceremony permits chaplains from any faith tradition to participate—"an honest endeavor to achieve inclusivity and nondiscrimination." *Am. Legion*, 139 S. Ct. at 2089 (plurality); SUF ¶¶ 8–15. It specifically includes clergy from "minority belief systems." Judge Mack Decl. ¶ 3; SUF ¶¶ 8–15; *see also* SUF ¶¶ 10–13; Exs. 7–8 (Judge Mack email instructing that local Jewish and Muslim leaders be invited to participate in the chaplaincy program); SUF ¶ 14; Ex. 9 (Judge Mack email inquiring whether members of the Church of Jesus Christ of Latter-day Saints and Jehovah's Witnesses were included in the program). Judge Mack "maintains a policy of nondiscrimination" and the invocation "does not reflect an aversion or bias . . . against minority faiths." *Town of Greece*, 572 U.S. at 585 (majority).

* * *

The brief invocation offered during Judge Mack's opening ceremony—a ceremony to honor Montgomery County's volunteer chaplains and to solemnize Judge Mack's courtroom proceedings—is fully consistent with the practice upheld in *Town of Greece*.

Our Nation also has a rich historical tradition of opening judicial proceedings with clergy-led prayer—a tradition that extends back to the Justices of the original Supreme Court. Judge

Mack's practice fits comfortably within that tradition. The invocations—offered by guest chaplains from a wide array of faiths—are voluntary, non-coercive, non-proselytizing, and non-denigrating. They comport with the Establishment Clause and require judgment for Judge Mack.

CONCLUSION

For the foregoing reasons, the Court should grant summary judgment in favor of Judge Mack.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on December 18, 2020, a true and correct copy of the foregoing Motion for Summary Judgment and Brief in Support was served by ECF on all counsel of record.

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