UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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NATURE AND STAGE OF THE PROCEEDINGS

Plaintiffs Freedom From Religion Foundation, Inc. (FFRF) and John Roe filed suit for declaratory relief against Judge Wayne Mack in his individual and official judicial capacity on May 29, 2019. Dkt. No. 1. Judge Mack was served with the summons and complaint on Aug. 19, 2019. Dkt. 11. On Sept. 4, 2019, Judge Mack, in his individual capacity, filed a motion to dismiss this suit. Dkt. No. 12. The Court denied the motion to dismiss on January 13, 2020. Dkt. No. 38. On Feb. 10, 2020, Judge Mack, in his individual capacity, filed a motion for reconsideration of the Court's Memorandum Opinion and Order denying his Motion to Dismiss or, alternatively, for certification of that order for an interlocutory appeal. Dkt. No. 39. The Court denied the motion. Dkt. No. 43. Judge Mack, in his personal capacity, filed an answer on March 12, 2020. Dkt. No. 45.

The Plaintiffs filed a Motion for Miscellaneous Relief Against Judge Mack in His Official Judicial Capacity on Feb. 12, 2020 seeking to have the state file an answer (or otherwise defend) or order the clerk to enter default against Judge Mack in his official capacity. Dkt. Nos. 41, 41-1. The Court granted the motion on Feb. 27, 2020. Dkt. No. 44. The State of Texas filed a motion to dismiss "solely in its own right" and not on behalf of any party to this litigation. Dkt. No. 46. The Court granted the motion, finding that the Plaintiffs brought claims against Judge Mack in his personal and official capacities, and may not seek relief separately against the State of Texas. Dkt. No. 50.

On Sept. 11, 2020, the Court entered an order on a joint motion to extend case deadlines. Dkt. No. 55. Pursuant to the order, dispositive motions are due by Dec. 18, 2020 and oppositions to dispositive motions are due by Jan. 18, 2021. Any replies in support of dispositive motions are due by Feb. 1, 2021. If appropriate, a docket call is scheduled for 11:30 A.M. on April 5, 2021.

STATEMENT OF FACTS

Plaintiffs' Statement of Undisputed Facts is filed concurrently with this brief as Tab 1 in Plaintiffs' Appendix to Motion for Summary Judgment and is cited hereinafter as "PSUF."

SUMMARY JUDGMENT STANDARD

The sole issue to be ruled upon by this Court at this time is whether Plaintiffs are entitled to judgment as a matter of law on their claim that Judge Mack's courtroom-prayer practice violates the Establishment Clause of the First Amendment.

Summary judgment under Federal Rule of Civil Procedure 56 is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1996). The district court should "view the evidence in the light most favorable to the non-moving party, and the moving party has the burden of showing [the] court that summary judgment is appropriate." *QBE Ins. Corp. v. Brown & Mitchell, Inc.,* 591 F.3d 439, 442 (5th Cir. 2009). A fact is genuinely in dispute only if a reasonable jury could return a verdict for the non-moving party. *Fordoche, Inc. v. Texaco, Inc.*, 463 F.3d 388, 392 (5th Cir. 2006).

SUMMARY OF THE ARGUMENT

Judge Mack's courtroom-prayer practice is unconstitutionally coercive of those who appear in his courtroom. Because Judge Mack's court sessions coerce court participates into a religious practice, he has violated one of the strongest most fundamental commands of the Establishment Clause of the First Amendment and the Court need not proceed beyond a coercion analysis. However, even if the courtroom prayers were not coercive, Judge Mack's courtroom-prayer practice was developed and is undertaken for a primarily religious propose in violation of

the Establishment Clause. In addition, the courtroom prayers have a primarily religious effect and endorse religion. These violations of the Establishment Clause cannot be justified with unsupported claims that they are historically permissible. The Plaintiffs are entitled to declaratory relief to address these violations of their First Amendment rights.

ARGUMENT

I. Plaintiffs Have Standing to Pursue Their Claims.

This Court previously rejected Judge Mack's arguments that the plaintiffs in this case lacked standing. *See* Mem. Op. and Order, Dkt. No. 38 (Jan. 13, 2020). With regard to plaintiff Roe, this Court held, "Attorney Roe has offered testimony that he practices law in Montgomery County, Texas, has appeared in Judge Mack's courtroom on several occasions, and that he avoids the courtroom because of Judge Mack's practice. The harm alleged does not occur only because he enters the courtroom, but also because he must avoid the courtroom since the practice continues. Therefore, there is a substantive risk that were he to accept a case in Judge Mack's court, he will be exposed to the prayer practice. Hence, Attorney Roe has satisfied the standing requirements." *Id.* at 6. With regard to the plaintiff the Freedom From Religion Foundation (FFRF), this Court held, that because "Attorney Roe has standing, the FFRF has associational standing." *Id.* (citing *Hunt v. Washington State Apple Advert. Comm'n*, 97 S. Ct. 2434 (1977)).

Nothing in the record alters any of this Court's previous analysis, which Plaintiffs incorporate by reference. As the record demonstrates, Attorney Roe's law practice is located in Montgomery County, PSUF ¶ 59, and he continues to practice law in Montgomery County, with cases active or pending in Montgomery County Justice Court (but not currently in Precinct 1) and Montgomery County District Court, as well as other courts in the area, including courts in Harris County, Galveston, and Fort Bend. *See* PSUF ¶ 70. Attorney Roe was exposed to Judge

Mack's courtroom-prayer practice several times in that past, *see* PSUF ¶ 60 (describing Roe's experience with the prayers on four separate occasions in 2016 and 2017), before Roe ultimately decided to no longer take cases in Judge Mack's courtroom, due to the prayer practice. *See* PSUF ¶ 69. This decision has cost Attorney Roe business, both from one-time flat-fee appearances and from potential clients who contacted Roe directly. *See* PSUF ¶ 71. As for FFRF, Attorney Roe was a member at the time this lawsuit was filed and has remained a member ever since. *See* PSUF ¶ 74.

Accordingly, it is abundantly clear that Plaintiff Roe, and the FFRF, have standing to maintain this action.

II. Judge Mack's Courtroom-Prayer Practice Is Unconstitutionally Coercive.

The Supreme Court generally applies at least one of three tests under the Establishment Clause: the *Lemon* test, the endorsement test, or the coercion test. *Am. Humanist Ass'n v. McCarty*, 851 F.3d 521, 525 (5th Cir. 2017). Of these, the coercion test represents the lowest constitutional bar that any governmental practice must meet. "[A]t a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise." *Lee v. Weisman*, 505 U.S. 577, 587 (1992). The Supreme Court has called this anti-coercion protection "an elemental First Amendment principle," *Town of Greece v. Galloway*, 572 U.S. 565, 586 (2014), and a "fundamental limitation[ ] imposed by the Establishment Clause." *Lee*, 505 U.S. at 587. In short, being noncoercive is a necessary, but not sufficient, requirement for any governmental practice. *See, e.g.*, *Town of Greece*, 572 U.S. 565 (holding the town's prayer practice constitutional because it both "comports with our [historical legislative prayer] tradition *and* does not coerce participation by nonadherents" (emphasis added)).

Unconstitutional coercion occurs where "(1) the government directs (2) a formal religious exercise (3) in such a way as to oblige the participation of objectors." *McCarty*, 851 F.3d at 525 n.12 (quoting *Doe ex rel. Doe v. Beaumont Indep. Sch. Dist.*, 173 F.3d 274, 285 (5th Cir. 1999) (quoting *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963, 970 (5th Cir. 1992))). The coercion need not be overt; rather, it can stem from "subtle coercive pressures" that arise when an intended audience has "no real alternative which would have allowed [them] to avoid the fact or appearance of participation." *Lee v. Weisman*, 505 U.S. 577, 587–88 (1992); *see also Kerr v. Farrey*, 95 F.3d 472, 474, 479-80 (7th Cir. 1996) (finding coercion where inmates were required to "observe" religious Narcotics Anonymous meetings although "they were not required to 'participate'"). While concerns over coercion are "most pronounced" in the context of schools, the concern is not limited to that context. *Lee*, 505 U.S. at 592. Because both case law and the record demonstrate that Judge Mack's practice cannot withstand the coercion analysis, this Court can rule the practice unconstitutional without reviewing the practice under any other Establishment Clause test.

A. A majority of the Justices in Town of Greece expressed the view that courtroom prayer runs afoul of the coercion test.

The Supreme Court applied the coercion test outside the school context as recently as 2014 in *Town of Greece*, when it considered the constitutionality of prayers that were delivered before a local legislative body. The Court upheld the prayers on the grounds that the practice of legislative prayer dated to the First Congress and was not coercive. 572 U.S. at 575-77, 586-91.

In her dissenting opinion, Justice Kagan presented a highly detailed hypothetical, the specifics of which closely mirror Judge Mack's courtroom-prayer practice:

> You are a party in a case going to trial; let's say you have filed suit against the government for violating one of your legal rights. The judge bangs his gavel to call the court to order, asks a minister to come to the front of the room, and instructs the 10 or

> so individuals present to rise for an opening prayer. The clergyman faces those in attendance and says: "Lord, God of all creation, . . . We acknowledge the saving sacrifice of Jesus Christ on the cross. We draw strength . . . from his resurrection at Easter. Jesus Christ, who took away the sins of the world, destroyed our death, through his dying and in his rising, he has restored our life. Blessed are you, who has raised up the Lord Jesus, you who will raise us, in our turn, and put us by His side . . . . Amen." The judge then asks your lawyer to begin the trial.

572 U.S. at 617 (Kagan, J., dissenting). Justice Alito, who was in the majority in *Town of Greece*, specifically addressed the above hypothetical in a concurring opinion joined by Justice Scalia, stating that he was "concerned that at least some readers will take these hypotheticals as a warning that this is where today's decision leads—to a country in which religious minorities are denied the equal benefits of citizenship." *Id.* at 603 (Alito, J., concurring). He continued, "Nothing could be further from the truth." *Id.*

This prompted Justice Kagan to observe that a majority of the justices "would hold that the government officials responsible for [the hypothetical courtroom prayer practice] . . . crossed a constitutional line. I have every confidence the Court would agree." *Id.* at 618 (Kagan, J., dissenting) (citing Justice Alito's concurrence at 603). Thus, six Justice on the Supreme Court have expressed the view that a courtroom-prayer practice would run afoul of the coercion test and thus violate the Establishment Clause. That should come as no surprise given that, as described in the next section, coercive pressures are paramount in the courtroom context.

B. Courtrooms are inherently coercive.

It is axiomatic that a judge's "lightest word or intimation is received with deference" in his or her courtroom. *Quercia v. United States*, 289 U.S. 466, 470 (1933) (quoting *Starr v. United States*, 153 U.S. 614, 626 (1894)). Indeed, federal courts, including the Supreme Court and Fifth Circuit, have repeatedly recognized the influence and coercive power that judges wield over the attorneys, defendants, jurors, and other adults who appear before them.

With respect to jurors, courts have concluded that judges have an undue influence, which is why judges take special care to maintain the appearance of strict judicial impartiality. *See, e.g.*, *Starr v. United States*, 153 U.S. 614, 626 (1894) ("It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight . . . ."); *Offutt v. United States*, 348 U.S. 11 (1954) (holding that a judgment must be reversed because of a judge's inappropriate comments and behavior, citing the power and influence that a judge has over those in his courtroom); *Quercia v. United States*, 289 U.S. 466, 470 (1933) (quoting *Starr*); *United States v. Fischer*, 531 F.2d 783, 786 (5th Cir. 1976) (reversing conviction in recognition of "the great influence which the trial judge necessarily exerts upon the jury"); *United States v. Dillon*, 446 F.2d 598, 601 n.3 (5th Cir. 1971) (quoting *Dopf*, quoting *Quercia*); *United States v. Dopf*, 434 F.2d 205, 209 (5th Cir. 1970) (quoting *Quercia*, quoting *Starr*); *Travelers Ins. Co. v. Ryan*, 416 F.2d 362, 364 (5th Cir. 1969) ("[T]he judge is a figure of overpowering influence, whose every change in facial expression is noted, and whose every word is received attentively and acted upon with alacrity and without question."). In fact, the Fifth Circuit has gone so far as to describe this recognition of judicial influence and the need for maintaining strict impartiality as a "truism[ ] distilled in countless cases by unnumbered judicial forbears long since dust." *Travelers Insurance Co.*, 416 F.2d at 364.

A judge's inherent coercive influence over litigants has also been widely acknowledged. For instance, Federal Rule of Criminal Procedure 11(e) was amended in 1974 to exclude judges from the negotiation process to avoid the inherent coercive power judges have over the accused. The comments to the 1974 amendment include this quote from the District Court for the Southern District of New York, which summarizes the issue:

> The unequal positions of the judge and the accused, one with the power to commit to prison and the other deeply concerned to avoid prison, at once raise a question of

> fundamental fairness. When a judge becomes a participant in plea bargaining he brings to bear the full force and majesty of his office. His awesome power to impose a substantially longer or even maximum sentence in excess of that proposed is present whether referred to or not.

Notes of the Advisory Committee on Rules, Fed. R. Crim.P. 11, 18 U.S.C.A. at 25 (1975) (quoting *Elksnis v. Gilligan*, 256 F. Supp. 244, 254 (S.D.N.Y. 1966)). The Fifth Circuit agrees. *See, e.g.*, *United States v. Adams*, 634 F.2d 830 (5th Cir. 1981) (treating trial judge's participation in plea negotiation as "plain error" necessitating resentencing even absent showing of actual prejudice); *Frank v. Blackburn*, 646 F.2d 873, 880 (5th Cir. 1980) (identifying among the reasons for disallowing judicial involvement in plea negotiations: "the risk of not going along with the disposition apparently desired by the judge may seem so great to the defendant that he will be induced to plead guilty even if innocent"); *Brown v. Beto*, 377 F.2d 950, 957 (5th Cir. 1967) (describing a judge as "almost all-powerful in his sentencing capacity").

Coercive pressures in a courtroom setting are also extreme with respect to attorneys present to represent their clients. As Attorney Roe put it, "I have a client, and he's sitting here, and he wants me to perform my legal job. He doesn't want me to make a scene, be an activist, or to otherwise make this courtroom prayer a part of what I'm doing that day. That's the last thing I want. The client wants me to follow the rules." Plaintiffs' Appx. to Motion for Summary Judgment Tab 14, Roe Depo. 142:20 – 143:1. "The client wants me to follow the rules, to be nice, be courteous, and win his case. If I suddenly got up in the middle of the prayer, and made it a point to not participate in these things, they would be livid with me. And so, just by dint of having the prayer be the centerpiece of the proceedings, means that I would never choose to not participate, if I'm there for a client." *Id.* at 143:12–21 (cleaned up). Other attorneys have had the same reaction, and Judge

Mack has long been aware of this fact. *See* PSUF ¶ 106 ("On each occasion that I observed Judge Mack's courtroom-prayer practice, I felt compelled to remain in the courtroom, to stand during the prayer along with everyone else around me, and to remain silent during the prayer, in order to protect the interests of my clients."); Plaintiffs' Appx. to Motion for Summary Judgment Tab 22 (Case No. 4:17-cv-881, Doc. 31-3 (S.D. Tex. Aug. 2017) (Jane Doe Decl.)) ("If my professional duties to one of my existing clients so required, I would appear in Judge Mack's courtroom. In that scenario, I would remain in the courtroom during the opening prayer, just as I have in the past, in order to avoid prejudicing Judge Mack against my client.").

To the knowledge of the undersigned counsel, only one federal appellate decision has ever addressed the constitutionality of courtroom prayers—*North Carolina Civil Liberties Union Legal Found. v. Constangy*, 947 F.2d 1145 (4th Cir. 1991)—presumably because the practice is so rare. In that case, the Fourth Circuit struck down the prayer practice, but it did so pursuant to the purpose and effects/endorsement inquiries, without applying the coercion test. Id. at 1150-51. But in another Fourth Circuit decision—*Lund v. Rowan County,* 863 F.3d 268, 288 (4th Cir. 2017), *cert. denied* 138 S. Ct. 2564 (2018)—the court did address the coercive effects of government prayer delivered before a quasi-judicial body that was responsible for hearing "such granular issues as zoning petitions, permit applications, and contract awards." In that case, the court held that "[t]he 'close proximity' between a board's sectarian exercises and its consideration of specific individual petitions 'presents, to say the least, the opportunity for abuse.'" *Id.* While there was no "suggest[ion] that the commissioners made decisions based on whether an attendee participated in the prayers," "the fact remains that the Board considered individual

petitions on the heels of the commissioners' prayers," which was enough to warrant a finding that the meetings presented a " heightened potential for coercion." *Id.*

The coercive power wielded by municipal boards pales in comparison to the coercive authority of a judge in his courtroom. In a courtroom, the decision-making authority is vested in a single judge, rather than shared by a multi-member body. But far more importantly, as Judge Mack testified at his deposition, in a courtroom "generally [ ] you have a plaintiff that's suing somebody . . . there's a great possibility that 50 percent of my courtroom [*i.e.*, the defendants] is there, on a civil side, because they don't want to be there. The criminal side, it's probably even a higher percentage than that." Plaintiffs' Appx. to Motion for Summary Judgment Tab 2, Mack Depo. 147:4–9. That is, as even Judge Mack himself recognizes, a majority of courtroom litigants are not present by choice. Rather, the power of the State—by threat of misdemeanor charge or default judgment—compels them to be there.

Thus, the case law leaves no doubt that attorneys and litigants face considerable coercive pressures both to be present, and to show ample respect, to courtroom judges. In a word, attorneys and litigants are at a judge's mercy.

C. Various dynamics in Judge Mack's courtroom exacerbate the coercive pressures faced by audience members beyond those present in a normal courtroom setting.

The coercive pressures faced by the people in Judge Mack's courtroom are further heightened by several dynamics that are not necessarily present in other courtrooms. First, Judge Mack often observes the audience during the prayers, despite having been informed that this exacerbates the audience's perception of coercion. Multiple *pro se* litigants have reported to the State Commission on Judicial Conduct that Judge Mack surveys the

courtroom during the chaplain-led prayer, observes the litigant with their head not bowed, and that the litigants later felt that the outcome of their case was affected by their body language during the prayer. For example, in a statement FFRF included in its initial complaint to the State Commission on Judicial Conduct, a *pro se* litigant recounts that during the chaplain-led prayer "I felt that the Judge was watching for reactions from the courtroom; bowed heads, indifference etc. I definitely felt that our cases were to be affected by our reactions or lack of. . . . I was very uncomfortable and certainly felt that I was being coerced into following this ritual and that the outcome of my case depended upon my body language." PSUF ¶ 103. "I felt that I was singled out and the outcome of my case depended on my participation in the religious ceremony." *Id.*

Another *pro se* litigant, writing directly to the State Commission in May 2016, recounted, "[d]uring the prayer I opened my eyes and looked right at the judge he did NOT have his head bowed or his eyes closed, he was scanning the [courtroom], looking at each individual person. I was appalled and worried because me and the judge made eye contact during the prayer, I just shook my head and replied amen, as the preacher said now everyone say amen." PSUF ¶ 109. This litigant concluded their complaint with a plea to the State Commission: "our community needs to know[,] no matter what your religion is or is not[,] you are going to get a fair [trial]. If Wayne Mack [cannot] be impartial about religion in his capacity as justice of the peace what else is he not willing to be impartial about." *Id.* Attorney Roe likewise reports that in his experience, Judge Mack faces the audience during the prayers. *See* PSUF ¶ 48.

This behavior has persisted into 2020. One litigant—a property owner within the Precinct 1 jurisdiction and a seasoned out-of-state attorney—reported to the State

Commission that in January 2020 he "felt compelled to remain in the courtroom, standing and silent, for the duration of Judge Mack's introduction of the chaplain and the chaplain's prayer, which directly followed," PSUF ¶ 114, that "[t]here was no opportunity to leave between the time that Judge Mack entered the courtroom and when the chaplain began praying," *id.*, and that because Judge Mack surveyed the courtroom during the prayer and because the litigant did not bow his head during the prayer, "[t]here is no question in my mind that Judge Mack's observation of my nonparticipation in the prayer influenced his impression of me and subsequently influenced his demeanor while hearing my case." *Id*. At least on some occasions, Judge Mack has elected to continue surveying the courtroom during the prayers, despite the judge being aware that multiple litigants have concluded that he was biased against them based on their conduct during the prayer practice.

Second, as Attorney Roe explained in his deposition, to a far greater degree than in other courts, attorneys who practice in Justice Courts can expect to appear repeatedly before the same justices of the peace on many different matters, given the small size and insular nature of the local legal community. Accordingly, creating a bad impression with a justice of the peace could therefore be detrimental not only for the attorney's present client, but also to many future clients the attorney reasonably expects to represent in that same courtroom. *See* Plaintiffs' Appx. to Motion for Summary Judgment Tab 14, Roe Depo. 144:13–19 (testifying that for attorneys who regularly practice in Justice Courts in particular, "a lot of it really is personal --you know, personal relationships").

Third, for the litigants appearing in a Justice Court, "you're not in JP court because you could choose to go to another court. You're here because you have to, or you're here because this is the only thing [you] can afford." Plaintiffs' Appx. to Motion for Summary

Judgment Tab 14, Roe Depo. 144:21–24. This is coercion in two related respects: jurisdictional and financial. Jurisdictionally, certain types of cases in Texas are required to begin in the Justice Court. For many types of cases there are legally no alternative venues. *See* Plaintiffs' Appx. to Motion for Summary Judgment Tab 14, Roe Depo. 172:7 – 173:9 (describing mandatory jurisdiction for evictions and some misdemeanors, and exclusive jurisdiction for suits under $100). And for Montgomery County Justice Court in particular, litigants are not even faced with multiple precinct locations (referred to as "places") to choose from. Judge Mack's courtroom is designated as Precinct 1-1, but as Attorney Roe put it, "there is no 1-2." Plaintiffs' Appx. to Motion for Summary Judgment Tab 14, Roe Depo. 173:21. Financially, as Judge Mack himself recognizes, "Justice courts are the highest-volume courts in Texas. 90 percent of Texans that interact with the judicial branch of government happen in a justice or municipal court." Plaintiffs' Appx. to Motion for Summary Judgment Tab 2, Mack Depo. 12:5–8. For the majority of individuals appearing in a Texas justice court, an appeal is cost-prohibitive. Drawing the ire of the judge, or even his unconscious disfavor, by not participating in the court's opening ceremonies is therefore a decision too costly to contemplate.

Fourth, because a justice of the peace's reasoning is not recorded when entering his judgment, there are fewer barriers built into the system to protect litigants from the personal biases a justice of the peace may possess. As Attorney Roe put it, "one thing about JP courts is, it's pure *de novo* [review], and there is no record. The judge can rule any way they'd like, and no one will ever know what they ruled except for what's on the judgment. Plaintiffs' Appx. to Motion for Summary Judgment Tab 14, Roe Depo. 144:13–17.

Fifth, Judge Mack's actions make it abundantly clear that he personally stands behind the prayer. Indeed, under his standard operating procedure, before he personally introduces the day's chaplain, Judge Mack addresses the courtroom to express his personal reasons for developing the courtroom-prayer practice. *See* PSUF ¶ 39. His mannerisms during the ceremony make it "clear" that the judge is "very proud of his courtroom-prayer practice." PSUF ¶ 107.

Sixth, Judge Mack's entire courtroom opening routine—from the bailiff's opening announcement through the calling of the first case—is set up in such a way that it would be nearly impossible for someone to inconspicuously remove themselves from the courtroom in order to avoid participating in the prayer. First, prior to the court's opening ceremony, attorneys and litigants must enter the courtroom to enter their appearances with the court clerk. PSUF ¶ 32. Then, at the start of the opening ceremony, prior to the prayer, the bailiff reads a statement that includes important information on courtroom rules and then a statement regarding the upcoming prayer. PSUF ¶ 33. After the bailiff informs the courtroom of the upcoming prayer, there is a pause of unpredictable length, as brief as 30 seconds, prior to Judge Mack entering the courtroom PSUF ¶ 37. There is no break between Judge Mack's initial greeting to those in the courtroom and the chaplain's prayer, nor a break after the prayer prior to the recitation of the Pledge of Allegiance, Texas Pledge of Allegiance, and an additional statement from the bailiff regarding rules of the court. PSUF ¶ 49. Moreover, when the bailiff comes to the front of the courtroom to make his initial announcement, he has already closed the courtroom door, which remains magnetically locked throughout the opening ceremony. PSUF ¶ 53. Entering the courtroom mid-ceremony, in order to hear the court rules or participate in the pledges of allegiance, is not possible without knocking on the courtroom door, which would draw the

attention of everyone inside. PSUF ¶ 57. At the conclusion of the ceremony, the first case is immediately called, PSUF ¶ 51, and any litigant or attorney entering the courtroom after this point is considered to be late by Judge Mack. PSUF ¶ 52 ("[W]hen we start a docket, everybody that's there is going to be there unless somebody's running late.").

Finally, the setting makes it clear that the primary audience for the prayers delivered in Judge Mack's courtroom are the audience members—the attorneys, litigants, and other citizens present in the courtroom—rather than Judge Mack himself. The chaplains who lead the prayers face the audience—those positioned at the courtroom benches, directly behind the litigation tables—rather than facing the judge. *See* PSUF ¶ 42. During the prayers Judge Mack claims that he physically turns his back to the chaplains, which, if true, would reinforce to the audience that the prayers are for them, not the judge. Mack Depo. 186:6 – 187:1. Indeed, even Judge Mack admits that the prayers are designed to "set[ ] a tone . . . [f]or everybody that's in the courtroom." PSUF ¶ 46. It is no surprise, therefore, that attorneys and litigants have felt compelled to participate, and have even concluded that their participation in the prayers is necessary in order to avoid drawing Judge Mack's disfavor. *See, e.g.,* Plaintiffs' Appx. to Motion for Summary Judgment Tab 14, Roe Depo. 165:21–166:22.

This contrasts significantly to the legislative context, where the intended audience for the prayers is the legislators themselves, rather than members of the public, who attend largely as observers only. *See, e.g.*, *Town of Greece*, 572 U.S. at 587 ("The principal audience for these invocations is not, indeed, the public but lawmakers themselves . . . ."); *id.* at 587–88 ("The District Court in *Marsh* described the prayer exercise as 'an internal act' directed at the Nebraska Legislature's 'own members') (citing *Chambers v. Marsh*, 504 F. Supp. 585, 588 (D. Neb.

1980)); *McCarty*, 851 F.3d at 526-27 (noting that the "principal audience" for the school-board prayers was the board members themselves, rather than the proceedings' attendees).

In sum, the inherent nature of a courtroom, as well as various considerations peculiar to Judge Mack's courtroom and the delivery of his prayers, compel the conclusion that Judge Mack's prayers amount to "(1) the government direct[ing] (2) a formal religious exercise (3) in such a way as to oblige the participation of objectors" (*McCarty*, 851 F.3d at 525 n.12) and thus run afoul of the coercion test.

III. Judge Mack's Courtroom-Prayer Practice Was and Is Undertaken with a Primarily Religious Purpose.

Because this Court can confidently conclude that courtroom prayer is inherently coercive and that Judge Mack's courtroom-prayer practice in fact coerces audience members to participate in a religious exercise, it need not evaluate whether the practice has a religious purpose. Nevertheless, if the Court chooses to undertake a purpose analysis, controlling precedent and record evidence indicates that government prayer is presumptively done for a religious purpose and that Judge Mack in fact created his courtroom-prayer practice for the impermissible purpose of advancing religion in general, and Christianity in particular, in his courtroom.

As the Fifth Circuit has recognized, for a government practice to be constitutional, it must have a secular purpose. *See McCarty*, 851 F.3d at 525 n.10. "[T]he secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective." *McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 865 (2005) (citing *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 308; *Edwards v. Aguilard*, 482 U.S. at 586–87, 590, 594; *Stone v. Graham*, 449 U.S. at 41). Furthermore, the purpose behind a practice is reviewed from the perspective of a reasonable observer. *McCreary*, 545 U.S. at 866

Prayer is an inherently and quintessentially religious act, so when the government establishes a prayer practice, the purpose of that action is presumptively religious. "[A]n act so intrinsically religious as prayer cannot meet, or at least would have difficulty meeting, the secular purpose prong of the *Lemon* test." *North Carolina Civil Liberties Union Legal Found. v. Constangy*, 947 F.2d 1145, 1150 (4th Cir. 1991) (citing *Wallace v. Jaffree*, 472 U.S. 38 (1985) and *Stone v. Graham*, 449 U.S. 39 (1980)). Thus, in *Constangy,* the only Court of Appeals decision to consider a challenge to a courtroom-prayer practice, the Fourth Circuit upheld the district court's conclusion that a judge's prayer practice reflected a primarily religious purpose. 947 F.2d at 1150. The Fourth Circuit rejected the judge's contrary contention that the primary purpose of the prayer "was to solemnify and dignify the atmosphere in court and to remind those in attendance of the court's search for truth and justice," because the evidence showed that "Judge Constangy recited the prayer only in the morning sessions," and "there was no evidence that the morning sessions were different from the afternoon sessions with regard to the atmosphere or level of noise in the courtroom. Nor was the atmosphere in Judge Constangy's courtroom different from that of other courtrooms." *Id.* Here, too, Judge Mack generally "does not use the opening ceremonies and thus does not include a prayer at DPS administrative hearings, adult show-cause hearings, and hearings or trials that begin in the afternoon." PSUF ¶ 115. There's no reason to think there is any greater need to solemnify and dignify the sessions before which the prayers are presented than the sessions before which a prayer is not presented, making it clear that the purpose behind the prayers is not to solemnify or dignify, but to advance religion.

The history of Judge Mack's courtroom-prayer practice further compels the conclusion that the practice is undertaken with a religious purpose. In determining the purpose of a

government practice, "the history of the government's actions" is probative. *McCreary*, 545 U.S. at 866 ("[R]easonable observers have reasonable memories, and our precedents sensibly forbid an observer to turn a blind eye to the context in which [the] policy arose." (quotation omitted)); *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 308 (holding that an objective observer is familiar with the history and "implementation of" government action). In this case, not only is the act of prayer itself presumptively religious, but Judge Mack's courtroom-prayer practice in particular undeniably has a "sectarian heritage." In campaigning to become a judge, Wayne Mack emphasized his identity as a Christian and promised to bring religion back into government, a component of which would occur by his bringing prayer into the courtroom. "Faith" was a cornerstone of Judge Mack's original campaign, in which he emphasized that he "Believes in true Servant Leadership of Faith, Family and Freedom." PSUF ¶ 77. He also highlighted that he was a "Sunday School teacher and Lay Youth Minister for 15 years" and that he had attended "Jackson College of Ministries – majored in Theology." *Id.* On December 23, 2013, his campaign sent a message to supporters quoting Isaiah 9:6 and reading in part "Merry CHRISTmas," PSUF ¶ 78 (capitalization in original), which is a nod to the rallying cry to "keep Christ in Christmas." The courtroom prayer was one component of fulfilling this campaign promise. As Judge Mack explained to the State Commission on Judicial Conduct regarding the use of his judicial title to promote his First Annual Prayer Breakfast event and his courtroom-prayer practice, "This is totally a campaign related issue, a campaign promise made and fulfilled, to open my court with prayer…." PSUF ¶ 76.

The history of Judge Mack's implementation of his courtroom-prayer practice further establishes that his original conception for holding courtroom prayers was decidedly biased toward not only religion in general, but Christianity in particular. The list of people eligible to

deliver prayers in Judge Mack's courtroom is drawn from the list of chaplains participating in Judge Mack's Justice Court Chaplaincy Program ("Chaplaincy Program"). PSUF ¶ 24. The Chaplaincy Program, in turn, was originally promoted only to Christian religious leaders and initially had only Christian participants.

Shortly after taking office, on June 19, 2014, Judge Mack mailed over 100 letters appearing on official Justice of the Peace Precinct 1 letterhead to chaplains, inviting them to meet in July 2014 to discuss participating in the Chaplaincy Program. *See* PSUF ¶ 7. Those two July 2014 meetings constituted the first formal invitations to join the Chaplaincy Program. PSUF ¶ 8. The religious leaders invited to those July 2014 meetings were all Christian. PSUF ¶ 10. Subsequently, Judge Mack invited religious leaders to an initial training session for the Chaplaincy Program, which took place on September 15 and 18, 2014. Again, only Christian religious leaders were included on the invitation list. *See* PSUF ¶ 14. The two September 2014 training meetings for the Chaplaincy Program opened and closed with prayer, *see* PSUF ¶ 16, included a discussion of scripture, *see id.*, and included Judge Mack discussing a personal philosophy of his, "plant seeds and pull weeds," which he describes as "a word picture I give people when I speak about faith." *Id*.

At these trainings, Judge Mack also gave attendees a physical copy of his Chaplaincy Program handbook, the contents of which he then presented at the trainings via Powerpoint. PSUF ¶ 17. An initial draft of this handbook and Powerpoint presentation featured a large Christian cross, as reflected in Plaintiffs' Appendix. *See* PSUF ¶ 18. At least two drafts of the handbook from 2015 and September 2015 also featured the Christian cross badge. *See* PSUF ¶ 22–23.[1] A revised version of that handbook that Judge Mack presented to the State

[1] Judge Mack continued to use the Christian cross badge in communications to the public after the 2014 Chaplaincy trainings. *See* PSUF 19.

Commission on Judicial Conduct in April 2015, omitted that cross but continued to reflect other Christian messages found in the 2014 draft handbook and Powerpoint, such as the description of the Chaplaincy Program as a "ministry," the statement that the "role of the JCC Chaplain is to be a representative of God bearing witness to His hope, forgiving and redeeming power," and the requirement that Chaplains and Assistant Chaplains "Maintain Biblical, ethical and moral standards." PSUF ¶ 21.

The initial outreach for the Chaplaincy Program, the Chaplaincy Program training materials, and Judge Mack's communications to the public about the Chaplaincy Program all suggest that the Chaplaincy Program from which courtroom-prayer-givers are drawn was for Christian chaplains only. The result was that for some time after Judge Mack implemented his Chaplaincy Program, all of the courtroom-prayer-givers were Christian religious leaders only. Thus, an advertisement for Judge Mack's October 23, 2014, prayer breakfast includes a list of the Chaplaincy Program's 50 members, all of whom were Christian religious leaders. *See* PSUF ¶ 26. Another early list of 58 participating chaplains, made for the purpose of creating badges for the participants to wear, again included only Christian religious leaders. *See* PSUF ¶ 28.[2] Thus, the evidence shows that the early list from which courtroom-prayer-givers was drawn consisted exclusively of Christian clergy.

In sum, the presumptively religious nature of prayers, together with the record evidence regarding the nature and history of Judge Mack's prayer practice, demonstrate that practice was, and is, undertaken with a religious purpose rather than a secular one.

[2] To be sure, the Chaplaincy Program did eventually expand to include a small number of representatives of a few other religions, but that was not due to a concerted effort on the part of Judge Mack or his staff to diversify the pool. Rather, as Judge Mack explained, "[a]fter 2014, the program grew and sustained itself naturally without any further work to spread the word." PSUF ¶ 29.

IV. Judge Mack's Courtroom-Prayer Practice Has a Primarily Religious Effect and Endorses Religion.

Because this Court can confidently conclude that courtroom prayer in general, and Judge Mack's practice in particular, runs afoul of the coercion test, and that Judge Mack created his courtroom-prayer practice for an impermissible religious purpose, it need not evaluate whether the practice also has the effect of advancing religion or impermissibly endorses religion. *See, e.g.*, *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 343 (5th Cir. 1999) (noting that the *Lemon* test is "disjunctive" such that a practice must fall if it violates any one prong of the three-part test); *see also Wallace v. Jaffree*, 472 U.S. at 78 (holding that because an Alabama prayer statute had an impermissible religious purpose, "it is therefore unnecessary also to determine the effect of the statute") (O'Connor, J., concurring). Nevertheless, if the Court chooses to undertake this analysis, it is abundantly clear that Judge Mack's practice runs afoul of the Establishment Clause because it has a primarily religious effect and endorses religion.

As the Fifth Circuit has put it, a governmental practice must "have a primary effect that neither advances nor inhibits religion" (*McCarty*, 851 F.3d at 525 n.10); and must not "endorse" religion (*id.* at n. 11). Although the effects and endorsement tests are distinct (*see Clear Creek*, 977 F.2d at 968), they entail overlapping considerations. *See Freiler*, 185 F.3d at 346 ("*Lemon*'s [effects] prong … is similar to analysis pursuant to the endorsement test"). Under the effects analysis, governmental action has a primary effect of advancing religion when it "in fact conveys a message of endorsement or disapproval" of religion (*id.* at 346), or it increases religious conviction, "which means attracting new believers or increasing the faith of the faithful" (*Clear Creek*, 977 F.2d at 967). Under the endorsement test, the government cannot "appear[ ] to take a position on questions of religious belief, or make[ ] adherence to a religion relevant in any way to a person's standing in the political community" and must not "convey[ ] a message that

religion is favored, preferred, or promoted over other beliefs." *McCarty*, 851 F.3d at 525 n.11 (quoting *Ingebretsen v. Jackson Public Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996)). Whether a governmental practice is deemed to violate this inquiry is evaluated from the perspective of a "reasonable observer" who is deemed aware of the practice's "contextual history." *Croft v. Perry*, 624 F.3d 157, 168 (5th Cir. 2010).

Here, with the delivery of every prayer, Judge Mack "conveys a message of endorsement" of religion (*Freiler*, 185 F.3d at 346), presents a message that "increase[es] the faith of the faithful" (*Clear Creek*, 977 F.2d at 967), "appears to take a position on questions of religious belief, [and] makes adherence to a religion relevant in any way to a person's standing in the political community," and "conveys a message that religion is favored, preferred, or promoted over other beliefs" (*McCarty*, 851 F.3d at 525 n.11). Thus, in the only appellate decision to consider the question, the Fourth Circuit had little trouble concluding that a judge's practice of opening court sessions with prayer has the primarily religious effect of endorsing religion, because "[w]hen a judge sits on the bench, says 'Let us pause for a moment of prayer,' and proceeds to recite a prayer in court, clearly the court is conveying a message of endorsement of religion." *Constangy*, 947 F.2d at 1151.

There is no reason to think the Fifth Circuit would reach a conclusion different than the one the Fourth Circuit reached in *Constangy*. Indeed, although the Fifth Circuit has not directly considered the question at issue here, it has deemed it "inappropriate" for judges to make religious comments in their courtrooms. *See, e.g.*, *Bunton v. Quarterman*, 524 F.3d 664, 673 (5th Cir. 2008) (holding judge's statement that he was "doing God's work" was "certainly inappropriate and indeed atypical for a trial proceeding" although it did not meet the high bar of "presumptive bias" needed to overturn sentencing in the habeas petition context); *see also United*

States v. Bakker, 925 F.2d 728, 741 (4th Cir. 1991) (holding that courts must not "create the perception of the bench as a pulpit from which judges announce their personal sense of religiosity"). A judge must not infuse "the court's own sense of religious propriety" into its proceedings. *Bakker*, 925 F.2d at 741. Yet that is plainly what Judge Mack has done.

The "history, purpose, [and] context" of Judge Mack's prayers lend further support to the conclusion that his practice advances and endorses religion. *Murray v. City of Austin*, 947 F.3d 147, 156 (5th Cir. 1991). Context matters, because it helps a court determine whether the government's practice in fact "convey[s] a message of endorsement or disapproval to an informed, reasonable observer." *Glassroth v. Moore*, 335 F.3d 1282, 1297 (11th Cir. 2003); *see also Croft*, 624 F.3d at 168. Thus, in declaring a Ten Commandments monument unconstitutional in *Glassroth*, the Eleventh Circuit considered "the fact that the Chief Justice campaigned as the 'Ten Commandments Judge'; his statements at the monument's unveiling; and the fact that the rotunda is not a public forum for speech." *Id.* at 1297.

Here, the religious effect and endorsement conveyed through Judge Mack's courtroom-prayer practice is compounded by the context in which his prayers are delivered. As Attorney Roe explained, Judge Mack has designed his practice in such a way that "the courtroom prayer is the overarching theme of [his] court." Plaintiffs' Appx. to Motion for Summary Judgment Tab 14, Roe Depo. 141:21–22. "[F]rom the moment you walk in the door, everything about [Judge Mack's] courtroom, and this procedure, is focused on the courtroom prayer." *Id.*, Roe Depo. 136:21–23. The signs outside the courtroom, the bailiff's opening statement, Judge Mack's statements to the courtroom upon entering, and the prayer that follows all serve to emphasize the importance of the prayer practice to Judge Mack. *See, e.g.*, PSUF ¶ 107 ("Based on the

introductory remarks made by Judge Mack at each court session, it was clear to me that he was very proud of his courtroom-prayer practice . . . .").

The message is equally perceived by litigants who *approve* of the courtroom-prayer practice, many of whom take it as an opportunity to bond with Judge Mack and seek his favor. As Attorney Roe has observed:

> [S]o often, I'll see it where a litigant, *pro se* or otherwise, will specifically approach Judge Mack -- I've seen this, I think, twice -- will specifically approach him, before or after the prayer, or [ ] in their opening statement, about how much they appreciate how he does the prayer, and how important religion is to them, and specifically, what religion they follow is to them. . . . [Y]ou can see these people are so desperate for a win, that they go, "ah, religion, that's something that I have in common with the person that's going to decide what will happen to me." And to hear them so blatantly use that, that's something that should be very important and special and personal, as just a way to try to check off a box, to make the decider decide for them. It makes me sad. And so, you know, it's exclusionary. And it's also [ ] just sad to see that happen in court, a place that should be about the facts. But it's not about facts anymore. It's about what team you're on.

Plaintiffs' Appx. to Motion for Summary Judgment Tab 14, Roe Depo. 35:16 – 36:17. Judge Mack takes note of these positive interactions. *See, e.g.*, Plaintiffs' Appx. to Motion for Summary Judgment Tab 23 at 17 (Judge Mack recalling an occasion where "[a]n attorney approached Judge Mack after court ended and said he had been in courts all over Texas, but had never been in a courtroom with such a spirit of reconciliation, referring in part to the courtroom opening routine.").

Judge Mack's other courtroom actions provide further contextual evidence that his courtroom prayers would be perceived as having a religious effect. He testified that when he talks to children in his court it is "one of [his] go-to things" to emphasize that he personally reads the Bible (without mentioning it by name) and that he brings up lessons from it: "I will say that there is a book that I read often, and one of the -- one of the commandments in that book is to honor your mother and father that your days might be long and it's the first commandment in

that book that has a promise, but I don't say 'The Bible says' . . . ." PSUF ¶ 94. In his book, *The Directed Path: Using God's Compass*, Judge Mack recounts one specific occasion when he discussed Proverbs 23:7 with a juvenile defendant: "As a man thinketh, so is he." PSUF ¶ 95. Judge Mack further admits that he has also discussed the Bible with adults, on both his criminal and civil dockets. *See* PSUF ¶ 96.

Judge Mack has also used other biblical allusions and religious references in court, including discussing the parable of the mustard seed, *see* PSUF ¶ 97, which, is a well-known allegory for growing the "Kingdom of God," *see* Matthew 13:31–32; Mark 4:30–32; Luke 13:18–19, and telling juveniles "You become who you fellowship." PSUF ¶ 97. And on multiple occasions Judge Mack has ordered juveniles to attend church services. *See* PSUF ¶ 98.

Further support for the conclusion that Judge Mack's courtroom-prayer practice advances and endorses religion is found in the history of the practice, of which a reasonable observer is deemed aware. As mentioned previously, he campaigned on a promise to bring religion back into government, with his courtroom prayers being one component of fulfilling that promise. *See supra*. His other off-the-bench actions point in the same direction. The largest fundraising event that Judge Mack holds for his reelection campaign is an annual prayer breakfast. He described his First Annual Prayer Breakfasts as an event to "honor God and the members of our new Chaplaincy Program and hear about the exciting things that are happening at your Justice Court No.1." PSUF ¶ 81. In that same advertisement, he included a list of 50 chaplains participating in the Chaplaincy Program, 48 of whom had the title of reverend and all 50 of whom were associated with a Christian church. *Id.* The badge for the Chaplaincy Program, which was included in that advertisement, featured a large Christian cross. *Id.* Furthermore, as a Justice of the Peace, Judge Mack regularly delivers prayers at public events, *see,* PSUF ¶ 79, and agrees to

be a featured guest at church services, where he often delivers prayers, sermons, or other remarks. *See* PSUF ¶ 80.

In addition, during his tenure as a Justice of the Peace, Judge Mack authored a book: *The Directed Path: Using God's Compass*. The book is part autobiography, part self-help book and, as the title suggests, it centers around Judge Mack's personal religious beliefs. As Judge Mack describes it in his promotional materials, the book is "a continuation of his commitment to strengthening individuals, families, and the community by helping them turn to the only true source of peace and happiness in life." PSUF ¶ 86. "Wayne's message is that by ***Using God's Compass*** (the scriptures) God is able to speak to us and will always direct us in the right way. *Id.* (emphasis in original). Judge Mack wrote twelve chapters in the book, each of which begins with a bible verse. PSUF ¶ 87. In one chapter, entitled "N.O.W. Faith," he describes his personal philosophy of leading a faithful life with "No Opportunity Wasted." *See* PSUF ¶ 88. The chapter begins by quoting Acts 13:47, which Judge Mack says exemplifies his N.O.W. Faith philosophy: "For so hath the Lord commanded us, saying, I have set thee to be a light of the Gentiles, that thou shouldest be for salvation unto the ends of the earth. –Acts 13:47." PSUF ¶ 89. The quote is commonly understood as a call to proselytize, by bringing the "light" (knowledge of God) to the "gentiles" (a common biblical term for a "non-Jew," *id.*, or nonbeliever) so that they may be saved. Early in the chapter itself, to help explain the meaning of his N.O.W. Faith philosophy, Judge Mack quotes evangelist Franklin Graham as saying, "You can take a stand for God, and God will bless that. God will use that." PSUF ¶ 91. He later explains that sometimes "God may want us to testify boldly that He exists and loves all of us." PSUF ¶ 92. Ultimately, he explains the concept more plainly: "Those of us who have been

blessed with the knowledge of Jesus Christ are here to spread His gospel," PSUF ¶ 93, which Judge Mack admits is what he strives to do as a Christian. PSUF ¶ 75.

Plaintiffs do not take issue with Judge Mack's personal religious convictions or with his right to express his religious views in his non-judicial capacity. But a reasonable observer cannot be expected to draw a clear distinction between Judge Mack acting in his private capacity to spread the gospel of Jesus Christ and Judge Mack acting in his official judicial capacity when Judge Mack engages in religious behavior in both capacities.[3] For this reason, Judge Mack's courtroom-prayer practice cannot be divorced from all of these other religious actions, which define his character as a judge and inform how an objective observer would view the courtroom-prayer practice.

In sum, the nature, history, purpose, and context of Judge Mack's prayer practice leaves no doubt that the practice has a primarily religious effect under the second *Lemon* prong and endorses religion in violation of the endorsement test.

V. Judge Mack's Courtroom-Prayer Practice Cannot Be Justified by Resort to History.

[3] Indeed, Judge Mack's statements affirmatively blur that line. In the chapter of his book entitled "Courage to Stand in the Light," where "the light" is an allusion to direct communication with God, Judge Mack describes his view of how people end up in the criminal justice system as follows:

> I see the terrible decisions people make and I wonder, "What were you thinking?" I question how someone can do such things. Many times, these are people who have allowed the creatures of the night to stalk their souls. They have lost the ability to live in the clarity and strength of the light. *Their souls have experienced an eclipse and the result has landed them in the criminal justice system*.

Plaintiffs' Appx. to Motion for Summary Judgment Tab 12, Mack Depo. Ex. 15 at 80–81 (emphasis added). Judge Mack explains his solution for those who have landed in the criminal justice system at the end of the chapter:

> How do you get the light? Go back to the compass; believe on Christ as the scriptures have said. Jesus said, "I am the light of the world." I wish I could sing the words of this hymnal to every person within my reach, which says, "Turn your eyes upon Jesus, look into his wonderful face and the things of this world will grow strangely dim in the light of his glory and grace."

Id. at 83. Judge Mack has a similar solution for the juvenile defendants who appear before him: "If more parents would just try to raise their children according to God's Word, I know we would see a dramatic drop in troubled youth." Plaintiffs' Appx. to Motion for Summary Judgment Tab 13, Mack Depo. Ex. 16 at 95.

Almost all government actions challenged under the Establishment Clause is analyzed under the tests addressed in the sections above. The legislative-prayer tradition, however, has been deemed to call for an exception to that approach because that practice "is deeply embedded in the history and tradition of this country." *McCarty*, 851 F.3d at 525 (quoting *Marsh*, 463 U.S. at 786). Thus, in *Marsh*, the Supreme Court upheld the practice of state legislatures opening with prayer (*see* 463 U.S. at 786); and in *Town of Greece*, the Court did so with respect to local legislative prayer (*see* 572 U.S. at 576). The *Marsh* Court described this result as stemming from a "unique history," 463 U.S. at 791, in which the First Congress, in the same week "voted to appoint and to pay a Chaplain for each House and also voted to approve the draft of the First Amendment for submission to the States." *Id.* at 790. In *Town of Greece*, the Supreme Court clarified that *Marsh* stands for the proposition that "it is not necessary to define the precise boundary of the Establishment Clause where history shows that the *specific practice* is permitted." 572 U.S. at 577.

Thus, a government practice is not afforded deference under an "historical precedent" test when that practice is merely *analogous* to legislative prayer. Such an expansion of *Marsh* would fly in the face of the Court's cautionary language in that decision: "Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees, but there is far more here than simply historical patterns." *Marsh*, 463 U.S. at 789. For this reason, the argument to expand *Marsh*'s reasoning to courtroom prayer was thoroughly considered and rejected by the only federal Court of Appeals to review a courtroom-prayer practice. *See Constangy*, 947 F.2d at 1147-49 (rejecting the argument "that prayer by a judge is analogous to legislative prayer" and instead applying traditional Establishment Clause tests).

As the *Constangy* Court explained, "[u]nlike legislative prayer, there is no similar long-standing tradition of opening courts with prayer. Nor is there any evidence regarding the intent of the Framers of the Bill of Rights with regard to the opening of court with prayer." *Id.* at 1148. Judge Mack has not designated an expert witness to provide testimony to the contrary, even if such evidence were to exist. Accordingly, the practice challenged in this case can find no refuge in the test attributable to the unique context of legislative prayer.

CONCLUSION

Because Judge Mack's courtroom-prayer practice violates the Establishment Clause of the First Amendment, this Court should grant Plaintiffs' Motion for Summary Judgment and enter declaratory relief that Judge Mack's courtroom-prayer practice, in which he has individuals deliver prayers during court sessions, violates the Establishment Clause of the First Amendment to the United States Constitution.