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

FREEDOM FROM RELIGION FOUNDATION, INC., JANE DOE, JOHN ROE, and JANE NOE Plaintiffs,	§	
v.	§	**CASE NO. 4:17-cv-881**
JUDGE WAYNE MACK and MONTGOMERY COUNTY, TEXAS Defendants.	§	

RESPONSE IN OPPOSITION TO DEFENDANT WAYNE MACK'S MOTION TO DISMISS AND MOTION TO STRIKE

Plaintiffs submit the accompanying brief in opposition to Defendant Wayne Mack's Motion to Dismiss (Dkt. 24). Plaintiffs' brief clarifies why this Court has subject matter jurisdiction by outlining the past harm, ongoing harm, and imminent future harm being suffered by the Plaintiffs. Plaintiffs then establish why Defendants' clergy-led courtroom prayer practice does not benefit from the same type of "unambiguous and unbroken history of more than 200 years" that the Supreme Court used to justify legislative prayer. Finally, the brief distinguishes Judge Mack's role in developing and implementing the courtroom prayer practice at issue here from the type of acts deserving of judicial immunity. Ultimately, Plaintiffs ask this Court to deny Defendant Wayne Mack's Motion to Dismiss and allow this case to proceed to discovery.

Plaintiffs also move to strike from Defendant Mack's Motion to Dismiss the final line on page i, reading, "In addition, Judge Mack incorporates by reference the arguments in support of dismissal presented in the brief of the Texas Commission on Law Enforcement as intervenor (Dkt. 23-2)." The rules of this Court limit filings to 25 pages without leave of court. Allowing a party to incorporate additional arguments by reference without obtaining prior leave of court

"eviscerates the court's page limit restriction." *Saffran v. Boston Sci. Corp.*, 2008 U.S. Dist. LEXIS 52557, 2008 WL 2716318, n. 5 (E.D. Tex. July 9, 2008). In this case, allowing Defendant Mack to incorporate the Texas Commission on Law Enforcement's (TCOLE's) Proposed Motion to Dismiss would achieve a particularly absurd result, thereby prejudicing the Plaintiffs.

The initial document Defendant Mack seeks to incorporate, TCOLE's Proposed Motion to Dismiss (Dkt. 23-2), in turn "relies on" three documents, including TCOLE's Memorandum in Support of TCOLE's Motion to Dismiss (Dkt. 23-3), which itself contains 17 pages of argument. But the chain of incorporation does not end there. Dkt. 23-3 in turn incorporates by reference the 23-pages of argument in Defendant's initial motion to dismiss, irrespective of the fact that those arguments were mooted by the filing of Plaintiffs' First Amended Complaint (Dkt. 22). *See* TCOLE's Proposed Motion to Dismiss at 1 n. 2 ("Irrespective of whether Judge Mack's initial motion to dismiss is mooted, TCOLE still adopts and incorporates by reference the arguments made in that initial motion. Moreover, TCOLE adopts and incorporates by reference any and all arguments made by Judge Mack in a second or subsequent motion to dismiss."). Furthermore, because Judge Mack's initial motion to dismiss then "incorporates by reference the arguments in support of dismissal presented in the brief of the Texas Commission on Law Enforcement as intervenor," (*see* Dkt. No. 14 at *i*)—which is a reference to the 14 pages of argument in Docket number 15.5, filed by TCOLE—Defendant has effectively filed a brief containing or incorporating at least 79 pages of argument.

By "incorporating arguments by reference without specifically identifying them," a party "leaves the court [and opposing counsel] to speculate which specific arguments [the party] intended to incorporate into the Motion." *Saffran*, 2008 WL 2716318, n. 5. That speculation is

particularly debilitating for opposing counsel in this case, where Defendant Mack's current motion to dismiss incorporates by reference his original motion to dismiss, a document that contains some duplicative arguments, some similar-but-reworded arguments, and some unique arguments that were not directly included in the subsequent version of the motion. Plaintiffs are left to speculate, for instance, whether Defendant Mack intended to incorporate by reference his original argument that "there is no live case or controversy concerning Judge Mack's previous practices" (see Dkt. 14 at 12, n.5) despite the similarly worded footnote in his current filing that omits that argument. (*See* Dkt. 24 at 11, n.7).

For the reasons stated above, Plaintiffs urge this Court to strike Defendant Mack's incorporation by reference of "the arguments in support of dismissal presented in the brief of the Texas Commission on Law Enforcement as intervenor (Dkt. 23-2)." In addition, for the reasons stated in the below Response, Plaintiffs request that this Court deny Defendant Mack's Motion to Dismiss in its entirety. Plaintiffs do not believe that oral argument on this motion is necessary.

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INTRODUCTION

Judge Mack and Montgomery County have instituted a novel courtroom prayer practice within the County's Justice of the Peace Precinct 1 in violation of the First Amendment of the U.S. Constitution, which counsels that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Plaintiffs, who have established past exposure, ongoing harm, and likely future exposure to this practice, seek relief from this Court for deprivation of their constitutional rights.

Defendant Wayne Mack now urges the Court to turn a blind eye to the inherently coercive authority of a judge within the unique context of his courtroom and rule that Plaintiffs have failed even to state a claim on which relief could be granted. In support of his motion, Defendant Mack asks the Court to look beyond the four corners of Plaintiffs' pleadings and conflate his clergy-led courtroom prayer practice with the ceremonial deistic opening call of the United States Supreme Court. He urges the Court to consider a few scattered examples of courtroom prayer that fall far short of the "unambiguous and unbroken history of more than 200 years" that justified legislative prayer in *Marsh v. Chambers*, 463 U.S. 783 (1983), and rule that as a matter of law, courtroom prayer "fits within" that legislative prayer exception, despite the express, contrary language in *Town of Greece v. Galloway*, 134 S.Ct. 1811 (2014). Failing that, Defendant incorrectly asserts that developing and implementing a courtroom prayer practice are judicial acts for which he is immune from suit. None of these arguments are persuasive and Defendant Wayne Mack's Motion to Dismiss should therefore be denied in its entirety.

STANDARD OF REVIEW

In his Motion to Dismiss and Brief in Support ("MTD") (Dkt. 24), Defendant Wayne Mack ("Defendant") presents arguments under FED. R. CIV. P. 12(b)(1) and 12(b)(6). The same standard of review applies to all of Defendant's arguments: the Court must accept all well-pleaded facts as true and view those facts in the light most favorable to Plaintiffs. *Stokes v. Gann*, 498 F.3d 483, 484 (5th Cir. 2007). The Court must also draw all reasonable inferences from well-pleaded facts in favor of Plaintiffs. *Club Retro, LLC v. Hilton*, 568 F.3d 181, 194 (5th Cir. 2009); *Woodard v. Andrus*, 419 F.3d 348, 351 (5th Cir. 2005) ("[T]he complaint must be liberally construed, with all reasonable inferences drawn in the light most favorable to the plaintiff.").

In a motion under FED. R. CIV. P. 12(b)(6), "the court may not look beyond the four corners of the plaintiff's pleadings." *Paton v. United Parcel Service, Inc.*, 910 F. Supp. 1250 (S.D. Tex. 1995) (citing *McCartney v. First City Bank*, 970 F.2d 45, 47 (5th Cir. 1992)). In this case, Defendant has presented matters outside the pleadings.[1] None of Defendant's newly presented matters are proper for consideration at the motion to dismiss stage. If the Court does not exclude the matters introduced by Defendant, then Defendant's motion "must be treated as one for summary judgment under Rule 56" and all parties must be given a reasonable opportunity to present additional material pertinent to those matters. FED. R. CIV. P. 12(d).

ARGUMENT

The plain statements of Plaintiffs' First Amended Complaint ("FAC") (Dkt. 22) establish that they are challenging the constitutionality of Defendants' courtroom prayer practice under the Establishment Clause of the First Amendment. FAC ¶ 1 ("Plaintiffs seek a declaration under 28

[1] Specifically, Defendant Mack asserts a number of claims about other court practices that he perceives as "prayers" analogous to his chaplain-led prayer practice. Defendant claims that the U.S Supreme Court "opens each session with a prayer," that the Texas Supreme Court "call[s] on the Divine" at the opening of each session, that some courts have invited chaplains to pray at the

U.S.C. §2201 that the Defendants have violated the Establishment Clause of the First Amendment through their implementation of an exclusively religious courtroom prayer practice."). The FAC is replete with specific allegations pertaining to the courtroom prayer practice. *Id.* ¶¶ 25–37, 42–60. It also describes the harms inflicted by the practice, *e.g.*, *id.* ¶¶ 61–68, including specific harms experienced by each individual plaintiff: "Ms. Doe has tried to avoid appearing in Judge Mack's courtroom," *id.* at ¶ 9, John Roe "regularly represents clients before Judge Mack . . . government-organized prayer violates Mr. Roe's sincerely held beliefs," *id.* at ¶ 10, and "Ms. Noe felt coerced to remain in the courtroom during the opening prayer, lest her absence from the courtroom bias the judge against her. . . . being subjected to religious prayer by a government official violates her sincerely held beliefs." *Id.* at ¶ 11.

Defendant Mack ignores the narrow constitutional challenge brought by Plaintiffs and proclaims that the FAC's allegations invite this Court to issue a sweeping declaration against a series of unrelated scenarios involving the Supreme Court, the Texas Supreme Court, and the town council prayer practice held constitutional in a 2014 Supreme Court decision. MTD at 2 (asserting without citation that "Plaintiffs . . . ask this Court to declare these traditions unconstitutional."). The Defendant's motion, in short, tilts at windmills.

I. Plaintiffs have standing to challenge the prayer practice.

To establish Article III standing, a plaintiff must demonstrate that she "(1) has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc*, 528 U.S. 167, 180-81 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). "By

insisting that a plaintiff have a personal stake—an individuated interest rather than an interest in good government shared by all citizens—Article III avoids enlisting federal courts in policy exercises about how the government operates." *Doe v. Beaumont Indep. Sch. Dist.*, 240 F.3d 462 (5th Cir. 2001) (discussing the lack of standing issue in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982)).

Defendant challenges the individual plaintiffs' standing on two grounds: that they have not established an injury in fact that is "concrete and particularized" and that they have not established the likelihood of future harm, such that prospective relief would be improper. He additionally challenges FFRF's associational standing. Each argument is addressed in turn.[2]

A. The individual plaintiffs have established an injury in fact that is concrete and particularized.

Defendant relies on *Valley Forge* to argue that Plaintiffs have not established an injury in fact that is concrete and particularized. 454 U.S. 464 (1982) (ruling on a challenge to a government land transfer to a religious institution). This reliance is misplaced. Although the *Valley Forge* plaintiffs were dedicated to the separation of church and state, they did not reside in the state where the challenged conveyance was made (Pennsylvania) and only learned about the conveyance through a news release. *Id.* at 487. In interpreting and applying the holding in *Valley Forge*, circuit courts, including the Fifth Circuit, have recognized that the Court's holding relied principally on the distance of the plaintiffs from the community in which the challenged conduct took place. *See, e.g.*, *Beaumont Indep. Sch. Dist.*, 240 F.3d at 466 ("[The *Valley Forge* plaintiffs] had *no* relationship to the government action at issue other than an interest in seeing the law enforced. They had suffered no injury from any unconstitutional acts not suffered by all citizens."); *Vasquez v. Los Angeles ("LA") Cnty.*, 487 F.3d 1246, 1252 (9th Cir. 2007)

[2] Defendant does not challenge Plaintiffs' standing on the grounds that their injuries are not fairly traceable to the challenged courtroom prayer practice. Nor does Defendant argue that the injuries could not be redressed by a favorable decision.

(distinguishing *Valley Forge* because the plaintiffs "were physically removed from the defendant's conduct"); *Suhre v. Haywood Cnty.*, 131 F.3d 1083, 1086 (4th Cir. 1997) (describing the complaint in *Valley Forge* as "a mere abstract objection" and noting that *Valley Forge* recognized standing where there is "direct contact with an unwelcome religious exercise"); *Saladin v. City of Milledgeville*, 812 F.2d 687, 692-93 (11th Cir. 1987) (referencing *ACLU of Georgia v. Rabun Cnty. Chamber of Commerce, Inc.*, 698 F.3d 1098 (11th Cir. 1983), which distinguished the facts in that case from *Valley Forge*).

Valley Forge reaffirmed rather than repudiated the idea that non-economic injury can provide a sufficient injury-in-fact to confer Article III standing. *Rabun*, 698 F.2d at 1105-06. Subsequent to *Valley Forge*, courts have nearly uniformly recognized that an Establishment Clause plaintiff need only demonstrate "direct, unwelcome contact" with a challenged practice in order to have standing. *See, e.g.*, *Vasquez*, 487 F.3d at 1253 (surveying such cases in the 2nd, 5th, 10th, and 11th Circuits); *Suhre*, 131 F.3d at 1086-90 (4th Circuit); *ACLU of Ohio Found., Inc. v. DeWeese*, 633 F.3d 424, 429-30 (6th Cir. 2011). While the foregoing cited cases primarily concern permanent religious displays rather than permanent prayer practices, the Fifth Circuit decision in *Doe v. Tangipahoa Parish Sch. Bd.* extends the same reasoning to a government prayer practice. 494 F.3d 494 (5th Cir. 2007).

In *Tangipahoa Parish Sch. Bd.*, the plaintiff Doe family challenged regular Christian prayer at school board meetings despite "no evidentiary proof that any of the Does ever attended a school board session at which a prayer like those challenged here was recited." *Id.* at 498. In considering whether plaintiffs had standing, the Fifth Circuit stated, "The question is whether there is proof in the record that Doe or his sons were exposed to, and may thus claim to have been injured by, invocations given at any Tangipahoa Parish School Board meeting." *Id.* at 497.

The court concluded that plaintiffs lacked standing because there was no such evidence of direct exposure. *Id.* at 499. Similarly, when the Supreme Court was presented with a case where residents *had* explicitly attended government meetings and thus been directly exposed to the government prayer practice, the Court ruled on the merits of the case, implicitly indicating that plaintiffs had satisfied the requirements of standing. *See Town of Greece v. Galloway*, 134 S.Ct. 1811 (2014), *deciding on merits Galloway v. Town of Greece*, 732 F. Supp. 2d 195, 204, 205 (W.D. N.Y. Aug. 2010) (where multiple plaintiffs "attended numerous Town Board meetings at which prayers have been given"); *cf. Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534 (1986) (noting that "every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review"). The Fifth Circuit has remained consistent on this point, recognizing an individual plaintiff's standing (and the standing of the membership organization representing him) to challenge a school board prayer practice to which he was exposed. *See Am. Humanist Assoc. v. Birdville Indep. Sch. Dist.*, No. 15-11067 at 2 (5th Cir. Mar. 20, 2017) (ruling on the merits after finding that plaintiff "attended BISD board meetings, some of which included student-led prayers").

In the instant case, the individual plaintiffs have each suffered injuries beyond those "suffered by all citizens." They have each demonstrated a personal stake in the outcome of litigation, as they have been directly exposed to the challenged practice and felt coerced to participate. *See* FAC ¶¶ 9–11, 26, 34, 36–37, 57–59. Plaintiffs further establish that the practice to which they were exposed conflicts with their sincerely held beliefs. *See* FAC ¶¶ 9–11. Finally, plaintiff Jane Doe asserts that she has changed her behavior in an attempt to avoid future expose to Judge Mack's courtroom prayer practice, though she has appeared before him since and will

do so again when a case requires it. *Id.* ¶ 9. Each one of these facts is enough to meet Article III's requirements of harm that is concrete and particularized.

B. The individual plaintiffs have established both imminent and likely future harm and actual ongoing harm.

In order to sustain a claim for prospective relief, an injury must not only be concrete and particularized, but the Court must determine that the harm is *either* " 'certainly impending' *or* [that] there is a 'substantial risk' that the harm will occur." *See Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334, 2341 (2014) (quoting *Clapper v. Amnesty Intern USA*, 133 S.Ct. 1138, 1150 n.5 (2013) ("Our cases do not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about.")) (emphasis added). Alternatively, prospective relief is available to a plaintiff who is suffering ongoing injuries. *See, e.g.*, *Friends of the Earth, Inc. v. Laidlaw Environmental Servs. (TOC), Inc.*, 528 U.S. 167, 184–85 (2000) (finding standing to pursue injunctive relief based on statements that plaintiff's members changed their behavior to avoid pollution dumped into a river by defendant). In this case, Plaintiffs have established both types of harm.[3]

Defendant first argues that the future harm that Plaintiffs will suffer if exposed to Judge Mack's courtroom prayer practice is not certainly impending. Defendant urges this court to look past the well-pleaded assertion that there is a substantial risk—indeed, a high probability—that Jane Doe and John Roe will appear before Judge Mack in the future. FAC ¶¶ 9–11. These individual plaintiffs are two attorneys who are actively doing business in Montgomery County and have each appeared before Judge Mack on multiple occasions in that capacity. *Id.* ¶¶ 9, 10.

[3] All three individual plaintiffs have additionally suffered actual harm from their past exposure to Judge Mack's courtroom prayer practice. Judge Mack does not dispute that the individual plaintiffs would be entitled to nominal damages if this court finds that they suffered harm due to the depravation of their constitutional rights. Though the nominal damages claim is levied solely against defendant Montgomery County, that claim alone is sufficient to maintain the standing of any individual plaintiff not otherwise entitled to relief. *See Harris v. City of Houston*, 151 F.3d 186, 191 n.6 (5th Cir. 1998) (noting that a plaintiff whose injunctive claims became moot "could have preserved his suit by requesting even nominal damages as opposed to resting completely on the request for injunctive relief").

Defendant draws a false equivalence between these attorneys, who are required to appear before Judge Mack in their regular course of business, and ordinary citizens, who cannot establish a reasonable expectation that they will wind up in court again. Defendant cites three cases involving courtrooms: *Society of Separationists, Inc. v. Herman*, 959 F.2d 1283 (5th Cir. 1992) (denying prospective relief to a citizen who was summoned for jury duty); *Henok v. Kessler*, 78 F. Supp. 3d 452, 464 (D.D.C. 2015) (denying prospective relief to a plaintiff whose divorce was heard before a judge who was "no longer assigned to [plaintiff's] case"); and *Medina v. Devine*, No. 4:96-cv-02485 (Dkt. 44) (S.D. Tex. Apr. 2, 1997), which Defendant represents is a case where the district court dismissed a claim for prospective relief because a non-attorney plaintiff's case "was 'no longer pending' " before the judge. Defendant also cites *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (denying injunctive relief because the fact that plaintiff "may have been illegally choked by the police on October 6, 1976 . . . does nothing to establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him"). None of this authority undercuts the reasonable inference that two attorneys who regularly work in Montgomery County on matters that fall under Judge Mack's jurisdiction will be exposed to Judge Mack's courtroom prayers.

Plaintiffs can establish standing by demonstrating that "their regular course of business . . . repeatedly subjected them to the allegedly unconstitutional conduct." *Ala. Freethought Ass'n v. Moore*, 893 F.Supp. 1522 (N.D. Ala. 1995) (providing thorough analysis on applicable standing doctrine and finding no standing to challenge a judge's clergy-led courtroom prayer practice for plaintiffs without regular contact with the courtroom). Attorney Roe regularly works within Montgomery County and regularly represents clients before Judge Mack. FAC ¶ 10. On its face, the FAC asserts imminent future harm for attorney Roe. Attorney Doe's place of

business is located in Montgomery County. FAC ¶ 9. And though attorney Doe "now tries to avoid appearing in Judge Mack's courtroom," *id.*, her efforts have not foreclosed all future contact with Judge Mack's courtroom prayer practice. She was first exposed to Judge Mack's courtroom prayer practice in September 2014, *id.* ¶ 31, but despite her efforts to avoid his court, she has appeared before Judge Mack at least three more times, *id.* ¶ 9, most recently in February 2017. *Id.* ¶ 48. Based on her chosen profession and place of business, and because attorney Doe "would appear before [Judge Mack] again if a case required it," *id.* ¶ 9, future exposure to Judge Mack's prayer practice is more than speculative—it's highly probable.

Additionally, the FAC establishes actual, ongoing harm to plaintiff Doe. Attorney Doe has altered her behavior in an effort to minimize the chances of future contact with Judge Mack's prayer practice. FAC ¶ 9. The recognition of altered conduct as an injury-in-fact has long been recognized by the Supreme Court. *See, e.g.*, *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 224 (1963); *Valley Forge Christian College*, 454 U.S. at 486 n.22 ("The plaintiffs in *Schempp* had standing, not because their complaint rested on the Establishment Clause . . . but because impressionable school children were subjected to unwelcome religious exercise *or were forced to assume special burdens to avoid them*") (emphasis added). Attorney Doe has assumed an ongoing special burden—avoiding the Precinct 1 courtroom whenever possible—in order to avoid a constitutional violation perpetrated by Defendant. And while Ms. Doe would still go before Judge Mack to help an existing client, her avoidance still implicates actual, ongoing financial harm through lost business from potential new clients.

C. FFRF has established associational standing.

A party to a lawsuit acquires associational standing by showing that "(1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are

germane to the organization's purpose; and (3) neither the claims asserted nor the relief requested requires the participation of the individual members in the lawsuit." *McKinney v. U.S. Dep't of the Treasury*, 799 F.2d 1544, 1550 n.13 (Fed. Cir. 1986) (quoting *Hunt v. Wa. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977)). Defendant first argues that FFRF lacks associational standing because its members do not have standing to sue in their own right. This argument is addressed above.

Defendant alternatively argues that even if the individual plaintiffs have standing, FFRF does not, because they were not members at the time they observed the prayers. Defendant cites *Natural Arch & Bridge Soc'y v. Alston*, 209 F. Supp. 2d 1207, 1219 (D. Utah 2002) to support this argument. MTD at 11. No federal appellate court has ever adopted this criteria for associational standing and it is not the law in the Fifth Circuit. On the contrary, the U.S. Supreme Court has clearly enumerated the prerequisites for associational standing, and having members who joined the organization prior to being injured is not one of them. All that is required is that "[t]he association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." *Hunt*, 432 U.S. at 342-43 (quoting *Warth v. Seldin*, 422 U.S. 490, 511 (1975)). Plaintiffs have met this burden. *See, e.g.*, FAC ¶¶ 9–11, 26, 36, 57–59, 61–68.

Once the standing of individual members has been established, then, "so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction." *Hunt*, 432 U.S. at 342–43 (quoting *Warth*, 422 U.S. at 511). Plaintiffs anticipate no material disputed facts

in this case and certainly not any disputed facts that would make an individual plaintiff indispensible to the proper resolution of the cause. Even if such a disputed fact arises, the individual plaintiffs are also parties, such that Defendants will not be prejudiced.

If this Court chooses to deny Plaintiffs' Motion to Strike and allows Defendant Mack to incorporate TCOLE's arguments by reference, the Court should reject TCOLE's misreading of *NAACP v. City of Kyle*, 626 F.3d 233, 237 (5th Cir. 2010) to support its argument that "individuals must be members of organizations at the time an injury occurs for associational standing to exist." TCOLE's Memorandum in Support of TCOLE's Motion to Dismiss (Dkt. 23-3) at 12. In *City of Kyle*, the Fifth Circuit held that the NAACP lacked associational standing when it did not show that any *specific* NAACP member would be unable to purchase a residence as a result of the challenged ordinances; but rather alleged only that, "in the abstract, that some minority members may be less able to afford such residences due to the revised ordinances." *City of Kyle*, 626 F.3d at 237. TCOLE places undue emphasis on the phrase "minority members" and appears to interpret the phrase as meaning something akin to persons who are not yet actual members, rather than meaning members who part of a minority group, such as a racial minority. All *City of Kyle* held is that an association must be able to point to specific members who "independently meet the Article III standing requirement," rather than alleging injuries to its members "in the abstract." *Id.* FFRF is joined by three specific members in this case who each have standing. At least two of those members are suffering imminent future harm and actual ongoing harm. *See* Section I.B. *supra*. Neither Defendant Mack nor TCOLE point to any authority that would prevent FFRF from filing a new lawsuit, likely to be joined with this current cause, the very next time either of those members is subjected to the courtroom prayer practice.

II. Existing precedent counsels against dismissal, and indeed, suggests that courtroom prayer is unconstitutional.

"At this stage of the litigation, [the court] must accept petitioner's allegations as true. A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69 (1984) (citing *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957)). To justify dismissal at this stage of litigation, Defendant would have to convince this Court that the courtroom prayer practice is legally indistinguishable from the legislative prayer practices upheld in *Marsh v. Chambers* and *Town of Greece v. Galloway*, such that binding precedent precludes judgment in Plaintiffs' favor, regardless of the specific facts of the case. Defendant doesn't come close to meeting this burden. Defendant proposes two arguments: first, that courtroom prayer is indistinguishable from legislative prayer and thus should benefit from the "unambiguous and unbroken history of more than 200 years" of legislative prayer recognized by the Supreme Court, and second, that there is a similar history of courtroom prayer that justifies use of the same legal analysis that applies to legislative prayer. Neither argument is convincing.

A. Courtroom prayer is distinguishable from legislative prayer as a matter of law and when the record is examined.

Defendant first argues that his courtroom prayer practice "fits within" the legislative prayer tradition established in *Marsh* and *Galloway* and should thus benefit from the same treatment. MTD at 12 (citing *Galloway*, 134 S. Ct. at 1819). But Defendant's sole citation for this argument is to *Galloway* itself, which explicitly considers and rejects the conclusion that *Galloway* applies to courtroom prayer. Justice Kagan was worried that some might interpret the decision in that way. In her dissenting opinion, she wrote 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.

134 S.Ct. at 1842 (Kagan, J., dissenting). Justice Alito, concurring in the *Galloway* decision, joined by Justice Scalia, specifically addressed the above hypothetical and stated 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 1834 (Alito, J., concurring). He continued, "Nothing could be further from the truth." *Id.* Far from standing for the idea that courtroom prayer should be lumped together with legislative prayer, *Galloway* stands for the exact opposite: the four Justices writing in dissent, plus Justice Alito and the late Justice Scalia, "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 1842 (Kagan, J., dissenting) (citing Justice Alito's concurrence at 1834). Thus, courtroom prayer practices do not get a free ride to constitutionality on the backs of a legislative prayer tradition.

To determine if a practice is afforded the legislative prayer exception, "[t]he inquiry remains a fact-sensitive one that considers both the setting in which the prayer arises and the audience to whom it is directed." *Galloway*, 134 S.Ct. at 1825 (emphasis added). If a public school teacher opened every school day with prayers delivered by guest chaplains in the exact manner described in *Greece*, there is no doubt that the practice would violate the Establishment Clause. *Cf. Lee v. Weisman*, 505 U.S. 577 (1992) (holding similar prayers at graduation

ceremonies unconstitutional). The practice would not receive the protections afforded to legislative prayer because even though the method of delivery is the same, the setting—the public school system—and the audience—school children readily susceptible to coercive pressure—makes the practice factually distinct from the unbroken 200-year tradition of legislative prayer. Defendants' courtroom prayer practice is similarly distinguishable.

Judge Mack's courtroom is a far more coercive setting than a state legislature or local town council meeting. Citizens are often compelled to appear before Judge Mack under threat of additional fines or the issuance of an arrest warrant for failure to appear. This is in stark contrast to the members of the public who may choose to attend a legislative session, but is in line with public school cases that have long recognized the coercive nature of truancy laws. *See, e.g.*, *McCollum v. Bd. of Educ.*, 333 U.S. 203, 204 (1948) (noting Illinois' compulsory education law and that "[p]arents who violate this law commit a misdemeanor punishable by fine").[4]

Unlike in the case of legislative prayer where "[t]he principal audience for these invocations is not, indeed, the public but lawmakers themselves," *Galloway*, 134 S.Ct. at 1825, the intended audience for Defendants' courtroom prayers are the attorneys and other members of the public assembled in the courtroom. FAC ¶ 49 ("The prayers and sermons are directed to those in attendance in the courtroom and everyone present is asked to participate, or show obeisance, by bowing their heads."). The practice itself makes it clear that the intended audience is those assembled in the courtroom: the bailiff reads a prepared statement to those assembled before Judge Mack has even entered, FAC ¶ 46, and Judge Mack then addresses the audience when introducing the chaplain and describing the court's chaplaincy program. FAC ¶ 48. Unlike

[4] Judge Mack also holds juvenile court hearings, FAC ¶ 14. The coercive nature of the courtroom prayer practice is particularly potent for an adolescent in a room of peers. *E.g. Lee*, 505 U.S. at 593–94 (noting the heightened level of coercive pressure the state can exert on adolescents, since "adolescents are often susceptible to pressure from their peers towards conformity, and that [ ] influence is strongest in matters of social convention. . . . [T]he government may no more use social pressure to enforce orthodoxy than it may use more direct means.").

a state legislative session, where only lawmakers are typically permitted to speak, or a local board meeting, where public comment may be invited but is not essential, court proceedings *necessarily* involve private parties and their attorneys. If Judge Mack were the sole intended audience, he could, of course, pray by himself, or engage with his chosen chaplain in the privacy of his chambers, rather than making a public display of it. For these reasons, Defendant cannot establish that courtroom prayer "fits within" the legislative prayer scheme.

B. Unlike legislative prayer, courtroom prayer is not justified by an unambiguous and unbroken history of more than 200 years.

Defendant's second argument is really just a recommendation: "[f]or judicial chaplaincies this Court *should* [follow the historical approach used in *Marsh* and *Galloway*]." MTD at 12 (citing A.G. Opinion, 2016 WL 4414588, at *3) (emphasis added). Defendant must frame his argument as a mere recommendation though, because there is no controlling precedent that would require this Court to rule as Defendant wants. Defendant offers no cases that address the legality of clergy-led prayer in a courtroom *setting* or a prayer practice directed to an *audience* of civil litigants and accused misdemeanor offenders. *Cf. Galloway*, 134 S.Ct. at 1825 (ruling that the inquiry is "a fact-sensitive one" that considers both of these factors). Instead, Defendant submits evidence that falls outside of the pleadings (*see* footnote 1, *supra*) and asks this Court, at a pre-discovery stage of litigation, to extend legislative prayer jurisprudence to the unique setting of the courtroom. This invitation should be rejected out of hand because it is not proper at this stage of litigation. If the Court does consider Defendant's invitation to analyze the history of courtroom prayer, the Court should find that the few available examples are scattered, broken, and not unambiguously analogous to the specific prayer practice at issue in this case. A traditional Establishment Clause analysis of the courtroom prayer practice is thus warranted.

In urging this Court to follow the historical analysis approach used in *Marsh* and *Galloway*, the sole source cited by Defendant is the opinion of the Texas Attorney General, which is not binding precedent on this Court, and which itself concedes, "We have found no federal appellate decisions that have directly analyzed courtroom prayer under the Establishment Clause in the twenty-five years since *Constangy* was issued." A.G. Opinion, 2016 WL 4414588, at *3. The *Constangy* court fully considered *Marsh*'s historical approach to analyzing legislative prayer and rejected it within the context of the courtroom, concluding, "[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." *N.C. Civil Liberties Union Legal Found. v. Constangy*, 947 F.2d 1145, 1148 (4th Cir. 1991) (emphasis added). The *Constangy* court then applied a traditional Establishment Clause analysis to the courtroom prayer at issue and concluded that the practice violated all three prongs of the *Lemon* test. *Id.* at 1149–53. When addressing Defendant's courtroom prayer practice on the merits, this Court should do the same.

"The Supreme Court has warned that a broad reading of *Marsh* 'would gut the core of the Establishment Clause' and has stated that '*Marsh* plainly does not stand for the sweeping proposition . . . that all accepted practices 200 years old and their equivalents are constitutional today.'" *Glassroth v. Moore*, 335 F.3d 1282, 1298 (11th Cir. 2003) (citing *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 603–04 (1989)). Defendant offers alleged examples of judicial prayers at various points in history in an effort to establish that courtroom prayer enjoys an "unambiguous and unbroken history of more than 200 years." *Marsh*, 463 U.S. at 792. But the spotty examples offered by Defendant are not akin to the history established in *Marsh*. Nor could they be. Courtroom prayer is exceedingly rare.

Defendant first points to the traditions of the Supreme Court and Supreme Court of Texas of opening sessions with the phrase "God save the United States [the State of Texas] and this Honorable Court" and argues that this justifies Defendant's chaplain-led prayer practice. MTD at 12–13. This argument misunderstands the nature of these traditions. The Supreme Court has explicitly recognized that its opening call is one of a handful of references "to the divine" that fall under the category of "ceremonial deism." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 37 (2004) (O'Connor, J., concurring) (citing as examples the Supreme Court's opening phrase, the national motto, "religious references in traditional patriotic songs such as The Star-Spangled Banner," and "the phrase 'under God' in the Pledge of Allegiance"). A religious reference may qualify as ceremonial deism due to its "history, character, and context."[5] *Id.* All practices deemed ceremonially deistic share a common *character* that clergy-led prayer does not: such references do not offend the Constitution under the theory that "they have lost through rote repetition any significant religious content." *Lynch v. Donnelly*, 465 U.S. 668, 716 (1984) (Brennan, J., dissenting). Unlike these ceremonially deistic practices, clergy-led prayer does not involve rote repetition. There is no script for the prayers invoked in Judge Mack's courtroom. For this reason, Defendants' clergy-led courtroom prayer practice cannot be justified by reference to the Supreme Court and Texas Supreme Court's opening traditions.[6]

Defendant next points to scattered examples of prayers delivered between 1790 and 1800 as evidence that clergy-led (and, apparently, judge-led) courtroom prayer enjoys a sufficiently unambiguous and unbroken history of more than 200 years. This argument is also flawed. The Supreme Court has noted that *Marsh* does not stand for the proposition "that specific practices

[5] Though both appeal to history, legislative prayer was not justified in *Marsh* as ceremonial deism. *Marsh* established a separate, unique standard for legislative prayer based solely on the practice's "unambiguous and unbroken history of more than 200 years." The majority opinion did not analyze either the character of the prayers or the context in which they were said.

[6] Nor does the rote repetition of "Let us pray. God save the United States and this Honorable Court" in the Northern District of Texas justify Defendants' practice. Whether identified as a "prayer" or not, the character of the recitation falls squarely in line with other ceremonially deistic practices.

common in 1791 are an exception to the otherwise broad sweep of the Establishment Clause . . . ." *Cnty. of Allegheny*, 492 U.S. at 670 (Stevens, J., concurring in part); *see also Marsh*, 463 U.S. at 789 ("Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees . . . ."). But that is essentially what Defendant asks this Court to decide, as there is no evidence that the practice of courtroom prayer continued, unbroken, into the modern era. Defendant cites three examples from the turn of the twentieth century, but they only serve to emphasize how spotty and broken the practice truly is.

Defendant also could have referenced more modern examples—from the late 1980s and mid-1990s—of the brief clergy-led courtroom prayer practice adopted by then-judge Roy Moore of the Etowah County Courthouse in Gadsden, Alabama or the judge-led prayer practice of the Honorable William Constangy of the Twenty Sixth Judicial District of Northern Carolina. But, of course, like Defendants' practice in this case, both those practices resulted in quick litigation. *See Ala. Freethought Ass'n*, 893 F.Supp. 1522 (N.D. Ala. 1995); *Constangy*, 947 F.2d 1145 (4th Cir. 1991). Most telling of all is the other evidence not cited by Defendant. He makes no attempt to argue an unambiguous and unbroken history of any length for prayer in the courtrooms of Montgomery County's Justice of the Peace precincts. The courtroom prayer practice at issue in this case begins and ends with Judge Wayne Mack.

III. Judge Mack does not enjoy judicial immunity for developing a courtroom prayer policy or for implementing that policy, both of which are non-judicial functions.

Plaintiffs challenge two interrelated but conceptually distinct sets of actions by Judge Mack and Montgomery County: the development and adoption of a courtroom prayer *policy* and the implementation of that policy through additional acts that include the daily courtroom prayer *practice*. *See* FAC ¶ 18 ("The prayer practice itself is an established policy of Montgomery County, implemented within the Justice of the Peace Precinct 1."). Judge Mack is jointly

responsible for both of these sets of actions and the Plaintiffs allege as much in the complaint. *See* FAC ¶ 15 ("Judge Mack is responsible for devising and implementing the prayer practice described below."). Section 1988 provides for immunity for any judicial officer from paying costs and attorney's fees for any "act or omission taken in such officer's judicial capacity." 42 U.S.C. § 1988(b). While Plaintiffs do not dispute that at all times Judge Mack has acted in his official capacity as Justice of the Peace for Precinct 1, that official capacity encompasses both a judicial function and a non-judicial function. FAC ¶ 13 ("Judge Mack . . . has final *policymaking* authority over, Montgomery County's Justice of the Peace Precinct 1.") (emphasis added). The development and adoption of a prayer policy was not a judicial act, but a policy-making act and Defendant does not enjoy § 1988 judicial immunity for that act. And while implementation of the prayer policy involves some acts that take place daily in the actual courtroom and some that do not, none of these acts meet the test for judicial immunity.

The Fifth Circuit has adopted a four-part test to determine whether an act qualifies a judicial officer for § 1988 judicial immunity. Acts are considered "judicial" when: "(1) the offending action is a normal judicial function; (2) it occurred in the judge's courtroom or chambers; (3) the controversy involved a case pending before the judge; and (4) the confrontation arose 'directly and immediately out of a visit to the judge in his official capacity.'" *Ammons v. Baldwin*, 705 F.2d 1445, 1447 (5th Cir. 1983) (citing *Brewer v. Blackwell*, 692 F.2d 387, 396 (5th Cir. 1982)). Immunity is meant to protect judges from "inappropriate collateral attacks" or "vexatious actions prosecuted by disgruntled litigants" and thereby helps "to establish appellate procedures as the standard system for correcting judicial error." *See Forrester v. White*, 484 U.S. 219, 225 (1988). It follows that judicial immunity should not automatically extend to acts performed against non-litigants or to acts that are not in some sense subject to the appellate

process. And the case law bears this out. Immunity "is justified and defined by the functions it protects and serves, not by the person to whom it attaches." *Id.* at 277. "The decided cases [ ] suggest an intelligible distinction between judicial acts and the administrative, legislative, or executive functions that judges may on occasion be assigned by law to perform." *Id.* When a judicial officer acts in a non-judicial capacity, he does not retain immunity.

A. The development of a prayer policy was a non-judicial act that does not trigger judicial immunity.

In developing the prayer practice, Judge Mack exercised his role as final policymaking authority for Montgomery County's Justice of the Peace Precinct 1. FAC ¶ 13. This policymaking authority is distinct from his judicial authority and implicates separate liability. *Cf. Supreme Court of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 735–36 (1980) (holding the Chief Justice of the Virginia Supreme Court could be "properly held liable in [his] enforcement capacit[y]" "just as other enforcement officers and agencies were" despite having legislative immunity for acts made in his legislative capacity). While Judge Mack has this policymaking authority due to his position as Justice of the Peace, the authority is decidedly non-judicial. Developing and adopting a prayer policy does not meet *any* of the four factors for judicial immunity, let alone all four, and Defendant does not argue otherwise.

First, any exercise of policymaking authority is not a "normal judicial function," but rather a function normally vested in an administrator. "Administrative decisions, even though they may be essential to the very functioning of the courts, have not [ ] been regarded as judicial acts." *Forrester*, 484 U.S. at 228. Second, the decision to develop and adopt a courtroom prayer policy was not made while Judge Mack was in his courtroom or chambers, or at least, the record does not support that conclusion. Third, the decision to adopt a courtroom prayer policy was unrelated to any case pending before Judge Mack. The policy could have conceivably been

adopted before he ever took the bench. The fourth factor presupposes a litigant or some other third party capable of "visit[ing]" the judge, but that element is lacking for this act, which arose due to Judge Mack's policymaking authority, and ultimately affects everyone who appears in Judge Mack's courtroom, whether a litigant, attorney, court clerk, or casual observer.

B. The implementation of the prayer policy, including the daily prayer practice, is a series of non-judicial acts.

"The burden of justifying absolute immunity rests on the official asserting the claim." *Harlow v. Fitzgerald*, 457 U.S. 800, 812 (1982) (citing *Butz v. Economou*, 438 U.S. 478, 506 (1978)). Defendant Mack has not met this burden as to any of the multiple acts he took to implement the courtroom prayer policy. Defendant characterizes the implementation of the prayer practice as "opening court," MTD at 23, but in reality the implementation of the courtroom prayer practice encompasses a much wider set of acts. As alleged by Plaintiffs, Judge Mack maintains a database of chaplains eligible to deliver prayers in his courtroom, FAC ¶ 45, and selects chaplains from that database and schedules a chaplain to open each court session with prayer. FAC ¶ 43. Defendant has ordered that signs be placed in the courthouse to alert litigants of the courtroom prayer practice, FAC ¶ 56, has issued official badges to the guest chaplains, FAC ¶ 50, and ordered that his courtroom doors be magnetically locked during the chaplain-led prayers. FAC ¶¶ 53–54. Finally, Judge Mack also participates directly in the daily prayer ritual, by addressing the litigants, attorneys and other observers in the courtroom, to introduce the guest chaplain and talk about the chaplaincy program. FAC ¶ 48. None of these actions can be described as judicial in nature.

Judge Mack allegedly performed all actions related to developing the chaplain program while acting in his capacity as coroner, not in his judicial role. Tex. Atty. Gen. Op. KP-0109, 2016 WL 4414588, at *1 (Tex. A.G. Aug. 15, 2016) ("In an effort to provide better comfort and

counsel to those present at the scene of the death, and to allow him to focus on his role as investigator, the Justice of the Peace established the chaplain program."); FAC ¶ 44. Performing duties as a coroner falls far outside the "normal judicial function" required under the first factor for judicial immunity. Even the act performed daily by Judge Mack in court—introducing a chaplain to lead those assembled in prayer—falls outside the normal judicial function. Other courts do not open with chaplain-led prayer. *See* Section II. B. *supra*. The entire prayer practice is a unique addition to the normal operation of the Justice of the Peace Precinct 1.

Many of Defendant Mack's acts in furtherance of the courtroom prayer practice—maintaining a database of chaplains, scheduling chaplains, and issuing official badges— did not occur in his courtroom or chambers, as required by the second factor. Some of the acts did occur in chambers, but that fact alone is not enough to convert an otherwise non-judicial act into an act that confers judicial immunity. *See, e.g.*, *Harper v. Merckle*, 638 F.2d 848 (5th Cir. 1981) (holding that acts made in judge's chambers did not warrant immunity); *Gregory v. Thompson*, 500 F.2d 59 (9th Cir. 1974) (finding judge's act of assaulting a litigant, made in courtroom during trial, was not a judicial act); *Zircon v. Perry*, 572 F.2d 52 (2nd Cir. 1978) (finding no judicial immunity for judge's order to a deputy sheriff, made in chambers, to handcuff a coffee vendor and bring him into the courthouse).

Even if an act meets the first two factors, immunity should be denied if the act fails the third. *See, e.g.*, *Harper*, 638 F.2d 848 (5th Cir. 1981) (holding judge was not immune when finding a person in contempt—a "normal judicial act" that took place in the judge's chambers—when the controversy that led to the contempt finding "did not center around any matter 'then pending before the judge' "). Defendant asserts without justification that the prayer practice "'involved a case pending before' Judge Mack" as required under the third judicial immunity

prong. MTD at 23. But this is false. The third factor is meant to protect judges for *decisions made in cases*, but Plaintiffs challenge a practice completely disconnected from any singular case pending before Judge Mack. Indeed, that's why there are multiple unrelated parties acting as plaintiffs in this case. *Anyone* entering Judge Mack's courtroom—court clerks or other employees, attorneys volunteering to pick up cases, non-litigant courtroom observers—will be exposed to this prayer practice, regardless of whether they are involved in a pending case.

While it's true that the plaintiffs were exposed to the prayer practice while seeking to visit with Judge Mack in his official capacity, the fourth immunity factor also "requires the judge's physical presence." *Daniels v. Stovall*, 660 F.Supp. 301, 304 (S.D. Tex. 1987) (ruling that judge was not immune from suit after ordering use of his rubber-stamped signature outside his presence, *an act that seemingly met the first three immunity factors*). While Judge Mack is present for parts of the courtroom prayer practice, including when the chaplain-led prayers are recited, he is not present when the prayer practice is initiated, FAC ¶¶ 46–48, MTD at 20, and his presence is not necessary for the unconstitutional prayers to take place. Defendant, who bears the burden of justifying absolute immunity, points to no cases where judicial immunity applied to an act that could have been performed without the judge's involvement. It would be a departure from the plain purpose of the judicial immunity doctrine to extend immunity to such a case.

IV. Qualified immunity does not shield Judge Mack from paying costs and fees.

Defendant Mack finally argues that he is immune from paying costs and fees under the doctrine of qualified immunity. But qualified immunity only shields government officials from liability for "civil damages." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Attorneys fees and other costs are not considered "damages." *See Pulliam v. Allen*, 466 U.S. 522, 543–44 (1984) ("The legislative history [of § 1988] confirms Congress' intent that an attorney's fee award be

available even when damages would be barred or limited by 'immunity doctrines and special defenses, available only to public officials.' "); *Supreme Ct. of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 738 (1980) ("[E]nforcement authorities against whom § 1983 judgments have been entered would ordinarily be charged with attorney's fees."); *Hutto v. Finney*, 437 U.S. 678, 695 (1978) (declining to extend state's Eleventh Amendment immunity from suits for damages to the costs and fees associated with a suit for prospective relief). Government officials are not immune from paying fees and costs when sued successfully for declaratory or injunctive relief. *See, e.g.*, *Tonya K. v. Bd. of Educ. of City of Chicago*, 847 F.2d 1243, 1246 (7th Cir. 1988) ("[T]he court may award as part of the costs of the case the attorneys' fees reasonably incurred in obtaining that permissible, prospective relief. Damages are not authorized, but fees are not damages."); *Meredith v. Federal Mine Safety and Health Review Comm'n*, 177 F.3d 1042, 1049 (D.C. Cir. 1999) ("While an assertion of qualified immunity may shield a government official from answering for his actions in a suit for damages such immunity does not extend to a suit seeking equitable relief.").

Moreover, "[q]ualified immunity is available only to officials sued in their personal capacities." *Reyna v. City of Weslaco*, 944 S.W.2d 657, 662 (Tex. Ct. App. 1997) (citing *Kentucky v. Graham*, 473 U.S. 159, 166–67 (1985)). While an official in a *personal* capacity action may be able to assert personal immunity defenses, such as qualified immunity, "[i]n an official-capacity action, these defenses are unavailable." *Graham*, 473 U.S. at 166 (citing *Owen v. City of Independence*, 445 U.S. 622 (1980)). "The only immunities that can be claimed in an official-capacity action are forms of sovereign immunity that the entity, *qua* entity, may possess, such as the Eleventh Amendment." *Id.* Because Judge Mack has been sued in his official capacity, the defense of qualified immunity is not available to him.

CONCLUSION

Judge Mack and Montgomery County have instituted a novel courtroom prayer practice within the County's Justice of the Peace Precinct 1. Plaintiffs have directly encountered this practice in the past and have standing to seek nominal damages for the violation of their constitutional rights. Two plaintiffs will also regularly encounter the prayer practice in the future, during the course of their business in the court. They therefore have standing to seek declaratory and injunctive relief. The Supreme Court has recognized that courtroom prayer is legally distinct from legislative prayer and Defendants' clergy-led courtroom prayer practice is not justified by anything resembling the "unambiguous and unbroken history of more than 200 years" that justified legislative prayer in *Marsh*. Judge Mack cannot claim judicial immunity for his policymaking acts in developing this prayer practice or for his non-judicial acts in implementing it. Finally, qualified immunity does not protect Judge Mack from paying costs and fees.

For the foregoing reasons, the Court should deny Defendant Mack's Motion to Dismiss.

DATE: July 12, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Patrick A. Luff, hereby certify that on this the 12th day of July, 2017, a true and correct copy of the foregoing document was transmitted using the CM/ECF system, which automatically sends notice and a copy of the filing to all counsel of record.

/s/ Patrick A. Luff
Patrick A. Luff