EXPERT REPORT AND DECLARATION OF PAUL FINKELMAN, PH.D.

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I, Paul Finkelman, declare under penalty of perjury, that if called upon as a witness I could and would competently testify to the following:

1. My name is Paul Finkelman. I am currently the President of Gratz College, in Melrose Park, Pennsylvania. I am an historian, author, and legal scholar. I have expertise on the history of American law and American institutions, including at the time of the Founding. My business address is 7605 Old York Road, Melrose Park, Pennsylvania 19027.

QUALIFICATIONS

2. Immediately before accepting my current position as President of Gratz College, I held the Fulbright Research Chair in Human Rights and Social Justice at the University of Ottawa College of Law and I was also the John E. Murray Visiting Professor of Law at the University of Pittsburgh School of Law. I have previously held, as a tenured professor, the President William McKinley Chair at Albany Law School (where I am now an Emeritus Professor) and before that the Chapman Chair in Constitutional Law at the University of Tulsa College of Law. I have held visiting chairs at a number of other institutions including Ariel F. Sallows Chair in Human Rights Law at the University of Saskatchewan College of Law (2016); Justice Pike Hall, Jr. Chair at the Paul M. Hebert Law Center, Louisiana State University (2014); the John Hope Franklin Chair in American Legal History at Duke Law School (2012); the John F. Seiberling Chair in Constitutional Law at the University of Akron School of Law (1998-99); the Baker and Hostetler Chair at Cleveland-Marshall College of Law at Cleveland State University (1997-98); and the Charlton W. Tebeau Research Chair in History at the University of Miami (1999).
3. A true and correct copy of my curriculum vitae is attached to Plaintiffs’ Designation of Expert Witness as Exhibit B. This vita lists all my positions in both law schools, history departments, and other academic venues.

4. I earned a Bachelor of Arts in American Studies from Syracuse University (1971) and an M.A. and Ph.D. in history from the University of Chicago (1972 and 1976). I later studied at Harvard Law School, where I was a Fellow in Law and Humanities in 1982-83. I held a Mellon Post-Doctoral Fellowship at Washington University in St. Louis in 1977-78. In 1979, I held the J. Franklin Jamison Fellowship at the Library of Congress. I was a Scholar-in-Residence at the National Constitution Center in Philadelphia (2014-15) and a Senior Fellow at the Penn Program on Democracy, Citizenship, and Constitutionalism at the University of Pennsylvania (2014-2016), where I also taught courses in the political science department.

5. I have authored, co-authored, edited, or co-edited about fifty books and I have written about one hundred law review articles and approximately one hundred other scholarly articles and book chapters. I have also edited a number of collections of reprinted articles and primary sources. Most of my published work has been on the history of American law and American legal institutions. I am the co-author of *A March of Liberty: A Constitutional History of the United States* (3rd ed., 2 vols. Oxford, 2011), co-author of *American Legal History: Cases and Materials* (5th ed., Oxford, 2017), and editor of *Religion and American Law: An Encyclopedia* (Garland, 2000). My most recent book, *Supreme Injustice: Slavery in the Nation’s Highest Court* was published by Harvard University Press in 2018. My curriculum vitae, appended as Exhibit B, includes a list of most of the publications I have authored, co-authored, edited, and co-edited during my academic career, including all publications published in the previous 10 years.
6. The United States Supreme Court has cited me in four cases including two focused on the Establishment Clause of the First Amendment—\textit{Van Orden v. Perry}, 545 U.S. 677 (2005) and \textit{Town of Greece v. Galloway}, 572 U.S. ___, 134 S.Ct. 1811 (2014). I have been cited by other courts as well. I have also been cited by many other scholars. In 2014 (when I accepted emeritus status from Albany Law School), I was ranked as the fifth most cited legal historian in American legal scholarship in Brian Leiter’s “\textbf{Top Ten Law Faculty (by area) in Scholarly Impact, 2009-2013}.” According to the HeinOnline database of English language Law Journals, my books and articles have been cited more than 2,500 times.

7. I have given public and academic lectures in almost every state in the nation, given CLEs in many states, and given special programs for the Second Circuit Court of Appeals, U.S. District Courts in Michigan and Kentucky, and for the state supreme courts of Florida, Ohio, and Pennsylvania. I have lectured and/or taught in Austria, Canada, China, Colombia, France, Germany, Ireland, Israel, Italy, Japan, Switzerland, and the United Kingdom (England, Northern Ireland, and Scotland). The United States Information Agency and the United States Department of State sponsored some of these lectures in Germany, Colombia, Japan, and China. I have served as a consultant or an advisor to the Library of Congress, the National Parks Service, the National Archives, the National Science Foundation, the National Endowment for the Humanities, the New York State Freedom Trails Program, the Tulsa Race Riot Monument Commission, and various television productions for PBS, C-Span, and the History Channel. Since earning my Ph.D., I have received grants and fellowships from, among other institutions and agencies, the American Council of Learned Societies, the American Bar Foundation, the American Historical Association, the American Philosophical Society, Harvard Law School, the Japan Society for the Promotion of Science, the Library of Congress, the National Endowment
for the Humanities, the New York State Archives, Osaka University (Japan), and the United States Fulbright Commission.

8. I am a member of three honorary societies: Phi Beta Kappa (1971), Phi Alpha Phi (1971), and Phi Alpha Theta (1971). I am an elected member of the American Antiquarian Society (2009), one of the most prestigious and oldest scholarly institutions in the nation. I am a life member of the American Society for Legal History, the Organization of American Historians (OAH), and the Southern Historical Association. Since 2001, I have been one of a select group of scholars who are available as speakers as part of the “Distinguished Lecture Series” sponsored by the OAH.

9. I have twice testified as an expert witness. I was an expert for the plaintiff in Glassroth v. Moore, 229 F. Supp. 2d 1290 (M.D. Ala. 2002), which involved the Ten Commandments monument that Chief Justice Roy Moore placed in the rotunda of the Alabama Supreme Court building. I was also a member of an “experts panel” on behalf of the plaintiff in Popov v. Hayashi, No. 400545, 2002 WL 31833731 (Cal. Super. Ct. 2002), which involved the ownership of the 73rd home run ball hit by San Francisco Giants baseball player Barry Bonds. I submitted an expert report on behalf of the plaintiff in the case of Brian Fields, et al. v. Speaker of the Pennsylvania House of Representatives, No. 1:16-CV-1764 (filed Aug. 25, 2016) (Chief Judge Conner) in the United States District Court for the Middle District of Pennsylvania. This case involves policies surrounding who is allowed to offer a prayer or invocation in the Pennsylvania House of Representatives and whether visitors to the House must stand during such prayers. I have not yet testified in this case, but if this case goes to trial I will likely testify. I have also submitted expert reports in cases that were settled, and thus I did not testify. I have not given any depositions in the last four years.
10. I have been asked to research and present analysis pertaining to the use of prayers in trial courts, especially in the context of U.S. history. My opinion on this issue is informed in part by my extensive experience studying the role of religion in the development of American political institutions at the Founding and in the early nineteenth century. My opinion is also informed by my long career investigating and writing about the relationship between religion and American society and the relationship between Biblical and religious texts and public statements about religion and faith.

11. I base the interpretations, analyses, and conclusions in this Report on my education, research, writing, and experience as a professional historian and legal scholar. My process in forming my conclusions has included the following: reading significant works on the history of religion in the United States; studying and writing about the process of early constitution making, including reading most of the early state constitutions; looking at state statutes from the founding period and beyond that dealt with religion, especially with state establishments of religion; reading and teaching about the major Supreme Court decisions involving the Establishment Clause of the First Amendment; editing the Encyclopedia of Religion and American Law, which involved reading hundreds of separate entries on religion and law mostly written by scholars; and engaging in discussion on these general topics with law professors and others who are interested in church and state issues.

12. It would be impossible for me to list every source that I drew on in forming the opinions in this Report, as I have been an academic working on these and related issues for more than four decades. However, I have provided a bibliography of sources, attached to Plaintiffs’ Designation of Expert Witness as Exhibit C, that I have consulted during the research and
writing of this document. It includes primary sources, most of which are discussed directly in the Report below, and a list of the most relevant secondary sources from which my opinions are drawn.

13. Additionally, I reviewed all of the examples of prayer, deistic courtroom practices, plus legislative and executive prayer practices, cited by the Defendants in Judge Mack’s Motion to Dismiss and Brief in Support (Document 24 at 12–20) and Judge Mack’s Reply Brief in Support of Judge Mack’s Motion to Dismiss (Document 30 at 7–10), and all of the similar examples from the Proposed Memorandum of Law in Support of Intervenor-Defendant Texas Commission on Law Enforcement’s Motion to Dismiss (Document 23 at 13–17), incorporated by reference into Defendants’ motions to dismiss.

14. For the purpose of my study, the preparation and writing of this report, and testimony in this case, I have reserved the right to be compensated at a rate of $125 per hour by the Freedom From Religion Foundation (FFRF). Any expenses I incur will, by agreement, be reimbursed by FFRF.

**METHODOLOGY**

15. Prior to drafting this Report, an extensive review of primary sources was undertaken to **determine if there was a prevalent or pervasive practice of opening courts with prayer from the Founding era through the first half of the nineteenth century.** Had this review uncovered examples of courtroom prayer or examples of chaplains designated to lead prayers in courts, such findings would have supported an answer in the affirmative.

16. It is much more difficult to prove a negative. Therefore, part of the goal for the primary source review was to catalogue evidence of prayers or government-appointed chaplains in other contexts. If the existence and state approval of chaplains in other contexts is historically
documented and similar evidence for courtroom prayers or courtroom chaplains is not, this is the best possible evidence from which to conclude that there was no common practice of opening courts with prayer in the Founding era.

17. I also explored a secondary question: whether any such courtroom prayer practice persisted over time. For this reason, I reviewed primary sources beyond the Founding, including some sources from the late nineteenth and early twentieth centuries.

18. The results of this primary source review are catalogued along with a notation describing what type of prayer or government chaplaincy was documented in each instance. In total, I have provided approximately 160 unique mentions of chaplains from this primary source review.

19. This review was not intended to be exhaustive, as it would take an impractical amount of time and resources to perform an exhaustive search, with only marginal increase in the confidence of the resulting findings. Instead, this search was intended to be representative of the common practices within the states during the Founding. The catalogued sources were collected for their diversity and exemplification of early American practices and, in some cases, for what they indicate about the persistence of some chaplaincy practices over time.

20. The results are now presented under the Primary Sources section of Exhibit C to Plaintiffs’ Designation of Expert Witness and are discussed state-by-state in the “Findings” section below.
FINDINGS

I. Courtroom prayers similar to the practice at issue in this case were not consistently or regularly practiced in any state during the Founding era.

21. The results of this primary source review speak for themselves, but to summarize: There is virtually no evidence that courtrooms in any state regularly opened with prayer in any form at the time of the Founding and no evidence that courtroom prayer has endured as a practice over time.

22. The results indicate that many early states had legislative chaplains. Such a finding is consistent with scholarship on the historical origins of legislative prayer.¹

23. In addition to legislative chaplains, the review produced documented evidence in almost every examined state of authorizations for chaplains in some state facilities, primarily in prisons, state militias, and later, the national guard. A few states also provided for chaplains in other contexts, including fire departments, a home for disabled soldiers, or other state institutions.

24. But I found no state laws that provided for chaplains in the courtroom context. I found no evidence that any state legislature authorized the appointment of chaplains for the purpose of giving courtroom prayers, even while the legislatures authorized the appointment of chaplains in many other government bodies.

25. For example, Texas has appropriated money for chaplains for the state senate, prisons and reformatories, and the state militia, but never for the courts. The review uncovered sixteen Massachusetts statutes that mentioned chaplains in the context of prisons, prison personnel, and women’s prisons; the militia and military personnel, including a special act for a chaplain for the cavalry; and the state House of Representatives. New Jersey provided money

¹ See the Secondary Sources section of Exhibit C to Plaintiffs’ Designation of Expert Witness for examples.
for chaplains for a fire department, prisons, the militia, the national guard, the state reformatory, a home for disable soldiers, and the legislature. New York’s appropriations were similar but also include a chaplain for a marine hospital. Georgia appropriated money for military and prison chaplains. Virginia did the same, including one for the “staff of the major general.” But this search did not uncover a single state appropriation for courtroom chaplains. The silence of the legislatures on this issue illustrates that even where there were state-established churches (as there were in some states from the Revolution until the 1830s), state governments have drawn a line at prayer in the courtroom. It simply was not done.

26. What follows is a state-by-state summary of the primary source documentation uncovered, with citations to the bibliography, which is similarly organized by state.

27. Connecticut: A review of the Revised Statutes of the State of Connecticut (1849) revealed a statute that described the position of county-appointed chaplains for prisons and workhouses, but no similar mention of a county-appointed chaplain for any court could be found. While other Connecticut statutes from that same year concerned matters of the courts, including an “Act Relating to Court Systems” and a separate statute that detailed the salary for county court clerks, neither mentioned court chaplains. Any mention of court chaplains was also conspicuously absent from an additional statute that provided the amounts for the salaries of several official county positions. Courtroom prayer was not otherwise mentioned in any primary source document reviewed from the State of Connecticut.

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2 It did uncover one story from Maine about a chaplain opening a “term of court,” though the meaning of that phrase is ambiguous, as discussed below. (See ¶¶ 31, 48–52).
3 Revised Statutes of the State of Connecticut (1849) at 541.
4 Id.
5 Id.
28. **Delaware:** The State of Delaware designated the use of chaplains for the legislature and military. Statutes from 1852\(^6\) and 1915\(^7\) list the officers, including chaplains of both houses of the legislature and denote their salaries. Also, in 1852, state statutes provided lists of positions that were included in a military regiment and included in them a chaplain.\(^8\) Again in 1915, a statute provided a list that indicated a chaplain shall be included among positions in a military regiment\(^9\) and described how and when they are selected.\(^10\) I found no similar listings for any court chaplains, nor any examples of courtroom prayers.

29. **District of Columbia:** Two documents, over 100 years apart, demonstrate the existence and use of government-appointed chaplains within the Washington, D.C. prison system.\(^11\) Though two sources is not enough to draw conclusions as to whether the use of chaplains in prisons persisted over that time, finding such evidence at two distinct points in time indicates that further research would be warranted, were prison chaplains the primary topic of interest. A separate source lists chaplains among persons included in a military regiment in 1887–1889.\(^12\) No similar sources revealed any use of chaplains or prayers in courtrooms.

30. **Georgia:** The State of Georgia has frequently provided guidance on the duties and salaries of prison chaplains as shown in statutes from 1845,\(^13\) . . .

\(^6\) See Revised Statutes of the State of Delaware, Eighteen Hundred and Fifty-Two as They Have since Been Amended (1893) at 244.

\(^7\) See Revised Statutes of the State of Delaware to the Year of Our Lord One Thousand Nine Hundred and Fifteen (1915) at 2121.

\(^8\) See Revised Statutes of the State of Delaware, Eighteen Hundred and Fifty-Two as They Have since Been Amended (1893) at 133.

\(^9\) Revised Statutes of the State of Delaware to the Year of Our Lord One Thousand Nine Hundred and Fifteen (1915) at 177.

\(^10\) See id. at 181.


\(^12\) Compiled Statutes in Force in the District of Columbia, Including the Acts of the Second Session of the Fiftieth Congress, 1887–‘89 (William Stone Abert & Benjamin G. Lovejoy 1894) at 387.

\(^13\) Codification of the Statute Law of Georgia, including the English Statutes of Force (William A. Hotchkiss) (1845) at 936, 972.
1850, 1851, 1861, 1873, 1876, 1882, and 1895. The state also included details on allowances for books for prison chaplains in 1851. State statutes from 1789, 1821, and 1895 describe the use of chaplains as members of a militia. Additionally, legislative chaplains were accounted for in a statute from 1870. But none of these regular mentions of chaplains in government positions in the late-eighteenth and nineteenth centuries included any mention of chaplains in the courtroom context.

31. **Maine**: The primary source review did uncover one story from *The Green Bag* in 1889 which states in part, “at the opening of a term of court in County, Maine, a young clergyman was called upon to act as chaplain, who concluded his prayer with this supplication: ‘And finally may we all be gathered in that happy land where there are no courts, no lawyers, and no judges.’ ” From this anecdote alone, it cannot be determined whether a “term of court” describes a single day of court, or, more likely, the opening of court for several days, as a judge rode circuit. This difference is significant and discussed in greater detail below. (See ¶¶ 48–52).

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14 Compilation of the Penal Code of the State of Georgia, with the Forms of Bills of Indictment Necessary in Prosecutions under It and the Rules of Practice (Howell Cobb 1850) at 225.
15 Digest of the Statute Laws of the State of Georgia, in Force Prior to the Session of the General Assembly of 1851, with Explanatory Notes and References (Thomas R.R. Cobb 1851) at 866, 874.
18 Public Laws Passed at the Session of 1876 of the General Assembly of the State of Georgia (1876) at 21.
21 Digest of the Statute Laws of the State of Georgia, in Force Prior to the Session of the General Assembly of 1851, with Explanatory Notes and References (Thomas R.R. Cobb 1851) at 1240.
23 Compilation of the Laws of the State of Georgia, Passed by the Legislature since the Year 1810 to the Year 1819, Inclusive (Lucius Q.C. Lamar 1821) at 454.
25 Public Laws, Passed by the General Assembly of the State of Georgia, at the Session of 1870, with an Appendix (Augustus Flesh 1870) at 63.
26 1 Green Bag 505 (1889).
It is also worth noting that this story in *The Green Bag* is obviously meant to be humorous, if not satirical, and perhaps even mocks the use of prayer at the beginning of a court session.

32. **Maryland:** Maryland employed prison chaplains in the nineteenth century, as documented in statutes from 1837, 1838, 1840 and 1840. Military chaplains were also accounted for in 1860 and 1911 and in the Maryland National Guard in the early twentieth century. In an 1832 statute, the treasurer was instructed to pay the chaplain of each branch of the legislature. There were no similar statutes referencing the appointment of any court chaplain.

33. **Massachusetts:** State statutes from the years 1822, 1836, 1849, 1860, 1873, 1882 provide listed positions for chaplains in prisons, including women’s reformatories in 1882–1887. Military chaplains are also accounted for in 1822, 1836, and

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27 *Index to the Laws and Resolutions of Maryland, from the Year Eighteen Hundred and Thirty-Two, to the Year Eighteen Hundred and Thirty-Seven, Inclusively* (1838) at ccxlii.
28 *Index to the Laws of Maryland, from the Year 1838 to the Year 1845, Inclusive* (1846) at 395.
29 *General Public Statutory Law and Public Local Law of the State of Maryland, from the Year 1692 to 1839 Inclusive* (Dorsey Clement 1840) at 2771.
30 *Maryland Code* (Otho Scott et al. 1860) at 418.
31 *Annotated Code of the Public Civil Laws of Maryland* (George P. Bagby, ed. 1911-18) at 1485.
32 *Supplement to the Code of Public General Laws of Maryland* (John Prentiss Poe 1888) at 82 (in 1900); *Maryland Code: Public General Laws* (John Prentiss Poe 1904) at 1521 (in 1904).
33 *Index to the Laws and Resolutions of Maryland, from the Year 1826 to the Year 1831, Inclusively* (1832) at ccxcii.
34 *General Laws of Massachusetts* (Asahel Stearns et al. 1823) at 223.
35 *Revised Statutes of the Commonwealth of Massachusetts Passed November 4, 1835 to which are Subjoined, as Act in Amendment Thereof, and an Act Expressly to Repeal the Acts Which are Consolidated Therein, both Passed in February 1836 (1836) at 790.
36 *Supplements to the Revised Statutes. Laws of the Commonwealth of Massachusetts, Passed subsequently to the Revised Statutes: 1836 to 1849, Inclusive* (Theron Metcalf & Luther S. Cushing, eds. 1849) at 42.
37 *General Statutes of the Commonwealth of Massachusetts: Revised by Commissioners Appointed under a Resolve of February 16, 1855, Amended by the Legislature, and Passed December 28, 1859 (1860) at 856.
38 *General Statutes of the Commonwealth of Massachusetts: Enacted December 28, 1859, to Take Effect June 1, 1860* (William A. Richardson & George P. Sanger, eds. 1873) at 870.
39 *Public Statutes of the Commonwealth of Massachusetts, Enacted November 19, 1881, to Take Effect February 1, 1882 (1886) at 1235.
40 *Index to the Public Statutes of the Commonwealth of Massachusetts and to the Public Acts of 1882 to 1887, Both Inclusive* (William V. Kellen 1888) at 409.
41 *General Laws of Massachusetts* (Asahel Stearns et al. 1823) at 223.
42 *Revised Statutes of the Commonwealth of Massachusetts Passed November 4, 1835 to which are Subjoined, as Act in Amendment Thereof, and an Act Expressly to Repeal the Acts Which are Consolidated Therein, both Passed in February 1836 (1836) at 105.
In a collection of statutes from 1873 that includes provisions for the state’s court system, one mention of a chaplain in the military was catalogued, but no courtroom chaplains. Additionally, in a document that covers several areas of government personnel, a portion is dedicated to the inclusion of chaplains for the state’s Senate, as well as prisons and provides the salaries for chaplains appointed by the state’s House of Representatives. Nothing similar was found for court chaplains.

34. New Hampshire: New Hampshire repeatedly calls for the inclusion of a military chaplain in statutes for the years 1815–1824, 1842, 1854, 1867, 1878, 1900, and 1901. Prison chaplains were accounted for in state statutes from 1843, which authorized funding for the position, 1851, and 1901. Details for legislative chaplains and how they were compensated were provided for in statutes from 1901.

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43 Public Statutes of the Commonwealth of Massachusetts, Enacted November 19, 1881; to Take Effect February 1, 1882 (1882) at 154.
44 General Statutes of the Commonwealth of Massachusetts (William A. Richardson & George P. Sanger 1860) at 364.
45 Id. at v, xxiii.
46 Index to the Public Statutes of the Commonwealth of Massachusetts and to the Public Acts of 1882 to 1887, Both Inclusive (William V. Kellen 1888) at 442, 463, 464.
47 Id. at 250.
48 Laws of the State of New-Hampshire, Enacted since June 1, 1815 (1824) at 57.
49 Revised Statutes of the State of New Hampshire, Passed December 23, 1842 (1851) at 179.
50 Compiled Statutes of the State of New Hampshire: To Which Are Prefixed the Constitutions of the United States and of the State of New Hampshire (1854) at 213.
51 General Statutes of the State of New-Hampshire; To Which Are Prefixed the Constitutions of the United States and of the State (1867) at 183.
52 General Laws of the State of New Hampshire; to Which Are Prefixed the Constitutions of the United States and State of New Hampshire (1878) at 239.
55 Revised Statutes of the State of New Hampshire, Passed December 23, 1842 (1843) at 17, 20.
56 Revised Statutes of the State of New Hampshire, Passed December 23, 1842 (1851) at 160.
58 Id. at 8.
59 Id. at 604.
and 1925. Nothing from the state indicates that chaplains were similarly contemplated in the courtroom context.

35. **New Jersey**: Chaplains were consistently included in statutes describing who was to be included in New Jersey military regiments, as can be seen in examples from 1761, 1783, 1847, 1855, 1861, 1868, and 1871. Prisons chaplains were accounted for in statutes from 1911 and 1915. The state also provided for the employment of chaplains for rehabilitation homes for disabled soldiers in 1868, 1896, and 1911. New Jersey even provided for state-funded chaplains for fire departments in 1937. Court chaplains are noticeably absent from statutory allocations.

36. **New York**: Chaplains were among the personnel included in military brigades for the State of New York in statutes from 1846, 1852, 1870, . . .

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60 Public Laws of the State of New Hampshire (1925) at 46.
61 Acts of the General Assembly of the Province of New-Jersey, from the Year 1753 (Samuel Nevill 1761) at 24 (provides for compensation); id. at 38 (prohibits harming military chaplains).
63 Statutes of the State of New Jersey (1847) at 748.
64 Digest of the Laws of New Jersey (Lucius Q. C. Elmer & John T. Nixon 1855) at 498.
65 Digest of the Laws of New Jersey (Lucius Q. C. Elmer & John T. Nixon 1861) at 540.
67 Revision of the Statutes of New Jersey (1877) at 679 (organization of persons included in the National Guard).
68 Compiled Statutes of New Jersey. Published under the Authority of the Legislature by Virtue of an Act Approved April 12, 1910 (1911) at 4934.
69 First Supplement to the Compiled Statutes of New Jersey (1918) at 1481.
70 Digest of the Laws of New Jersey (Lucius Q. C. Elmer & John T. Nixon 1868) at 897.
71 General Statutes of New Jersey. Published under the Authority of the Legislature, by Virtue of an Act Approved April 4, 1894, and a Supplement thereto, Approved March 20, 1895 (1896) at 3131.
72 Compiled Statutes of New Jersey. Published under the Authority of the Legislature by Virtue of an Act Approved April 12, 1910 (1911) at 4859.
73 Revised Statutes of New Jersey, 1937: Effective December 20, 1937 (1938) at 532.
76 Statutes at Large of the State of New York (John W. Edmonds, et al., eds. 1869–90) at 597.
1875, and 1896. Chaplains were also included in military hospitals and staff at homes for disabled soldiers, as described in statutes from 1846, 1850, and 1874. The use of prison chaplains was evident in statutes from 1828, 1846, 1852, 1862, 1867, 1875, 1880, 1889, and 1896. A chaplain was also assigned to the inebriate asylum in 1874. New York additionally provided for chaplains that would serve the state legislature in the years 1877, 1897, and

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77 Revised Statutes of the State of New York (George W. Cothran 1875) at 770.
78 Revised Statutes of the State of New York, Together with All the Other General Statutes, (except the Civil, Criminal and Penal Codes) as Amended and in Force on January 1, 1896 (Charles A. Collin, ed. 1896) at 506.
79 Digest of the Laws of the State of New York: Comprising the Revised Statutes and Statutes of General Interest in Force on January 1, 1874 (Joseph D. Fay 1874) at 499.
80 General Index to the Laws of the State of New-York. From 1777 to 1850. Prepared to 1842 Inclusive, under a Joint Resolution of the Senate and Assembly of the 26th March, 1841, by the Clerks of the Two Houses; and Continued to 1850 Inclusive (1850) at 201.
81 Digest of the Laws of the State of New York: Comprising the Revised Statutes and Statutes of General Interest in Force on January 1, 1874 (Joseph D. Fay 1874) at 303.
82 Laws of the State of New-York, of a General Nature; from 1828 (1845) at 471 (allowance of a prison chaplain in 1828); Revised Statutes of the State of New-York, as Altered by Subsequent Enactments: Together with Statutory Provisions of a General Nature, Passed between the Years 1828 and 1845 Inclusive (John Duer, Benjamin F. Butler & John C. Spencer 1846–48) at 795 (duties of prison chaplains in 1846); Revised Statutes of the State of New-York, as Altered by Subsequent Legislation: Together with the Unrepealed Statutory Provisions of a General Nature, Passed from the Time of the Revision to the Close of the Second Session of the Legislature in 1851, Arranged in the Manner of the Revised Statutes. To Which Are Added, All Acts of General Interest Passed during the Session of 1852, with References to Judicial Decisions in Relation to Their Provisions, and Explanatory Notes (Hiram Denio & William Tracy 1852) at 945 (officers of state prisons in 1852); Statutes at Large of the State of New York, Comprising the Revised Statutes, as They Existed on the 1st Day of July, 1862, and All the General Public Statutes Then in Force, with References to Judicial Decisions, and the Material Notes of the Revisers in Their Report to the Legislature (John W. Edmonds 1863) at 797 (duties of the prison chaplain in 1862); Statutes at Large of the State of New York (John W. Edmonds, et al., eds. 1869–90) at 785 (duties of the prison chaplain in 1867); Revised Statutes of the State of New York (George W. Cothran 1875) at 1069 (duties of the state prison chaplain and other details concerning the position in 1875); Statutes at Large of the State of New York (John W. Edmonds, et al., eds. 1869–90) at 384 (prison chaplains—appointment of officers in 1880); Revised Statutes of the State of New York, as Altered by Subsequent Legislation: Together with the Other Statutory Provisions of a General and Permanent Nature, (Except the Code of Civil Procedure, the Code of Criminal Procedure, and the Penal Code,) Passed from the Year 1778 to February 1, 1889, and Now in Force; Arranged in Connection with the Same or Kindred Subjects in the Revised Statutes; to Which Are Added an Analysis of the Entire Work: References to Judicial Decision upon the Different Enactments; Explanatory Notes; a Full and Complete Alphabetical Index; and an Indexed Table of the Statutes Contained in the Work (1889–92) at 2804 (duties of the prison chaplain in 1889); Revised Statutes of the State of New York, Together with All the Other General Statutes, (except the Civil, Criminal and Penal Codes) as Amended and in Force on January 1, 1896 (Charles A. Collin, ed. 1896) at 1945 (chaplain included among prison officers and employees in 1896).
83 Digest of the Laws of the State of New York: Comprising the Revised Statutes and Statutes of General Interest in Force on January 1, 1874 (Joseph D. Fay 1874) at 449.
84 Index to the Laws of the State of New York, 1876-77, Inclusive, 5 General Index of the Laws of the State of New York 3, 260 (1866–97) at 10, 240 (accounts for legislative and prison chaplains in one document).
85 Revised Statutes, Codes and General Laws of the State of New York. Containing the Text, Carefully Compared with the Original, and Certified by the Secretary of State, of All the General Statutory Law of the State in Force on January 1st, 1897, Including the Constitution of the State, the Revised Statutes, the General Laws and Statutes, the Codes of Civil and Criminal Procedure, and the Penal Code, Alphabetically Arranged by Subjects, with Full
1908. This extensive record of chaplain positions does not include any mention of courtroom chaplains or courtroom prayers.

37. **North Carolina:** North Carolina statutorily included chaplains among military personnel in 1782 and 1905. Prison chaplains were mentioned in a 1920 statute. There is no statutory indication that the state ever employed courtroom chaplains.

38. **Ohio:** An opinion from the state Attorney General indicates that chaplains were included among military staff in 1846. Ohio statutes were not reviewed.

39. **Pennsylvania:** The Commonwealth of Pennsylvania frequently included chaplains as military staff, including in statutes from 1775, 1810, and 1883. In Pennsylvania’s first 120-years, which includes the pre-Revolution era, statutes described military chaplains as members of a battalion, described their compensation (including being entered into a lottery for land) and detailed their appointment. Chaplains for the state legislature were defined in numerous statutes, including in 1883 and 1907, and their salaries are described in

References to the Decisions, and with Historical and Explanatory Notes, and a Complete System of Cross-References, Supplemented by a Full Analytical Index and Tables of the Statutes Contained Herein. Certified by the Secretary of State, under Section 932 of the Code of Civil Procedure, as Amended by Laws of 1895, Chapter 594 (Clarence F. Birdseye 1896–97) at 572.

86 General Index to the Laws of the State of New York, 1902-1907, Both Dates Inclusive (Archie E. Baxter 1908) at 411.


90 1846 Ohio Att’y Gen. Reports and Ops. 3, 1028 (1846–1904).

91 Acts of the General Assembly of the Commonwealth of Pennsylvania, Carefully Compared with the Originals (Thomas McKean 1782) at 278.

92 Laws of the Commonwealth of Pennsylvania, from the Fourteenth Day of October, One Thousand Seven Hundred (1810–44) at 418.

93 Digest of the Laws of Pennsylvania, from the Year One Thousand Seven Hundred to the Sixth Day of June, One Thousand Eight Hundred and Eighty-Three (John Purdon & Frederick C. Brightly 1885) at 1256.

94 Statutes at Large of Pennsylvania from 1682 to 1801 (James T. Mitchell et al. 1700–1809) at 335, 496, 1055.

95 Digest of the Laws of Pennsylvania, from the Year One Thousand Seven Hundred to the Sixth Day of June, One Thousand Eight Hundred and Eighty-Three (John Purdon & Frederick C. Brightly 1885) at 1522.

96 Stewart’s Purdon’s Digest: A Digest of the Statute Law of the State of Pennsylvania from the Year 1700 to 1903 (Ardemus Stewart & John Purdon 1905) at 4354.
The methods of appointing chaplains for state prisons are described in statutes from 1700–1894 and 1907. No similar appointments for courtroom chaplains or descriptions of their duties, compensation, or prayers were catalogued.

40. **Rhode Island**: The state of Rhode Island allocated funds to provide for prison chaplains in 1867 and 1872. The state also statutorily designated chaplains to serve in military regiments in several years, including 1844, 1857, 1882, 1890, and 1896. Courtroom chaplains were not similarly designated.

41. **South Carolina**: Like most of the previously listed states, South Carolina employed chaplains as members of military staff—as evidenced in an example statute from 1881 to 1882—and in prisons, as exemplified in statutes from 1873, 1881–1882, 1893, and 1902. And like many of the aforementioned states, South Carolina allocated chaplains to its...
state legislature, including by statute in 1893\textsuperscript{112} and 1902.\textsuperscript{113} Unlike the above states, South Carolina also mandated the employment of a ceremonial chaplain for the state’s university in 1873,\textsuperscript{114} 1881–1882,\textsuperscript{115} and 1893.\textsuperscript{116} Like other states, South Carolina has no statutes or appropriations for chaplains leading prayers in courts.

42. **Texas**: Texas has provided for the compensation of a Chaplain for the Senate by statute, including in 1852.\textsuperscript{117} Chaplains have been referenced in the prison and asylum context since at least the early 1900s.\textsuperscript{118} But it does not appear that the State of Texas has ever designated an appropriation for, or otherwise mentioned by statute, a courtroom chaplain or other officer with duties that include opening a courtroom session with prayer.

43. **Virginia**: The state provided statutes for military chaplains in 1887,\textsuperscript{119} 1899,\textsuperscript{120} and 1904,\textsuperscript{121} and for prison chaplains in 1887,\textsuperscript{122} 1891,\textsuperscript{123} and 1899.\textsuperscript{124} A chaplain working for the state Assembly was also mentioned in a law journal article from 1877.\textsuperscript{125} No reviewed sources indicated any state appropriations or other designations for courtroom chaplains.

\textsuperscript{112} Revised Statutes of South Carolina (1894), at 18.
\textsuperscript{113} Code of Laws of South Carolina, 1902 (1902) at 25.
\textsuperscript{114} Revised Statutes of the State of South Carolina (1873) at 258.
\textsuperscript{115} General Statutes and the Code of Civil Procedure of the State of South Carolina, Adopted by the General Assembly of 1881–82 (1882) at 311.
\textsuperscript{116} Revised Statutes of South Carolina (1894) at 385.
\textsuperscript{117} Laws of Texas 1822-1897 (H.P.N. Gammel 1898) (establishing “For pay of Chaplain to the Senate, three hundred dollars” in 1852).
\textsuperscript{118} Laws of Texas: Supplement Volume to the Original Ten Volumes, 1822-1897 (H.P.N. Gammel 1902) (listing an insane asylum chaplain in 1901 and a house of correction and reformatory chaplain in 1902, each with appropriations).
\textsuperscript{119} Code of Virginia: With the Declaration of Independence and the Constitution of the United States; and the Constitution of Virginia (1887) at 141.
\textsuperscript{120} Code of West Virginia (John A. Warth 1900) at 163.
\textsuperscript{121} Code of Virginia as Amended to Adjournment of General Assembly 1904 Together with All Other Statutes of a General and Permanent Nature Then in Force, including Tax Bill (John G. Pollard 1904) at 158.
\textsuperscript{122} Code of West Virginia (John A. Warth 1887) at 963.
\textsuperscript{123} Code of West Virginia (John A. Warth 1891) at 1241.
\textsuperscript{124} Code of West Virginia (John A. Warth 1900) at 1036.
\textsuperscript{125} William. L. Royall, *Virginia Colonial Money, and Tobacco’s Part Therein - Tobacco Warehouses, &c.*, 1 Va. L.J. 447, 461 (1877).
44. The lack of documented state involvement with chaplains in the courtroom setting during the Founding era—a time when the states almost uniformly designated chaplains in numerous other government institutions and made appropriations for them—provides compelling evidence that courtroom prayer was not historically a common practice in the United States.

45. Balanced against this deafening silence is the evidence offered by Defendants in their motions to dismiss. (Documents 23-3, 24, and 30). I turn now to discuss why none of the evidence provided by Defendants demonstrates a common, widely-held practiced—or even an infrequent or sporadic practice—of daily courtroom prayers at the time of the Founding or after.

II. The examples of prayer and other practices cited by the Defendants do not indicate that courtroom prayer was a common practice in the Founding era.

46. The Defendants in this case offer a few examples of prayer that they characterize as happening in courtrooms in the early national period. They claim that “courtroom prayer was part of the normal practices of the local community” at this time and that modern courts “engage in these solemnizing prayer practices because they are deeply embedded in the history and tradition of America’s judiciary.” (Document 23-3 at 14). But upon review, even the scant evidence offered is subject to a very different interpretation.

47. Defendants’ offered evidence does not support the conclusion that the type of courtroom prayer practice at issue in this lawsuit is supported by any common, historically-based practice.

A. Opening a court with prayer while riding circuit in the Founding era was a fundamentally different act that served a very different purpose than opening daily modern court sessions with prayer.

48. Many of the examples that Defendants characterize as, or conflate with, opening daily court sessions with prayer do not actually involve daily court practices at all. For instance, the Defendants make much of the fact that when Chief Justice John Jay first rode circuit he
agreed to follow what “has been generally the Custom in the New England States,” of having a “Clergy[man] attend as Chaplain.” (Document 24 at 13). But when put in their proper historical context, these examples of prayer served a fundamentally different purpose than prayer to open daily sessions of a modern American court.

49. Under the Judiciary Act of 1789, members of the Supreme Court “rode circuit,” presiding over grand juries and trials in the circuit courts. When the Chief Justice and associate justices rode circuit to hold court throughout the new United States, their presence marked a new kind of court in American history—a national court operating inside a specific state. Thus, some justices at this time were willing to defer, to some extent, to local practice. They incorporated prayer into the “opening” of the court, which in this context meant the first impaneling of a grand jury. But they did not open each day of court business with prayer.

50. Defendants have presented some evidence that the practice of inviting clergy to give a prayer when justices temporarily established courts was common in at least a few states in the Founding era. They cite, for instance, sixteen reports concerning the opening of temporary courts in Massachusetts, New Hampshire, and Rhode Island. (Document 23-3 at 14 n.7, 15–17).

51. Most of these sixteen reports include the phrase “[on this date] the Circuit Court of the United States was opened in this town,” or a similar phrase that is best interpreted as meaning that the court was set up or established on that date, not that another day of an ongoing court session had begun.

52. None of these sixteen reports demonstrate that prayers were recited daily at these courts. Instead, they all support the alternate conclusion that these prayers were only given on

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126 Act of Sept. 24, 1789, To establish the Judicial Courts of the United States (1 Stat.) 73, 74–75.
one day, the day that the grand jury was impaneled, even though the judges and grand juries would likely work for several days.

53. When seen in their proper historic context, these examples are best understood as a diplomatic attempt to respect state sensibilities. This is particularly clear when we remember that Chief Justice Jay began his career as a diplomat during the Revolution and was one of the negotiators of the Treaty of Paris which secured American Independence in 1783. He then served as the Secretary of Foreign Affairs under the Articles of Confederation and would later return to diplomacy in the mid-1790s, with the negotiation of the famous Jay Treaty.

54. It is important to note the fragile diplomatic context in which Chief Justice John Jay approved of prayer in these periodic ceremonies celebrating the opening of a circuit court.

55. Chief Justice Jay presided over a circuit that included the New England States and New York State. His role was new to the American nation. He was a New Yorker—the former Chief Justice of New York—who was presiding over courts in New England. These were new courts, and as the process of ratifying the Constitution showed, there was considerable opposition to the Constitution in New Hampshire and Massachusetts, and strong opposition in Rhode Island, which had refused to send delegates to the Constitutional Convention and did not ratify the Constitution until May 29, 1789, nearly two years after the scheme of government went into effect.127 Thus, Jay—as a “foreign jurist” from New York—bent over backwards to be diplomatic and respectful of local practice and procedure. He allowed local ministers to pray at the opening of the court because that was the practice in these New England states.

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56. It is also important to remember that at this time Massachusetts, Connecticut, and New Hampshire had established churches and restricted office holding to Protestants. In his desire to enhance the authority of the new Constitution and the new national court system, Jay tipped his hat to the practices of New England during the initial charge to the grand jury, which marked the new court session. This early practice disappeared in the early nineteenth century.

57. Additionally, it is important to note the legal context surrounding the early prayer examples cited by the Defendants. Many of the examples come from a time before the ratification of the Bill of Rights, a time when there was no prohibition on the federal government creating an “establishment” of religion. For instance, Defendants note that Rev. Dr. Howard directed a prayer to the grand jury to open the Circuit Court in Massachusetts on May 10, 1790. This example is accompanied by six other specific examples of prayer that all took place before the ratification of the First Amendment. As such, these examples can tell us very little about how to interpret the Establishment Clause.

58. Finally, to the extent that all the prayer examples provided by the Defendants were given to grand juries, these prayers took place at events that served a fundamentally different function than daily court sessions. Like today, a grand jury in the Founding era served a different purpose than a regular court session, and thus raises different considerations.

59. Grand juries, then as now, are substantially different from trial courts. They did not serve to determine guilt or to set punishments. Rather, grand juries in early America, as now, called witnesses to determine whether to bring charges against a potential defendant. The witnesses testifying before the grand jury would most likely not have been present when these

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128 A more complete discussion of religious tests for office holding can be found below at ¶¶ 60–74.
129 Document 23-3 at 14 n.7; Document 24 at 13–14.
130 Document 23-3 at 15–16 nn.10–15 (listing 6 examples); Document 24 at 14 (listing the same 6 examples).
ceremonial prayers were invoked, since witnesses were not typically present in the grand jury room and would have been called into the room only when their testimony was needed. Nor would the potential defendants, those potentially jeopardized by the outcome of the grand jury process, have been present for these periodic court-establishing prayers.

**B. Founding-era practices must be understood as a product of their unique place in history.**

60. In the wake of the Revolution, some, but not all, state legislatures provided for invocations and prayers at the beginning of a legislative session or at the beginning of each legislative day. And many states also incorporated chaplains into their state militias and prisons. But these Founding-era practices are of limited use when it comes to evaluating what government activity the Establishment Clause should permit and prohibit in our modern, pluralistic society.

61. Practices that existed at the American founding must be understood in light of the limited religious diversity and simultaneous Protestant domination of American society at the Founding. At the Founding the vast majority of Americans were Protestants, with only a small number of Catholics in the nation, and a smattering of Jews. Of the 3 million or so free people in the United States when the Constitution was written, it is estimated that there were between 25,000 and 35,000 Roman Catholics. There were no more than 3,000 Jews in the

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131 The first U.S. Census, in 1790, found 59,527 free blacks in the United States. About 55% of them lived in the seven states (Connecticut, Delaware, Georgia, Maryland, Rhode Island, South Carolina, and Virginia) that did NOT allow black suffrage. Probably there were no more than 5,000 eligible black voters in the nation, and most of these would also have been Protestants. Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals By Race, 1790 to 1990, and By Hispanic Origin, 1970 to 1990, For The United States, Regions, Divisions, and States*, tbls. 1, 21, 22, 25, 35, 54, 55, 61, U.S. CENSUS BUREAU, WORKING PAPER SERIES NO. 56 (2002), available at [http://mapmaker.rutgers.edu/REFERENCE/Hist_Pop_stats.pdf](http://mapmaker.rutgers.edu/REFERENCE/Hist_Pop_stats.pdf).

132 The first U.S. Census, in 1790, found about 3.2 million free people in the United States and just under 700,000 slaves. *Id.* at tbl. 1.

133 In 1785, Father John Carroll estimated there were about 25,000 Catholics in the nation, mostly in Maryland and Pennsylvania, and that about 3,000 of these were slaves. Margaret McGuinness, *Catholicism in the United States*, OXFORD ONLINE RESEARCH ENCYCLOPEDIA, [http://americanhistory.oxfordre.com/view/10.1093/acrefore/](http://americanhistory.oxfordre.com/view/10.1093/acrefore/)
country in the period between the Revolution and the writing of the Constitution, and there may have been as few as 1,000 to 1,500.  

62. The most significant limitation in looking to history to determine what should be permissible today is that at the time of the Founding, no state was required to maintain any separation between religion and the government. With the exception of New York State, every one of the new states had a religious test for office holding and most had some form of established church. Some states maintained these established churches until after the Civil War, and it was not until the 1960s and 1970s that the U.S. Supreme Court finally prohibited state religious tests for public office holding.  

63. Religious favoritism permeated the early state constitutions, and when combined with the Protestant hegemony in the nation, set the stage for states to impose majoritarian religious values on the population through the use of official prayer and government-designated chaplains. Religious favoritism was established in part through: 1) clauses proclaiming free religious exercise that were internally contradictory or limited to those practicing certain religions; 2) religious tests for holding public office that undermined and contradicted the protection of free exercise; and 3) direct state support for particular faiths—which we would call state establishments of religion today.

64. Every early state constitution recognized some right to free exercise, although many were incomplete. They were also often juxtaposed with religious tests for office holding that contradicted the free exercise provisions. During and after the Revolution, every state that

9780199329175.001.0001/acrefore-9780199329175-e-319; Richard Middleton, Colonial America: A History to 1763 (Oxford: Blackwell Publ’g 2003) at 225.
wrote a constitution except New York had a religious test for office holding. Some states
limited office holding to Protestants; others to Christians, and one, Delaware, limited it to
Trinitarians.

65. New Jersey illuminates the often contradictory notion of “religious liberty” in the
new nation. The state’s first constitution contained assertions of religious freedom while
providing second class citizenship—at best—for people of the “wrong” faith. Article 18 of New
Jersey’s first constitution provided:

That no person shall ever, within this Colony, be deprived of the inestimable privilege of
worshipping Almighty God in a manner agreeable to the dictates of his own conscience;
nor, under any pretence whatever, be compelled to attend any place of worship, contrary
to his own faith and judgment; nor shall any person, within this Colony, ever be obliged
to pay tithes, taxes or any other rates, for the purpose of building or repairing any other
church or churches, place or places of worship, or for the maintenance of any minister or
ministry, contrary to what he believes to be right, or has deliberately or voluntarily
engaged himself to perform.

This provision would provide full free exercise for anyone with theistic beliefs in a Christian or
Jewish tradition. It might not have been interpreted to protect atheists, agnostics, or perhaps
deists. There is no evidence of any Buddhists, Hindus, or members of other non-Westerns faiths
in the state at the time. Few Native Americans remained in New Jersey and it is not clear if the
provision would have protected traditional Indian religious practices.

136 THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE BILL OF RIGHTS (New York:
Oxford Univ. Press 1986); J. Jackson Barlow, Officeholding: Religious-Base Limitations in Eighteenth-Century
State Constitutions, in RELIGION AND AMERICAN LAW: AN ENCYCLOPEDIA 346-48 (Paul Finkelman, ed., New York:
Garland 2000).

137 The Delaware Constitution in 1776 prescribed the following oath for officeholders:
ART. 22. Every person who shall be chosen a member of either house, or appointed to any office or place
of trust, before taking his seat, or entering upon the execution of his office, shall take the following oath,
or affirmation, if conscientiously scrupulous of taking an oath . . .
‘I, A B. do profess faith in God the Father, and in Jesus Christ His only Son, and in the Holy Ghost, one
God, blessed for evermore; and I do acknowledge the holy scriptures of the Old and New Testament to be
given by divine inspiration.’

66. This provision is followed by a striking example of the limits of religious freedom in early America. Section 19 of the New Jersey Constitution provided:

That there shall be no establishment of any one religious sect in this Province, in preference to another; and that no Protestant inhabitant of this Colony shall be denied the enjoyment of any civil right, merely on account of his religious principles; but that all persons, professing a belief in the faith of any Protestant sect, who shall demean themselves peaceably under the government, as hereby established, shall be capable of being elected into any office of profit or trust, or being a member of either branch of the Legislature, and shall fully and freely enjoy every privilege and immunity, enjoyed by others their fellow subjects.\footnote{NEW JERSEY CONST. OF 1776, sec. XIX, available at \url{http://www.state.nj.us/njfacts/njdoc10a.htm}.}

Thus, in New Jersey, Catholics and Jews could practice their faith, and atheists, agnostics, and deists could gather as they wished, but they could not hold public office and might be “denied the enjoyment of any civil right, merely on account of his religious principles.”

67. By the time independence from Great Britain was achieved in 1783, every state offered some guarantees of religious liberty, or at least toleration. But these guarantees were not equivalent to what Americans expect today.

68. Pennsylvania’s experience illustrates these problems well. At the Founding it had the largest free population of any state and thus had more voters than any other state. And as a colony and early state, Pennsylvania was both renowned for its religious diversity and celebrated for its religious tolerance. Founded as a haven for Quakers, Mennonites, and other pietists who were persecuted in England and Europe, William Penn’s colony famously welcomed and tolerated Europeans of all faiths. Adherents of virtually all known Protestant denominations were found in the colony. Catholics worshipped freely, with the first public Catholic Mass celebrated in Philadelphia in 1707. In 1733, Saint Joseph’s Church (today known as Old Saint Joseph’s Church) became the first urban Catholic house of worship in America.\footnote{18th Century, Old Saint Joseph’s, \url{https://oldstjoseph.org/about-osj/history/18th-century/}.} In 1785,
Pennsylvania had two Catholic priests (all other Catholic priests in the nation were in Maryland) and about 7,000 members of the faith.\textsuperscript{141} Jews arrived in the colony in the 1680s and Congregation Mikveh Israel was established in 1740, more than three decades before the Revolution.\textsuperscript{142} There were probably no more than 400 Jews in the state at the time of Independence.

69. Given this history and demographic makeup, the contradictions of the Pennsylvania Constitution, and lack of full religious freedom in the state, underscores the sometimes precarious status of “religious freedom” in the new nation. The Pennsylvania Constitution of 1776 guaranteed religious freedom for all theists:

That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding: And that no man ought or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent: Nor can any man, who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship.\textsuperscript{143}

70. Under this provision, Pennsylvania Protestants, Catholics, and Jews had full civil rights in the state. But such rights were not guaranteed to atheists or agnostics, as well as Hindus, Buddhists, and other non-monotheists. It is not clear if this would also have applied to deists—such as Pennsylvania’s most famous citizen, Benjamin Franklin—who believed in a supreme being, but not “God” according to traditional Christian values.

71. Full “civil rights” did not, however, necessarily include the right to sit as judges or serve in the executive or legislative branches of the state, or perhaps in any aspect of state

\textsuperscript{142} Our History, Congregation Mikveh Israel http://www.mikvehisrael.org/e2_cms_display.php?p=past_our_history.
government. The constitution provided that every member of the state legislature “before he takes his seat, shall make and subscribe the following declaration: viz: I do believe in one God, the creator and governor of the universe, the rewarder of the good and the punisher of the wicked. And I do acknowledge the Scriptures of the Old and New Testament to be given by Divine inspiration.”

It is not clear if this clause was applied to other government officials, but the implications of such religious tests are clear.

72. Under this provision such important Pennsylvania leaders as Dr. Benjamin Rush and Thomas Paine would have been ineligible for the legislature because of their deism. Lt. Col. David Salisbury Franks, a native of Philadelphia, who served under Washington (among others) during the Revolution and as a diplomat after the Revolution, could not have served in the legislature—or perhaps in any other state office—because he was Jewish. During the Revolution the Pennsylvania government appointed Major Solomon Bush to be deputy adjutant-general of the state militia, but as a Jew he could not have served in the state legislature or perhaps in any other state office. Oddly, Benjamin Franklin was the president of the Convention that wrote this Constitution, but his deism might have precluded him from sitting in the legislature once the Constitution was in place.

73. In 1790, Pennsylvania adopted a new constitution, which abandoned the narrow religious test for office holding of the 1776 document that blatantly discriminated against Jews and other non-Christians. But the new clause still contained a religious test for office holding. Furthermore, this new clause expanded the religious test beyond the legislature, to include “any office or place of trust” under the control of the Commonwealth—this would have included judges, justices of the peace, and even jurors, who also held an “office or place of trust” under

144 PENNSYLVANIA CONST. OF 1776, Plan or Frame of Government for the Commonwealth or State of Pennsylvania, sec. 10.
the constitution. It read: “That no person, who acknowledges the being of a God and a future state of rewards and punishments, shall, on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this commonwealth.”145 Atheists, agnostics, perhaps deists, and followers of non-Western polytheistic or non-theistic faiths, such as Hindus or Buddhists, could not have held office under this constitution.146

74. The explicit religious tests for office holding in New Jersey, Pennsylvania and other states guaranteed that prayer initiated by officeholders—including judges—would be of a particular faith. In New Jersey, they would have been Protestant, in Massachusetts they would have been Congregationalist or Unitarian, and in Delaware they would have been Trinitarian Christians. Thus, when we look to the earliest adoption of government-designated chaplains in the nation we see that they were defined by faith and denominations.147

145 PENNSYLVANIA CONST. OF 1790, art. IX, sec. IV.
147 The history of legislative prayers is a good example of how such government prayer practices were made explicitly sectarian. See Christopher C. Lund, The Congressional Chaplaincies, 17 WM. & MARY BILL RTS. J. 1202 (2009). The United States House of Representatives did not appoint a Roman Catholic chaplain until 2000, when Father Daniel P. Coughlin of Chicago became the first Roman Catholic chaplain in the 210 years history of the House of Representatives. Sheryl Henderson Blun, Congress: First Catholic Chaplain Emphasizes House Unity, Christianity Today (May 22, 2000), available at www.christianitytoday.com/ct/2000/may22/11.22.html; History of the Chaplaincy, Office of the Chaplain, UNITED STATES HOUSE OF REPRESENTATIVES, http://bit.ly/2wlwNqH (last visited Mar. 29, 2018). The Senate had a Catholic chaplain, Father Charles Pise, for one year, in 1832–33, but has never had a Catholic chaplain since. Lund, The Congressional Chaplaincies, at 1187–90 and n.92. Neither body has ever had a Jewish, Mormon, or Orthodox Christian chaplain. Indeed, from 1789 to the present, the U.S. Senate has employed 61 chaplains who were Protestant, and one (who served for a year) who was Catholic. The 61 Protestant chaplains came from just eight Protestant denominations, and more than four fifths of these chaplains came from just three denominations. Senate Chaplain, UNITED STATES SENATE, http://bit.ly/2em2A0L (last visited Mar. 29, 2108).
C. **Historical practices should not serve as a guide for modern constitutional interpretation, especially when those practices did not persist through even the nineteenth century.**

75. This history is relevant to the present case because it provides important context for any early examples of state involvement with chaplains or religious practices. Direct government involvement with religion at the state level was consistent with the understanding, prior to the incorporation of the Fourteenth Amendment,\(^{148}\) that the Establishment Clause of the First Amendment did not prohibit state establishments. Thus, the examples of early state prayers and chaplaincies are of limited value when analyzing modern United States practice or constitutional law.\(^{149}\)

76. This historical context is particularly relevant with regard to courtroom prayer. Defendants characterize courtroom prayer as “a judicial tradition older than the Republic itself.” (Document 24 at 1). But any government prayers “older than the Republic” took place at a time when there was no separation of church and state, and when the church was legally an arm of the state. Before the creation of the Republic the American settlements were colonies within the British Empire. The Church of England (commonly called the Anglican Church) was the legally official church of the Empire. The King (to whom all Americans owed fealty and support) was also the head of the Church of England. The claim that pre-Revolutionary practices support courtroom prayer ignores the entire history of the American Revolution, which was to reject the Crown and, by extension, the rule of the Anglican Church. To conclude that practices “older than the Republic itself” are relevant to the modern United States ignores the critical and


\(^{149}\) See, *e.g.*, *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (applying First Amendment free speech and free exercise protections against state action through incorporation in the Fourteenth Amendment’s Due Process Clause).
essential impact of the American Revolution, the Declaration of Independence, and the eventual adoption of the Constitution, and implies that this history did not fundamentally change the relationship between church and state in America.

77. The Founders created a new nation, the first in the western world, that did not have any established church and implicitly (and later in the First Amendment explicitly) separated government from religion. The Declaration of Independence asserted that “governments are instituted among men, deriving their just powers from the consent of the governed,” and the creation of the new nation rejected the notion of a religious basis for laws or government.

78. During an early crisis in the Constitutional Convention, Benjamin Franklin suggested that the sessions begin with a prayer as a way of achieving greater harmony among the delegates. This was not a public meeting, but a meeting that was explicitly closed to the public. The delegates, famously (but politely) ignored Franklin’s suggestion and went about their business without any prayer. The final document flatly prohibited the use of religious tests for office holding and allowed people to take office by “affirmation” as well as oath, thus making sure that no one would be prevented from serving the nation through an “oath” that violated that person’s religious, or non-religious, scruples.

79. Later, after the adoption of the Constitution, Congress passed, and the states ratified, what became the First Amendment, which of course prohibits an establishment of religion at the federal level. At the time there were state establishments, and so prayer in state

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151 U.S. Const., art. VI, cl. 3 (“The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”).
bodies, including courts, would have been permissible under the federal Constitution in this early period. The Establishment Clause of the First Amendment would not be incorporated to the states (through the Fourteenth Amendment) until the late 1940s. Thus, states were free until this time to employ chaplains and have prayers at government-sponsored events.

80. It is incredibly significant then, that even with no legal barriers to opening state court sessions with prayer, there are very few examples of states doing so after 1800. The Defendants claim that the “tradition” of court prayer “has continued into the modern era,” (Document 24 at 18) but the lack of documentation of established state court prayer practices that persisted even through the nineteenth century cuts against this conclusion.

D. Courtroom practices that have persisted into the modern era would not have been considered “prayers” during the Founding era.

81. Defendants offer up several examples of modern courtroom practices that do have historical roots. But none of these enduring practices involve what would have been considered a “prayer” at the time of the Founding.

82. The United States Supreme Court famously opens its sessions with a statement that references God, but lacks the reverential language and humility that we normally associate with prayer. The marshal of the Court enters the courtroom and announces to all present: “The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States. Oyez! Oyez! Oyez! All persons having business before the Honorable, the Supreme Court

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153 Conversely, the United States Congress appointed chaplains for both the House and the Senate very early on in our country’s history. And while it has not always done so, Congress maintains this practice today. In the nineteenth century and well into the twentieth century, Congress and some state legislatures appointed or hired official chaplains. Some state legislatures also had guest chaplains or others who offered invocations. Many state legislatures have now abandoned the use of chaplains and some have also abandoned altogether having prayers or invocation to open their sessions.
of the United States, are admonished to draw near and give their attention, for the Court is now sitting. God save the United States and this Honorable Court!”¹⁵⁴ In their motions to dismiss, Defendants significantly truncated this chant, offering only the last sentence. (Document 23-3 at 13 and Document 24 at 1, 12). However, the context of the full quotation shows that the chant of the marshal is neither religious nor reverential.

83. Only the last sentence of this “chant,” as the Supreme Court website calls it,¹⁵⁵ makes any reference to God, and that sentence is not reverential. Members of the Court have disagreed about whether this chant should be called a “prayer.”¹⁵⁶ Most of the language in the chant is about the Court and politics. It is not said in a reverent manner; it is primarily addressed to “All persons having business before the Honorable Court,” rather than to God; and it is not prefaced by any language normally associated with prayer, such as the statement “let us pray.”

84. Other non-prayer examples mentioned by the Defendants include statements given at sentencing, such as a call for God to “have mercy on your souls,” (Document 24 at 17–18) or ending the oath for prospective jurors with the phrase “so help you God.” (Document 24 at 16–17).

85. Just as these practices would not be considered “prayers” by modern standards, they also would not have been considered prayers at the time of the Founding. These practices did not include admonitions to bow one’s head or to say “Amen,” or to observe any other

¹⁵⁶ The late Justice Scalia called it a prayer in his dissent in McCreary County v. ACLU of Kentucky, 545 U.S. 844, 885–86 (2005) (Scalia, J., dissenting) (describing both “God save the United States and this Honorable Court” and the phrase “God Bless America” as prayers), and later referred to it as an “invocation” in Lee v. Weisman, 505 U.S. 577, 635 (1992) (Scalia, J., dissenting). Other opinions have called it a prayer, invocation, or a supplication: See Chief Justice Burger’s opinion for the Court in Marsh v. Chambers, 463 U.S. 783, 787 (1983) (calling it an “invocation”), Justice Brennan’s dissenting opinion in Marsh, 463 U.S. at 818 (calling it a “formalistic recitation”), and Justice Douglas’s concurrence and Justice Stewart’s dissent in Engel v. Vitale, 370 U.S. 421, 439, 448 (1962).
traditional response to a prayer. And the language in these oft-repeated phrases was not addressed to God, as a prayer would have been.\textsuperscript{157}

86. Prayers in the Founding era were composed quite similarly to modern prayers and contained essentially the same markers. They regularly invoked the Lord, Almighty God, Jesus, Christ, or the Holy Ghost. They quite often beseeched God for favor, love, strength, forgiveness, etc. They were deeply devotional and even supplicatory. A typical prayer ended with “Amen.”\textsuperscript{158}

87. There is no question that some jurists in this period used religious language. Some talked about “God” and Christianity, especially when swearing in jurors or sentencing people to death. But such statements were not prayers said from the bench and they would not have been understood as prayers by lay persons at the time. The judges did not say, “let us pray,” they did not invoke the Lord, Jesus, or the Holy Ghost, as most eighteenth and nineteenth century clergymen did in their prayers. No one in the courtroom was asked to join in the statements of the judge or respond in any way. These statements from the bench did not require bowed heads, an “Amen,” or any other traditional markers of a prayer.

\textsuperscript{157} This Report does not delve into a full examination of the history or evolution of prayer. Some example prayers from the Founding era will suffice to demonstrate that a Founding-era prayer would be readily recognizable to a modern religious practitioner or lay person. \textit{See, e.g.,} THE COMMON BOOK OF PRAYER (Oxford Univ. Press 1791), available at https://babel.hathitrust.org/cgi/pt?id=bc.ark:/13960/t4dn9rw1t (containing numerous examples of prayers, mostly addressed, “O Lord” or to “Almighty and everlasting God” and typically ending with “Amen.”). Many other collections of Founding-era prayers exist: https://gatheredprayers.wordpress.com/category/church-militantkingdom-of-god-1800s/; https://acollectionofprayers.wordpress.com/tag/18th-century/; https://acollectionofprayers.wordpress.com/tag/19th-century/.

\textsuperscript{158} Without belaboring the point, here’s an example:

Almighty God, give us grace that we may cast away the works of darkness, and put upon us the armour of light, now in the time of this mortal life, (in which thy Son Jesus Christ came to visit us in great humility;) that in the last day when he shall come again in his glorious majesty, to judge both the quick and the dead, we may rise to the life immortal, through him who liveth and reigneth with thee and the Holy Ghost, now and ever. Amen.

THE COMMON BOOK OF PRAYER (Oxford Univ. Press 1791) at 69 (this is the first “collect” entry under “The Collects, Epistles, and Gospels, To be used throughout the Year”) (with “f’s changed to “s’s for ease of reading).
CONCLUSION

88. After an extensive primary source review, there is virtually no evidence that courtrooms in any state regularly opened with prayer at the time of the Founding and no evidence that courtroom prayer has endured as a practice over time. While many states designated chaplains for various government bodies, including legislatures, militias, and prisons, no similar designations were found for court chaplains. This lack of evidence, coupled with the ample evidence of designated chaplains in other contexts, leads me to conclude that daily courtroom prayer simply was not done at the time of the Founding or after.

89. Defendants’ evidence does not alter this conclusion. Most of the offered examples of “prayer” in American courts are not examples of prayer at all and would not have been understood by those alive in the Founding era as prayers.

90. The few prayers identified by Defendants in the court setting are best understood not as daily courtroom prayers, but as a prayer to mark the occasion of a Supreme Court Justice opening a temporary federal court when arriving in a new town while riding circuit. These prayers served a fundamentally different purpose than opening a daily court session with prayer.

91. In those early years, prayers to mark the temporary opening of a federal court are best understood as a diplomatic concession by the new Supreme Court Justices in order to gain legitimacy in the eyes of those states that had established churches and openly favored some religions over others. Prayers had been practiced in some pre-Revolutionary courts, and initially the new federal courts deferred to the “Custom in the New England States,” at least when it came to establishing a temporary federal court with the impaneling of a grand jury. This concession by the Justices began before the adoption of the Bill of Rights, and thus at a time where there was no First Amendment injunction against an “Establishment of Religion.” Some of the federal courts continued this practice after the adoption of the First Amendment, but the practice had mostly disappeared before the Revolution of 1800, which sent Thomas Jefferson to the presidency and led to an expansion of democracy and an invigorated sense of separation of church and state.
92. Jefferson’s call for a “wall of separation”\(^{159}\) between religion and government carried the day in American history, as state establishments fell and religious tests for office holding disappeared. This all occurred well before the Fourteenth Amendment and the eventual incorporation of the First Amendment to the states. A pre-Revolution practice that died out quickly under the newly-established federal Constitution and did not persist into the nineteenth century should not be used to justify a modern-day practice that otherwise breaches the “wall of separation of Church and State.” Such reliance ignores nearly two hundred years of history and one of the foundational tenets on which America was founded.

Dated: March 30, 2018

\(^{159}\) Thomas Jefferson, *Letter to the Danbury Baptist Church* (Jan. 1, 1802), available at [https://www.loc.gov/loc/lcib/9806/danpre.html](https://www.loc.gov/loc/lcib/9806/danpre.html) (“Believing with you that religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, & not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should ‘make no law respecting an establishment of religion, or prohibiting the free exercise thereof,’ thus building a wall of separation between Church & State.”)