No. 21-20279

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FREEDOM FROM RELIGION FOUNDATION, INC.; JOHN ROE,

Plaintiffs - Appellees,

v.

WAYNE MACK, INDIVIDUAL CAPACITY,

Defendant - Appellant.

On Appeal from the United States District Court for the Southern District of Texas, Houston Division, Case No. 4:19-cv-1934

BRIEF OF PLAINTIFFS-APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

No. 21-20279, *Freedom from Religion Foundation, Inc.; John Roe v. Wayne Mack, in his Individual Capacity*

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

The Appellees respectfully request oral argument, which they believe would be helpful to the Court in understanding the complex factual and legal issues that are stake in this appeal.

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INTRODUCTION

Judge Mack uses his judicial office to advance his personal religious agenda. Attorneys and litigants are coerced to engage in a religious practice whether they want to or not. The "freedom" to leave the courtroom is a fiction.

There is no historical precedent for his actions. Judge Mack has not been able to point to a single courtroom that followed his practice at the time of the Founding, let alone on a continual basis since that time. This Court should follow on the heels of the Fourth Circuit in declaring his anomalous practice unconstitutional.

ISSUE PRESENTED

Whether opening daily courtroom sessions with a prayer delivered by an invited chaplain violates the Establishment Clause.

STATEMENT OF THE CASE

The Parties

Defendant-Appellant Wayne Mack has served as a Justice of the Peace in Precinct 1 of Montgomery County, Texas, since May 1, 2014. ROA.2106. As such, he performs many functions, including serving as the County Coroner and presiding in two courtrooms, one in Willis and

another in Montgomery. ROA.2106. In these courtrooms, Judge Mack hears civil cases and criminal matters involving both juveniles and adults. ROA.1653, 1549-50.

The Appellees are John Roe, a pseudonymous attorney who handles landlord-tenant disputes in Montgomery County, and the Freedom from Religion Foundation, a nonprofit membership organization with many Texan members, including John Roe. ROA.2105-06. John Roe is an atheist who, until June 2017, regularly appeared in Judge Mack's courtroom. ROA.1615, 1679 (documenting ten appearances for 28 clients between Aug. 2015 and July 2017). Since then, Roe has declined business that would require him to appear before Judge Mack to avoid being pressured to engage in prayer. ROA.2110.

Judge Mack's Self-Proclaimed Crusade to Spread the Gospel

As a Christian, Judge Mack personally seeks to spread the gospel of Jesus Christ. ROA.1560. He described this mission in a book he published entitled "The Directed Path: Using God's Compass." ROA.1560-61. The book is "a continuation of Judge Mack's commitment to strengthening individuals, families, and the community by helping

them turn to the only true source of peace and happiness in life." ROA.1702. The book quotes the Bible and evangelist Franklin Graham to encourage readers to "be a light of the Gentiles," "take a stand for God," and "testify boldly that He exists." ROA.1600-02. As he puts it, "Those of us who have been blessed with the knowledge of Jesus Christ are here to spread His gospel." ROA.1602.

This self-proclaimed agenda figured prominently in Judge Mack's campaign for Justice of the Peace. His original campaign fliers emphasized that he "majored in Theology" and "Served as [a] Sunday School teacher & Lay Youth Minister for 15 years." Under the heading "Continuing the Service," the fliers indicated that he "Believes in true Servant Leadership of Faith, Family and Freedom" and described him as a "Proven Servant Leader." ROA.1708.

One of his campaign promises was to institute a chaplaincy program and open his court with prayer. ROA.1543-44, 1595, 2108. As he explained, the program is "a campaign promise made and fulfilled, to open my court with prayer" and one "that God wanted in place, for His larger purpose." ROA.1510, 2108. He has further explained, in response to complaints about the prayer practice, that the prayers are

designed to show "that God has a place in all aspects of our lives and public service." ROA.1142.

The Chaplaincy Program's Inception

Judge Mack began inviting ministers to open his court sessions with prayers four days after being sworn in. *See* ROA.1499. The following month, in June 2014, he created a formal "Chaplaincy Program," sending a mass mailing on official letterhead inviting exclusively Christian religious leaders to meet to discuss the program. ROA.1524-25, 1570, 1572-76.

Judge Mack held the first official training for the Program in September 2014. ROA.2106. Only Christian religious leaders were invited to attend. ROA.1700-01, 1703-04. At the training, Judge Mack used his "Justice Court Chaplaincy Handbook," which stated that "[t]he role of the JCC Chaplain is to be a representative of God[,] bearing witness to His hope, forgiving and redeeming power." ROA.2107. The first page of the Handbook featured an image of the Chaplaincy Program badge, the central feature of which was a Christian cross:

Justice Court
Chaplaincy Handbook

ROA.2106-07. The Handbook described the Chaplaincy Program as a "ministry" (ROA.1582, 1588); stated that the "role of the JCC Chaplain is to be a representative of God bearing witness to His hope, forgiving and redeeming power" (ROA.1582, 1588); and stated under the heading "Qualifications and Requirements" that Chaplains and Assistant Chaplains must "Maintain Biblical, ethical and moral standards" (ROA.1584, 1589).

Thereafter, the Program became the source of the chaplains delivering courtroom prayers. ROA.1718. After attending a training, Chaplains are put on a list maintained by court staff. ROA.2107. To schedule chaplains, a court employee sends an email to all chaplains on the list, advising them of available dates. ROA.1643-44. An advertisement for a prayer breakfast hosted by Judge Mack in October

2014 included a list of the Program's 50 members, all of whom were Christian religious leaders. ROA.1592.

Until approximately the end of 2014, Judge Mack initiated court proceedings by describing the Chaplaincy Program, introducing the volunteer chaplain, and inviting all present to stand for the prayer. ROA.1675, 2108. Judge Mack stated that attendees could absent themselves for the prayer. *Id.* After the prayer and pledges, Judge Mack would then take his seat, and after those who had absented themselves returned, the clerk would call the first case. *Id.*

The Current Practice

In September 2014, FFRF wrote to Judge Mack to object to his opening ceremony. Judge Mack responded by changing certain aspects of the ceremony. Around January 2015, he installed signs outside his courtroom that read:

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

ROA.2108-09.

Under current procedures, attorneys check in with the courtroom clerk before court begins. ROA.1674. Shortly before proceedings get underway, the bailiff locks the courtroom door[1] and goes to the front of the courtroom and reads an introductory statement describing the prayer practice and telling audience members that they may leave the courtroom to avoid the prayer. *See* ROA.1649, 1674. There is then a brief pause to allow attendees to exit if they wish. ROA.2109.

Despite these statements, the record evidence uniformly demonstrated that attorneys feel compelled to remain in the courtroom for the prayers. Every time Attorney Roe appeared, he felt compelled to remain in the courtroom to avoid Judge Mack's disapproval and the risk of prejudicing his clients' interest. ROA.1627-28. Attorneys Scott Smith and Julie Howell attested to feeling and acting the same way as Attorney Roe. ROA.1659, 1664, 1666.

After the audience members are told they can leave, Judge Mack enters the courtroom and, as he does, the bailiff instructs all attendees

[1] There is typically only one bailiff present in the court building. ROA.1642. On the rare occasion when two bailiffs are present, the courtroom door remains ajar during the entire court session because one bailiff staffs the courtroom door while the other goes to the front of the courtroom to make the announcement discussed in the text. ROA.1674.

to rise. ROA.2109. While everyone remains standing, Judge Mack describes the Program, introduces the chaplain, and thanks the chaplain for his service. ROA.2109. When delivering the prayers, chaplains face the audience. ROA.1646-47, 1651.[2] During the prayers, everyone in the courtroom remains standing and quiet, with their heads generally bowed. ROA.1632, 1653. The attendees remain standing until the chaplain completes the prayer, at which point the bailiff leads the audience in reciting the U.S. and Texas Pledges of Allegiance and announces the rules of the court, and then Judge Mack instructs the audience to be seated. ROA.2109.

Once the bailiff finishes speaking, he returns to the courtroom door, unlocks it (ROA.1540, 1674), and announces to anyone in the lobby that the prayer has concluded. ROA.1144. At that point, Judge Mack can observe whether anyone re-enters the courtroom. ROA.2109. The first case is then called. ROA.1653.

[2] Judge Mack said that he turns his back to the chaplains and faces the flags behind his bench during the prayers, but several witnesses testified that, when they've attended, Judge Mack faced and scanned the audience during the prayers. ROA.59-60, 1516, 1667. The trial court thus concluded that the evidence conflicted on this point. ROA.2109.

At some point after receiving FFRF's initial complaint, Judge Mack also revised the Chaplaincy Handbook. The version in use as of August 7, 2018, omits the badge with a Christian cross and the statement that "[t]he role of the JCC Chaplain is to be a representative of God[,] bearing witness to His hope, forgiving and redeeming power." ROA.2107.

Furthermore, although in the early years, the chaplains were exclusively Christian, the list has diversified, albeit marginally, over time. From November 2017 to October 2020, between 75 and 100 participants volunteered for the Program, approximately 90% of whom represented Protestant Christian congregations, with the balance including one representative each from the Catholic, Buddhist, Hindu, Mormon, and Jewish faiths, as well as two Muslim representatives. ROA.2107.

The Prayers

Chaplains write their own prayers. ROA.2108. The prayers are generally addressed to God and spoken on behalf of all persons in the courtroom (using phrases like "we ask" and "grant us"). ROA.1632.

Many of the prayers are distinctly Christian. On each of the ten occasions Attorney Roe attended, the prayer-giver was a Christian chaplain who delivered a manifestly Cristian prayer. ROA.1621. For example, on December 13, 2016, the chaplain directed his prayer to "Father" and ended it "In Jesus' name," with "Amen" said in unison by the ten attorneys and thirty *pro se* litigants in the courtroom. ROA.1682. Attorney Smith attended an eviction hearing on January 8, 2020, where the prayer was addressed to the Christian God and ended "in Jesus' name we pray. Amen." ROA.1666-67.

Prayers are presented during the juvenile docket and are sometimes explicitly directed at the juveniles who are present. On June 8, 2017, Attorney Roe observed a Presbyterian chaplain open court with a prayer that, paraphrased, included the language "Lord we ask Your blessings to help these kids make good choices and that You bless this court to make good judgements to help these kids and not punish them," and ended "In Your name we pray. Amen." ROA.1682-83.

Involvement of the State Commission and Attorney General

On October 17, 2014, FFRF filed a complaint with the Texas State Commission on Judicial Conduct. ROA.1137. During the Commission's

investigation, another attorney who practices before Judge Mack reported to the Commission that she, too, objected to the prayer practice. ROA.1660. The State Commission declined to discipline Judge Mack, believing that it lacked authority to decide whether the prayers violate the Establishment Clause. ROA.1812.

In an update sent to his supporters in June 2016, summarizing his achievements during his first 777 days in office, Judge Mack reflected on the Chaplaincy Program and the Commission's decision: "What we quickly learned is that the program that I wanted in place was a program that God wanted in place, for His larger purpose. There are those local haters among us, backed by bureaucrats in Austin and reinforced by well funded national organizations who exist for the purpose of removing our basic religious freedoms." ROA.52. He went on, "We are staying the course, fighting for what we believe is right, for the values and freedoms we hold dear. Faith and Freedom. The first rounds of the fight were won handily. Atheists brought a complaint to the Judicial Conduct Commission, while it proved to be without merit, sympathetic bureaucrats without authority directed that the programs be ended." *Id.*

On May 13, 2016, a *pro se* litigant in the Precinct 1 Court filed a complaint with the State Commission based in part on her observations of Judge Mack's surveying the courtroom to ensure that attendees participated in the prayers and her view that Judge Mack's rulings were not impartial to religion. ROA.58-60.

In February 2016, Lieutenant Governor Dan Patrick and the State Commission's then-Executive Director requested that the Texas Attorney General issue an opinion regarding the constitutionality of Judge Mack's practice. ROA.1711-16. On August 15, 2016, Attorney General Paxton opined that Mack's practice was permissible. *Id*. In reaction to Paxton's opinion, Judge Mack wrote to his supporters, "Because of the Lord we have won this battle, but the war of the attack on our religious freedoms continues. And we will stay the course with HIS help and your support." ROA.55.

In January 2020, Attorney Scott Smith submitted a complaint to the State Commission about Judge Mack's practice. ROA.1669. After the district court issued its summary judgment ruling on May 21, 2021, the State Commission opened a new investigation in June 2021. *FFRF v. Mack*, 4 F.4th 306, 318-21 (July 9, 2021).

Judge Mack's Use of His Office for Other Religious Activities

Judge Mack regularly accepts invitations to deliver prayers at public events, using court employees to schedule these appearances. ROA.1695, 1698. He is also regularly a featured guest at church services, where he delivers prayers, sermons, or other remarks. ROA.1564-67, 1692-93, 1696-97. He hosts an annual "Prayer Breakfast," the first of which was held on October 23, 2014, and doubled as a fundraiser for his reelection. He advertised that prayer breakfast as an opportunity to "honor God and the members of our new Chaplaincy Program." ROA.1596. He later held his "2nd Annual Faith & Freedom Prayer Breakfast" on October 22, 2015, explaining that "As a nation we must get back to the basics of Faith, Family & Freedom." ROA.1709. He has hosted a similar "Faith & Freedom Prayer Breakfast" on an annual basis ever since. ROA.1565, 1694.

While on the bench, Judge Mack regularly discusses the Bible with juvenile litigants. He tells them that he personally reads the Bible and brings up lessons from it. ROA.1548, 1655. Judge Mack's book recounts an occasion when he spoke with a juvenile about Proverbs 23:7: "As a man thinketh, so is he." ROA.1551. He has also discussed

the Bible with adults on both his criminal and civil dockets. ROA.1549-50. He has told biblical stories to litigants, such as the parable of the mustard seed. ROA.1656. And on multiple occasions, he has ordered juveniles to attend church as part of their community service. ROA.1552-53, 1657.

The Inception of Litigation

Prior to filing this lawsuit, the Appellees, joined by other individuals, filed suit in 2017 against Montgomery County, Texas. *See FFRF v. Mack*, No. 17-cv-881 (S.D. Tex. 2017). The Honorable Ewing Werlein, Jr. dismissed the lawsuit, concluding that the injury was not traceable to, or redressable by, the County, because the office of Justices of the Peace is established by the *State* Constitution, their powers are conferred by the *State* Constitution, and other matters pertaining to them are prescribed by *State* statutes, while local commissioners courts, in contrast, are given no authority over them and cannot remove them. *Id.*, ECF 88 at 7-8 (Sept. 27, 2018).

In light of that holding, Appellees filed this lawsuit against Judge Mack in his official capacity as a State officer and against Judge Mack in his individual capacity. ROA.14-32. The Plaintiffs sought

declaratory relief (and injunctive relief in the event that declaratory relief is unavailable) against Judge Mack in both capacities. ROA.31. Pursuant to §1988, Plaintiffs also sought attorneys' fees and costs against the official-capacity defendant. *Id.*

Proceedings Against the Individual-Capacity Defendant

Judge Mack moved to dismiss the individual-capacity claim, asserting that the Plaintiffs lacked standing and failed to state a claim. ROA.123. The district court denied that motion, as well as Judge Mack's Motion for Reconsideration of the denial. ROA.624-29, 778. Judge Mack then answered in his individual capacity. ROA.780. Discovery took place over several months and, thereafter, the Parties filed cross-motions for summary judgment. ROA.998, 1460.

On May 21, 2021, the district court granted summary judgment against Mack in his individual capacity. ROA.2105. The court first observed that the Plaintiffs had standing. ROA.2113. It then addressed the merits, concluding that decisions upholding legislative prayers were inapt because Judge Mack's prayers were delivered in an adjudicatory setting. ROA.2114. The district court distinguished the legislative-prayers cases on three grounds: first, the court concluded

that there is no established practice of having court days open with prayer (ROA.2114-15); second, Judge Mack's prayers are targeted at the parties with business before the court, rather than at public officials (*id.*); and third, Judge Mack's prayers are coercive because litigants are required to attend courtroom proceedings at the risk of the issuance of an arrest warrant or a default judgment (ROA.2216-17). Because the prayers were not justified under the legislative-prayer line of cases, the district court applied the more traditional Establishment Clause tests, concluding that the prayers ran afoul of those tests because they were undertaken with a religious purpose and have a primary effect of endorsing religion. ROA.2217-19.

Proceedings Against the Official-Capacity Defendant

The Plaintiffs' action against the official-capacity Defendant was brought under 42 U.S.C. §1983, in reliance on *Ex Parte Young*, 209 U.S. 123 (1908). ROA.14, 868-69. The Texas Attorney General's Office did not enter an appearance to defend the official-capacity claim, instead opting to file a brief as a third party. ROA.493-502. The Plaintiffs then filed a motion asking the Court to direct the State to defend or, in the alternative, to enter default against the official-capacity defendant.

ROA.697. The district court granted that motion, holding that "Judge Mack's conduct in opening his court sessions with a prayer practice is action taken in his official judicial capacity and that such action implicates the State of Texas" and directing the State to "defend through a responsive pleading." ROA.779. The State then filed a Motion to Dismiss "solely in its own right" and *not on behalf of the official-capacity defendant*, arguing in part that the Plaintiffs could not proceed against the State itself. ROA.797. The district court granted the State's motion and dismissed the *State* as a separate defendant, but made it clear that the case could still proceed against "Judge Mack in his personal *and official capacities*." ROA.975 (emphasis added). Thereafter, the State Attorney General's Office continued to sit on the sidelines, never entering an appearance on Judge Mack's behalf.

On March 25, 2021, the district court granted Plaintiffs' motion for a default judgment against the official-capacity defendant, on whose behalf no defense had been mounted. ROA.2084-85. No appeal was taken from this ruling. Plaintiffs then filed a motion for fees and costs against the official-capacity defendant. ROA.2274. The State opposed the motion. *See FFRF v. Judge Mack*, No. 19-cv-1943, ECF 93 (July 2,

2021). The district court stayed ruling on the fee motion pending the outcome of this appeal. *See id.*, ECF 98 (July 27, 2021). Meanwhile, the State filed a Rule 60 motion asking the district court to correct as a "clerical mistake" the extent to which the default judgment imposed any responsibility on the State. *See id.*, ECF 92 (July 2, 2021); *id.*, ECF 96, Pls.' Opp. Br. (July 23, 2021). That motion has not yet been ruled upon.

Stay Order

On July 9, 2021, this Court, Judge Oldham writing, granted Judge Mack's request for a stay pending appeal. 4 F.4th 306 ("Stay Order"). The motions panel concluded that Judge Mack is likely to succeed for two reasons, the first of which was that "the district court's adjudication of FFRF's official-capacity claim was manifestly erroneous." *Id.* at 311. That was a curious conclusion, given that the official-capacity claim was not (and is not) on appeal and neither party had briefed the underlying issues on which the motions panel opined.[3]

[3] The motions panel concluded that "Judge Mack is a county officer (not a state one)." Stay Order at 312. This conflicts with repeated decisions from this Court that some duties of Texas Justices of the Peace are executed as County officials and other duties, including judicial ones, are executed as State officials. *See Carbalan v. Vaughn*, 760 F.2d 662, 665 (5th Cir.1985) (citing *Familias Unidas v. Briscoe*, 619 F.2d 391, 404 (5th Cir. 1980)); *Garcia Guevara v. City of Haltom City*, 106 F. App'x 900, 902 (5th Cir. 2004) (citing *Eggar v. City of Livingston*, 40 F.3d 312, 316 (9th Cir.1994); *Johnson v. Moore*, 958 F.2d 92, 94 (5th Cir.1992); *Davis v. Tarrant Cty.*,

The other reason the Court gave for concluding that the Plaintiffs' claim was likely to fail was that Judge Mack's prayers were permissible under the U.S. Supreme Court's legislative-prayer decisions. *Id.* at 313-15. The Court acknowledged that those decisions "involved a legislature's chaplains, not a justice of the peace's chaplains," *id.* at 313, but concluded that there is a similarly "abundant history and tradition of courtroom prayer," *id.* at 313-14, though the only examples the panel offered of this purported tradition were the U.S. Supreme Court's opening cry and a few instances of early Justices' opening court terms with prayer. *Id.* at 314.

SUMMARY OF THE ARGUMENT

I. The Appellees have standing. This Court has repeatedly held that personal exposure to an alleged Establishment Clause violation

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565 F.3d 214, 226-27 (5th Cir.2009) (citing *Krueger v. Reimer*, 66 F.3d 75, 77 (5th Cir. 1995); *Clanton v. Harris Cty.*, 893 F.2d 757, 758 (5th Cir. 1990); *Hamill v. Wright*, 870 F.2d 1032, 1037 (5th Cir. 1989); *Clark v. Tarrant Cty.*, 798 F.2d 736, 744 (5th Cir. 1986). Three states filed an *amicus* brief arguing that Judge Mack is a County, not State, official. Leg. Br. Br. at 3. Not only is their argument irrelevant to this appeal, but they, like the motions panel, fail to contend with the cited case law.

The motions panel also stated that the official-capacity claim was misguided because an action premised on *Ex Parte Young* cannot proceed under 42 U.S.C. §1983. Stay Order at 312. The Supreme Court has said otherwise: "Of course a state official in his or her official capacity, when sued for injunctive relief [under *Ex Parte Young*], would be a person under Section 1983." *Will v. Mich. Dep't of State Police*, 492 U.S. 58, 167 n.10 (1989).

that impairs a plaintiff's enjoyment or use of a public facility is sufficient to confer standing. *See, e.g., Doe v. Beaumont Indep. Sch. Dist.*, 240 F.3d 462, 467 (5th Cir. 2001). Other Circuits have uniformly reached the same conclusion. *See, e.g.*, *Vasquez v. Los Angeles Cty.*, 487 F.3d 1246, 1253 (9th Cir. 2007) (surveying cases in the 2nd, 5th, 10th, and 11th Circuits).

It is equally well-established that standing exists where a plaintiff takes steps to *avoid* exposure to an alleged legal violation. *See, e.g.*, *Friends of the Earth, Inc. v. Laidlaw Environmental Servs. Inc.*, 528 U.S. 167, 184-85 (2000); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 224 (1963); *Valley Forge Christian College v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 486 n.22 (1982). Here, it was undisputed that Attorney Roe has appeared before Judge Mack many times; that he has turned down work that would require him to appear in Judge Mack's courtroom; and that if he were to resume accepting cases pending before Judge Mack, he would once again be exposed to the prayers. ROA.1507, 1509-10, 2105, 2110. He thus squarely presents the standing that arises when a plaintiff "assume[s] special burdens to avoid" a religious exercise. *Valley Forge Christian*

College, 454 U.S. at 486 n.22. Given Roe's standing, FFRF's entitlement to associational standing is not open to question.

II. The reasoning adopted by the Supreme Court in upholding the constitutionality of legislative prayer does not extend to courtrooms. While the U.S. Supreme Court cited an "unambiguous and unbroken history of more than 200 years" of legislative prayer in this country—a history that revealed that the First Congress itself thought the practice permissible (*see Marsh v. Chambers*, 463 U.S. 783, 792 (1983)—there is no similar history of prayers being used to open daily courtroom sessions. Furthermore, courtrooms are inherently coercive, and Judge Mack's courtroom is even more coercive than most. Indeed, a majority of the Supreme Court's Justices have cautioned against extending the Court's legislative cases to the courtroom context. *See Town of Greece v. Galloway*, 572 U.S. 565, 603 (2014) (Alito, J., concurring); *id.* at 618 (Kagan, J., dissenting).

III. Because Judge Mack's practice violates the coercion test, it cannot stand irrespective of how the practice fares under the *Lemon* or endorsement tests. However, if the Court is inclined to address these tests, it should conclude that Judge Mack's practice violates both. The

evidence shows that he adopted his courtroom-prayer practice to advance his personal religious beliefs, that the practice has the effect of advancing religion, and that a reasonable observer would conclude that it endorses religion.

STANDARD OF REVIEW

The Appellees agree with Judge Mack's recitation of the Standard of Review. Furthermore, "the motions panel order is not binding on [the merits panel]." *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 311 n.26 (5th Cir. 1998) (citing cases).

ARGUMENT

I. The Plaintiffs Have Standing

Judge Mack does not take issue with the Appellees' standing, but several Texas legislators submitted an *amicus* brief arguing that Attorney Roe's standing is deficient. *See* Leg. Br.[4] Their arguments fly in the face of this Court's and the U.S. Supreme Court's longstanding jurisprudence.

[4] The Legislators concede that FFRF has standing if Roe does. *See* Leg. Br. at 22-23.

This Court has repeatedly held that personal exposure to an alleged Establishment Clause violation that impairs a plaintiff's enjoyment or use of a public facility is sufficient to confer standing. *See, e.g., Doe v. Beaumont Indep. Sch. Dist.*, 240 F.3d 462, 467 (5th Cir. 2001); *Doe v. Sch. Bd. of Ouachita Par.*, 274 F.3d 289, 292 (5th Cir. 2001); *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 294 n.31 (5th Cir. 2001); *Murray v. City of Austin*, 947 F.2d 147, 151-52 (5th Cir. 1991)). Other Circuits have uniformly reached the same conclusion. *See, e.g.*, *Vasquez v. Los Angeles Cty.*, 487 F.3d 1246, 1253 (9th Cir. 2007) (surveying cases in the 2nd, 5th, 10th, and 11th Circuits); *Suhre v. Haywood Cty.*, 131 F.3d 1083, 1086-90 (4th Cir. 1997); *Am. Civil Liberties Union of Ohio Found., Inc. v. DeWeese*, 633 F.3d 424, 429-30 (6th Cir. 2011).

It is equally well-established that standing exists where a plaintiff takes steps to *avoid* exposure to an alleged legal violation. *See, e.g.*, *Friends of the Earth, Inc. v. Laidlaw Environmental Servs. Inc.*, 528 U.S. 167, 184-85 (2000). This principle has long been applied in the context of the Establishment Clause. *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; *Suhre*, 131 F.3d at 1088 (4th Cir.); *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1113-14 (10th Cir. 2010); *FFRF v. New Kensington Arnold Sch. Dist.,* 832 F.3d 469, 479 (3d Cir. 2016); *Adland v. Russ*, 307 F.3d 471, 478 (6th Cir. 2002).

Amici turn this case law on its head by arguing that Roe's avoidance *defeats* his standing rather than cements it. *See* Leg. Br. at 3-5. They ignore the on-point case law cited above and rely instead on a handful of inapposite cases in which the plaintiffs were not forced to choose between confronting or avoiding the challenged activity. They cite *Barber v. Bryant*, 860 F.3d 345, 352 (5th Cir. 2017) (*see* Leg. Br. at 4-5), but that case was a challenge to statutory text that the plaintiffs neither confronted nor avoided. *See* 860 F.3d at 353 (noting that there is no "item or event to 'encounter'"). Similarly, in *Staley v. Harris County*, 485 F.3d 305, 309 (5th Cir. 2007) (en banc) (cited at Leg. Br. at 4-5), the Court found a challenge moot once a religious monument was removed, as there was no longer anything to confront or avoid. They cite *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997) (*see* Leg. Br. at 6-7), in which a challenge to a statute affecting public employees was mooted by the plaintiff's acceptance of a private-sector

job, which meant that she was no longer even affected by the challenged policy. Similarly, they cite *Doe v. Madison School District No. 321*, 177 F.3d 789 (9th Cir. 1999) (en banc) (*see* Leg. Br. at 6), in which standing to challenge a graduation-ceremony practice was denied because the plaintiff's children had graduated and the plaintiff did "not claim that she will attend another graduation ceremony in the future." 177 F.3d at 797. Even further afield, the Legislators cite *Doe v. Tangipahoa Parish School Board*, 494 F.3d 494, 497-99 (5th Cir. 2007) (en banc), in which standing was denied because the plaintiffs had never even observed the practice they were challenging.

Here, it was undisputed that Roe *has* appeared before Judge Mack many times; that he has gone out of his way to turn down work that would require him to appear in Judge Mack's courtroom; and that if he were to resume accepting cases pending before Judge Mack, he would once again be exposed to the prayers. ROA.1507, 1509-10, 2105, 2110. He thus squarely presents the standing that arises when a plaintiff "assume[s] special burdens to avoid" a religious exercise. *Valley Forge Christian College v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 486 n.22 (1982).

The Legislators also argue that Roe lacks standing to seek prospective relief because he has not shown a "significant likelihood" that he will encounter the challenged practice because of his conscious choice to avoid Judge Mack's courtroom. Leg. Br. at 9-11. This argument is frivolous. In the cases the Legislators cite, the lack of ongoing exposure was not due to avoidance; rather, it turned on variables outside the plaintiffs' control. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 105-06 (1983) (plaintiff could not show likelihood that he would be stopped and put into a chokehold); *Serafine v. Crump*, 800 F. Appx. 234, 238 (5th Cir. 2020) (plaintiff could not show likelihood of future appearance before specific panel of appellate judges); *Society of Separationist, Inc. v. Herman*, 959 F.2d 1283, 1285 (5th Cir. 1992) ("There are over half a million residents in Travis County and twenty trial judges" so "[t]he chance that O'Hair will be selected again for jury service and that Judge Herman will be assigned again to oversee her selection as a juror is slim."). Here, in contrast, it was undisputed that the *only* reason Roe does not face ongoing exposure to the challenged prayers is that he turns down cases that would require him to appear in

Judge Mack's courtroom. ROA.1509-10, 2110. Even the Legislators acknowledge as much. *See* Leg. Br. at 10-11, 16.

The Legislators also invite the Court to jettison "offended observer standing" altogether, but all they cite to support this radical request are dissenting opinions, random statements in cases in which the plaintiffs were found to *have* standing, and cases that did not even involve the Establishment Clause. *See* Leg. Br. at 11-16. Finally, the Legislators grasp at straws by arguing that Roe's status as an attorney means that he should be expected to withstand offensive viewpoints. *See* Leg. Br. at 16-22. Not only have they failed to cite a single case from any Circuit adopting this line of reasoning, but they ignore decisions holding otherwise. *See, e.g., Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003).

II. Judge Mack's Practice Runs Afoul of the Test Adopted in *Marsh* and *Greece*

Some public-prayer activities, particularly in the legislative context, have been analyzed under a distinct Establishment Clause approach that licenses certain practices that are deeply embedded in the history and traditions of this country. Under this approach, however, it is not enough that a practice has an historical pedigree. *Marsh*, 463 U.S. at 789 ("Standing alone, historical patterns cannot

justify contemporary violations of constitutional guarantees."); *Greece*, 572 U.S. at 576 (an "historical foundation" is not enough). Rather, the practice at issue in *Marsh* and *Greece*—the delivery of prayer to open the meetings of state and local legislatures respectively—was upheld because it met the following three considerations: (1) the Founders "clearly" (*Marsh*, 463 U.S. at 788) viewed the "specific practice" (*Greece*, 572 U.S. at 577) as consistent with the Establishment Clause because the First Congress, in the same week, voted to both engage in the practice and approve the draft of the First Amendment for submission to the States (*Marsh*, 463 U.S. at 790; *Greece*, 572 U.S. at 575-76); (2) the practice had an "unambiguous and unbroken history of more than 200 years" (*Marsh*, 463 U.S. at 792) and had continued virtually uninterrupted" since the Founding (*Greece*, 572 U.S. at 575); and (3) the practice was non-coercive (*Greece*, 572 U.S. at 586). Judge Mack's practice cannot withstand scrutiny under any, let alone all, of these considerations.

A. There is No Evidence that Founding-Era Courtrooms Opened Daily Sessions with Prayer or that the Framers Approved of the Practice.

Judge Mack quotes this Court's Stay Order, 4 F.4th at 313-14, to claim that there is an "abundant history and tradition of courtroom prayer." Mack Br. at 26. But the evidence that he cites is so lacking as to prove precisely the opposite proposition, namely, that Judge Mack's practice is deeply and historically *anomalous*.

The first example he offers for this purportedly "storied history" is the same one the stay-motion panel offered, namely, the U.S. Supreme Court's tradition of opening its oral-argument sessions with the following cry:

> 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 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!"

ROA.1929-30; *see also* ROA.1979-80. But this statement is not even a prayer. It is addressed to "All persons having business before the Honorable Court," rather than to God; it is not prefaced by any language normally associated with prayer, such as the statement "let us pray"; and it does not end with "Amen." And the only religious

reference is found in the last sentence of an otherwise non-religious statement. Judge Mack may characterize the statement as a "prayer" (Mack Br. at 26), but the High Court itself refers to it as a "chant." ROA.1929.

The other example Judge Mack gives is a handful of prayers that were delivered at the opening of court *terms* when Justices "rode circuit" in the states for the first time pursuant to the Judiciary Act of 1789. *See* Mack Br. at 26-27; *see also* Stay Order at 314. These prayers were delivered to open court *terms*—events akin to a ribbon-cutting ceremony—not to open daily court sessions. Thus, for example, John Jay approved of a chaplain's presence at a ceremony marking the "Occasion[ ]" of the Justices' "Reception" at the opening of the court of the Circuit Court for Connecticut in 1790. ROA.1230 (cited at Mack Br. at 27). The evidence showed that the court session lasted several days, with no indication that a prayer was delivered on ensuing days. ROA.1224. The other handful of Circuit-riding prayers that Judge Mack cites were likewise delivered at the opening of the court's first term in a particular state. *See* Mack Br. at 26-27 n.5. And even these incidents were aberrational, as most court terms in that era did *not*

open with prayer. *See, e.g.,* ROA.1234 (referencing 1791 opening of Circuit Court for South Carolina without any mention of a prayer); ROA.1237 (same for 1791 opening of Circuit Court for the District of Vermont); ROA.1236 (same for 1791 in Virginia); ROA.1237 (same for 1791 in Rhode Island); ROA.1239 (same for 1792 in Maryland).[5]

Thus, to support the central contention that Judge Mack's practice grows out of a tradition dating to the Founding, the only incidents to which Judge Mack can point are a chant that is manifestly not a prayer and approximately ten prayers marking the opening of seminal federal courts terms in the states. That is, *he cannot cite a single Founding-era courtroom that opened its daily sessions with prayer*. He thus provides no basis for this Court to disagree with the Fourth Circuit's conclusion that, "[u]nlike legislative prayer, there is no similar long-standing tradition of opening courts with prayer. Nor is there any evidence

[5] Inexplicably, the stay-motion panel said that "Neither the district court nor FFRF said one word about this evidence [regarding circuit-riding prayers]." Stay Order at 314. The district court discussed these "prayers in federal circuit courts in the late 18th century," explaining that they were presented "during a court's inauguration or at the opening of a given term" and were thus distinct from prayers that were "delivered routinely before the commencement of court proceedings." ROA.2114-15. The Plaintiffs discussed the Circuit-riding prayers at length, demonstrating that each one involved the opening of a court's term, not daily courtroom proceedings. *See* ROA.1825-26, 1962-67. And before this Court, the Appellees' opposition to the stay motion distinguished the Circuit-riding prayers on the same ground. *See* Appellees' Resp. to Stay Mot. at 6 (June 11, 2021).

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).

B. There Is No Evidence That the Practice of Daily Courtroom Prayer Has Continued "Virtually Uninterrupted" Since the Founding.

After failing to demonstrate a tradition dating to the Founding, Judge Mack then asserts: "By 1835, the practice of inviting a guest chaplain to give a brief invocation had become so engrained that Alexander Griswold, the presiding bishop of the Episcopal Church, published a ministerial handbook that included a model prayer for opening court sessions." Mack Br. at 27. This is law-office history at its worst. Judge Mack does not cite even a single instance of this prayer's delivery in a courtroom, let alone on a "virtually uninterrupted" basis since that time.

Then, in the ensuing sentence, Judge Mack claims: "That practice continued through the Antebellum period, Reconstruction, the Gilded Age, the Progressive era, both World Wars, the post-War era, and up to today." Mack Br. at 28 & n.6. What he does not do is alert the Court to what the cited paragraphs depict, to wit:

- Prayers that marked the convening of a court's *term*, not its daily sessions (*see* ROA.1021-42 (Def.'s SUF) ¶¶ 79-80, 82-84, 87-89, 91, 93-94, 96-97, 99, 101-02, 105, 108-10). And even then, many of the cited sources stated that the practice was highly unusual, which was why it was being covered by the newspaper in the first place. *See, e.g., re.* ¶ 83 ("[the practice was] something unknown to the judicature of the State previous to his introducing it.") (quoting ROA.1339, two-thirds down the 4th column, *Judge Howe*); *re.* ¶ 89 (calling the prayer "a new departure in city court") (quoting ROA.1351, two-thirds down the 1st column, *Georgia*); *re.* ¶ 91 (stating that the prayer marked "the first time in [the court's] history" that a prayer had been offered) (quoting ROA.1354, middle of the 4th column, *Judge Opens Court with Prayer*); *re.* ¶ 93 ("Judge Caruthers of the Ninth judicial district surprised court hangers-on and spectators when he convened court here Thursday by having a minister present to open court with prayer.") (quoting ROA.1359, bot. of 2d column, *Opens Court with Prayer*); *re.* ¶ 105 (noting that the judge was "the First circuit

Judge in this circuit" ever to engage in the practice) (quoting ROA.1386, middle of 1st column, *For Circuit Judge*).

- Prayers that took place in a courthouse on a random one-time basis to mark a seminal event (*see* ROA.1021-42 (Def.'s SUF) ¶¶ 86, 90, 98, 103, 106-07, 114). With respect to these, too, the newspaper coverage almost uniformly noted the anomalous nature of the incidents. *See, e.g., re.* ¶90 (quoting chaplain as saying that he told the judge that he "was accustomed to praying in church or Sunday school and at funerals but not in court") (citing ROA.1353, one-third down the 3d column, Hughes' Deliverance). With respect to one such incident, an article reported, "The minister's opening the argument with prayer yesterday is regarded as a peculiar thing, *unknown in the annals of court-room history*." *See* ROA.1970 (referencing ROA.1921, two-thirds down the 3d column, Hez Hughes Is Not Guilty, Indianapolis News (March 1, 1898) (emphasis added)). Similarly, with respect to a 1914 prayer to mark the conclusion of "the biggest case the courts of this country have had to deal with in years," the article noted that "It was the first time in the history of the county that a prayer was offered in

court for the settlement of a case." ROA.1973 (quoting ROA.1369, 5th & 6th columns, *Agreements in Yorba Linda Case Are Signed, Court is Adjourned with a Prayer*).

- And a bill—*that was never enacted*—requiring daily sessions of the courts in the State of Georgia to be opened with prayer. ROA.1968-69.

Aside from these incidents, none of which involved daily courtroom sessions, Judge Mack pointed to a whopping five instances, *all from the Twentieth century and none continuing to this day,* in which a judge opened daily courtroom sessions with prayer—and in virtually every case (four of five articles), the cited article indicated that the practice was unusual, to wit:

- A Mississippi judge's practice in 1910 of "having a minister on hand in the mor[n]ing to open court with prayer." ROA.1971-72 (citing ROA.1921, first two columns, *Judge Evans' Court*). The article said the newspaper was "surprised to learn" of the practice; that it was an "innovation" undertaken by a judge who was sitting temporarily, was considered a "crank and a fanatic," and did not have "public opinion behind him." ROA.1971-72 (quoting

ROA.1921). The article said that former judges on the court had not pursued the practice. *Id.* Furthermore, there was no evidence that the practice outlived that judge, let alone that it continues in that court today.

- A daily courtroom prayer introduced by a Florida judge in 1915, with the article referring to it as "a decided innovation in Florida courts." ROA.1973-74 (quoting ROA.1372, bot. of 2d column, *Florida Judge Will Open Court with Prayer*). Judge Mack offered no evidence that the practice outlived that judge, or otherwise continues in that court.
- A 1972 article describing a North Carolina judge who had a pastor "open [his] court with prayer." ROA.1039 (citing ROA.1399, 3d column, "*Judge Cooper Opens Court with Prayer*"). Not only was it unclear whether the practice was followed every court day or was undertaken to mark the opening of a court term, but even the judge himself noted the controversial nature of his practice, stating, "there had been controversy in recent years over public prayer" and adding that "I intend to open this court with prayer. If it offends any of you, you may leave." ROA.1978 (quoting

ROA.1399). It should come as no surprise that "None left the crowded courtroom" at that invitation. *Id.* Furthermore, Judge Mack did not claim, let alone show, that the practice outlived that judge or continues in that court today.

- A 1976 newspaper article with the headline "Judge William Bivens Jr. begins court with prayer," that recounts a Circuit Judge who began "opening his court with prayer his first day." ROA.1039 (citing ROA.1404, 1st three columns). Although the Appellant quoted the article at length below, he omitted that the judge "is probably the only judge in West Virginia who opens court with prayer." ROA.1978-79 (quoting ROA.1404 (first para.)). Nor did he offer any evidence that the practice continued after Judge Bivens left the bench, let alone that it continues to this day.
- A 1985 article from the Houston Chronicle describing an incident in which a South Carolina judge "asked if there was a pre[a]cher in the courtroom to lead the customary opening prayer." ROA.1039 (citing ROA.1401, *Minister turns Into Surprise Witness*). It's unclear whether the prayer marked the opening of a court day or a court term, but Judge Mack offered no evidence

that the practice continued after 1985, let alone that the practice continues in that court today.

There are 870 authorized Article III federal judgeships; and the U.S. Bureau of Labor Statistics reports that there were 28,670 state and local judges in 2019. ROA.1835. Each of those judges was preceded by countless others in the history of their courtrooms. Hundreds of thousands of judges have presided in courtrooms throughout this country since the Nation's founding over 230 years ago. Yet, after scouring the archives and microfiche, Judge Mack was able to come up with only *five judges* who have ever pursued a practice like Judge Mack's. None of these was in place at the time of the Founding and in none of those judges' courtrooms does the practice continue to this day.

In sum, Judge Mack did not identify a *single* federal or state court that regularly opened with prayer at the time of the Founding; he did not identify a *single* federal or state court that has maintained a practice of daily prayer for any extended period of time, let alone "virtually uninterrupted" since the Founding; and he has not referenced even a *single* federal or state court judge (other than Judge Mack himself) who maintains such a practice today. Nor has he pointed to a

single state law that has called for the hiring of a chaplain in the courtroom context or for the presentation of courtroom prayer (daily or otherwise). Instead, what his evidence shows is that prayer has so rarely occurred in courtrooms in this country that, when it has, it was remarkable enough to be written about in newspapers.

By cobbling together isolated incidents and omitting passages indicating that the incidents were highly unusual, Judge Mack seeks to dupe the Court into thinking that the exception is the rule. This effort—pursued without the blessing of even the most barely-qualified historian and almost entirely dependent on newspaper articles rather than original sources—rests on a house of cards. His request that the Court join him in a layman's version of bad (and agenda-driven) law-office history should be declined.

C. The Court Should Reject Judge Mack's Invitation to Interpret *Greece* to Authorize Prayers at All "Government Proceedings."

In apparent recognition of the lack of any historical pedigree for daily courtroom prayers, Judge Mack asks the Court to extend the holding of *Greece* to all "government proceedings." Mack Br. at 21. But that extension cannot be squared with the decision's reasoning. *Greece*

was concerned with the Founders' views on, and the longevity of, the "specific practice" in question. 572 U.S. at 577. The Court looked at the actions of the "First Congress" and state and local legislatures (not government officials generally). *See* 572 U.S. at 575-77. The majority stated that its inquiry was "to determine whether the prayer practice in the town of Greece fits within the tradition long followed *in Congress and the state legislatures*." *Id.* at 577 (emphasis added). That is, the Court was peculiarly focused on legislative proceedings and it provided no indication that its holding extended to government proceedings generally. Furthermore, as discussed below in Section II.D., a courtroom is distinct from a legislative meeting in ways that are highly material to the Justices' analysis. And the only other federal Court of Appeals to review a courtroom-prayer practice concluded that a judicial prayer is simply not analogous to a legislative one. *See Constangy*, 947 F.2d at 1147-49.

To be sure, the Court in *Marsh* was willing to rely on the practice of the First federal Congress to authorize *state* legislatures to engage in legislative prayer, and *Greece* was willing to extend that result to *local* legislatures, but that was because the same "specific practice," namely,

"legislative invocations," was at issue in each instance. *See Greece*, 572 U.S. at 575, 577; *see also id.* at 576 (noting that a majority of the states had followed the "*same*, consistent practice" as the federal Congress).

The Appellant points out that this Court later extended the holding of *Greece* to school board invocations, *see* Mack Br. at 21, but it did so because:

> The BISD board is a deliberative body, charged with overseeing the district's public schools, adopting budgets, collecting taxes, conducting elections, issuing bonds, and other tasks that are *undeniably legislative*. *See* Tex. Educ. Code § 11.1511. In no respect is it less a deliberative legislative body than was the town board in *Galloway*.

Am. Humanist Ass'n v. McCarty, 851 F.3d 521, 526 (5th Cir. 2017) (emphasis added). Thus, these decisions simply mean that if the Framers approved of a specific practice as consistent with the Establishment Clause, the practice must be equally permitted at the federal, state, and local levels. Here, there has been no showing that the Framers approved of the practice at issue, so *Greece* wouldn't authorize the practice at the local level, any more than it would at the federal or state levels.

D. Judge Mack's Courtroom-Prayer Practice Is Coercive in a Way that Legislative Prayer Is Not.

All of the Justices in the *Greece* majority agreed that, even where a specific practice was countenanced by the Framers and maintained without interruption, the practice must still be non-coercive. 572 U.S. at 586. But they fractured on what coercion means. Justice Kennedy's majority opinion (572 U.S. at 569-92) was joined by Justices Roberts, Alito, Scalia, and Thomas. But Justices Thomas and Scalia did not join the coercion portion of the opinion (Part II.B.), which turned on an analysis of subtle coercive considerations, such as the audience for the prayers, the source of the directive to stand, and the portion of the meeting during which the prayers took place. *See* 572 U.S. at 587-91. Justices Thomas and Scalia instead took the position that the Establishment Clause does not apply to the States and that a practice is coercive only if one faces a legal penalty for non-compliance. *Id.* at 604-10 (Thomas, J., concurring).

Judge Mack argues that Justice Thomas's concurrence, rather than the plurality opinion, governs the coercion analysis (Mack Br. at 32) and that this Court has limited the "'subtle coercive pressures' test to 'the public school context.'" Mack Br. at 29 (citing *McCarty*, 851 F.3d

at 526-28). He is wrong on this score. *See, e.g., Bormuth v. Cty. of Jackson*, 849 F.3d 266, 280 (6th Cir. 2017) (concluding after analysis that Part II.B. is the controlling opinion on coercion in *Greece*). Nowhere in *McCarty* did this Court hold that only children are subject to subtle coercive pressures. Indeed, the Court set out the factors of the coercion test without any indication that the considerations apply only to children, *see* 851 F.3d at 525 n.12, and it cited the *Greece* plurality as controlling the coercion analysis. *See id.* at 526, 528.

Thus, coercion need not be overt; rather, it can stem from "subtle coercive pressures" that arise when an intended audience has "no real alternative which would have allowed [them] to avoid the fact or appearance of participation." *Lee v. Weisman*, 505 U.S. 577, 587-88 (1992); *see also Kerr v. Farrey*, 95 F.3d 472, 474, 479-80 (7th Cir. 1996) (finding coercion where inmates were required to "observe" religious Narcotics Anonymous meetings although "they were not required to 'participate'").

The fundamental differences between legislatures and courtrooms, the considerations on which the *Greece* Justices relied in finding legislative prayers to be non-coercive, and the particular facts of the

prayers at issue here leave no doubt that Judge Mack's practice is coercive under the governing analysis.

i. Unlike legislative sessions, courtrooms are inherently coercive, as a majority of the Greece Justices recognized.

Unconstitutional coercion occurs where "(1) the government directs (2) a formal religious exercise (3) in such a way as to oblige the participation of objectors." *McCarty*, 851 F.3d at 525 n.12 (quoting *Doe ex rel. Doe v. Beaumont Indep. Sch. Dist.*, 173 F.3d 274, 285 (5th Cir. 1999) (quoting *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963, 970 (5th Cir. 1992))). Here, the setting makes it clear that the government is behind the prayers and the prayers themselves are manifestly a formal religious exercise. Furthermore, the record—and common sense—demonstrates that the practice "oblige[s] the participation of objectors" (*McCarty*, 851 F.3d at 525 n.12) and leaves attendees with no "real alternative" but to participate (*Lee*, 505 U.S. at 588).

It is axiomatic that a judge's "lightest word or intimation is received with deference" in his or her courtroom. *Quercia v. United States*, 289 U.S. 466, 470 (1933) (quoting *Starr v. United States*, 153 U.S. 614, 626 (1894)). With respect to litigants, as Judge Mack

testified, "generally [] you have a plaintiff that's suing somebody … there's a great possibility that 50 percent of my courtroom [*i.e.*, the defendants] is there, on a civil side, because they don't want to be there. The criminal side, it's probably even a higher percentage than that." ROA.1546. The power of the State—by threat of misdemeanor charge or default judgment—compels litigants to attend court.

Judges wield especially coercive power over criminal defendants. When the federal rules of criminal procedure were amended to exclude judges from the plea-bargaining-negotiation process, the explanation was as follows:

> The unequal positions of the judge and the accused, one with the power to commit to prison and the other deeply concerned to avoid prison, at once raise a question of fundamental fairness. When a judge becomes a participant in plea bargaining he brings to bear the full force and majesty of his office. His awesome power to impose a substantially longer or even maximum sentence in excess of that proposed is present whether referred to or not.

Notes of the Advisory Committee on Rules, Fed. R. Crim.P. 11, 18 U.S.C.A. at 25 (1975) (quoting *Elksnis v. Gilligan*, 256 F. Supp. 244, 254 (S.D.N.Y. 1966)). This Court has agreed with this understanding of courtroom dynamics. *See, e.g.*, *United States v. Adams*, 634 F.2d 830 (5th Cir. 1981) (treating trial judge's participation in plea negotiation as

"plain error" necessitating resentencing even absent showing of actual prejudice); *Frank v. Blackburn*, 646 F.2d 873, 880 (5th Cir. 1980) ("[T]he risk of not going along with the disposition apparently desired by the judge may seem so great to the defendant that he will be induced to plead guilty even if innocent."); *Brown v. Beto*, 377 F.2d 950, 957 (5th Cir. 1967) (describing a judge as "almost all-powerful in his sentencing capacity"). It is thus not surprising that this Court deemed a judge's statement in a criminal proceeding that he was "doing God's work" to be "certainly inappropriate and indeed atypical for a trial proceeding." *Bunton v. Quarterman*, 524 F.3d 664, 673 (5th Cir. 2008); *see also United States v. Bakker*, 925 F.2d 728, 741 (4th Cir. 1991) (reversing sentence by judge who made religious comment).

Judges have similarly undue influence over jurors, which is why it is essential for judges to maintain strict impartiality in relation to them. *See, e.g.*, *Starr*, 153 U.S. at 626 ("It is obvious that ... the influence of the trial judge on the jury is necessarily and properly of great weight ... ."); *Offutt v. United States*, 348 U.S. 11 (1954) (reversing a judgment because of a judge's inappropriate comments and behavior, citing the power and influence a judge has over those in his courtroom);

Quercia, 289 U.S. at 470; *United States v. Fischer*, 531 F.2d 783, 786 (5th Cir. 1976) (reversing conviction in recognition of "the great influence which the trial judge necessarily exerts upon the jury"); *United States v. Dillon*, 446 F.2d 598, 601 n.3 (5th Cir. 1971); *United States v. Dopf*, 434 F.2d 205, 209 (5th Cir. 1970); *Travelers Ins. Co. v. Ryan*, 416 F.2d 362, 364 (5th Cir. 1969) ("[T]he judge is a figure of overpowering influence, whose every change in facial expression is noted, and whose every word is received attentively and acted upon with alacrity and without question."). Judges' outsized weight is a "truism[ ] distilled in countless cases by unnumbered judicial forbears long since dust." *Travelers Ins. Co.*, 416 F.2d at 364.

Coercive pressures in a courtroom setting are also extreme with respect to counsel. As Attorney Roe put it, "I have a client, and he's sitting here, and he wants me to perform my legal job. He doesn't want me to make a scene, be an activist, or to otherwise make this courtroom prayer a part of what I'm doing that day. That's the last thing I want. The client wants me to follow the rules." ROA.1621. "The client wants me to follow the rules, to be nice, be courteous, and win his case. If I … made it a point to not participate in [the prayers], they would be livid

with me. And so, just by dint of having the prayer be the centerpiece of the proceedings, means that I would never choose to not participate, if I'm there for a client." ROA.1628 (cleaned up). Several other attorneys testified that they feel the same way. *See* ROA.1515, 1671-72.

Simply put, courtroom attendees are at the mercy of the presiding judge. And unlike a legislative session, where the power is dispersed throughout the many members of the deliberative body, the power in a courtroom is concentrated in the hands of a single judge. Under this circumstance, attendees' vulnerability is not undone by telling them that they are free to absent themselves for the prayer. *Cf.* Mack Br. at 33; Stay Order at 314. When one is at the mercy of a judge who will decide one's case or impose one's sentence, the last thing one is going to do is openly reject a practice that the decider-in-chief so clearly favors.

It is presumably for this reason that the Justices in *Greece* pointed to a courtroom as the paradigmatic circumstance in which coercion is present. In her dissenting opinion, Justice Kagan presented a highly detailed hypothetical, the specifics of which closely mirror Judge Mack's courtroom-prayer practice:

> You are a party in a case going to trial; let's say you have filed suit against the government for violating one of your legal rights.

> The judge bangs his gavel to call the court to order, asks a minister to come to the front of the room, and instructs the 10 or so individuals present to rise for an opening prayer. The clergyman faces those in attendance and says: "Lord, God of all creation, ... We acknowledge the saving sacrifice of Jesus Christ on the cross. We draw strength ... from his resurrection at Easter. Jesus Christ, who took away the sins of the world, destroyed our death, through his dying and in his rising, he has restored our life. Blessed are you, who has raised up the Lord Jesus, you who will raise us, in our turn, and put us by His side …. Amen." The judge then asks your lawyer to begin the trial.

572 U.S. at 617 (Kagan, J., dissenting). Justice Alito specifically addressed this hypothetical in his concurrence (joined by Justice Scalia), stating that he was "concerned that at least some readers will take these hypotheticals as a warning that this is where today's decision leads—to a country in which religious minorities are denied the equal benefits of citizenship." *Id.* at 603 (Alito, J., concurring). He continued, "Nothing could be further from the truth." *Id.* This prompted Justice Kagan to observe that a majority of the Justices "would hold that the government officials responsible for [the hypothetical courtroom prayer practice] ... crossed a constitutional line. I have every confidence the Court would agree." *Id.* at 618 (Kagan, J., dissenting) (citing Justice Alito's concurrence at 603).

The stay-motion panel distinguished Justice Kagan's hypothetical on several grounds, none of which holds up to scrutiny. First, the panel said that the judge in the hypothetical "instructs" the attendees to stand, while Judge Mack "by contrast has taken multiple steps … to facilitate non-participation in his opening ceremonies." Stay Order at 315. Here, it is the bailiff—the Judge's agent—who instructs attendees to stand, which no reasonable individual could think would have made a difference to Justice Kagan; and the record evidence demonstrates that the signs and statements instructing litigants and attorneys that they can absent themselves do not lift the pressures they feel to remain in place. *See* ROA.1515, 1621, 1628, 1671-72. The stay-motion panel added that "it's undisputed that Judge Mack's opening ceremonies are open to chaplains of all faiths—not just Christians." Stay Order at 315. But Justice Kagan's hypothetical did not say that non-Christians were excluded; rather, she was positing a single occasion in which a Christian prayer was presented. *See* 572 U.S. at 617. Here, the evidence demonstrated that the vast majority of prayer-givers are Christian and the prayers are often decidedly sectarian, not unlike the prayer Justice Kagan described. *See* Statement of the Case, *supra* at 9-

10 ("The Prayers"). And in any event, unlike legislators, litigants attend courtroom proceedings on only a sporadic (if not one-time) basis, so what happens on other days is irrelevant to them.

Finally, the panel characterized Justice Kagan's hypothetical as a concession that the *Greece* holding extends to "adjudicatory hearings." Stay Order at 315 (quoting 572 U.S. at 626). Not so. Justice Kagan was making the point that some portions of the local legislative body's proceedings involved citizens petitioning their government, *see* 572 U.S. at 625-26, but she did not suggest that the holding would extend to *courtrooms*. Indeed, she specifically stated that she had "every confidence the Court would agree" that a courtroom prayer violates the Constitution. *Id.* at 618 (Kagan, J., dissenting). Justice Alito said the same: "I do not understand this case to involve the constitutionality of a prayer prior to what may be characterized as an adjudicatory proceeding," because "[t]he prayer preceded only the portion of the town board meeting that I view as essentially legislative." *Id.* at 594 (Alito, J., concurring).

In a post-*Greece* decision from the Fourth Circuit—*Lund v. Rowan County,* 863 F.3d 268 (4th Cir. 2017), *cert. denied* 138 S. Ct. 2564

(2018)—the court addressed the coercive aspect of a prayer before a quasi-judicial body that was responsible for hearing "such granular issues as zoning petitions, permit applications, and contract awards." *Id.* at 288. The court held that "[t]he 'close proximity' between a board's sectarian exercises and its consideration of specific individual petitions 'presents, to say the least, the opportunity for abuse.'" *Id.* While there was no "suggest[ion] that the commissioners made decisions based on whether an attendee participated in the prayers," "the fact remains that the Board considered individual petitions on the heels of the commissioners' prayers," which was enough to conclude that the meetings presented a "heightened potential for coercion." *Id.* If that is true for a quasi-judicial body, it is most certainly true in a fully judicial setting like Judge Mack's courtroom.

ii. The other factors on which the *Greece* plurality relied further support a finding of coercion.

The fundamental differences between a legislative session and a courtroom should be enough to carry the day here, but the particular factors that the *Greece* plurality cited in finding a lack of coercion in that case lend further support to a finding of coercion here. First, the controlling opinion relied on the fact that "[t]he principal audience for

these invocations [was] not, indeed, the public but lawmakers themselves," 572 U.S. at 587, and that the same had been true in *Marsh*. *See id.* at 587-88 (quoting *Chambers v. Marsh*, 504 F. Supp. 585, 588 (D. Neb. 1980) (finding the prayer to be "'an internal act' directed at the Nebraska Legislature's 'own members'")); *see also McCarty*, 851 F.3d at 526-27 (noting that the "main" and "principal audience" for the school-board prayers was the board members themselves). Here, in contrast, the prayers are directed at the attorneys, litigants, and others present in the courtroom, rather than at Judge Mack (who could easily have a chaplain pray with him before arriving in the courtroom). The chaplains who lead the prayers face the audience, not the judge. *See* ROA.1505. During the prayers Judge Mack claims that he physically turns his back to the chaplains, which, if true, would further reinforce that the prayers are for the audience rather than for the judge. ROA.1554-55. Indeed, even Judge Mack admits that the prayers are designed "[f]or everybody that's in the courtroom." ROA.1506.

Second, in finding no coercion, the *Greece* plurality relied on the fact that the reported occasional requests to stand "came not from town

leaders but from the guest ministers, who presumably are accustomed to directing their congregations in this way." 572 U.S. at 588. The plurality expressly cautioned that "[t]he analysis would be different if town board members directed the public to participate in the prayers." *Id.* In Judge Mack's courtroom, by contrast, the instruction to stand is routine; comes from the bailiff, an officer of the court; and everyone remains standing until Judge Mack himself instructs them to sit. *See* ROA.1985.

Third, the *Greece* plurality relied on the prayers' being delivered "during the ceremonial portion of the town's meeting," when police officers are sworn in, athletes are inducted into the town hall of fame, proclamations are presented to volunteers and civic groups, etc.—rather than close-in-time to when the Board members were "engaged in policymaking." 572 U.S. at 591. In contrast, in *Lund*, decided after *Greece*, a municipal board's prayers were deemed coercive in part because "adjudicatory proceedings were the first items up for consideration after the standard opening protocols" of which prayer was a part. 863 F.3d at 288, *cert. denied*, 138 S. Ct. 2564. Here, the prayer is sandwiched between the parties' checking in with the clerk and the

first case being called, and Judge Mack's singular function inside the courtroom is to serve as an arbiter over litigants' cases. ROA.1029, 1955.

To be sure, in finding no coercion, the *Greece* plurality also relied on the fact that Town Board members had not singled out dissenters for opprobrium or prejudice. 572 U.S. at 588. So Judge Mack makes much of his not being shown to have penalized litigants for declining to participate.[6] *See* Mack Br. at 32. But the coercion in a courtroom doesn't come from the imposition of actual prejudice; it comes from a perceived *risk* of prejudice. That is why, in *Lund*, the Fourth Circuit held that even though there was no "suggest[ion] that the commissioners made decisions based on whether an attendee participated in the prayers," the "close proximity between a board's sectarian exercises and its consideration of specific individual petitions" "presents … the opportunity for abuse." 863 F.3d at 288. It is that *opportunity* for abuse, and the audience's awareness of that opportunity, that generates the coercion, regardless of whether Judge

[6] The record demonstrates that at least two litigants *have* perceived Judge Mack's demeanor and decision-making as influenced by their lack of participation in the prayer practice. *See* ROA.63, 1667.

Mack actually penalizes non-participants. Furthermore, many decisions are subject to a judges' discretion, often unexplained, and Justice Courts in particular do not maintain a record of proceedings (*see* ROA.1629), so it would be virtually impossible to prove if anyone was prejudiced by their non-participation.

iii. The dynamics in Judge Mack's courtroom exacerbate the coercive pressures faced by audience members.

The coercive pressures faced by attendees are further heightened by several dynamics peculiar to Judge Mack's courtroom that go beyond what was discussed in *Greece*. First, as Attorney Roe explained, the community of lawyers who practice in Justice Courts is small and insular, with attorneys repeatedly appearing before the same judges. ROA.1629. Rather than being akin to a state or local legislative meeting, where attendees are largely anonymous, Judge Mack's courtroom is similar to the "intimate setting of a municipal board meeting" that the Fourth Circuit found to create "a heightened potential for coercion." *Lund*, 863 F.3d at 287.

Second, many of the cases decided in Justice Court involve gritty issues central to litigants' survival and welfare, as to which they have no other available venue. ROA1634-35 (describing mandatory

jurisdiction for evictions and some misdemeanors, and exclusive jurisdiction for suits under $100). As Judge Mack explained, "Justice courts are the highest-volume courts in Texas. 90% of Texans that interact with the judicial branch of government happen in a justice or municipal court." ROA.1519. Attorney Roe testified that "you're not in JP court because you could choose to go to another court. You're here because you have to, or you're here because this is the only thing [you] can afford." ROA.1629. For Montgomery County Justice Court in particular, litigants are not even faced with multiple precinct locations to choose from. Judge Mack's courtroom is designated as Precinct 1-1, but as Attorney Roe put it, "there is no 1-2." ROA.1635.

Third, because a justice of the peace's reasoning is not recorded when entering his judgment, there are fewer barriers built into the system to protect litigants from the personal biases a justice of the peace may possess. As Attorney Roe put it, "one thing about JP courts is, it's pure *de novo* [review], and there is no record. The judge can rule any way they'd like, and no one will ever know what they ruled except for what's on the judgment." ROA.1629. And for the majority of litigants, an appeal is cost-prohibitive. Drawing the ire of the judge, or

even his unconscious disfavor, by not participating in the court's opening prayer is therefore too costly and irremediable to risk.

Fourth, the prayers are not presented as an administrative formality from which Judge Mack maintains an arms-length distance. To the contrary, he goes out of his way to put his personal imprimatur on the prayer, by introducing the day's chaplain and personally explaining the reasons for the practice. ROA.1505, 2109. Indeed, he has made "the courtroom prayer [] the overarching theme of [his] court." ROA.1627. "[F]rom the moment you walk in the door, everything about [Judge Mack's] courtroom, and his procedure, is focused on the courtroom prayer." ROA.1626. The signs outside the courtroom, the bailiff's opening statement, Judge Mack's statements to attendees, and the prayer that follows all serve to emphasize how important the practice is to him. *See, e.g.*, ROA.1515 ("Based on the introductory remarks made by Judge Mack at each court session, it was clear to me that he was very proud of his courtroom-prayer practice…."). In fact, the practice is so prominent that many litigants rely on it to curry his favor. *See* ROA.1616-17.

Finally, it is impossible to inconspicuously remove oneself to avoid the prayer. Although one could possibly leave the courtroom before the opening ceremony begins, one cannot re-enter after the ceremony without being seen by Judge Mack. ROA.1540, 1674, 2109. Nor can one enter the courtroom mid-ceremony to hear the bailiff's announcement regarding the court rules or participate in the Pledges of Allegiance without knocking on the locked courtroom door and drawing the attention of everyone inside. ROA.1507.

In sum, Judge Mack's prayer practice runs afoul of the test adopted in *Greece* because his practice lacks a historical pedigree, courtroom prayer is inherently coercive, and the particularities of Judge Mack's practice further exacerbate the coercive pressures faced by attendees.

III. Judge Mack's Practice Violates the Traditional Establishment Clause Tests

Judge Mack and the stay-motion panel unfairly fault the district court for applying the *Lemon* and endorsement tests. Mack Br. at 23; Stay Order at 315. The district court applied these tests only *after* applying the test enunciated in *Greece*. *See* ROA.2113-18. And the panel's assertion that "the Supreme 'Court no longer applies the old test

articulated in *Lemon*'" is an over-statement, as exemplified by its exclusive citation of concurring, not majority, opinions. Stay Order at 315.

This Court has recognized that the Supreme Court has historically applied at least one of three tests under the Establishment Clause: the *Lemon* test, the endorsement test, or the coercion test. *McCarty*, 851 F.3d at 525. As discussed above, Judge Mack's practice violates the coercion test and thus cannot survive irrespective of how the practice fares under the other tests. *See Lee*, 505 U.S. at 587 (referring to the coercion principle as the bare *minimum* that a challenged practice must meet). However, if the Court is inclined to address the *Lemon* or endorsement tests, it should conclude that Judge Mack's practice violates both.

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

For a government practice to be constitutional, it must have a primarily secular purposes that is "genuine, not a sham, and not merely secondary to a religious objective." *McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 865 (2005). The Fourth Circuit has concluded that courtroom prayer reflects a primarily religious purpose

because "an act so intrinsically religious as prayer cannot meet, or at least would have difficulty meeting, the secular purpose prong of the *Lemon* test." *Constangy*, 947 F.2d at 1150 (citing *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Stone v. Graham*, 449 U.S. 39 (1980)).[7]

If there were any doubt that Judge Mack's prayer practice is pursued with a religious purpose, it was cleared up in a 2015 letter that Judge Mack sent to his supporters, in which he defended his courtroom prayers on the ground that "the [Chaplaincy] program that I wanted in place was a program that God wanted in place, for His larger purpose." ROA.2108. The history of the practice, which is relevant to an assessment of purpose (*see McCreary*, 545 U.S. at 866; *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)), likewise shows that the practice was undertaken as part of the Judge's broader agenda to integrate religion into government. *See* Statement of the Case, *supra* at

[7] The Fourth Circuit rejected the contention that the prayers were designed "to solemnify and dignify the atmosphere in court," because the prayers were delivered before the morning sessions, but not before the afternoon one; and there was no showing that the atmosphere in Judge Constangy's courtroom was different from that of other courtrooms in which prayers were not delivered. 947 F.2d at 1150. Here too, Judge Mack " does not include a prayer at DPS administrative hearings, adult show-cause hearings, and hearings or trials that begin in the afternoon." ROA.1517. Nor did he show that his courtroom was somehow more dignified than other ones.

2-4 ("Judge Mack's Self-Proclaimed Crusade to Spread the Gospel"); *id.*, *supra* at 13-14 ("Judge Mack's Use of His Office for Other Religious Activities"). Indeed, that history shows that the practice was originally biased toward not only religion in general, but Christianity in particular. *See* Statement of the Case, *supra* at 4-6 ("The Chaplaincy Program's Inception").

In sum, the presumptively religious nature of prayers and the history behind Judge Mack's practice leave no doubt that the practice was, and is, undertaken with a primarily, if not exclusively, religious purpose.

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

Because this Court can confidently conclude that courtroom prayer in general, and Judge Mack's practice in particular, runs afoul of the coercion test, and that Judge Mack's practice has a primarily religious purpose, it need not evaluate whether the practice also has the effect of advancing religion or impermissibly endorses religion. *See, e.g.*, *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 343 (5th Cir. 1999) (noting that a practice must fall if it violates any prong of three-

part *Lemon* test). Nevertheless, Judge Mack's practice cannot withstand scrutiny under these tests either.

A governmental practice must "have a primary effect that neither advances nor inhibits religion," *McCarty*, 851 F.3d at 525 n.10, and must not "endorse" religion. *Id.* at n. 11. Although the effects and endorsement tests are distinct, *see Clear Creek*, 977 F.2d at 968, they entail overlapping considerations. *See Freiler*, 185 F.3d at 346. Governmental action has a primary effect of advancing religion when it "in fact conveys a message of endorsement or disapproval" of religion. *Id.* at 346. Under the endorsement test, the government cannot "appear[ ] to take a position on questions of religious belief, or make[ ] adherence to a religion relevant in any way to a person's standing in the political community" and must not "convey[ ] a message that religion is favored, preferred, or promoted over other beliefs." *McCarty*, 851 F.3d at 525 n.11. Whether a governmental practice violates this inquiry is evaluated from the perspective of a "reasonable observer" with knowledge of the practice's "contextual history." *Croft v. Perry*, 624 F.3d 157, 168 (5th Cir. 2010); *see also Murray*, 947 F.2d at 156

("history, purpose, [and] context" are relevant to determining whether practice advances and endorses religion).

In the only appellate decision to consider the question, the Fourth Circuit had little trouble concluding that a judge's practice of opening court sessions with prayer has the primarily religious effect of endorsing religion. *Constangy*, 947 F.2d at 1151. There can be no doubt that Judge Mack's practice does the same. Prayer is a quintessentially religious act, and these prayers are no different: they are almost uniformly religious in content; they are always delivered by religious personnel; they are accompanied by religious body language, such as standing and head-bowing; and the attorneys and litigants in attendance experience them as religious presentations. *See* Statement of the Case, *supra* at 9-10 ("The Prayers"). The history behind the practice further reinforces the religious endorsement reflected in the prayers, as well as the prayers' religious effect. *See* Sec. III.A., *supra*.

CONCLUSION

For the reasons set forth above, the Court should affirm the decision below.

Dated: November 19, 2021

Respectfully submitted,

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Certificate of Service

On November 19, 2021, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13.

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Certificate of Compliance

I certify that this motion complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7) because it contains 12,959 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

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