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

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

DEFENDANT JUDGE WAYNE MACK'S OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Judge Wayne Mack, in his individual capacity, submits the following opposition to plaintiffs' motion for summary judgment (Dkts. 61, 61-1). The Court should deny summary judgment for plaintiffs because the practice about which they complain—Judge Mack's opening ceremony, including an invocation offered by volunteer chaplains from an array of faiths on a rotating basis—is constitutionally permissible. As a result, plaintiffs are not entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56.

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INTRODUCTION

Plaintiffs' motion harkens back to a bygone era of Establishment Clause jurisprudence when courts ignored history and tradition in favor of obsolete tests the Supreme Court hasn't applied in decades (and that wouldn't apply here anyway). As the Supreme Court recently made clear, however, "the Establishment Clause *must* be interpreted 'by reference to historical practices and understandings.'" *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014) (emphasis added). That is why the Supreme Court has repeatedly rejected Establishment Clause challenges to practices rooted in the Nation's history and tradition—including chaplain-led invocations at legislative sessions and municipal government meetings. *See Marsh v. Chambers*, 463 U.S. 783, 786–95 (1983); *Town of Greece*, 572 U.S. at 569–70, 591–92.

In the three paragraphs plaintiffs devote to history and tradition in their overlong motion, they attempt to distinguish *Marsh* and *Town of Greece* on the theory that legislative prayer is somehow unique. Pls.' MSJ (Dkt. 61-1) at 29. But *Town of Greece*—and *American Legion*, which plaintiffs don't address at all—unambiguously rejected that theory, emphasizing that what matters is whether the challenged practice "fits within" our Nation's history and tradition. *Town of Greece*, 572 U.S. at 577; *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2088–89 (2019) (plurality).

Plaintiffs don't dispute—nor could they—that our Nation has a long history of solemnizing government proceedings with chaplain-led invocations. Plaintiffs put forth no evidence to the contrary—citing only a nonbinding thirty-year-old Fourth Circuit case. Dkt. 61-1 at 28–29. And plaintiffs don't dispute—nor could they—that Judge Mack's opening ceremony is materially indistinguishable from the opening ceremony approved by the Supreme Court in *Town of Greece* or any of the other opening ceremonies cited in Judge Mack's summary-judgment motion. *See*

Mack MSJ (Dkt. 59) at 8–12 & nn.4–10. Judge Mack's practice passes constitutional muster and plaintiffs' motion for summary judgment should be denied.[1]

ARGUMENT

I. *Town of Greece* governs Establishment Clause cases like this one.

Plaintiffs recite—and spend the vast bulk of their motion applying—three Establishment Clause tests: the *Lemon* test, the endorsement test, and the coercion test. Dkt. 61-1 at 4–27 (citing *Am. Humanist Ass'n v. McCarty*, 851 F.3d 521, 525 (5th Cir. 2017)). Plaintiffs don't mention that the Fifth Circuit case they cite for those tests—*McCarty*—didn't actually apply any of them. Instead, it analyzed—and *rejected*—an Establishment Clause challenge to a school board's invocation practice by relying solely on *Marsh* and *Town of Greece*'s focus on history and tradition. *McCarty*, 851 F.3d at 527 (relying on the "well-established practice of opening meetings of deliberative bodies with invocations" even though "[s]chool-board prayer presumably does not date back to the Constitution's adoption").

1. Plaintiffs' reliance on *Lee v. Weisman*'s coercion test (at 4–16) is misplaced. Unlike that case, this one doesn't involve public education. And that test doesn't apply outside of "the public school context," as the Fifth Circuit explained when declining to apply it in *McCarty.* 851 F.3d at 526–28 (*Weisman* limited to "school-prayer cases") (quoting *Lee v. Weisman*, 505 U.S. 577, 597 (1992)); *see also Freedom from Religion Found., Inc. v. Mack*, 2018 WL 6981152, at *8 n.46 (S.D. Tex. Jan. 19, 2018) (same) (citing *Briggs v. Mississippi*, 331 F.3d 499, 505 (5th Cir. 2003)); *see also Freeman v. Davis*, 2018 WL 5306661, at *7 (E.D. Tex. June 26, 2018), *report and recommendation adopted*, 2018 WL 4241776 (E.D. Tex. Sept. 5, 2018).

[1] Judge Mack incorporates by reference (1) his statement of undisputed facts and appendix (Dkts. 60 & 60-1), (2) his response to plaintiffs' statement of undisputed facts and counterstatement of facts (filed contemporaneously with this opposition), and (3) the appendix to this opposition. *See* Fed. R. Civ. P. 56(c)(1)(A) (party may support factual assertions by citing materials "in the record"); *United States v. Holmes*, 693 F. App'x 299, 304 n.1 (5th Cir. 2017) (same).

Plaintiffs nonetheless contend (at 5–6) that a majority of Supreme Court Justices in *Town of Greece* applied the *Lee v. Weisman* coercion test and agreed that a judicial invocation would violate it. Not so. To begin, the Fifth Circuit has expressly rejected the assumption on which plaintiffs' entire argument is based: "that the views of dissenting Justices can be cobbled together with those of a concurring Justice to create a binding holding." *Whole Woman's Health v. Paxton*, 972 F.3d 649, 653 (5th Cir. 2020). If anything, under a proper analysis, Justice Thomas's *Town of Greece* concurrence—which requires "actual legal coercion," 572 U.S. at 608–10 (Thomas, J., concurring)—controls. *See* Dkt. 59 at 12 (citing *Marks v. United States*, 430 U.S. 188, 193 (1977)); *see also Bormuth v. County of Jackson*, 870 F.3d 494, 515 n.10 (6th Cir. 2017) (en banc) (Griffin, J., concurring, joined by Batchelder and Thapar, JJ.).

But the point is academic, because even Justice Kennedy's three-Justice plurality rejected the view that "subtle pressure[s]" were sufficient to violate the Establishment Clause and distinguished *Lee v. Weisman* on the ground that it involved the public-school context—"circumstances . . . not present in this case." *Town of Greece*, 572 U.S. at 586–91 (Kennedy, J.).[2] Those circumstances aren't present in this case, either—so *Lee v. Weisman*'s coercion test has no role to play.

2. Plaintiffs' reliance (at 16–27) on *Lemon* and the endorsement test is equally misplaced. The Fifth Circuit didn't apply those tests in *McCarty*, the Supreme Court didn't apply them in *Town of Greece* or *American Legion*, and numerous courts recognize that the Supreme Court has "explicitly rejected" those tests in cases like this one involving invocations by "public officials." *Perrier-Bilbo v. United States*, 954 F.3d 413, 424–25 (1st Cir. 2020); *Kondrat'yev v.*

[2] As explained below, *infra* Part II.B, none of plaintiffs' complaints about Judge Mack's opening ceremony rises to the level of actionable coercion as Justice Kennedy defined it. There is no evidence that Judge Mack "directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that [his] decisions might be influenced by a person's acquiescence in the prayer opportunity." *Town of Greece*, 572 U.S. at 588.

City of Pensacola, 949 F.3d 1319, 1322–23, 1326–27 (11th Cir. 2020) (*American Legion* "jettisoned *Lemon*"); *Freedom from Religion Found., Inc. v. County of Lehigh*, 933 F.3d 275, 280–82 (3d Cir. 2019) ("*American Legion* confirms that *Lemon* does not apply").[3]

The Fifth Circuit saw the writing on the wall even before the *American Legion* decision. In *McCarty*, the Fifth Circuit rejected an Establishment Clause challenge to a school board's invocation practice without invoking *Lemon* or analyzing any of its factors. Instead, the court viewed the "key question" as whether to look to history and tradition (as in *Marsh* and *Town of Greece*) or apply the coercion test from *Lee v. Weisman* (because *McCarty* involved "school-district-sanctioned invocations delivered by students on district property"). 851 F.3d at 526. The Fifth Circuit ultimately looked to history and tradition because "[m]ost attendees at school-board meetings, including [plaintiff], are 'mature adults,' and . . . the presence of students at board meetings does not transform this into a school-prayer case." *Id*. at 526–28 (declining to apply the coercion test). This case is even more straightforward than *McCarty*, because it doesn't involve students or schools at all—much less school-sanctioned invocations on school property.

McCarty also refutes plaintiffs' contention (at 28) that history and tradition are only relevant where "history shows that the *specific practice* is permitted." Resort to history and tradition was appropriate, the Fifth Circuit held, even though school-board prayer in general "presumably does not date back to the Constitution's adoption, since 'free public education was virtually nonexistent at the time,'" and the specific practice at issue didn't begin until the late

[3] The list of cases over the last thirty years in which the Supreme Court has either declined to apply *Lemon* or ignored it altogether is long. *See*, *e.g.*, *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Bd. of Ed. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687 (1994); *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Cutter v. Wilkinson*, 544 U.S. 709 (2005); *Van Orden v. Perry*, 545 U.S. 677 (2005); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012); *Town of Greece*, 572 U.S. 565 (2014); *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *Am. Legion*, 139 S. Ct. 2067 (2019).

1990s. 851 F.3d at 524, 527. Nor did it matter that students, rather than chaplains, led the invocation. *Id*. at 527 n.16. What mattered was the existence of "some history of opening prayers at school-board meetings" dating back to "the early nineteenth century" that was consistent with the "well-established practice of opening meetings of deliberative bodies with invocations." *Id*. at 527.

3. *Constangy*—a thirty-year-old, out-of-circuit decision on which plaintiffs heavily rely—doesn't counsel otherwise. *See* Dkt. 61-1 at 9, 17, 22, 28–29 (citing *N.C. C.L. Union Legal Found. v. Constangy*, 947 F.2d 1145 (4th Cir. 1991)). *Constangy*, like plaintiffs' motion itself, is a relic of a bygone era of Establishment Clause jurisprudence. *Compare* 947 F.2d at 1148 ("The *Lemon* test has been applied in all cases since its adoption in 1971, except in *Marsh*"), *with supra* n.3 (citing Supreme Court's departures from *Lemon*, which except for *Marsh*, began in earnest two years after *Constangy* was decided). Even setting that aside, *Constangy* is distinguishable. So contrary to plaintiffs' unsupported assertion (at 22), there is *every* "reason to think the Fifth Circuit would reach a conclusion different than the one the Fourth Circuit reached in *Constangy*."

In *McCarty* itself, the Fifth Circuit distinguished four cases that—like *Constangy*—"predate[d]" *Town of Greece* and either "turn[ed] on an argument the Court rejected there" or were "factually, and therefore legally, distinguishable." 851 F.3d at 528; *see also* Tex. Att'y Gen. Op. No. KP-0109, 2016 WL 4414588, at *2–3 (2016) (distinguishing *Constangy* on similar grounds). Both of *Constangy*'s predicates—(i) the notion that *Marsh* was limited to its facts, and (ii) that direct evidence of the Framers' intent is necessary for a challenged practice to prevail under the historical approach, *see* 947 F.2d at 1147–48—were conclusively rejected by the Supreme Court in both *Town of Greece* and *American Legion*. *See Town of Greece*, 572 U.S. at 575–77 (majority); *Am. Legion*, 139 S. Ct. at 2087–89 (plurality).

As the Supreme Court explained in *American Legion*, what mattered in *Town of Greece* wasn't whether "the specific practice" had "the very direct connection, via the First Congress, to the thinking of those who were responsible for framing the First Amendment." 139 S. Ct. at 2088. "[W]hat mattered was that the town's practice fit within the tradition long followed" by federal and state government officials. *Id.* at 2088–89 (internal quotation mark and alteration omitted) ("When . . . practices with a longstanding history follow in that tradition, they are likewise constitutional.") ; *see Town of Greece*, 572 U.S. at 577 (asking "whether the prayer practice . . . fits within the [relevant] tradition"); *see also McCarty*, 851 F.3d at 526–28 & n.16 (rejecting Establishment Clause challenge even though the practice "does not date back to the Constitution's adoption" and "depart[s] from the historical practice of chaplain-led invocations").

What's more, the Fourth Circuit decided *Constangy* on a very different record. There, the defendant presented scant (if any) historical evidence of judicial invocations. Here, Judge Mack presented voluminous evidence of the Nation's history of opening judicial proceedings with chaplain-led invocations—a tradition dating back to the Founding generation. *Compare Constangy*, 947 F.2d at 1148–49 (defendant relying solely on evidence that "other state court judges in North Carolina open court with prayer"), *with* Dkt. 59 at 10–11 (tracing the practice of courtroom prayer from the Founding through present day), *and* Mack SUF (Dkt. 60) ¶¶ 63–118 (same). And this Court, unlike the *Constangy* court, has the benefit of the Supreme Court's intervening decision in *Town of Greece*, which approved an opening ceremony materially indistinguishable from the one here. *See* Dkt. 59 at 8–9.[4]

[4] Whatever concerns the Fourth Circuit might have had in *Constangy* about the judge himself delivering the invocation, *see* 947 F.2d at 1151–52, they are not implicated here, where the invocation is delivered (as in *Town of Greece*) by diverse clergy on a rotating, inclusive, non-discriminatory basis (and after attendees are given the option to leave the courtroom). *See* Dkt. 59 at 12–15.

II. Judge Mack's opening ceremony is consistent with the Establishment Clause.

As the Supreme Court made clear in *Town of Greece*, the relevant inquiry in analyzing an Establishment Clause challenge like plaintiffs' is "whether the prayer practice" at issue "fits within the tradition long followed" by federal and state government officials. 572 U.S. at 577. Our Nation has a long tradition, which predates the ratification of the Constitution, of invocations that solemnize government proceedings—including judicial proceedings. Because Judge Mack's "prayer practice" "fits within th[at] tradition," it complies with the Establishment Clause. *Id.*

A. Judicial and other government proceedings have begun with chaplain-led invocations since the Founding.

In his summary-judgment motion, Judge Mack presented a wealth of historical evidence underscoring the Nation's longstanding tradition of solemnizing government proceedings in general, and judicial proceedings in particular, with chaplain-led invocations—a practice that dates back to the Founding and continues, unbroken, to this day. Dkt. 59 at 8–12 & nn.4–10; Dkt. 60 ¶¶ 63–118. Plaintiffs' motion neither questions the veracity of this evidence nor presents any contrary evidence. Instead, plaintiffs stake their argument on (i) two sentences from the Fourth Circuit's decision in *Constangy*, and (ii) a baseless assertion about expert testimony. Neither withstands scrutiny.

First, as already explained, the Fourth Circuit ruled that there was no "long-standing tradition of opening courts with prayer" based on the record evidence before it—"a few examples of judges who open court with prayer." 947 F.2d at 1148–49. The record here is very different and exhaustively documents the tradition of chaplain-led invocations to solemnize judicial proceedings. *See* Dkt. 59 at 8–12 & nn.4–10; Dkt. 60 ¶¶ 63–118.

Second, plaintiffs' suggestion (at 29) that Judge Mack cannot rely on history and tradition because he "has not designated an expert witness to provide testimony" about that history and

tradition is meritless. The Fifth Circuit had no problem finding a single secondary source sufficient to establish a "history of opening prayers at school-board meetings" extending back to "the early nineteenth century" without resort to expert testimony. *McCarty*, 851 F.3d at 527 & nn.15–16 (citing Marie Elizabeth Wicks, *Prayer Is Prologue: The Impact of* Town of Greece *on the Constitutionality of Deliberative Public Body Prayer at the Start of School Board Meetings*, 31 J.L. & Pol'y 1, 30–31 (2015)). Nor did the Supreme Court need expert testimony to establish a tradition of opening government proceedings with chaplain-led invocations. *See Town of Greece*, 572 U.S. at 577, 584–85; *see also Marsh*, 463 U.S. at 786 (determining that "opening . . . sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country" without expert testimony). Plaintiffs' argument that expert testimony is somehow required here finds no purchase in either law or logic.

B. Judge Mack's opening ceremony is consistent with longstanding tradition and materially indistinguishable from the practice approved in *Town of Greece*.

As the Supreme Court has repeatedly reiterated, "whether the [challenged] prayer practice" is consistent with the Establishment Clause turns on whether it "fits within the tradition long followed" by federal and state government officials. *Town of Greece*, 572 U.S. at 577; *see also Am. Legion*, 139 S. Ct. at 2088–89 (plurality) ("practices with a longstanding history," which "follow in that tradition," "are likewise constitutional"). Judge Mack's opening ceremony, like the one approved in *Town of Greece*, fits squarely within that description.

Plaintiffs' motion does not—and cannot—seriously dispute that Judge Mack's opening ceremony is entirely consistent with the historical evidence. Nor do plaintiffs dispute that the opening ceremony here is materially indistinguishable from the one approved in *Town of Greece* (save that it takes place in a courtroom instead of a municipal hearing room). Instead, they contend

(at 4–16) that Judge Mack's practice is somehow unconstitutionally coercive as a matter of law. It is not.

Where, as in *Town of Greece*, a Supreme Court "decision produce[s] a majority result, but not a majority rationale," *Bormuth*, 870 F.3d at 515 (majority), "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment[ ] on the narrowest grounds." *Marks*, 430 U.S. at 193. If anything, under a proper *Marks* analysis, Justice Thomas's concurrence, which repudiated *Lee v. Weisman*'s coercion test, is controlling as to the coercion analysis here: "[T]o the extent coercion is relevant to the Establishment Clause analysis, it is actual legal coercion that counts—not the 'subtle coercive pressures' allegedly felt by respondents in this case." *Town of Greece*, 572 U.S. at 610 (Thomas, J., concurring).

Justice Thomas's concurrence controls because it sets out the narrowest grounds common to the concurring Justices: It "offer[s] a narrower definition of coercion: that a more limited set of government actions—those backed 'by force of law and threat of penalty'—will constitute coercion." *Bormuth*, 870 F.3d at 515 n.10 (Griffin, J., concurring, joined by Batchelder and Thapar, JJ.) ("Justice Thomas's opinion is the narrowest and should control."). There is nothing even remotely like that here, and plaintiffs don't argue otherwise.[5] Even plaintiffs' most forceful articulation of their coercion argument—that unnamed "attorneys and litigants have felt compelled to participate . . . to avoid drawing Judge Mack's disfavor," Dkt. 61-1 at 15—is a far cry from "*force of law and threat of penalty*." *Town of Greece*, 572 U.S. at 608 (Thomas, J., concurring).

[5] As in *Town of Greece*, people in Judge Mack's courtroom may come and go before, during, or after the opening ceremony, and "their absence will not stand out as disrespectful or even noteworthy" if they do. 572 U.S. at 590 (Kennedy, J.); Dkt. 60 ¶¶ 38–40 (bailiff instructs, and witnesses observe, that people come and go for a variety of reasons); *see also* Mack Resp. to PSUF ¶¶ 35–37, 53–54, 56–57 (people are free to come and go and generally several minutes elapse between the bailiff's announcement and Judge Mack's entrance).

Plaintiffs fare no better under the coercion analysis set out in Justice Kennedy's *Town of Greece* plurality opinion. The "societal 'pressures' exerted upon [plaintiff] during the prayers are consistent with those advanced . . . in *Town of Greece* and rejected by Justice Kennedy." *Bormuth*, 870 F.3d at 516 (majority).

Plaintiffs' argument (at 6–10) that courtrooms "are inherently coercive" misses the point. The question is whether Judge Mack, "through the act of offering a brief, solemn, and respectful prayer to open [his courtroom proceedings], compelled [attendees] to engage in a religious observance." *Town of Greece*, 572 U.S. at 587 (Kennedy, J.). "The prayer opportunity in this case must be evaluated against the backdrop of historical practice" to ensure that "its purposes are to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens, not to afford government an opportunity to proselytize or force truant constituents into the pews." *Id.* That is all—and Judge Mack's opening ceremony easily satisfies that standard.

Plaintiffs don't allege—and point to no facts to show—that Judge Mack (1) "directed the public to participate in the prayers"; (2) "singled out dissidents for opprobrium"; or (3) "indicated that [his] decisions might be influenced by a person's acquiescence in the prayer opportunity." *Id.* (listing factors that might cause a prayer practice to violate the Establishment Clause). Instead, plaintiffs' coercion argument proceeds from the premise that "attorneys and litigants have felt compelled to participate . . . to avoid drawing Judge Mack's disfavor." Dkt. 61-1 at 15; *see* Dkt. 61-1 at 10 (citing concerns about "show[ing] ample respect[ ] to courtroom judges"); Dkt. 61-1 at 10–13 (concerns about "creating a bad impression," or "[d]rawing the ire of the judge, or even his unconscious disfavor"). But the *Town of Greece* plaintiffs made that exact same argument—"that constituents might feel pressure to join the prayers to avoid irritating the officials who would be ruling on their petitions"—and the Supreme Court rejected it. 572 U.S. at 589.

Plaintiffs' argument here fails for the same reason the plaintiffs' argument failed in *Town of Greece*—it "has no evidentiary support." *Id*. Here, as there:

- "Nothing in the record indicates that [Judge Mack] allocated benefits and burdens based on participation in the prayer." *Town of Greece*, 572 U.S. at 589; *see* Dkt. 59 at 14 ("Judge Mack has repeatedly made clear that participation (or non-participation) in the opening ceremony would not 'affect[ ] the outcome of [any] cases.' ") (alterations in original) (citing Compl. (Dkt. 1) ¶¶ 34, 66, 76, and Dkt. 60 ¶¶ 31, 37–40, 51).

- There is no evidence "that citizens were received differently depending on whether they joined the invocation or quietly declined." *Town of Greece*, 572 U.S. at 589; Dkt. 59 at 13–14 (citing Dkt. 60 ¶¶ 23–26, 31, 37–38); *see generally* Dkt. 61-1 at 10–13, 15 (discussing concerns about "drawing Judge Mack's disfavor" but failing to provide even a single instance in which Judge Mack ever exhibited such disfavor).

- Plaintiffs cite "no instance" in which Judge Mack "signal[ed] disfavor toward nonparticipants or suggest[ed] that their stature in the community was in any way diminished." *Town of Greece*, 572 U.S. at 589; Dkt. 59 at 13–14 (citing Dkt. 60 ¶¶ 23–26, 31, 37–38).

Plaintiffs point to no evidence that Judge Mack ever directed participation in prayer, singled anyone out, or exhibited any bias whatsoever. Dkt. 61-1 at 5–16. Instead, plaintiffs repeatedly assert that Judge Mack's opening practice is coercive because some attendees "have felt"—"and have even concluded"—"that their participation in the prayers is necessary in order to avoid drawing Judge Mack's disfavor." Dkt. 61-1 at 15; *see also* Dkt. 61-1 at 10–13. But, for one thing, *Town of Greece* rejected the proposition that "feel[ing] subtle pressure to participate in prayers that violate [one's] beliefs in order to please the [decision maker] from whom [one is] about to seek a favorable ruling" constitutes unconstitutional coercion. 572 U.S. at 586.

For another thing, though this dispute is heading into its seventh year, plaintiffs cannot point to a single piece of evidence to substantiate their feelings, concerns, and conclusions—not one instance in which Judge Mack has exhibited bias or disfavor based on participation (or non-participation) in the opening ceremony. Dkt. 61-1 at 5–16. Indeed, Plaintiff Roe testified that he

has "never witnessed any particular direct religious discrimination at the bench against a litigant for failing to participate, or for expressing their religion in some overt or covert way," Dkt. 60 ¶ 23, and admitted that he can't identify a single "specific action taken by Judge Mack in response to . . . participation in the courtroom opening routine." Dkt. 60 ¶¶ 24–25.

Plaintiffs are left with conjecture, speculation, and unsubstantiated concerns that—contrary to his uncontradicted public statements and nearly seven years of practice—Judge Mack will reverse course and discriminate against attendees based on whether they participate in the opening ceremony.[6] But as the Fifth Circuit has made clear, such "conclusory allegations, speculation, and unsubstantiated assertions are inadequate." *Bargher v. White*, 928 F.3d 439, 444 (5th Cir. 2019); *see Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir. 1994) ("unsubstantiated assertions are not competent summary judgment evidence").[7]

* * *

Nothing in plaintiffs' summary-judgment motion—certainly not the personal attacks on Judge Mack—alters the conclusion that Judge Mack's opening ceremony fits comfortably within the Nation's history and tradition of opening judicial and other government proceedings with a brief, chaplain-led invocation to solemnize the proceedings. Plaintiffs no doubt take umbrage at Judge Mack's opening ceremony, but "an Establishment Clause violation is not made out any time

[6] *See*, *e.g.*, Dkt. 61-1 at 10–12 (concerns about Judge Mack "observ[ing] the audience during the prayers"); Dkt. 61-1 at 12 (concerns about "creating a bad impression"); Dkt. 61-1 at 12–13 (concerns about the costs of appealing a hypothetical retaliatory decision); Dkt. 61-1 at 14 (concerns that Judge Mack is "very proud" of his opening ceremony); Dkt. 61-1 at 14 (concerns about "inconspicuously remov[ing]" oneself from the courtroom); Dkt. 61-1 at 14 (concerns about entering "mid-ceremony"). These concerns are no different than the perceived offense, exclusion, and disrespect that *Town of Greece* found insufficient to support an Establishment Clause violation. 572 U.S. at 589 ("Offense, however, does not equate to coercion.").

[7] Despite repeatedly asserting that Judge Mack "often observes the audience during the prayers," Dkt. 61-1 at 10–13, plaintiffs concede that "Judge Mack claims that he physically turns his back to the chaplains." Dkt. 61-1 at 15. Even accepted as true, plaintiffs' assertion is irrelevant. The constitutionality of the opening practice turns on whether it follows in the Nation's history and tradition of opening judicial and other government proceedings with chaplain-led invocations—not the direction Judge Mack faces during that invocation.

a person experiences a sense of affront from the expression of contrary religious views," even in an official forum. *Town of Greece*, 572 U.S. at 589.

CONCLUSION

For the foregoing reasons, the Court should deny plaintiffs' motion for summary judgment.

Dated: January 18, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on January 18, 2021, a true and correct copy of the foregoing Opposition to Plaintiffs' Motion for Summary Judgment was served by ECF on all counsel of record.

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