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

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

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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Statement of Nature and State of Proceeding and Issues to Be Ruled Upon

This is an Establishment Clause challenge to the Defendant's practice of opening daily courtroom sessions with a clergy-led prayer. The Parties have cross-moved for summary judgment. In considering whether the challenged practice violates the Establishment Clause, the district court should "view the evidence in the light most favorable to the nonmoving party, and the moving party has the burden of showing [the] court that summary judgment is appropriate." *QBE Ins. Corp. v. Brown & Mitchell, Inc.*, 591 F.3d 439, 442 (5th Cir. 2009).

Introduction & Summary

Judge Mack's Motion for Summary Judgment is as notable for what it does not say as for what it does. He does not challenge the Plaintiffs' standing; and he does not mention the *Lemon* or endorsement tests (let alone attempt to defend his practice under those tests), thereby all but conceding that his practice must fall if those tests are applicable.

Although he pays lip service to the facts (*see* Def.'s Br. at 1–5), as a legal matter, Judge Mack puts all his eggs in the "history" basket, relying exclusively on *Town of Greece v. Galloway*, 572 U.S. 565 (2014), as the source of the standard by which his practice should be measured. Def.'s Br. at 8. The *sine qua non* of his defense is that his practice grows out of "a rich historical tradition of opening government proceedings—including judicial proceedings—with solemnizing invocations." Def.'s Br. at 8. His argument fails for several reasons.

First, the premise of his argument is flawed: *Galloway* did not hold that a practice is permissible simply because it comports with tradition; nor did it overrule the *Lemon* or endorsement tests. It simply held that "it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted." *Id.* at 575. That showing had been made with respect to legislative invocations because the Framers' views

had been made plain by their taking a vote, close-in-time to their approval of the Establishment Clause, regarding the practice in question. *Id.* at 575–78. Here, Judge Mack has pointed to no evidence that the Framers deliberated over, let alone approved of, the delivery of prayers to open courtroom sessions. *See infra* Part I.A.

Second, *Galloway* approved of legislative invocations not only because the Framers had explicitly endorsed the practice, but because they actually engaged in it. *Id.* at 576. Here, in contrast, the Defendant has not cited a single instance of a Founding era courtroom that engaged in routine courtroom prayer. *See infra* Part I.B.

Third, in addition to relying on Founding-era enactments and actions, *Galloway* approved of legislative invocations because the practice had been observed "virtually uninterrupted" ever since. 572 U.S. at 575–78. Yet, Judge Mack has not identified a single courtroom that has followed an uninterrupted practice of opening its daily proceedings with prayer. Instead, his evidence consists of prayers that were delivered at ceremonies marking the opening of court terms, rather than on routine court days; and anecdotal one-off prayers that were never repeated and that, in passages deliberately omitted from the Defendant's recounting, are acknowledged by the sources to have been highly unusual. From the federal courts to all of the fifty states, in the entire 231-year history of this Nation, the Defendant references only five judges who have ever included prayers in routine courtroom sessions and in none of those courts has the Defendant shown the practice to continue to this day. Indeed, when one looks at the Defendant's actual evidence, rather than at his *characterization* of that evidence, it shows that daily courtroom prayer has been a rare and anomalous occurrence in the Nation's history. *See infra* Part I.C.

Fourth, *Galloway* ruled as it did because "history shows that the *specific practice* [of legislative invocations was] permitted" under the Establishment Clause. 572 U.S. at 577

(emphasis added). Nonetheless, in an effort to distract from his poor showing regarding whether judges have engaged in daily courtroom prayer from the Founding to the modern day, the Defendant points to all manner of practices that do not involve prayer at all and asks the Court to equate judicial prayers with legislative ones. Because those practices are distinct from courtroom prayer, they have no bearing on the case at hand. *See infra* Part I.D.

Finally, *Galloway* held that, even where a specific practice was countenanced by the Framers and maintained without interruption, it must nonetheless be non-coercive. *Id.* at 586. The Court concluded that legislative invocations are non-coercive for a variety of reasons, including that a reasonable observer would know that the practice grows out of a longstanding benign tradition and that the "principal audience for these invocations is not, indeed, the public but lawmakers themselves." *Id.* at 587–89. Neither of these, nor any of the other factors on which *Galloway* relied, is true here. Courtroom prayers are decidedly *aberrational*; Judge Mack's particular practice is directed at the audience, rather than at the judge himself; and a courtroom is an infinitely more coercive setting than a legislative session, with various aspects of Judge Mack's practice making it even more coercive still. *See infra* Part II.

For all of these reasons, *Galloway* does not immunize Judge Mack's practice from constitutional infirmity.

I. The Defendant Has Not Shown that the Framers Approved of Daily Courtroom Prayer, that the Practice was Followed in the Founding Era, or that the Practice Has Continued Uninterrupted Since that Time.

A. The Defendant has not demonstrated that the Framers took any deliberative action to indicate their approval of courtroom prayer.

Galloway was decided against the backdrop of the Court's earlier decision in *Marsh v. Chambers*, 463 U.S. 783 (1983), in which the Court upheld the Nebraska Legislature's practice

of opening its legislative sessions with prayer. *Galloway* discussed and relied on *Marsh* at length, explaining as follows:

> … *Marsh* must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation. The case teaches instead that the Establishment Clause must be interpreted by reference to historical practices and understandings. That the First Congress provided for the appointment of chaplains only days after approving language for the First Amendment demonstrates that the Framers considered legislative prayer a benign acknowledgment of religion's role in society.

572 U.S. at 576–77 (internal citations and quotations marks omitted); *see also id.* at 575 ("*Marsh* is sometimes described as carving out an exception to the Court's Establishment Clause jurisprudence, because it sustained legislative prayer without subjecting the practice to any of the formal tests that have traditionally structured this inquiry," when in fact, what it stands for is that "[t]he Court in *Marsh* found those tests unnecessary because history supported the conclusion that legislative invocations are compatible with the Establishment Clause").

The Court had indeed made these same points in *Marsh*, squarely holding that "[s]tanding alone, historical patterns cannot justify contemporary violations of constitutional guarantees." 463 U.S. at 790. The Court upheld the practice at issue in *Marsh* only because "there is far more here than simply historical patterns," *id.*, namely:

> On Sept. 25, 1789, three days after Congress authorized the appointment of paid chaplains, final agreement was reached on the language of the Bill of Rights, J. of the Sen. 88; J. of the H.R. 121. Clearly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment.

Id. at 788. Thus, *Marsh* and *Galloway* held that the fact that a practice occurred at the Founding was *not* enough; rather, those decisions came out as they did because history showed that the Founders had taken formal action to approve of the practice in question. *Galloway*, 572 U.S. at 576; *Marsh*, 463 U.S. at 790. But Judge Mack ignores this: he cites no evidence demonstrating that the Framers deliberated over, or even expressed a view on (either unanimously or by

majoritarian decision), whether courtroom prayer was consistent with the federal Establishment Clause. He thus cannot satisfy the threshold requirement for reliance on *Galloway*.

B. The Defendant has not even shown that Founding-era courtrooms opened their daily sessions with prayer.

Marsh and *Galloway* did not only focus on the Framers' formal endorsement of legislative invocations; it also considered that their *actions* were consistent with that enactment, thereby confirming by both word and deed that the Establishment Clause did not prohibit the practice. Thus, in *Marsh*, the Court relied on the "unique history" surrounding legislative invocations, 463 U.S. at 791, in which the First Congress, in the same week, "voted to appoint and to pay a Chaplain for each House and also voted to approve the draft of the First Amendment for submission to the States," *id.* at 790, which "sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress—their actions reveal their intent." *Id.* Similarly, in *Galloway*, the Court observed that "history supported the conclusion that legislative invocations are compatible with the Establishment Clause" because the First Congress actually engaged in the practice. 572 U.S. at 575–76.

Defendant asserts that "jurists have been inviting guest chaplains to open court proceedings with brief invocations since the Founding era." Def.'s Br. at 10 (citing Def.'s SUF ¶¶ 63–80).[1] But the evidence that he cites does not support this assertion. For starters, he cites only *ten* instances of a prayer being delivered in a courtroom in the thirty-three-year period from 1790–1823, which amounts to less than one prayer every three years. *See* Def.'s SUF ¶¶ 65–69,

[1] The Defendant does not define "Founding era," but he refers in this passage of his brief to prayers concluding in 1823 (*see* Def.'s Br. at 10 (citing Def.'s SUF ¶¶ 63–80), so Plaintiff will refer to this era accordingly.

72, 78–80.[2] Furthermore, in every one of those ten instances, the prayer was delivered at a ceremony marking the opening of the court's *term*—an occasion akin to a ribbon-cutting ceremony—not at the opening of daily court sessions.

Eight of those term-opening prayers took place to mark the introduction of federal courts first operating in the states. *See* Def.'s SUF ¶¶ 65–66, 68–69, 72, 78–79. The Judiciary Act of 1789 marked a new kind of court in American history, with members of the federal Supreme Court "riding Circuit" by presiding over grand juries and trials in the states for the first time. Pls.' Resp. to Def.'s SUF ¶ 66 (citing Act of Sept. 24, 1789). Because there was considerable resistance to the federal Constitution, with many New England states opposing it, some Justices were willing to defer to local practices when the federal courts were first opened. *See id.* (citing Finkelman). For example, upon request, 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. *Id.* (citing Def.'s Ex. 23 at 59 n.1 (indicating that court session lasted several days, with no indication that a prayer was delivered on subsequent days)). The other seven Circuit-riding prayers were likewise delivered at the opening of the court's first term in a particular state. *See* Pls.' Resp. to Def.'s SUF ¶¶ 65, 68–69, 72, 78–79.[3]

Furthermore, it's no secret that the Framers were of different minds on what the Establishment Clause required, so the views or actions of any one individual Circuit-riding Justice says nothing about the view of the Founders generally. Their individual actions thus

[2] Defendant cites various other incidents that took place during this era. *See* Def.'s SUF ¶¶ 63–64, 70–71, 73–77. As none of these is a prayer, they are discussed in Part I.D. below.

[3] Even then, the inclusion of a prayer appears to have been aberrational, as in most federal circuit court openings that occurred during the Founding era, a prayer appears *not* to have been included. *See, e.g.,* Def.'s Ex. 24 at 164 (referencing 1791 opening of Circuit Court for South Carolina without any mention of a prayer); Def.'s Ex. 24 at 192 (same for 1791 opening of Circuit Court for the District of Vermont); Def.'s Ex. 24 at 166 (same for 1791 in Virginia); Def.'s Ex. 24 at 192 (same for 1791 in Rhode Island); Def.'s Ex. 24 at 331 (same for 1792 in Maryland).

stand in sharp contrast to the First Congress' deliberative appointment of a chaplain to deliver legislative prayers. *Cf. Galloway*, 572 U.S. at 575–77; *Marsh*, 463 U.S. at 788.

The Defendant's showing regarding *state-court* practices in the Founding era is even more lacking. He lists only two courtroom prayers from those thirty-five years: a prayer delivered at the inauguration of a courthouse for the "first sitting" of the "new courts of justice" in Otsego County, New York in 1791, *see* Def.'s SUF ¶ 67 (citing Def.'s Ex. 26, 2d column, *Extract of a Letter from Cooper's-Town*), and an 1823 prayer "[a]t the opening of the [Massachusetts] Supreme Court in [Boston]." Def.'s SUF ¶ 80 (citing Def.'s Ex. 31, 3d column, *From the Boston Galaxy of Nov. 7*). Both of these, like the Circuit-riding prayers discussed above, occurred at the opening of a court's term, rather than in conjunction with routine, daily courtroom sessions; and a practice of two courts throughout the twenty-four states that had become part of the union by 1825 hardly amounts to a widespread practice. *See* www.britannica.com/topic/list-of-U-S-states-by-date-of-admission-to-the-Union-2130026 (listing states by order of date of admission to the union).

In sum, to support the central contention of his motion—that Judge Mack's practice grows out of a tradition dating to the Founding—the Defendant has pointed to a mere ten prayers, and every one of them involved the opening of a court term, rather than a routine practice. Indeed, *the Defendant has not cited a single Founding-era courtroom that maintained a practice of opening daily sessions with a prayer*.

C. The Defendant has not shown that a practice of delivering prayer before routine courtroom sessions has continued "virtually uninterrupted" since the Founding.

Galloway did not singularly focus on the Founders' views and actions; it also focused on the longevity of the practice in question:

> The First Congress made it an early item of business to appoint and pay official chaplains, and both the House and Senate have maintained the office *virtually uninterrupted* since that time. When *Marsh* was decided, in 1983, legislative prayer had persisted in the Nebraska Legislature for more than a century, and the majority of the other States also had the same, consistent practice.… "In light of the unambiguous and *unbroken history of more than 200 years*, there can be no doubt that the practice of opening legislative sessions with a prayer has become part of the fabric of our society."

572 U.S. at 575–77 (quoting *Marsh*, 463 U.S. at 792) (citations omitted, emphasis added).

Judge Mack makes the sweeping statements that "prayer has long been a fixture in American courtrooms" and that "[b]y 1835, the practice of inviting a guest chaplain to give a brief invocation had become so engrained …." Def.'s Br. at 10. But the scant evidence he cites does not in fact demonstrate what he says. Instead, the post-1800 courtroom prayers that he references fall into one of the following six categories:

(a) A one-time prayer to mark the convening of a court's term, rather than a daily court practice, with no showing that a prayer occurred on the other days of the court's term or even that the court continues to engage in the practice today, and with many of the source articles stating, in language omitted by the Defendant, that the practice was highly unusual, to wit:

- One prayer delivered in 1845 at a federal Circuit-riding court-term opening. Def.'s SUF ¶ 82 & Pls.' Resp. thereto (citing Def.'s Ex. 33). Not only did that prayer mark a term's (not day's) opening, but the Defendant has not pointed to a single instance of this practice persisting after the mid-nineteenth century.
- An 1851 article reporting on a Wisconsin judge's practice of having a prayer presented at the "opening of the Court in that County." Def.'s SUF ¶ 83 (citing Def.'s Ex. 34, two-thirds down the 4th column, *Judge Howe*). But the Defendant omits what follows: "[the practice was] something unknown to the judicature of the State previous to his

introducing it." Pls.' Resp. to Def.'s SUF ¶ 83 (quoting Def.'s Ex. 34). Furthermore, the Defendant provides no indication that the practice outlived that judge or continues today.

- A prayer presented in Georgia 1895, when "the Judge requested [that a reverend] open the court with prayer." Def.'s SUF ¶ 89 (citing Def.'s Ex. 40, two-thirds down the 1st column, *Georgia*). It is unclear whether this prayer opened a term or session, but it is clear that the article was reporting on a one-time event, rather than a daily practice. In language Defendant omits, the article describes the event as "a new departure in city court" and the paragraph is bookended reports of other courts' proceedings, with no indication that either of those courtrooms were the site of any prayer. Pls.' Resp. to Def.'s SUF ¶ 89 (quoting Def.'s Ex. 40). Furthermore, Defendant makes no showing that this practice outlived that judge, let alone that it continues to this day.
- A prayer presented in 1898 to mark the opening of the "term of the Christian circuit court" in Hopkinsville, Kentucky. Def.'s SUF ¶ 91 (citing Def.'s Ex. 42, middle of the 4th column, *Judge Opens Court with Prayer*). The article states that this was "*the first time in [the court's] history*" that a prayer had been offered. Pls.' Resp. to Def.'s SUF ¶ 91 (quoting Def.'s Ex. 42 (emphasis added)). The article also indicates that the term would be a long one, including "six notable murder cases," with no indication that prayers were offered on any other days of the term. *See id.* Furthermore, the Defendant makes no showing that this practice continues in that court today.
- A 1908 article reporting that an Oklahoma judge "convened court … by having a minister present to open court with prayer." Def.'s SUF ¶ 93 (citing Def.'s Ex. 44, bot. of 2d column, *Opens Court with Prayer*). It is unclear whether the prayer opened a court term or session, but it is clear that the article was reporting on a one-time event, rather than on

a daily practice. By interrupting the quotation, Defendant omits the salient point of the sentence: "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." Pls.' Resp. to Def.'s SUF ¶ 93 (quoting Def.'s Ex. 44 (emphasis added)). That is, the point of the article is that it was unusual, to the point of being newsworthy, for a prayer to be delivered at all. Furthermore, Defendant makes no showing that this practice outlived that judge, let alone that it continues to this day.

- A 1934 article regarding a judge's re-election campaign, which states that the judge is "A man of high ideals and Christian character he always opens his terms of court with prayer." Def.'s SUF ¶ 105 (citing Def.'s Ex. 57, middle of 1st column, *For Circuit Judge*). But the Defendant omits the second sentence of that paragraph, which states that the judge was "the First circuit Judge in this circuit" ever to engage in the practice. Pls.' Resp. to Def.'s SUF ¶ 105 (quoting Def.'s Ex. 57). The Defendant neither claims nor shows that the practice outlived the judge or continues in that court today.
- A prayer presented in North Carolina to mark the convening of the first court session held by a newly elected Superior Court Judge. Def.'s SUF ¶ 108 (citing Def.'s Ex. 60, bot. of 2d column, *Baptist Judge Has Pastor Open First court with Prayer*). The judge made it clear that the practice was a one-time occurrence rather than a daily practice, stating "No one believes in the separation of church and state any more than I do," "but I want my pastor to open this first court with prayer." Pls.' Resp. to Def.'s SUF ¶ 108 (quoting Def.'s Ex. 60). The coverage of the incident makes it clear that the practice was unusual for the area. Furthermore, the Defendant does not claim that the practice outlived the judge or that it continues in that court today.

- A prayer presented by a local minister to open a term of criminal court in North Carolina in 1963. *See* Def.'s SUF ¶ 109 (citing Def.'s Ex. 61, 4th Column, *Court to Open with Prayer on Feb. 4th*). The article indicates that the practice was requested by a "special judge" pursuing a practice that departed from the court's typical practice, and the report of the incident makes it clear that the practice was unusual for the area. *See* Pls.' Resp. to Def.'s SUF ¶ 109 (quoting Def.'s Ex. 61). The Defendant does not claim that the practice outlived that judge or continues in that court today.
- Twelve other occasions, from 1858 to 1916, in which a prayer was presented at the opening of a court's term, with no indication that a prayer was delivered on any other day of the court's term, and no showing that the practice persists in that court today.[4]

(b) A prayer delivered in a courthouse on a random one-time basis, again with much of the coverage noting the rarity of the practice, in language that Defendant omits, to wit:

- A prayer presented in a courtroom in Ripley County, Indiana, in 1898 by a minister, just before a judge's decision on whether to hold a defendant over for trial in a sensational mob lynching. *See* Def.'s SUF ¶ 90 (citing Def.'s Ex. 41, one-third down the 3d column, *Hughes' Deliverance*). What the Defendant omits, by way of a break in his quotation, is that the minister acknowledged the rarity of his prayer, stating:

> Squire Craig had asked me privately and in the court room to open court with prayer. *I told him I was accustomed to praying in church or Sunday school and at*

[4] *See* Def.'s SUF & Pls.' Resp thereto for ¶ 84 (regarding an 1858 prayer referenced in Def.'s Ex. 35, 2d-to-last column, *The Supreme Court of Vermont*), ¶ 85 (regarding an 1871 prayer referenced in Def.'s Ex. 36, top of 2d column, *Circuit Court*), ¶ 87 (regarding an 1881 prayer described in Def.'s Ex. 38, 5th column, *St. Johnsbury*), ¶ 88 (regarding 1889 prayer described in Def.'s Ex. 39, 2d column, *Federal Court*), ¶ 94 (regarding a 1909 prayer described in Def.'s Ex. 45, two-thirds down the 2d column, *Minister Refuses Fee*), ¶ 96 (regarding 1912 prayer described in Def.'s Ex. 47, in 4th column below ad for The Howland Dry Goods Co., *Murder Trial for Superior Court Next Week*), ¶ 97 (regarding 1913 prayer described in Def.'s Ex. 48, 1st column, *Superior Court in Session*), ¶ 99 (regarding 1914 prayer described in Def.'s Ex. 50, 1st column, *Open Court with Prayer*), ¶ 101 (regarding a 1916 prayer described in Def.'s Ex. 52, top of 3d column, *Jersey Justice Is Promised to Slayer Kralik* and a 1916 prayer described in Def.'s Ex. 53, bottom of 4th column, *Asks Fr. McGivney to Open Court with Prayer*) & ¶ 102 (regarding a 1919 prayer described in Def.'s Ex. 54, top of 3d column, *Putnam*).

> *funerals but not in court;* but bretheran, if even I offered a prayer to God from the depths of my heart, and with the greatest amount of faith in God, I did that day.

Pls.' Resp. to Def.'s SUF ¶ 90 (quoting Def.'s Ex. 41 (emphasis added)). What is even more notable is that the Defendant chose not to include another newspaper article, equally available online and elsewhere, which has this to say about the incident: "The minister's opening the argument with prayer yesterday is regarded as a peculiar thing, unknown in the annals of court-room history." *See id.* (citing Pls.' Appx. Tab 46, two-thirds down the 3d column, *Hez Hughes Is Not Guilty*, Indianapolis News (March 1, 1898)). That same article also adds that the minister stated in his prayer that this was the first time he had ever been asked to pray in a courtroom. *See id.*

- A prayer presented in a California courtroom in 1914 to mark the conclusion of "the biggest case the courts of this county have had to deal within in years." Def.'s SUF ¶ 98 (quoting Def.'s Ex. 49, 5th & 6th columns, *Agreements in Yorba Linda Case Are Signed, Court is Adjourned with a Prayer*). The Defendant's quotation omits this: "It was the first time in the history of the county that a prayer was offered in court for the settlement of a case." Pls.' Resp. to Def.'s SUF ¶ 98 (quoting Def.'s Ex. 49).
- Five additional prayers that were plainly one-time incidents that, by definition, did not even continue on a routine basis, let alone persist to today.[5]

When one considers the frequency and timing of all of the prayers discussed above, whether delivered to open a court term or as a one-off incident, one learns of two-to-three instances of courtroom prayers for each of the following *multi-decade* historical periods: "the antebellum

[5] Def.'s SUF & Pls.' Resp. thereto for ¶ 86 (re. 1879 prayer described in Def.'s Ex. 37, 2d-to-last column, *A Verified Dream*); ¶ 103 (re. 1922 prayer described in Def.'s Ex. 55, last column, *25 Moonshiners Confess*); ¶ 106 (re. 1947 prayer described in Def.'s Ex. 58, 1st column, *Who Is Governor of Georgia?*)); ¶ 107 (re. 1955 prayer referenced in Def.'s Ex. 59 (3d column, *Murder Trial Is Opened in Madison Court*); ¶ 114 (re. Def.'s Ex. 66, *Court Holds First Session*).

period, Reconstruction, the Gilded Age, the Progressive era, both World Wars, the Post-War era, and up to today." Def.'s Br. at 11 (footnotes omitted). That is, even these seminal and one-off events were extremely rare occurrences—and none continues to today.[6]

(c) A bill that failed: Defendant cites a 1901 bill introduced in the Georgia legislature calling for the state's courts to be "opened with prayer every day." Def.'s SUF ¶ 92 & Pls.' Resp. thereto (citing Def.'s Ex. 43, near bot. of 3d column, *To Open Court with Prayer*). What the Defendant doesn't mention is that *the bill did not pass*, there is no such law on the books, and there would have been no need to make such a proposal if the prayers were already a tradition.

(d) Ministerial handbooks: Defendant references a handbook from 1835 that includes a model prayer for potential delivery in a courtroom, without any indication of the context in which the prayer would be presented or whether it has ever been presented in any courtroom on even one occasion, let alone on a "virtually uninterrupted" basis ever since, Def.'s SUF ¶ 81 & Pls.' Resp. thereto (citing Def.'s Ex. 32); and a 1928 handbook stating that "some courts" "are opened with a prayer by a chaplain," again without reference to any particular context or presentation. Def.'s SUF ¶ 104 & Pls.' Resp. thereto (citing Def.'s Ex. 56 at 52).

(e) A prayer to open monthly convenings of a non-adjudicatory administrative body: In support of his contention that courtroom prayer "continued through . . . the Post-War era," Judge Mack cites a 1971 article describing a request by the newly elected President of a three-member "Mercer County Court" in West Virginia to institute a practice in which a local minister would

[6] In addition, the vast majority of these incidents occurred when the federal Establishment Clause did not even apply to the States. The Establishment Clause was not be made applicable to the states until the late 1940s in *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1 (1947), and *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948). Prior to that, direct government involvement with religion at the state level was consistent with the federal Establishment Clause. Indeed, at the time of the Founding, most states had an established church, some of which endured until after the Civil War. Thus, state-court pre-1947 practices shed no light on what the First Congress or the Framers (or even State officials, for that matter) may have thought about whether courtroom prayer comports with the federal Establishment Clause. It is significant then, that even with no legal barrier, the Defendant has been unable to point to a single pre-1947 state court that opened its sessions with prayer on a daily basis.

deliver a prayer to open the body's once-a-month convenings. Def.'s Br. at 11 & n.9 (citing Def.'s SUF ¶ 110 (citing Def.'s Ex. 62, 1st column, "*McMillion Leads Prayer*")). Although the body in question is called a "court," it is a purely administrative/legislative, rather than adjudicatory, body. *See* Pls.' Resp. to Def.'s SUF ¶ 110 (citing *Three County Court Hopefuls Favor County Manager Hiring*, Bluefield Daily Tel. (Bluefield, W. Va.) (Apr. 28, 1972)). In some states, counties refer to administrative or legislative bodies as "courts." Texas itself has designated County Commissioners' Courts in this same manner. *See* Tex. Const. art. 5 sec. 18; *see also Familias Unidas v. Briscoe,* 619 F.2d 391, 404 (5th Cir. 1980) (distinguishing a Texas county judge's "numerous executive, legislative and administrative chores in the day-to-day governance of the county" from any adjudicatory responsibilities, and describing a Commissioners' Court as "the county's legislative body").

(f) Five judges' practices that do not continue to this day: Finally, Defendant cites evidence of five—yes, *five*—judges from all of the fifty states, in the Nation's entire 231-year history, who have opened their daily courtroom sessions with prayer. In virtually every instance (four of five articles), the source he cites indicates that the practice was an *anomaly* and in none of the five instances has the practice been shown to persist to this day:

- A Mississippi judge's practice in 1910 of "having a minister on hand in the mor[n]ing to open court with prayer." *See* Def.'s SUF ¶ 95 (citing Def.'s Ex. 46, first two columns, *Judge Evans' Court*). The article says the newspaper was "surprised to learn" of the practice; that it was an "innovation" undertaken by a judge who was temporarily sitting in for another judge, who was considered a "crank and a fanatic," and who did not have "public opinion behind him." Pls.' Resp. to Def.'s SUF ¶ 95 (quoting Def.'s Ex. 46). Former judges on the circuit court bench had not pursued the practice. *See id.*

Furthermore, the Defendant provides no evidence that the practice outlived that judge, let alone that it continues in that court today.

- A practice of daily courtroom prayer introduced by a judge of the Thirteenth Judicial Circuit in Florida in 1915, which the article refers to as "a decided innovation in Florida courts." Pls.' Resp. to Def.'s SUF ¶ 100 (quoting Def.'s Ex. 51, bot. of 2d column, *Florida Judge Will Open Court with Prayer*). The Defendant has offered no evidence to indicate that the practice outlived that judge, let alone continues in that court today.
- A 1972 article describing a practice of a Durham County, North Carolina Superior Court judge of having a pastor "open [his] court with prayer." Def.'s SUF ¶ 111 (citing Def.'s Ex. 63, 3d column, "*Judge Cooper Opens Court with Prayer*"). It's unclear whether the practice was followed every court day or was undertaken to mark the opening of a court term. What is clear, however, is that the development was newsworthy and that even the judge himself noted the controversial nature of his practice, stating that "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." Pls.' Resp. to Def.'s SUF ¶ 111 (quoting Def.'s Ex. 63). It should come as no surprise that "None left the crowded courtroom" at that invitation. *Id.* Furthermore, the Defendant does 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." Def.'s SUF ¶ 113 (citing Def.'s Ex. 65, 1st three columns). Although the Defendant quotes at length from the article, here's what he omits: the judge "is probably the only judge in West Virginia who opens court with prayer." Pls.' Resp. to Def.'s SUF

¶ 113 (quoting Def.'s Ex. 65 (first para.)). Nor does 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 that took place in Aiken, South Carolina, in which Circuit Judge Frank Eppes "asked if there was a pre[a]cher in the courtroom to lead the customary opening prayer." Def.'s SUF ¶ 112 (citing Def.'s Ex. 64 at 1, *Minister turns Into Surprise Witness*). It's unclear whether the prayer marked the opening of a court day or a court term. Judge Eppes was elected resident judge for the Thirteenth Judicial Circuit and served in that position from 1962 until 1985. *See* Pls.' Resp. to Def.'s SUF ¶ 112. The Defendant offers no evidence that the practice continued after 1985, let alone that the practice continues today in that court.

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. *See* www.bls.gov/oes/current/oes231023.htm. Each of those judges was preceded by countless others in the history of their courtrooms. Thus, we can reasonably assume that hundreds of thousands of judges have presided in courtrooms throughout this country since the Nation's founding. Yet, the Defendant has come up with *five judges* who have ever adhered to a practice even remotely analogous to Judge Mack's. All of them did so in the Twentieth Century, nowhere near the Nation's Founding. And in none of those judges' courtrooms has the practice been shown to continue to this day. Furthermore, the record does not reflect whether the conduct of any of these five judges was ever professionally disciplined or legally challenged, as in the case of Judge William Constangy, who opened court sessions of the Twenty-Sixth Judicial District of North Carolina with prayer from May 1989 until October 1991, when that practice was struck down by the

Fourth Circuit Court of Appeals in *North Carolina Civil Liberties Union Legal Found. v. Constangy*, 947 F.2d. 1145, 1147 (4th Cir. 1991).

In sum, Judge Mack has not cited a single federal or state court that regularly opened with prayer at the time of the Founding; and he has not referenced 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.

His extensive reliance on newspaper articles (*see* Def.'s Exs. 26, 28–31, 33–55, 57–66), rather than on official documents, further betrays the weakness of his showing. Notably absent from his presentation are any original sources. The only original historical sources he cites are two early cases (Def.'s Exs. 21 & 27) and some historical and documentary collections (Def.'s Exs. 23–25). To make matters worse, many of the newspaper articles he cites are of dubious accuracy. They include reports of dreams coming true that the Defendant presents as fact (Def.'s Ex. 37); they describe what *might* happen, rather than what actually did (Def.'s Ex. 47); they report on yet *other* newspapers' articles (Def.'s Ex. 45); and they describe occurrences in distant states (*see, e.g.*, Def. Exs. 33, 51 & 58). No respectable historian would rely on secondary and tertiary evidence of this kind.

By cobbling together isolated incidents and omitting passages indicating that the incidents were highly unusual, Defendant 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—rests on a house of cards. His request that the Court join him in a layman's version of bad law-office history should be declined.

D. Legislative prayer, and the other far-flung practices the Defendant mentions, cannot be equated to the "specific practice" of courtroom prayer.

Galloway was not concerned with the Framers' general views; it was concerned with their views on, and the longevity of, the "specific practice" in question. 572 U.S. at 577. The Court ruled as it did because "history shows that the *specific practice* [of legislative invocations was] permitted" under the Establishment Clause. *Id.* (emphasis added). Nonetheless, in an effort to distract from his poor showing regarding a purported tradition of daily courtroom prayer, Defendant points to all manner of practices that are distinct from courtroom prayer.

For starters, he argues that "the opening ceremony specifically approved by the Supreme Court in *Galloway* is the same in all material respects as the opening ceremony challenged here." Def.'s Br. at 8. He downplays the "only difference" between the practices, which is "that the opening ceremony takes place in a courtroom," dismissing that difference as being of "no moment." *Id.* at 9. This is word play that reads the word "specific" out of the "specific practice" phrase. A judicial invocation is different in important material ways from a legislative one, as explained in both Section II below, and also more generally in Plaintiffs' Brief in Support of their Motion for Summary Judgment. *See* Pl.'s Br. in Supp. of Summ. J. at 4–16. For this reason, the argument to expand *Marsh*'s reasoning to courtroom prayer was thoroughly considered and rejected by the only federal Court of Appeals to review a courtroom-prayer practice. *See Constangy*, 947 F.2d at 1147–49 (rejecting the argument "that prayer by a judge is analogous to legislative prayer" and instead applying traditional Establishment Clause tests).

To be sure, as the Defendant points out (*see* Def.'s Br. at 9), 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 *Galloway* 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 Galloway*, 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 Defendant points out that the Fifth Circuit has since extended the holding of *Galloway* to school board invocations, even though "[s]chool board prayer presumably does not date back to the Constitution's adoption, since 'free public education was virtually nonexistent at the time.'" *See* Def.'s Br. at 9 (quoting *Humanist Ass'n v. McCarty*, 851 F.3d 521, 527 (5th Cir. 2017)). But the Fifth Circuit 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*.

McCarty, 851 F.3d at 526 (emphasis added).

Thus, these decisions simply establish that if the Framers approved of a specific practice as consistent with the Establishment Clause, and the practice has continued unabated ever since, that practice must be equally permitted at the federal, state, and local levels. Here, in contrast, there has been no showing that the Framers approved of the practice at issue, or that the practice has continued unabated to this day, so *Galloway* wouldn't authorize the practice at the local level, any more than it would at the federal or state levels.

Taking matters even further afield, Defendant analogizes his practice to numerous practices that don't involve prayer at all. For example, he references the U.S. and Texas Supreme Courts' practices of opening their sessions with a short clause that references God. *See* Def.'s SUF ¶¶ 115 & 116. The United States Supreme Court opens with the following statement by the marshal of the Court:

> 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!"

See Pls.' Resp. to Def.'s SUF ¶ 115.

This statement—and the analogous one uttered in the Texas Supreme Court, *see* Def.'s SUF ¶ 116—lacks the reverential language associated with 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." Furthermore, although the Defendant truncates the statement to its last sentence only (*see* Def.'s SUF ¶ 115; *accord id.* at ¶ 116), the sentence is embedded in a larger statement, the majority of which is entirely non-religious. The statement is thus nothing like the prayers to which the Defendant himself cites. *Cf.* Def.'s SUF ¶ 81 & 104 (handbooks with multi-page sample prayers purportedly for delivery in courtrooms). So, while Justice Scalia may have referred to this statement as a "prayer" (*see* Def.'s SUF ¶ 115), the Court itself refers to it as a "chant." *See* Pls.' Resp. to Def.'s SUF ¶ 115.

The Defendant references several other practices that involve similarly short religious clauses in otherwise-secular presentations, to wit:

- a ten-word clause—"that God of his infinite goodness and mercy may prevent"—in a twenty-four-page U.S. Supreme Court decision issued in 1805. *See* Def.'s SUF ¶ 63 & Pls.' Resp. thereto (citing Def.'s Ex. 21 at 312);
- a lengthy 1791 opinion reviewing a trial court's imposition of a death sentence and indicating that the trial judge had made a lengthy otherwise-secular presentation to the defendant and had "prayed that the Lord might have mercy on his soul!" *See* Def.'s SUF ¶ 70 & Pls.' Resp. thereto (citing Def.'s Ex. 27 at 156);

- various statements made by Circuit-riding Justices in the Founding-era, but not only did those take place at court-term openings rather than on regular courtroom days, but they were not prayers at all; instead, they were one-sentence ceremonial lines, embedded within a larger otherwise-secular presentation.[7]
- a provision in the Texas Rules of Civil Procedure directing jury panels to be sworn with oaths that end with "So help you God." *See* Def.'s SUF ¶ 118 & Pls.' Resp. thereto.

None of these practices can be equated to a prayer, as none of them includes an admonition to bow one's head, to say "Amen," or to observe any other typical response to a prayer.

Even further removed, the Defendant mentions a ten-word inscription on the judge's bench in the Supreme Court courtroom of the Texas State Capitol. *See* Def.'s SUF ¶ 117 & Pls.' Resp. thereto. This could hardly be more different than a prayer that is uttered aloud, in which attendees are asked to participate, in a setting in which attendance is mandatory. *Id.*

In perhaps the most perverse reference, the Defendant asserts that in the eighteenth century, English judges included the clause "may the Almighty God have mercy on your souls" when sentencing defendants found guilty of treason. *See* Def.'s SUF ¶ 64 & Pls.' Resp. thereto (citing Def.'s Ex. 22 at 1182 & n. 229). Not only is that not a prayer, but what the Defendant omits is that the clause came at the end of the recitation of a "gruesome" sentence of having "your bowels torn out, and burnt before your faces; your heads are to be then cut off; and your bodies divided each into four quarters." *Id*. The Defendant's cited source offers the presentation as an illustration of what the U.S. Constitution was designed to *prohibit*. By claiming that it

[7] *See* Def.'s SUF & Pls.' Resp. thereto for ¶ 71 (re. 1792 incident described in Def.'s Ex. 24 at 284); ¶ 73 (re. 1794 incident described in Def.'s Ex. 25 at 60); ¶ 74 (re. 1795 incident described in Def.'s Ex. 25 at 74-82); ¶ 75 (re. 1797 incident described in Def.'s Ex. 25 at 163–69); ¶ 76 (re. 1798 incident described in Def.'s Ex. 25 at 306–16); ¶ 77 (re. 1799 incident described in Def.'s Ex. 25 at 332–51).

evidences a tradition that the federal Constitution was designed to *allow*, the Defendant misses the entire point of the federal Constitution and, indeed, the American Revolution. *Id.*

In sum, the Defendant's effort to legitimize the practice of courtroom prayer by referencing legislative invocations, and by citing historical artifacts that don't involve prayer at all, should be called out for what it is: an attempt to distract the Court from a failure to prove what matters, namely, whether the *specific practice* of courtroom prayer was approved by the Founders, dates to the Founding, and continues to this day.

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

Galloway further held that, even where a specific practice was countenanced by the Framers and maintained without interruption, the practice must nonetheless be non-coercive. 572 U.S. at 586. The Justices in the majority concluded that legislative invocations met that standard. *Id.* at 587–89 (plurality of three Justices); *id.* at 604–10 (Thomas, J., concurring, in an op. joined by Scalia, J.). But as described below, the factors on which the plurality of three relied support a contrary conclusion here. When coupled with the conclusion of the dissenters that the practice in *Galloway* was impermissible, *see id.* at 610–38, it is clear that Judge Mack's practice would not receive the approval of a majority in *Galloway*.

First, in concluding that the practice was non-coercive, the *Galloway* plurality relied on the assumption that a reasonable observer would know that legislative invocations are a long-observed tradition dating to the Founding and continuing to this day. *Id.* at 587. In contrast, as discussed above, routine courtroom prayer was not approved or followed at the Founding and is decidedly *not* the norm in this country today. *See supra* Part I.

Second, the *Galloway* plurality concluded 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* (*id.* at 587–88 (quoting *Chambers v. Marsh*, 504 F. Supp. 585, 588 (D. Neb. 1980), as finding the prayer to be "'an internal act' directed at the Nebraska Legislature's 'own members'")). In contrast, Judge Mack's prayers are directed at the audience, not at court personnel. *See* Br. in Supp. of Pls.' Mot. for Summ. J. at 15. Indeed, on one occasion when Attorney Roe and a *pro se* litigant were in an adjoining room negotiating a settlement, a court employee actually called them into the courtroom to be present for the prayer. *See* Pls.' Resp. to Def.'s SUF ¶ 53; Pls.' SUF ¶ 65.

Third, in *Galloway*, the plurality reasoned that the prayer practice was not coercive because the request 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 comes from the bailiff, an officer of the court, and everyone remains standing until Judge Mack himself tells them to be seated. Pls.' Additional SUF ¶ 132.

Fourth, the *Galloway* 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. Here, in contrast, there is no equivalent non-adjudicatory portion of Judge Mack's court proceedings, as Judge Mack's singular function is to serve as an arbiter over litigants' cases; and the prayer is sandwiched between the parties' checking in with the court clerk regarding the day's matters (*see* Pls.' Resp. to Def.'s SUF ¶ 41 ("[A] process that includes reading and signing their plea paperwork (which describes their rights, the charges against them,

and their plea options), asking questions of the court clerk, and registering their presence in the courtroom.")), and the bailiff's announcing the rules of the court and the first case being called (*see* Def.'s SUF ¶¶ 45–46). In *Lund v. Rowan Cty.*, 863 F.3d 268, 287 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 2564 (2018), decided after *Galloway*, the Fourth Circuit found coercion in a municipal board's prayers because the board engaged in adjudicatory actions and "[o]n numerous occasions, adjudicatory proceedings were the first items up for consideration after the standard opening protocols." *Id.* at 288. This Court should so find here, too.

Finally, a majority of the Justices in *Galloway* contended with the very question of whether courtrooms are more coercive than legislative sessions, expressing the view that they are. *See* Pls.' Br. in Supp. of Summ. J. at 5–6. That is hardly surprising, given that courts have repeatedly recognized the influence and coercive power that judges wield over those who appear before them. *See id.* at 6–9. And various aspects of Judge Mack's practice make it even more coercive than a typical courtroom. *See id.* at 10–15. He can easily identify anyone who declines to participate in the prayers, due to the small size of the courtroom, the fact that entry often requires knocking on the locked courtroom door to draw the bailiff's attention, and the lack of anonymity and the insular nature of the community of litigants and attorneys who appear before him. *See id.* Rather than being akin to the legislative session at issue in *Galloway*, 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.

To be sure, in finding no coercion, the *Galloway* plurality noted that Town Board members had not singled out dissenters for opprobrium or prejudice. 572 U.S. at 588. So Judge Mack makes much of the lack of a showing that he has penalized litigants for declining to participate. *See* Def.'s Br. at 14. 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 Mack has actually penalized non-participants.

In sum, judicial prayer, and especially Judge Mack's version of judicial prayer, is coercive in material ways that legislative invocations are not.

Conclusion

Judge Mack has not shown that the Framers approved of routine courtroom prayer, that such a practice was followed by Founding-era courts, or that it has continued uninterrupted since then. And his practice is more coercive than the one approved in *Galloway*. His practice can therefore find no refuge in *Galloway* and is, instead, subject to the traditional *Lemon*, endorsement, and coercion tests—all of which it fails for the reasons set forth in Plaintiffs' Motion for Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 18, 2020, a true and correct copy of this brief and all accompanying documents were served by ECF on all counsel of record.

/s/ Samuel T. Grover
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