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

FREEDOM FROM RELIGION FOUNDATION, INC., JANE DOE, JOHN ROE, and JANE NOE, *Plaintiffs*, v. JUDGE WAYNE MACK, *Defendant*.	§ § § § § § § § § § §	CIVIL ACTION NO. 4:17-CV-881 **ORAL ARGUMENT REQUESTED**

MOTION TO DISMISS AND BRIEF IN SUPPORT

Defendant, Judge Wayne Mack, moves to dismiss the Complaint (Dkt. 1) with prejudice pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Dismissal is warranted for two independent reasons. First, this Court lacks subject matter jurisdiction because Plaintiffs Freedom From Religion Foundation, Jane Doe, John Roe, and Jane Noe ("Plaintiffs") lack Article III standing. This Court therefore should dismiss the Complaint with prejudice pursuant to Rule 12(b)(1). Second, Plaintiffs have failed to state a claim upon which relief can be granted, because the practice they complain of is constitutional, and in any event the statutes under which they sue do not authorize the relief they seek. The Court therefore should dismiss the Complaint with prejudice pursuant to Rule 12(b)(6). The brief accompanying this Motion further sets out reasons for dismissal. In addition, Judge Mack incorporates by reference the arguments in support of dismissal presented in the brief of the Texas Commission on Law Enforcement as intervenor.

Judge Mack requests oral argument.

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INTRODUCTION

This lawsuit asks the Court to declare unconstitutional a judicial tradition older than the Republic itself. Just as countless American judges have done for centuries, the Defendant, Judge Wayne Mack, permits prayer in the courtroom he presides over as a Justice of the Peace in Montgomery County, Texas. Indeed, he invites a guest chaplain from a rotating selection of local groups of faith to offer a brief invocation before each court session begins. Just as the U.S. Supreme Court opens each hearing by praying that "God save the United States and this honorable Court," so too do Judge Mack's guest chaplains solemnize the proceedings by invoking a higher power. These guest chaplains, who represent a cornucopia of religious beliefs, offer their invocations before the first case is called. No one is required to listen to these prayers; attendance is voluntary. And no one has alleged that Judge Mack actually discriminates in any way against those who decline to observe this practice. Judge Mack's practice thus comports fully with the Establishment Clause.

The Freedom From Religion Foundation ("FFRF"), along with three pseudonymous individuals (collectively, "Plaintiffs"), have brought this lawsuit seeking a declaration that Judge Mack's practice violates the Constitution, an injunction proscribing further prayer in Judge Mack's courtroom, and their costs and fees. But their claims fail before they begin because Plaintiffs lack standing to bring this lawsuit. They have alleged no cognizable harm, and they have failed to plead certainly impending cognizable injuries. This Court thus lacks subject matter jurisdiction. Moreover, the relief they seek is unavailable under Section 1983, which does not permit injunctive relief against judicial officers like Judge Mack. Plaintiffs cannot recover costs and fees, because Judge Mack is immune to suit.

Setting aside those fatal defects, Plaintiffs cannot prevail because no part of Judge Mack's practice offends the Establishment Clause. Longstanding practice confirms that judicial officers

may permit prayer in their courtrooms. The U.S. Supreme Court opens each session with a prayer. So too does the Texas Supreme Court, calling on the Divine to "save the State of Texas, this Honorable Court." Our courtrooms are imbued with religious iconography, from the Ten Commandments in the U.S. Supreme Court to "Sicut Patribus, Sit Deus Nobis"—"As God was to our fathers, may He also be to us"—in the Texas Supreme Court. Judges throughout history have prayed during sentencing proceedings: "May God have mercy on your soul." And they even have included supplications to the Divine in written judicial opinions. Moreover, Judge Mack's prayer practice differs in no meaningful way from the Town of Greece's legislative prayer tradition the Supreme Court recently upheld in *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014).

Plaintiffs overlook all that and ask this Court to declare—for the first time in U.S. history—that all of these traditions are unconstitutional. This Court should decline to do so. The Complaint should be dismissed with prejudice.

BACKGROUND

I. Plaintiffs' Factual Allegations

At the Rule 12(b)(6) stage, this Court must accept all plausible, well-pleaded allegations as true. This brief therefore presents the facts as Plaintiffs tell them in their Complaint.[1]

Judge Wayne Mack is a Justice of the Peace in Montgomery County, Texas. Compl. ¶ 13. After taking office in May 2014, Judge Mack "started a new chaplaincy program" with religious leaders who "assist law enforcement in times of crisis and tragedy to help families affected [and] help them start the process of grieving [and] healing."[2] As part of that volunteer-driven program,

[1] For purposes of this motion, Judge Mack relies on the Complaint's factual allegations, but Judge Mack does not concede that those allegations are true. *See Chhim v. Univ. of Tex. at Austin*, 836 F.3d 467, 469 (5th Cir. 2016) (per curiam).

[2] The Wayne Mack Campaign, About, *available at* http://www.waynemack.org/ (capitalization altered). The Court can consider Judge Mack's campaign website at this stage because

Judge Mack invites the religious leaders who assist law enforcement with grieving families to offer a prayer at the start of each court session, before the first case is called. Compl. ¶ 20. After a brief introduction of the volunteer chaplain, Judge Mack advises the courtroom that anyone may leave if they do not want to attend the opening ceremony and "[their] case will not be affected." *Id.* ¶ 23. The opening ceremony includes a chaplain introduction, chaplain invocation, the recitation of the Pledge of Allegiance and the Texas Pledge of Allegiance, and the docket is called. *Id.* ¶¶ 20, 23, 24, 30.

In September 2014, FFRF wrote to Judge Mack, complaining that Judge Mack's practice violated the Establishment Clause. *Id.* ¶ 33. The next month, Judge Mack wrote an open letter defending the invocation. *Id.* ¶ 34. At some point over the next several months, Judge Mack revised his opening ceremony to its current format. Compl. ¶ 37. Under its present iteration, a bailiff makes "a brief introductory statement" about the chaplaincy program after the docket call. *Id.* ¶ 38. The bailiff also gives those who do not want to remain in the courtroom for the ceremony an opportunity to leave, outside of Judge Mack's presence. *Id.* Judge Mack then "enters the courtroom," "talks briefly about his chaplaincy program[,] and introduces a religious leader from the program." *Id.* ¶ 39. Next, "the chaplain leads a prayer, sometimes preceded by a short sermon." *Id.* ¶ 40. After the prayer, those present recite the federal Pledge of Allegiance and the Texas Pledge of Allegiance. *Id.* ¶ 41. Last, the bailiff "announces the rules of the court and the first case is called." *Id.* ¶ 42.

Plaintiffs cited it in the Complaint. *See* Compl. ¶ 17; *Doe v. United States*, 853 F.3d 792, 800 (5th Cir. 2017); *Stone v. Life Partners Holdings, Inc.*, 26 F. Supp. 3d 575, 603 n.13 (W.D. Tex. 2014) (considering "the full text of documents that are partially quoted or referred to in the complaint").

II. Procedural History

In October 2014, FFRF filed a complaint against Judge Mack with the Texas State Commission on Judicial Conduct. Compl. ¶ 35. One month later, the Commission "declined to issue any form of discipline against Judge Mack." *Id.* ¶ 36.

Both the Commission and the Texas Lieutenant Governor asked the Attorney General of Texas for his opinion on the constitutionality of Judge Mack's practice. On August 15, 2016, the Attorney General concluded that Judge Mack's practice comports with the Constitution. He wrote that "a Justice of the Peace's practice of opening daily court proceedings with a prayer by a volunteer chaplain . . . is sufficiently similar to the U.S. Supreme Court's decision in [*Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014)] such that a court would likely be compelled to agree with *Galloway* that the long-standing tradition of opening a governmental proceeding with prayer does not violate the Establishment Clause." Office of the Attorney General, Re: The Constitutionality of a Volunteer Justice Court Chaplaincy Program and Opening Daily Judicial Proceedings with Prayer ("A.G. Opinion"), Tex. Atty. Gen. Op. KP-0109, 2016 WL 4414588, at *3 (Tex. A.G. Aug. 15, 2016).

Undeterred, FFRF filed this lawsuit on March 21, 2017. It has been joined by three pseudonymous plaintiffs—Jane Doe, John Roe, and Jane Noe—who collectively seek declaratory and injunctive relief, as well as costs and fees. Ignoring the long historical tradition of judicial prayer, the Complaint asserts that Judge Mack's chaplaincy program violates the Establishment Clause of the First Amendment. Judge Mack now moves to dismiss that Complaint with prejudice.

STATEMENT OF THE ISSUES

Judge Mack seeks dismissal with prejudice on four grounds.

1. The Complaint should be dismissed under Rule 12(b)(1) for lack of jurisdiction because Plaintiffs lack standing.

2. The Complaint should be dismissed under Rule 12(b)(6) for failure to plausibly plead a violation of the Establishment Clause.

3. Plaintiffs' request for costs and fees should be dismissed because Judge Mack is immune from any relief under 42 U.S.C. § 1988.

4. Plaintiffs' request for injunctive relief should be dismissed because 42 U.S.C. § 1983 does not authorize injunctive relief against a judicial officer, such as Judge Mack.

SUMMARY OF THE ARGUMENT

Plaintiffs lack standing to sue Judge Mack for the prospective relief that they seek. First, they do not face a cognizable injury in fact. Observing a prayer with which one disagrees is not a cognizable harm, and Plaintiffs have explicitly disclaimed any fear of bias or retaliation against those who refuse to observe the prayer practice. Second, any future harm is not "certainly impending" because Plaintiffs cannot plausibly plead that they will appear before Judge Mack again in the future. The Complaint should therefore be dismissed pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction.

On the merits, Judge Mack's practice fully comports with the Establishment Clause. Comfortably fitting within the historical tradition of judicial prayer set by judges as eminent as John Marshall and Joseph Story, Judge Mack's practice is neither coercive nor discriminatory. In fact, Judge Mack's prayer is materially indistinguishable from the forms of legislative prayer that the Supreme Court has consistently upheld as constitutional.

Finally, Plaintiffs seek relief against which Judge Mack is immune. The statutes on which Plaintiffs rely expressly exempt judicial officers from injunctive relief and awards of costs and fees.

ARGUMENT

I. This Court Lacks Subject Matter Jurisdiction.

Plaintiffs lack standing to invoke this Court's jurisdiction for two independent reasons. First, Plaintiffs' offense at observing prayers with which they disagree is not a cognizable injury in fact. Second, even if such offense were a cognizable injury, Plaintiffs still could not seek prospective relief because they have not plausibly alleged with reasonable certainty any future appearances before Judge Mack. As a result, this Court lacks subject matter jurisdiction.

A. Plaintiffs Do Not Face a Plausible Injury in Fact.

1. Plaintiffs "bear[] the burden of establishing" that their Complaint meets "the irreducible constitutional minimum of standing." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). Plaintiffs thus must show that they "have suffered an 'injury in fact,'" that is, "an invasion of a legally protected interest." *Id*. at 560. That "invasion" must be both "concrete and particularized," and it must be "actual or imminent, not conjectural or hypothetical." *Id*. (internal quotation marks and citations omitted). Unless Plaintiffs have affirmatively "supported" that "irreducible constitutional minimum," this Court cannot exert jurisdiction. *Id*. at 560–61.

A "concrete and particularized" injury does *not* include the offense or discomfort one experienced when viewing a distasteful practice. That is the Supreme Court's core holding in *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, which explained that "the psychological consequence presumably produced by observation of conduct with which one disagrees . . . . is not an injury sufficient to confer standing." 454 U.S. 464, 485 (1982). A "disagreement" with a practice that offends a "firm[] commit[ment] to the constitutional principle of separation of church and State" does not satisfy Article III's standing requirement because even "concrete adverseness" is not an "injury itself." *Id*. at 485–86.

That bedrock principle has been widely applied to reject claims from offended observers. Indeed, this Court recently applied *Valley Forge* to declare that the same plaintiff now before this Court —the Freedom From Religion Foundation—lacked standing to sue over "offense [at] the conduct of the government." *Freedom from Religion Found., Inc. v. Perry*, No. H-11-2585, 2011 WL 3269339, at *5 (S.D. Tex. July 28, 2011). FFRF's lack of injury prevented it from suing then-Governor Perry from promoting a prayer rally. *Id.*

The Colorado Supreme Court reached a similar result, holding that FFRF could not sue over an unpleasant "psychological consequence." *Hickenlooper v. Freedom from Religion Found., Inc.*, 338 P.3d 1002, 1009 (Colo. 2014). That case involved FFRF's challenge to the practice of honorary governmental proclamations promoting prayer. *Id.* at 1004. The court held that "expos[ure] to unavoidable and extensive media coverage revealing the existence of [] honorary proclamations" promoting prayer did not constitute an injury in fact. *Id.* at 1009. In the absence of coercion or discrimination, Plaintiffs "fail to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees." *Id.* (quoting *Valley Forge*, 454 U.S. at 485).

2. *Valley Forge* and its progeny confirm that this Court lacks jurisdiction because Plaintiffs have not alleged any cognizable injury in fact. Instead, Plaintiffs' primary allegation is that they simply dislike Judge Mack's practice of opening court with prayer. Jane Doe and John Roe claim that they "object[]" to the practice. Compl. ¶¶ 9–10. And Jane Noe alleges that courtroom prayer conflicts with her "sincerely held beliefs." *Id.* ¶ 11. Those supposed injuries, however, are exactly the type of "psychological consequence" that *Valley Forge* declared insufficient to confer Article III standing. 454 U.S. at 485. Indeed, Plaintiffs' allegations amount

to a generalized grievance "produced by observation of conduct with which one disagrees"—in other words, no constitutional injury at all. *Freedom from Religion Foundation*, 338 P.3d at 1009. The fact that Plaintiffs *strongly* object to Judge Mack's practice carries no relevance even if his practice were to offend their "sincerely held beliefs." Compl. ¶¶ 10–11; *see Valley Forge*, 454 U.S. at 485–86.

Nor can Plaintiffs manufacture standing by pointing to a discriminatory practice; indeed, they have explicitly *disclaimed* any accusation along those lines. FFRF sent Judge Mack a letter, now attached to their Complaint, stating: "Please note that we are not claiming that you are actually biased against those who choose not to participate in your courtroom prayers." Letter from FFRF to Judge Mack, re: Prayer During Open Court (Sept. 18, 2014) (Dkt. 1-1). Plaintiffs further acknowledge Judge Mack's policy that declining to participate in the opening prayer will not affect the disposition of anyone's case. The Complaint quotes Judge Mack's policy as follows: "If any of you are offended by [the prayer] you can leave into the hallway and your case will not be affected." Compl. ¶ 23; *see also id.* ¶ 38.

To be sure, the individual Plaintiffs have offered speculation that Judge Mack might one day exhibit bias against those who decline to participate in the prayer practice. Compl. ¶¶ 9–11. But in light of Judge Mack's unequivocal promise that non-participation will not affect anyone's case, unfounded predictions that Judge Mack might exhibit bias against those declining to pray is not plausible under Rule 8. *See Ashcroft v. Iqbal*, 556 U.S. 662, 682 (2009) ("As between that 'obvious alternative explanation' for the arrests, and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion.") (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 567 (2007)). And in any event, Plaintiffs' own allegations reinforce the veracity of Judge Mack's promise. According to the Complaint, at least one person has left

Judge Mack's courtroom before a prayer, Compl. ¶ 48, but Plaintiffs make no claim that Judge Mack exhibited any type of bias against that person.

Finally, Plaintiffs have not plausibly pleaded that they are coerced to participate in the practice they find objectionable. They do not allege that the invocation is actually mandatory. Instead, they claim that they participate in the prayer against their will because they speculate that their failure to do so will result in some future harm. *Id.* ¶¶ 9–11. But the Supreme Court has expressly rejected that brand of attempt to manufacture standing. In *Clapper v. Amnesty International USA*, the Supreme Court specifically rejected the theory that plaintiffs had "standing because they incurred certain costs as a reasonable reaction to a risk of harm." 133 S. Ct. 1138, 1151 (2013). "[B]ecause the harm [the plaintiffs] s[ought] to avoid" was not an injury in fact, the costs borne to avoid that harm also were not injuries in fact. *Id.* The same is true here. Implausible allegations of bias would not satisfy the injury-in-fact requirements, so Plaintiffs' efforts to avoid that implausible harm (by remaining in the courtroom) also do not support standing.

B. Plaintiffs Have Not Alleged that They Will Appear before Judge Mack Again.

To obtain the prospective relief that they seek, each individual Plaintiff must plausibly allege that he faces future harm and that that harm is "certainly impending." *Crane v. Johnson*, 783 F.3d 244, 251 (5th Cir. 2015). In this case, that requires at least a "certainly impending" appearance before Judge Mack. No Plaintiff has made that allegation. That is not surprising, since no Plaintiff could plausibly make such an allegation.

It is well settled that prospective relief against judges is generally unavailable because a plaintiff usually cannot establish that he will appear before that judge in the future. As the *en banc* Fifth Circuit put it, "plaintiffs lack standing to seek prospective relief against judges because the likelihood of future encounters is speculative." *Soc'y of Separationists, Inc. v. Herman*, 959 F.2d 1283, 1286 (5th Cir. 1992) (en banc). Other courts have similarly held that speculative future

encounters are insufficient to confer standing. *E.g., City of Los Angeles v. Lyons*, 461 U.S. 95, 105–06 (1983) (holding that a plaintiff lacked standing to pursue injunctive relief against the use of chokeholds by the police for failure to allege that he would have another encounter with the police and that such an encounter would result in another chokehold).

Even when a plaintiff alleges a likelihood of appearing before the same judge in the future, courts have consistently found no standing. For example, in *Henok v. Kessler*, the court held that the plaintiff lacked standing to seek injunctive relief against a judge's use of a Bible in court once that judge was no longer assigned to the plaintiff's case. 78 F. Supp. 3d 452, 463–64 (D.D.C. 2015). Although the plaintiff alleged that the defendant judge "would likely hear an emergency motion in [the plaintiff's] case because [the defendant judge] is familiar with the matter," the court ruled that the concern was "wholly speculative." *Id.* at 464. As *Henok* recognized, "speculat[ion] regarding future interactions with judges" does not support standing to seek prospective relief. *Id.*

Similarly, this Court has also dismissed a similar challenge on mootness grounds. In *Medina v. Devine*, the plaintiff, a litigant who appeared before Judge Devine in Texas state court, sought a federal injunction against the display of religious pictures in and near Judge Devine's courtroom.[3] Memo. & Order of Dismissal, No. 4:96-cv-02485 (Dkt. 44) (S.D. Tex. Apr. 2, 1997), *aff'd* No. 97-20369, 1998 WL 327271 (5th Cir. June 5, 1998) (per curiam). But the Court dismissed the case as moot because the plaintiff's case was "no longer pending before Judge Devine." *Id.* at *22.[4] Without a "reasonable expectation that the [plaintiff] would file another suit

[3] Then-Judge Devine, of the 190th Judicial District Court in Harris County, is now Justice Devine of the Supreme Court of Texas. *See* Biography of Justice John Phillip Devine, Texas Judicial Branch, available at http://www.txcourts.gov/supreme/about-the-court/justices/justice-john-phillip-devine.aspx.

[4] Due to a pagination error, the cited page is labelled "22" but is actually the eleventh page of a twelve-page document.

that would be assigned to Judge Devine and tried in his courtroom," the plaintiff could not maintain a federal lawsuit. *Id.* at *22–23.

To sum up, the mere possibility of appearing before a particular judge in the future is insufficient to confer standing, even when a plaintiff alleges that there is a high likelihood of such an appearance. That principle confirms that no Plaintiff in this case has standing:

Jane Noe. Jane Noe has appeared before Judge Mack once. Compl. ¶ 11. The Complaint asserts that "there is a reasonable chance that [Ms. Noe] will be compelled to appear in Judge Mack's courtroom again in the future" because "she is still a Montgomery County resident." *Id.* This is insufficient to support standing. First, "reasonable chance" is not the relevant standard; Ms. Noe must allege "a real and immediate threat that she will again appear before Judge [Mack]." *Herman*, 959 F.2d at 1285. Second, being a resident of the relevant jurisdiction is insufficient. After all, the plaintiff in *Lyons* lived in the jurisdiction of the Los Angeles Police Department, but that was insufficient to convince a majority of the Court that that he would be subjected to the same treatment again in the future. *See Lyons*, 461 U.S. at 114 (Marshall, J., dissenting).

Jane Doe. As an attorney, Jane Doe has appeared before Judge Mack in the past, but there is no reason to think that she will again in the future. Compl. ¶ 9. In fact, Ms. Doe "now tries to avoid appearing in Judge Mack's courtroom." *Id.* Far from alleging that Ms. Doe will appear before Judge Mack in the future, the Complaint shows that such an appearance is unlikely.

John Roe. John Roe alleges that he "regularly represents clients before Judge Mack," *id.* ¶ 10, but this is insufficient. Mr. Roe's allegation establishes that he has appeared before Judge Mack in the past, not that he has any currently pending cases that will require him to appear before Judge Mack in the future. Under *Society of Separationists*, *Henok*, and *Medina*, this Court lacks jurisdiction to consider Mr. Roe's claims.

FFRF. Finally, FFRF lacks associational standing. FFRF can maintain such standing "only if its members would have standing in their own right." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65–66 (1997); *see also Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977) ("[W]e have recognized that an association has standing to bring suit on behalf of its members when . . . its members would otherwise have standing to sue in their own right."). Here, the Complaint alleges that only Ms. Noe is an FFRF member. Compl. ¶ 11. Because Ms. Noe does not have standing, FFRF cannot have standing either. *Hunt*, 432 U.S. at 343.

For the foregoing reasons, the Court should dismiss Plaintiffs' Complaint pursuant to Rule 12(b)(1) for lack of jurisdiction.[5]

II. Judge Mack's Practice Is Constitutional.

If this Court reaches the merits, it should dismiss the Complaint pursuant to Rule 12(b)(6) for failure to state a claim. Judge Mack's practice comports with longstanding historical tradition. The invocation is voluntary and inclusive; it is not discriminatory. It therefore comports fully with the Establishment Clause.

In analyzing the constitutionality of legislative chaplaincies, the Supreme Court has found it "unnecessary" to apply older Establishment Clause tests, like the *Lemon* test, and instead adopted a historical approach. *See Town of Greece v. Galloway*, 134 S. Ct. 1811, 1818 (2014); *Marsh v. Chambers*, 463 U.S. 783, 786–92 (1983). For judicial chaplaincies, this Court should do the same. *See* A.G. Opinion, 2016 WL 4414588, at *3.

[5] To the extent Plaintiffs base their claims on Judge Mack's previous practice, rather than his current practice, their claims are moot. Requests for prospective relief against practices that have ceased are moot, and therefore not justiciable in federal court. *See Stauffer v. Gearhart*, 741 F.3d 574, 583 & n.6 (5th Cir. 2014) (per curiam) (holding that a change in policy mooted claims for injunctive and declaratory relief). Here, Plaintiffs acknowledge that Judge Mack's practices have changed over time. Compl. ¶ 37. Plaintiffs do not allege that Judge Mack is likely to resume his previous practices, and they do not request any retrospective relief. As a result, there is no live case or controversy concerning Judge Mack's previous practices.

A. Extensive Historical Tradition Supports Judge Mack's Practice.

The United States and the State of Texas both have a long tradition of governmental prayer that began before and continued through and after the ratification of their respective Constitutions. Because Judge Mack's "prayer practice . . . fits within th[at] tradition," it necessarily comports with the Establishment Clause. *Galloway*, 134 S. Ct. at 1819.

1. Judicial Prayer

Prayer is common in courtrooms—and it has been since the Founding. From the opening cry to the final opinion, judicial proceedings have frequently included not only religious expression generally, but prayers in particular. As the Supreme Court explained in *Marsh v. Chambers*:

> The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. . . . In the very courtrooms in which the United States District Judge and later three Circuit Judges heard and decided this case, the proceedings opened with an announcement that concluded, "God save the United States and this Honorable Court." The same invocation occurs at all sessions of this Court.

463 U.S. at 786. Indeed, the Supreme Court has "opened its sessions with the prayer, 'God save the United States and this Honorable Court'" since the time of Chief Justice John Marshall. *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 886 (2005) (Scalia, J., dissenting) (citing 1 C. Warren, *The Supreme Court in United States History* 469 (rev. ed. 1926)).

Lower federal courts also continue that tradition in modern times. *See, e.g.*, Oral Argument in *Smith v. United Airlines, Inc.*, No. 14-17569 (9th Cir. Dec. 15, 2016), available at https://www.youtube.com/watch?v=mIooYzBnzx8 (court employee opens court with a prayer that "God save these United States and this honorable Court"). And courts still recognize that this opening cry is a prayer. *See, e.g.*, *United States v. Odiodio*, Nos. 399-cr-0236-D(02), 3:03-cv-0896-D, 2005 WL 2990906, at *29 (N.D. Tex. Nov. 7, 2005) (noting that a federal criminal trial opened with "Let us pray. God save the United States and this Honorable Court.").

Texas courts have similar traditions. In the Supreme Court of Texas, the marshal's opening includes "God save the State of Texas, this Honorable Court." *E.g.*, *Royston, Rayzor, Vickery, & Williams, LLP v. Lopez*, Nos. 13-1026, 14-0109, 2015 WL 1648039 (Tex. Mar. 26, 2015) (oral argument transcript). The judges' bench in the old Supreme Court Building, which "served as the core of the Texas judicial system from 1888 to 1959," is inscribed with a Latin phrase that translates to "Just as to our fathers, may God be to us." The Texas Capitol: A Self-Guided Tour, § 10 (Supreme Court Courtroom), available at http://www.tspb.state.tx.us/plan/brochures/doc/in_print/capitol_brochure/text/english_capitol_self_guided_interior_walking_tour.pdf; *see also Van Orden v. Perry*, 351 F.3d 173, 175–76 (5th Cir. 2003) (translating "Sicut Patribus, Sit Deus Nobis" to "As God was to our fathers, may He also be to us"), *aff'd* 545 U.S. 677 (2005).

Beyond the opening cry and courtroom décor, though, prayer has played a significant role in promoting truthfulness. Before voir dire, prospective jurors take an oath that includes a prayer for divine assistance: "so help you God." Tex. R. Civ. P. 226. Then, the jurors chosen take a similar oath and offer the same prayer before trial. Tex. R. Civ. P. 236 ("So help you God."). During trial, witnesses frequently end their oaths with the phrase "so help me God." *Zorach v. Clauson*, 343 U.S. 306, 312–13 (1952) (explaining that such oaths do not violate the Establishment Clause).

After criminal trials, judges have traditionally prayed for defendants facing a sentence of death. Historically, English courts concluded death sentences with the phrase "and may the Almighty God have mercy on your souls." Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L. J. 1131, 1182 (1991) (discussing sentences for treason). This tradition carried over to the United States. In 1791, the same year that the First Amendment was ratified, the Chief Justice of South Carolina's Constitutional Court of Chancery recommended that a defendant sentenced to

death "employ that little interval of life which remained, in making his peace with that God whose law he had offended" and "prayed that the Lord might have mercy on his soul." *State v. Washington*, 1 S.C.L. (1 Bay) 120, 156–57 (S.C. 1791).

In 1834, Justice Joseph Story, a noted scholar of the Constitution, included religious messages and his "earnest prayers" when pronouncing his sentence on convicted pirates:

> The sentence is, that you, and each of you, for the crime whereof you severally stand convicted, be deemed, taken, and adjudged to be pirates and felons, and that you, and each of you, be therefore severally hanged by the neck until you are severally dead. . . . I earnestly recommend to each of you to employ the intermediate period in sober reflections upon your past life and conduct, and by prayer and penitence, and religious exercise, to seek the favor and forgiveness of Almighty God for any sins and crimes which you may have committed; and for this purpose I earnestly recommend to you, and to each of you, to seek the aid and assistance of the ministers of our holy religion of the denomination of Christians to which you severally belong. And in bidding you, so far as I can presume to know, an eternal farewell, *I offer up my earnest prayers that Almighty God may in his infinite goodness have mercy on your souls*.

United States v. Gilbert, 2 Sumn. 19, 25 F. Cas. 1287, 1317 (C.C.D. Mass. 1834) (No. 15,204) (Story, J.) (emphasis added).

That tradition has continued into the modern era. *See, e.g.*, North Carolina Pattern Jury Instructions for Criminal Cases, N.C.P.I-Crim. § 107.10 (adopted May 1997) ("May God have mercy on his soul."); *Tunget v. Commonwealth*, 198 S.W.2d 785, 789 (Ky. 1946) ("And so we now say, as courts customarily and very properly say in the face of duty's commanding necessity, 'May God have mercy on his soul.'"); *Commonwealth v. Davis*, 110 A. 85, 87 note (Pa. 1920) (explaining that "May God in His infinite goodness have mercy on your soul" is "the usual invocation").

After live proceedings have concluded, American courts have long included prayers in their written opinions. In 1793, Justice Iredell included the following prayer in his opinion in *Chisolm v. Georgia*:

> I pray to God, that if the Attorney General's doctrine, as to the law, be established by the judgment of this Court, all the good he predicts from it may take place, and none of the evils with which, I have the concern to say, it appears to me to be pregnant.

2 U.S. 419, 450 (1793) (Iredell, J., dissenting); *see also Commonwealth of Pennsylvania v. State of West Virginia*, 262 U.S. 553, 605 (1923) (McReynolds, J., dissenting) (quoting Justice Iredell's prayer and concluding, "A like prayer seems not inappropriate here and now").

Chief Justice Marshall, writing in 1805, included a prayer, partially borrowed from Lord Coke, that the union binding the states together would not dissolve:

> Our general government is composed of a number of distinct and independent states, uniting under one head by mutual consent for common benefit. But an event may happen (which every good man should join with my Lord Coke in his devout prayer, 'that God of his infinite goodness and mercy may prevent,')—time may come when this bond of union may be broken, this confederacy dissolved, and these sovereignties become altogether and completely independent.

M'Ilvanie v. Coxe's Lessee, 6 U.S. (2 Cranch) 280, 312 (1805) (Marshal, C.J.) (quoting *Calvin's Case*, (1608) 77 Eng. Rep. 379 (K.B.) 409; 7 Coke Reports 2 a, 27 b (praying that "Almighty God of his infinite goodness and mercy [would] divert," meaning prevent, the dissolution of the personal union of England, Scotland, and Ireland)).

Considering this history, "the prayer practice in [Judge Mack's court] fits within the tradition long followed in" federal and state courts. *Galloway*, 134 S. Ct. at 1819. As a result, it necessarily comports with the Establishment Clause. *See id.*

2. Legislative and Executive Prayer

The other branches also have long traditions of prayer. As the Supreme Court explained in *Marsh*, "the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress." 463 U.S. at 788. The First Congress "authorized the appointment of paid chaplains" mere days before agreeing on the language of the First Amendment. *Id.*

The tradition of chaplaincies is not limited to the legislative branch. The United States military has long had chaplains. *Katcoff v. Marsh*, 755 F.2d 223, 232 (2d Cir. 1985) ("Congress' authorization of a military chaplaincy before and contemporaneous with the adoption of the Establishment Clause is also 'weighty evidence' that it did not intend that Clause to apply to such a chaplaincy.").

The Executive Branch also has many other examples of governmental prayer. As the Supreme Court has noted, the President "appeals to the Almighty" and "proclamations making Thanksgiving Day a holiday." *Zorach*, 343 U.S. at 312–13. And Presidents, including George Washington, have added "So help me God" to their inaugural oaths. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 26 (2004) (Rehnquist, C.J., concurring in the judgment).

Like the history of judicial prayer, the tradition of prayer in the other branches of government demonstrates that official prayer does not violate the Establishment Clause. Plaintiffs present no reason to believe that Judge Mack's practice falls outside of that historical tradition.

B. Judge Mack's Practice Is Voluntary.

The Complaint implausibly asserts that Ms. Noe felt "coerced" by Judge Mack's practice, but it contains no factual allegations supporting that assertion. Compl. ¶¶ 11, 56. In fact, the Complaint affirmatively establishes that Judge Mack's practice is voluntary rather than coercive. Judge Mack has told people in his courtroom that "If any of you are offended by [the prayer] you can leave into the hallway and your case will not be affected." *Id.* ¶ 23. Plaintiffs acknowledge that under the "revised courtroom prayer practice," the bailiff states "that those opposed to prayer may leave the courtroom without affecting the outcome of their cases." *Id.* ¶ 38. Plaintiffs also allege that at least one person felt comfortable accepting Judge Mack's invitation to exit during the prayer. *Id.* ¶ 48.

Plaintiffs claim that "everyone present is asked to participate, or show obeisance, by bowing their heads." *Id.* ¶ 40. These "polite requests, however, do not coerce prayer." *Am. Humanist Ass'n v. McCarty*, 851 F.3d 521, 526 (5th Cir. 2017).

Nor does the offense that Plaintiffs take to Judge Mack's practice "equate to coercion. Adults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views . . . ." *Galloway*, 134 S. Ct. at 1826.

Plaintiffs also plead that they fear non-participation in prayer will bias Jude Mack against them. But as discussed above, that fear is unreasonable. *See supra* Part I.A. In any event, such subjective concerns about "social pressures" do not amount to coercion. *Galloway*, 134 S. Ct. at 1820. In the legislative prayer context, the Supreme Court held that the fear of "offending the representatives who sponsor the prayer and will vote on matters citizens bring before the board" was not coercive. *Id.* Similarly, the fear of offending Judge Mack is also not coercive. As the Fourth Circuit has recognized, claims of "unconstitutional coercion" cannot be "based on [plaintiffs'] subjective speculation about how their abstention might be received." *Lund v. Rowan Cty., N.C.*, 837 F.3d 407, 430 (4th Cir. 2016). Giving such weight to subjective speculation "cannot be reconciled with [*Galloway*] and its rejection of the notion of coercion of adults in similar circumstances." *Id.*

C. Judge Mack's Practice Is Inclusive, Not Discriminatory.

Plaintiffs do not allege that Judge Mack's practice is discriminatory. On the face of the Complaint, there is no reason to doubt that Judge Mack "maintains a policy of nondiscrimination." *Galloway*, 134 S. Ct. at 1824.

The Complaint does allege that all of the prayers observed by the individual Plaintiffs were "delivered by Christians." Compl. ¶ 49. Even assuming this represents a statistically significant

overrepresentation of Christians—which Plaintiffs have not pled—it would not establish a discriminatory motive. *See Galloway*, 134 S. Ct. at 1824. "As *Marsh* itself made clear, this Court cannot ascribe an impermissible motive to the legislature in its selection of clergy merely based on the disproportionate (or even exclusive) representation of one faith behind the invocational podium." *Pelphrey v. Cobb Cty., Ga.*, 410 F. Supp. 2d 1324, 1346 (N.D. Ga. 2006).

D. Plaintiffs Rely on Irrelevant Allegations.

Ignoring the long history of public prayer, Plaintiffs assert that Judge Mack's practice is unconstitutional based on: (1) the sectarian nature of the prayers, Compl. ¶ 49, and (2) the *Lemon* test, *id.* ¶¶ 52–54.[6]

The Complaint alleges that the individual Plaintiffs heard "sectarian prayers," Compl. ¶ 49, but the sectarian nature of prayers is irrelevant to the constitutional analysis. As the Supreme Court has explained in the context of legislative prayer, "to hold that invocations must be nonsectarian would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech, a rule that would involve government in religious matters to a far greater degree than is the case under the town's current practice of neither editing or approving prayers in advance nor criticizing their content after the fact." *Galloway*, 134 S. Ct. at 1822; *see also Am. Humanist Ass'n*, 851 F.3d at 529 ("[T]he Constitution does not require invocations to be non-sectarian."). There is no reason an analysis of alleged "sectarianism" would be more appropriate for judicial prayer.

[6] Plaintiffs also invoke the Endorsement Test, Compl. ¶¶ 51, 55, but that test simply "clarifies the *Lemon* test as an analytical device." *Lynch v. Donnelly*, 465 U.S. 668, 689 (1984) (O'Connor, J., concurring). As a result, Plaintiffs' endorsement allegations are irrelevant for the same reasons that their *Lemon* test allegations are.

Plaintiffs also rely on the *Lemon* test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Compl. ¶¶ 52–54 (including legal conclusions regarding the prongs of that test). Plaintiffs' argument fails for two reasons. First, as noted above, the *Lemon* test does not apply to governmental prayer cases. *See Galloway*, 134 S. Ct. at 1818; *Marsh*, 463 U.S. at 786–92.[7]

Second, even if the *Lemon* test did apply, the Complaint does not plausibly allege its elements. Plaintiffs do not allege any reason to doubt that Judge Mack's practice has a legitimate secular purpose and effect, such as "solemniz[ing] the occasion." *Galloway*, 134 S. Ct. at 1823. Moreover, the Complaint does not plausibly allege excessive entanglement. Plaintiffs do not plead that Judge Mack evaluates the content of prayers before they are given or makes any "inappropriate judgments about the number of religions [he] should sponsor and the relative frequency with which [he] should sponsor each." *Id.* at 1824.

* * *

Judge Mack's practice is in keeping with long-standing historical practice and case law permitting official prayer. It does not offend the Establishment Clause.

III. Judge Mack Is Immune from Paying Costs and Fees.

Plaintiffs request "reasonable, costs, disbursements, and attorneys' fees," Compl. 11, but Judge Mack is immune from such relief.

A. Judge Mack Is Absolutely Immune from Paying Costs and Fees.

Section 1988, the only provision Plaintiffs cite in support of their request, contains an express statutory exception for judicial officers. "[I]n any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable

[7] For this reason, pre-*Galloway* cases applying the *Lemon* test are not persuasive. *See, e.g.*, *N.C. Civil Liberties Union Legal Found. v. Constangy*, 947 F.2d 1145, 1147 (4th Cir. 1991) (applying the *Lemon* test). *See also* A.G. Opinion, 2016 WL 4414588, at *2–3 (distinguishing *Constangy* from this case).

for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction." 42 U.S.C. § 1988(b). Judge Mack satisfies all criteria for this statutory extension of judicial immunity. *See Knox v. Bland*, 632 F.3d 1290, 1291 n.1 (10th Cir. 2011).

First, Judge Mack is a judicial officer. Compl. ¶ 13 (alleging that Judge Mack is a Justice of the Peace). Judicial immunity protects all judges, "of whatever status in the judicial hierarchy," and "extends to Justices of the Peace." *Ammons v. Baldwin*, 705 F.2d 1445, 1447 (5th Cir. 1983).

Second, Plaintiffs' action is based on acts Judge Mack took in his judicial capacity, as Plaintiffs themselves acknowledge. *See, e.g.*, Compl. ¶ 55 (alleging that Judge Mack "act[ed] in his official capacity as Justice of the Peace"). The Fifth Circuit has "established a four-part test to determine whether an act is sufficiently judicial to warrant immunity," namely "whether: (1) the offending action is a normal judicial function; (2) it occurred in the judge's courtroom or chambers; (3) the controversy involved a case pending before the judge; and (4) the confrontation arose directly and immediately out of a visit to the judge in his official capacity." *Ammons*, 705 F.2d at 1447 (internal quotation marks omitted).

Here, opening court "is a normal judicial function" that "occurred in the judge's courtroom." *See* Compl. ¶ 40. Also, this "controversy involved a case pending before" Judge Mack and arose "out of a visit to the judge in his official capacity" because each of the individual Plaintiffs heard the prayer when appearing before Judge Mack as a lawyer or party. *See* Compl. ¶¶ 9–11; *see also* Compl. ¶ 55 ("official capacity"). That Plaintiffs complain about prayer in particular does not change this analysis. The invocation is a normal part of the court's opening ceremony, *see supra* Part II.A, but even if it were not, Judge Mack would still enjoy immunity because the Fifth Circuit's test analyzes the parties' broader interaction, not the narrow conduct about which the plaintiff complains. For example, in *Wells v. Ali*, the Fifth Circuit ruled that a

judge was immune from liability for an in-chambers interaction with a litigant, even though the judge allegedly used "a racist epithet," which is certainly not a normal judicial function. 304 F. App'x 292, 294 (5th Cir. 2008).

Third, Judge Mack's actions were not "clearly in excess of [his] jurisdiction." This "exception refers to situations in which a judge acts purely in a private and non-judicial capacity." *Henzel v. Gerstein*, 608 F.2d 654, 657–58 (5th Cir. 1979). But Plaintiffs allege that Judge Mack's actions were taken "in his official capacity as Justice of the Peace," Compl. ¶ 55, not "in a private and non-judicial capacity."

As a result, Judge Mack is absolutely immune from paying costs and fees.

B. Alternatively, Judge Mack Has Qualified Immunity from Paying Costs and Fees.

But even if Judge Mack were not entitled to absolute judicial immunity, he would retain qualified immunity from paying costs and fees. The Fifth Circuit has held that qualified immunity protects government officials from having to pay costs and fees. *See Clanton v. Orleans Parish Sch. Bd.*, 649 F.2d 1084, 1103 (5th Cir. 1981) ("[W]e must reverse the assessment of attorneys' fees and costs against the individual defendants, since the finding that they established the defense of qualified immunity forecloses their personal liability for attorneys' fees."); *Familias Unidas v. Briscoe*, 619 F.2d 391, 406 (5th Cir. 1980).

In light of the authorities supporting the constitutionality of Judge Mack's practice of opening court with prayer, *see supra* Part II, the alleged unconstitutionality of Judge Mack's actions cannot be "clearly established" in a way that would overcome qualified immunity. "When considering a defendant's entitlement to qualified immunity, we must ask whether the law so clearly and unambiguously prohibited his conduct that *every* reasonable official would understand that what he is doing violates [the law]." *Morgan v. Swanson*, 659 F.3d 359, 371 (5th Cir. 2011)

(en banc) (internal quotation marks omitted). Especially in light of the Attorney General's conclusion that Judge Mack's practice is constitutional, A.G. Opinion, 2016 WL 4414588, at *4, Plaintiffs cannot make that showing.

IV. Judge Mack Is Immune from Injunctive Relief.

Plaintiffs request injunctive relief, Compl. 11, but Section 1983 does not authorize injunctive relief against Judge Mack, regardless of the merits. "[I]n any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." 42 U.S.C. § 1983.

For the reasons discussed above, Judge Mack is a judicial officer who acted in his judicial capacity. *See supra* Part III. Also, declaratory relief is available—though unwarranted on the merits. Compl. 10 (requesting declaratory relief). As a result, Plaintiffs' request for injunctive relief should be dismissed.

CONCLUSION

For the foregoing reasons, as well as those set out in the brief of the Texas Commission on Law Enforcement as intervenor, the Court should dismiss Plaintiffs' Complaint with prejudice.

DATE: May 17, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion to Dismiss and Brief in Support will be served by ECF on the 17th day of May, 2017, to all counsel of record.

/s/ Kyle Douglas Hawkins
Kyle Douglas Hawkins