No. 21-20279

In the United States Court of Appeals for the Fifth Circuit

FREEDOM FROM RELIGION FOUNDATION, INC.; JOHN ROE,

Plaintiffs – Appellees,

v.

WAYNE MACK, INDIVIDUAL CAPACITY,

Defendant – Appellant.

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

BRIEF OF APPELLANT

Kelly J. Shackelford
Hiram S. Sasser, III
Justin Butterfield
Jeremiah G. Dys
FIRST LIBERTY INSTITUTE
2001 West Plano Parkway, Suite 1600
Plano, Texas 75075
Telephone: (972) 941-4444
Facsimile: (972) 423-6162

Allyson N. Ho
Counsel of Record
Bradley G. Hubbard
Matthew Scorcio
Elizabeth A. Kiernan
GIBSON, DUNN & CRUTCHER LLP
2001 Ross Avenue, Suite 2100
Dallas, Texas 75201
Telephone: (214) 698-3100
Facsimile: (214) 571-2934

Katherine L. Montoya
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 955-8500
Facsimile: (202) 530-9595

COUNSEL FOR APPELLANT JUDGE WAYNE MACK
IN HIS INDIVIDUAL CAPACITY

CERTIFICATE OF INTERESTED PERSONS

No. 21-20297, *Freedom from Religion Foundation, Inc.; John Roe v. Wayne Mack, Individual Capacity*

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

Defendant–Appellant	Counsel for Defendant–Appellant
Judge Wayne Mack, in his individual capacity	Allyson N. Ho Bradley G. Hubbard Matthew Scorcio Elizabeth A. Kiernan GIBSON, DUNN & CRUTCHER LLP 2001 Ross Avenue, Suite 2100 Dallas, Texas 75201 Katherine L. Montoya GIBSON, DUNN & CRUTCHER LLP 1050 Connecticut Avenue, N.W. Washington, D.C. 20036 Kelly J. Shackelford Hiram S. Sasser, III Justin Butterfield Jeremiah G. Dys FIRST LIBERTY INSTITUTE 2001 West Plano Parkway, Suite 1600 Plano, Texas 75075

CERTIFICATE OF INTERESTED PERSONS
(continued)

Defendant	Counsel for the State of Texas
Judge Wayne Mack, in his official capacity on behalf of the State of Texas	Ken Paxton Brent Webster Grant Dorfman Shawn Cowles Thomas A. Albright Christopher D. Hilton STATE OF TEXAS P.O. Box 12548, Capitol Station Austin, Texas 78711
Plaintiffs–Appellees	**Counsel for Plaintiffs–Appellees**
Freedom from Religion Foundation, Inc. John Roe	Samuel T. Grover Elizabeth Cavell FREEDOM FROM RELIGION FOUNDATION, INC. P.O. Box 750 Madison, Wisconsin 53701 Ayesha Khan ROCK CREEK LAW, LLC 5309 Burling Terrace Bethesda, Maryland 20814

Respectfully submitted,

/s/ *Allyson N. Ho*
Allyson N. Ho

Counsel of Record for Judge Wayne Mack in his Individual Capacity

STATEMENT REGARDING ORAL ARGUMENT

Judge Mack respectfully requests oral argument. The district court's decision that Judge Mack's voluntary opening ceremony violates the Establishment Clause is contrary to the precedent of the Supreme Court and this Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes, Rules & Attorney General Opinions

TABLE OF AUTHORITIES
(continued)

Other Authorities

INTRODUCTION

The district court declared unconstitutional a tradition older than the Republic itself—a solemnizing prayer before the opening of court. But this Court and the Supreme Court have held repeatedly that practices like this that are rooted in the Nation's history are consistent with the Establishment Clause—including invocations before official proceedings. *Town of Greece v. Galloway*, 572 U.S. 565 (2014); *Marsh v. Chambers*, 463 U.S. 783 (1983); *Am. Humanist Ass'n v. McCarty*, 851 F.3d 521 (5th Cir. 2017). The practice at issue here is no exception.

Since first taking office seven years ago, Judge Wayne Mack—a justice of the peace in Montgomery County, Texas—has opened proceedings in his courtroom with a brief ceremony that solemnizes the proceedings and honors volunteer chaplains from a variety of faiths who assist Judge Mack in his duties as county coroner. The honoree often offers a brief invocation. But the ceremony doesn't begin and Judge Mack doesn't enter the courtroom until all attendees are informed (by oral and written instructions) that they are not required to be present for or participate in the opening ceremony.

Judge Mack's practice of "allowing volunteer chaplains to perform brief, optional, and interfaith opening ceremonies before court sessions," fully comports with the Establishment Clause. *Freedom from Religion Found., Inc. v. Mack*, 4 F.4th 306, 308, 313–15 (5th Cir. 2021) (granting stay pending appeal). It is entirely consistent with our Nation's tradition of opening government proceedings (including judicial proceedings) with chaplain-led invocations—a tradition that dates back to the Founding. And if anything, it is "*much less* 'coercive'" than the invocations this Court and the Supreme Court offer before oral argument. *Id.* at 314. This Court should reverse and render judgment for Judge Mack.

JURISDICTIONAL STATEMENT

The district court granted summary judgment for the plaintiffs on May 20, 2021. ROA.2119. Judge Mack filed a timely notice of appeal on May 25, 2021. ROA.2120. The district court had federal-question jurisdiction under 28 U.S.C. § 1331, and this Court has jurisdiction under 28 U.S.C. § 1291.

ISSUE PRESENTED

Whether Judge Mack's opening ceremony—which solemnizes the proceedings by following in the Nation's time-honored tradition of opening government proceedings with a brief, voluntary, chaplain-led invocation—is consistent with the Establishment Clause.

STATEMENT OF THE CASE

I. Judge Mack's opening ceremony honors volunteer chaplains from many faith traditions.

Judge Mack is a justice of the peace in Montgomery County, Texas. ROA.1047. In addition to hearing misdemeanor criminal matters punishable by a fine and civil matters involving claims less than $20,000, Judge Mack serves as a county coroner. ROA.1067.

Seven years ago, Judge Mack was called as coroner to the scene of a tragic accident that took a young woman's life. ROA.1077. While at the hospital, her family requested a chaplain, but the hospital chaplain wasn't available. ROA.1077. After trying in vain to find a volunteer chaplain for the family, Judge Mack resolved to establish a chaplaincy program to counsel and comfort "grieving families on tragic death scenes or death call notifications." ROA.1077, 1081.

The mission of the chaplaincy program is to (1) provide care and counseling to first responders and their families; (2) comfort and provide resources to victims; and (3) assist law enforcement in notifying next of kin and providing comfort to the grieving family. ROA.1087. The program comprises a diverse coalition of clergy and lay persons that reflects a wide variety of belief systems, faiths, and denominations—

including Protestantism, Catholicism, Buddhism, Hinduism, Judaism, and Islam. ROA.1024 (citing ROA.1102–10). Since the program's inception, Judge Mack has actively sought diverse participation, and all members of the faith-based community are welcome to participate. ROA.1024 (citing ROA.1047, 1068–69, 1112–17).

To thank the volunteer chaplains who are "willing to be on call" for "giving their time, talent, [and] resources" to the community and to solemnize the proceedings in his courtroom, Judge Mack regularly invites a volunteer chaplain to be recognized before the first case is called. ROA.1025–29 (citing ROA.1070, 1073, 1077). When recognized, many chaplains offer a prayer, others say "encouraging words." ROA.1073. The volunteer chaplains neither proselytize nor denigrate any other belief (or non-belief). ROA.1025–26 (citing ROA.1047, 1075, 1123–24, 1135).

Judge Mack has always made clear that attendance at the opening ceremony is entirely optional—anyone who doesn't wish to observe the opening ceremony is free to leave without consequence. ROA.1026–29 (citing ROA.1048, 1053, 1133, 1144, 1147, 1150). Years ago, after plaintiff Freedom from Religion Foundation first complained about the

opening ceremony, Judge Mack took additional steps to ensure that no one felt compelled to remain present—even installing signs outside the courtroom and on a television screen at the back of the courtroom explaining:

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

ROA.1053 (capitalization altered).

Before Judge Mack enters the courtroom, the bailiff tells attendees that "you are not required to be present during the opening ceremonies, and if you like, you may step out of the court room before the judge comes in. Your participation will have no effect on your business today or the decisions of this court." ROA.1144 (capitalization altered).

The bailiff then invites attendees to "take this opportunity to use the facilities, make a phone call, or not to participate in the opening ceremonies." ROA.1144. The bailiff also tells attendees that they "may exit the court room at this time" and that the bailiff "will notify the lobby when court will be called into session." ROA.1144 (capitalization altered).

People routinely enter and exit the courtroom during this time. ROA.1147, 1150. One of Judge Mack's clerks testified without contradiction that although she has "seen people leave" after the bailiff's instructions, neither she nor anyone else knows "if they're leaving because of the prayer or because they are using the facilities or . . . their cell phones"—no one knows "what their motivation was for leaving." ROA.1150. There is "no evidence that anyone has ever been disciplined, criticized, or suffered any adverse outcome whatsoever based on their non-attendance." *Mack*, 4 F.4th at 309.

Judge Mack then enters, briefly explains the chaplaincy program, introduces the volunteer chaplain if one is present that day, and faces away from the courtroom while the chaplain makes remarks and offers a brief invocation or words of encouragement. ROA.1070. The bailiff then recites the pledges of allegiance to the U.S. and Texas flags, invites those in the lobby (for whatever reason) to enter or return to the courtroom, announces the rules of the court, and calls the first case. ROA.1029 (citing ROA.1070, 1144).

II. Plaintiffs mount two unsuccessful challenges to Judge Mack's opening ceremony before filing this suit.

In October 2014, plaintiff Freedom from Religion Foundation filed a complaint against Judge Mack with the Texas State Commission on Judicial Conduct. ROA.1137–42. After thoroughly considering the allegations, the Commission declined to issue any form of discipline against Judge Mack. *See* ROA.1176.

The Commission also sought an opinion about the constitutionality of Judge Mack's practice from the Texas Attorney General, who opined that both the chaplaincy program and the opening ceremony are entirely consistent with the Establishment Clause. Tex. Att'y Gen. Op. No. KP-0109, 2016 WL 4414588, at *3–4 (2016) (ROA.1186–91).

Three years after filing the ethics complaint, Freedom from Religion Foundation—joined by three pseudonymous plaintiffs—sued Judge Mack in his official capacity as a Montgomery County official. ROA.1152–62. The district court dismissed the case for lack of standing because the County lacks the power "to control the judicial or administrative courtroom practices of justices of the peace." *Freedom from Religion Found., Inc. v. Mack*, 2018 WL 6981153, at *3–5 (S.D. Tex. Sept. 27, 2018) (ROA.456–60). Plaintiffs didn't appeal that judgment.

III. Plaintiffs again challenge Judge Mack's opening ceremony—this time, the district court rules for plaintiffs, but this Court enters a stay pending appeal.

Eight months later and two pseudonymous plaintiffs fewer, plaintiffs filed suit again—this time against Judge Mack in his *individual* capacity and in his *official* capacity as a s*tate* official. Plaintiffs seek a declaration that Judge Mack's opening ceremony is unconstitutional, plus attorneys' fees and costs "against Judge Mack in his official capacity only." ROA.14–32.

Plaintiff Roe is an attorney who primarily handles landlord-tenant cases. ROA.1128. He has no cases pending before Judge Mack and hasn't appeared before Judge Mack for over four years. ROA.1130. He appeared in Judge Mack's courtroom and witnessed the opening ceremony several times between fall 2014 and summer 2017, but he never left the courtroom, despite having the opportunity to do so. ROA.1131–34. Freedom from Religion Foundation is not "aware . . . of any members scheduled to appear in Judge Mack's court" in the future. ROA.1165.

Judge Mack moved (unsuccessfully) to dismiss the action both for lack of standing and on the merits—because Judge Mack's opening

ceremony is constitutional. ROA.123–55 (arguing plaintiffs lacked standing because offense at observing prayers is not a cognizable injury and, even if it were, plaintiffs failed to plausibly allege any certainly impending future appearance before Judge Mack).

At that point, the State of Texas filed a statement of interest, explaining that "Judge Mack is not a state official, and Plaintiffs' claims do not implicate the State." ROA.493–502. After the district court ordered the State to answer or file a responsive pleading, ROA.779, the State filed a motion to dismiss, which the court granted. ROA.797–816, 972–75.

After discovery, both Judge Mack and plaintiffs moved for summary judgment. ROA.998, 1460. While those motions were pending, the court granted a default judgment for plaintiffs on their claims against Judge Mack "in his official judicial capacity"—despite the fact that the court had dismissed the State from this case nearly a year earlier. ROA.2084–85.

The district court granted plaintiffs' motion for summary judgment (and denied Judge Mack's), declaring that Judge Mack's opening ceremony violated the Establishment Clause. *Freedom from Religion Found., Inc. v. Mack*, 2021 WL 2044326 (S.D. Tex. May 20, 2021) (ROA.2105–19). In the court's view, Judge Mack "presents himself as

theopneustically-inspired" and his opening ceremony "flies in the face of historical tradition, and makes a mockery of both, religion and law." ROA.2118–19.

In reaching that conclusion, the court first held that *Marsh*, *Town of Greece*, and *McCarty* "do not inherently control" because "here, the challenged ceremony occurs in an adjudicative setting." ROA.2114 ("observ[ing]" that those cases "considered prayers delivered in a legislative setting").

Without explaining why or how the distinction mattered, the court "turn[ed] to consideration of invocations at or during adjudicative settings." ROA.2114. Despite the voluminous record evidence of clergy-led judicial prayer, *see* ROA.1031–40 (citing ROA.1192–1446), the court held that "public prayer to begin court proceedings is not historical." ROA.2114–15 (capitalization altered; emphasis omitted).

The court disregarded many of the historical examples in the record because they involved "clergy delivering prayers . . . generally either during a court's inauguration or at the opening of a given term." ROA.2114. The court suggested that "the historical practice of prayer delivered by clergy at a one-time, ceremonial event" somehow "differs

from the practice challenged here, where prayer is delivered routinely before the commencement of court proceedings," ROA.2114–15—but never explained why that difference has constitutional import.[1]

The district court similarly purported to distinguish the Supreme Court's opening invocation—"God save the United States and this Honorable Court"—on the ground that it "does not solicit the participation of the attending public." ROA.2115. But that "is a particularly odd accusation" given that the "Supreme Court does not invite the public to leave the Court before invoking God." *Mack*, 4 F.4th at 314.

The court further held that Judge Mack's opening ceremony "evinces coercion." ROA.2115–17 (capitalization altered; emphasis omitted). The court reached that conclusion by equating attending a court date with attending the opening ceremony. ROA.2116. The court observed that permitting attendees to avoid the ceremony altogether by leaving the courtroom didn't "cancel the coercive pressure" and was, itself, "inherently coercive." ROA.2116.

---

[1] Similarly, the district court found it "noteworthy"—again without explaining why—that the Supreme Court, which also opens with a brief invocation, "holds proceedings in only 70 to 80 cases per year," but Judge Mack's "court is in session much more frequently, on a daily or weekly basis." ROA.2115 n.8.

Finally, relying exclusively on a nearly 20-year-old Eleventh Circuit decision, the district court breathed new life into *Lemon* and held that Judge Mack's "ceremony also violates the Establishment Clause because it has both a religious purpose and a primary effect of advancing or endorsing religion." ROA.2117–18 (citing *Glassroth v. Moore*, 335 F.3d 1282, 1284 (11th Cir. 2003)).[2]

The district court declared that Judge Mack's "practice of opening regular court proceedings with religious prayers is unconstitutional" and admonished that if Judge Mack "violate[d] this Court's declaratory decree, an injunction will issue." ROA.2119.

Judge Mack immediately moved the district court for a stay pending appeal, which plaintiffs opposed, and a temporary stay pending resolution of that motion, which plaintiffs did not oppose. ROA.2123–32. Two days later, the district court denied the unopposed temporary stay motion, ROA.2186, and Judge Mack sought relief in this Court.

---

[2] The court purported to distinguish *American Legion v. American Humanist Ass'n*, 139 S. Ct. 2067 (2019), on the ground that it "counseled against applying *Lemon* to cases involving 'established, religiously expressive monuments, symbols, and practices'"—and this case "does not involve such a scenario." ROA.2117 n.13.

The motions panel granted Judge Mack's temporary stay motion, ruling that Judge Mack could "continue his scheduled ceremonies pending further order of this Court." Order, *Freedom from Religion Found., Inc. v. Mack*, No. 21-20279 (5th Cir. June 2, 2021) (ROA.2187). The panel then granted Judge Mack's motion for a stay pending appeal, ruling that Judge Mack was "likely to succeed" and made a "strong showing that the district court erred." *Mack*, 4 F.4th at 308, 311–15.

As an initial matter, the panel rejected the district court's application of the *Lemon* test, noting that "the Supreme 'Court no longer applies the old test articulated in *Lemon*'" and concluding that "the Supreme Court precedent that most squarely controls" here "is plainly *Town of Greece*." *Id.* at 315 (quoting *Am. Legion*, 139 S. Ct. at 2092 (Kavanaugh, J., concurring), and citing *id.* at 2081–82 (plurality), *id.* at 2097–98 (Thomas, J., concurring), and *id.* at 2101 (Gorsuch, J., concurring)).

After explaining that Judge Mack's chaplaincy program raises fewer constitutional questions than the practices upheld in *Marsh* (because Judge Mack's program "uses zero tax dollars and operates on a volunteer basis") and *Town of Greece* (because the program there was

"comprised almost exclusively of Christians"), the motions panel rejected the district court's distinction between legislative and adjudicative settings, "given the abundant history and tradition of courtroom prayer." *Id*. at 313–14 (citing examples).

The panel also rejected any suggestion that Judge Mack's practice is coercive. It is not only "*much less* 'coercive'" than the Supreme Court's opening invocation, but also "the understanding of 'coercion' shared by [plaintiffs] and the district court would condemn numerous examples of courtroom prayer in the historical record." *Id*. at 314. The panel observed that it's "undisputed that Judge Mack . . . has taken multiple steps (including oral and written instructions) to facilitate *non*-participation in his opening ceremonies." *Id*. at 315.

SUMMARY OF THE ARGUMENT

Judge Mack's ceremony is part of a judicial tradition of chaplain-led courtroom prayer that dates back to the Founding and is materially indistinguishable from practices upheld by this Court and the Supreme Court. Three fundamental errors led the district court to nevertheless declare Judge Mack's practice unconstitutional.

I. The district court mistakenly held that *Marsh*, *Town of Greece*, and *McCarty* "do not inherently control." ROA.2114. Relying on out-of-date, out-of-circuit precedent, the court resurrected *Lemon*, ROA.2117–18—even though the Supreme Court hasn't applied *Lemon* in an Establishment Clause case like this one in decades. *See Mack*, 4 F.4th at 315 ("the Supreme Court no longer applies the old test articulated in *Lemon*") (internal quotation marks omitted). Instead, "the Supreme Court precedent that most squarely controls [this] case . . . is plainly *Town of Greece*." *Id*.

As *Marsh* and *Town of Greece* recognize, our Nation has a rich historical tradition of offering clergy-led invocations to solemnize government proceedings. *See id*. at 313–14 (analyzing "the abundant history and tradition of courtroom prayer"). Judge Mack's opening ceremony fully comports with the Establishment Clause both because it fits squarely within that tradition and because it's materially indistinguishable from the practice recently upheld by the Supreme Court in *Town of Greece* itself.

II. The district court erroneously interpreted *Town of Greece* to require evidence that the Founders engaged in the precise practice at

issue, which the court defined as "prayer . . . *delivered routinely* before the commencement of court proceedings." ROA.2114–15 (emphasis added). The court rejected Judge Mack's voluminous "historical sources" on the ground that they "generally" involved prayer "either during a court's inauguration or at the opening of a given term." ROA.2114–15 ("prayer delivered by clergy at a one-time, ceremonial event differs from the practice challenged here").

But the frequency of clergy-led invocations lacks constitutional import, as *Marsh* demonstrates. *See* 463 U.S. at 784–88 (rejecting challenge to the "practice of opening each legislative day with a prayer" and observing that an "invocation occurs at all sessions of this Court"). As *Town of Greece* held, what matters is whether the challenged practice "fits within the tradition long followed" in America—not whether it's identical to a practice engaged in by the Founding generation. 572 U.S. at 577. Judge Mack's practice is entirely consistent with this country's "abundant history and tradition of courtroom prayer." *Mack*, 4 F.4th at 313–14.

III. The district court's coercion analysis erroneously relied on the same theory of subtle "coercive pressures" that the Supreme Court

rejected in *Town of Greece*. *See* 572 U.S. at 577–78; *id.* at 586–91 (Kennedy, J.); *id.* at 610 (Thomas, J., concurring); *see also McCarty*, 851 F.3d at 526–28 (limiting *Lee v. Weisman*, 505 U.S. 577, 597 (1992), to "school-prayer cases"). And it conflated attending court (which is mandatory) with attending the opening ceremony (which is voluntary). Lest there be any doubt, the district court's "understanding of 'coercion' . . . would condemn numerous examples of courtroom prayer in the historical record." *Mack*, 4 F.4th at 314. That cannot be right.

Any one of those errors standing alone would require reversal. Together, they compel it. The Court should reverse and render judgment for Judge Mack.

STANDARD OF REVIEW

This Court "review[s] a summary judgment *de novo*." *Miller v. Reliance Standard Life Ins. Co.*, 999 F.3d 280, 282–83 (5th Cir. 2021). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* (quoting Fed. R. Civ. P. 56(a)). "When parties file cross-motions for summary judgment," the Court "review[s] each party's motion independently, viewing the evidence and inferences

in the light most favorable to the nonmoving party." *Id.* (quoting *Green v. Life Ins. Co. of N. Am.*, 754 F.3d 324, 329 (5th Cir. 2014)).

ARGUMENT

I. *Town of Greece* governs this case—and Judge Mack's practice is materially indistinguishable from the one approved in that case.

In case after case, the Supreme Court has held that where, as here, a practice has a "longstanding history" and "follow[s] in th[e] tradition" of "respect and tolerance," it comports with the Establishment Clause and merely recognizes "the important role that religion plays in the lives of many Americans." *E.g.*, *Am. Legion*, 139 S. Ct. at 2089 (plurality); *Town of Greece*, 572 U.S. at 585–86 (upholding legislature's unpaid, volunteer chaplaincy program comprised almost exclusively of Christians); *Marsh*, 463 U.S. at 784–86 (permitting legislature to use tax dollars to pay chaplains to perform sectarian prayers before sessions).

In short, the "Establishment Clause *must* be interpreted 'by reference to historical practices and understandings.'" *Town of Greece*, 572 U.S. at 576 (emphasis added). That is a command, not a suggestion. And as the motions panel concluded, the "Supreme Court precedent that most squarely controls" this case "is plainly *Town of Greece*." 4 F.4th at

315; *see also McCarty*, 851 F.3d at 525–28 (analyzing history and tradition in upholding student-led sectarian prayer at school-board meeting). Under *Town of Greece*, where a challenged practice "fits within [a] tradition long followed" by state and federal officials, it comports with the Establishment Clause. 572 U.S. at 577.

What matters is not whether "the *specific* practice challenged" has a "very direct connection, via the First Congress, to the thinking of those who were responsible for framing the First Amendment." *Am. Legion*, 139 S. Ct. at 2088–89 (plurality) (emphasis added) (citing *Town of Greece*, 572 U.S. at 577). Instead, what matters is whether the challenged practice "on the whole reflects and embraces our tradition." *Town of Greece*, 572 U.S. at 585; *see also McCarty*, 851 F.3d at 527 (rejecting challenge to school board's invocation policy even though "[s]chool-board prayer presumably does not date back to the Constitution's adoption") (citing *Marsh*, 463 U.S. at 787–88, and *Town of Greece*, 572 U.S. at 576–77).

As *Marsh* and *Town of Greece* explain, our Nation has a long tradition—dating back to the Founding—of offering chaplain-led invocations to solemnize government proceedings. Judge Mack's opening ceremony not only fits within that tradition, it is also materially

indistinguishable from the practice recently upheld by the Supreme Court in *Town of Greece*. There, as here:

- "a local clergyman" was invited "to the front of the room to deliver an invocation," 572 U.S. at 570; *see* ROA.1024–25 (citing ROA.1047–48, 1070–74, 1077);
- the prayer was intended to foster "a solemn and deliberative frame of mind, invoke divine guidance in town affairs, and follow a tradition practiced by Congress and dozens of state legislatures," 572 U.S. at 570; *see* ROA.1026 (citing ROA.1075–76);
- the prayer did "not coerce participation by nonadherents," 572 U.S. at 591–92; *see* ROA.1025–30 (citing ROA.1047–48, 1053, 1075, 1120–23, 1133–35, 1144);
- chaplains were thanked for their service, 572 U.S. at 570; *see* ROA.1025 (citing ROA.1073, 1077); and
- the practice followed in a tradition "that has long endured" and "become part of our heritage and tradition," 572 U.S. at 587; *see* ROA.1031–40 (citing ROA.1192–1450).

That should be the beginning and end of this case. "If anything," as the motions panel observed, "Judge Mack's chaplaincy program raises fewer questions under the Establishment Clause" than the programs at issue in *Marsh*, *Town of Greece*, and *McCarty*. 4 F.4th at 313.

The district court, however, declined to follow *Town of Greece* on the ground that this case involves adjudicatory, rather than legislative, prayer. ROA.2114. But the court never explained why that distinction

matters. *See Mack*, 4 F.4th at 313–14 ("It's true that *Marsh* and *Town of Greece* involved a legislature's chaplains, not a justice of the peace's chaplains. But it's unclear why that matters.").

Nor could it, particularly given that the meetings in *Town of Greece* included some "essentially adjudicatory" proceedings. *See* 572 U.S. at 626, 629 (Kagan, J., dissenting); *id.* at 586 (Kennedy, J.); *see also Mack*, 4 F.4th at 315 ("Justice Kagan's opinion is at best unhelpful to [plaintiffs]; at worst, it proves that *Town of Greece* squarely forecloses [plaintiffs'] position.").[3]

Instead of conducting a historical inquiry—which controls in Establishment Clause cases, *see*, *e.g.*, *Am. Legion*, 139 S. Ct. at 2087–89 (plurality)—the district court applied the long-defunct *Lemon* and coercion tests. ROA.2117–18 & n.13. But the only case the district court marshaled in support of its decision to resurrect *Lemon* is an out-of-date,

[3] *Town of Greece* rejected an argument nearly identical to the one the district court adopted—namely, that *Marsh* was distinguishable because "prayer conducted in the intimate setting of a town board meeting differs in fundamental ways from the invocations delivered in Congress and state legislatures, where the public remains segregated from legislative activity and may not address the body except by occasional invitation." 572 U.S. at 586–92 (Kennedy, J.); *id*. at 599–603 (Alito, J., concurring); *id*. at 604 (Thomas, J., concurring).

out-of-circuit decision. ROA.2118 (citing *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003)). The dearth of authority isn't surprising, given that the Supreme Court has either declined to apply *Lemon* or ignored it altogether for decades. *Mack*, 4 F.4th at 315 ("the Supreme 'Court no longer applies the old test articulated in *Lemon*'") (quoting *Am. Legion*, 139 S. Ct. at 2092 (Kavanaugh, J., concurring), and citing *id.* at 2081–82 (plurality), *id.* at 2097–98 (Thomas, J., concurring), and *id.* at 2101 (Gorsuch, J., concurring)).[4]

This Court has done likewise. In *McCarty*, this Court refused to apply *Lemon* and the coercion test in an Establishment Clause challenge to opening a school-board meeting with prayer. 851 F.3d 521 at 525–26 (applying *Town of Greece* because the "conventional" Establishment Clause tests, like *Lemon* and coercion, generally apply only in "school-prayer cases").

---

[4] *See*, *e.g.*, *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Bd. of Ed. v. Grumet*, 512 U.S. 687 (1994); *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Cutter v. Wilkinson*, 544 U.S. 709 (2005); *Van Orden v. Perry*, 545 U.S. 677 (2005); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012); *Town of Greece*, 572 U.S. 565 (2014); *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *Am. Legion*, 139 S. Ct. 2067 (2019).

This Court is hardly an outlier. Other courts have also recognized that the Supreme Court has "explicitly rejected" *Lemon* in cases like this one involving invocations by "public officials." *See*, *e.g.*, *Perrier-Bilbo v. United States*, 954 F.3d 413, 424–25 (1st Cir. 2020) (upholding use of phrase "so help me God" in oath of allegiance administered at naturalization ceremonies); *Freedom from Religion Found., Inc. v. County of Lehigh*, 933 F.3d 275, 280–82 (3d Cir. 2019) ("*American Legion* confirms that *Lemon* does not apply"). That includes a more recent decision by the same court of appeals upon which the district court relied. *Kondrat'yev v. City of Pensacola*, 949 F.3d 1319, 1322–23, 1326–27 (11th Cir. 2020) (*American Legion* "jettisoned *Lemon*").

To sum up, the relevant inquiry is "whether the prayer practice" at issue "fits within the tradition long followed" by federal and state government officials. *Town of Greece*, 572 U.S. at 577. The answer is yes, because Judge Mack's opening ceremony fits comfortably within a tradition as old as the Nation itself. *See Mack*, 4 F.4th at 313–15.

II. Judge Mack's practice fits comfortably within our Nation's rich historical tradition of opening judicial proceedings, in particular, with solemnizing invocations.

Even if the district court were correct that what matters under *Town of Greece* is the history and tradition surrounding "invocations at or during adjudicative settings" in particular, ROA.2114, the outcome would be no different because there is an "abundant history and tradition of courtroom prayer." *Mack*, 4 F.4th at 313–14 (citing examples).

As the motions panel explained, the Supreme Court has opened its sessions with the prayer "God save the United States and this Honorable Court" since at least the time of Chief Justice John Marshall. *Id.* at 314 (citing 1 Charles Warren, *The Supreme Court in United States History* 469 (1923)); *see also* ROA.1040 (citing ROA.1425, 1440).

Chaplain-led courtroom prayers also have a storied history that can be traced back to the Founding generation. At least four of the six original Justices—Jay, Cushing, Iredell, and Wilson—"authorized clergymen to open court sessions with prayer" when riding circuit. *Mack*, 4 F.4th at 314 (citing sources).[5] These prayers weren't novel or unusual:

[5] *See also* R.E. 36–38 (ROA.1031–33 ¶¶ 63–78 (citing ROA.1192–1325)) (Founding-era); 1 Charles Warren, *The Supreme Court in United States History* 59 n.1 (rev. ed. 1926) (ROA.1224) (Chief Justice Jay and

they were "the custom" and reflected "ancient usages." *Id*. (quoting 2 *Documentary History* at 11–13 (ROA.1230–32) (wishing "to respect ancient usages," Chief Justice Jay opined that the "custom in New England of a clergyman's attending, should . . . be observed and continued")).

By 1835, the practice of inviting a guest chaplain to give a brief invocation had become so engrained that Alexander Griswold, the presiding bishop of the Episcopal Church, published a ministerial handbook that included a model prayer for opening court sessions. Alexander V. Griswold, *Prayers Adapted to Various Occasions of Social Worship: For Which Provision Is Not Made in the Book of Common*

Justice Cushing, 1790) ("After the usual forms were gone through and the Grand Jury impannelled, a charge was given them by the Chief Justice and the Throne of Grace addressed in Prayer by the Rev. Dr. Howard."); 2 *The Documentary History of the Supreme Court of the United States, 1789–1800* 192 (Maeva Marcus ed., 1988) (ROA.1237) (Chief Justice Jay and Justice Cushing, 1791) ("After the customary proclamations were made and the Grand Jury sworn—a short, though pertinent charge was given them by his Honor the Chief Justice—when the throne of Grace was addressed by the Rev. Dr. Haven."); *id*. at 331 (ROA.1239) (Justices Wilson and Iredell, 1792) ("the Throne of Grace was addressed in Prayer by the Rev. Dr. Hitchcock"); *id.* at 317 (Justice Iredell, 1792) ("After the Rev. Dr. Lathrop had addressed the throne of Grace, in prayer, the Hon. Judge Iredell gave an elegant charge to the jury.").

Prayer 149–51 (1835) (ROA.1333–35) ("A Prayer for Courts of Justice"). That practice continued through the Antebellum period, Reconstruction, the Gilded Age, the Progressive era, both World Wars, the post-War era, and up to today.[6]

Just as the practice upheld in *Town of Greece* "on the whole reflect[ed] and embrace[d]" the tradition of legislative prayer, 572 U.S. at 585, Judge Mack's practice is fully consistent with the Establishment Clause because it reflects and embraces our Nation's rich history and tradition of solemnizing adjudicatory proceedings, in particular, with chaplain-led invocations and other prayers "meant to lend gravity to the occasion and reflect values long part of the Nation's heritage." *Id.* at 583.

III. Judge Mack's practice is not coercive.

As it did in resurrecting the *Lemon* test, the district court reinvigorated the discarded "subtle coercive pressures" test by relying on

[6] *See*, *e.g.*, R.E. 38–39 (ROA.1034 ¶¶ 79–84 (citing ROA.1326–41)) (antebellum); R.E. 39 (ROA.1034 ¶¶ 85–86 (citing ROA.1342–45)) (Reconstruction); R.E. 40 (ROA.1035 ¶¶ 87–91 (citing ROA.1346–55)) (Gilded Age); R.E. 40–41 (ROA.1035–36 ¶¶ 92–97 (citing ROA.1356–67)) (Progressive era); R.E. 41–43 (ROA.1036–38 ¶¶ 98–106 (citing ROA.1368–89)) (Wartime); R.E. 43–44 (ROA.1038–39 ¶¶ 107–11 (citing ROA.1390–99)) (post-War era); R.E. 44–45 (ROA.1039–40 ¶¶ 112–14 (citing ROA.1400–07)) (modern era).

another out-of-circuit case, ROA.2117 (citing *Lund v. Rowan County*, 863 F.3d 268, 278 (4th Cir. 2017) (en banc))[7]—despite the fact that this Court has expressly limited *Lee v. Weisman*'s "subtle coercive pressures" test to "the public school context." *McCarty*, 851 F.3d at 526–28. And all five Justices in the *Town of Greece* majority agreed that "subtle coercive pressures" weren't enough to establish a constitutional violation. 572 U.S. at 577–78; *id.* at 586–91 (Kennedy, J.); *id.* at 610 (Thomas, J., concurring).

As the motions panel explained, the district court's "understanding of 'coercion' . . . would condemn numerous examples of courtroom prayer in the historical record." 4 F.4th at 314. That cannot be right. And that error led the district court into another: conflating mandatory attendance at *court* with voluntary attendance at the *opening ceremony*. ROA.2116. The record establishes without contradiction that Judge Mack goes to great lengths to inform all attendees (even those whose court attendance is mandatory) that they are free to leave the courtroom for the opening ceremony. ROA.1026–30 (citing ROA.1048, 1053, 1133, 1144, 1147, 1150).

[7] The Sixth Circuit, sitting en banc, expressly rejected *Lund*'s analysis. *Bormuth v. County of Jackson*, 870 F.3d 494, 509–10 & n.5, 514 (6th Cir. 2017) (en banc).

No one who stays is required to participate in the prayer. *See Mack*, 4 F.4th at 315 ("It's undisputed that Judge Mack by contrast has taken multiple steps (including oral and written instructions) to facilitate *non*-participation in his opening ceremonies."); *see also Town of Greece*, 572 U.S. at 590 (Kennedy, J.) (government does "not engage in impermissible coercion merely by exposing constituents to prayer they would rather not hear and in which they need not participate").

Like the practice upheld in *Town of Greece*, Judge Mack's practice isn't coercive either, because the undisputed record evidence establishes that:

> (1) "Participation in the opening ceremonies is completely optional";
>
> (2) "The volunteer chaplains neither proselytize nor denigrate any other belief"; and
>
> (3) "The summary-judgment record contains *no evidence* that anyone has ever been disciplined, criticized, or suffered any adverse outcome whatsoever based on their non-attendance."

Mack, 4 F.4th at 308–09 (emphasis added); *see* ROA.1026–30 (citing ROA.1048, 1053, 1133, 1144, 1147, 1150) (voluntary); ROA.1025–26 (citing ROA.1075, 1123–24) (non-proselytizing); ROA.1026 (citing ROA.1047–

48, 1075) (non-denigrating); ROA.1024–28 (citing ROA.1047–48, 1053, 1068–69, 1101–21, 1135, 1144) (non-discriminatory and non-biased).

Just as in *Marsh* and *Town of Greece*, attendees in Judge Mack's courtroom "are 'free to enter and leave with little comment and for any number of reasons.'" *Town of Greece*, 572 U.S. at 590; *Mack*, 4 F.4th at 309 ("People routinely enter and exit the courtroom during this time."); *see* ROA.1026–30 (citing ROA.1048, 1053, 1133, 1144, 1147, 1150). Some attendees may take offense at the opening ceremony. "Offense, however, does not equate to coercion." *Town of Greece*, 572 U.S. at 589 (Kennedy, J.).

The constitutionality of Judge Mack's practice is even more apparent under Justice Thomas's *Town of Greece* concurrence, which focuses on "actual legal coercion"—i.e., government action backed "by force of law and threat of penalty." *Id.* at 608–09 (Thomas, J., concurring) (emphasis omitted). There is none of that here. Participation is "completely optional" and it's undisputed that Judge Mack "has taken multiple steps (including oral and written instructions) to facilitate *non*-participation." *Mack*, 4 F.4th at 308, 315; *see* ROA.1026–30 (citing ROA.1053, 1133, 1144, 1147, 1150).

Justice Thomas's concurrence is controlling under *Marks* because it sets out "a narrower definition of coercion" than Justice Kennedy's opinion. *Bormuth*, 870 F.3d at 515–16 n.10 (Griffin, J., concurring, joined by Batchelder and Thapar, JJ.) (citing *Marks v. United States*, 430 U.S. 188, 193 (1977)). Ultimately it does not matter, though, because there is no coercion under Justice Kennedy's opinion either—"subtle pressure to participate" isn't enough. *Town of Greece*, 572 U.S. at 586 (Kennedy, J.); *McCarty*, 851 F.3d at 526.

There is no evidence of anything more: No evidence that Judge Mack "direct[s] the public to participate in the prayers, single[s] out dissidents for opprobrium, or indicate[s] that [his] decisions might be influenced by a person's acquiescence in the prayer opportunity." *Town of Greece*, 572 U.S. at 588 (Kennedy, J.); *see* ROA.1025–28 (citing ROA.1047–48, 1053, 1120–21, 1135, 1144). And no evidence that Judge Mack "allocate[s] benefits and burdens based on participation in the [ceremony], or that citizens [are] received differently depending on whether they joined the invocation or quietly declined." *Town of Greece*, 572 U.S. at 589 (Kennedy, J.); *see* ROA.1025–28 (citing ROA.1047–48, 1053, 1120–21, 1135, 1144).

Despite the uncontroverted evidence that attendees can step out of the courtroom for the opening ceremony (for any number of reasons), the district court concluded that "attendance is not voluntary in any real sense" because litigants and attorneys need to appear for court dates. ROA.2116. But that conflates mandatory attendance at court with voluntary attendance at the opening ceremony. And the district court's belief that it is "inherently coercive" to put attendees to "a 'choice'" to stay or leave, ROA.2116, has already been rejected by the Supreme Court. *Town of Greece*, 572 U.S. at 590 (Kennedy, J.) ("Neither choice represents an unconstitutional imposition as to mature adults.").

Finally, it's undisputed that the "volunteer chaplains neither proselytize nor denigrate any other belief." *Mack*, 4 F.4th at 308; *see* ROA.1025–26 (citing ROA.1047–48, 1075, 1123–24) (chaplains are "not there to promote themselves or their faith"). Instead, Judge Mack "maintains a policy of nondiscrimination" and his practice reflects no "aversion or bias . . . against minority faiths." *Town of Greece*, 572 U.S. at 585 (majority); *see* ROA.1047, 1068–69; *see also* ROA.1024 (citing ROA.1102–17).

Judge Mack's opening ceremony not only permits but also actively encourages clergy from any faith tradition to participate, ROA.1024 (citing ROA.1047, 1068–69, 1112–17)—"an honest endeavor to achieve inclusivity and nondiscrimination." *Am. Legion*, 139 S. Ct. at 2089 (plurality); *see also Mack*, 4 F.4th at 308. Judge Mack quite intentionally seeks to include "clergy from minority belief systems in the area" so that the chaplaincy program can "serve anyone who suffered a fire, death, accident, or disaster." ROA.1047, 1068–69; *see also* ROA.1024 (citing ROA.1112–17).

In sum, the "brief, solemn, and respectful prayer" at issue, "delivered during the ceremonial portion" of a government proceeding—with the opportunity to leave or quietly abstain—is not coercive under any legitimate standard. *Town of Greece*, 572 U.S. at 587–91 (Kennedy, J.).

* * *

Judge Mack's opening ceremony, which honors Montgomery County's volunteer chaplains and solemnizes Judge Mack's courtroom proceedings, is fully consistent with our Nation's time-honored tradition of opening government proceedings with brief invocations—a practice that this Court and the Supreme Court repeatedly have upheld.

It is also consistent with our Nation's rich historical tradition of opening judicial proceedings, in particular, with chaplain-led prayer—a tradition that extends back to the first Justices of the Supreme Court. The invocations here—offered by volunteer chaplains from a variety of faiths, including Protestantism, Catholicism, Buddhism, Hinduism, Judaism, and Islam—are voluntary, non-coercive, non-proselytizing, and non-denigrating. Judge Mack's opening ceremony fully comports with the Establishment Clause and the district court reversibly erred in declaring it unconstitutional.

CONCLUSION

The Court should reverse the judgment and render judgment in favor of Judge Mack.

Dated: September 22, 2021

Respectfully submitted,

/s/ Allyson N. Ho

Kelly J. Shackelford
Hiram S. Sasser, III
Justin Butterfield
Jeremiah G. Dys
FIRST LIBERTY INSTITUTE
2001 West Plano Parkway,
Suite 1600
Plano, Texas 75075
Telephone: (972) 941-4444
Facsimile: (972) 423-6162
[redacted]

Allyson N. Ho
Bradley G. Hubbard
Matthew Scorcio
Elizabeth A. Kiernan
GIBSON, DUNN & CRUTCHER LLP
2001 Ross Avenue, Suite 2100
Dallas, Texas 75201
Telephone: (214) 698-3100
Facsimile: (214) 571-2900
[redacted]

Katherine L. Montoya
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 955-8500
Facsimile: (202) 530-9595
[redacted]

COUNSEL FOR APPELLANT JUDGE WAYNE MACK
IN HIS INDIVIDUAL CAPACITY

CERTIFICATE OF SERVICE

I certify that, on September 22, 2021, a true and correct copy of the foregoing brief was served via CM/ECF on all counsel of record.

/s/ *Allyson N. Ho*
Allyson N. Ho

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the typeface requirements of Rule 32(a)(5) and the typestyle requirements of Rule 32(a)(6) because it was prepared in 14-point New Century Schoolbook, a proportionally spaced typeface, using Microsoft Word 2019. This brief complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 6,450 words, excluding the parts exempted by Rule 32(f).

/s/ *Allyson N. Ho*
Allyson N. Ho