UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

FREEDOM FROM RELIGION FOUNDATION, INC., et al.,

Plaintiffs,

v.

MONTGOMERY COUNTY, TEXAS; and JUDGE WAYNE MACK, in his official capacity,

Defendants.

Civil Action No. 4:17-cv-881

[PROPOSED] BRIEF OF *AMICUS CURIAE* THE STATE OF TEXAS IN SUPPORT OF DEFENDANTS

TABLE OF CONTENTS

NATURE OF THE CASE 1
STATEMENT OF THE ISSUES 1
SUMMARY OF THE ARGUMENT 2
ARGUMENT 2
I. Plaintiffs Lack Taxpayer Standing. 2
A. Plaintiffs failed to plead taxpayer standing and amendment would be futile. 3
B. There is no logical link or nexus between Plaintiffs' taxpayer status and Judge Mack's prayer practice. 4
II. Plaintiffs' "Offended Observer" Status Is Insufficient for Article III Standing. 5
III. Plaintiff FFRF Lacks Associational Standing. 7
IV. Judicial Prayer, Like Prayer by Other Government Bodies, Is Constitutional. 11
CONCLUSION 16
CERTIFICATE OF SERVICE 17

TABLE OF AUTHORITIES

Cases **Page(s)**

Am. Humanist Ass'n v. McCarty,
851 F.3d 521 (5th Cir. 2017) 11–12

Amnesty Int'l USA v. Clapper,
667 F.3d 163 (2d Cir. 2011) 9

Ariz. Christian Sch. Tuition Org. v. Winn,
563 U.S. 125 (2011) 2, 3, 6

Clapper v. Amnesty Int'l, USA,
133 S. Ct. 1138 (2013) 9, 10, 11

Cooper v. Texas Alcoholic Beverage Comm'n,
820 F.3d 730 (5th Cir. 2016) 7

Doe v. Duncanville Indep. Sch. Dist.,
70 F.3d 402 (5th Cir. 1995) 3

Doe v. Tangipahoa Parish Sch. Bd.,
494 F.3d 494 (5th Cir. 2007) (en banc) 5

Flast v. Cohen,
392 U.S. 83 (1968) 2, 3

Freedom from Religion Found., Inc. v. Perry,
No. H–11–2585, 2011 WL 3269339 (S.D. Tex. July 28, 2011) 6–7

Hein v. Freedom from Religion Found., Inc.,
551 U.S. 587 (2007) 2, 4, 5, 9

Marsh v. Chambers,
463 U.S. 783 (1983) 1, 11, 12

NAACP v. City of Kyle,
626 F.3d 233 (5th Cir. 2010) 10

Sch. Dist. of Abington Twp. v. Schempp,
374 U.S. 203 (1963) 6

Summers v. Earth Island Institute,
555 U.S. 488 (2009) 8

Texas Democratic Party v. Benkiser,
459 F.3d 582 (5th Cir. 2006) 7

Town of Greece, N.Y. v. Galloway,
134 S. Ct. 1811 (2014) 11, 12

United States v. Odiodio,
No. 3:03-CV-0896-D, 2005 WL 2990906 (N.D. Tex. Nov. 7, 2005) 12

Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.,
454 U.S. 464 (1982) 4–5, 6, 7, 9

Van Orden v. Perry,
545 U.S. 677 (2005) 12

Whitmore v. Arkansas,
495 U.S. 149 (1990) 10

Wolcott v. Sebelius,
635 F.3d 757 (5th Cir. 2011) 9

Other Authorities

1 Charles Warren, *The Supreme Court in United States History* 59 (1926) 12

FFRF, Membership Application, *available at* https://secure.ffrf.org/np/clients/ffrf/membershipJoin.jsp 9

2 Maeva Marcus, et al., *The Documentary History of the Supreme Court of the United States, 1789–1800* 11 (1988) .... passim

4 *Papers of John Marshall* 95 (C. Cullen ed. 1984) 6

Tex. Att'y Gen. Op. KP–0109 (2016) 1

NATURE OF THE CASE

Freedom From Religion Foundation and three unnamed persons (collectively, "FFRF") sued Montgomery County and one of its justices of the peace, Wayne Mack, in his official capacity, alleging that the judge's practice of inviting volunteer guests to give invocations in his courtroom violates the Establishment Clause of the First Amendment. *See* Notice to Clarify Pls.' Claims 1, ECF No. 41. FFRF is a Madison, Wisconsin-based non-profit organization that "advocates for the separation of state and church." Am. Compl. ¶ 8, ECF No. 22. The three unnamed individual plaintiffs allegedly include two attorneys and a local resident. *Id.* ¶¶ 9–11.

FFRF alleges, in relevant part, that Judge Mack invites one of a rotating group of volunteer chaplains to give an invocation at the beginning of court. *Id.* ¶¶ 43–45. The invocation occurs after Judge Mack takes the bench, but before he calls the first case. *Id.* ¶¶ 46–49. Prior to the judge entering the courtroom, the bailiff gives an introductory statement, including a statement about the forthcoming invocation, and allows people to leave the courtroom if they do not wish to participate. *Id.* ¶ 46. Judge Mack, since he is not yet on the bench, does not know who leaves in response to the bailiff's invitation. After the invocation, attendees are encouraged to recite the Pledges of Allegiance to both the Texas and American flags. *Id.* ¶ 51.

Judge Mack's invocations and recitations of the pledges are no different than the longstanding practices by the United States Supreme Court and Texas Supreme Court. *Marsh v. Chambers*, 463 U.S. 783, 786 (1983); Tex. Att'y Gen. Op. No. KP–0109 (2016). In fact, across Texas, state agencies, counties, cities, and courts use invocations to open their meetings.

STATEMENT OF THE ISSUES

Amicus agrees with the Statement of Issues articulated in Montgomery County's motion to dismiss. Defs.' Mot. to Dismiss 7, ECF No. 29.

SUMMARY OF THE ARGUMENT

Plaintiffs' complaint should be dismissed for two reasons mentioned only briefly by Defendants. First, Plaintiffs lack Article III standing as taxpayers, as "offended observers," and as an association. Second, the prayer practices they challenge are constitutional. Legislative prayer, town board prayer, and school board prayer, either by paid chaplains or volunteers does not violate the Establishment Clause. Likewise, judicial prayer before courtroom proceedings is part of the fabric of our country, and has been practiced by courts since Chief Justice John Jay rode circuit in the early days of the Republic. For these reasons and those stated in Defendants' motion to dismiss, Plaintiffs' complaint should be dismissed with prejudice.

ARGUMENT

I. Plaintiffs Lack Taxpayer Standing.

Plaintiffs' complaint must be dismissed with prejudice because their status as taxpayers is insufficient for Article III standing. "Absent special circumstances" not present here, "standing cannot be based on a plaintiff's mere status as a taxpayer." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 134 (2011). The reason for this is that "claims of taxpayer standing rest on unjustifiable economic and political speculation." *Id.* at 136. The interest of a taxpayer in ensuring that government funds "are spent in accordance with the Constitution does not give rise to the kind of redressable 'personal injury' required for Article III standing." *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 599 (2007).

In *Flast v. Cohen*, 392 U.S. 83 (1968), the Supreme Court recognized there may be some First Amendment cases where a party's mere status as a taxpayer confers standing. But the Court recently described this as a "narrow exception" to the general rule against taxpayer standing. *Winn*, 563 U.S. at 138. *Flast* held that taxpayers have standing only when two conditions are met. First, "there must be a 'logical link'

between the plaintiff's taxpayer status 'and the type of legislative enactment attacked.'" *Id.* (quoting *Flast*, 392 U.S. at 102). This means the taxpayer may only attack the constitutionality of "congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution." *Flast*, 392 U.S. at 102. It is not sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute." *Id.* The Supreme Court "has been careful to enforce [this] requirement." *Winn*, 563 U.S. at 139.

Second, "there must be a 'nexus' between the plaintiff's taxpayer status and 'the precise nature of the constitutional infringement alleged.'" *Id.* at 139 (quoting *Flast*, 392 U.S. at 102). "After stating the two conditions for taxpayer standing, *Flast* considered them together, explaining that individuals suffer a particular injury for standing purposes when, in violation of the Establishment Clause and by means of 'the taxing and spending power,' their property is transferred through the Government's Treasury to a sectarian entity." *Winn*, 563 U.S. at 139–40 (quoting *Flast*, 392 U.S. at 105–06).

As to state or municipal taxpayer standing in Establishment Clause cases, like standing in federal taxpayer cases, "a plaintiff must not only show that he pays taxes to the relevant entity, he must also show that tax revenues are expended on the disputed practice." *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 408 (5th Cir. 1995). Plaintiffs failed to plead standing based on their taxpayer status in Montgomery County, but even if they did, the county does not expend any tax revenues on Judge Mack's prayer practices.

A. Plaintiffs failed to plead taxpayer standing and amendment would be futile.

Plaintiffs did not allege taxpayer standing. Jane Doe alleges her place of business is located in Montgomery County, John Roe claims to work in the county, and Jane Noe is a county resident. Am. Compl. ¶¶ 9–11. FFRF alleges only that it

has members in Texas. *Id.* ¶ 8. None of the allegations refer to status as taxpayers or that claims are brought as taxpayers. Since Plaintiffs amended their complaint, and the amendment fails to cure this jurisdictional defect, the Court should not allow them to amend again to cure this defect.

But even if the Court read taxpayer standing into Plaintiffs allegations, Plaintiffs still fail to meet *Flast's* test. Plaintiffs do not articulate any logical link or nexus between their status as taxpayers and Judge Mack's prayer practice.

B. There is no logical link or nexus between Plaintiffs' taxpayer status and Judge Mack's prayer practice.

Assuming that Plaintiffs made a sufficiently well-pleaded allegation of taxpayer status, Plaintiffs' complaint nonetheless fails both of *Flast's* inquiries. Judge Mack does not conduct invocations pursuant to any taxing or spending power of Montgomery County or Texas. In fact, Plaintiffs fail to allege that Judge Mack expends *any* taxpayer resources on the invocations, and for good reason—he doesn't. None of the chaplains are paid and they do not use any Montgomery County or Texas money for their invocations.

These allegations, or lack thereof, taken as true, put this case squarely within *Hein v. Freedom from Religion Foundation*. There, the Supreme Court held FFRF lacked taxpayer standing under *Flast* to challenge a federal executive action funded by general appropriations. 551 U.S. at 608–09. The Supreme Court determined that FFRF failed to cite any statute or municipal action authorizing the expenditure of money whose application they challenged. *Id.* at 607. "Because the expenditures that respondents challenge were not expressly authorized or mandated by any specific congressional enactment, respondents' lawsuit is not directed at an exercise of congressional power, and thus lacks the requisite logical nexus between taxpayer status and the type of legislative enactment attacked." *Id.* at 608–09 (citations and quotation marks omitted); *see also Valley Forge Christian Coll. v. Ams. United for*

Separation of Church & State, Inc., 454 U.S. 464, 479 (1982) (holding that an organization similar to FFRF lacked taxpayer standing under *Flast* to challenge an agency's decision to transfer a parcel of federal property to a religious organization because there was no legislative action); *Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494, 497 (5th Cir. 2007) (en banc) (stating agreement between the majority and dissent on the lack of parent's taxpayer standing in an Establishment Clause attack against school board prayer: "As the dissenters agree, there is no basis for taxpayer standing.").

Here, FFRF fails to allege any facts that taxpayer money is transferred from the municipality or Texas to the community members who solemnize Judge Mack's courtroom proceedings with prayer. Judge Mack's invocations do not expend any state or county appropriations. Based upon this alone, the Court must dismiss Plaintiffs complaint, with prejudice, for lack of taxpayer standing. "The link between congressional [or municipal] action and constitutional violation that supported taxpayer standing in *Flast* is missing here." *Hein*, 551 U.S. at 605. Thus, their complaint should be dismissed with prejudice.

II. Plaintiffs' "Offended Observer" Status Is Insufficient for Article III Standing.

The "psychological consequence presumably produced by observation of conduct with which one disagrees" does not constitute Article III standing. *Valley Forge*, 454 U.S. at 487. In *Valley Forge*, plaintiffs from Maryland, Virginia, and the District of Columbia (one of whom was an organization like FFRF) argued that a land transfer to a religious college in Pennsylvania violated the Establishment Clause. *Id.* at 486–87. But other than claiming the Constitution had been violated, the plaintiffs had no other connection to the alleged constitutional error. *Id.* at 486. The Supreme Court held that plaintiffs who "roam[ed] the country in search of governmental wrongdoing" under the Establishment Clause did not have Article III standing to sue

as an offended observer. *Id*. at 487. They possessed no injury in fact.

More recently, the Court reaffirmed:

> Continued adherence to the case-or-controversy requirement of Article III maintains the public's confidence in an unelected but restrained Federal Judiciary. If the judicial power were "extended to every question under the constitution," Chief Justice Marshall once explained, federal courts might take possession of "almost every subject proper for legislative discussion and decision."

Winn, 563 U.S. at 133 (quoting 4 *Papers of John Marshall* 95 (C. Cullen ed. 1984)).

The Fifth Circuit never infers standing. *Doe*, 494 F.3d at 498. Plaintiffs must prove it. And while the Fifth Circuit occasionally recognizes that "offended observer" status may be sufficient for Article III standing in an Establishment Clause case involving children, *see id.* at 497 (recognizing a parent may have had standing to challenge the prayer practices of a school board based on personal offense, but the fact that the parent never attended any of the school board meetings meant he had no injury), the Supreme Court distinguished standing in public school cases involving Establishment Clause challenges, *see Valley Forge*, 454 U.S. at 486 n.22 ("The plaintiffs in [*School District of Abington Township v.*] *Schempp*[, 374 U.S. 203 (1963),] had standing, not because their complaint rested on the Establishment Clause—for as *Doremus* demonstrated, that is insufficient—but because impressionable schoolchildren were subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them.").

Regular exposure to solemnizing prayer does not create Article III standing. In *Freedom from Religion Foundation, Inc. v. Perry*, No. H–11–2585, 2011 WL 3269339, at *6 (S.D. Tex. July 28, 2011), Judge Miller held that FFRF lacked standing to challenge a proclamation by former Texas Governor Rick Perry sponsoring a prayer rally. FFRF claimed it was offended by the former governor's proclamation. But in dismissing FFRF's complaint for lack of "offended observer" standing, Judge Miller said:

> Persons offended by an elected official's speech are free to give voice to

> their feelings of offense and exclusion in a number of ways. They can choose not to attend and not to pray. They can also exercise their free speech rights and their right to vote, among others. Therefore, this court's finding that plaintiffs lack standing is not a denial of a remedy—it is just a denial of remedy in the courts.

Id.

In the same way here, Plaintiffs' assertion that "the Government has violated the Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court." *Valley Forge*, 454 U.S. at 487. But that is all Plaintiffs allege. Plaintiff Doe simply "objects, based on her sincerely held beliefs, to the government telling her when or how to pray." Am. Compl. ¶ 9. But Judge Mack does not require any one to participate in or attend his invocations. Plaintiff Roe "objects to being subjected to religious prayers in Judge Mack's courtroom." *Id.* ¶ 10. Plaintiff Noe feels "coerced to remain in the courtroom during the opening prayer." *Id.* ¶ 11. FFRF does not allege any specific objection to or offense created by Judge Mack's invocation practice, but simply rests its associational standing on that of its alleged member plaintiffs. *Id.* ¶¶ 8–11. Plaintiffs lack standing to challenge Judge Mack's prayer practices based on their personal offense.

III. Plaintiff FFRF Lacks Associational Standing.

FFRF lacks associational standing. To show associational standing under Article III, FFRF must meet a "three-part test: (1) the association's members would independently meet the Article III standing requirements; (2) the interests the association seeks to protect are germane to the purpose of the organization; and (3) neither the claim asserted nor the relief requested requires participation of individual members." *Texas Democratic Party v. Benkiser*, 459 F.3d 582, 587 (5th Cir. 2006); *accord Cooper v. Texas Alcoholic Beverage Comm'n*, 820 F.3d 730, 737 (5th Cir. 2016). FFRF fails to meet the first factor.

According to the Complaint, FFRF has never appeared before Judge Mack,

either as a party or as counsel of record, and has never experienced Judge Mack's prayer practice. The only connection FFRF has to Judge Mack's prayers are its alleged members. Am. Compl. ¶¶ 9–11. As for Ms. Noe, she hardly alleges sufficient facts to show that she regularly appears before Judge Mack. She states that she "has appeared before Judge Mack on official business." *Id*. But she fails to allege when she has appeared before him, how many times she has appeared before him in the past, and when she expects to do so in the future. As for Jane Doe and John Roe, they were not members of FFRF at the time the original complaint was filed. *Compare* Compl. ¶¶ 9–10, ECF No. 1, *with* Am. Comp. ¶¶ 9–10. That they have now allegedly become members of FFRF *after* being offended by Judge Mack's prayer practices is insufficient to create associational standing. By this standard, an organization owns every past vestige of prospective standing possessed by an individual once that individual joins the organization.

Plaintiffs' allegations are similar to those that the Supreme Court rejected in *Summers v. Earth Island Institute*, 555 U.S. 488 (2009). There, the Supreme Court examined the associational standing of an organization challenging forestry regulations. The Court rejected the plaintiff organization's associational standing because only one member had claimed an injury from the regulations, but that injury was not sufficient because, *inter alia*, it related to "past injuries rather than imminent future injury that is sought to be enjoined." *Id*. at 495.

Similarly, Ms. Noe did not plead an injury in fact that is actual or imminent. Her allegations are hypothetical and speculative. She may continue to live in Montgomery County and never enter Judge Mack's courtroom again. The fact that she has done so once does not indicate it will happen again in the future. Most citizens rarely appear before the judiciary. Thus, Ms. Noe cannot be the basis for FFRF's associational standing.

As for FFRF's newest members, Jane Doe and John Roe, FFRF cannot

manufacture standing through their new membership, presumably created for the benefit of FFRF. Neither Jane Doe nor John Roe were members of FFRF at the time the initial complaint was filed. Compl. ¶¶ 9–10. Now, Jane Doe and John Roe are members of FFRF. Am. Compl. ¶¶ 9–10. Assuming that all of the well-pleaded facts contained in the complaints are true, *Wolcott v. Sebelius*, 635 F.3d 757, 763 (5th Cir. 2011), the only reasonable inference to be drawn from the transformation in Jane Doe and John Roe's membership status is that it was done to manufacture standing for purposes of this litigation.

And even if it were presumed that the individual plaintiffs possess standing in their individual capacities, FFRF's choice to engage as members those who claim a dispute with Judge Mack, "cannot manufacture standing merely by inflicting harm on themselves." *Clapper v. Amnesty Int'l, USA*, 133 S. Ct. 1138, 1151 (2013). Here, FFRF perverts the requirements of Article III standing not "for the price of a plane ticket," *id*. (quoting *Amnesty Int'l USA v. Clapper*, 667 F.3d 163, 180 (2d Cir. 2011) (Raggi, J., dissenting), but for the price of a $40.00 membership.[1] *Clapper* is directly applicable to the circumstance presented here, as the Supreme Court was concerned that "an enterprising plaintiff would be able to secure a lower standard for Article III standing simply by making an expenditure based on a nonparanoid fear." *Id*. There is no dispute that FFRF is "an enterprising plaintiff," and one that the Supreme Court has found guilty of "roam[ing] the country in search of governmental wrongdoing." *Hein*, 551 U.S. at 632 (quoting *Valley Forge*, 454 U.S. at 487). Now, though FFRF has never appeared before Judge Mack, and is unlikely to ever do so, it sought out and added to the roles of its membership Jane Doe and John Roe to manufacture Article III standing.

Any allegation that FFRF's newest members may or will appear before Judge

[1] *See* FFRF, Membership Application, *available at* https://secure.ffrf.org/np/clients/ffrf/membershipJoin.jsp.

Mack at some time in the future, without concrete and particularized facts as to when and in what capacity, fails to establish Article III standing. *See NAACP v. City of Kyle*, 626 F.3d 233, 237 (5th Cir. 2010) (holding NAACP lacked association standing because no evidence showed a member had been affected by the challenged city ordinance). That John Roe "regularly represents clients before Judge Mack," Am. Compl. ¶ 10, is insufficient. Americans also "regularly" elect their President every four years, but that John Roe may appear before Judge Mack within the next four years is hardly sufficient to justify Article III standing. "'Allegations of possible future injury' are not sufficient." *Clapper*, 133 S. Ct. at 1147 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)).

Even if John Roe's "regular" past appearances are sufficient to establish the likelihood of an ongoing and future injury, this does not cure the problem, reasonably implied from the well-pled facts, that FFRF manufactured its own associational standing by allegedly making a previously-injured individual a member so as to justify a lawsuit. And beyond the self-infliction problem, any injury incurred by John Roe existed *before* his FFRF membership. But individuals must be members of organizations at the time an injury occurs for associational standing to exist. In *NAACP v. City of Kyle*, the Fifth Circuit envisioned that any harm imputed to an organization was incurred by an actual member, 626 F.3d at 237 ("there is no evidence in the record showing that a specific member of the NAACP has been unable to purchase a residence in Kyle as a result of the revised ordinances"), not someone that became a member after-the-fact. There, "Plaintiffs [] pointed only to evidence suggesting, in the abstract, that some *minority members* may be less able to afford such residences due to the revised ordinances. This is insufficient for associational standing because the alleged injury is neither concrete nor imminent." *Id*. (emphasis added). That only "minority members," and not actual members of the NAACP, were affected by the law did not satisfy Article III. And had those "minority members"

subsequently joined the NAACP, standing would still not exist because, under *Clapper*, a prospective plaintiff "cannot manufacture standing." *Clapper*, 133 S. Ct. at 1155.

Even if the Court assumes that the individual plaintiffs possess standing, FFRF cannot satisfy the elements of Article III standing. Jane Noe does not allege that she was a member of FFRF on the single occasion she appeared before Judge Mack, and she has not pled any expectation of ever being before Judge Mack again. As for Jane Doe and John Roe, their newly enshrined membership in FFRF is nothing more than a ruse to manufacture standing for an association that cannot credibly allege a concrete and particularized injury under Article III. FFRF should be dismissed as a plaintiff.

IV. Judicial Prayer, Like Prayer by Other Government Bodies, Is Constitutional.

Prayer by government bodies does not violate the Establishment Clause. In *Marsh v. Chambers*, the Supreme Court found that the "opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country." 463 U.S. 783, 786 (1983). Indeed, "[f]rom colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom." *Id*. Just three years ago, the Supreme Court reaffirmed the constitutionality of these practices and extended the protection afforded by the First Amendment to town board meetings that open with prayer. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1828 (2014). And just this year, the Fifth Circuit extended the same protection to school board meetings that open with prayer. *Am. Humanist Ass'n v. McCarty*, 851 F.3d 521, 529 (5th Cir. 2017) ("'[L]egislative prayer lends gravity to public business, reminds lawmakers to transcend petty differences in pursuit of a higher purpose, and expresses a common aspiration to a just and peaceful

society.'" (quoting *Galloway*, 134 S. Ct. at 1818)).

These principles extend to prayers by courts and adjudicative tribunals. "In the very courtrooms in which the United States District Judge and later three Circuit Judges heard and decided [*Marsh*], 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 [the Supreme] Court." *Marsh*, 463 U.S.at 786; *see also Galloway*, 134 S. Ct. at 1825 (noting the same). The Texas Supreme Court opens with a solemnizing invocation: "God save the State of Texas, and this Honorable Court." Resp'ts Br. 48 n.35 in *Van Orden v. Perry*, 545 U.S. 677 (2005). And the Northern District of Texas, for example, opens with "The United States District Court for the Northern District of Texas is now in session, the Honorable [Judge] presiding. Let us pray. God save the United States and this Honorable Court." *United States v. Odiodio*, No. 3:03-CV-0896-D, 2005 WL 2990906, at *29 (N.D. Tex. Nov. 7, 2005).

Courts engage in these solemnizing prayer practices because they are deeply embedded in the history and tradition of America's judiciary. At the founding of our nation, the Chief Justice and associate justices of the Supreme Court rode circuit and held court in districts throughout the country. During those proceedings, the Chief Justice, associate justices, and local judges all participated in and requested that ministers open their proceedings with prayer. On May 10, 1790, the opening of the Circuit Court of the United States for the Massachusetts District "was held before Chief Justice Jay, Judge Cushing, and Judge Lowell. 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." 1 Charles Warren, *The Supreme Court in United States History* 59 (1926).

Asking a member of the clergy to attend court hearings and pray was "Custom

in the New England States."[2] As a result, when United States District Judge Richard Law asked Chief Justice John Jay whether he would like to continue the practice of clergy solemnizing the courtroom proceedings, the Chief Justice responded: "The custom in New England of a clergyman's attending, should in my opinion be observed and continued."[3]

From then on, in Massachusetts, New Hampshire, Rhode Island, and other states, when courtroom prayer was part of the normal practices of the local community, the federal courts respected those practices and opened with prayer:

- Yesterday the Circuit Court of the United Scares, was opened in this Town for the Massachusetts district, present Judge Jay, Judge Cushing and Judge Lowell—after the grand Jury were impannelled and sworn, an elegant and nervous charge was given them by the Chief Justice—and the throne of grace was addressed in a well adapted prayer by the Rev. Dr. Howard.[4]
- The circuit court for Massachusetts opened on November 3, with Chief Justice John Jay, Associate Justice William Cushing, and Judge John Lowell in attendance. "After the usual forms were gone through with, and the Grand-Jury impannelled, an excellent charge was given them, by the Chief-Justice, and the Throne of Grace was addressed in prayer, by the Rev. Dr. Stillman.[5]
- Judge Jay is here he is much respected & esteemed and is taken very partial notice of_ his speech to the Grand Jury was much admired_ Doctor Stillman gave us a most sublime Prayer on the occasion_ I was a Juryman, and appointed Foreman of the first Jury _ we had no cause to try and after two days attendance we were dismissed.[6]
- On Thursday the Circuit Court of the United States was opened in this town. . . . The procession having arrived at the Court-House, and the usual Proclamations being made-a very respectable Grand Jury was sworn, (of which Mr. Thomas Harris, of Charlestown, was appointed Foreman)—After which the Chief Justice delivered to

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[2] Letter from Richard Law, U.S. District Judge for the District of Connecticut, to Chief Justice John Jay, U.S. Supreme Court (Feb. 24, 1790) (reprinted in 2 Maeva Marcus, et al., *The Documentary History of the Supreme Court of the United States, 1789–1800* 11 (1988)).

[3] Marcus *supra* note 8, at 13 (Letter from Chief Justice John Jay to District Judge Law (Mar. 10, 1790)).

[4] *Id*. at 60 (*Herald of Freedom* (Boston), May 4, 1790).

[5] *Id*. at 104–05 (Circuit Ct. for the Dist. of Mass. (Boston), Nov. 3, 1790).

[6] *Id*. at 106 (Letter from Henry Jackson, Boston merchant, to Henry Knox, Secretary of War (Nov. 7, 1790)).

them, a short and elegant extempore Charge. The Throne of Grace was then addressed in prayer, by the Rev. Mr. West.[7]

- Pursuant to law, court convened with Chief Justice John Jay, Associate Justice William Cushing, and Judge John Sullivan in attendance. "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." The court adjourned on May 26 to the next term.[8]
- On Monday last the Circuit Court of Massachusetts District, opened in this town, before the Hon. Chief Justice Jay, and Judge Lowell. After the customary formalities were over, the Chief Justice gave a short and elegant charge to the Grand-Jury. . . . After the charge, the Rev. Mr. Belknap addressed the Throne of Grace in prayer.[9]
- Court opened on Saturday, May 12, with Chief Justice John Jay, Associate Justice William Cushing, and Judge John Lowell in attendance. On Monday, May 14, Jay delivered a charge to the grand jury. . . . The prayer was made by the Rev. Dr. Parker. His Excellency the Vice President of the United States, was in Court.[10]
- On Friday last, the Circuit Court of the United States opened in this town. After the Rev. Dr. Lathrop had addressed the throne of Grace, in prayer, the Hon. Judge Iredell gave an elegant charge to the jury, and the business of the session commenced. The Hon. Judge Wilson [Associate Justice] is on the circuit—but has not yet arrived.[11]
- Yesterday the Circuit Court of the United States opened in this town: When the Hon. Judge Wilson delivered to the Grand Jury, a Charge, replete with the purest principles of our equal Government, and highly indicative of his legal reputation. After the Charge, the Rev. Dr. Thacher addressed the throne of Grace, in prayer.[12]
- Last Wednesday the Circuit Court of the United States opened in this Town: When the Rev. Mr. Patten addressed the Throne of Grace in Prayer—After which the Hon. Judge Wilson delivered to the Grand Jury a Charge, replete with the purest Principles of our equal Government and highly indicative of its legal Reputation.[13]
- On Thursday, last Week, the Circuit Court of the United States was opened in this Town, before the Hon. Judge Wilson, and Judge Marchant.—The Throne of Grace was addressed, in a Prayer well

[7] *Id*. at 164–65 (*Columbian Centinel* (Boston), May 14, 1791).

[8] *Id*. at 192 (Circuit Ct. for the Dist. of N.H. (Portsmouth), May 24, 1791).

[9] *Id*. at 231–32 (*Columbian Centinel* (Boston), Nov. 16, 1791).

[10] *Id*. at 276 (Circuit Ct. for the Dist. of Mass. (Boston), May 12, 1792).

[11] *Id*. at 317 (*Columbian Centinel* (Boston), Oct. 17, 1792).

[12] *Id*. at 406 (*Columbian Centinel* (Boston), June 8, 1793).

[13] *Id*. at 412 (*Newport Mercury*, June 25, 1793).

adapted to the Occasion, by the Rev. James Wilson, Co-Pastor of the Congregational church on the West Side of the River; after which his Honour the presiding Judge delivered a pertinent and affecting Charge to the Grand Jury.[14]

- On Monday last, the Hon. Judge Cushing commenced the session of the Circuit Court, in this town, when he delivered to the Grand Jury, an animated charge, in which to the genuine principles of true republicanism, were united sentiments eminently calculated to enforce the necessity of social order, and a due respect to the voice of the People, expressed in the Laws of the Union. Previous to the charge the throne of Mercy was addressed, in prayer, by the Rev. Mr. Eckley.[15]
- On June 19 the circuit court began its session with Associate Justice James Wilson and Judge Henry Marchant in attendance. On June 20, "the Court was opened with Prayer, by the Rev. Mr. Patten, after which an excellent Charge was given by Judge Wilson to the Grand Jury."[16]
- Yesterday the Circuit Court of the United Scares was opened in this Town.—The Rev. Dr. Hitchcock addressed the Throne of Grace in a Prayer, and the Honourable Judge Cushing gave a sensible and truly patriotic Charge to the Grand Jury, well adapted to the Situation of our public Affairs.[17]
- On Monday last the Circuit Court of the United States was opened in this town. The Hon. Judge Patterson presided. After the Jury were empannelled, the Judge delivered a most elegant and appropriate Charge. . . . Religion & Morality were pleasingly inculcated and enforced, as being necessary to good government, good order and good laws, for "when the righteous are in authority, the people rejoice." . . . After the Charge was delivered, the Rev. Mr. Alden addressed the Throne of Grace, in an excellent, well adapted prayer.[18]

The First Amendment protects legislative, town, and school board prayer, because they are part of our nation's history and tradition. Given the historical tradition of opening judicial proceedings with prayer, Plaintiffs' lawsuit must be dismissed because his prayer practices are no different than those upheld by—and practiced by—the Supreme Court, Fifth Circuit, Texas Supreme Court, and myriad other courts in similar contexts.

[14] *Id*. at 430 (*Providence Gazette*, Nov. 16, 1793).

[15] *Id*. at 475 (*Columbian Centinel* (Boston), June 11, 1794).

[16] *Id*. (Circuit Ct. for the Dist. of R.I. (Newport), June 19, 1794)

[17] *Id*. at 496 (*Providence Gazette*, Nov. 8, 1794).

[18] *Id*. at 436 (*United States Oracle* (Portsmouth, NH), May 24, 1800).

CONCLUSION

For the reasons stated herein and those articulated by Defendants, Plaintiffs' complaint should be dismissed with prejudice.

Respectfully submitted this 22nd day of December, 2017.

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CERTIFICATE OF SERVICE

I, David J. Hacker, hereby certify that on this 22nd day of December, 2017, a true and correct copy of the foregoing document was transmitted using the CM/ECF system, which automatically sends notice and a copy of the filing to all counsel of record.

/s/ David J. Hacker
David J. Hacker