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, No. 4:19-cv-1934

BRIEF, IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE, OF *AMICI CURIAE* SCHOLARS OF RELIGION AND HISTORY: PAUL FINKELMAN, JOHN A. RAGOSTA, OMAR H. ALI, CHRIS BENEKE, ALAN BROWNSTEIN, STEVEN K. GREEN, IRA KATZNELSON, FRANKLIN T. LAMBERT, DAVID V. MASON, PETER S. ONUF, FRANK S. RAVITCH, RICHARD C. SCHRAGGER, AND LAURENCE H. WINER

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

No. 21-20279, Freedom from Religion Foundation, Inc.; John Roe v. Wayne Mack, Individual Capacity

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel of record certifies that, in addition to the persons and entities listed in the Certificates of Interested Persons of the parties and other *amici*, 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.

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Dated: November 23, 2021

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions and Statutes

Other Authorities

IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici are historians and legal scholars who specialize in constitutional history and religious freedom. They have substantial expertise in the history of the Establishment Clause and related issues. *Amici* have a professional interest in the proper disposition of those issues and believe that the Court should decide this case based on a more complete and accurate understanding of history.

Paul Finkelman, Ph.D., is the Chancellor and Distinguished Professor of History at Gratz College. He specializes in American legal history and constitutional law, with particular interests in, among other topics, constitutional history and freedom of religion. He has authored more than 200 articles and more than 50 books on these and other topics.

Professor Finkelman is joined by the following *amici*, who include specialists on the Founders, scholars of early American religious

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel made a monetary contribution intended to fund the brief's preparation or submission. All parties have consented to the filing of this brief.

history, nationally recognized constitutional-law scholars, and winners of numerous awards and prizes:

- John A. Ragosta, PhD/JD, Fellow, Virginia Humanities.
- Omar H. Ali, Professor of African American and African Diaspora Studies and History, The University of North Carolina at Greensboro.
- Chris Beneke, Professor of History, Bentley University.
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- Franklin T. Lambert, Professor Emeritus of History, Purdue University.
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- Richard C. Schragger, Perre Bowen Professor, Martha Lubin Karsh and Bruce A. Karsh Bicentennial Professor of Law, University of Virginia School of Law.
- Laurence H. Winer, Ph.D., J.D., Professor Emeritus of Law, Sandra Day O'Connor College of Law, Arizona State University.

SUMMARY OF ARGUMENT

When interpreting the First Amendment's Establishment Clause, it is vital for courts to look to appropriate historical sources and events. These include the writings of leading Founders of our country, abuses and controversies that occurred in the centuries and decades preceding the Amendment's ratification, and—to a limited extent—events that occurred immediately thereafter at the federal level.

As these historical sources demonstrate, a principal purpose of the Establishment Clause was to bar government from coercing people—whether overtly or through more subtle means—in religious matters. Another central purpose of the Clause was to keep government out of religious affairs and free from religious control—thereby allowing *both* religion and government to flourish. Daily government-sponsored prayer in a courtroom is an egregious violation of these principles.

Moreover, there is no historical evidence of courtroom prayer being a common practice immediately after the ratification of the First Amendment, much less of a long and unbroken tradition of courtroom prayer going back to that time. Indeed, the materials on which Judge Mack relies—many of them cherry-picked fragments from local

newspapers—demonstrate only that courts have rarely opened with prayer during our nation's history. In addition, further highlighting the weakness of his case, Judge Mack substantially relies on practices that are not remotely similar to the one at issue here.

The district court's judgment should be affirmed.

ARGUMENT

Interpreting the Establishment Clause by reference to history is a task fraught with difficulty. "[H]istorical accounts are selective and interpretive." Steven K. Green, *"Bad History": The Lure of History in Establishment Clause Adjudication*, 81 Notre Dame L. Rev. 1717, 1733 (2006). The historical records of debates relating to the drafting and ratification of the Bill of Rights in particular are incomplete, and the accuracy of the records that do exist has been questioned. *See id.* at 1730–31.

This does not mean that lawyers and courts engaging in constitutional interpretation should ignore history—"the constitutional lawyer owes certain duties of fidelity to the past." Cass R. Sunstein, *The Idea of a Useable Past*, 95 Colum. L. Rev. 601, 602 (1995). But they "should attempt to make the best constructive sense out of historical

events associated with the Constitution." *Id.* As historians, our role is to assist the Court in interpreting the past. We strongly believe that constitutional law should not be built on oversimplified history, and that courts should not draw historical conclusions based on specious evidence. "[J]udges are not historians with fancy robes and life tenure. And historical reinterpretation always poses the risk that courts will too readily 'imagine the past [to] remember the future.'" *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 200 (2d Cir. 2009) (Calabresi, J., concurring) (quoting Lewis B. Namier, *Conflicts: Studies in Contemporary History* 69–70 (1942) (alteration in original)).

To the extent that courts do engage in historical analysis,[2] it should be robust and analytically sound. Unfortunately, what Judge Mack and one of his supporting *amicus* briefs—by the Coalition for Jewish Values *et al.*—present to the Court is far from that. They cite excerpts from sources such as local newspapers and cobble them

[2] Though we do not press the argument here, there are strong reasons to doubt the usefulness and logical rigor of using originalism and historical analysis to interpret the Establishment Clause. *See* Alan Brownstein, *The Reasons Why Originalism Provides a Weak Foundation for Interpreting Constitutional Provisions Relating to Religion*, 2009 Cardozo L. Rev. 196, https://bit.ly/30Tt3Pi; *see also* Paul Finkelman, *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis*, 50 U. Pitt. L. Rev. 349 (1989).

together to argue that Judge Mack's ritual of starting every court session with a prayer fits neatly into a long history consistent with the Establishment Clause. But Judge Mack's chosen sources are insufficient in both kind and quality to show that courtroom prayer is "deeply embedded in the history and tradition of this country" or that there is an "unambiguous and unbroken history of more than 200 years" of the practice. *Cf. Marsh v. Chambers*, 463 U.S. 783, 786, 792 (1983). Making such a showing requires more than choosing snippets from a grab-bag of largely inapposite sources and suggesting that they provide an accurate representation of the nation's past.

I. Proper historical analysis should focus on the events that motivated the Establishment Clause and the writings of leading Founders.

When engaging in historical analysis of the Establishment Clause's meaning, it is proper to look to three types of sources: (1) sources illuminating the historical abuses and controversies that led to the enactment of the Establishment Clause; (2) the writings of Founders who influenced its inclusion in the Bill of Rights, as well as those of earlier thinkers who inspired them; and (3) to a very limited

extent, federal-government actions occurring shortly after the First Amendment was adopted.

A. Events before the First Amendment's adoption and the writings of leading Founders are the best evidence of the Establishment Clause's purpose.

Among the touchstones that courts use to interpret the Establishment Clause are sources discussing the events that motivated the Founders to adopt the First Amendment's Religion Clauses. That is because the "meaning and scope of the First Amendment" are best understood in light "of its history and the evils it was designed forever to suppress." *Everson v. Bd. of Educ.*, 330 U.S. 1, 14–15 (1947). For "the First Amendment reflected in the minds of early Americans a vivid mental picture of conditions and practices which they fervently wished to stamp out in order to preserve liberty for themselves and for their posterity." *Id.* at 8. Understanding the reasons for the creation of the Establishment Clause helps illuminate what types of practices the Clause forbids.

Relatedly, in interpreting the animating purposes and understanding of the Clause, courts look to the writings of our country's Founders and of their intellectual predecessors. James Madison in

particular played a "leading role[ ]" "in the drafting and adoption of" the First Amendment. *Id.* at 13. He was in many ways influenced by his long association with Thomas Jefferson and Jefferson's strong opposition to an established church in Virginia. *See id.* at 11–13; Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 Sup. Ct. Rev. 301, 328–33, https://bit.ly/3DsAAmn.

Thus, the Supreme Court has noted that "the views of Madison and Jefferson, preceded by Roger Williams, came to be incorporated not only in the Federal Constitution but likewise in those of most of our States." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 214 (1963) (footnote omitted). The Court has therefore focused on the views of these leading thinkers in construing the Establishment Clause. *See, e.g.*, *Everson*, 330 U.S. at 11–13 (extensively discussing and relying on Madison's and Jefferson's writings); *Flast v. Cohen*, 392 U.S. 83, 103 (1968) (relying on Madison's writings); *Schempp*, 374 U.S. at 213–14 (same); *Larson v. Valente*, 456 U.S. 228, 245 (1982) (same); *Lee v. Weisman*, 505 U.S. 577, 590 (1992) (same); *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 140–41 (2011) (same); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 770 n.28 (1973)

(discussing Madison's writings and Jefferson-authored Virginia Statute for Religious Freedom); *Reynolds v. United States*, 98 U.S. 145, 162–63 (1878) (interpreting the First Amendment based on how "religious freedom is defined" in the Virginia Statute); *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 878 (2005) (citing Madison and Jefferson).

B. In very limited circumstances, courts consider the federal government's actions shortly after the Bill of Rights was approved by Congress as additional evidence of the Establishment Clause's purpose.

Another historical tool courts use to interpret the Establishment Clause is evidence describing federal-government actions and practices in the period immediately following the First Amendment's ratification. The Supreme Court relied on this type of analysis in its cases concerning opening prayers before legislative bodies, *Marsh*, 463 U.S. 783, and *Town of Greece v. Galloway*, 572 U.S. 565 (2014). In concluding in *Marsh* that legislative prayer is constitutional, the Court emphasized that, in 1789, Congress authorized public funding of legislative chaplains just three days before approving the language of the First Amendment. *See Marsh*, 463 U.S. at 787–90; *accord Greece*, 572 U.S. at 576. The Court reasoned, therefore, that the First Amendment's framers could not have thought that its Establishment Clause prohibits

legislative prayer. *See Marsh*, 463 U.S. at 790; *accord Greece*, 572 U.S. at 576. The Court also emphasized that the practice of legislative prayer has continued in Congress from 1789 through today without interruption. *See Marsh*, 463 U.S. at 788, 790, 792; *accord Greece*, 572 U.S. at 575–76.

It is improper, however, to extend this type of interpretation significantly (if at all) beyond its narrow and unusual circumstances. First, it is wrong to consider state or local actions that occurred after the Establishment Clause's adoption in interpreting the Clause's meaning. That is because "the relevant historical practices are" only "those conducted by governmental units which were subject to the constraints of the Establishment Clause." *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 670 n.7 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part). And "[p]rior to the adoption of the Fourteenth Amendment, the First Amendment did not apply as a restraint against the states." *Everson*, 330 U.S. at 13.

Indeed, for decades following the ratification of the First Amendment, many states sponsored religion in ways that would clearly have violated the Establishment Clause had the Clause applied to

them. For instance, several states maintained established churches into the early nineteenth century, and Massachusetts did so until 1833. *See* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2126 (2003). Other states maintained religious tests for holding public office, at least one of which remained in place until 1961. *See* J. Jackson Barlow, *Officeholding: Religious-Based Limitations in Eighteenth-Century State Constitutions*, *in Religion and American Law: An Encyclopedia* 346–48 (Paul Finkelman ed., 2000); *Torcaso v. Watkins*, 367 U.S. 488, 489, 496 (1961). And some states had constitutional provisions that facially discriminated against non-Christians. *See* Alex J. Luchenitser & Sarah R. Goetz, *A Hollow History Test: Why Establishment Clause Cases Should Not Be Decided through Comparisons with Historical Practices*, 68 Cath. U. L. Rev. 653, 666 (2019). For example, until 1968, New Hampshire's Bill of Rights specified that only "[e]very denomination of *christians* . . . shall be equally under the protection of the law." *See* Morton Borden, *Jews, Turks, and Infidels* 35–36 (1984) (quoting N.H. Const. of 1784, art. I, § 6, https://bit.ly/3vwRPQ5) (emphasis added).

Judge Mack and the Coalition thus err in relying on several antebellum state-level events to show a purported history and tradition of courtroom prayer. (*See* R.E. 37, 39.) Since the Fourteenth Amendment was ratified in 1868, and the Supreme Court did not recognize that it rendered the Religion Clauses applicable to the states until the 1940s (*see Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *Everson*, 330 U.S. at 8), it makes no difference for purposes of interpreting the Establishment Clause that, for example, "[i]n 1791 . . . defendants sentenced to death in South Carolina [state courts] heard the invocation 'pray[ing] that the Lord might have mercy on his soul!'" (Coalition Br. 20 (quoting *State v. Washington*, 1 S.C.L. 120, 156–57 (1791) (alteration in original)).

Moreover, even with respect to federal-government actions, the later they occurred after the adoption of a constitutional provision, the less likely it is that they can properly be viewed as a reliable guide to the provision's meaning. That is because as time passes, individual legislators become less likely to act in compliance with—or even remember the meaning of—a constitutional provision they may have originally supported, and the composition of a legislature changes so

that fewer and fewer of those legislators remain members. *See* Luchenitser, *supra*, 68 Cath. U. L. Rev. at 667–69; *see also* Laurence H. Winer & Nina J. Crimm, *God, Schools, and Government Funding: First Amendment Conundrums* 90–91 (2015). Indeed, Madison himself wrote "that Legislative precedents are frequently of a character entitled to little respect; and that those of Congress, are sometimes liable to peculiar distrust." Letter from James Madison to Spencer Roane (May 6, 1821), https://bit.ly/30H3LTW.

For instance, the very first act struck down by the Supreme Court as unconstitutional—a section of the Judiciary Act of 1789, ch. 20, § 8, 1 Stat. 73, 76—was passed by the First Congress barely a year after ratification of the Constitution. *See Marbury v. Madison*, 5 U.S. 137, 147, 176 (1803); Luchenitser, *supra*, 68 Cath. U. L. Rev. at 669–70. Just seven months after approving the Bill of Rights, the First Congress passed a law requiring that people convicted of certain theft crimes "be publicly whipped, not exceeding thirty-nine stripes" (Crimes Act of 1790, ch. 9, § 16, 1 Stat. 112)—a punishment that is now understood to violate the Eighth Amendment (*see Ingraham v. Wright*, 430 U.S. 651, 666 (1977)). And in 1798, less than a decade after approving the First

Amendment, Congress passed the Sedition Act, ch. 74, 1 Stat. 596—which criminalized criticism of the President, Congress, or the U.S. government—and is roundly considered to have been unconstitutional. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 273–74, 276 & n.16 (1964) ("Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history.").

Because it becomes less and less likely that governmental conduct represents a valid guide to a constitutional clause's meaning as more and more time passes after the clause's enactment, the bulk of the events on which Judge Mack and the Coalition rely are temporally irrelevant. Indeed, approximately three quarters of the incidents that Judge Mack cites occurred at least three decades after Congress submitted the First Amendment to the states. (*See* R.E. 38–45.)

II. Historical analysis confirms that Judge Mack's prayer practice is unconstitutional.

Proper historical analysis reveals that there was no long, unbroken, or established history of courtroom prayer in the United States. Instead, it shows that courtroom prayer is not consistent with the purpose of the Establishment Clause, would not have been supported by the Founders whose ideas the Establishment Clause

reflects, and was rare around the time of the ratification of the First Amendment.

A. Judge Mack's prayer practice is contrary to the Establishment Clause's purpose.

Contrary to what the Coalition argues (Coalition Br. 5–12), the purpose of the Establishment Clause was not limited to preventing favoritism for any religious group over another. In fact, Virginia's Statute for Religious Freedom, a foundation for the First Amendment's Religion Clauses, was adopted in response to a proposal for non-discriminatory support of religion that was soundly defeated. *See* Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 Wm. & Mary L. Rev. 875, 895–99 (1986). Rather, a principal purpose of the Establishment Clause was to prevent government from coercing—whether directly or subtly—people to support or take part in religion. Another principal purpose was to prevent government from sponsoring or becoming involved in religion.

All this is evident from an examination of the historical abuses the Clause was meant to prevent. Many American colonists left Europe to escape religious persecution—including official established churches, taxation to support the churches, required attendance at church, and

punishment of dissenters. *See Everson*, 330 U.S. at 8–9. Yet subsequently, in many colonies, the same abuses were repeated. *See id.* at 9–11. And "compelled attendance at a religious worship service was [then] regarded as one of the defining characteristics (and most hated features) of religious establishments." Michael S. Paulsen, *Lemon Is Dead*, 43 Case W. Res. L. Rev. 795, 828 (1993).

Eventually, the colonists and our nation's Founders "reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions." *Everson*, 330 U.S. at 11. The Establishment Clause was therefore intended in part to prevent even "indirect coercive pressure upon religious minorities to conform." *Engel v. Vitale*, 370 U.S. 421, 431 (1962). And the "first and most immediate purpose" of the Clause "rested on the belief that a union of government and religion tends to destroy government and to degrade religion." *Id.* The Clause was accordingly understood to bar "a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies."

Schempp, 374 U.S. at 222. "The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate." *Engel*, 370 U.S. at 431–32 (quoting James Madison, *Memorial and Remonstrance against Religious Assessments* (1785), https://bit.ly/2YwACub).

The writings of Madison, Jefferson, and related thinkers further demonstrate that the Establishment Clause was intended to prevent both governmental religious coercion—including of an indirect nature—and involvement by government with religion. On coercion, for instance, Jefferson wrote:

> Truth can stand by itself. Subject opinion to coercion: whom will you make your inquisitors? Fallible men; men governed by bad passions, by private as well as public reasons. And why subject it to coercion? To produce uniformity. But is uniformity of opinion desirable? No more than of face and stature. . . . Difference of opinion is advantageous in religion. . . . What has been the effect of coercion? To make one half the world fools, and the other half hypocrites. To support roguery and error all over the earth.

Thomas Jefferson, *Notes on the State of Virginia* 167–68 (1787), https://bit.ly/3x1tu5D.

Similarly, the famed Virginia Statute for Religious Freedom—which Jefferson wrote and Madison guided to passage (*see* David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 Md. L. Rev. 429, 455 (1983))—stated that "to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty." An Act for Establishing Religious Freedom, Chap. XXXIV, 12 Hening 84 (1786). It was for this reason that the Statute declared that "no man shall be compelled to frequent or support any religious worship." *Id.*

Madison developed a passion for preventing religious coercion by government partly because of "his experience of seeing Baptist ministers in jail" as a result of their religious differences with governing authorities. McConnell, *supra*, 44 Wm. & Mary L. Rev. at 2166. Reflecting on that experience, Madison wrote, "[t]hat diabolical, hell-conceived principle of persecution rages among some . . . . So I must beg you to . . . pray for liberty of conscience to all." *Id.* (quoting Letter from James Madison to William Bradford (Jan. 27, 1774)).

And in his oft-cited *Memorial and Remonstrance Against Religious Assessments*, Madison stated:

> Because we hold it for a fundamental and undeniable truth, "that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate.

Madison, *Memorial and Remonstrance*, *supra* (quoting Virginia Decl. of Rights of 1776, art. XVI). Likewise, John Locke—a significant influence on Jefferson, Madison, and the founding generation (*see* Edward J. Eberle, *Roger Williams' Gift: Religious Freedom in America*, 4 Roger Williams U. L. Rev. 425, 468 (1999))—declared that "the magistrate's power extends not to the establishing of any articles of faith, or forms of worship, by the force of his laws." John Locke, *A Letter Concerning Toleration* 8 (1689), https://bit.ly/3qv5SVV.

What is more, the Founders had a broad view of what constitutes impermissible religious coercion by government. Jefferson was concerned not only about religious coercion sanctioned by "fine & imprisonment" but also about governmental action that could result in "some degree of proscription perhaps in public opinion." Letter from

Thomas Jefferson to Samuel Miller (Jan. 23, 1808), https://bit.ly/31BeShI. He explained that official action amounting to "recommendation" of prayer, even without the backing of legal force, was no "less a *law* of conduct for those to whom it is directed." *Id.*

Similarly, Madison wrote that even a practice of governmental "recommendation only" concerning religion "naturally terminates in a conformity to the creed of the major[ity] and of a single sect, if amounting to a majority." James Madison, *Detached Memoranda* (1820), https://bit.ly/3HGs2e7. And the Baptist minister John Leland, who "may have been" "the most important proponent of the Establishment Clause" (Andrew Koppelman, *Phony Originalism and the Establishment Clause*, 103 Nw. U. L. Rev. 727, 741 n.67 (2009)), stated that

> the minds of men are biassed to embrace that religion which is favored and pampered by law (and thereby hypocrisy is nourished) while those who cannot stretch their consciences to believe any thing and every thing in the established creed are treated with contempt and opprobrious names; and by such means some are pampered to death by largesses and others confined from doing what good they otherwise could by penury.

John Leland, *The Rights of Conscience Inalienable* (1791), https://bit.ly/3HDcEyO.

The Founders further believed that—just like followers of minority faiths—nonbelievers should be fully protected against coercion in religious matters. Jefferson explained that his Virginia Statute omitted any reference to Jesus Christ in order "to comprehend, within the mantle of [the law's] protection, the Jew and the Gentile, the Christian and Mahometan, the Hindoo, and Infidel of every denomination." 1 *Writings of Thomas Jefferson* 62 (P. Ford ed. 1892). Jefferson also wrote, "The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbour to say there are twenty gods, or no God." Jefferson, *Notes on the State of Virginia*, *supra*, at 166. Likewise, Reverend Leland stated:

> Let every man speak freely without fear—maintain the principles that he believes—worship according to his own faith, either one God, three Gods, no God, or twenty Gods; and let government protect him in so doing, i.e. see that he meets with no personal abuse or loss of property for his religious opinions.

Leland, *supra*.

In addition to opposing religious coercion by government, the Founders were concerned about any form of governmental sponsorship of or involvement with religious activities. Jefferson wrote:

> I consider the government of the US. as interdicted by the constitution from intermedling with religious institutions, their doctrines, discipline, or exercises. . . . I do not believe it is for the interest of religion to invite the civil magistrate to direct it's exercises . . . . fasting & prayer are religious exercises. . . . every religious society has a right to determine for itself the times for these exercises & the objects proper for them according to their own particular tenets. and this right can never be safer than in their own hands, where the constitution has deposited it.

Letter from Jefferson to Miller, *supra*. Madison warned against

> the old error, that without some sort of alliance or coalition between Government & Religion, neither can be duly supported. Such indeed is the tendency to such a Coalition, and such its corrupting influence on both the parties, that the danger can not be too carefully guarded against. . . . Religion & Govt. will both exist in greater purity, the less they are mixed together.

Letter from James Madison to Edward Livingston (July 10, 1822), https://bit.ly/3BUkbp6. And Reverend Leland said, "Government has no more to do with the religious opinions of men than it has with the principles of the mathematics. . . . The duty of magistrates is not to judge of the divinity or tendency of doctrines. . . ." Leland, *supra*.

Judge Mack's prayer practice produces the very evils of governmental religious coercion and entwinement against which the Establishment Clause was intended to guard. As Justice Alito recognized in a concurring opinion in *Greece*, while the Supreme Court

has held that prayers prior to the commencement of legislative meetings are not inherently coercive, "an adjudicatory proceeding" is different—permitting "a litigant awaiting trial [to be] asked by the presiding judge to rise for a Christian prayer" would "lead[ ] . . . to a country in which religious minorities are denied the equal benefits of citizenship." *See* 572 U.S. at 594, 603 (Alito, J., concurring). Yet here Judge Mack effectively pressures a captive audience of citizens to participate in religious worship before he decides their cases or, in the case of a jury trial, exercises substantial control over the proceedings. (*See* R.E. 19–20.) That Judge Mack nominally allows attendees to leave the courtroom before the prayer commences does not render the practice noncoercive—attorneys and litigants are loath to walk out because they know that Judge Mack will see them when they reenter and they fear that he will view them with disfavor as a result. (R.E. 19–20, 26–27.) Moreover, on at least one occasion, the court clerk summoned an attorney and a litigant into the courtroom for the prayer. (R.E. 20 n.3.) And Judge Mack is plainly sponsoring religious activity and enmeshing it with fundamental operations of government. (*See* R.E. 17–20.)

B. Judge Mack has not demonstrated anything remotely resembling an unbroken history of prayer in the courtroom.

In the Supreme Court's legislative-prayer cases, the Court emphasized that there was an "unambiguous and unbroken history of more than 200 years" that left "no doubt that the practice of opening legislative sessions with a prayer has become part of the fabric of our society." *Greece*, 572 U.S. at 576 (quoting *Marsh*, 463 U.S. at 792). The Court also cautioned that "[s]tanding alone, historical patterns cannot justify contemporary violations of constitutional guarantees." *Marsh*, 463 U.S. at 790.

Here, there is nothing resembling a long and unbroken history of courtroom prayer going back to the founding of our country. All that Judge Mack is able to demonstrate is that there were isolated occurrences of courtroom prayer at disconnected points in American history. And while there may have been *some* prayer at the *special occasions of ceremonial openings* of federal-court terms around the time of the Establishment Clause's adoption, as historians we are not aware of any evidence that prayer was the norm. To the contrary, there is evidence that many federal circuit-court openings that occurred during

the Founding Era did not include prayer. *See, e.g.*, 2 *The Documentary History of the Supreme Court of the United States, 1789–1800*, at 164 (Maeva Marcus ed., 1988) (referencing 1791 opening of Circuit Court for South Carolina without any mention of a prayer); *id.* at 166 (same for 1791 in Virginia, Maryland, and New York); *id.* at 192 (same for 1791 in Rhode Island and Vermont); *id.* at 331 (same for 1792 in Maryland).

What is more, as noted above, Judge Mack principally—and improperly—relies on events that occurred at the state level or occurred long after the adoption of the Bill of Rights. *See supra* § I(B). And even if those events were at all relevant, they do not come close to showing that courtroom prayer was ever common in the United States. Instead, Judge Mack presents "what historians properly denounce as 'law-office history'"—"picking and choosing statements and events favorable to the client's cause." *See* Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 Wm. & Mary L. Rev. 839, 842 (1986).[3]

[3] It is particularly problematic to rely on such law-office history in a situation like this one, in which the issue is whether judicial prayers were a common practice or a rare, sporadic occurrence. The matter at bar is unlike the Supreme Court's legislative-prayer cases, where there was a long and undisputed historical record of a continuous prayer practice in Congress. *See, e.g.*, *Greece*, 572 U.S. at 575–76; *Marsh*, 463 U.S. at 786–92. Where, as here, a party relies merely on isolated examples to argue that a practice was standard, courts should not uphold the practice on the ground that it is historically well-established (to the extent that it is

Further, the sources on which Judge Mack relies have a variety of weaknesses. A good number of them undermine Judge Mack's case by making clear that the presentation of a prayer in the courtroom was unusual or contrary to standard practice. *See* Appellees' Br. 33–37. Others do not evince prayers taking place in courtrooms but instead merely reflect a desire by some that they occur. For example, Judge Mack references a "model prayer" for opening court sessions from a ministerial handbook, without presenting any proof that it was ever used. (*See* R.E. 39 ¶ 81.) Similarly, he points to a bill introduced by a state legislator to require court sessions to be opened with prayer, but he does not present any evidence that the bill passed, and it appears that it never did. (*See* R.E. 40 ¶ 92.)

Judge Mack also relies on events that are far different from his practice of opening court sessions with long and detailed prayers by ministers. For instance, most of the federal-court examples from the 1790s that Judge Mack cites describe stray religious references by judges, not opening prayers akin to Judge Mack's. (*See* R.E. 37–38 ¶¶

legally proper to do so at all) without at the very least receiving evidence of that from expert historians. Judge Mack does not present any such evidence here.

70–71, 73–77.) But in *Greece*, the Court explained that it viewed legislative prayer as consistent with the Establishment Clause because "history shows that the *specific* practice is permitted." 572 U.S. at 577 (emphasis added).

Similarly inapposite is Judge Mack's citation (R.E. 45 ¶ 115) of the Supreme Court's use of the phrase "God save the United States and this honorable Court" as part of the opening of its sessions. That phrase is understood to be constitutional because it is a "ceremonial deism"—a short phrase, ubiquitously utilized, that has minimal religious content, does not amount to worship or prayer, and does not reflect or refer to any particular religion. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 37–43 (2004) (O'Connor, J., concurring in the judgment). In any event, the Supreme Court's use of that phrase is not probative of the Framers' intent (*see supra* at pp. 13–15) because it is not known to have occurred earlier than 1827, nearly forty years after Congress approved the First Amendment (*see* Michael I. Meyerson, *The Original Meaning of "God": Using the Language of the Framing Generation to Create a Coherent Establishment Clause Jurisprudence*, 98 Marq. L. Rev. 1035, 1042–43 (2015)).

Judge Mack's (R.E. 45 ¶ 118) and the Coalition's (Coalition Br. 19) reliance on courtroom oaths that end with "so help me God" is likewise irrelevant. This four-word phrase, with no content particular to any religion, is a far cry from a full-fledged prayer that is directed at the audience. In addition, the First Amendment prohibits judges from requiring anyone to take a religious oath as a condition of testifying. *See, e.g.*, *Soc'y of Separationists v. Herman*, 939 F.2d 1207, 1215 (5th Cir. 1991). By contrast, as documented in detail in Plaintiffs' brief, Judge Mack's prayer practice is deeply coercive. *See* Appellees' Br. 6–10, 44–48, 53–59.

Finally, Judge Mack makes much of some instances of original justices of the Supreme Court presiding over judicial proceedings that were opened with prayer. *See* Appellant's Br. 26–27. But in history, context matters. Under the Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 73, 74–75, members of the Supreme Court "rode circuit," presiding over grand juries and trials in the circuit courts. When the Chief Justice and associate justices did so throughout the new United States, their presence marked a new kind of court in American history—a national

court operating inside a specific state. *See* 2 *Documentary History*, *supra*, at 1–3.

At this time, Massachusetts, Connecticut, and New Hampshire had established churches. *See* Colin Kidd, *Civil Theology and Church Establishments in Revolutionary America*, 42 Hist. J. 1007, 1020 (1999). In his desire to enhance the authority of the new Constitution and the new national court system, Chief Justice John Jay decided to defer to local New England practice. *See* 2 *Documentary History, supra*, at 13. He and some of his colleagues therefore incorporated ceremonial prayer into the very limited circumstance of special occasions of court-term openings. *See id.* at 13, 331.

Importantly, however, there is no evidence that the justices opened each day of court business with prayer. Many of the sources on which Judge Mack relies with respect to this matter are reports that include the phrase "[on this date] the Circuit Court of the United States, was opened in this Town" or a similar phrase that is best interpreted as meaning that the court was set up or established on that date, not that another day of an ongoing court session had begun. *See, e.g.*, *id.* at 60, 164, 192, 331. None of these reports demonstrate that

prayers were recited daily at these courts. Rather, they all support the alternate conclusion that these prayers were given on only one day, the day that a court *term* commenced.

Moreover, these opening court days had special ceremonial importance. They "occasioned a sort of local holiday in many of the circuit towns." *Id.* at 4; *see also id.* at 5 ("Once the jurors had taken their oaths and settled in their seats they were usually addressed by the senior Supreme Court justice present. This address, or charge to the grand jury, was an important part of the court opening ritual.").

In addition, virtually all the examples Judge Mack provides of prayers when justices were riding circuit relate to the opening of grand-jury terms. (*See* R.E. 36–38 ¶¶ 65, 68–69, 72, 78–79.) Grand-jury proceedings were quite different from daily court sessions, however. Grand juries in early America determined whether to bring indictments for alleged violations of the law, as grand juries do now, and they also brought "presentments"—complaints about various matters of local interest. *See* 2 *Documentary History, supra*, at 5–6. There is no evidence that potential witnesses or defendants would have been present when term-opening ceremonial prayers were given. *See id.* at 4–6. The

prayers thus would not have had the coercive impact that Judge Mack's practice has on litigants and attorneys, who reasonably fear that attempting to avoid his government-sponsored prayers may have prejudicial effects on the outcomes of their cases. (*See* R.E. 19–20, 26–27.)

Also, many of the examples that Judge Mack provides of prayers to open grand-jury terms overseen by circuit-riding justices occurred before (*see* R.E. 36–37 ¶¶ 65–69 and sources cited therein) the December 15, 1789 ratification of the First Amendment (*see First Amendment*, Nat'l Const. Ctr., https://bit.ly/3l0TKIw (last visited Nov. 23, 2021)). Because the Amendment was not yet in effect, these examples cannot properly be construed as evidence that justices thought that the prayers were allowed by it. And in any event, Judge Mack presents no evidence of any justice allowing opening prayers when riding circuit past the early nineteenth century.

In the end, Judge Mack has failed to present any evidence that *any* federal or state court has regularly opened its daily proceedings with prayer throughout a significant stretch of the existence of the United States, much less of an unbroken practice extending from the

enactment of the First Amendment through the present. Judge Mack has merely offered evidence of isolated prayers that occurred in different courts at different times. As historians, we cannot support his attempt to present isolated historical events as a long-standing tradition.

CONCLUSION

The Establishment Clause was intended to shield individuals from religious coercion—both direct and implicit—and to prevent government from becoming involved with religion, so that both religion and government could flourish. Judge Mack's prayer practice violates these fundamental principles. And he has not come close to demonstrating a continuous practice throughout the history of this country of daily government-sponsored courtroom prayer. The Court should affirm the district court's judgment.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 23, 2021, I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. The participants in this case are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

s/ Alex J. Luchenitser
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CERTIFICATE OF COMPLIANCE

I hereby certify that:

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