The Senate of
The State of Texas

FILE # ML-47967-16
I.D. # 47967

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February 16, 2016

Via hand delivery and e-mail to Opinion_committee@texasattorneygeneral.gov

The Honorable Ken Paxton
Texas Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

RQ-0099-KP

Re: Request for an opinion regarding the constitutionality of a volunteer justice court chaplaincy program and prayer given by said chaplains as part of the opening ceremonies of a justice court

Dear General Paxton:

I submit this opinion request on behalf of the Honorable Wayne L. Mack, Justice of the Peace, Precinct 1, Montgomery County, Texas (hereinafter "Judge Mack"). Since Montgomery County has no medical examiner, Judge Mack also serves as the County Coroner.

It has come to my attention that Judge Mack recently underwent investigation by the State Commission on Judicial Conduct (hereinafter "Commission") regarding Judge Mack (1) offering a volunteer-led Justice Court Chaplaincy Program as a religious accommodation to persons in distress, and that also facilitates his job as County Coroner, and; (2) allowing those chaplains, as a means of recognizing their volunteer service, to open his courtroom proceedings with a prayer as part of the court's daily opening ceremonies.

On October 14, 2015, Judge Mack appeared before the Commission for an informal hearing, under Rule 6 of the Procedure Rules for the Removal or Retirement of Judges, where I understand he responded to extensive questioning by each of the State Commissioners.

After a thorough review, as mandated by the laws concerning its procedures, the Commission dismissed the matter against Judge Mack in its entirety. Had the Commission simply allowed their dismissal to speak for itself, I would not be submitting this request for opinion.

However, along with their notice of dismissal, the Commission issued Judge Mack a letter, "strongly caution[ing him] against continuing with the Justice Court Chaplaincy Program and [his] current courtroom prayer practice." The Commission further urged Judge Mack to "eliminat[e] the unauthorized Chaplaincy program and modify the opening prayer ceremony to comport with the perfunctory acknowledgement of religion that is accepted and employed by the United States Supreme Court and the Texas Supreme Court."

This letter of caution by the Commission has left Judge Mack and other similarly situated judges with a lack of clarity as to the constitutionality of the volunteer-led Justice Court Chaplaincy Program and the prayer given by said chaplains as part of the opening ceremonies in Judge Mack's court.

It appears to me, that Judge Mack's volunteer chaplaincy program and chaplain-led prayer are constitutional, within bounds of United States Supreme Court precedent, and consistent with a long history in the United States of acknowledging the role of religion in American life by all three branches of government.

Below is a brief in support of these issues. Assuming all facts as alleged are true, I seek an opinion to provide Judge Mack clarity as to the constitutionality of (1) the Justice Court Chaplaincy Program that Judge Mack offers as a religious accommodation to persons in distress and that also facilitates his job as County Coroner, and; (2) the Chaplain-led prayer in his court's opening ceremonies. I seek neither review of the Commission's decision nor resolution of a question of fact.

Brief in Support

I. Introduction

An informal hearing before the State Commission on Judicial Conduct on October 14, 2015, was the result of Judge Mack (1) offering a volunteer-led Justice Court Chaplaincy Program as a religious accommodation to persons in distress, and that also facilitates his job as County Coroner, and; (2) allowing those chaplains, as a means of recognizing their volunteer service, to open his courtroom proceedings with a prayer as part of the court's daily opening ceremonies.

In offering chaplains to persons in distress and in inviting these chaplains to solemnize Judge Mack's court proceedings with a prayer, Judge Mack has carefully and conscientiously followed the Supreme Court's precedents, particularly *Marsh v. Chambers* and *Town of Greece v. Galloway*, which each upheld a governmental prayer similar to that offered by the chaplains in Judge Mack's courtroom. Furthermore, Judge Mack has made every effort to ensure that his chaplaincy program accommodates all religious faiths and that those who decline to participate in the opening ceremonies are permitted to do so without any consequences or Judge Mack's knowledge of their participation or lack thereof.

Judge Mack implemented several policies and procedures to ensure that no person will believe that justice in his courtroom depends on a person's participation in his court's opening ceremonies, whether praying or participating in the pledges of allegiance to the U.S. and Texas flags.

II. Factual Background

Montgomery County, Texas, has no medical examiner; instead, the justices of the peace serve as coroner. When Judge Mack was first elected as Justice of the Peace, Precinct 1, for Montgomery County, he quickly discovered that one of the hardest parts of his position was being a first-on-scene responder to deaths and having to simultaneously investigate the death while comforting and managing mourners at the site.

In an effort to provide better comfort and counsel for the friends and family of the deceased while also permitting Judge Mack to focus on his role in the investigation of the cause of death, Judge Mack began recruiting a volunteer chaplain cadre who would be willing, upon the request of the deceased's friends and family, to provide care and counsel to the mourners in those first-on-scene situations. Judge Mack invited all religious leaders of any faith in Montgomery County to participate in this chaplaincy program. When Judge Mack must serve in this medical examiner role, he asks those at the scene of the death whether they would like him to invite a chaplain and if they have a preference for a chaplain of any particular faith. Only once those on-site request such a chaplain does Judge Mack send for one. County personnel who participate in the chaplaincy program do so on a voluntary basis.

Being on-call to respond to a death in these situations is extremely burdensome on the chaplains as they must be able to cancel their plans with a last-minute notice and travel, often late at night, to comfort those mourning a recent death. In an effort to recognize these chaplains who are willing to place serving others above their own comfort, Judge Mack invites these chaplains to give a brief prayer during the opening ceremonies of his court. Although Judge Mack does not time the prayers, he asks the praying chaplain to keep the prayer brief. It is estimated that each chaplain prays for no longer than two minutes. Judge Mack's policy and practice is not to permit chaplains to read from scripture during the prayer. Judge Mack does not give the chaplains any instructions as to how to pray except that they should not read from scripture, and to note that they should be respectful of those who might disagree with their faith. In this manner, the chaplains who give so much are themselves given a brief recognition in the community and they solemnize the court proceedings. After the prayer, the bailiff leads the courtroom in the Pledge of Allegiance to the U.S. Flag and the Pledge of Allegiance to the Texas Flag.

Judge Mack recognizes that some may not desire to participate in or even hear a prayer. To accommodate such persons, Judge Mack has taken several steps to ensure that any such discomfort is mitigated. Judge Mack has the bailiff read a prepared statement explaining the

procedure and reassuring anyone who does not wish to be present for the prayer that he or she may leave the courtroom and return after the prayer. The bailiff provides an opportunity for anyone who so desires to leave the courtroom before Judge Mack even enters the courtroom so that he cannot see anyone leave. As a practical matter, persons come and go into and out of the courtroom throughout Judge Mack's proceedings regularly, so any person who chooses to leave the courtroom for the prayer and return after will not stand out from the many other persons coming and going. The bailiff also states, "Your participation [in the opening ceremony] will have no effect on your business today or the decisions of this court." During the prayer itself, Judge Mack bows his head and closes his eyes, in part so that he cannot see anyone's response to the prayer. Judge Mack does not watch the courtroom during the prayers.

III. Legal Argument

"From at least 1789, there has been an unbroken history of official acknowledgment by all three branches of government of religion's role in American life." *Van Orden v. Perry,* 545 U.S. 677, 677 (2005). This acknowledgment can take the form of a solemnizing prayer, as courts from the U.S. Supreme Court to the Texas Supreme Court have employed. See *Town of Greece v. Galloway,* 134 S. Ct. 1811, 1825 (2014) ("[T]he recitation of 'God save the United States and this honorable Court' at the opening of this Court's sessions ... lend[s] gravity to public proceedings and ... acknowledge[s] the place religion holds in the lives of many private citizens."); video of oral argument in *Campbell v. Wilder,* No. 14-0379, at 0:47 (Tex. Sept. 23, 2015) (video of the justices of the Texas Supreme Court bowing their heads for the opening prayer). That Judge Mack is a justice of the peace and not a justice on the Supreme Court does not render such solemnizing prayers impermissible.

A. The prayers given during Judge Mack's opening ceremonies are in an almost identical situation as those upheld in *Town of Greece v. Galloway.*

The U.S. Supreme Court recently upheld opening prayers before a town council that were very similar to Judge Mack's opening prayers:

> The prayer was intended to place town board members in 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.
>
> The town followed an informal method for selecting prayer givers, all of whom were unpaid volunteers. ... The town eventually compiled a list of willing "board chaplains" who had accepted invitations and agreed to return in the future. The town at no point excluded or denied an opportunity to a would-be prayer giver. Its leaders maintained that a minister or layperson of any persuasion, including an atheist, could give the invocation. But nearly all of the congregations in town were Christian; and from 1999 to 2007, all of the

> participating ministers were too.
>
> Greece neither reviewed the prayers in advance of the meetings nor provided guidance as to their tone or content.

Town of Greece, 134 S. Ct. at 1816. In each of these points, the prayers at issue in *Town of Greece* were like those given by the volunteer chaplains during Judge Mack's opening ceremonies. The prayers given in Judge Mack's opening ceremonies are designed to solemnize the proceedings; are given by unpaid, volunteer chaplains; and are open to all, though most of the chaplains who actually pray are Christian because of the makeup of the community. And, with both the prayers at issue in *Town of Greece* and the prayers given in Judge Mack's opening ceremonies, some were offended by the prayers. The plaintiffs in *Town of Greece* "found the prayers 'offensive,' 'intolerable,' and an affront to a 'diverse community.'" *Id.* at 1817. The plaintiffs in that case also "argue[d] that the setting and conduct of the town board meetings create social pressures that force nonadherents to remain in the room or even feign participation in order to avoid offending the representatives who sponsor the prayer and will vote on matters citizens bring before the board." *Id.* at 1820.

The U.S. Supreme Court rejected the plaintiffs' arguments in *Town of Greece*, holding that "[o]ur tradition assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith." *Id.* at 1823. The U.S. Supreme Court also noted that while "Respondents argue that the public may feel subtle pressure to participate in prayers that violate their beliefs in order to please the board members from whom they are about to seek a favorable ruling[,] ... [o]n the record in this case the Court is not persuaded that the town of Greece, through the act of offering a brief, solemn, and respectful prayer to open its monthly meetings, compelled its citizens to engage in a religious observance." *Id.* at 1825. "Offense, however, does not equate to coercion." *Id.* at 1826.

As in *Town of Greece*, Judge Mack has made every effort to ensure that the prayers are brief, solemn, and respectful to those of other faiths and to avoid any "subtle pressure to participate" for those who prefer not to be in the room during the opening ceremonies. Judge Mack's prepared statement that the bailiff reads emphasizes that anyone is free to leave the courtroom during the opening ceremonies and emphasizes that no case will be affected by praying or not praying. *Id.* As the Supreme Court noted in *Town of Greece*,

> The analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity. No such thing occurred in the town of Greece. Although board members themselves stood, bowed their heads, or made the sign of the cross during the prayer, they at no point solicited similar gestures by the public.

Id. Instead, in Judge Mack's courtroom, as in *Town of Greece*,

> Nothing in the record suggests that members of the public are dissuaded from leaving the meeting room during the prayer, arriving late, or even, as happened here, making a later protest. In this case..., board members and constituents are "free to enter and leave with little comment and for any number of reasons." Should nonbelievers choose to exit the room during a prayer they find distasteful, their absence will not stand out as disrespectful or even noteworthy. And should they remain, their quiet acquiescence will not, in light of our traditions, be interpreted as an agreement with the words or ideas expressed.

Id. at 1827 (internal cites omitted). Finally, in a conclusion that almost exactly matches Judge Mack's situation, the U.S. Supreme Court said,

> By inviting ministers to serve as chaplains for the month, and welcoming them to the front of the room alongside civic leaders, the town is acknowledging the central place that religion, and religious institutions, hold in the lives of those present. Indeed, some congregations are not simply spiritual homes for town residents but also the provider of social services for citizens regardless of their beliefs. The inclusion of a brief, ceremonial prayer as part of a larger exercise in civic recognition suggests that its purpose and effect are to acknowledge religious leaders and the institutions they represent rather than to exclude or coerce nonbelievers.

Id.

B. The prayers given during Judge Mack's opening ceremonies cannot be distinguished from those prayers given before the U.S. Supreme Court and the Texas Supreme Court.

As noted above, both the U.S. Supreme Court and the Texas Supreme Court open with prayers. Given that the justices of the Texas Supreme Court bow their heads while a prayer is recited as part of their opening ceremonies, it is difficult to see how doing so would violate the Code of Judicial Conduct for Texas judges. The only apparent distinction is that the prayer given before the Texas Supreme Court, "God save the State of Texas and this honorable Court," is of fixed content while the prayers given by the chaplains before Judge Mack's court may vary in their content as each chaplain so decides. This distinction, however, cannot have a legal effect.

In *Town of Greece,* the plaintiffs opposed the prayers given before the board meetings in part because the prayers often mentioned distinctly Christian beliefs instead of being "nonsectarian," civic prayers. The U.S. Supreme Court rejected this argument:

> This proposition [that the prayers must be nonsectarian, civic prayers] is irreconcilable with the facts of *Marsh* [*v. Chambers,* 463 U.S. 783 (1983)] and

> with its holding and reasoning. *Marsh* nowhere suggested that the constitutionality of legislative prayer turns on the neutrality of its content. ... *Marsh* did not suggest that Nebraska's prayer practice would have failed had the chaplain not acceded to the legislator's request [to remove references to Christ]. Nor did the Court imply the rule that prayer violates the Establishment Clause any time it is given in the name of a figure deified by only one faith or creed. See *Van Orden* [*v. Perry*], 545 U.S., at 688, n.8 (recognizing that the prayers in *Marsh* were "often explicitly Christian" and rejecting the view that this gave rise to an establishment violation). To the contrary, the Court instructed that the "content of the prayer is not of concern to judges," provided "there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." 463 U.S., at 794–795.
>
> To hold that invocations must be nonsectarian would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech, a rule that would involve government in religious matters to a far greater degree than is the case under the town's current practice of neither editing or approving prayers in advance nor criticizing their content after the fact.

Id. at 1821-22. Judge Mack, guided by this prohibition on the establishment of a civic orthodoxy, has been careful to not direct the content of the prayer givers. But the content of the prayer is the only distinction between those prayers recited before the U.S. Supreme Court and the Texas Supreme Court and those prayers recited before Judge Mack's court. As the U.S. Supreme Court recognized, "Government may not mandate a civic religion that stifles any but the most generic reference to the sacred any more than it may prescribe a religious orthodoxy. ... The First Amendment is not a majority rule, and government may not seek to define permissible categories of religious speech. Once it invites prayer into the public sphere, government must permit a prayer giver to address his or her own God or gods as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian." *Id.* at 1822–23.

C. The volunteer chaplaincy program comports with the requirements of the Establishment Clause.

As with the opening prayer, Judge Mack is careful to ensure that the volunteer chaplaincy program follows the dictates of the Constitution. Both of the touchstone governmental prayer cases, *Town of Greece* and *Marsh*, involved prayers given by chaplains. In *Town of Greece*, the chaplains were volunteers; in *Marsh*, the chaplain was paid by the state. *Town of Greece*, 134 S. Ct. at 1816; *Marsh*, 463 U.S. at 784. Judge Mack, following *Town of Greece*, uses only volunteer chaplains. He ensures that no governmental funds or resources are expended on the volunteer chaplain project.

When Judge Mack is called to a death scene at which a volunteer chaplain would be a help to Judge Mack, he first asks those present at the scene whether they would like him to summon a chaplain. Furthermore, if those at the scene inform Judge Mack that they would like a chaplain, he then asks them if they would prefer a chaplain of a particular faith. At no time does Judge Mack coerce anyone to accept a chaplain's assistance.

Even under the most stringent Establishment Clause tests, Judge Mack's chaplain program is constitutional. As Justice Brennan noted in *Sch. Dist. of Abington Twp. v. Schempp,* in discussing military and prison chaplains, "[T]here is no element of coercion present in the appointment of military or prison chaplains; the soldier or convict who declines the opportunities for worship would not ordinarily subject himself to the suspicion or obloquy of his peers." 374 U.S. 203, 298 (1963) (Brennan, J., concurring). Similarly, a person at a death scene who refuses a volunteer chaplain is not subject to "suspicion or obloquy" for doing so.

Under the test set forth in *Lemon v. Kurtzman,* 403 U.S. 602 (1971), a governmental action must have a secular purpose instead of "the ostensible and predominant purpose of advancing religion." *Lemon,* 403 U.S. at 612; *McCreary Cty. v. ACLU,* 545 U.S. 844, 860 (2005). Judge Mack's chaplaincy program serves the secular purpose of freeing him to concentrate on the death investigation instead of having to divide his time between investigating the death and managing traumatized persons on the often-chaotic scene. By merely offering the services of a chaplain, however, Judge Mack's program does not advance religion. Judge Mack has worked to ensure that chaplains from multiple faiths are available and that any person who requests a chaplain may also choose the faith of the chaplain.

Under *Lemon*'s entanglement test, a government program must not lead to "an excessive government entanglement with religion." *Lemon,* 403 U.S. at 613; *Walz v. Tax Com. of New York,* 397 U.S. 664, 674 (1970). Because the volunteer chaplains in Judge Mack's program are not paid by the government, and no governmental resources are used in furtherance of the program, there is no entanglement. Furthermore, the chaplaincy program is open to all chaplains without any religious requirements, avoiding any governmental intrusion into religion. *Id.*

Finally, under *Lemon*'s effects test, the governmental program must not advance nor inhibit religion. *Lemon,* 403 U.S. at 612; *Van Orden,* 545 U.S. at 686 n.6. As discussed under the purpose test, Judge Mack's chaplaincy program, as it is voluntary to both the chaplains and those at the scene of a death, neither advances nor inhibits religion.

IV. Conclusion

For the foregoing reasons, I respectfully request an opinion as to the constitutionality of (1) the Justice Court Chaplaincy Program that Judge Mack offers as a religious accommodation to persons in distress and that also facilitates his job as County Coroner, and; (2) the Chaplain-led prayer in his court's opening ceremonies.

Thank you for all you do for Texas. I look forward to your response.

Respectfully submitted,

Dan Patrick
Lieutenant Governor of Texas

FILE # ML-47967-16
I.D. # 47968

State Commission on Judicial Conduct

RQ-0099-KP

February 17, 2016

The Honorable Ken Paxton
Texas Attorney General
209 West 14th Street
Austin, TX 78701

Re: Request for Attorney General Opinion

Dear Mr. Attorney General:

As Executive Director of the State Commission on Judicial Conduct, I respectfully request a formal opinion from you on the following legal issue: Are the following courtroom prayer practices described in the three scenarios below lawful or does the practice in one or more of the scenarios violate the Establishment Clause of the First Amendment of the United States Constitution?

1. First Scenario: Before calling the court docket, the judge leads courtroom attendees in a religious[1] prayer or invocation, or invites a Chaplain to stand before the court and lead the attendees in such a prayer.
2. Second Scenario: Before the judge enters the courtroom to commence the judicial proceedings, courtroom attendees are instructed by a bailiff or a member of court staff that there will be an opening prayer or invocation and that those in attendance who object or are offended by the prayer may leave the courtroom and return when the prayer is over. The bailiff or court staff person represents to those in attendance that their cases will not be affected by their decision not to participate in the prayer. The judge does not enter the courtroom until those who choose not to participate in the courtroom prayer have exited, presumably to avoid an appearance of a lack of impartiality toward those who departed; however, those who elected to leave before the prayer must re-enter the

[1] The Commission's intent is to raise the question as to *any* religious prayer from any religion.

courtroom in order to have their cases heard and would be observed entering the courtroom by the judge at that time. In this instance, the opening prayer is also religious.

3. Third Scenario: The judge, a bailiff, or member of court staff opens court proceedings with either a moment of silence or a perfunctory acknowledgment of religion by stating words to the effect, "God save the State of Texas and this Honorable Court."

I have enclosed a brief addressing the legal and ethical issues posed by these scenarios.

Thank you in advance for your consideration of this matter. If you have any questions or concerns, or need additional information, please do not hesitate to contact me.

Sincerely,

ORIGINAL SIGNED BY

Seana Willing
Executive Director

SBW/sw
Attachment

BRIEF

TO: **The Honorable Ken Paxton**
Texas Attorney General

FROM: **Seana Willing, Executive Director**
State Commission on Judicial Conduct

DATE: **February 17, 2016**

SUBJECT: Whether opening court proceedings with a religious prayer violates the Establishment Clause of the First Amendment to the United States Constitution

The Establishment Clause and Courtroom Prayer

The First Amendment's Establishment Clause states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." Under the 14th Amendment to the United States Constitution, adherence to the restrictions of the Establishment Clause applies to all government action, including at the state and local level.[2]

Few courts, and no court in Texas, have been called upon to address the constitutionality of courtroom prayer. However, in 1991, the 4th Circuit Court of Appeals ruled in *North Carolina Civil Liberties Union Legal Foundation v. H. William Constangy*, 947 F.2d 1145 (4th Cir. 1991) that Judge Constangy should be enjoined from opening court with a prayer because "judicial prayer in the courtroom was not legitimated under the Establishment Clause by past history or present practice." Applying the three-part *Lemon* Test,[3] the Court found that Judge Constangy's prayer failed all three prongs: (1) the prayer resulted in "excessive government entanglement" with religious affairs (the "Entanglement" Prong); (2) it advanced religious practice (the "Effect" Prong); and (3) it did not have a secular legislative purpose (The "Purpose" Prong). The Court found that Judge Constangy's prayer did not qualify as mere "ceremonial deism," nor was it a perfunctory acknowledgment of religion such as "Under God," "In God We Trust," or "God save the United States and this Honorable Court." (citing *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 322-23 (2000); *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984)). In fact, it found that "an act so intrinsically religious as prayer cannot meet, or at least would have difficulty meeting, the secular purpose prong of the *Lemon* Test." *Constangy*, 947 F.2d at 1150.

The Court noted that it was required to apply the *Lemon* Test as opposed to the *Marsh* Test,[4] which it concluded applied only to legislative prayer. *Constangy*, 947 F.2d at 1147. The Court

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[2] See *Everson v. Board of Education*, 330 U.S. 1, 15-18 (1947).

[3] In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the United States Supreme Court reviewed a Pennsylvania law that allocated public funds to reimburse the salaries of teachers at private (mostly parochial) schools for the purchase of text books and found it to be unconstitutional under the Establishment Clause of the United States Constitution. The Court laid out the three-prong test recited above, and found that if any prong is violated, government action is deemed unconstitutional under the Establishment Clause of the First Amendment. Although the *Lemon* Test has been criticized by members of the Court, it remains intact and regularly applied in Establishment Clause cases.

[4] In 1983, the United States Supreme Court ruled in *Marsh v. Chambers*, 463 U.S. 783 (1983), that legislative prayer itself, along with the practice of hiring a chaplain for the Nebraska state legislature, did not violate the Establishment

rejected Judge Contangy's argument that prayer by a judge is analogous to legislative prayer and, therefore, the Court should apply the *Marsh* Test. *Id.* at 1148. The Court contrasted prayer in the courtroom with legislative prayer and noted that "a judge's prayer in the courtroom is not to fellow consenting judges but to litigants and their attorneys." *Id.* at 1149. Moreover, the Court found that "because a judge must be a neutral decision maker, prayer in court by a judge has far more potential for establishing religion than legislative prayer," and that "for the judge to start each day with a prayer is to inject religion into the judicial process and destroy the appearance of neutrality." *Id.* at 1149-52.

Also of note is the fact that Judge Constangy had asserted arguments that his prayer had a secular purpose and that praying in court was his own personal prayer; however, the Court rejected these positions by concluding that prayer is "undeniably religious," and that a judge wearing a robe and speaking from the bench is "obviously engaging in official conduct." *Id.* at 1150-1151.

The Court also determined that Judge Constangy's intent was irrelevant; instead, how his prayer was perceived was the proper question to ask. *Id.* at 1151. According to the Court, persons who heard the judge's courtroom prayer felt the judge wanted them to join him in prayer and, therefore, felt the judge was endorsing religion, in violation of the Establishment Clause. *Id.* Finally, the Court expressed concern that Judge Constangy's prayer would lead to religious divisiveness, which it noted was among "the principal evils against which the First Amendment was intended to protect." *Id.* at 1152 (citing *Lemon*, 403 U.S. at 622). The Court found that Judge Constangy's practice not only offended nonbelievers, but also devout believers who regard prayer as personal and private, thus potentially entangling the state in divisiveness along religious lines. *Id.*

Determining what state-sponsored conduct would violate the Religious Clauses of the First Amendment and what does not is a complicated task.[5] In *Lynch v. Donnelly*, the Court found that a predominantly religious display located in a private park within the downtown shopping district would violate the First Amendment, but a display that combines religion along with secular elements to present a secular message would not. In this case, the Court compared Pawtucket, Rhode Island's 40-year tradition of displaying a crèche within a larger holiday exhibition to the display of religious paintings in government funded museums, as well as within the Supreme Court building itself.[6]

Clause of the First Amendment. Only focusing on legislative prayer and its "unique history," the Court concluded that the practice did not violate the Establishment Clause because of the historical acceptance of the practice. The Court also determined that the content of Nebraska's legislative prayer did not promote any one religion after the Chaplain promised to remove all references to "Jesus" in future prayers. In reaching this decision, the Court overruled the appellate court's decision that found, applying the *Lemon* Test, that all three prongs had been violated; however, the Court did not overrule the *Lemon* Test; instead, it simply ignored it.

[5] As Chief Justice Warren Burger noted in *Lynch*, "[i]n each case, the inquiry calls for line-drawing; no fixed, *per se* rule can be framed. The Establishment Clause like the Due Process Clauses is not a precise, detailed provision in a legal code capable of ready application. The purpose of the Establishment Clause 'was to state an objective, not to write a statute.'" The Chief Justice added that "[t]he line between permissible relationships and those barred by the Clause can no more be straight and unwavering than due process can be defined in a single stroke or phrase or test. The Clause erects a 'blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.'" *Lynch*, 465 U.S. at 679 (citing *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970); *Lemon*, 403 U.S., at 614.)

[6] The Court also added an additional prong of "Endorsement," which has since become subsumed in the *Lemon* "Purpose" Prong. In her concurring opinion, Justice O'Connor explained that the "Endorsement" Test applies to laws wherein the government intends to convey a message of endorsement or disapproval of religion. *Lynch*, 465 U.S. at 688. This test is usually used in situations where the government is engaged in expressive activities, such as school graduation prayers, religious signs on government property, or religion in school curriculum.

By contrast, in *County of Allegheny et al. v. ACLU*, 492 U.S. 573 (1989), the Court criticized the majority decision in *Lynch* and found that a crèche displayed inside the county courthouse in Pittsburgh, Pennsylvania, violated the Establishment Clause of the 1st Amendment, because of the crèche's unmistakable religious message; whereas the display of a menorah next to a Christmas tree located outside the building did not because, in this particular setting, it conveyed a secular holiday message. Of significance is that the Court warned that a broad reading of *Marsh* "would gut the core of the Establishment Clause;" and that "*Marsh* plainly does not stand for the sweeping proposition . . . that all accepted practices 200 years old and their equivalents are constitutional today." *Id.* at 602-04.

Most recently, the United States Supreme Court upheld the *Marsh* Test when it decided in *Town of Greece v. Galloway*, 134 S.Ct. 1811 (2014) that city councils were similar enough to state legislatures to allow the practice of opening a town meeting with prayer without violating the Establishment Clause. In its 5-4 decision issued in May 2014, the Court ruled that the practice was consistent with the tradition followed by Congress and state legislatures; the town did not discriminate against minority faiths in determining who may offer the prayer; and the prayer did not coerce participation with non-adherents.

It bears noting that the United States Supreme Court declined to hear Judge Constangy's appeal of the 4th Circuit Court's injunction. Also, in oral arguments before the Court in *Galloway*, both Justice Kagan and Justice Scalia discussed the appropriateness of courtroom prayer suggesting that it was neither a tradition nor appropriate. The final opinions in *Galloway* themselves do not address the practice of courtroom prayer in any context.

There are other cases of some significance that attempted to address the propriety of courtroom prayer surrounded a controversial judge from Alabama, Roy Moore. When Judge Moore was a Circuit Judge (1992-2000), he brought a wooden plaque depicting the Ten Commandments to court and hung it on the wall behind his bench. He also began each session of court with a prayer, asking for divine guidance over the deliberations of jurors. In 1995, a lawsuit was filed by the ACLU against Judge Moore claiming the display of the Ten Commandments plaque and his pre-session prayers were unconstitutional. That lawsuit was dismissed for lack of standing; however, the Alabama Governor and the Attorney General filed a suit for declaratory judgment in support of Judge Moore. In 1996, Circuit Court Judge Charles Price found that the pre-session prayers were unconstitutional, but allowed the display of the plaque. The Court also issued an order directing all Alabama judges to immediately "cease and desist" from the practice of conducting courtroom prayers and to take "all reasonable steps to prevent the conduct of unconstitutional prayer in the public courts" of the state. Thereafter, Judge Moore held a press conference asserting a religious intent in displaying the plaque. In response, Judge Price issued a new ruling requiring Judge Moore to remove the plaque within ten days. Judge Moore appealed the ruling but the appeal was dismissed on technical grounds in 1998.[7]

Recently, the State Commission on Judicial Conduct has been made aware of the fact that there are judges in Texas who open court proceedings with an overtly Christian prayer, some of

[7] As Chief Justice of the Alabama Supreme Court, in 2001, Judge Moore erected a 5,280 lb. granite block depicting the Ten Commandments and installed it in the central rotunda of the State Judiciary Building. The ACLU sued to have the monument removed (*Glassroth v. Moore*, 229 F.Supp. 2d 1290 (M.D. Ala. 2002)) and, in 2002, U.S. District Judge Myron Thompson declared the monument violated the Establishment Clause of the First Amendment, a ruling that was upheld by the 11th Circuit Court of Appeals applying the *Lemon* Test. (*Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. Ala., 2003). After Judge Moore announced his intent to disobey a court order to remove the monument, disciplinary action was commenced against him and he was eventually removed from office. The monument was moved to a private area of the Judiciary Building and eventually removed from the building a year later. In 2013, Judge Moore was re-elected to the Alabama Supreme Court as Chief Justice.

whom have characterized their practice as "a tradition," apparently in an effort to have this practice fall under the legislative prayer holdings of *Marsh* and *Galloway*; however, unlike legislative prayer, there is no similar long-standing tradition of opening courts with prayer, nor is there evidence that the Founding Fathers intended the Bill of Rights to apply to courtroom prayer. As the Court noted in *Allegheny*, "just because *Marsh* sustained the validity of legislative prayer, it does not necessarily follow that practices like proclaiming a National Day of Prayer are constitutional...Legislative prayer does not urge citizens to engage on religious practices, and on that basis could well be distinguishable from an exhortation from government to the people that they engage in religious conduct." *Allegheny*, 492 U.S. at 603 n. 52. It appears from *Constangy* that the proper test to apply to the practice of courtroom prayer is the *Lemon* Test, and that the practices described in Scenarios 1 and 2 above would likely fail some if not all prongs of that test.

An argument could be made that the danger posed by a judge's public display of religion in the courtroom, as described in Scenarios 1 and 2, is that the practice equates to official governmental endorsement or approval not just of religion, but of the Christian religion. This is something the United States Supreme Court has consistently held to violate the Establishment Clause. Additionally, despite an announcement to litigants that they can leave the courtroom if they choose not to participate or object to the prayer, the prayer practices in Scenarios 1 and 2 could still have a direct coercive effect on litigants, many of whom are not present in court by choice.[8] Objectively, it would appear axiomatic that anyone who would dare to leave the courtroom upon this announcement and return after the prayer when the judge is present is being placed in an untenable position. By exiting and then returning to the courtroom, the litigant runs the risk that he or she will possibly be noticed by the judge as having left the courtroom during the prayer and held up to ridicule, denigrated, or retaliated against by the judge or by the community for implying a rejection of the judge's Christian[9] religious beliefs.

At the same time, those who remain silent and choose to stay in the courtroom may be subjected to a court-sanctioned prayer and governmental endorsement of a religious belief other than their own, in violation of the Establishment Clause. The United States Supreme Court specifically addressed the dangers of this kind of endorsement, which "sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch*, 465 U.S. at 688. (O'Connor, J., concurring). The Court has stated that government is prohibited from "making adherence to a religion relevant in any way to a person's standing in the political community." *Id.* at 687. The Commission is aware that some court attendees, including attorneys, have articulated that the prayer practices outlined in Scenarios 1 and 2 made them feel like outsiders and that their standing in the community, or ability to practice law in the community, would be placed at risk as a direct result of their criticism of this practice.

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[8] Courts are more likely to find a violation of the Establishment Clause in instances such as this where the government has an opportunity to influence what is essentially a "captive audience." For example, in 1992 the Court applied a "coercion" test to strike down school-led prayer by invited clergy at a middle school graduation even though attendance was not strictly compulsory (*Lee v. Weisman,* 505 U.S. 577 (1992)) and in 2000, it struck down the traditional practice of student-led prayer at school sponsored events. (*Santa Fe v. Doe,* 530 U.S. 290 (2000)). In each instance, over arguments that student attendance or participation was not compulsory, the Court held that schools should not force such a difficult choice on students as "it is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice." *Santa Fe*, 530 U.S. at 312 (citing *Lee*, 505 U.S. at 596).

[9] The same argument would hold true regardless of the sectarian nature of the prayer.

Even if a judge were not influenced by a litigant's decision not to participate, that judge cannot avoid the *perception* that his/her decisions and rulings might be based on something other than the facts, evidence, and law. In fact, it would seem more likely than not that the decision to stay and participate in the prayer versus exiting the courtroom and returning later would be based in large part on a perception or belief that the judge's ruling would somehow be influenced by the litigant's level of participation. Using an objective, reasonable person standard, it would be difficult to conclude that even a non-mandatory prayer ceremony is not coercive, which in turn could also violate the Free Exercise portion of the Establishment Clause.

By contrast, the practice described in Scenario 3, which is similar to the manner by which the United States Supreme Court and the Texas Supreme Court open their proceedings[10], has been explicitly approved by the same courts that have found the other examples of courtroom prayer unconstitutional. *Constangy*, 947 F.2d at 1150; *Santa Fe ISD v. Doe*, 530 U.S. at 322-23; *Lynch* 465 U.S. at 693. Such an announcement, without any other entreaty to others to join or participate in a particular prayer (of any religious denomination), does not offend the Religious Clauses of the First Amendment as its "reason or effect merely happens to coincide or harmonize with the tenets of some . . . religions." *Lynch*, 465 U.S. at 682 (citing *McGowan* v. *Maryland*, 366 U.S. 420, 442 (1961)). In fact, as the Court went on to note in *Lynch:*

> "whatever benefit there is to one faith or religion or to all religions, is indirect, remote, and incidental; display of the creche is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as "Christ's Mass," or the exhibition of literally hundreds of religious paintings in governmentally supported museums." *Id.* at 683.

In reaching this conclusion, the Court has consistently found that "total separation [of church and state] is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable." *Id.* at 672 (Citing *Lemon*, 403 U.S. at 614.) More specifically, the Court stated:

> "In every Establishment Clause case, we must reconcile the inescapable tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other, and the reality that, as the Court has so often noted, total separation of the two is not possible." *Id.*

In light of this clear precedent, it would appear safe to conclude that, unlike the courtroom prayer practices described in Scenarios 1 and 2, a court's announcement, "God save the State of Texas and this Honorable Court," would not violate the Establishment Clause of the First Amendment to the United States Constitution.

[10] In each instance, the Court Clerk makes this announcement before the commencement of proceedings.