United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
July 9, 2021
Lyle W. Cayce
Clerk

No. 21-20279

FREEDOM FROM RELIGION FOUNDATION, INC.; JOHN ROE,

Plaintiffs—Appellees,

versus

WAYNE MACK, *Individual Capacity*,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:19-cv-1934

Before HIGGINBOTHAM, SMITH, and OLDHAM, *Circuit Judges*.

ANDREW S. OLDHAM, *Circuit Judge*:

The question presented is whether a justice of the peace is entitled to a stay pending appeal. On cross-motions for summary judgment, the district court held the judge violated the Establishment Clause, as incorporated against the States by the Fourteenth Amendment, by allowing volunteer chaplains to perform brief, optional, and interfaith opening ceremonies before court sessions. The judge has made a strong showing that the district court erred. The other three stay factors also favor the judge. We therefore issue the stay.

I.

A.

Wayne Mack is a justice of the peace in Montgomery County, Texas.[1] In that role, he also serves as a county coroner. Seven years ago, Judge Mack was called as coroner to the scene of a fatal accident. After trying in vain to find a volunteer chaplain to counsel and comfort the victim's family, Judge Mack resolved to establish a chaplaincy program so he would have "more than just . . . phone numbers of people to call" in times of need.

The chaplaincy program comprises a diverse coalition of clergy and lay persons who subscribe to a variety of belief systems, faiths, and denominations—including Protestantism, Catholicism, Buddhism, Hinduism, Judaism, and Islam. Members of any faith-based community may participate.

To thank the volunteer chaplains for their service and to solemnize the proceedings in his courtroom, Judge Mack regularly invites a volunteer chaplain to be recognized before the first case is called. Many chaplains offer a prayer, while others offer "encouraging words." The volunteer chaplains neither proselytize nor denigrate any other belief.

Participation in the opening ceremonies is completely optional. Judge Mack installed signs outside the courtroom and on a TV screen at the back of the courtroom explaining:

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[1] We construe the facts in the light most favorable to the non-movant, who in relevant part is Judge Mack. *See White Buffalo Ventures, LLC v. Univ. of Tex.*, 420 F.3d 366, 370 (5th Cir. 2005) (holding that cross-motions for summary judgment "are reviewed independently, with evidence and inferences taken in the light most favorable to the nonmoving party").

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

In addition, before Judge Mack enters the courtroom, the bailiff explains that "[y]ou are NOT required to be present during the opening ceremonies, and if you like, you may step out of the Court Room before the Judge comes in. Your participation will have no effect on your business today or the decisions of this court." The bailiff then invites attendees to "take this opportunity to use the facilities, make a phone call, or not to participate in the opening ceremonies. You may exit the Court Room at this time. I will notify the lobby when court will be called into session." People routinely enter and exit the courtroom during this time. The summary-judgment record contains no evidence that anyone has ever been disciplined, criticized, or suffered any adverse outcome whatsoever based on their non-attendance.

Judge Mack then enters the courtroom, briefly explains the chaplaincy program, introduces the volunteer chaplain if one is present that day, and turns his back to the courtroom while the chaplain makes remarks and offers a brief invocation or words of encouragement. The bailiff then leads the courtroom in pledging allegiance to the United States and Texas flags, invites those in the lobby to enter (or reenter) the courtroom, announces the rules of the court, and calls the first case.

B.

Over the years, Judge Mack's ceremonies have generated much criticism from the Freedom from Religion Foundation ("FFRF"). And these

criticisms have found a receptive ear at the Texas State Commission on Judicial Conduct (the "Commission").

In October 2014, FFRF filed a complaint against Judge Mack with the Commission. The Commission conducted an investigation. In November 2015, it issued a "Letter of Caution" to Judge Mack but decided not to discipline him further.

That was not the end of the matter, however. The Commission then wrote a lengthy request for an opinion from the Texas Attorney General.[2] In the opinion request, the Commission stated:

> Objectively, it would appear axiomatic that anyone who would dare to leave the courtroom upon this announcement [that they're free to do so] 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 [or other] religious beliefs.

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[2] The Texas Constitution authorizes the Attorney General to issue legal advice in the form of opinions to government entities and officials. TEX. CONST. art. IV, § 22. These opinions clarify the legal obligations and liabilities of state officials. *See* TEX. GOV'T CODE § 402.042; *Thomas v. Groebl*, 212 S.W.2d 625, 632 (Tex. 1948). And although the Attorney General's opinions do not control later-issued judicial decisions, they are "entitled to great weight" in Texas courts. *See Royalty v. Nicholson*, 411 S.W.2d 565, 572 (Tex. Civ. App.—Houston 1967, writ ref'd n.r.e.). Moreover, government officials who rely on an opinion of the Attorney General in the execution of their official duties can assert the opinion as a shield against personal liability. *See Manion v. Lockhart*, 114 S.W.2d 216, 219 (Tex. 1938) (holding official not responsible for illegal act made in good-faith reliance on an Attorney General opinion). Similarly, members of the public who rely on the Attorney General's opinions may assert such reliance as a defense to criminal liability. *See* TEX. PENAL CODE § 9.21.

> 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.

Letter from Ms. Seana Willing, Exec. Dir., State Comm'n on Judicial Conduct, to Honorable Ken Paxton, Tex. Att'y Gen., at 6 (Feb. 17, 2016). The Texas Attorney General emphatically rejected these concerns and concluded that both the chaplaincy program and the opening ceremonies were consistent with the Establishment Clause. *See* Op. Tex. Att'y Gen. No. KP-0109, 2016 WL 4414588, at *3–4 (2016).

Still, neither the FFRF (nor the Commission) desisted. In 2017, FFRF and three pseudonymous plaintiffs filed suit against Judge Mack in federal court. FFRF sued Judge Mack in his official capacity as a Montgomery County official. The district court dismissed that complaint for lack of standing because the County lacks the power "to control the judicial or administrative courtroom practices of justices of the peace." *Freedom From Religion Found., Inc. v. Mack*, No. H-17-881, 2018 WL 6981153, at *3–5 (S.D. Tex. Sept. 27, 2018) ["*Mack I*"].

Eight months later, FFRF and one pseudonymous plaintiff sued Judge Mack *again*—this time in his individual capacity and in his official capacity as a state official. And this time, on cross-motions for summary judgment, the district court agreed with the plaintiffs. As the district court saw it, Judge Mack "presents himself as theopneustically-inspired" and his opening ceremony "flies in the face of historical tradition, and makes a mockery of both, religion and law." *Freedom From Religion Found., Inc. v. Mack*, No. 4:19-cv-1934, 2021 WL 2044326, --- F. Supp. 3d --- (S.D. Tex. May 20, 2021) ["*Mack II*"].

We granted a temporary stay almost immediately to give our court time to consider and adjudicate Judge Mack's request for a stay pending

appeal under Federal Rule of Appellate Procedure 8. *See Freedom From Religion Found., Inc. v. Mack*, No. 21-20279, at 1 (5th Cir. June 1, 2021) (per curiam) ["*Mack III*"]. In our stay order, we noted: "Judge Mack is permitted to continue his scheduled ceremonies pending further order of this court." *Ibid.*

Notwithstanding our stay and the text of our stay order, the Commission opened a new investigation into Judge Mack on June 24, 2021. The Commission's "Letter of Inquiry" asked a series of questions, including:

> 7. Please state whether the Freedom from Religion Foundation, Inc. ("FFRF") filed a federal civil lawsuit against you pursuant to 42 U.S.C. § 1983 challenging the constitutionality of your practice of opening court with a prayer (Cause No. 4:19-CV-1934).
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> 8. Please state whether on May 21, 2021, the United States District Court for the Southern District of Texas, Houston Division, issued a Memorandum Opinion and Order in Cause No. 4:19-CV-1934 declaring your practice of opening court with a prayer unconstitutional.
>
> 9. Please describe in detail the changes you have made and/or the steps you have taken as a result of this ruling. In your response, please address the fact the U.S. District Court stated in its ruling that should you violate the declaratory decree in the future, an injunction will issue.
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> 10. Please discuss whether, in your opinion, by opening your court sessions with a prayer, you violated the United States Constitution . . . .
>
> 12. Please discuss whether, in your opinion, your conduct in this regard constituted willful and persistent conduct that was clearly inconsistent with the proper performance of your duties and/or cast public discredit upon the judiciary or

> administration of justice, in violation of Article V, Section 1-a(6) of the Texas Constitution?

Commission Inquiry at 3–4 (attached as an Appendix hereto). Although the Commission recognized its obligation to "keep itself informed as fully as" possible regarding legal developments, *id.* at 1 (quoting TEX. CONST. art. V, § 1-a, ¶ 7), the Commission appeared unaware that we stayed the district court order upon which it premised its "Inquiry." The Commission never once cited our order or acknowledged Judge Mack's appeal. Nor did the Commission recognize that we specifically authorized Judge Mack to continue his ceremonies pending further order of this court. The Commission gave Judge Mack until July 12, 2021, to answer its "Inquiry." *Id.* at 2.

II.

In deciding whether to grant a stay pending appeal, we consider four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009) (quotation omitted). All four factors favor Judge Mack. We therefore enter the stay.

A.

We begin with Judge Mack's likelihood of success on the merits. We conclude he is likely to succeed on appeal. That's for two reasons.

1.

First, the district court's adjudication of FFRF's official-capacity claim was manifestly erroneous.

FFRF sued Judge Mack in his official capacity as an officer of the State of Texas. Obviously, "[s]uits against state officials in their official capacity . . . should be treated as suits against the State." *Hafer v. Melo*, 502 U.S. 21, 25 (1991). Suits against the State generally must be dismissed because they're barred by sovereign immunity. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72–73 (1996). Suits against the State under 42 U.S.C. § 1983 are doubly dismissible because the State is not a "person" under that statute. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58 (1989). Rather, the only way to bring an official-capacity claim against an officer of the State is to do so under the equitable cause of action recognized in *Ex parte Young*, 209 U.S. 123 (1908).[3] And an official-capacity equitable claim is cognizable under *Ex parte Young* only if, *inter alia*, (1) the defendant is a state officer, (2) the complaint seeks injunctive relief for an ongoing violation of federal law, and (3) the defendant state officer bears a sufficiently close connection to the unlawful conduct that a district court can meaningfully redress that injury with an injunction against that officer. *See, e.g.*, *Tex. Democratic Party v. Abbott*, 978 F.3d 168 (5th Cir. 2020).

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[3] *Ex parte Young* has two holdings: "First, [the Attorney General of Minnesota, Edward T.] Young could be sued, notwithstanding the State's sovereign immunity. Second, an equitable cause of action would open the federal courts to suits like the one against Young." *Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 496 (5th Cir. 2020) (en banc) (Oldham, J., concurring) (citations omitted). Much of the *Ex parte Young* precedent in the Supreme Court and our court concerns the *first* of these holdings. For example, much ink has been spilled on whether declaratory relief can be sufficiently prospective so as not to offend the State's sovereign immunity. *Compare, e.g.*, *Green v. Mansour*, 474 U.S. 64, 73 (1985) (no), *with Lipscomb v. Columbus Mun. Separate Sch. Dist.*, 269 F.3d 494, 500–01 (5th Cir. 2001) (yes), *and Williams ex rel. J.E. v. Reeves*, 954 F.3d 729, 736–37 (5th Cir. 2020) (yes). But no one here is arguing about sovereign immunity. The only question in this case concerns the *second* of *Ex parte Young*'s holdings—namely, whether FFRF has an equitable cause of action against Judge Mack.

So, in adjudicating an official-capacity claim against an alleged official of the State, the district court *should've* started and ended with *Ex parte Young*. That decision obviously does not apply—both because (1) Judge Mack is a county officer (not a state one),[4] and (2) the complaint sought relief only under 42 U.S.C. § 1983 and never once mentioned the equitable cause of action recognized in *Ex parte Young*. The plaintiff is the master of his complaint. And here, the plaintiff chose to invoke *only* § 1983. *Mack II*, ECF No. 1, at 1 (May 29, 2019) ("Plaintiffs bring this action pursuant to 42 U.S.C. § 1983 . . . ."). In FFRF's prayer, in fact, it asked only for this: "Judgment declaring that Judge Mack's courtroom prayer practice violates the Establishment Clause of the First Amendment to the United States Constitution or, in the event declaratory relief is unavailable, injunctive relief ordering Judge Mack to discontinue his courtroom prayer practice." *Id.* at 18. That prayer perfectly tracks the text of § 1983. *See* 42 U.S.C. § 1983 (providing, in suits against judges, that "injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was

[4] We have previously held that a "municipal judge acting in his or her judicial capacity to enforce state law" or "effectuat[e] state policy" does "not act as a municipal official." *Johnson v. Moore*, 958 F.2d 92, 94 (5th Cir. 1992). But as the State informed the district court in its successful motion to dismiss, cases like *Johnson* do not apply here: "Even if Judge Mack performs a state function while applying the laws of . . . Texas, [FFRF] ha[s] not alleged the existence of any state law regarding the challenged conduct that guides, influences, or otherwise informs Judge Mack's invocation." Thus Judge Mack is, for all relevant purposes, a county official only.

unavailable").[5] So the district court should've held that FFRF's suit arises only under § 1983; the Supreme Court's *Will* decision squarely prohibits official-capacity claims against state officers under § 1983; therefore, even assuming Judge Mack could be considered a state official, FFRF's official-capacity claim must be dismissed.

The district court started on the right foot. It first recognized that FFRF's official-capacity claim against an alleged state official is a claim against the State of Texas. The district court then ordered the State of Texas, through its Attorney General, to respond to FFRF's complaint because, again, the official-capacity claim was in fact a claim against the State of Texas. *See Mack II*, ECF No. 44, at 1. The State of Texas dutifully responded in a motion to dismiss. It pointed out that Judge Mack is not a state official; plaintiffs' claims do not implicate the State in any way; *Ex parte Young* cannot apply for any number of reasons; and plaintiffs' official-capacity claim is not cognizable in any event. The district court correctly recognized the validity of the State's arguments and granted its motion to dismiss. *See id.*, ECF No. 50, at 4. So far so good.

But then the district court badly lost its footing. It apparently thought that, even after dismissing the State, FFRF retained some sort of freestanding official-capacity claim against a state official named Wayne

[5] FFRF's litigation decision makes perfect sense because it's unclear how it could've pleaded an equitable cause of action under *Ex parte Young* if it wanted to. As noted above, *see supra* note 3 and accompanying text, *Ex parte Young*'s second holding recognizes an equitable cause of action for injunctive relief. If *Ex parte Young* could be read to recognize an equitable cause of action for injunctive and declaratory relief against Judge Mack, it would render the limitations in § 1983 utterly superfluous. No litigant would sue an alleged state judge under § 1983 and its attendant limitations; all litigants would simply sue under *Ex parte Young* and avoid § 1983 altogether. *Cf. Green Valley*, 969 F.3d at 499–500 (Oldham, J., concurring) (noting such capacious readings of *Ex parte Young*'s second holding conflict with § 1983).

Mack that somehow did not run against the State.[6] *But see Hafer*, 502 U.S. at 25 (holding official-capacity suits against state officials run *only* against the State). So after dismissing the State, the district court purported to enter a "default judgment" against Judge Mack "in his official judicial capacity on behalf of the State of Texas." *See Mack II*, 2021 WL 2044326, at *3 (citing ECF No. 76, at 1–2). That was equal parts bizarre and wrong. Judge Mack could be sued in his *personal* capacity for his official acts. *See Hafer*, 502 U.S. at 31. But after correctly recognizing that FFRF cannot sue the State of Texas, the district court had no choice but to dismiss any claim brought against Judge Mack "in his official judicial capacity on behalf of the State of Texas." Were it otherwise, the district court could enter an official-capacity judgment that's completely unchallengeable—either by Judge Mack's individual-capacity lawyers or by the State, which has been dismissed and which is unconnected to Judge Mack in any event.

2.

Second, as to FFRF's individual-capacity claim, that too is likely to fail. The Supreme Court has held that our Nation's history and tradition allow legislatures to use tax dollars to pay for chaplains who perform sectarian prayers before sessions. *See Marsh v. Chambers*, 463 U.S. 783 (1983). If anything, Judge Mack's chaplaincy program raises fewer questions under the Establishment Clause because it uses zero tax dollars and operates on a volunteer basis. And the Supreme Court recently reaffirmed *Marsh* in upholding a legislature's unpaid, volunteer chaplaincy program comprised almost exclusively of Christians. *See Town of Greece v. Galloway*, 572 U.S. 565

[6] Obviously, FFRF could (and previously did) bring an official-capacity claim against Judge Mack that ran against the *county*. He is, after all and indisputably, a *county* official. But FFRF's attempt to do that failed in 2018. *See supra*, at 5. And FFRF does not re-urge its official-capacity claims against Montgomery County here.

(2014); *accord Am. Humanist Ass'n v. McCarty*, 851 F.3d 521 (5th Cir. 2017) (finding volunteer student-led sectarian prayer at a school-board meeting permissible under the Establishment Clause).

It's true that *Marsh* and *Town of Greece* involved a legislature's chaplains, not a justice of the peace's chaplains. But it's unclear why that matters, given the abundant history and tradition of courtroom prayer. Since at least the Marshall Court, for example, the Supreme Court has opened its sessions with some variant of "God save this Honorable Court." 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 469 (1923) ["SUPREME COURT HISTORY"]. When riding circuit, our Nation's first Chief Justice, John Jay, authorized clergymen to open court sessions with prayer. *See, e.g.*, Letter from Chief Justice John Jay to Richard Law (Mar. 10, 1790), *in* 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 13–14 (Maeva Marcus et al. eds., 1988) ["DOCUMENTARY HISTORY"]. Justice Cushing did the same. *See, e.g.*, 1 SUPREME COURT HISTORY, *supra*, at 59 n.1 (noting "the Throne of Grace [was] addressed in Prayer by the Rev. Dr. Howard"). Justice Iredell did the same. *See, e.g.*, 2 DOCUMENTARY HISTORY, *supra*, at 317 (noting "the Rev. Dr. Lathrop had addressed the throne of Grace, in prayer"). And Justice Wilson did the same. *See, e.g.*, *id.* at 331 & n.2 (noting "the Throne of Grace was addressed in Prayer by the Rev. Dr. Hitchcock").

FFRF and the district court offer four responses, none of which is persuasive. First, they argue that evidence of courtroom prayers at the Founding was spotty. To the contrary, however, Chief Justice Jay referred to such prayers as an "ancient use[]" and "the custom." Letter from Chief Justice John Jay, *in* 2 DOCUMENTARY HISTORY, *supra*, at 13. Specifically, before the opening session of the Circuit Court for the District of Connecticut, District Judge Richard Law wrote to Chief Justice Jay to ask

"whether [the Justices riding circuit] would wish to have a Clerg[y]man attend as Chapl[a]in, as has been generally the Custom in the New England States, upon such Occasions." Letter from Richard Law to Chief Justice John Jay (Feb. 24, 1790), *in* 2 DOCUMENTARY HISTORY, *supra*, at 11. Wishing "to respect ancient usages in . . . all Cases where Deviations from them are not of essential Importance," Chief Justice Jay responded that "[t]he custom in New England of a clergyman's attending, should in my opinion be observed and continued." *Id.* at 13. Neither the district court nor FFRF said one word about this evidence. One cannot simply ignore the historical record and then pretend it's silent.

Second, they say that the Supreme Court's invocation—"God save the United States and this Honorable Court"—"does not solicit the participation of the attending public." *Mack II*, 2021 WL 2044326, at *6. By contrast, they argue, Judge Mack's opening ceremony is "coercive." *Id.* at *6–7. This is a particularly odd accusation. The Supreme Court does not invite the public to leave the Court before invoking God; in that sense, Judge Mack's practices are *much less* "coercive." Moreover, the understanding of "coercion" shared by FFRF and the district court would condemn numerous examples of courtroom prayer in the historical record. For example, the Chief Justice of South Carolina's Constitutional Court of Chancery recommended in 1791 that a defendant sentenced to death "employ that little interval of life which remained, in making his peace with that God whose law he had offended" and "prayed that the Lord might have mercy on his soul." *State v. Washington*, 1 S.C.L. (1 Bay) 120, 156–57 (S.C. 1791). And in charging a grand jury in the Circuit Court for the District of Vermont in 1792, Chief Justice Jay explained that witness "Testimony is . . . given under those solemn obligations which an appeal to the God of Truth impose" and called the crime of perjury an "abominable Insult . . . to the divine Being." 2 DOCUMENTARY HISTORY, *supra*, at 284. Neither the district court nor

FFRF has cited any evidence whatsoever to suggest the Supreme Court, justices riding circuit, or judges imposing criminal sentences ever invited members of the observing public, grand jurors, or criminal defendants to leave the courtroom before invoking Almighty God.

Third, the district court and FFRF rely on Justice Kagan's dissent in *Town of Greece*. In that dissent, Justice Kagan posits a hypothetical prayer that she says would violate the Establishment Clause:

> You are a party in a case going to trial; let's say you have filed suit against the government for violating one of your legal rights. The judge bangs his gavel to call the court to order, asks a minister to come to the front of the room, and instructs the 10 or so individuals present to rise for an opening prayer. The clergyman faces those in attendance and says: "Lord, God of all creation, ... We acknowledge the saving sacrifice of Jesus Christ on the cross. We draw strength . . . from his resurrection at Easter. Jesus Christ, who took away the sins of the world, destroyed our death, through his dying and in his rising, he has restored our life. Blessed are you, who has raised up the Lord Jesus, you who will raise us, in our turn, and put us by His side . . . . Amen." The judge then asks your lawyer to begin the trial.

Town of Greece, 572 U.S. at 617 (Kagan, J., dissenting) (citation omitted). It's unclear what the district court and FFRF hope to gain from this hypothetical. After all, Justice Kagan posits a judge who "instructs" the party to participate it the prayer. *Ibid.* It's undisputed that Judge Mack by contrast has taken multiple steps (including oral and written instructions) to facilitate *non*-participation in his opening ceremonies. Moreover, it's undisputed that Judge Mack's opening ceremonies are open to chaplains of all faiths—not just Christians. And in any event, Justice Kagan's concern in dissent was that the *Town of Greece* holding extended to "what are essentially adjudicatory hearings." *Id.* at 626. Thus, Justice Kagan's opinion is at best unhelpful to

FFRF; at worst, it proves that *Town of Greece* squarely forecloses FFRF's position.

Fourth, the district court and FFRF say that even if history and tradition support Judge Mack's practices, they run afoul of the so-called "*Lemon* test." *See Lemon v. Kurtzman*, 403 U.S. 602 (1971). We are bound to follow the Supreme Court precedent that most squarely controls our case. *Cf. Agostini v. Felton*, 521 U.S. 203, 237–38 (1997). Here that decision is plainly *Town of Greece*. By contrast, the Supreme "Court no longer applies the old test articulated in *Lemon*." *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2092 (2019) (Kavanaugh, J., concurring); *see id.* at 2081–82 (plurality op.) (similar); *id.* at 2097–98 (Thomas, J., concurring in the judgment) (similar); *id.* at 2101 (Gorsuch, J., concurring in the judgment) (similar). Indeed it's telling that, across the various opinions in *Town of Greece*, the Supreme Court cited *Lemon* only once—and it was in Justice Breyer's dissent. *See* 572 U.S. at 615 (dissenting op.). We therefore hold that *Lemon* does nothing to diminish Judge Mack's strong showing of a likelihood success on the merits.

B.

We next consider irreparable injury. It's beyond cavil that Judge Mack will be irreparably harmed in the absence of a stay pending appeal. That's for two independent reasons.

First, the district court's declaration treads on important federalism principles. *See, e.g.*, *Texas v. EPA*, 829 F.3d 405, 434 (5th Cir. 2016) (recognizing that violations of federalism constitute irreparable injury); *accord Valentine v. Collier*, 956 F.3d 797, 803–04 (5th Cir. 2020) (per curiam). To respect the independence of state courts, Congress carefully circumscribed the remedies it authorized against state judges. *See* 42 U.S.C § 1983 ("injunctive relief shall not be granted" against a state judge "unless

a declaratory decree was violated or declaratory relief was unavailable"). And the Supreme Court has recognized a "need for restraint by federal courts called on to enjoin the actions of state judicial officers." *Pulliam v. Allen*, 466 U.S. 522, 539 (1984).

The district court's declaratory remedy superintends Judge Mack's courtroom in violation of these federalism principles. And in that way, the remedy is reminiscent of others that we've stayed or vacated. *See, e.g.*, *Valentine v. Collier*, 993 F.3d 270, 292–93 (5th Cir. 2021) (Oldham, J., concurring in the judgment). Federalism principles therefore warrant a stay.

Second, and independently, the Texas State Commission on Judicial Conduct has made clear that it intends to pursue its "Inquiry" against Judge Mack while his appeal is pending. One might've thought that the Texas Attorney General's opinion in this matter would've tempered the Commission. After all, the Attorney General agreed with Judge Mack, and that alone is sufficient to give the judge a good-faith basis for continuing his opening ceremonies. *See supra* note 2 (collecting authorities that hold good-faith compliance with an Attorney General opinion cannot constitute knowing misconduct). It's therefore unclear what conceivable basis the Commission could have to ask whether Judge Mack's compliance with an Attorney General opinion constituted "willful and persistent conduct that was clearly inconsistent with the proper performance of [his] duties." Commission Inquiry at 4.

If the Attorney General's opinion was not enough, one might've thought that the Commission would await our appellate review of the district court's judgment. But Judge Mack's notice of appeal plainly did nothing to slow the Commission. Failing that, one might've thought the Commission would delay its "Inquiry" after we entered our first stay. Wrong again. The Commission's demand that Judge Mack participate in its "Inquiry"—based

on nothing more than the view of a single district judge, in conflict with the Texas Attorney General and our stay panel, and without awaiting an orderly disposition of Judge Mack's appeal—clearly constitutes irreparable injury. And it too warrants a stay pending appeal.

C.

On the other side of the ledger, any injury to FFRF is outweighed by Judge Mack's strong likelihood of success on the merits. *See, e.g.*, *Richardson v. Tex. Sec'y of State*, 978 F.3d 220, 243 (5th Cir. 2020); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013) (finding plaintiffs' "showing that their interests would be harmed by staying the injunction" to be irrelevant "given the State's likely success on the merits").

Moreover, a "stay pending appeal simply suspend[s] judicial alteration of the status quo, so as to allow appellate courts to bring considered judgment to the matter before them and responsibly fulfill their role in the judicial process." *Tex. All. for Retired Ams. v. Hughs*, 976 F.3d 564, 566 (5th Cir. 2020) (alteration in original) (quotation omitted); *Veasey v. Abbott*, 870 F.3d 387, 392 (5th Cir. 2017) (per curiam) (granting stay pending appeal because "a temporary stay will allow this court to . . . rule on the merits while preserving the status quo"). Here, preservation of the status quo plainly balances the equities and does not irreparably injure FFRF.

D.

Finally, the public interest always lies "in a correct application of the [First Amendment]." *Ams. United for Separation of Church & State v. City of Grand Rapids*, 922 F.2d 303, 306 (6th Cir. 1990). Given the clear-cut merits discussed above, the public interest therefore warrants a stay.

* * *

For the foregoing reasons, Judge Mack's motion for a stay pending appeal is GRANTED. Each of the district court's orders in this matter shall have no effect pending further order of this court. Given the ongoing "Inquiry" by the Texas State Commission on Judicial Conduct, notwithstanding our prior stay order, this panel will retain power to enter any additional orders that are necessary and appropriate in aid of our jurisdiction. *See* 28 U.S.C. § 1651.

No. 21-20279

APPENDIX

Texas State Commission on Judicial Conduct

Letter of Inquiry: Honorable Wayne Mack

CJC No. 20-0695

State Commission on Judicial Conduct

June 24, 2021

CONFIDENTIAL

Judge Wayne L. Mack
Justice of the Peace, Precinct 1
300 South Danville
Willis, TX 77378

Re: CJC No. 20-0695

Dear Judge Mack:

As you are aware, the State Commission on Judicial Conduct exercises jurisdiction over allegations of judicial misconduct. Article V, Section 1-a, Paragraph (7) of the Texas Constitution provides that, "The Commission shall keep itself informed as fully as may be of circumstances relating to the misconduct or disability of particular persons holding an office named in Paragraph A of Subsection (6) of this Section, receive complaints or reports, formal or informal, from any source in this behalf, and make such preliminary investigations as it may determine." Enclosed please find a copy of a written complaint filed against you by [redacted] marked as Exhibit C-1, pages 1-3. Also enclosed please find a copy of the May 21, 2021 Memorandum Opinion and Order issued by the United States District Court for the Southern District of Texas, Houston Division, in *Freedom from Religion Foundation, Inc. and John Roe v. Wayne Mack, in both his personal capacity and in his official capacity on behalf of the State of Texas* (Cause No. 4:19-CV-1934), marked as Exhibit CJC-2, pages 6-20, and an article relating to same, marked as Exhibit CJC-3, pages 21-37. Also, for your convenience, please find enclosed a copy of the Letter of Caution issued to you by the Commission in November of 2015 in CJC No. 15-0148-JP, marked as Exhibit CJC-1, pages 4-5.

Our inquiries at this point are confidential, and it has been our experience that the majority of complaints can be resolved based on information received from the judge. In order for us to complete the investigation into this matter, we ask that you respond to the questions contained in the enclosed Letter of Inquiry, marked as item **QJ-1**. We encourage you to provide typed responses on additional pages. After responding to the questions, please feel free to submit any comment, explanation, or justification you believe appropriate. Additionally, please personally sign, date and verify your answers before a notary public.

In making this request, the Commission makes no prejudgment that you have done anything improper, and we look forward to resolving this matter as expeditiously as possible. Accordingly, we request your written response on or before **Monday, July 12, 2021.**

We appreciate your assistance in carrying out our responsibilities. If you have any questions, or if we can be of assistance to you, please do not hesitate to contact this office.

Sincerely,

/s/ Lorin Hayes

Lorin Hayes
Commission Counsel

LH

Enclosures:

Complaint	(C-1)
Letter of Caution	(CJC-1)
Memorandum Opinion and Order	(CJC-2)
Article	(CJC-3)
Letter of Inquiry	(QJ-1)

QJ-1
CJC No. 20-0695
LETTER OF INQUIRY: HONORABLE WAYNE MACK

1. Please specify the physical address, telephone number, and email address you would like the Commission to use when contacting you.

2. Please state the dates and nature of your judicial service.

3. Please describe the changes you made, if any, in response to the Letter of Caution issued to you by the Commission in November of 2015 regarding your Chaplaincy Program and/or your practice of opening court with a prayer. [*See* Exhibit CJC-1, pages 4-5.]

4. Please describe in detail your practice in this regard on or around [redacted], when [redacted] came before your court for a hearing.

5. Please respond to [redacted] allegation that even though you told those in attendance during his hearing they "could step out if [they] wanted to" and it would not affect their case, you in fact "took notice of who was participating and continued to look around the room throughout the prayer."

6. Please respond to [redacted] allegation that in your handling of his case, you were prejudiced against him because of his religious beliefs.

7. Please state whether the Freedom from Religion Foundation, Inc. ("FFRF") filed a federal civil lawsuit against you pursuant to 42 U.S.C. § 1983 challenging the constitutionality of your practice of opening court with a prayer (Cause No. 4:19-CV-1934).

8. Please state whether on May 21, 2021, the United States District Court for the Southern District of Texas, Houston Division, issued a Memorandum Opinion and Order in Cause No. 4:19-CV-1934 declaring your practice of opening court with a prayer unconstitutional. [*See* CJC-2, pages 6-20.]

9. Please describe in detail the changes you have made and/or the steps you have taken as a result of this ruling. In your response, please address the fact the U.S. District Court stated in its ruling that should you violate the declaratory decree in the future, an injunction will issue.

10. Please discuss whether, in your opinion, by opening your court sessions with a prayer, you violated the United States Constitution and in so doing, violated Canon 2A of the Texas Code of Judicial Conduct.

11. Please discuss whether, in your opinion, your practice of opening your court sessions with a prayer created the appearance you were biased in favor of those who participated in said prayer and/or biased against those individuals who did not, in violation of Canons 3B(5) and/or 3B(6) of the Texas Code of Judicial Conduct.

12. Please discuss whether, in your opinion, your conduct in this regard constituted willful and persistent conduct that was clearly inconsistent with the proper performance of your duties and/or cast public discredit upon the judiciary or administration of justice, in violation of Article V, Section 1-a(6) of the Texas Constitution?

13. Please provide the Commission with any additional information and/or copies of documentation that you believe to be relevant to this matter. You may also include sworn statements or affidavits from fact witnesses in support of your response.

_____ _____

(Judge's signature) **(Date)**

_____

(**Printed Name**)