Exhibit H

FREEDOM FROM RELIGION *foundation*

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April 21, 2016

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

Dear Attorney General Paxton:

I am writing on behalf of the Freedom From Religion Foundation regarding the constitutionality of the Justice Court Chaplaincy Program and courtroom prayer practice of the Honorable Judge Wayne L. Mack. FFRF is a national nonprofit organization with over 23,500 members, including more than 950 members in the state of Texas. Our purpose is to protect the constitutional separation between state and church.

FFRF first received a complaint about Judge Mack's courtroom prayer practice from a citizen who was forced to appear before Judge Mack for a civil case. On October 10, 2014, FFRF contacted the Texas State Commission on Judicial Conduct to complain about Judge Mack's practice of opening court sessions with prayer. Shortly thereafter, a second complainant, an attorney who was obligated to appear before Judge Mack on a number of cases, contacted FFRF to object to the courtroom prayer practice. Both complainants consider the courtroom prayers to be an endorsement of Christianity. Both complainants felt coerced to participate in the prayers and both did in fact participate, despite their personal objections, out of fear that nonparticipation would prejudice the judge against them and affect their social or professional standing.

It is our sincere hope that the Office of the Attorney General will issue an objective opinion on the current state of the law, despite its recent hiring of two attorneys from First Liberty to the positions of First Assistant Attorney General and Chief of Staff. First Liberty, of course, defended Judge Mack's courtroom prayer practice before the State Commission on Judicial Conduct. The conflict of interest here should be apparent. Government officials and Texas citizens should be able to rely on Attorney General legal opinions. It would be a disservice to the public for the Attorney General to issue opinions that merely reflect the desires and biases of those who serve in that office. To assist the office in reaching an objective decision, FFRF submits the brief below.

We write in opposition to the continuation of Judge Mack's unconstitutional courtroom prayer practice, which is unsupported by our nation's history and runs counter to the constitutional principles on which this country was founded. These courtroom prayers are a divisive religious endorsement and a coercive practice that forces citizens to violate their right of conscience in order to attend to secular matters before Judge Mack.

The facts surrounding Judge Mack's courtroom prayer practice are adequately summarized in the State Commission on Judicial Conduct's February 17 brief and will not be repeated here. Instead, we urge the Office of the Attorney General to first consider the following hypothetical:

> 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.

Judge Mack's prayer practice closely resembles the above hypothetical, which specifically concerns courtroom prayer and is taken from Justice Kagan's dissenting opinion in *Town of Greece v. Galloway*, 134 S.Ct. 1811, 1842 (2014) (Kagan, J., dissenting). While the Lieutenant Governor's office characterizes Judge Mack's courtroom prayers as "almost identical" to the legislative prayer practice found permissible in *Greece*, this argument is unpersuasive, given the explicitly contradictory language in the opinion. Justice Alito, concurring in the *Greece* decision, joined by Justice Scalia, specifically addressed the above hypothetical and stated that he was "concerned that at least some readers will take these hypotheticals as a warning that this is where today's decision leads—to a country in which religious minorities are denied the equal benefits of citizenship." *Id.* at 1834 (Alito, J., concurring). He continued, "Nothing could be further from the truth." *Id.* In Alito's mind, the legislative prayer practice upheld in *Greece* <u>does not extend to courtroom prayer</u>.

The four dissenting justices in the *Greece* decision similarly would not hold that Judge Mack's courtroom prayer practice passes constitutional muster. Justice Kagan's opinion makes clear that the analysis in *Greece* would be different if the Supreme Court were considering courtroom, instead of legislative, prayer. Referring to the above hypothetical, Justice Kagan writes, "I would hold that the government officials responsible for the above practices—that is, for prayer repeatedly invoking a single religion's beliefs in these settings—crossed a constitutional line. I have every confidence that the Court would agree." *Id. at* 1843 (Kagan, J., dissenting).

We encourage the Office of the Attorney General to adopt the opinion of the six Supreme Court justices, five of whom remain on the Court today, who addressed courtroom prayer in *Greece* and indicated it does not fall within the narrow legislative prayer exception to the Establishment Clause. For the follow reasons, Judge Mack's courtroom prayer practice violates the Establishment Clause of the First Amendment.

A. Judge Mack's courtroom prayer practice is historically unsupported and factually distinct from the legislative prayer upheld in *Marsh* and *Greece*.

In *Marsh v. Chambers*, the U.S. Supreme Court carved out a narrow exception to traditional Establishment Clause analysis in holding that invocations offered to open legislative sessions are constitutional because legislative prayer is historically unique: "In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society." 463 U.S. 783, 792 (1983); *see also id.* at 796 (Brennan, J., dissenting) ("The Court makes no pretense of subjecting . . . legislative prayer to any of the formal 'tests' that have traditionally structured our inquiry under the Establishment Clause."). In 2014, in *Town of Greece v. Galloway*, the Court reaffirmed its commitment to *Marsh* and the special exception legislative prayer receives from the Establishment Clause due to its unique history. 134 S.Ct. at 1819 (noting that the Court's inquiry is to "determine whether the prayer practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures" upheld in *Marsh*).

Judge Mack's courtroom prayer practice enjoys none of the "unbroken history of more than 200 years" that insulates the legislative prayer practice from traditional Establishment Clause analysis. The Lieutenant Governor's February 16 brief points to similarities in the method used to select chaplains in an effort to equate Judge Mack's courtroom prayer practice and the legislative prayer upheld in *Greece*. But these similarities are beside the point.

If a public school teacher opened every school day with prayers delivered by guest chaplains in the exact manner described in *Greece*, there is no doubt that the practice would violate the Establishment Clause. *Cf. Lee v. Weisman*, 505 U.S. 577 (1992) (holding similar prayers at graduation ceremonies unconstitutional). The practice would not receive the protections afforded to legislative prayer because even though the method of delivery is the same, the setting—the public school system—and the audience—school children readily susceptible to coercive pressure—makes the practice factually distinct from the unbroken 200-year tradition of legislative prayer. To determine if a practice is afforded the legislative prayer exception, "[t]he inquiry remains a fact-sensitive one that considers both <u>the setting</u> in which the prayer arises and <u>the audience</u> to whom it is directed." *Greece*, 134 S.Ct. at 1825 (emphasis added).

Judge Mack's courtroom is a far more coercive <u>setting</u> than a state legislature or local town council meeting. Citizens are often compelled to appear before Judge Mack under threat of additional fines or the issuance of an arrest warrant for failure to appear. This is in stark contrast to the members of the public who may choose to attend a legislative session, but is in line with public school cases that have long recognized the coercive nature of truancy laws. *See, e.g.*, *McCollum v. Bd. of Educ.*, 333 U.S. 203, 204 (1948) (noting Illinois' compulsory education law and that "[p]arents who violate this law commit a misdemeanor punishable by fine").

Unlike in the case of legislative prayer where "[t]he principal audience for these invocations is not, indeed, the public but lawmakers themselves," *Greece*, 134 S.Ct. at 1825, the intended <u>audience</u> for Judge Mack's prayers is the attorneys and other members of the public assembled in the courtroom. This is clear from the practice itself, which includes the bailiff reading a prepared statement to those assembled in the courtroom before Judge Mack has even entered. Indeed, it

would be odd to claim that the intended audience is Judge Mack, rather than those assembled in the courtroom. The alleged purpose of the prayers is to "solemnize the court proceedings." Unlike a state legislative session, where only lawmakers are typically permitted to speak, or a local board meeting, where public comment may be invited but is not essential, court proceedings *necessarily* involve private parties and their attorneys. If Judge Mack were the sole intended audience, he could, of course, pray by himself, or engage with his chosen chaplain in the privacy of his chambers, rather than making a public display of it.

B. Judge Mack's courtroom prayer practice is legally distinct from the ceremonial deism that opens court sessions before the Texas and U.S. Supreme Courts.

The Lieutenant Governor's February 16 brief seeks refuge in tradition and history by claiming that Judge Mack's prayer practice "cannot be distinguished" from the announcement, "God save the [United States] [State of Texas] and this Honorable Court," which regularly opens U.S. and Texas Supreme Court sessions. But the Lieutenant Governor's office is mistaken to characterize the U.S. and Texas Supreme Court's opening announcements as "prayers" at all. In reality, these instances of "ceremonial deism"—brief, historically ubiquitous, non-prayers with minimal religious content—can and have been distinguished from courtroom prayer, though the Lieutenant Governor's office fails to address, or even acknowledge, any of the relevant case law. The most relevant case, *Constangy*, is fully addressed in the State Commission on Judicial Conduct's February 17 brief and will not be further explored here. *See N.C. Civil Liberties Union Legal Found. v. Constangy*, 947 F.2d 1145 (4th Cir. 1991), *cert. denied*, 112 S.Ct. 3027 (1992) (distinguishing the practice of opening courtroom sessions with prayer from the U.S. Supreme Court's tradition and the legislative prayer tradition, and ruling that courtroom prayer violates the Establishment Clause).

In *Elk Grove Unified Sch. Dist. v. Newdow*, Justice O'Connor explained why the Court permits passing references to religion in limited circumstance:

> This category of "ceremonial deism" most clearly encompasses such things as the national motto ("In God We Trust"), religious references in traditional patriotic songs such as The Star–Spangled Banner, and the words with which the Marshal of this Court opens each of its sessions ("God save the United States and this honorable Court").

542 U.S. 1, 37 (2004) (O'Connor, J., concurring). According to Justice O'Connor, government expression that falls within this limited category does not offend the Establishment Clause due to its "history, character, and context." *Id.* In contrast, the prayers in Judge Mack's courtroom are historically unsupported, quintessentially religious in character, and given in a coercive context where a government actor is exercising significant power over the lives of citizens.

Unlike the ceremonial deism practiced by the U.S. and Texas Supreme Courts, the prayers given in Judge Mack's courtroom, in which religious leaders make direct appeals to a supernatural entity, are the archetype of a religious act. "[O]nly in the most extraordinary circumstances could actual worship or prayer be defended as ceremonial deism. We have upheld only one such prayer against Establishment Clause challenge, and it was supported by an

extremely long and unambiguous history." *Id.* at 40 (citing *Marsh v. Chambers*). Judge Mack's courtroom prayers lack any resemblance to ceremonial deism, acts which are "protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content." *Lynch v. Donnelly*, 465 U.S. 668, 716 (1984) (Brennan, J., dissenting).

Judge Mack's courtroom prayer practice is legally and factually distinct from both the legislative prayer practice upheld in *Marsh* and *Greece* and the tradition of the U.S. and Texas Supreme Courts, which do not open with a prayer but with a statement that amounts to ceremonial deism. Therefore, Judge Mack's courtroom prayer practice must be analyzed under traditional Establishment Clause tests. The practice fails each of these tests.

C. Judge Mack's prayer practice violates the Establishment Clause due to its religious purpose, religious endorsement, and coercive nature.

The Constitution's Establishment Clause, among other things, "prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 594 (1989) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)). In *Lemon v. Kurtzman*, the Supreme Court established a three-part test to determine whether governmental action runs afoul of the Establishment Clause: a challenged government action is unconstitutional if: (1) it does not have a secular purpose; (2) its primary effect either advances or inhibits religion; or (3) it excessively entangles government with religion. 403 U.S. 602, 612–13 (1971); *see also, e.g.*, *Agostini v. Felton*, 521 U.S. 203 (1997); *Doe v. Beaumont Indep. Sch. Dist.*, 240 F.3d 462, 468 (5th Cir. 2001).

The "*Lemon* test" has been subjected to much criticism by some members of the Supreme Court and, as this internal criticism has mounted, a number of cases have redefined the first two prongs under a so-called "endorsement test" that asks whether the practice under review conveys a message of endorsement of religion. *See, e.g.*, *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *Cnty. of Allegheny*, 492 U.S. at 626–32 (O'Connor, J., concurring). Alternatively, a minority of Justices occasionally advocate for scrutinizing government action under a "coercion test" derived from the Supreme Court's decisions in *Santa Fe Independent Sch. Dist. v. Doe*, 530 U.S. 290 (2000), and *Lee v. Weisman*, 505 U.S. 577 (1992). Although it is not clear where this test "belongs in relation to the Lemon test," the test itself "seeks to determine whether the state has applied coercive pressure on an individual to support or participate in religion." *Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 850 (7th Cir. 2012).

Regardless of the test used, Judge Mack's courtroom prayer practice fails.

i. Judge Mack's public comments betray his underlying religious purpose.

Courts analyzing the purpose behind a government practice normally give deference to a government assertion of secular purpose. *See Edwards v. Aguillard*, 482 U.S. 578, 585 (1987). However, the court does not have to accept a secular purpose that is "an apparent sham, or [where] the secular purpose [is] secondary." *McCreary Cnty. v. Am. Civil Liberties Union*, 545

U.S. 844, 864–65 (2005) ("[W]e have not made the purpose test a pushover for any secular claim."). Judge Mack's public comments reveal the underlying religious purpose behind his courtroom prayer practice.

On October 10, 2014, Judge Mack issued a statement in response to FFRF's concerns about his courtroom prayer practice in a letter advertising a prayer breakfast, entitled "I need your help to take a stand." The letter, addressed to "Pastors & People of Faith," explained that Judge Mack wanted "to make a statement . . . that God has a place in all aspects of our lives and public service . . . ."[1] This statement is not consistent with Judge Mack's proffered secular purpose of using courtroom prayer to solemnize his court proceedings. This statement is a call to arms, directed to people of faith.

Judge Mack has used his courtroom prayer practice to draw a line in the sand, dividing the citizens of Montgomery County into Christian insiders who support his Christian cause and non-Christian outsiders, whom he refers to collectively as "atheists." Speaking at his prayer breakfast on October 23, 2014, Justice Mack stated, "as the Justice of the Peace, I will bring the Prince of Peace to work with me every day." He went on to claim, "Atheists have fabricated facts to suit their agendas and even used fabricated and imaginary events to create a complaint to file with the Texas Commission on Judicial Conduct."[2] Judge Mack's eagerness to cast himself as a Christian martyr and frame the issue as one of him against "atheists" betrays his underlying religious purpose.

ii. Judge Mack's courtroom prayer practice has the primary effect of endorsing religion.

Whether reviewed under *Lemon's* "effect" prong or under the separate endorsement test, Judge Mack's courtroom prayer practice fails to pass constitutional muster. Judge Mack's prayer practice has already had the demonstrable effect of isolating non-Christians who have appeared in his courtroom by creating the appearance that he, in his capacity as a Montgomery County Justice of the Peace, is endorsing Christianity. FFRF's original citizen complainant described the experience of appearing in Judge Mack's court like this:

> [Judge Mack] announced that all present in the court should remain standing after rising for his entrance. [After issuing the prayer announcement] he instructed us to remain standing while he discussed his new program that he was very proud of in which his court now has 50 Chaplains 'on staff.' . . . He then spent a few minutes introducing 'today's visiting pastor,' discussing his credentials, announcing which Church he was from and where it was located. The pastor then stood and announced that he was going to read from the Bible. He read a Bible passage (about 5-8 min) and while he was reading it, I felt that the Judge was watching for reactions from the courtroom; bowed heads, indifference etc. I definitely felt that our cases were to be affected by our reactions or lack [thereof].

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[1] Judge Wayne L. Mack, letter appearing in Montgomery County Eagle Forum (last visited Apr. 19, 2016), *available at* http://goo.gl/Nu2o5l.

[2] Kimberly Sutton, *Mack's inaugural breakfast turnout victorious despite courtroom prayer controversy*, THE COURIER OF MONTGOMERY COUNTY (last visited Apr. 19, 2016), *available at* http://goo.gl/CzGvQI.

Judge Mack's prayer practice has undermined his appearance of impartiality as a judge. FFRF's second complainant, an attorney who regularly appeared before Judge Mack, remarked that the judge "was so proud of his ceremonies that it would clearly be prejudicial to anyone who took exception." This is a concern from a judicial ethics perspective, but also demonstrates that the prayer practice creates the impression in reasonable observers that a government representative endorses the religious statements made by the visiting pastors. Judge Mack has done nothing to alleviate this impression and has, in fact, exacerbated the appearance of government endorsement through his subsequent actions—holding a prayer breakfast to defend his courtroom prayer practice—and statements.

iii. The courtroom atmosphere in which the prayers take place is inherently coercive.

Though never adopted by the majority on the Supreme Court, the coercion test represents the lowest bar for the government when analyzing a potential Establishment Clause violation. Judge Mack's courtroom prayer practice utterly fails this maximally permissive test, as applied to citizens, attorneys, and court employees.

The Establishment Clause "guarantees that government may not coerce anyone to support or participate in religion or its exercise." *Lee*, 505 U.S. at 587 (quoting *Lynch*, 465 U.S. at 678). In *Lee*, the Supreme Court held that a public school district had coerced students into supporting government-sponsored religion by having clergy lead prayers at graduation ceremonies. *Id.* In analyzing the coercive nature of this practice, the Court concluded that the school's "direct supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence . . . ." *Id.* at 593. Even though the parties had stipulated that student attendance at graduation was voluntary, the Court rejected the argument that the voluntary nature of the ceremony diminished the coercive influence on students. *Id.* at 594–95. For many who appear in Judge Mack's courtroom, their presence is not voluntary. Even for those who can leave during the prayers, the coercive nature of the courtroom effectively compels their attendance.

As described earlier in this brief, citizens are often compelled to appear before Judge Mack under threat of fines or the issuance of an arrest warrant for failure to appear. The entire machinery of the Montgomery County government compels their appearance in court. And though they are allegedly invited to step outside the room during the prayers, Judge Mack has presented them with an untenable dilemma: either risk the court's ire by leaving the courtroom during the prayer practice or violate their right of conscience by remaining.

As for legal counsel, there is substantial professional pressure to stay in a judge's good graces. Attorneys risk their very livelihood if they cross a judge. If a judge has instituted and vigorously defended a particular set of religious practices in his courtroom, common sense and professional obligations dictate that attorneys remain standing inside the courtroom and "maintain respectful silence" during the prayers. *Id.* at 593. FFRF's attorney complainant summarized the coercive nature of Judge Mack's prayer practice like this: "I did not leave the courtroom because I was there to represent my client, not to make a protest, and I could not in good conscience put my client's interests at risk by accepting the Judge's 'invitation' to leave."

Court employees, too, have professional duties that require their attendance in the courtroom during these prayers. The very bailiff who is charged with announcing the supposedly voluntary nature of the prayers is himself required to remain inside the courtroom. For county employees working in Judge Mack's courtroom, not observing the prayers may amount to a fireable offense.

D. Judge Mack's "Justice Court Chaplaincy Program" may itself violate the Constitution and cannot justify the courtroom prayer practice.

The Lieutenant Governor's brief describes Judge Mack's Justice Court Chaplaincy Program as a "religious accommodation" with the secular purpose of "freeing [Judge Mack] to concentrate on the death investigation instead of having to divide his time between investigating the death and managing traumatized persons . . . ." But this description fails in two regards: 1) the proposed secular purpose does not justify the creation of a Justice Court Chaplaincy Program, and 2) the very concept of a religious accommodation does not apply to this program.

The State Commission on Judicial Conduct's March 4 supplemental statement describes Judge Mack's Court Chaplaincy Program as an "unauthorized practice." This description is accurate, since "managing traumatized persons" is not among Judge Mack's duties as a Justice of the Peace. The Texas Code of Criminal Procedure, ch. 49, describes the "Duties Performed By Justices of The Peace" in great detail and interacting with traumatized persons is not among them. On its face, therefore, the proposed secular justification for the chaplain program fails. The chaplains cannot be justified as relieving Judge Mack of a duty with which he is not charged.

The proposed secular justification for the chaplaincy program also fails because Judge Mack needs to do more than justify creating a program to manage traumatized persons. He needs to justify why that program is inherently religious, rather than secular. Secular trauma counselors or therapists would be qualified to perform the duties assigned to Judge Mack's chaplains and would be available to manage *all* traumatized persons on the scene, not just those with a specific religious background. The Lieutenant Governor's brief attempts to gloss over this question with a passing reference to "religious accommodation," but the very concept of a religious accommodation does not apply to the circumstances in this case.

Justice Brennan addressed the permissible purpose of a government-run chaplain program in *Schempp*, which the Lieutenant Governor's office cited, but inexplicably failed to analyze on this fundamental point, made directly before the language quoted in its brief:

> [The provision of chaplains may] be sustained on constitutional grounds as necessary to secure to the members of the Armed Forces and prisoners those rights of worship guaranteed under the Free Exercise Clause. *Since government has deprived such persons of the opportunity to practice their faith at places of their choice*, the argument runs, government may, in order to avoid infringing the free exercise guarantees, provide substitutes where it requires such persons to be.

Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 297–98 (1963) (Brennan, J., concurring) (emphasis added). Government-run chaplain programs are justified as a religious accommodation only when they relieve a government-imposed burden on religious exercise. It

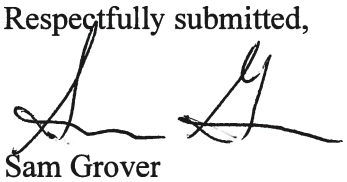
may be impossible for military service members to find a place of worship while on a mission in a foreign country or for an inmate in a prison to find a way to worship. But there is no comparable government-imposed burden on the free exercise rights of traumatized persons when a Justice of the Peace is performing an inquest into the death of a person. Therefore, "religious accommodation" does not provide a constitutional justification for Judge Mack's court chaplaincy program.

Judge Mack's program provides chaplains not because any branch of the government has created a burden on any person's free exercise rights, but because the judge has chosen to act outside of his official duties. He has created an inherently religious program designed to promote his personal religious views by ministering to traumatized people at scenes of death and proselytizing citizens obligated to appear before him in court.

E. Conclusion

There is no constitutional justification for Judge Mack's courtroom prayer practice or his Justice Court Chaplaincy Program. Judge Mack's courtroom prayers are historically unsupported and factually distinct from the legislative prayer upheld in *Marsh* and *Greece* or the ceremonial deism practiced before Texas and U.S. Supreme Court sessions. The practice violates the Establishment Clause due to its religious purpose, religious effect and endorsement, and inherently coercive nature. And Judge Mack's Justice Court Chaplaincy Program is itself a constitutional violation that cannot justify his courtroom prayers. Both the chaplain program and courtroom prayer practice must be stopped immediately.

Respectfully submitted,



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