



The Senate of The State of Texas

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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

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.

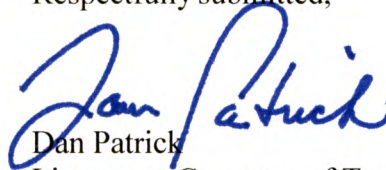
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IV. Conclusion

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,

A handwritten signature in blue ink that reads "Dan Patrick". The signature is stylized and cursive.

Dan Patrick
Lieutenant Governor of Texas