

LEGISLATOR-LED PRAYER: A HARMLESS HISTORICAL TRADITION OR AN UNCONSTITUTIONAL ESTABLISHMENT OF RELIGION?

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INTRODUCTION

The First Amendment commands that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”¹ The Framers intended for the Establishment Clause to erect a wall separating the relations of church and state.² This metaphor is an accepted conceptualization of the relationship between church and state that represents the notion that the state neither inhibit nor advance any religion.³ Thomas Jefferson’s architectural symbolism illustrating the meaning of the

1. See U.S. CONST. amend. I.

2. See DANIEL DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 1-2 (2002) (recounting Thomas Jefferson’s celebration of the division of religion and civil government in a letter to Danbury Baptist Association of Connecticut on January 1, 1802).

3. See *id.* at 2 (conveying that religion is a voluntary and intimately personal endeavor; political intrusions would implicate an individual’s rights of conscience).

First Amendment sparked debate about its implications for church-state law.⁴ Despite a declaration forbidding the establishment of religion in the Constitution, there are many religious references throughout American government including: “One Nation Under God” in the pledge of allegiance and “In God We Trust” on U.S. currency.⁵ Many of these traditions are now widely accepted as part of American culture; however, some traditions, such as government sanctioned prayer, face repeated challenges in the Court as potential violations of the First Amendment.⁶

This Comment examines the constitutionality of state legislator-led prayer by focusing on a circuit split between the Fourth and Sixth Circuits regarding prayers at local government board meetings led directly by elected commissioners.⁷ Part I describes the current Supreme Court jurisprudence surrounding legislative prayer, specifically by exploring *Marsh v. Chambers* and *Town of Greece v. Galloway*.⁸ Part I also introduces the circuit court cases that analyze the constitutionality of prayer practices at local Board of Commissioner meetings.⁹ Part II compares the cases at issue in the current circuit split: Fourth Circuit case *Lund v. Rowan County* and Sixth Circuit case *Bormuth v. County of Jackson*.¹⁰ Part II argues that both the Fourth

4. See *id.* at 2-4 (discussing the reliance on Jefferson’s metaphor in Supreme Court jurisprudence, specifically Justice Black’s reference in the *Everson v. Board of Education* opinion).

5. See *Engel v. Vitale*, 370 U.S. 421, 442 (1962) (identifying that as a nation, we are a religious people and our institutions presuppose a higher being).

6. See generally *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 317 (2000) (ruling that a school district’s policy permitting students to lead prayers before a football game was a violation of the Constitution); *Lee v. Weisman*, 505 U.S. 577, 586 (1992) (holding clerical members presiding over invocation and benediction at a public school graduation was inconsistent with the Establishment Clause); *Marsh v. Chambers*, 463 U.S. 783, 794-795 (1983) (upholding the traditional practice of legislative prayer led by a paid clergy member); *Engel*, 370 U.S. at 424 (holding the prayer practices of the Board of Education violate the Establishment Clause despite parents’ ability to opt-out).

7. See Patrick L. Gregory, *Circuit Split on Legislator-Led Prayer Could Entice Supreme Court*, BNA (Sept. 17, 2017), <https://www.bna.com/circuit-split-legislator-led-n57982087849/> (indicating that such a rigid split between circuit courts could prompt the Supreme Court to take up the issue of legislative prayer for the third time).

8. See *infra* Part I (demonstrating how the Court handles claims challenging legislative prayer, and the Court’s clarification in *Town of Greece v. Galloway* that legislative prayer was not a mere carved out exception to Establishment Clause jurisprudence).

9. See *infra* Part I (summarizing the decisions filed in *Lund v. Rowan County* and *Bormuth v. County of Jackson*).

10. See *infra* Part II (demonstrating the differences in how each circuit analyzed the prayer practices performed at local board meetings).

Circuit and Sixth Circuit correctly applied precedent despite reaching different verdicts as to the constitutionality of legislator-led prayer.¹¹ Finally, Part II proposes that if the Sixth Circuit considered additional evidence offered to supplement the record, the court would find the prayer practices in Jackson County, Michigan, violate the Constitution.¹² Part III recommends that the Supreme Court take up the issue to answer looming questions regarding the constitutionality of legislator-led prayer and establish a framework for analysis to be followed by lower courts.¹³ Part IV concludes by reiterating the unique significance of legislative prayer in Establishment Clause jurisprudence and the implications of such precedent in the current circuit split.¹⁴

I. BACKGROUND

A. *The First Amendment*

The First Amendment contains two clauses regarding religion: the Establishment Clause and the Free Exercise Clause.¹⁵ These clauses were made applicable to states through incorporation by the Fourteenth Amendment.¹⁶ The Establishment Clause has been interpreted by the Court to mean that the government may not hold one religion or the absence of religion to be greater than any other religion.¹⁷ The Court has created various

11. *See infra* Part II (distinguishing the factual records in each case and noting the fact-sensitive considerations a court must make in determining the constitutionality of particular legislative prayer practices).

12. *See infra* Part II (exploring the outcome of *Bormuth* if the Sixth Circuit had considered videos of commissioner's treatment of the plaintiff and additional facts provided by the amicus brief filed by Americans United for the Separation of Church and State).

13. *See infra* Part III (explain that District Courts around the nation have also issued conflicting rulings on the topic of legislative prayer due to a lack of guidance from the Court).

14. *See infra* Part IV (concluding that courts should examine claims challenging the constitutionality of legislative led prayer on a case-by-case basis due to the fact-sensitive nature of the Court's method of analysis).

15. *See* U.S. CONST. amend. I (stating Congress shall not make laws regarding the establishment of religion or prohibiting the free exercise of religion).

16. *See* *Everson v. Bd. of Educ.*, 330 U.S. 1, 13-15 (1947) (noting that prior to the passage of the Fourteenth Amendment, First Amendment restraints did not apply to states but many state constitutions still adopted similar provisions protecting religious liberties).

17. *See id.* at 15-16 (identifying that neither state nor federal government may set up a religious worship center, force or influence citizens to practice a religion, or levy taxes to benefit a religious group).

tests to evaluate Establishment Clause claims; the most commonly applied test is the *Lemon* Test which requires the government's practice (1) to have a secular legislative purpose, (2) its principal and primary effect must neither advance nor inhibit religion, and (3) it must not nurture an unnecessary entanglement with religion.¹⁸ Challenges to legislative prayer practices are Establishment Clause inquiries; however, the Court has not analyzed these claims using the tests because the Court rested its holding on historical analysis.¹⁹

B. *Supreme Court Jurisprudence of Legislative Prayer*

I. *Marsh v. Chambers and the Historic Importance of Legislative Prayer*

The Supreme Court first answered challenges brought against the constitutionality of legislative prayer in the 1983 case, *Marsh v. Chambers*.²⁰ Ernest Chambers, a member of the Nebraska Legislature from the Eleventh District, brought suit to enjoin the legislature's prayer practice led by a chaplain paid by the state.²¹ The majority opinion upheld the prayer practices of the Nebraska legislature based largely on the support of history and tradition.²² The Court asserted that legislative prayer does not conflict with the Establishment Clause based on the prayer policies adopted by the First Congress which allowed for a chaplain to be chosen and paid by the government, just as the case in the Nebraska Legislature.²³ While historical patterns alone would not permit a modern constitutional violation, the majority of the Court believed the historical context surrounding legislative prayer revealed that the Framers did not intend to prohibit legislative

18. *See generally* *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (holding statutes that provide state aid to church-related educational institutions are unconstitutional).

19. *See* *Bormuth v. Cty. of Jackson*, 870 F.3d 494, 515 (6th Cir. 2017) (en banc) (noting that Justice Burger, the author of the opinion in *Lemon*, also wrote the opinion in *Marsh* that neglected to apply the tests to legislative prayer).

20. *See* *Marsh v. Chambers*, 463 U.S. 783, 784 (1983) (upholding the constitutionality of Nebraska's legislative prayer practices that employed a chaplain, paid by the state, to open each legislative session).

21. *See id.* (identifying that Ernest Chambers brought the action under 42 U.S.C. § 1983).

22. *See id.* at 786 (explaining that the tradition of legislative prayer has existed in the United States since colonial times, persisted through the nation's founding, and coexisted with "principles of disestablishment and religious freedom" ever since).

23. *See id.* at 787 (noting the lack of legislative prayer during the Constitutional Convention and emphasizing Congress's appointment of committees to establish a statute that would provide compensation to chaplains).

prayer.²⁴ Legislative prayer has been and, according to *Marsh*, will remain a tradition so long as the prayer practice does not proselytize or advance a particular religion and does not disparage other faiths.²⁵

Taken alone, *Marsh v. Chambers*, appeared to create an exception to Establishment Clause doctrine.²⁶ Confusion spawned from the majority opinion's failure to apply the dominant Establishment Clause test, the *Lemon* Test, in the context of legislative prayer.²⁷ Instead, the Court in *Marsh* relied on a historical analysis to uphold the practice's constitutionality by treating legislative prayer differently than other Establishment Clause claims such as school prayer.²⁸ Nevertheless, Justice Brennan's dissent in *Marsh* illustrates that if the Court applied the *Lemon* Test, legislative prayer would undeniably fail all three prongs.²⁹ The Court did not address the issue of legislative prayer again until three decades after the ruling of *Marsh*.³⁰

2. Town of Greece v. Galloway: An Expansion of Marsh

Since 1983, lower courts have struggled with the question of whether and how the ruling in *Marsh* applied to prayer practices in city councils and

24. See *id.* at 814-815 (announcing that James Madison, a strong proponent of religious freedom and the drafter of the Establishment Clause of the First Amendment, voted for the bill authorizing payment of chaplains in 1789).

25. See Kenneth A. Klukowski, *In Whose Name We Pray: Fixing the Establishment Clause Train Wreck Involving Legislative Prayer*, 6 GEO. J.L. & PUB. POL'Y 219, 222 (2008) (adopting dicta from *Marsh* to create a standard applicable to future cases questioning legislative prayer practices).

26. See *Marsh*, 463 U.S. at 796 (Brennan, J., dissenting) (concluding the majority was simply carving out an exception to the Establishment Clause rather than reshaping existing doctrine to accommodate legislative prayer because the majority neglected to analyze the prayer practices through settled doctrine).

27. See generally Scott W. Gaylord, *When the Exception Becomes the Rule: Marsh and Sectarian Legislative Prayer Post-Summum*, 79 U. CIN. L. REV. 1017, 1019 (2011) (highlighting that the majority opinion failed to mention *Lemon v. Kurtzman*, let alone distinguish the case).

28. See *Marsh*, 463 U.S. at 795-96 (Brennan, J., dissenting) (explaining that the Court's limited rationale shall not threaten the overall fate of the Establishment Clause).

29. See *id.* at 800-801 (Brennan, J., dissenting) (emphasizing that law students applying the principles of the *Lemon* test to legislative prayer nearly unanimously find the practice to be unconstitutional).

30. See David Masci, *5 Facts About the U.S. Supreme Court's Public Prayer Case*, PEW RES. CTR. (November 6, 2013), <http://www.pewresearch.org/fact-tank/2013/11/06/5-facts-about-the-u-s-supreme-courts-public-prayer-case/> (suggesting the Court's ruling in a new legislative prayer case would hinge on whether the new panel of judges interprets *Marsh* broadly or narrowly).

county commissioner offices.³¹ The Court addressed this inquiry and elucidated many of the questions surrounding the *Marsh* opinion in response to a suit filed in 2013 by citizens of Greece, New York, requesting an injunction to limit the opening prayer practice at the town's public board meetings to inclusive and nonsectarian prayers.³²

The town's monthly board meetings opened with an invocation led by a local clergy member.³³ Even though all of the participating clergy from 1999-2007 were Christian, the town maintained that it would never exclude or deny an opportunity to any prospective prayer giver.³⁴ Despite the explicit references to the Christian faith during the town's opening prayers, the Court upheld the constitutionality of the prayer practice as permissible under the Establishment Clause because the board's informal selection method did not exclude religions other than Christianity and permitted other religious groups to give the invocation.³⁵

The opinion in *Town of Greece* directly rejects the long-standing assumption that *Marsh* carved an exception into the Establishment Clause by explaining that the majority in *Marsh* did not find applications of formal tests necessary because the history of legislative prayer provided ample support for its holding.³⁶ The Court's analysis in *Town of Greece*, unlike

31. See Perry Dane, *Prayer Is Serious Business: Reflections on Town of Greece*, 15 RUTGERS J.L. & RELIGION 611, 614 (2014) (exploring whether, under *Marsh*, lower courts may find practices "too sectarian" and therefore a violation of the Establishment Clause).

32. See *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1817 (2014) (noting the respondents did not seek to end the town's prayer practice).

33. See *id.* at 1816 (indicating the prayer practice initiated in 1999 by a newly elected town supervisor who adopted the practice from his time serving in the county legislature).

34. See *id.* (indicating the town selected prayer givers from a list of local congregations that are majority Christian); see also Dominic Perella, *As Supreme Court Tackles Legislative Prayer, It's 1789 All Over Again*, MSNBC (Nov. 6, 2013, 4:35 PM) <http://www.msnbc.com/msnbc/supreme-court-tackles-legislative> (expressing petitioners' anguish that the board only began allowing clergy from other faiths to give the invocation after petitioner filed formal complaints).

35. See *Town of Greece*, 134 S. Ct. at 1816-18 (noting references to distinct language that invoked Christian religious holidays, scripture, and occasionally doctrine).

36. See Paul Horwitz, *The Religious Geography of the Town of Greece v. Galloway*, 2014 SUP. CT. REV. 243, 250 (2014) (explaining that the Court uses the Establishment Clause doctrine as a supplement to its analysis rather than historical support as an exception); see also *Town of Greece*, 134 S. Ct. at 1819 (noting that a test that sweeps away settled practices would create controversy and awaken the very religious divisions the Establishment Clause seeks to prevent).

Marsh, does not stop at a historical inquiry.³⁷ While legislative prayer is constitutional, courts determine whether the particular prayer practice falls within the traditional scope of the Establishment Clause by evaluating if the prayer is given to solemnize rather than proselytize.³⁸ Petitioners claimed that the town's practices were outside the purview of tradition because the prayers were sectarian and the setting of the board meetings elicits social pressures forcing nonadherents to participate for fear of being ostracized.³⁹

The Court rejected the notion that the constitutionality of legislative prayer hinges on the neutrality of the content because the proposition is inconsistent with the facts and holding in *Marsh*; therefore, the Court denied the petitioners' request to enjoin the sectarian language of the prayers in Greece.⁴⁰ The Court refused to issue a judicial decree that such prayers remain nonsectarian; however, the Court implied that content is not necessarily free from all constraints if the remarks disparage nonadherents, threaten damnation, or preach conversion.⁴¹

Furthermore, the Court denied petitioner's request to distinguish this case from *Marsh* because prayers at town board meetings and invocations before Congress are fundamentally different.⁴² The Court noted that the intended audience of the opening prayers were lawmakers rather than the members of the public in attendance and that the prayers were offered to elevate the mind of officials before governing.⁴³ Even though the Court found no evidence of

37. See Krista M. Pikus, *Hopeful Clarity or Hopeless Disarray?: An Examination of Town of Greece v. Galloway and the Establishment Clause*, 65 CATH. U. L. REV. 387, 388 (2015) (clarifying that the analysis used by the court focused on history and nondiscriminatory procedure rather than a settled Establishment Clause test).

38. See *Town of Greece*, 134 S. Ct. at 1824 (identifying that a challenge based purely on the content of the prayer will likely not establish a violation).

39. See *id.* (emphasizing the coercive nature of the prayer practice which forces members of minority faiths to partake in behavior against their beliefs for fear of offending the officials that will vote on matters before the board).

40. See *id.* at 1821-1822 (explaining the contention that legislative prayer must be nonsectarian came from dictum in *County of Allegheny v. ACLU*, and further asserting that the content of prayer is not the concern of the judges unless the practice attempts to proselytize, advance, or inhibit any one faith).

41. See *id.* at 1822 (finding that a holding that invocations must be nonsectarian would force legislatures to censor religious speech, creating an even greater government involvement in religious matters).

42. See *id.* at 1824-25 (suggesting the intimate nature of town board meetings where citizens come to speak on local issues, petition for action by the board, or seek permits creates a coercive atmosphere for the nonbeliever that does not wish to offend board members or fellow citizens).

43. See *id.* at 1826 (noting that while some members of the public may find meaning in the prayers and wish to join, the prayers should enlighten the lawmakers).

coercion in the prayer practices in *Town of Greece*, the Court noted its analysis would be different if town board members directed the public to partake in the prayers, showed bias toward dissidents, or specified that a failure to participate affects their governing decisions.⁴⁴ Today, there is a circuit split regarding whether prayers led directly by commissioners at local board meetings go beyond constitutionally permitted legislative prayer.⁴⁵

C. Circuit Split on Legislator-Led Prayer

1. Lund v. Rowan County

The Board of Commissioners in *Lund* held the practice of personally delivering a deliberate sectarian prayer at the start of each county board meeting inconsistent with the Establishment Clause of the First Amendment.⁴⁶ In *Lund*, board members were permitted to use their discretion as to the content of the prayer during their rotation, but undoubtedly all commissioners gave prayers filled with Christian sentiment by invoking the name of the Lord as the one true way to salvation.⁴⁷ The Fourth Circuit distinguished *Lund* from *Town of Greece* by stating that the Supreme Court did not address lawmaker-led prayer, only prayer led by clergy.⁴⁸ Ultimately, the Fourth Circuit determined that prayer led by legislators may fit within the constitutional bounds, but the prayer practices of the Lund County Board of Commissioners fell outside the scope of traditionally protected legislative prayer due to the attempts made by commissioners to promote Christianity as the one true religion.⁴⁹

2. Bormuth v. County of Jackson

Just two months after the Fourth Circuit decided *Lund*, the Sixth Circuit upheld similar lawmaker-led prayer practices in *Bormuth v. County of*

44. See *id.* (indicating that clergy members invited members of the public to stand and participate, rather than the board members directly instructing them to do so).

45. See Gregory, *supra* note 7 (summarizing the uncertainty created when the Sixth Circuit upheld the constitutionality of legislator-led prayer in direct opposition to a Fourth Circuit holding just months prior).

46. See *Lund v. Rowan Cty.*, 863 F.3d 268, 272 (4th Cir. 2017) (en banc) (indicating the prayer practice only permitted commissioners to offer the invocation).

47. See *id.* at 273 (demonstrating that 97 percent of the board's prayers over the past five and a half years made purely Christian references such as "Jesus," "Christ," or "Savior" and the commissioners referenced no other religion).

48. See *id.* at 277-78 (elaborating that the "historical practice of prayer" is not identical to the challenge before the Fourth Circuit).

49. See *id.* at 289 (establishing that the court should look at the prayer practice holistically to determine the constitutionality of the practice).

Jackson because a historical analysis showed that such prayer had a long-standing tradition with roots in the American Revolutionary period and reportedly began in Michigan in 1879.⁵⁰ The Sixth Circuit described the prayers as largely solemn, reverent, and contemplative.⁵¹ The court indicated that pro se litigant Bormuth failed to meet his burden to prove that the Board attempted to indoctrinate, coerce participation, or allocate benefits or burdens with respect to his adherence.⁵² The Court acknowledged that commissioners in *Bormuth* lost their cool and acted negatively toward the petitioner; however, nothing in the record indicated the behavior resulted from the petitioner's discontent with the prayer practice.⁵³

II. ANALYSIS

A. *A Fact-Sensitive Analysis Demonstrates that Both the Fourth and Sixth Circuits Correctly Applied Establishment Clause Jurisprudence to the Facts Before Each Circuit Notwithstanding the Conflicting Rulings*

This year, the Fourth Circuit and Sixth Circuit heard cases challenging the constitutionality of prayer practices at local community board meetings where opening prayers were led directly by the commissioners of the board.⁵⁴ The directly opposing outcomes elicited from the Circuit Courts' opinions implied that one circuit court ruled correctly while the other misapplied precedent; however, the fact-sensitive consideration required in Establishment Clause inquiries regarding legislative prayer proves that both circuits ruled correctly with the record of facts presented before them.⁵⁵ A

50. See *Bormuth v. Cty. of Jackson*, 870 F.3d 494, 510 (6th Cir. 2017) (en banc) (explaining that the historical reliance here parallels those relied on in *Marsh* and *Town of Greece*).

51. See *id.* at 497-98 (suggesting the Board opens its public meetings with prayers consistent with the historical practices of Congress and state legislatures, which the Court upheld as consistent with the First Amendment).

52. See *id.* at 519 (stating that there is nothing in the record that suggests that the actions against Bormuth were the result of his religious beliefs or evidence to rebut the presumption that adults understand the purpose of invocations).

53. See *id.* at 545 (Moore, J., dissenting) (indicating that the commissioners turned their chairs around while petitioner Bormuth spoke at a meeting and made statements to the press after litigation commenced).

54. Compare *Lund*, 863 F.3d at 271 (holding the prayer practices of the Board of Commissioners in Rowan County unconstitutional), with *Bormuth*, 870 F.3d at 498 (upholding the prayer practices of the County of Jackson commissioners as consistent with the First Amendment).

55. See *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1814 (2014) (establishing that challenges to legislative prayer require a fact-sensitive inquiry into the "setting in which the prayer arises and the audience to whom it is directed" to show the town leaders are

difference of ruling among the circuits is not surprising when looking at the prayer practices illustrated in each record and subsequently reviewed by each circuit sitting en banc.⁵⁶ Unlike the commissioners in *Bormuth* that simply mentioned the Christian faith during prayers by referencing Jesus or the Holy Spirit, commissioners in *Lund* made attempts to proselytize by expressing that Jesus is the only way to salvation and condemn nonbelievers by holding out that Christianity is superior to other religions.⁵⁷ The prayer practice in Rowan County portrayed the Board's endorsement of Christianity.⁵⁸ The subtle distinctions between the prayer practices illustrate that the practice in *Lund*, unlike *Bormuth*, exceeded the traditional scope of legislative prayer by holding out Christianity as superior to other religions.⁵⁹ Through the application of *Marsh* and *Town of Greece*, both courts ruled correctly regardless of the apparently conflicting rulings on similar issues in the same year because the factual distinctions warrant the courts' respective outcomes.⁶⁰

1. Legislator-Led Prayer Inquiries Require Courts to Take a Totality of Circumstances Approach Because a Single Factor Analysis Is Inconsistent with Supreme Court Precedent.

When weighing the facts of particular prayer practices, a court must first evaluate the prayer practice against the backdrop of the historical practice of legislative prayer that has become so significant to the nation's heritage and

not coercing the members of the public to engage in religious activities that are not of his or her own conscience).

56. Compare *Lund*, 863 F.3d at 273 (describing the prayer practices as “invariably and unmistakably Christian in content”), with *Bormuth*, 870 F.3d at 509-10 (describing the prayers as consistent with the traditionally permitted prayers given before Congress as an act to solemnize the proceeding).

57. Compare *Bormuth*, 870 F.3d at 498 (informing that the prayers asked for blessings for community members facing hardships and military members), with *Lund*, 863 F.3d at 273 (emphasizing that Christianity is the only religion represented in prayers referring to “King of kings and Lord of lords,” asking for forgiveness of sins, and proclaiming God as the only way to happiness and an everlasting eternal life).

58. See *Lund*, 863 F.3d at 283 (stating that the identification of a state with one religion cannot be ignored and doing so equates to wishing away the Establishment Clause).

59. Compare *Bormuth*, 870 F.3d at 498 (noting that the Board adopted the prayer practice without discriminatory intent to any religion) with *Lund*, 863 F.3d at 282 (highlighting that the risk of division stemming from the prayer practice causes more than an abstract concern for constitutional protections).

60. See Gregory, *supra* note 7 (noting the rigid discrepancies between the Fourth Circuit and Sixth Circuit rulings regarding legislator-led prayer).

tradition.⁶¹ Historical analysis is important because prayer practices that fall outside the generally accepted practice of solemnizing governmental proceedings and either endorse one religion or condemn patrons of other faiths violate the First Amendment's disestablishment principles.⁶² In addition to considering history, the court must consider the setting of the prayer, the intended audience of the invocation, and the pattern of prayers offered when evaluating whether the prayer practice is permissible.⁶³ This analysis will help to determine whether the prayer practice is permissible if the practice falls within the traditional scope accepted by the Court or whether the prayer practice is impermissible because the practice is used to proselytize and promote one religion over others or condemns and burdens nonadherents.⁶⁴ A prayer practice is impermissible if it is overly coercive, attempts to indoctrinate, or condemns nonbelievers.⁶⁵

It is crucial to assess the totality of the circumstances rather than dissecting and evaluating the prayer practice piece by piece because a singular statement may be permissible when given by a clergy member before Congress but impermissible when given by a government official, acting in his official capacity, such as at a town hall meeting.⁶⁶ Citizens in attendance at local board meetings experience these prayer practices in their entirety rather than piece by piece; therefore, courts must consider all of the facts

61. See *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1814 (2014) (assuming that a "reasonable observer" witnessing opening prayers at government meetings is familiar with the tradition and understands the purpose of the prayer is to solemnize and acknowledge the role of religion in the lives of many private citizens); see also *Cty. of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 603 (1989) (stating that history affects the permissibility of religious references by the government, but history cannot legitimate practices that identify the government with any particular religion or sect).

62. See *Cty. of Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring in judgment in part and dissenting in part) (asserting that *Marsh* exemplifies that the Establishment Clause must be interpreted in reference to historical practices, not that historical foundations creates an automatic exception).

63. See generally *Marsh v. Chambers*, 463 U.S. 783, 792 (1983) (explaining that the Establishment Clause does not prohibit the regulation of conduct simply because it is intertwined with religious canons).

64. See *id.* (suggesting that the invocations should be given for the benefit of the elected officials to elevate spirits before setting one's mind to the governance of the people rather than to "benefit" the public in attendance).

65. See *Town of Greece*, 134 S. Ct. at 1824 (noting a single prayer will not necessarily deplete a prayer practice that reflects the tradition of legislative prayer).

66. See *Lund v. Rowan Cty.*, 863 F.3d 268, 289 (4th Cir. 2017) (en banc) (indicating that facts relevant to the court's inquiry are not necessarily outcome determinative, but the court should not overlook the crucial interaction of elements when evaluating the constitutionality of the practice).

surrounding the prayer practices because doing so can accurately determine whether the particular prayer practice is permissible.⁶⁷

Lund and *Bormuth* both involve prayer practices led directly by commissioners at local board meetings that are open to the public, and both practices invoke Christian sentiments throughout the history of their prayer practice; however, only the Fourth Circuit, in *Lund*, held the practices unconstitutional.⁶⁸ The prayers given by Commissioners at the local town meetings in Rowan County, North Carolina, explicitly stated that God was the only way to eternal life and confessed for the sins of all in attendance while dissidents were booed and jeered for failure to participate.⁶⁹ While one stray remark or exclusively Christian statement may not constitute a violation, when taken in totality, the practice in Rowan County clearly attempts to indoctrinate and allocate a burden to nonadherents.⁷⁰ The Sixth Circuit, in *Bormuth*, determined the practice of the County of Jackson Board of Commissioners consistent with those upheld by the Supreme Court in *Marsh* and *Town of Greece*.⁷¹ In *Bormuth*, the court found the prayer statements reported in the district court record were made to solemnize the meeting rather than indoctrinate attendees with a religion preferred by the members of the board; the stray references to the Christian faith were not enough to “despoil” the practice without evidence of indoctrination or condemnation of nonadherents.⁷² When considered in totality, the courts correctly determined the permissibility of the respective prayer practice

67. See *Bormuth v. Cty. of Jackson*, 870 F.3d 494, 539 (6th Cir. 2017) (en banc) (Moore, J., dissenting) (citing *United States v. Arvizu*, 534 U.S. 266, 274 (2002)) (noting the Supreme Court has the use of a “divide and conquer” approach to analyzing constitutional challenges of multi-faceted practices).

68. See *Lund*, 863 F.3d at 273 (indicating that after controversy grew, several Commissioners announced they planned to continue giving the Christian prayers for the benefit of the public).

69. See *id.* at 285 (quoting a prayer from August 2010: “God of healing mercies, we come to you this day confessing that we are an imperfect people We acknowledge that we’ve been given the pathway to peace, in the witness of Jesus Christ [But] oftentimes we have failed to witness on Earth.”).

70. See *Bormuth*, 870 F.3d at 512-13 (explaining that one remark does not necessarily despoil an entire prayer practice that would otherwise fall within the tradition accepted by *Marsh*).

71. See *id.* at 498 (explaining the prayer practice implemented by the Jackson County Board of Commissioners).

72. See *Lund*, 863 F.3d at 272 (emphasizing that the prayer practice crossed a line by identifying government with Christianity and potentially conveying that other faiths were unwelcome); see also *Bormuth*, 870 F.3d at 498 (stating that the prayer practice is facially neutral and possessed no discriminatory intent).

because the factual records warranted different outcomes.⁷³

2. *While the Intimate Setting of County Commissioner Meetings Included Many Nonadherents, the Prayer Practices Are Not Impermissible Unless Commissioners Attempt to Indoctrinate or Allocate Benefits or Burdens Based on Attendees' Participation.*

Marsh and Town of Greece determined that legislative prayer in hearings at state legislatures and local board meetings, like invocations before Congressional hearings, fit within the well-accepted tradition recognized by the Court.⁷⁴ Petitioners in both *Lund* and *Bormuth* argue that the intimate setting of the prayer practice is coercive because nonadherents feel compelled to participate for fear of being ostracized.⁷⁵ Prayer practices that rise to the level of coercion are impermissible because the First Amendment prohibits the government from coercing citizens to support or participate in religious exercises against one's own religious beliefs and devotions.⁷⁶ Prayer practices at local board meetings are not automatically deemed coercive as a result of a more intimate setting.⁷⁷ However, analysis differs if the elected officials direct the participation in the prayer practice because this direction can be coercive, compelling many attendees to participate for fear of heeding the burdens that result from opposing the directions of the lawmakers before them.⁷⁸

73. Compare *Lund*, 863 F.3d at 272 (ruling that the prayer practice made attempts to proselytize and convert attendees), with *Bormuth*, 870 F.3d at 512-13 (holding that stray remarks do not constitute an impermissible practice).

74. See *Marsh v. Chambers*, 463 U.S. 783, 795 (1983) (upholding legislative prayer in the Nebraska Legislature); see also *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1815-816 (2014) (recognizing that no constitutional violation existed in the informal prayer selecting method used by the town's board).

75. Compare *Lund*, 863 F.3d at 288 (suggesting plaintiffs' discomfort with the prayer practice is not trivial), with *Bormuth*, 870 F.3d at 528 (holding that *Bormuth's* claim of coercion fails under either standard of coercion set forth in *Town of Greece*).

76. Compare *Van Orden v. Perry*, 545 U.S. 677, 694 (2005) (finding that statues of the Ten Commandments at the Texas State Capital did not violate the Establishment Clause after determining that mere presence did not compel the petitioner to read or even look at the statue; mere offense is not coercion), with *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 628 (1989) (specifying that the Court has never relied on coercion alone as the hallmark of Establishment Clause analysis).

77. See *Town of Greece*, 134 S. Ct. at 1818 (reversing the Court of Appeals and holding the prayer practice at the local board meeting to be consistent with the tradition and transgresses permitted by First Amendment).

78. See *id.* at 1825 (acknowledging that board members in *Greece*, New York, participated in the prayers but never gestured for the citizens in attendance to solicit their participation in the prayer practice).

The commissioners in both *Lund* and *Bormuth* directed the prayer practice by asking the attendees to stand and pray with them.⁷⁹ Alone, the Commissioners' directions do not amount to coercion if attendees can willingly opt out of participating in the prayer practice, and abstention does not result in mistreatment of nonadherent attendees.⁸⁰ Commissioners in neither *Lund* nor *Bormuth* prohibited attendees from arriving at the meetings late or merely sitting during the invocation, which allows nonadherents to avoid the prayer practice completely or sit idly while it takes place.⁸¹ The petitioner in *Bormuth* admitted to refusing to participate because the practice was inconsistent with his Pagan beliefs.⁸² The mistreatment and disfavor expressed to dissidents in *Lund* demonstrates the impermissibility of the Rowan County Board of Commissioners' prayer practice.⁸³ The petitioner in *Bormuth* failed to prove that the board treated dissidents in Jackson County differently due to failure to partake in the prayer practice.⁸⁴ It is possible that Jackson County Commissioners' personal disagreements with petitioner Bormuth resulted from Bormuth's disposition on other matters throughout the course of the meetings rather than his distain toward the opening invocations.⁸⁵ The requests by commissioners to stand and pray in both *Lund* and *Bormuth* do not trigger an impermissible coercion because the attendees could opt out of the prayer practice; however, when

79. Compare *Lund*, 863 F.3d at 272 (conveying that all five members of the Board of Commissioners rise and bow their heads just before the commissioner leading the prayer asks all in attendance to join him in worship), with *Bormuth*, 870 F.3d at 498 (specifying that the Chairman of the Board typically asks his fellow Commissioners and citizens in attendance to "rise and assume a reverent position.").

80. See *Town of Greece*, 134 S. Ct. at 1825 (noting that direction to stand and pray given by the guest minister was inclusive rather than coercive because ministers were likely accustomed to directing their congregation in the same manner, so the court continued the analysis to determine if evidence supported a finding of impermissible indirect coercion, which it determined not to be present).

81. See *Lund*, 863 F.3d at 274 (suggesting these options seemed to only serve to marginalize attendees who were uncomfortable with the observance of the prayer practice at the board meeting).

82. See *Bormuth*, 870 F.3d at 516-17 (noting that petitioner Bormuth's "quiet acquiescence" should not be interpreted as acceptance of the expressed ideas).

83. See *Lund*, 863 F.3d at 288 (identifying that others booed the only attendee who openly objected to the prayer practice).

84. See *Bormuth*, 870 F.3d at 517-19 (indicating that petitioner Bormuth believed that commissioners excluded him because of his Pagan beliefs but the court attributed no weight to his allegations).

85. See *id.* at 517 (specifying that petitioner Bormuth's vocal stance on controversial topics such as abortion and his demeanor at the meetings likely attributed to the treatment he encountered).

commissioners burden nonadherents, such as booing nonparticipants, the practice may become too coercive and consequently exceed the scope of *Marsh and Town of Greece*.⁸⁶

In addition to the setting, courts must consider the proximity of the prayer to governmental action, such as voting on issues before the board, to determine the potential for coercion for a particular prayer practice in its setting.⁸⁷ Petitioners in *Lund* and *Bormuth* advance a similar argument as petitioners in *Town of Greece* by asserting that constituents in attendance feel pressured to participate in the prayer practice to avoid negative consequences from the lawmakers at their local county commissioners' meetings.⁸⁸ Attendees at local board meetings often petition for rights and benefits, advocate for important community causes, and participate in democracy.⁸⁹ Participation or failure to participate during the recognition of invocation should not affect how commissioners rule on the matters brought before the board because the Establishment Clause prohibits such actions by state agencies due to evidence of favor or disfavor of any religion.⁹⁰

In *Lund*, the commissioners conducted business moments after the prayer; the board members considered and subsequently approved or denied the petitions put forth by the citizens in attendance.⁹¹ Alternatively, in *Bormuth*,

86. See *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1826 (2014) (stating Commissioners and fellow citizens should not find a nonbeliever's absence disrespectful or noteworthy or a nonadherent's acquiescence as an agreement with the expressed notions).

87. Compare *Lund*, 863 F.3d at 288 (indicating that the commissioners considering the attendee's petitions moments after the invocation presents, at the very least, an opportunity for abuse), with *Bormuth*, 870 F.3d at 516 (referencing that the plurality in *Town of Greece* rejected Justice Kagan's dissent describing the "chasm" between prayers on given the legislative floor and prayers given at intimate town hall meetings (citing *Town of Greece*, 134 S. Ct. at 1851-52 (Kagan, J., dissenting))).

88. See *Bormuth*, 870 F.3d at 516 (indicating that nothing in the record suggests that the members of the board in Greece, New York gave preference to attendees that participated or ruled on issues in a way that disadvantaged nonadherents to the prayer practice).

89. See generally *Lund*, 863 F.3d at 287-88 (articulating that attendance at one's place of government and one's place of worship are very different).

90. See *id.* at 287 (revealing that attendance at these local board meetings are not always completely voluntary because the citizens in attendance are advancing programs that they are passionate about or petitioning for changes that directly affect their communities).

91. See *id.* at 288 (explaining that the board had many functions, including adjudicatory power over zoning petitions, permit applications, and contract awards); see also *Town of Greece*, 134 S. Ct. at 1829 (Alito, J. concurring) (pointing out that legislative acts, rather than adjudicatory acts, preceded the prayer practice in Greece,

the neutral prayer practice permitted prayers followed by the Pledge of Allegiance and then proceeded by legislative and adjudicatory business matters.⁹² At first glance, the practices do not seem significantly dissimilar, yet the court distinguished between proximity of prayers to legislative and adjudicatory matters to illustrate citizen compulsion present at the start of the meeting, when the invocation typically takes place.⁹³

3. Prayer Practices That Attempt to Indoctrinate or Proselytize the Public in Attendance, Rather Than to Solemnize the Meeting Before Lawmakers Preside Over Important Matters, Fall Outside the Traditional Scope of Prayer Practices.

Traditionally, the Court has held that legislative prayer, regardless of setting, solemnizes and invokes heavenly guidance to set the mind in a frame appropriate for making decisions.⁹⁴ Prayers are given to exalt legislators before conducting business, not to proselytize or indoctrinate the citizens in attendance.⁹⁵ Courts presume that a reasonable adult observer is well aware of this tradition and understands its purpose to solemnize and to recognize the importance of religion to the lives of many citizens in this nation.⁹⁶

In *Lund*, the content of the prayer expanded beyond merely reminding commissioners of a higher purpose; the language targeted members of the

New York).

92. See *Bormuth*, 870 F.3d at 498 (explaining that the prayer practice in Jackson County, Michigan, rotated the opportunity for commissioners to pray in accordance to the commissioner's own conscience without review of another member or the board as a whole).

93. See *Town of Greece*, 134 S. Ct. at 1829 (Alito, J., concurring) (declaring that invocations do not take place before the second part of the meeting, the portion where the board in Greece, New York conducted its adjudicatory duties).

94. See *id.* at 1816 (noting the town's informal method for selecting local clergy to give the invocation).

95. See *id.* at 1825 (indicating that the prayers in Greece, New York targeted only the legislators). Compare *Lund*, 863 F.3d at 287 (stating that the record clearly depicts that the commissioners sought audience involvement), with *Bormuth*, 870 F.3d at 512 (announcing that while the prayers varied in degree of religiosity, no evidence existed of attempts to proselytize, threats of damnation to nonbelievers, or endeavors to convert).

96. See also *Bormuth*, 870 F.3d at 530-31 (relaying the Sixth Circuit Court's view that solicitation of adults to participate in the solemnization of meetings by standing quietly is not inherently coercive). Compare *Town of Greece*, 134 S. Ct. at 1825 (assuming that adults firm in their own beliefs can tolerate a ceremonial prayer of a different faith), with *Doe. v. Indian River Sch. Dist.*, 653 F.3d 256, 275 (3rd Cir. 2011) (ruling prayers at school board meeting impermissible and suggesting that there is a greater possibility of coercion in schools because children are more susceptible to peer pressure).

audience.⁹⁷ The content of the prayers in *Lund* urged those in attendance to believe in God and embrace the religion of Christianity and preached Christianity as the only way to deliverance.⁹⁸ While the prayers in *Bormuth* mentioned specifically Christian references by praying to Jesus and God Almighty, the prayers made by the commissioners in the County of Jackson fell within the “religious idiom accepted by our Founders” because they were not given in effort to convert attendees but merely for the purpose of solemnization.⁹⁹

Furthermore, an examination of the pattern of prayer illustrates the potential of prayer practices to cross from solemnization to proselytization.¹⁰⁰ While prayer practices may not preach conversion or condemn other faiths, the content of legislative prayers is not required to be nonsectarian.¹⁰¹ As indicated by *Town of Greece*, individual prayer givers must be allowed to give prayers that align with their conscience.¹⁰² A singular or even occasional sectarian prayer that references a god associated with only one faith is not enough to conclude the prayer practice unconstitutional.¹⁰³ However, where there appears to be an improper prayer practice, courts must examine the entire record.¹⁰⁴

The Sixth Circuit, in *Bormuth*, conceded commissioners made exclusively

97. See *Lund*, 863 F.3d at 287 (noting that one commissioner asked attendees to join him in prayers that asked the world to acknowledge and trust that God sent his son, Jesus Christ, to “save us from our sins”).

98. See *id.* at 285 (specifying that one prayer asked God to enable the Commissioners to spread God’s message).

99. See *Bormuth*, 870 F.3d at 512 (clarifying that reference to the Christian faith does not make the prayer practice fall outside the purview of the Establishment Clause).

100. See *Town of Greece*, 134 S. Ct. at 1826-27 (implying that review of a particular prayer practice is warranted if there is a substantial likelihood for coercion to determine whether the prayer practice comports with the tradition of respectful and solemn prayer).

101. See *Marsh v. Chambers*, 463 U.S. 783, 795 (1983) (indicating that it is not the Court’s job to parse the content of a particular prayer unless the prayer opportunity has been exploited to convert or disparage nonbelievers); see also *Town of Greece*, 134 S. Ct. at 1814 (maintaining that *Marsh* was not upheld because of the use of general terminology, but rather because the principles of disestablishment and religious freedom can coexist in the context of legislative prayer).

102. See *Town of Greece*, 134 S. Ct. at 1822 (suggesting that requiring all prayers to be nonsectarian would force courts to censor religious speech which is contrary to the essence of the Establishment Clause of the First Amendment).

103. See *Bormuth*, 870 F.3d at 512 (acknowledging that one remark pales in comparison to the repetitive attempts to advance Christianity recognized by the Fourth Circuit in *Lund*).

104. See *Lund v. Rowan Cty.*, 863 F.3d 268, 283 (4th Cir. 2017) (explaining that the record includes the content and transcripts of the invocations).

Christian references but concluded that these references, such as invoking the name of Jesus or the Holy Spirit, do not denigrate nonbelievers or preach conversion.¹⁰⁵ Conversely, the prayer practices analyzed by the Fourth Circuit in *Lund* depict a pattern of attempts to convert nonbelievers and demean minority religions by indicating that Christianity is supreme to all other religions.¹⁰⁶

4. *The Identity of the Prayer Giver As a Legislator Is Not Per Se Unconstitutional and Thus, Constitutional Challenges Require an Individual Evaluation of the Prayer Practice in Question.*

The Supreme Court has yet to address the notion that the identity of the prayer giver is per se inconsistent with the Establishment Clause.¹⁰⁷ The plurality in *Town of Greece* cautioned that the analysis would be different if the board members directed the public to participate in the opening prayers.¹⁰⁸ The identity of the prayer giver can play a significant role in determining if coercion exists.¹⁰⁹ There is a more significant threat of coercion when the prayer giver requesting attendants' participation are the same individuals that will ultimately vote on the matter brought before the board at the meeting.¹¹⁰ However, the identity of the prayer giver as a

105. See *Bormuth*, 870 F.3d at 512-13 (illustrating one prayer identified by the petitioner that specifically spoke of blessing Christians that may be targets of "extremists").

106. See *Lund*, 863 F. 3d at 283-85 (quoting prayers that preach conversion of nonadherents: "Father, I pray that all may be one as you, Father, are in Jesus, and He in you. I pray that they may be one in you, that the world may believe that you sent Jesus to save us from our sins. May we hunger and thirst for righteousness, be made perfect in holiness, and be preserved, whole and entire, spirit, soul, and body, irreproachable at the coming of our Lord Jesus Christ.").

107. Compare *Bormuth*, 870 F.3d at 512 (determining that the identity of the prayer giver should not determine the constitutionality of the practice because that analysis deems permissible prayers unconstitutional solely based on the agent delivering the prayer), with *Lund*, 863 F.3d at 281 (indicating that courts should consider the prayer giver's identity when evaluating the other elements of the practice).

108. See *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1826 (2014) (suggesting the analysis only changes if the elected officials treated nonadherents differently for failure to participate).

109. See *Lund*, 863 F.3d at 281 (suggesting that the court evaluated other elements through the lens of the prayer giver's identity because the prayer giver was an agent of the state). But see *Bormuth*, 870 F.3d at 513 (implying that the religious references reflected the individual Commissioners' beliefs rather than the opinions of the Jackson County Board).

110. See *Lund*, 863 F.3d at 319 (explaining the standard from *Town of Greece* that state coercion may exist when the lawmaker directs the public to participate, singles out

legislator has not been found per se unconstitutional; rather each prayer practice requires individual evaluation.¹¹¹ In its holding, the Fourth Circuit in *Lund* notes that lawmaker-led prayer is not per se unconstitutional but finds it difficult to discern if any constitutional limitations exist to legislative prayer if the court permitted the practices of the Rowan County Board of Commissioners to continue.¹¹²

Town of Greece suggests that the Court is more concerned with the effect of the prayer practice creating instances of coercion, indoctrination, or condemnation of nonadherents than the identity of the prayer giver.¹¹³ Consequently, *Bormuth* remains consistent with existing jurisprudence because the Sixth Circuit held there was not enough evidence in the record to support Mr. Bormuth's claims that the County of Jackson Board of Commissioners exceeded scope of traditionally accepted solemn prayer practices.¹¹⁴

B. The Sixth Circuit Would Have Reached a Different Outcome If the Court Considered Evidence that the Pro Se Petitioner, Bormuth, Failed to Maintain in the District Court Record.

Upon appeal from the district court, Americans United for Separation of Church and State (Americans United) filed an amicus brief to strengthen appellants Bormuth's position.¹¹⁵ Americans United, on behalf of Bormuth,

nonadherents, or indicates his decisions are influenced by participation or lack of participation in the religious practice). *Contra Bormuth*, 870 F.3d at 508-09 (noting that social pressures do not necessarily equate coercion because Justices Thomas and Scalia hold the opinions that "coercion is limited to 'coercive state establishments' 'by force of law or threat of penalty'" (quoting *Town of Greece*, 134 S. Ct. at 1837 (Thomas, J., concurring in part and in judgment))).

111. See *Lund*, 863 F.3d at 280 (noting that legislator-led prayer has its limits just as sectarian prayers do); see also *Bormuth*, 870 F.3d at 509 (denying petitioner Bormuth's contention that legislator-led prayer is per se unconstitutional).

112. See *Lund*, 863 F.3d at 290 (noting that the court's holding is a limited ruling on the specific prayer practices at the specific setting of the commissioner meetings).

113. See generally *Town of Greece*, 134 S. Ct. at 1826 (suggesting that while not present in this case, if circumstances arise alleging that legislative prayer demeans nonadherents or imposes a religious dogma, claims arising out of those circumstances may succeed).

114. See *Bormuth*, 870 F.3d at 498 (holding that the legislator-led prayer was consistent with the Constitution).

115. *AU Files Brief in Michigan Legislative Prayer Case*, CHURCH & STATE MAG. (May 2017), <https://au.org/church-state/may-2017-church-state/people-events/au-files-brief-in-michigan-legislative-prayer-case> (informing that Americans United, accompanied by the American Civil Liberties Union, filed a brief opposing the County of Jackson prayer practice because commissioners led exclusively Christian prayers and

attempted to illustrate the constitutional violations produced by the prayer practice by supplementing evidence presented by petitioner Bormuth.¹¹⁶

Judges in the Sixth Circuit decided *sua sponte* to hear the case en banc after a panel of Sixth Circuit Judges ruled the County of Jackson prayer practice to be a violation of the Establishment Clause while considering the additional evidence.¹¹⁷ The Sixth Circuit sitting en banc declined to hear certain facts considered in the earlier panel because the district court previously denied appellant Bormuth's motion to supplement the record.¹¹⁸ The court did not consider the evidence offered on appeal due to a procedural restriction prohibiting the introduction of new evidence on appeal even when the evidence offered by the appellant presented a genuine issue of material fact.¹¹⁹ The additional evidence included statements made by commissioners criticizing Bormuth for questioning the constitutionality of the prayer practice, letters from commissioners denying Bormuth positions on two committees as a result of his opposition, and videos demonstrating the commissioners only gave invocations before meetings open to the public.¹²⁰ However, had the additional evidence been evaluated, the Sixth Circuit sitting en banc likely would have found that a constitutional violation existed because the additional facts showed that commissioners excluded non-Christian prayer givers from controlling the content of the invocation and

disparaged dissenters of the prayer practice, including Bormuth).

116. *See generally* Brief for Americans United for the Separation of Church and State as Amicus Curiae Supporting Petitioner, *Bormuth v. Cty. of Jackson*, 870 F.3d 494 (6th Cir. 2017) (No. 15-1869) (explaining that the prayer practice violated the Constitution because it impermissibly advances Christianity and coerces religious participation).

117. *See generally* *Bormuth v. Cty. of Jackson*, 849 F.3d 266, 273-76 (6th Cir. 2017), *aff'd en banc*, 870 F.3d 494 (6th Cir. 2017) (determining that the district court abused its discretion by granting a motion to quash and denying a motion to supplement the record, but holding the errors to be harmless because the record before the district court supported Bormuth's motion for summary judgment as a matter of law).

118. *See* *Bormuth v. Cty. of Jackson*, 870 F.3d 494, 499-500 (6th Cir. 2017) (en banc) (identifying two discovery items that included statements made by Commissioners after petitioner Bormuth filed the lawsuit and publicly available videos of the Board of Commissioner meetings found on the internet).

119. *See id.* (quoting *Chicago Title Insurance Company v. Magnuson* and restating that the court will not hear factual recitation that differs from the recitation at the district court when hearing an appeal of a district court's decision); *see also id.* (citing an en banc ruling in *E.E.O.C v. Ford Motor Company* and describing the burden on the opposing party under Federal Rule of Civil Procedure 56(c)).

120. *See id.* at 500-01 (emphasizing that Bormuth did not offer any specific video evidence at the district court level); *see also Bormuth*, 849 F.3d at 271-73 (explaining the evidentiary disputes between the parties that also included Bormuth's efforts to take depositions).

insulted Bormuth for his abstention and disparagement of the prayer practice.¹²¹

In an effort to salvage evidence that pro se litigant Bormuth failed to maintain on the district court record, Bormuth and amicus curiae claimed the video recordings of the Board's meetings were mentioned within petitioner's briefs and the videos remained on the Board's website for the public to view.¹²² Alternatively, if the court did not accept the videos as part of the record, Bormuth and amicus curiae requested that the court at least take judicial notice of the content of the videos for appeal under Federal Rule of Evidence 201.¹²³ Judicial notice of the videos may have been warranted because the Board in County of Jackson admitted to the accuracy of the videos on their website as live recordings of the monthly board of commissioner meetings.¹²⁴ Ultimately, the Sixth Circuit sitting en banc denied the request because taking judicial notice of evidence never introduced during the fact-finding process might create an evidentiary loophole.¹²⁵ On appeal, Bormuth also questioned the district court's ruling that prevented him from supplementing the record in regards to the Board's decision to deny him appointment to a position on the Board of Public Works or the Solid Waste Planning Committee because Bormuth was the most qualified person for the position and claimed to be denied as a result of his objection to the prayer practice at the monthly meetings.¹²⁶

The additional evidence demonstrates that the Board of Commissioners in

121. *See generally Bormuth*, 870 F.3d 494 at 543-44 (Moore, J., dissenting) (underscoring the details of the prayer practice that led to the conclusion that upholding the prayer practice rests in opposition to Justice Alito's concurrence in *Town of Greece* that identifies a difference between a chaplain and a government official requesting citizens to rise and participate in a religious prayer).

122. *See id.* at 499-500 (emphasizing that one need not look past the opinion of the magistrate judge or district judge to know that Bormuth failed to provide any video evidence to the district court).

123. *See id.* at 501 (specifying that Jackson County concedes the accuracy of the videos posted on the website and noting that the court has the necessary information needed to take notice).

124. *See Fed. R. Evid. 201* (indicating that a court may take judicial notice at any stage of a proceeding on its own or if presented with the necessary information after one party makes a request).

125. *See Bormuth*, 870 F.3d at 501 (suggesting that accepting evidence on appeal in order to reverse a decision made by a district court would subvert the relationship held between district and appellate courts).

126. *See id.* at 518-19 (indicating that the court knew more about the application to the Board of Public Works but suggesting the record fails to demonstrate the denial of the position stemmed from Bormuth's failure to participate in the prayer practice).

Jackson County, Michigan, gave invocations for purposes other than solemnizing the meeting for the benefit of the lawmakers and that commissioners allocated burdens based on participation in the prayer practice.¹²⁷ These additional facts require a different holding than that reached by the Sixth Circuit sitting en banc.¹²⁸ The first step in analyzing whether the prayer practice is permissible requires a court to determine whether the prayer practice falls within the traditional scope of legislative prayer.¹²⁹ Traditional legislative prayer permitted governmental bodies to solemnize the governmental proceedings to elevate the minds the lawmakers, not to promote religion to the public.¹³⁰ Americans United introduced evidence illustrating that the County of Jackson prayer practice did not function as a means of solemnizing the Board by offering a video depicting that the only meeting during a two year period conducted without an offer of invocation occurred on November 6, 2014, when no citizens were in attendance.¹³¹ These videos demonstrate that the prayer practice falls outside the scope of traditional purpose because the County Commissioners did not give the invocation to exalt the lawmakers but rather for the “benefit” of the public in attendance.¹³²

The Sixth Circuit sitting en banc upheld the prayer practice, stating that the record showed no evidence that the commissioners allocated benefits or burdens due to their participation in the prayer practices.¹³³ However, the

127. *Contra id.* at 501 (stating in footnote two of the opinion that the disposition of the court would not change if the court considered the videos of the recorded Board of Commissioner meetings that Bormuth proffered).

128. *See supra* Part II.A (describing the importance of a fact-sensitive analysis in Establishment Clause inquiries).

129. *See supra* Part II.A.1 (explaining that court must first evaluate the prayer practice against the backdrop of the historical practice); *see also* *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1817 (2014) (indicating that the district court began its analysis by reviewing *Marsh v. Chambers*, which permitted prayer practice so long as the practice did not advance or disparage any one religion).

130. *See* *Lund v. Rowan Cty.*, 863 F.3d 268, 272 (4th Cir. 2017) (en banc) (emphasizing that legislative prayer can further both religious exercise and religious tolerance).

131. *See* *Bormuth v. Cty. of Jackson*, 849 F.3d 266, 284-85 (6th Cir. 2017), *aff'd en banc*, 870 F.3d 494 (6th Cir. 2017) (noting that pro se petitioner, Bormuth, waived the argument presented by Amicus Americans United that the Board’s choice to only conduct prayers in the presence of the public supported the assertion that the commissioners offered prayers to promote religion rather than to solemnize the meeting).

132. *See id.* (extrapolating that the Board uses the prayer practice for the purposes of proselytizing members of the community in attendance at these meetings).

133. *See* *Bormuth v. Cty. of Jackson*, 870 F.3d 494, 512 (6th Cir. 2017) (en banc) (maintaining that the prayers fall within the restraints required by *Town of Greece*).

additional evidence proffered by Bormuth and Americans United demonstrates that the Board treated petitioner Bormuth differently after he voiced his disagreements with the prayer practice.¹³⁴ After litigation commenced, local newspapers released statements made by two commissioners indicating that the two commissioners perceived Bormuth's abstention as a personal attack on their rights to conduct a prayer before the meetings.¹³⁵ Other Commissioners reportedly turned their backs as Bormuth spoke during the public comments portion of the Board's meeting.¹³⁶ These additional facts trigger the warning put forth in *Town of Greece* that prayer practices must not disparage dissidents or benefit adherents.¹³⁷

Bormuth asserted additional instances of the Board of Commissioners demonstrating disfavor of his resistance to participate in the prayer practice; he claimed that the Board denied appointing him to the Solid Waste Planning Committee or the Board of Public Works despite his qualifications for the positions.¹³⁸ Bormuth asserted that he was the most qualified applicant for the vacancy on the Board of Public Works and believed the Board of Commissioners denied his appointment because of his Pagan religious beliefs, his objection to the Christian prayer practice, and his pursuit of the lawsuit.¹³⁹

Giving weight to these additional facts and taking judicial notice of the videos of the County of Jackson monthly meetings demonstrates that the prayer practice in place in the County of Jackson, Michigan, is impermissible when viewed under the totality of the circumstances.¹⁴⁰ The practice falls

134. *See id.* at 527 (Moore, J., dissenting) (emphasizing that a newspaper article released shortly after petitioner Bormuth filed the suit revealed the Commissioner's disapproval).

135. *See id.* at 517-18 (quoting Commissioner Rice: "Our civil liberties should not be taken away from us, as commissioner," and Commissioner Duckham: "What about my right?").

136. *See id.* (indicating that the Sixth Circuit sitting en banc concedes the Commissioners reacted poorly but gave no constitutional weight to the actions of the Commissioners).

137. *See generally* *Town of Greece v. Galloway* 134 S. Ct. 1811, 1826 (2014) (distinguishing that petitioners provided no evidence that lawmakers in Greece treated citizens differently whether they participate or choose to abstain).

138. *See Bormuth*, 870 F.3d at 519 (stressing that Bormuth introduced the rejection letter regarding the Solid Waste Committee).

139. *See id.* (requiring Bormuth to go "beyond the pleadings" to defeat County of Jackson's motion for summary judgment by providing more evidence than the correlation between his objections and the Board's denial of appointments).

140. *See id.* at 544 (Moore, J., dissenting) (concluding that Commissioners' attempt to silence Bormuth and their treatment illustrate how Jackson County's prayer practice

outside the traditional scope of legislative prayer by directing prayers at citizens in the audience and attempting to promote Christian prayer and by the Commissioners' mistreatment of nonadherents.

III. POLICY RECOMMENDATION

A. The Supreme Court Should Take Up the Issue to Answer Looming Questions Regarding the Constitutionality of Legislator-Led Prayer and Establish an Analytical Framework to Be Followed By Lower Courts.

Currently, a rigid circuit split exists among the Fourth Circuit and Sixth Circuit regarding legislator-led prayer.¹⁴¹ Other courts, such as district courts, have also issued conflicting rulings due to the Court's failure to provide guidance and answer questions that grew from *Town of Greece's* conclusion that the analysis would be different if the lawmakers directed the audience to participate in the prayer practice.¹⁴² The Court has yet to address the issue of lawmaker-led prayer, despite petitions of certiorari filed by the parties in *Lund* and *Bormuth*.¹⁴³ The Court should take up the issue to properly clarify the role of tradition in legislative prayer cases and determine whether prayers led exclusively by lawmakers are consistent with the disestablishment principles of the First Amendment.¹⁴⁴

The Supreme Court should not issue a sweeping declaration that lawmaker-led prayer is permissible. While legislative prayer, including

strays from the traditionally tolerated legislative prayer).

141. See Gregory, *supra* note 7 (noting that this case marks the third time the Court has taken a case regarding legislative prayer).

142. See *Williamson v. Brevard Cty.*, No. 6:15-cv-1098-Orl-28DCI, 2017 U.S. Dist. LEXIS 163707, at *93-94 (M.D. Fla. Sept. 30, 2017) (holding the Brevard County prayer practice to be a violation of the First Amendment because the practice controls citizens' opportunity to participate in the prayer practice based on his religious beliefs); *Doe v. Pittsylvania Cty.*, 842 F.Supp.2d 906, 927 (W.D. Va. 2012) (denying the Board's motion to dismiss and stating that the practice of opening meetings with Christian prayers runs afoul the First Amendment); see also *Hinrichs v. Bosma*, 400 F.Supp.2d 1103, 1104 (S.D. Ind. 2005) (granting declaratory and injunctive relief to petitioners challenging the prayer practice of the Indiana General Assembly but maintaining that relief did not prevent opening House sessions with prayers so long as all official prayers remain inclusive and nonsectarian).

143. See *Lund v. Rowan Cty.*, 138 S. Ct. 2564, 2564 (2018) (noting Justice Thomas's and Justice Gorsuch's dissent from the denial of certiorari); see also *Bormuth v. Jackson Cty.*, 138 S. Ct. 2708, 2708 (2018) (indicating the Court denied the petition for writ of certiorari).

144. See Gregory, *supra* note 7 (quoting Professor Frank S. Ravitch, from Michigan State University, when stating that the Court may wait to take the case after watching what other circuits do in this area).

prayers led directly by lawmakers, is consistent with the tradition of this nation, allowing prayer practices that intentionally exclude minority religions or align governmental entities with any one religion defies the principles of the First Amendment by promoting one religion and condemning others.¹⁴⁵ If the Supreme Court upholds lawmaker-led prayer, the Court should provide guidance that the prayer practice must not promote one religion by proselytizing or allocating burdens and benefits to citizens by virtue of one's religious affiliation.

IV. CONCLUSION

Although conflicting rulings by circuit courts during the same year on such parallel topics may indicate that one circuit got it wrong while the other circuit got it right, the fact-specific inquiry required in Establishment Clause cases proves that both the Fourth Circuit and the Sixth Circuit ruled correctly on the matter of legislator-led prayer.¹⁴⁶ The prayer practice in *Lund* exemplified a pattern of proselytizing and preaching conversion whereas the petitioner in *Bormuth* failed to prove that the prayer practices of the County of Jackson Board of Commissioners were inconsistent with traditionally accepted practices.¹⁴⁷ However, if the Sixth Circuit considered information that the pro se petitioner failed to properly place on the district court record, the court would have held the prayer practice of the County of Jackson Board of Commissioners unconstitutional due to the additional facts revealed to the court.¹⁴⁸

145. See generally *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (explaining that the language of the Establishment Clause prevents more than the establishment of a formal state religion but also prohibits government action *respecting* the establishment of religion, such as the promotion of one religion over any others).

146. See generally *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1814 (2014) (establishing that challenges to legislative prayer requires a fact-sensitive inquiry to show the town leaders are not coercing the members of the public to engage in religious activities contrary to his own beliefs).

147. Compare *Lund v. Rowan Cty.*, 863 F.3d 268, 287 (4th Cir. 2017) (en banc) (noting that the record clearly depicts that the content of the prayers suggested that Christianity was the one true faith), with *Bormuth v. Cty. of Jackson*, 870 F.3d 494, 512-13 (6th Cir. 2017) (en banc) (explaining that while the prayers had a Christian tone, no evidence of attempts to proselytize or convert nonbelievers existed).

148. See *Bormuth*, 870 F.3d at 499-500 (noting the rule that state appellate courts do not have to accept facts even if the proffered evidence might show an outcome determinative issue of material fact).