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LEGISLATORS LIVIN' ON A PRAYER: THE FOURTH AND SIXTH CIRCUITS' APPLICATION OF *TOWN OF GREECE* ON THE QUESTION OF LEGISLATOR-LED PRAYER

*Tori Gooder**

I. INTRODUCTION

In the words of Thomas Jefferson, the Establishment Clause was intended to erect "a wall of separation between church and State."¹ While the phrase may be simple, determining what that "wall" should look like has been far from a simple task. The Supreme Court has spent more than a century debating what that wall looks like between the Establishment Clause and the Free Exercise Clause. Beginning with *Everson* and continuing to *Town of Greece*, a plethora of tests have formed, and yet not one precedential standard to evaluate Establishment Clause cases rules.² In the recent circuit split between the Fourth Circuit and Sixth Circuit, the two courts struggle with this complex Establishment Clause jurisprudence to answer the question whether legislators themselves may lead prayer.

The Fourth and Sixth Circuits emerge with seemingly different holdings about the constitutionality of legislator-led prayer, despite having extremely similar facts. In *Lund v. Rowan City*, the Fourth Circuit held the County's Board of Commissioners' longtime practice of leading prayers themselves violated the Establishment Clause.³ On the other hand, in *Bormuth v. City of Jackson*, the Sixth Circuit found the County's Board of Commissioners' tradition of leading prayers constitutional under the Establishment Clause.⁴ Both circuits agree that legislator-led prayer is not per se unconstitutional and apply at least the surface level law of *Marsh* and *Town of Greece* correctly.⁵ The difference in the holdings lies in the Sixth Circuit's mischaracterization of *Town of Greece's* deeper holding: courts must look beyond the contents of the prayers and the identity of the prayer-giver and instead focus on the motivation and intentions behind the prayer-giver's invocations. The Sixth Circuit strategically avoids facts vital to the constitutional inquiry of the prayer-giver's motivations by considering the prayers in a vacuum and dismissing the relevant facts through a

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1. *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947).

2. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014).

3. 863 F.3d 268, 275 (4th Cir. 2017).

4. 870 F.3d 494, 509 (6th Cir. 2017) (en banc).

5. *Lund*, 863 F.3d at 279; *Bormuth*, 870 F.3d at 509.

procedural ruling.

This article explores the complicated Establishment Clause jurisprudence and its involvement in the recent circuit split over legislator-led prayer. First, this article outlines the evolution of Establishment Clause case law, highlighting the ideological movements that shift the Supreme Court from strict separationists to accommodationists. Next, the article will investigate the doctrinal starting point for which *Marsh* and *Town of Greece* set the foundation for both the Fourth and Sixth Circuits to evaluate legislator-led prayer. In light of both *Marsh* and *Town of Greece*, the article will then explain the analysis and holdings of the Fourth and Sixth Circuit. Finally, the article will discuss the circuits' correct and incorrect holdings and application of *Town of Greece's* requirement that courts scrutinize the motivations and intentions of the prayer-givers or the prayer policies in legislative prayer cases. Although the Fourth Circuit correctly applies *Town of Greece's* true holding, the Sixth Circuit cannot hide its failure to investigate the prayer-giver's motives nor their obvious attempt to shield the appellate record from facts that expose the commissioners' prohibited motivations for prayer. The Supreme Court will most surely see through the façade of applying the surface level of *Marsh* and *Town of Greece's* precedence. Unfortunately, until then, the lower courts are left with a circuit split based on a procedural hoax and feigned dissidence.

II. BACKGROUND

The Supreme Court's Establishment Clause jurisprudence is littered with a myriad of tests, plurality opinions, and seemingly contradictory holdings. Much of the confusion can be attributed to the tension that exists between two fundamental First Amendment rights: the right protecting citizens from the establishment of a government endorsed religion and the right to have freedom of religion.⁶ These almost paradoxical clauses of the First Amendment have led to years of controversy over prayer, Christmas decorations, and government funding to private schools. For purposes of this article, the evolution of Establishment Clause case law will set up a framework to understand the foundation of the recent circuit split on whether legislator-led prayer is constitutional. In addition, the review of *Marsh* and *Town of Greece* will lay the foundation from which the circuits begin their analysis.

6. U.S. CONST. amend. I.

A. The Evolution of Establishment Clause Tests: Shifting Ideologies

The evolution of Establishment Clause jurisprudence appears nonsensical. However, the underlying ideological camps of the justices throughout the century, exposes the shifts between Establishment Clause tests. Establishment Clause cases fall into one of three categories based on the ideological undertones of the Supreme Court Justices of the time. The Supreme Court, under Justice Burger, for years held a strict separationist view and continued to build a high and impregnable wall of separation between church and state.⁷ Then the era of the Reagan-appointed Justices shifted the Court a little more “right” to the age of neutrality and endorsement.⁸ During this time, the court transitioned from the separationist viewpoint that no aid, no relationship, and no commingling between church and state may exist to a more flexible approach that substantial aid or substantial commingling may exist between church and state, as long as it is neutral and does not endorse a particular religion. Later, the Supreme Court relaxed their Establishment Clause jurisprudence further holding that the state and the church may be substantially intertwined provided that citizens do not feel coerced by the state.

1. The Time of Strict Separationists: The Birth of the *Lemon* Test

In 1947, *Everson v. Bd. of Education* commenced the Supreme Court’s separationist Supreme Court era. The Supreme Court narrowly upheld a municipal community’s decision to subsidize public transportation to and from parochial schools, but it unanimously held a staunch position that church and state should be completely and uncompromisingly separate.⁹

Engel v. Vitale echoed *Everson’s* strict separationist viewpoint.¹⁰ In *Engel*, the Supreme Court held that “it is no part of the business of the government to compose official prayers,” and therefore, students reciting prayers every day before school is an “indirect coercive pressure upon religious minorities” in violation of the Establishment Clause.¹¹ Before 1971, the Supreme Court had a “consistency in the way the Justices went about deciding the case... Neither side rested on any facile application of the ‘test’ or any simplistic reliance on the generality or

7. Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230 (1994).

8. *Id.* at 233.

9. *Id.*; see generally *Everson v. Bd. of Education*, 330 U.S. 1, 1 (1947) (upholding the statute to protect the rights of religious-school students under the Free Exercise Clause).

10. *Engel v. Vitale*, 370 U.S. 421, 425-431 (1962).

11. *Id.* at 425, 431 (explaining that public schools forcing students to recite prayers every day before school is in violation of the Establishment Clause).

evenhandedness of the state law."¹²

In 1971, *Lemon v. Kurtzman* developed a three part test to apply to Establishment Clause cases: (1) the statute must have a secular legislative purpose, (2) the primary effect of the statute must not be to advance nor inhibit a particular religion, and (3) the statute must not enable excessive government entanglement with religion.¹³ The Supreme Court in *Lemon* also seemed to create a fourth factor in the Establishment Clause analysis: the effect of the statute on political divisiveness.¹⁴ The Lemon Test marks the start of the Burger Court's effort to be less doctrinal about the separation of church and state, and more concerned about the effects the statute has.¹⁵ In other words, if the effects of the statute are not neutral, but instead endorse a particular religion, then, and only then, will the statute be in violation of the Establishment Clause.

While the Supreme Court in *Larson v. Valente* completely ignored the Lemon Test, the Court focused again on the effect of the statute, and whether the statute endorsed or preferred a specific religion.¹⁶ The Supreme Court applied strict scrutiny and held that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."¹⁷

In 1983, *Marsh v. Chambers* followed suit, and also did not apply the Lemon Test, but instead carved out an exception to the Establishment Clause for legislative prayer cases.¹⁸ The Supreme Court held that in legislative prayer cases the Lemon Test should not apply, but instead courts should interpret the Establishment Clause in light of the historical and traditional practices of legislative prayer.¹⁹

2. The Neutrality and Endorsement Era: The Reagan Justices' Revolution

Marsh was decided on the cusp of the Reagan Justices—Justice Scalia, O'Connor, and Kennedy—and clearly repudiated the years of separationists structure by carving out an exception within

12. *Mitchell v. Helms*, 530 U.S. 793, 876 (2000) (quoting Souter, J., dissenting).

13. 403 U.S. 602, 612-13 (1971) (finding state aid to religious schools creates excessive government entanglement in violation of the Establishment Clause).

14. *Id.* at 622.

15. Michael Stokes Paulsen, *Religion and the Public Schools after Lee v. Weisman: Lemon is Dead*, 43 CASE W. RES. 795, 804-05 (1993).

16. 456 U.S. 228, 252-53 (1982).

17. *Id.* at 244.

18. 463 U.S. 783, 786 (1983).

19. *Id.*

Establishment Clause case law.²⁰ Like *Larson* and *Marsh*, *Lynch v. Donnelly* shoved the Lemon Test aside, and instead focused on whether the statute endorsed a particular religion.²¹ While the majority in *Lynch* chose not to use the Lemon Test, the undertones of *Lemon's* shift from separationism to the effects of the statute appeared to be at play. Gaining momentum from *Lemon's* nudge, *Lynch* and *Marsh* illustrate the Court's self-conscious push from separationist to the effect of the statute on the community it governs.²²

The exception carved out in *Marsh* caused much confusion for the Supreme Court Justices in the 1989 case, *Allegheny County v. ACLU*.²³ In the dictum of *Allegheny*, the Justices disagreed about *Marsh's* application beyond legislative prayer, as well as whether the prayers must be non-sectarian.²⁴ Without guidance as to *Marsh's* scope, the Supreme Court fell back onto *Lynch's* use of the endorsement test: if the statute is "sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices," then the statute will be in violation of the Establishment Clause.²⁵

The Supreme Court reexamined on the Lemon Test in *McCreary County v. ACLU*.²⁶ The majority interpreted the first prong of the Lemon Test to necessitate a neutrality principle, in which the secular purpose of the statute must predominate over any other purpose.²⁷ The majority held that the evaluation of this predominance is by an objective observer, while Justice O'Connor suggests the evaluation be based on whether a reasonable observer would view an unmistakable message of endorsement by the government.²⁸ By this point, the Supreme Court completely replaced separationism with nonendorsement and neutrality.²⁹ Most of the Justices lie in the ideological camp where the state may have substantial involvement in religious aid and religious

20. Lupu, *supra* note 7, at 230-33.

21. 465 U.S. 668, 678-82 (1984).

22. Lupu, *supra* note 7, at 239-40.

23. 492 U.S. 573, 602-10 (1989).

24. *Id.* (writing for the majority in *Town of Greece*, Justice Kennedy answers the disagreements highlighted in *Allegheny* over *Marsh's* scope and holds that nonsectarian prayer is not dispositive in legislative prayer cases).

25. *Id.* at 597 (discussing the religious symbol of the creche, the majority believed "regardless of history, government may not demonstrate a preference for a particular faith," and therefore found the creche displayed on the steps of a courthouse to be unconstitutional. *Id.* at 605).

26. 545 U.S. 844, 859-60 (2005).

27. *Id.*

28. *Id.* at 862, 883-84 (writing a concurring opinion in *Lynch v. Donnelly*, Justice O'Connor's endorsement test first materializes and appears to be adopted by the majority in *Allegheny*. 465 U.S. at 688).

29. Lupu, *supra* note 7, at 240.

symbols, as long as the effect on the community does not appear to be endorsing a particular religion.

3. The Coercion and Accommodation Age: The Death of Separationism

In 1992, the Supreme Court took one step further towards conservatism through the creation of the coercion test. Justice Kennedy created the coercion test in *Lee v. Weisman* to distinguish legislative prayer in *Marsh* from public school prayer.³⁰ Justice Kennedy emphasized that the coercion or social pressure a student might feel from the government to support or to participate in religion during a student's graduation ceremony is very different than an adult's position during a state legislature opening prayer session where that adult may easily enter and leave for a myriad of reasons.³¹ The coercion test was re-applied in *Santa Fe Independent School District v. Doe* to invalidate a pre-game prayer practice led by students before high school football games.³²

Similar to the neutrality and endorsement tests, the coercion test allows the state to have substantial involvement in religious aid and symbols. However, the ideological undertones of the coercion test moved the focus further from separationists (even more than the neutrality and endorsement view) to the effect of the state's message on the individual within the community, in order to accommodate the individual's conscience.³³ Therefore, under the coercion and accommodation ideology, the state may have substantial involvement in religious aid and religious symbols, as long as the state's involvement is not putting pressure on the individual. What that "pressure" looks like is up for debate.³⁴ Justice Kennedy believes the pressure or coercion can be from society itself, while Justice Thomas suggests it can only be of a legal nature.³⁵ Like most Establishment Clause tests, the use of the coercion test has been inconsistent. In fact, this coercion test leads to a plurality opinion in *Town of Greece*.³⁶

The Supreme Court has slowly transitioned from a strict separationist

30. 505 U.S. 577, 592-94 (1992).

31. *Id.* at 596-97.

32. 530 U.S. 290, 317 (2000) (arguing that the policy of students partaking in an election on whether to keep the pre-game prayer encouraged divisiveness along religious lines in a public school setting).

33. Lupu, *supra* note 7, at 241.

34. See generally Ronald C. Kahn, *Religion and the Public Schools after Lee v. Weisman: God Save Us from the Coercion Test: Constitutive Decisionmaking, Polity Principles, and Religious Freedom*, 43 CASE W. RES. 983 (1993).

35. *Lee*, 505 U.S. at 592-93; see *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1838 (2014).

36. 134 S. Ct. at 1814.

view of the relationship between the state and religion to a more flexible view of the relationship between the individual and state.³⁷ Distinguishing the three ideological camps of the Justices over the decades allows for a better understanding of the various tests: the Lemon Test, the coercion test, the endorsement test, and *Marsh's* historical test. The disagreement over which test to apply is exposed in *Marsh* and *Town of Greece's* majority, dissenting, and concurring opinions.³⁸

B. *Marsh and Town of Greece: Setting the Doctrinal Starting Point*

This article focuses on the constitutionality of legislator-led prayer in light of the Establishment Clause. The lower courts only have two Supreme Court cases to lead them through the complex and fact-specific path: *Marsh v. Chambers* and *Town of Greece v. Galloway*.³⁹ However, neither of these cases are concerned specifically with legislator-led or lawmaker-led prayer. Yet *Marsh* and *Town of Greece* provide the foundation from which both the Fourth Circuit and Sixth Circuit begin their analyses.

The first case that dealt with prayer in a legislative context was *Marsh*.⁴⁰ In *Marsh*, the Court held that legislative prayer can be constitutional in light of historical and traditional practices, as long as the legislative prayers do not proselytize or advance a specific religion or disparage another.⁴¹ Thirty years later, the Court reaffirmed *Marsh's* holding in *Town of Greece* that sectarian prayer is not per se unconstitutional.⁴² Following the history and traditions analysis in *Marsh*, the Supreme Court in *Town of Greece* held that the Establishment Clause does not require legislative prayer to be nonsectarian or ecumenical.⁴³ Moreover, the Court determined that generally, “a challenge based solely on the content of a prayer will not likely establish a constitutional violation.”⁴⁴

Marsh involved the Nebraska legislators' routine of opening their meetings with a chaplain-led prayer.⁴⁵ While a new chaplain could be selected every two years, this particular chaplain had been leading the

37. Lupu, *supra* note 7, at 250.

38. See generally *Marsh v. Chambers*, 463 U.S. 783 (1983); *Town of Greece*, 134 S. Ct. at 1811.

39. *Id.*

40. 463 U.S. at 794-95.

41. *Id.*

42. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1820 (2014).

43. *Id.*

44. *Id.* at 1824.

45. *Marsh v. Chambers*, 463 U.S. 783, 784-85 (1983).

prayers for sixteen years and had been paid with public funds.⁴⁶ The Court in *Marsh* momentarily reflected on the test outlined in *Lemon*, before setting *Marsh* into its own distinct category involving legislative prayer.⁴⁷ Because legislative prayer is “embedded in the history and tradition of this country,” the Court held the Nebraska legislative prayer practice must be evaluated in light of the historical and traditional legislative prayer practices our country has engaged in since its founding.⁴⁸ The Court weighed heavily on the fact that the same Congress that established the language of the First Amendment, just three days earlier, had authorized the appointment and payment of chaplains to open its legislative sessions with prayer.⁴⁹ A legislature’s wish to “invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an ‘establishment’ of religion or a step toward establishment.”⁵⁰ Therefore, the Supreme Court held that, in light of historical and traditionally tolerated legislative prayer practices, the Establishment Clause was not violated in this case.⁵¹

Town of Greece expounded on *Marsh*’s holding, yet added its own confusing dicta to the Establishment Clause analysis.⁵² Unlike the situation in *Marsh*, the town of Greece invited local clergy, as unpaid volunteers, to open its monthly meeting in prayer.⁵³ The clergy were predominantly Christian due to the fact that most local congregations were Christian.⁵⁴ However, the town did not exclude or deny volunteers an opportunity to give a prayer.⁵⁵ Two residents who attended the monthly board meetings brought a complaint to the board about the prayers being predominantly Christian in content.⁵⁶ In direct response to the complaints, the town invited a Jewish layman, a chairman of a local Baha’i temple, and a Wiccan priestess to offer invocations before the monthly meetings.⁵⁷

The two residents, Galloway and Stephens, brought a suit against the town, alleging that the town’s opening prayers did not fall within the historical and traditional practices outlined in *Marsh* because of the

46. *Id.*

47. *Id.* at 786-87.

48. *Id.* at 786.

49. *Id.* at 788.

50. *Id.* at 792.

51. *Id.* at 793-95.

52. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1818-20 (2014).

53. *Id.* at 1816.

54. *Id.*

55. *Id.*

56. *Id.* at 1817.

57. *Id.*

sectarian language or messages in the prayers and because of the social pressures the town meetings created.⁵⁸ In order to rectify these alleged Establishment Clause violations, Galloway and Stephens sought “an injunction that would limit the town to ‘inclusive and ecumenical’ prayers that referred only to a ‘generic God’ and would not associate the government with any one faith or belief.”⁵⁹

The Supreme Court rejected Galloway and Stephen’s arguments that the town’s prayers must be nonsectarian. Justice Kennedy, writing for the majority, clarified *Marsh*’s history and traditions test.⁶⁰ The Court’s analysis should not be based on whether a generic God or theism is central to the prayers, but on whether “our history and tradition have shown that prayer in this limited context could ‘coexist[t] with the principles of disestablishment and religious freedom.’”⁶¹ Justice Kennedy held the neutrality element that Galloway and Stephens requested was not consistent with *Marsh*, but was derived from dicta from other Establishment Clause cases not addressing legislative prayer.⁶² In fact, the Court stated that a neutrality requirement in legislative prayer would expand the governments’ and courts’ involvement in religious matters to a worse degree than the situation at hand.⁶³

Yet, this does not mean that legislative prayer does not have constraints on its content. If the prayers deviate from their intended use — “to lend gravity to the occasion and reflect values long part of the Nation’s heritage”— then a different outcome might emerge.⁶⁴ However, in town of Greece’s situation, the town made reasonable efforts to reach beyond its major congregations to bring diversity to the invocations.⁶⁵ Therefore, the majority appeared to require the courts to look beyond the prayers content, to the intentions and motivations behind the prayer-giver before prayers amount to an Establishment violation.⁶⁶

While the first half of Justice Kennedy’s opinion sheds light on *Marsh*’s “history and tradition” analysis, the second half of the opinion muddies the Establishment Clause waters as only two other Justices join

58. *Id.*

59. *Id.*

60. *Id.* at 1818.

61. *Id.* at 1820.

62. *Id.* at 1821; *see also* County of Allegheny v. ACLU, 492 U.S. 573, 601-603 (1989).

63. Town of Greece v. Galloway, 134 S. Ct. 1811, 1822 (2014).

64. *Id.* at 1823.

65. *Id.* at 1824.

66. *Id.*; *see also* Caroline Mala Corbin, *Intentional Discrimination in Establishment Clause Jurisprudence*, 67 ALA. L. REV. 299, 301 (2015).

this part of his opinion.⁶⁷ Drawing on past cases, Justice Kennedy pointed to both *Allegheny* and *Van Orden* to illustrate the fundamental principle in First Amendment cases that the government not coerce its citizens “to support or participate in any religion or its exercise.”⁶⁸ However, the plurality opinion found no such coercion in this case.⁶⁹ The plurality opinion directed attention to the fact-sensitive aspects of the case: the setting where the prayer is given and the audience present. Due to the historical and traditional nature of legislative prayer, “[i]t is presumed that the reasonable observer is acquainted with this tradition and understands that its purposes are to lend gravity to public proceedings....”⁷⁰ Nothing in the record about the setting of the town of Greece’s prayers compromises this presumption to the reasonable observer.⁷¹ Similar to *Marsh*, the audience is not the public, but the present lawmakers who exercise an “internal act” directed to their “own members” during legislative prayer in order to implore the divine, not to promote one religion above another.⁷²

While Justice Kennedy’s three-justice plurality opinion stated that in this case there was no coercion, he cautioned that the analysis would be different if (1) “town board members directed the public to participate in the prayers” (2) “town leaders allocated benefits and burdens based on participation in the prayer,” or (3) “town leaders signal disfavor toward nonparticipants or suggest that their stature in the community was in any way diminished.”⁷³ Justice Thomas’s two-justice concurring opinion emphasized the coercion must be of a legal nature, not just societal pressures.⁷⁴ Neither Galloway’s nor Stephen’s offense, or feelings of disrespect, equal coercion from the town. Unlike the situations in *Lee* or *Santa Fe Independent School District*, the citizens were not hindered from arriving later in the meetings after the prayers, leaving during the prayers, or speaking to the town leaders about more diverse prayers.⁷⁵

67. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1825 (2014).

68. *Id.* (quoting *County of Allegheny v. ACLU*, 492 U.S. 573, 659 (1989)) (Kennedy, J., concurring in judgment in part and dissenting in part); *see also Van Orden v. Perry*, 545 U.S. at 677, 683 (2005) (plurality opinion) (recognizing that our “institutions must not press religious observances upon their citizens” *Id.*).

69. *Id.* at 1825.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 1826.

74. *Id.* at 1837-38.

75. *Id.* at 1827; *see Lee v. Weisman*, 505 U.S. 577, 577 (1992); *see also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 290 (2000).

C. Lund and Bormuth: The Circuit split on Legislator-Led Prayer

The biggest factor that distinguishes *Lund v. Rowan City* and *Bormuth v. County of Jackson* from *Marsh* and *Town of Greece* is the identity of the prayer-giver. *Marsh* and *Town of Greece* do not touch much on prayer specifically led by legislatures or public officials themselves. Yet *Town of Greece* prompts courts to conduct a “fact-sensitive” review of the particular prayer practice when the historical principles established by the Supreme Court do not direct a specific result.⁷⁶ Therefore, both the Fourth and Sixth Circuit begin their “fact-sensitive” analysis from *Marsh* and *Town of Greece*’s “doctrinal starting point.”⁷⁷

1. The Fourth Circuit Court of Appeals in *Lund*

Unlike *Marsh* and *Town of Greece*, the prayer-givers in *Lund* were the Commissioners themselves.⁷⁸ There were five members of the Board of Commissioners who met twice a month to hold board meetings in front of community members.⁷⁹ During these meetings, one of the five commissioners led a prayer of his or her choosing.⁸⁰ The prayer-giver usually asked everyone to stand up, bow their heads, and join in prayer.⁸¹ Over the last five years, ninety-seven percent of the commissioners’ prayers referenced “Jesus,” “Christ,” or “Savior,” along with other Christian content.⁸² Some board meeting prayers requested forgiveness on behalf of the whole community and other prayers requested attendees to accept Christianity.⁸³ After the prayers, the meetings continued with the Pledge of Allegiance, a public comment time, and an addressment of the matters on the agenda for the evening.⁸⁴ When both complaints were made about the prayers and the ACLU of North Carolina notified the board about their potential Establishment

76. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1825 (2014) (plurality opinion).

77. *Lund v. Rowan City*, N.C., 863 F.3d 268, 276 (4th Cir. 2017).

78. *Id.* at 272.

79. *Id.*

80. *Id.* at 273.

81. *Id.* at 272.

82. *Id.* at 273.; *see, e.g.*, S.A. 14 (prayer of April 21, 2008) (“I ask all these things in the name of Jesus, the King of Kings and the Lord of Lords. Amen.”).

83. *Lund*, 863 F.3d at 273.; *see, e.g.*, S.A. 30 (prayer of August 1, 2011) (“Lord, we confess that we have not loved you with all our heart, and mind and strength, and that we have not loved one another as Christ loves us. We have also neglected to follow the guidance of your Holy Spirit, and have allowed sin to enter into our lives.”); *see also, e.g.*, S.A. 21 (prayer of October 5, 2009) (“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.”).

84. *Lund*, 863 F.3d at 272.

Clause violation, individual commissioners stated they would continue to start the board meetings with prayer for the benefit of the Rowan community.⁸⁵ The prayers became so controversial that they appeared in the platforms of two incumbents in the 2016 board elections.⁸⁶

The Fourth Circuit begins its analysis of *Lund* by distinguishing it from *Marsh* and *Town of Greece* in two ways. The most obvious being that in both *Marsh* and *Town of Greece* the prayer-givers were guest clergy or ministers, while in *Lund* the prayer-givers were the legislators themselves.⁸⁷ Because the prayer opportunities were reserved only for the legislators, the Fourth Circuit believed that the commissioners created a “closed universe” of prayer-givers.⁸⁸ While these facts alone might not be outcome-determinative, the Fourth Circuit held that the “combination of legislators as the sole prayer-givers, official invitation for audience participation, consistently sectarian prayers referencing but a single faith, and the intimacy of a local government setting” go beyond the historical and traditional practices of legislative prayer.⁸⁹ Therefore, the Fourth Circuit held that under a “fact-sensitive” constitutional inquiry, Rowan City’s prayer practices, taken as a whole, exceeded the constitutional limits established in *Marsh* and *Town of Greece*.⁹⁰

Beginning similarly to *Marsh* and *Town of Greece*, the Fourth Circuit reflected on the past historical and traditional practices of prayer led by the legislators or public officials themselves.⁹¹ The Circuit cited multiple instances when legislators or public officials have led prayer. However, the Circuit found this to be the exception. Most instances illustrate legislators leading prayer as an occasional practice to the more consistent practice of chaplains leading the prayer.⁹² For example, Congress gives Senators, from time to time, the opportunity to deliver the prayer.⁹³ However, more often, Congress invites guest ministers and clergy to deliver the prayers or invocations.⁹⁴ Here, for the Fourth Circuit, lies the threat to the Establishment Clause: Rowan City does not *extend* the opportunity to lead prayer to the lawmakers, but instead *reserves* the opportunity to lead the prayer exclusively for the lawmakers.⁹⁵

85. *Id.* at 273.

86. *Id.* at 282.

87. *Id.* at 277.

88. *Id.*

89. *Id.* at 275.

90. *Id.* at 280.

91. *Id.* at 279.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

Importantly, the Fourth Circuit emphasized that not all legislator-led prayer is “inherently unconstitutional.”⁹⁶ Instead, the Court wished to establish that the identity of the prayer-giver is relevant to the “fact-sensitive” constitutional inquiry in Establishment Clause cases.⁹⁷ Due to the identity of the prayer-givers as legislators, *Rowan City* not only set an exhaustive list of prayer-givers, but created an environment in which the prayers were composed and tailored to the sectarian beliefs each commissioner held.⁹⁸ In this case, the single faith represented by the commissioners in their prayers was Christianity.⁹⁹ The Fourth Circuit found the prayer-giver restriction to be in direct contrast with *Marsh* and *Town of Greece*. The ability of lawmakers to invite ministers and clergy, the Fourth Circuit believes, allows the legislators to accommodate diverse religions. Instead, Rowan restricted prayer practice creating an intolerant and “closed universe” that the Fourth Circuit viewed as an advancement of a single faith.¹⁰⁰

Moreover, the Fourth Circuit viewed Rowan’s exclusive prayer practice as posing a risk to the political process within the city. Indeed, the Fourth Circuit believed the risk of political division had already begun. During one meeting, the individual who initially complained about the prayers was openly mocked.¹⁰¹ In addition, the prayers became a campaign issue in the most recent board elections.¹⁰² The court reflected on the Supreme Court’s warning in *Lemon* that “political division along religious lines...is a threat to the normal political process,” and is “one of the principal evils against which the First Amendment was intended to protect.”¹⁰³

The Fourth Circuit insisted that due to the Rowan City’s exclusive prayer practice, it has “link[ed] itself persistently and relentlessly to a single faith.”¹⁰⁴ One religion cannot be officially preferred over another. The Fourth Circuit suggested that the “reasonable observer” familiar with the history and tradition of legislative prayer would easily view this preference of Christianity through the sectarian prayers that sometimes invited observers to embrace Christianity as the sole road to salvation.¹⁰⁵ Citing *Town of Greece*, the Fourth Circuit assigned importance to the fact that the “*town board members* directed the public to participate in

96. *Id.* at 280.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 282.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 283 (citing *Larson v. Valente*, 456 U.S. 228, 244 (1982)).

105. *Id.* at 284-87.

the prayers” as potentially dispositive of Rowan’s prayer practice exceeding the constitutional limits of legislative prayer.¹⁰⁶

Last, the Fourth Circuit entertained Justice Kennedy’s plurality suggestion in *Town of Greece* to consider “the setting in which the prayer arises.”¹⁰⁷ Because the prayers were delivered at public meetings which are led by a local government body, the “close proximity” between the legislator-led prayers and the deliberation of certain individual community members’ appeals made the court very uncomfortable.¹⁰⁸ The Fourth Circuit feared this “close proximity” provided an avenue for abuse by the commissioners to deliberate issues not on the merits of the petition, but on whether the individual joined in the prayers.¹⁰⁹

2. The Sixth Circuit Court of Appeals in *Bormuth*

The prayers in *Bormuth* were extremely similar to the prayers complained about in *Lund*, yet the Sixth Circuit came out opposite of the Fourth Circuit.¹¹⁰ Exactly like *Lund*, the prayer-givers in *Bormuth* were one of the nine individuals on the Jackson County Board of Commissioners.¹¹¹ The meetings began with the boards’ chairman asking attendees to stand and bow their heads and proceed with one of the commissioners leading the prayer.¹¹² Similar to *Lund*, the Pledge of Allegiance was offered after the prayer and then the board conducted its usual business.¹¹³ The prayer contents tended to be Christian.¹¹⁴ However, the prayer was on a rotating basis between the nine commissioners, who have the freedom to lead the invocation however they please.¹¹⁵

The plaintiff first complained of the prayers during an open comment period of the meeting.¹¹⁶ During his complaint, one of the commissioners turned his chair so that his back faced the plaintiff,

106. *Id.* at 287 (quoting *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1826 (2014)) (emphasis added by the Fourth Circuit).

107. *Id.* (quoting *Town of Greece*, 134 S. Ct. at 1825).

108. *Id.* at 288.

109. *Id.*

110. *Bormuth v. County of Jackson*, 870 F.3d 494, 498 (6th Cir. 2017) (en banc opinion).

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* For example, “[s]ome prayers ask for blessings for others, from county residents suffering particular hardships, to military members, first responders serving in Jackson County, and others.” *Id.*

115. *Id.*

116. *Id.* at 499.

which the plaintiff stated offended and insulted him.¹¹⁷ The plaintiff feared that due to his complaint, the board would now discriminate against him during the County's dealings.¹¹⁸ After his complaint, the plaintiff brought a suit against the County.¹¹⁹ Not long after his commencement of litigation, the plaintiff desired appointment to the County's new Solid Waste Planning Committee.¹²⁰ However, he did not receive a nomination from the board to the committee and later amended his complaint against the County to reflect this alleged prejudice against him.¹²¹

The Sixth Circuit first addressed a procedural issue that is worth noting.¹²² The factual recitation before the Sixth Circuit does not include comments made, and recorded in videos, by the commissioners before and after litigation commenced.¹²³ Since no video evidence of these public recordings of the board of commissioners' meetings were presented to the District Court, the Sixth Circuit held it "will not entertain on appeal factual recitations not presented to the district court when reviewing a district court's decision."¹²⁴ These videos, highlighted in Americans United for Separation of Church and State's amicus brief, included recordings of board meetings over a two year span all of which began with a prayer lead by one of the commissioners, except for the one meeting no citizens were in attendance.¹²⁵ The video recordings also captured comments made by the commissioners in reaction to the litigation.¹²⁶

Just as the Fourth Circuit in *Lund*, the Sixth Circuit began its analysis with *Marsh* and *Town of Greece* as the foundation.¹²⁷ However, unlike the Fourth Circuit, the Sixth Circuit found legislator-led prayer to be far from an exception to the rule.¹²⁸ Citing many of the amicus briefs

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 500 (quoting *Chicago Title Ins. Corp v. Magnuson*, 487 F.3d 985, 995 (6th Cir. 2007)).

125. Brief of Amicus Curiae Am. United for Separation of Church and State In Support of Appellant and Reversal at 10, *Bormuth v. County of Jackson*, 870 F. 3d 494 (6th Cir. 2017).

126. *Id.* at 26. For example, one of the commissioners told the Plaintiff: "It's taken some nitwit 200 and some years to come up with an angle like this to try to deprive me or other people of my faith, of my rights." *Id.* (quoting *County of Jackson, Personnel and Finance Committee November 12, 2013 Jackson County, MI*, YouTube (Dec. 19, 2013), <http://tinyurl.com/2013nov12> (43:00)). During another meeting one commissioner declared the lawsuit was not "just an attack on us, it's an attack on Christianity, and it's an attack on our Lord and Savior Jesus Christ." (*Id.* at 33:28).

127. *Bormuth v. County of Jackson*, 870 F.3d 494, 503 (6th Cir. 2017).

128. *Id.* at 509-510.

submitted, the Sixth Circuit demonstrated “the historical breadth of legislator-led prayer in the state capitals for over one hundred fifty years.”¹²⁹ The Sixth Circuit interpreted the historical breadth to include guest ministers *or* legislator-appointed chaplains, as either prayer-giver is consistent with the traditional and modern practice of legislators leading prayers.¹³⁰ In light of the historical and traditional practices, the Sixth Circuit viewed legislator-led prayer to be no different than legislator-authorized prayer as both instances fill our history and traditions.¹³¹

In addition to Jackson County’s prayer practice coinciding with the historical and traditional practices of legislative prayer, the Sixth Circuit held the prayers within the limits of *Town of Greece*’s constraints: the content of the prayers should not preach conversion, disparage minorities, advance a single faith, or “betray an impermissible government purpose.”¹³² While the prayers were predominately Christian, unlike the Fourth Circuit, the Sixth Circuit did not view the Commissioners as preferential to one religion over another.¹³³ The Sixth Circuit pointed to the County’s prayer policy to illustrate that the County permits prayers of all faiths or no faith.¹³⁴ The commissioners elected at that time choose what prayers to compose; the board had no influence over the content of the prayers.¹³⁵ Moreover, the Sixth Circuit viewed the religious makeup of the commissioners to be irrelevant and immaterial to the legislative prayer analysis. Instead, citing *Town of Greece*, the Sixth Circuit believed that the relevant and material factors are the policies dictating the prayers content.¹³⁶ And therefore, the Sixth Circuit rejected the Fourth Circuit’s interpretation that “*Town of Greece*’s holding is dependent upon religious heterogeneity,” because it believes that *Marsh* and *Town of Greece* do not require the board to provide opportunities to people of other faiths.¹³⁷

Unlike the Fourth Circuit, the Sixth Circuit found Justice Kennedy’s plurality suggestion to consider “the setting in which the prayer arises and the audience to whom it is directed” useless as Jackson County’s legislative prayer practice does not rise to the level of coercion.¹³⁸

129. *Id.* at 510.

130. *Id.*

131. *Id.*

132. *Id.* at 512.

133. *Id.* at 513.

134. *Id.* at 514.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 515-16 (explaining that Justice Kennedy’s coercion test was only joined by two other Justices and the Sixth Circuit’s panel was divided on whether “Justice Kennedy’s three-Justice plurality

Similar to *Town of Greece*, the Sixth Circuit held the coercive effect of prayers at board meetings to be no different from the effect of prayers at legislative sessions.¹³⁹ While the Fourth Circuit in *Lund* determined the prayer to be in such a “close proximity” to the deliberation of individual community member’s appeals, the Sixth Circuit cited *Town of Greece*’s situation and the majority’s holding as rejecting these distinctions.¹⁴⁰ In addition, the “reasonable observer” familiar with the history and tradition of legislative prayer would not see a preferential treatment of one religion over another in the eyes of the Sixth Circuit.¹⁴¹ The Sixth Circuit distinguished itself from *Lund* in this sense. The Sixth Circuit recognized that in *Lund* the Fourth Circuit found excessive examples of prayers “portraying non-Christians as ‘spiritual[ly] defect[ive]’ and ‘suggesting that other faiths are inferior.’”¹⁴² However, the Sixth Circuit found no instances of harsh criticism against Jackson County’s citizens or the plaintiff in this case.¹⁴³

Specifically, the Sixth Circuit rejected the plaintiff’s argument that the commissioners’ request of attendees to rise and bow their heads was coercive by showing preferential treatment or mandating participation.¹⁴⁴ The practice of requesting attendees to join in prayer in this case is no different in the eyes of the Sixth Circuit than guest ministers requesting in *Town of Greece*.¹⁴⁵ Unlike the Fourth Circuit in *Lund* who found these requests served only to marginalize attendees, the Sixth Circuit viewed these requests approved by the majority in *Town of Greece* as “commonplace” and “reflexive” requests that “do not alone mandate participation.”¹⁴⁶

In addition, the Sixth Circuit viewed the two commissioners turning their backs during plaintiff’s complaints or the board choosing other appointments to a board committee littered with other factors and

opinion or Justice Thomas’s two-Justice concurring opinion” controls on the question of coercion. However, the Sixth Circuit found that the plaintiff’s challenge fails under both standards, and therefore need not be resolved at this time).

139. *Id.* at 516.

140. *Id.*; see *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1851-52 (2014) (explaining the distinction between a legislative floor session and an intimate town hall meeting, was one of the core issues Justice Kagan had with the majority in *Town of Greece*).

141. *Bormuth v. County of Jackson*, 870 F.3d 494, 515-16 (6th Cir. 2017) (dismissing Justice Thomas’s legal coercion test as inapplicable in the case at hand as the plaintiff only claimed societal pressures under Justice Kennedy’s *Town of Greece* opinion)

142. *Id.* at 517-18 (quoting *Lund v. Rowan City*, N.C., 863 F.3d 268, 284-85 (4th Cir. 2017)).

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

incidents regarding the plaintiff.¹⁴⁷ The Sixth Circuit determined no coercion present as there was no proof that the board acted prejudicially against the plaintiff nor “allocated benefits and burdens” based on a prejudice for not participating in the prayer.¹⁴⁸ Importantly, the Sixth Circuit reaffirmed *Town of Greece*’s holding that “[o]ffense...does not equate to coercion,” and therefore, Jackson County did not betray an impermissible government principle.¹⁴⁹

III. ANALYSIS

The Fourth and Sixth Circuit applied the basic law of *Marsh* and *Town of Greece* correctly. Both circuits agreed that legislator-led prayer is not per se unconstitutional, and in certain circumstances may lie within the historical and traditional legislative practices of this nation. The split between the circuits does not lie in the application of law, but in the Sixth Circuit’s mischaracterization of *Town of Greece*’s proper holding. *Town of Greece* requires courts to look beyond the prayer-giver’s identity to the intention behind giving the prayer.¹⁵⁰ Sectarian prayers are within the historical and traditional practices of legislative prayer, so long as the prayer opportunity is not used to proselytize or advance or disparage a particular faith. Another limitation upon the prayer-giver’s intentions or motivations, is the prayers should not be used for political divisiveness. These prohibited motivations are identified by the Fourth Circuit quickly and are the reasons Rowan’s prayer practice fell outside the bounds of historical and traditional legislative prayer practices. However, the Sixth Circuit failed to identify these obvious motivations, and moreover intentionally dismissed evidence that illustrated the commissioners’ misuse of prayer through a procedural ruling.

A. The Basic Law: Legislator-Led Prayer is Not Per Se Unconstitutional

The Supreme Court in *Marsh* and *Town of Greece* consistently held that “it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted.”¹⁵¹ Yet, the question the Sixth and Fourth Circuit are

147. *Id.* (explaining plaintiff had brought suits against multiple individuals and elected officials many times showing the dislike was not based on his religious beliefs, but antagonism towards him as a person).

148. *Id.* at 518-19 (arguing that the plaintiff showed no proof to his belief that his rejection from two committees was based on his complaint about prayer).

149. *Id.*

150. Corbin, *supra* note 66, at 301.

151. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014).

confronted with is within this very realm: whether legislator-led prayer fits within the historical and traditional practices followed in both Congress and state legislatures. While the Fourth and Sixth Circuits' holdings appear contradictory, the essence of the two cases is in perfect harmony. Both circuits agree that legislator-led prayer is not per se unconstitutional and can be within the historical and traditional legislative prayer practices.¹⁵² The disagreements ensue between the circuits on what weight should be given to the identity of the prayer-giver in the "fact-sensitive" inquiry required by *Town of Greece*.¹⁵³ However, a closer look illuminates that the circuits only disagree on the consequences of potentially inconsistent results.

The Sixth Circuit believes "legislative prayer [should not be] predicated on the identity of the speaker" because this would cause inconsistent and ridiculous results.¹⁵⁴ For example, if two identical prayers were delivered in bordering counties, one prayer given by a guest minister and the other by a legislator, the prayer given by the guest minister would be held constitutional, while the prayer given by the legislator would be struck down.¹⁵⁵ The Fourth Circuit does not necessarily disagree with the Sixth Circuit's view. The Fourth Circuit admits that depending on the circumstances, prayer by legislators in one instance may be constitutional and in another may be unconstitutional.¹⁵⁶ Nevertheless, in the Fourth Circuit's view, this inconsistency is aligned with Establishment Clause jurisprudence. In some situations sectarian prayer is unconstitutional, and in others situations it is constitutional.¹⁵⁷ Similar to sectarian prayers, the identity of the prayer-giver is one of the relevant factors to consider in the "fact-sensitive" constitutional inquiry.¹⁵⁸

From the lens of Justice Kennedy's opinion in *Town of Greece*, the Supreme Court would agree with both circuits that legislator-led prayer is not inherently unconstitutional and can fall within the historical and traditional practices of legislative prayer. Nevertheless, the Supreme Court would likely side with the Fourth Circuit that the identity of the prayer-giver, like sectarian prayers, is a relevant factor in the constitutional inquiry. But Justice Kennedy would beg the courts to not stop the analysis there. The courts must look beyond the prayer-giver's

152. *Lund v. Rowan City, N.C.*, 863 F.3d 268, 280 (4th Cir. 2017); *Bormuth v. County of Jackson*, 870 F.3d 494, 509 (6th Cir. 2017).

153. *Town of Greece*, 134 S. Ct. at 1825.

154. *Bormuth*, 870 F.3d at 512.

155. *Id.*

156. *Lund*, 863 F.3d at 280.

157. *Id.*

158. *Id.*

identity and evaluate the intentions and motivations of the prayer-giver for leading the invocations. Recall Justice Kennedy's reference to prohibited motivations in *Town of Greece*: "[a]bsent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of prayer will not likely establish a constitutional violation."¹⁵⁹ Moreover, Justice Kennedy's reference suggests the importance of the prayer-givers motivation behind giving the prayer. Is the prayer for the legislators to call upon divine guidance or is the prayer to proselytize, to advance a particular faith, or disparage another religion?

B. The Sixth Circuit's Strategy: A Procedural Sidestep Around Town of Greece's True Holding

Both circuits apply the general law of *Marsh* and *Town of Greece* correctly. Beginning with *Marsh* and *Town of Greece's* traditional and historical practice analysis, the circuits determine legislator-led prayer is not per se unconstitutional and, in some instances, falls within the historical and traditional practices of legislative prayer. However, legislator-led prayer has its limitations. Justice Kennedy emphasized in *Town of Greece* that if the prayers proselytize, disparage a faith, advance a particular faith, or betray an impermissible governmental purpose, the prayer practice will fall outside the historical and traditional legislative prayer practices of this nation.¹⁶⁰ These limitations direct the court's attention to the motivation behind the prayer-giver's invocations. Once the motivation transforms from a practice to lend divine guidance to an opportunity to proselytize, disparage, or advance a particular religion, the legislative prayer is in direct conflict with the Establishment Clause.

The discordance between the holdings of *Lund* and *Bormuth* lies within the Sixth Circuit's mischaracterization of *Town of Greece's* true holding: the purpose of prayer is to "lend gravity to the occasion and reflect values long part of the Nation's heritage," as well as to "invoke divine guidance in town affairs."¹⁶¹ Legislative prayer should not be used to proselytize or disparage, or advance, one faith over another. There is also a third purpose prayer should not be used for, political divisiveness. The Supreme Court must heed *Lemon's* long ago warning that political division along religious lines is a threat to the normal political process, and thus the prayers should not be used as a political wedge. Political divisiveness is an impermissible government purpose.

159. *Town of Greece*, 134 S. Ct. at 1823.

160. *Id.*

161. *Id.* at 1816, 1823.

Therefore, if there is a motive behind the prayer-givers to create a political community around religious divisions, then it would be outside the historical and traditional practices of legislative prayer and forbidden by the Establishment Clause.

The Sixth Circuit failed to understand that *Town of Greece* requires the courts to go beyond the identity of the prayer-giver. Courts must evaluate the prayer-giver's motive behind giving the invocation and determine whether the prayer practice crosses the "line between permissible and impermissible legislative prayer."¹⁶² The Fourth Circuit, on the other hand, correctly identified the commissioners' motives behind the prayer practice. Not only were the prayers used to proselytize and advance one religion over another, but the prayers were used to cause divide within the community.¹⁶³ At one particular meeting, an individual who opposed the prayer practice was booed and mocked by the audience.¹⁶⁴ Moreover, the prayer practice was used as a campaign platform by incumbents and challengers.¹⁶⁵ This kind of conduct is exactly what the majority in *Lemon* and Justice Breyer's concurring opinion in *Van Orden* warned against.¹⁶⁶

The Sixth Circuit majority strategically and intentionally ignored *Town of Greece's* core principle and did not look beyond the prayer-giver's identity to the motive of the prayer-giver. This strategic move was not in the substance of the opinion, but within the procedural history of the case. As stated above, the Sixth Circuit refused to supplement the appellant record with facts preserved in video recordings of the board commissioners' meetings or take judicial notice of the videos. This procedural note is vital because the videos contain strong evidence that the board members' motivations for giving the prayers were outside the scope of *Marsh* and *Town of Greece*. The reason for this is twofold. First, the Sixth Circuit held that under Federal Rule of Civil Procedure 56(c), Bormuth had "an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact," and it failed to do so.¹⁶⁷ Second, the Sixth Circuit declined to take judicial notice of the videos because of an apparent tension between judicial notice and the need "to review the case presented to the district court, rather than a

162. *Lund*, 863 F.3d at 295.

163. *Id.* at 282-85.

164. *Id.*

165. *Id.*

166. *Lemon v. Kurtzman*, 403 U.S. 602, 622-23 (1971). *Van Orden v. Perry*, 545 U.S. 677, 703 (2005).

167. *Bormuth v. County of Jackson*, 870 F.3d 494, 499-500 (6th Cir. 2017) (quoting *Chicago Title Ins. Corp v. Magnuson*, 487 F.3d 985, 995 (6th Cir. 2007)).

better case fashioned after a district court's unfavorable order."¹⁶⁸

Regarding the Federal Rule of Civil Procedure 56(c), the Sixth Circuit held that the plaintiff failed to assist the district court in understanding the facts within the videos.¹⁶⁹ The Sixth Circuit pointed to the party's briefs, as well as the plaintiff's complaint, to emphasize the lack of presentation of any video evidence.¹⁷⁰ However, the counsel for the County even admitted, during oral arguments at the panel stage of this case, that the official record includes all of the videos of the board of commissioners' meetings.¹⁷¹ Further, the plaintiff referenced the videos in his amended complaint and the Plaintiff's Response to Defendant's Motion for Summary Judgment.¹⁷² Nevertheless, the Sixth Circuit majority determined the plaintiff waived its opportunity to bring the district court's attention to those facts, and accordingly the Sixth Circuit would not supplement the appellate record with these videos either.

The Sixth Circuit also declined to take judicial notice of the videos. While the Sixth Circuit may take judicial notice at any stage of the proceeding under Federal Rule of Evidence 201, the Sixth Circuit refused to do so based on a desire to avoid potential tension between district and appellate courts.¹⁷³ Yet this disregards the language of the Federal Rule of Evidence 201(c): "[t]he court . . . must take judicial notice if a party requests it and the court is supplied with the necessary information."¹⁷⁴ The kinds of facts include facts that are not subject to reasonable dispute.¹⁷⁵ The facts within the videos were not subject to reasonable dispute, as the majority even pointed out, because Jackson County admitted the accuracy of these publicly-available videos.¹⁷⁶ Moreover, there was not a present tension in this case between the district and appellate courts, as the dissent correctly pointed out, because the plaintiff directed the district court's attention to the facts within these videos in his amended complaint and in his Plaintiff's Response to the Defendant's Motion for Summary Judgment.¹⁷⁷

168. *Id.* at 501.

169. *Id.* at 499-500.; *see* Fed. R. Civ. P. 56(c)(1) (requiring certain procedures for parties asserting there is a genuinely disputed fact).

170. *Bormuth*, 870 F.3d at 500.

171. *Id.* at 530-31.

172. *Id.*

173. *Id.* at 501.

174. Fed. R Evid. 201.

175. *Id.*

176. *Bormuth*, 870 F.3d at 501.

177. *Id.* at 531.

C. The Missing Videos: A Look Beyond the Prayer-Giver's Identity

Within these video recordings was strong evidence that the board members' motivations for giving the prayers were not limited to calling on divine guidance, but were also used to proselytize, advance one religion over another, and create political divineness. For example, one video uncovered that one of the boards' commissioners prayed at every meeting during a two year span, *except* for one meeting when no citizens attended.¹⁷⁸ Another video revealed the board of commissioners exclusively giving the prayers at every meeting because they were worried about "certain people com[ing] up here and say[ing] things that they are not going to like."¹⁷⁹ The board of commissioners wanted to avoid "things that they [were] not going to like" and did not want to "open a Pandora's Box" by allowing others to pray.¹⁸⁰ These videos exposed a pattern and underlying motive that the prayers led by the commissioners were not intended for themselves, but were intended for the citizens attending the meetings. The intention was to proselytize and advance Christianity specifically, because Christian prayers were the kinds of prayers they liked.

Further, the videos contradict the Sixth Circuit's argument that the comments made by the commissioners were not directed at the plaintiff's beliefs. One video reveals a commissioner calling the plaintiff a "nitwit": "[i]t's taken some nitwit 200 and some years to come up with an angle like this to try to deprive me or other people of my faith, of my rights."¹⁸¹ Another video shows a commissioner characterizing this issue as "political correctness nonsense" and stated the plaintiff has "political correctness jammed down his throat."¹⁸² An event the Sixth Circuit did take into consideration was when one commissioner turned his back to the plaintiff when the plaintiff first expressed his objection to the boards' prayer practice. The Sixth Circuit brushed this aside, stating it was not in reaction to the plaintiff's views, but to him bringing a lawsuit. However, the commissioner turned his back when the plaintiff *first* expressed his view about the prayer practice. Both the rhetoric in these videos and the commissioners' conduct demonstrate that the commissioners were specifically distained by and wished to exclude the

178. Brief of Amicus Curiae Am. United for Separation of Church and State In Support of Appellant and Reversal at 10, 26, *Bormuth v. County of Jackson*, 870 F. 3d 494 (2017) (No. 15-1869); see *November 6, 2014 Special Jackson County Board of Commissioners Meeting Video*, YouTube (Nov. 7, 2014), <http://tinyurl.com/2014nov6> (0:01-0:47).

179. *County of Jackson, Personnel & Finance Committee November 12, 2013 Jackson County, MI*, YouTube (Dec. 19, 2013), <http://tinyurl.com/2013nov12> (38:02-38:16).

180. *Id.* at 38:02-38:16, 46:51-47:25.

181. *Id.* at 43:30.

182. *Id.* at 43:00.

plaintiff's minority beliefs.

The Sixth Circuit attempted to distinguish itself from the Fourth Circuit at this point; suggesting the Fourth Circuit in *Lund* had multiple examples of opprobrium.¹⁸³ Yet all of the above examples illustrate the commissioners' defamation against the plaintiff, before and after litigation commenced, because of his minority view about the prayer practice. While the Sixth Circuit wished to conceal the videos from the record, there were still incidents the Sixth Circuit took into consideration that point to the true motivation behind the commissioners' prayer practice. Two commissioners were reported in a local newspaper stating "[Bormuth] is attacking us and, from my perspective, my Lord and savior Jesus Christ. Our civil liberties should not be taken away from us, as commissioners" and "[w]hat about my rights?... If a guy doesn't want to hear a public prayer, he can come into the meeting two minutes late."¹⁸⁴ The Sixth Circuit viewed them as just expressions about the commissioners' right to offer prayer. Nonetheless, even if the commissioners' were only speaking about their rights, the fact that the statements were published in the local newspaper and people in the community knew who the plaintiff was, clearly caused a community controversy and political division along religious lines. Members of the community now are either for or against the legislative prayer practice. Members are either an insider or an outsider.

Based on the facts within and outside of the appellate record, the Jackson County Board of Commissioners clearly intended the prayers to be a means to proselytize, advance Christianity, and create political divisions within the community. The Sixth Circuit's attempt to bury the facts in a pile of procedural rulings does not change the obvious motivations behind the legislator-led prayer. Unlike the Fourth Circuit, the Sixth refused to follow *Town of Greece*'s requirement to look beyond the prayers to the intentions of the prayer-giver. If *Bormuth* is granted cert to the Supreme Court, the case will almost certainly be found to be a mischaracterization of *Town of Greece* and flagrant attempt to ignore facts relevant to the "fact-sensitive" inquiry.

V. CONCLUSION

Establishment Clause jurisprudence is, and will continue to be, an ongoing debate between courts. As justices transition in and out of the Supreme Court, there is no doubt the ideology behind the Establishment Clause will continue to shift. Nonetheless, during the current time, the

183. *Bormuth v. County of Jackson*, 870 F.3d 494, 518 (6th Cir. 2017).

184. *Id.*

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Establishment Clause holds, at least in regards to legislative prayer, the “fact-sensitive” inquiry must begin and end with a look behind the prayers content and the prayer-giver’s identity to the motivations and intentions of the prayer-giver or prayer policy. *Marsh* and *Town of Greece* require courts to evaluate the intentions in light of the historical and traditional practices of legislative prayer. And if the intentions for the prayers consist of proselytizing, advancing, or disparaging a particular religion or causing political divisiveness, then the Supreme Court will find the prayer practice outside of the historical and traditional legislative prayer practices of our nation.