No. 15-1869

In The United States Court Of Appeals For The Sixth Circuit

PETER CARL BORMUTH,
Plaintiff - Appellant,

v.

COUNTY OF JACKSON,
Defendant - Appellee.

On Appeal from the United States District Court
for the Eastern District of Michigan
No. 2:13-cv-13726

SUPPLEMENTAL BRIEF OF APPELLEE COUNTY OF JACKSON

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INTRODUCTION AND SUMMARY OF ARGUMENT

"The First Amendment does not demand a wall of separation between church and state." *Smith v. Jefferson Cty. Bd. of Sch. Comm'rs*, 788 F.3d 580, 591 (6th Cir. 2015) (citation omitted). Instead, "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). Government "respects the best of our traditions" when it "respects the religious nature of our people and accommodates the public service to their spiritual needs." *Id.* at 314. And even when the Supreme Court has referenced some form of "separation of Church and State" as a general principle, *see, e.g.*, *id.*, it goes on to explain precisely what the Constitution requires, and what it does not. Contrary to Appellant's arguments, legislative prayer is constitutional beyond question.

The Supreme Court's decision in *Town of Greece* holds that legislative prayer practices that "fit[ ] within the tradition long followed" in the federal and state legislatures comport with the Establishment Clause. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014). Traditional prayers are those that "lend gravity . . . and reflect values long part of the Nation's heritage," are "solemn and respectful in tone," invite lawmakers to "reflect upon shared ideals and common ends," and sometimes involve asking for "blessings of peace, justice, and freedom." *Id.* at 1823.

Jackson County's practice of opening County Commissioners' meetings with an opportunity for individual Commissioners—on a rotating, voluntary basis—to deliver an invocation, or offer a moment of silence, according to the dictates of their own conscience, fits comfortably within this long tradition of seeking "wisdom" for the Nation's "lawmakers" and "justice" for the Nation's "people"—"values that count as universal and that are embodied not only in religious traditions, but in our founding documents and laws." *Id.*

Appellant would prefer to relitigate the meaning of the Establishment Clause and the tradition of legislative prayer—but it is too late in the day for that. Members of Congress have routinely opened legislative sessions with prayer.[1] State legislators have done so since the American Revolution.[2] And local legislators, like the County Commissioners, commonly open legislative sessions with prayer "to lend gravity to the occasion and reflect values long part of the Nation's heritage." *Id.*

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[1] *See* Sen. Robert C. Byrd, Senate Chaplain, *in II The Senate, 1789-1989: Addresses on the History of the United States Senate* 297, 305 (1982), available at http://www.senate.gov/artandhistory/history/resources/pdf/Chaplain.pdf.

[2] *See, e.g.*, *American Archives, Documents of the American Revolutionary Period 1774-1776*, at 1112 (1776); 1 *Journal of the Provincial Congress of South Carolina, 1776*, at 35, 52, 75 (1776); 1 *Legislative Journal of the State of Nebraska*, 85th Leg., 2d Sess. 640 (Feb 13, 1978).

Regardless, it is the "what," not the "who," that is constitutionally important—and as the Supreme Court made clear in *Town of Greece*, "[p]rayer that is solemn and respectful in tone, that invites lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing, serves [the] legitimate function" of legislative prayer. *Id.* The prayers here are materially indistinguishable from those approved in *Town of Greece*. They fit within the long tradition of legislative prayer and do not offend the Establishment Clause.

Nor is Jackson County's prayer practice unconstitutionally coercive. No one's participation is compelled—not even the individual Commissioners who are free to pray, offer a moment of silence, or "pass" on the opportunity altogether. No one's faith (or having no faith) is denigrated, and no one's faith is proselytized. The Commission merely seeks to provide an opportunity for "ceremonial prayers [that] strive for the idea[s] that people of many faiths may be united in a community of tolerance and devotion," such that "[e]ven those who disagree as to religious doctrine may find common ground in the desire to show respect for the divine in all aspects of their lives and being." *Id.* The County's purpose is permissible, its prayer practice is constitutional, and any other conclusion cannot be reconciled with the precedent of this Court and the Supreme Court.

ARGUMENT

I. The Historical Analysis Required By The Supreme Court Confirms That The County's Legislative Prayer Practice Falls Within The Boundaries Marked By *Town Of Greece* And *Marsh*.

The Supreme Court's analysis in *Town of Greece* answers each of the Appellant's arguments conclusively. Legislative prayer is presumptively constitutional if it "fits within the tradition long followed" in the federal and state legislatures. *Town of Greece*, 134 S. Ct. at 1819. Contrary to Appellant's argument, the Supreme Court's directive does not require that the practice must match any specific practice exactly—it must simply fit within the tradition of legislative prayer, thus allowing legislative bodies flexibility in fashioning their own practices. A historical analysis here reveals a practice well within the boundaries of what the Supreme Court has held the Establishment Clause allows.[3]

A. Invocations Offered By Legislators Fit Comfortably Within The Nation's Longstanding Legislative Prayer Traditions.

The historical analysis required by *Town of Greece* establishes a long tradition of opening legislative sessions—at all levels of government—with prayer

[3] Appellant argued in his panel briefing (at 48-50) that *Lemon v. Kurtzman* applies here—but as this Court has recognized, *Town of Greece* rejected *Lemon* or any form of the Endorsement Test in legislative prayer cases like this one. *See Smith*, 788 F.3d at 602. As demonstrated here, the panel majority erred in allowing "endorsement" to serve as a proxy for the analysis required by *Town of Greece*, which considers whether a prayer practice—over time and as a whole—falls outside the tradition of solemnizing the legislative process because it denigrates nonbelievers, threatens damnation, or preaches conversion. Panel Op. at 20 & n.6.

by legislators themselves. Thus the argument that the prayer-giver's identity is pertinent here cannot withstand a proper inquiry. It is and has long been a practice of United States Senators and Representatives to lead prayers to open congressional legislative sessions.[4] Indeed this practice continues today—a practice that would be impugned by the arguments made in this case.[5]

The same practice has been evident in state legislatures for more than two centuries as well.[6] And as is the case with Congress, local legislators still deliver prayers in most state legislatures throughout the country.[7] The same is true for municipalities of course, with many of them—such as Jackson County—having exclusively legislator-led legislative prayer. In fact, this makes even more sense on a local level where small municipalities may not have the time or resources to pay a chaplain or oversee a system of rotating clergy.

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[4] *See* Byrd, *supra*, at305 ("Senators have, from time to time, delivered the prayer."); 119 Cong. Rec. 17,441 (1973) (noting prayer offered by Rep. William H. Hudnut III).

[5] *See, e.g.*, 161 Cong. Rec. S3313 (daily ed. May 23, 2015) (Senator Lankford offering a prayer "[i]n the Name of Jesus"); 159 Cong. Rec. S3915 (daily ed. June 4, 2013) (Sen. William M. Cowan); 155 Cong. Rec. 32,658 (2009) (Sen. John Barrasso).

[6] *See, e.g.*, 1 *Journal of the Provincial Congress of South Carolina*, 1776, at 75 (1776) (noting prayers led by Reverend Turquand, a Member of the South Carolina legislature).

[7] *See* Nat'l Conf. of State Leg., Inside the Legislative Process, Prayer Practices 5-148 (2002), http://tinyurl.com/ncslprayer.

Given this history, it is unsurprising that the district court concluded that legislative prayer by legislators falls within the ambit of the Nation's historical traditions. *Bormuth v. County of Jackson*, 116 F. Supp. 3d 850, 860 (E.D. Mich. 2015) (upholding legislators delivering faith-specific legislative prayers). That conclusion follows directly from examining the Nation's historical practices, as *Town of Greece* requires. To brand legislator-led prayer as "far afield of the historical tradition upheld in *Marsh* and *Town of Greece*," Panel Op. at 20, is an *ipse dixit* label unsupported by the facts.

After all, legislative prayer is principally (though not exclusively) for the benefit of legislators themselves—"an opportunity for them to show who and what they are without denying the right to dissent by those who disagree." *Town of Greece*, 134 S. Ct. at 1826 (plurality opinion). Legislative prayers offered by legislators themselves serve these aims by allowing legislators to craft an uplifting message designed to prepare them for the solemn work of governance.

The argument that a legislator offering the prayers somehow removes the practice from the constitutional fold because it is "literally 'government speech,'" Panel Op. at 19-20, misses the mark entirely. Indeed, were the prayers in *Marsh* and *Town of Greece* not "government speech," the Supreme Court wasted considerable time and energy evaluating actions unable to violate the Establishment Clause. As it is, there can be no better example of "literal

government speech" than the paid chaplain in *Marsh*—who was an officer of the legislature—offering sectarian prayers underwritten by the public fisc. Whether there is "government speech" taking place is thus the wrong question to ask.

As the Supreme Court in *Town of Greece* explained, legislative prayers can permissibly "reflect the values [lawmakers] hold as private citizens." 134 S. Ct. at 1826 (plurality opinion). That is certainly the case here. As *Town of Greece* requires, the County "permit[s] [the] prayer giver to address his or her own God or gods as conscience dictates." *Id.* at 1822 (majority opinion). If a government body may pay for a chaplain to offer sectarian prayers exclusively over a period of many years, then legislators themselves offering invocations comfortably fits within the tradition of legislative prayer.

Appellant further attempts (at 12-20) to cast doubt on the tradition of legislator-led prayer by citing examples of individuals who may have been against the practice for some reason—but overlooks much of the reasoning behind those protests. For instance, a legislator would have offered the invocation in the First Congress were there not a dispute about the particular *denomination* to which the legislator belonged—there was no quarrel over a legislator offering a sectarian (*i.e.*, Christian) prayer in general.

Appellant's additional examples of individuals protesting chaplains and legislative prayer generally would prove too much even if they could be credited.

After all, the Supreme Court has sanctioned legislative prayer, even when offered by a government-paid chaplain. And it can hardly be said that *Town of Greece* would support excluding one of the rotating clergy in the town from offering the invocation simply because that person had also been elected to the town board. While Appellant tries to carve out an exception for such an "aberration" (at 16), this example proves the point.

There will always be variations in specific practices that need not have a historical analogue that maps perfectly onto a current one. Widespread use of the practice—from the Founding until the present day—evidences a historical tradition compatible with the Establishment Clause. The line Appellant attempts to draw to exclude legislators from that tradition cannot be supported by history, precedent, or logic.

B. Every Other Salient Feature Of The County's Prayer Practice Has Been Expressly Approved By The Supreme Court.

Despite the fact that the Nation's historical traditions include legislative prayers offered by legislators at all levels of government—federal, state, and local—the panel majority reasoned that allowing the legislators to offer prayers violates the "traditional purpose and effect of legislative prayer: respectful solemnification." Panel Op. at 20-24. This conclusion is contrary to the very purpose of legislative prayer—to focus the minds of the legislators themselves on the task at hand. And it cannot be reconciled with the fact that every other salient

feature of the County's prayer practice has been expressly approved by the Supreme Court.

Faith-specific content. In *Town of Greece*, the Supreme Court held that legislative prayer need not be devoid of faith-specific (or "sectarian") content to comport with the Establishment Clause. 134 S. Ct. at 1820-23. Indeed, as the Court explained, an "insistence on nonsectarian or ecumenical prayer . . . is not consistent with the tradition of legislative prayer," as "outlined in the Court's cases." *Id.* at 1820.

Thus it was not disqualifying that the prayers in *Town of Greece* included references to "the saving sacrifice of Jesus Christ on the cross," "the plan of redemption that is fulfilled in Jesus Christ," "the life and death, resurrection and ascension of the Savior Jesus Christ," the workings of the Holy Spirit, the events of Pentecost, and the belief that Jesus Christ, as the Son of God, rose from the dead. *Id.* at 1853 (Kagan, J., dissenting).

Yet the panel majority here took issue with the sectarian nature of the County's practice because there were "no opportunities for persons of other faiths to counteract this endorsement." Panel Op. at 21. This is wrong for two reasons. First, and most clearly, endorsement is not the constitutional yardstick for legislative prayer. Under that analysis, *Marsh* would have come out differently because there were not even opportunities for persons of other *denominations* (let

alone other *faiths*) to "counteract" the chaplain's prayers. And it is no answer to say that *Marsh* did not involve legislators offering the prayers themselves—again, the legislators there were *paying* the chaplain, who himself was an officer of the legislature, thus ensuring even less diversity than in the practice here.

Second, the County's practice is to permit each of its nine Commissioners the opportunity to pray in an equal rotation, each in his or her sole individual discretion. If a Commissioner chooses to pray, it is done according to that individual's own faith and tradition. The policy is facially neutral. If the voters elect three Muslims to the Board, then one-third of the prayers could be Islamic. If Peter Bormuth is elected to the Board, then one out of nine prayers could be Pagan.

The panel majority attempted to dispute this by asserting that "at least one Jackson County Commissioner admitted that, in order to control the prayers' content, he did not want to invite the public to give prayers." *Id*. at 21. As an initial matter, that assertion rests on evidence that is not properly part of the record on appeal, was not before the district court, and therefore cannot be considered in this Court's analysis. Moreover, one Commissioner's after-the-fact views concerning a *different* prayer policy—that was not adopted by the Board—would carry no weight in any event. But even if it could, when read in context, it is clear

that the Commissioner was not concerned with the "content" of prayers, but rather with the possibility that the prayer opportunity could be exploited.[8]

Under the panel majority's view, a legislature could never alter its legislative prayer practice from a *Town of Greece* rotating-clergy model open to all comers to a *Marsh*-style single-clergy model without violating the Establishment Clause. That cannot be right. After all, under *Marsh*, it is permissible for the County to hire a minister from a local Presbyterian church to offer *every* invocation. This illustrates precisely why the panel majority's reliance on an endorsement test is misplaced.

Ultimately, there is nothing divergent about the County's particular prayer practices. Indeed, the historical tradition illustrates far stronger exhortations to pray than anything found in this case. As far back as the early days of the Revolutionary War, the Continental Congress set aside May 17, 1776 as a "day of humiliation, fasting, and prayer" throughout the colonies, calling upon Americans to ask for divine "pardon and forgiveness" "through the merits and mediation of Jesus Christ" in the hope of gaining "his assistance to frustrate the cruel purposes

[8] "We all know that any one of us could go online and become an ordained minister in about ten minutes. Um, so if somebody from the public wants to come before us and say that they are an ordained minister we are going to have to allow them as well." Panel Op. at 22.

of our unnatural enemies." *Journal of the Proceedings of Congress, Held at Philadelphia, from September 5, 1775, to April 30, 1776*, at 155 (1778).

After the Establishment Clause was adopted, Presidents John Adams and James Madison each proclaimed days of national fasting and prayer in similarly sectarian terms. *See* Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2115 (1996). In response to a request from the Senate during the Civil War, President Abraham Lincoln likewise called upon the Nation to engage in a day of prayer and fasting, for the sake of "the restoration of our now divided and suffering country to its former happy condition of unity and peace." Abraham Lincoln, Proclamation Appointing a National Fast-day (Mar. 30, 1863), *in* 8 COMPLETE WORKS OF ABRAHAM LINCOLN 319-20 (Nicolay & Hay eds., 1894). The Nation's prayer traditions thus include vigorous calls to prayer—certainly stronger than anything in this case or, for that matter, in *Town of Greece*.

Moreover, Presidential Inaugural, Thanksgiving, and Christmas addresses have frequently invited religious observance (and done so in faith-specific terms). *See* Epstein, *supra*, at 2109, 2113-15. Many have included the same type of prefaces—similar to "let us pray" or "please pray with me"—that is of particular concern to the Appellant in this case. *See* 99 Cong. Rec. 451 (1953) (President Eisenhower at his first inauguration: "My friends, . . . would you permit me the

privilege of uttering a little private prayer of my own, and I ask that you bow your heads.").

Greece's chaplains spoke of "our Christian faith," of "us as Christian people," and prayed for "the members of the community who come here to speak before the board." Br. of Resp., *Town of Greece*, 2013 WL 5230742, at *10-11 (No. 12-696). None of these faith-specific references—and there were many—placed Greece's prayer practice outside the Nation's historical traditions of legislative prayer. The same is true here. If, as the Supreme Court concluded, the prayers in *Town of Greece* fit within the Nation's legislative prayer tradition—even though they were "explicitly Christian—***constantly and exclusively*** so," *Town of Greece*, 134 S. Ct. at 1848 (Kagan, J., dissenting) (emphasis added)—then the prayers here do too. The panel's reliance on whether the practice seems to endorse a certain religion is the exact argument made by the dissenters in *Town of Greece*, and must be rejected here as well.

Local government setting. The Board of Commissioners in Jackson County opens its monthly meeting with a legislative prayer. So did the Town of Greece. As the Supreme Court noted, Greece began its monthly town board meetings with a moment of silence "[f]or some years," transitioning to a clergy-delivered invocation in 1999. *Id.* at 1816 (majority opinion). The practice continued for the better part of a decade, eventually leading to the *Town of Greece* litigation. *Id.*

Greece included these invocations before every monthly board meeting—that is, before the meeting of the "local governing body."

An invocation's delivery before a local governing body does not raise special Establishment Clause concerns. Legislative prayer by definition is prayer before a governing body. And under the analysis required by *Town of Greece*, the governing body's status as *local* can be of no moment. Not only was Greece a local governing body, but the Nation's legislative prayer traditions also clearly extend beyond States to their subunits.[9] Any assessment based on the Nation's legislative prayer traditions, then, must include local governing bodies' legislative prayers. This directly undercuts the panel's reliance on the "local setting" as one of the factors that, added together, creates an Establishment Clause violation. Panel Op. at 24.

The panel majority again tries to use this factor as proof of coercion with the County's practice. *Id*. at 25. They note that citizens go before the Board for a variety of matters important to their community and therefore "there is increased pressure on Jackson County residents to follow the Board of Commissioners' instructions at these meetings, as the residents would not want to offend the local

[9] *See, e.g.*, S.C. Code § 6-1-160(B)(1) (providing local deliberative bodies with the authority to "allow for an invocation [by] one of the public officials, elected or appointed").

government officials they are petitioning." *Id.* Whatever weight this argument might have carried before *Town of Greece*, it has none now.

In *Town of Greece*, the legislators were free to watch which individuals participated in the prayer practice and which ones did not. Yet the Supreme Court affirmed that, while people may well disagree with various sorts of prayer practices, "[o]ur tradition assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith." 134 S. Ct. at 1823.

"Bow your heads." A Commissioner's decision to open a prayer with words such as "let us pray" or "please bow with me" poses no constitutional problem, either—the *Town of Greece* chaplains regularly did the same. The chaplains in *Town of Greece* began each monthly prayer with some invitation to the assembled, such as by asking audience members to stand and bow their heads, or by beginning with "let us pray." *Id.* at 1818. Other "inclusive, not coercive" introductions to prayers included: "Would you bow your heads with me as we invite the Lord's presence here tonight?," "Those who are willing may join me now in prayer," and "Let us join our hearts and minds together in prayer." *Id.* at 1826 (plurality opinion).

Some of the Commissioner's prayers here similarly began with "Bow your heads with me please." *See* Panel Op. at 3. As a member of the *Town of Greece*

plurality noted, these phrases are not only commonplace, but for public prayers are "almost reflexive." *Town of Greece*, 134 S. Ct. at 1832 (Alito, J., concurring). The Supreme Court saw no conflict between these introductions and the Establishment Clause. *See id.* at 1826 (plurality opinion).

Furthermore, the prayers themselves are filled with directives and requests directly for the benefit of the legislators. Panel Op. at 3 ("Lord help us to make good decisions that will be best for generations to come."). The prayers were thus aimed primarily at the legislators themselves and align with the traditional purpose of the practice.

C. The "Confluence Of Factors" Present In Jackson County's Prayer Practice Does Not Remove The Prayers From The Ambit Of Constitutional Legislative Prayer.

As demonstrated above, none of the characteristics of Jackson County's prayer practice raise constitutional concerns standing alone. Instead, the panel argues that the problem stems from the combination of (1) Commissioners delivering the prayers; (2) in a local setting with constituents in the audience; along with (3) deliberately excluding other prayer givers. Panel Op. at 24. Again, this approach misses the mark.

Each feature is common in prayer practices observed in state legislatures, municipalities, and city councils across the country. In *Town of Greece*, the prayers were overwhelmingly Christian, with one prayer expressly stating that the

prayer-giver "acknowledge[d] the saving sacrifice of Jesus Christ on the cross." 134 S. Ct. at 1816. And the prayers preceded each official legislative meeting. *Id.* The municipal lawmakers were certainly the "principal audience" for the legislative prayers in *Town of Greece*, *id.* at 1825 (plurality opinion), but never required to be the exclusive audience—it was of no consequence that constituents were in the audience. And in *Marsh*, the legislature exercised complete control over the identity of the prayer givers by paying a single chaplain to deliver the prayers—all others were excluded.

As a result, for the County's prayer practices to offend the Establishment Clause where others have not, the identity distinction would have to be dispositive. But *Town of Greece* does not permit that conclusion. The fundamental inquiry under *Town of Greece* is whether a practice fits within the Nation's traditions. As demonstrated above, legislative prayer by legislators comfortably does. A straightforward application of *Town of Greece* permits but one conclusion: the County's prayer practices comport with the Establishment Clause.

Crucially, a legislative prayer practice will not fall outside constitutional bounds unless "over time," the prayer opportunity is "'exploited to proselytize or advance any one, or to disparage any other, faith or belief'" or "over time . . . the ***invocations*** denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion." *Id.* at 1823 (emphasis added) (quoting *Marsh v. Chambers*,

463 U.S. 783, 794-95 (1983)). This prohibition refers to "invocations," *i.e.*, the "content of the *prayer*," *Marsh*, 463 U.S. at 794 (emphasis added).[10] None of those things happened within the legislative prayers here, and thus the County's practice has not been shown to be constitutionally infirm.

II. Jackson County's Prayer Practice Is Not Coercive.

The only concern here beyond the historical pedigree of legislator-led prayers is that the "government may not coerce its citizens to support or participate in any religion or its exercise." *Town of Greece*, 134 S. Ct. at 1825 (plurality opinion). Importantly, mere "social pressure[ ] . . . to remain in the room or even feign participation in order to avoid offending" board members falls short, however, of coercion. *Id.* at 1820 (majority opinion). Yet in the instant case, "social pressure" is the very most that Appellant offers. *See* Appellee's Br. at 3-4.

Appellant contends (at 5) that he "felt like he was being forced to worship Jesus [C]hrist in order to participate in the business of County Government." So,

[10] Thus, as the Supreme Court said in *Marsh* and reaffirmed in *Town of Greece*, a prayer practice cannot—over time—"proselytize or advance any one, or [ ] disparage any other, faith or belief." *Marsh*, 463 U.S. at 794-95. To proselytize means "[t]o induce someone to convert to one's own religious faith." AMERICAN HERITAGE DICTIONARY 1454 (3d ed. 1996). *Marsh* and *Town of Greece* draw precisely the same line: sectarian content is fine, proselytizing (meaning preaching to the hearer to convert to the prayer-giver's religion) or disparaging (*i.e.*, denigrating or damning)—again, over time—is not. The panel majority, however, blurred this line by essentially treating sectarian prayers the same as proselytization. *See, e.g.*, Panel Op. at 20 n.6.

too, did the *Town of Greece* plaintiffs, who claimed to feel "excluded and disrespected" because of the prayers' sectarian content. 134 S. Ct. at 1826 (plurality opinion). But the Supreme Court held that these complaints did "not equate to coercion." *Id.* Neither does "exposing constituents to prayer they would rather not hear and in which they need not participate." *Id.* at 1827. Appellant may have used the word "coerce" when filing his complaint (Amended Complaint, R. 10, Page ID # 75), but that does not make it so.

Of course, the analysis in *Town of Greece* might have been different if the *legislators*—who did not give the invocations in that case—themselves "directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity." 134 S. Ct. at 1826 (plurality opinion). But none of that happened here.

First, as noted previously, the Commissioners' prayers typically began with language along the lines of "Please bow your heads." Panel Op. at 3. The panel purported to distinguish *Town of Greece* on this score, where the plurality observed that "[a]lthough board members themselves stood, bowed their heads, or made the sign of the cross during the prayer, they at no point solicited similar gestures by the public." 134 S. Ct. at 1826 (plurality opinion). But this misunderstands *Town of Greece*.

The *Town of Greece* plurality emphasized that the "let us pray" statements by the invited clergy reflected the reality that the clergy "[we]re accustomed to directing their congregations in this way and might have done so thinking the action was inclusive." *Id.* at 1826. Similarly here, there is no reason to doubt that the Commissioners thought this language was inclusive, not coercive, based upon their personal experiences with prayers at church or home. *See also id.* at 1832 (Alito, J., concurring) (noting that certain statements such as "let us pray" are "almost reflexive" in certain communal prayer traditions). There is a difference between a legislator speaking as a "free agent" when offering his or her own legislative prayer and ordering those present to participate in someone else's prayer.

The *Town of Greece* plurality's admonition should not be stretched to capture inclusive statements that are hardly "directing" people to pray in a coercive sense. That point must be read in concert with the *Town of Greece* majority's holding that coercion cannot be mere discomfort at social pressure to participate, even going so far as to acknowledge that some individuals might feign participation. A polite invitation by the prayer giver is not the same as a government official directing citizens to pray.

Second, the Commissioners did not single Appellant out for opprobrium concerning his lack of participation in the legislative prayers. Two Commissioners

did express frustration stemming from this lawsuit. While these two instances were unfortunate, they are hardly opprobrium. Even if they were, they were momentary lapses, not a pattern or practice over time that exploited the prayer opportunity as a whole. The Establishment Clause forbids the "prayer opportunity" from being exploited, *Marsh*, 463 U.S. at 794, but does not circumscribe critical remarks by lawmakers during the business portion of a legislative session, or forbid a lawmaker from turning away from the lectern during a speech with which the lawmaker disagrees. Appellant may understandably be offended by those words and actions. "Offense, however, does not equate to coercion." *Town of Greece*, 134 S. Ct. at 1826 (plurality opinion). Nothing in *Town of Greece* says that if a local politician ever voices disapproval of someone suing over a legislative prayer practice, that expression becomes evidence of coercion. These isolated incidents—which occurred after Appellant filed this lawsuit—do not transgress the constitutional bar.[11]

[11] The videos showing these encounters should not be part of the record on appeal or considered by this Court. Appellant's pleadings never cite the videos, and they were never introduced in briefs or offered as exhibits. Appellant thus did not fulfill his "affirmative duty to direct the [district] court's attention" to the videos. *Chi. Title Ins. Corp. v. Magnuson*, 487 F.3d 985, 995 (6th Cir. 2007) (citation omitted). Thus the videos were never considered by the district court. Panel Op. at 54 (Griffin, J., dissenting). "The video[s] [were] not made part of the district court's record." *United States v. Crumpton*, 824 F.3d 593, 614 n.6 (6th Cir. 2016). Even if Appellant had proffered the videos on appeal, they still would not be part of the record. *Cacevic v. City of Hazel Park*, 226 F.3d 483, 491 (6th Cir. 2000). But he

Third, just as in *Town of Greece*, "[n]othing in the record indicates that town leaders allocated benefits and burdens ***based on participation in the prayer***, or that citizens were received differently ***depending on whether they joined the invocation or quietly declined***." 134 S. Ct. at 1826 (plurality opinion) (emphases added). To contest this point, the panel majority again points to the two instances of Commissioners expressing frustration and notes that Appellant did not get an appointment for which he believed he was qualified. Panel Op. at 26-27. Yet there is no evidence that the Board's official decisions were affected by Appellant's objections to prayer during the meetings—as the *Town of Greece* plurality warned. *See* Panel Op. at 60 (Griffin, J., dissenting). And though it makes sense that the Board would not want to select someone suing the County, there is not even evidence that the Board's choice to appoint someone else was motivated by this lawsuit, or that such legislative decisions are actionable.

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failed to do even that. Instead, they were mentioned only by an *amicus* at the appellate stage and should not now be brought into the case.

Were all the video evidence considered, however, it would actually *undercut* the panel majority's conclusions about the Commissioners and their motives. Commissioners were responding to personal attacks by Appellant and a legal challenge to a prayer practice they believed to be constitutional. County of Jackson, Personnel & Finance Committee November 12, 2013 Jackson County, MI, YOUTUBE (Dec. 19, 2013), http://tinyurl.com/2013nov12 (32:36–33:35). The Board was not endorsing a particular religion, just defending its own policies that, in his own words, "disgust[ed]" the Appellant. The Board was simply engaging in a debate (albeit a heated one) about a proposed policy change. The panel majority's "smoking gun" is nothing of the kind and, if anything, only confirms that the legislative prayers here are constitutional.

"Adults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum . . . ." *Town of Greece*, 134 S. Ct. at 1826 (plurality opinion). In *Town of Greece*, the Court identified the same number of disparaging remarks—made there in the prayers themselves—but held that stray remarks like these do not rise to the level of a constitutional violation because they do not form a "pattern . . . over time." *Id.* at 1824 (majority opinion). The same is true here. The County's prayer practice cannot be coercive when considered on the whole, and over time, as *Town of Greece* requires.[12]

Finally, the elements of the prayer practice here cannot combine to create coercion where specific practices have been approved by the Supreme Court. That is why *Town of Greece* similarly rejected the argument that the "sectarian content

[12] Given the lack of a pattern over time, the Commissioners' motives in dealing with Appellant are irrelevant. Nevertheless, the district court did not abuse its discretion in denying Appellant's request to depose the Commissioners. As the district court noted, Federal Rule of Civil Procedure 56(d) specifies how a nonmoving party objects to summary judgment when he still needs discovery. Order, R. 46, Page ID ## 820-821. But Appellant did not rely upon any discovery for summary judgment, *see Superior Prod. P'ship v. Gordon Auto Body Parts Co.*, 784 F.3d 311, 322 (6th Cir. 2015), instead moving for summary judgment before asking for discovery. While courts give leeway to pro se litigants, they do not ignore the Federal Rules to provide a party a "do over" whenever a litigant pursues a legal strategy that does not work, then wishes he had tried something else. At minimum, the court's following Rule 56(d) is not an abuse of discretion.

of the prayers compound[ed] the subtle coercive pressures" that they had purported to experience. *Id.* at 1820. Indeed, the County's prayer practice shares many of the features that the *Town of Greece* plurality found important in concluding that Greece's prayer practice coerced no one:

- "[T]he prayer is delivered during the ceremonial portion of the town's meeting," alongside the Pledge of Allegiance, and before the official business of policymaking. *Id.* at 1827 (plurality opinion); *see also id.* at 1816 (majority opinion).

- Anyone may arrive after the prayer or "exit the room during a prayer," and such an "absence will not stand out as disrespectful or even noteworthy." *Id.* at 1827 (plurality opinion).

In this, as in many other ways, the County's prayer practice is materially identical to that in *Town of Greece*—and thus no more coercive.

Nor is legislative prayer coercive because it limits the universe of prayer-givers. True, the *Town of Greece* plurality took note of the fact that Greece's policy permitted anyone who desired to lead a prayer. *Id.* at 1826 (plurality opinion). But there was only a single, Protestant chaplain in *Marsh*. Thus setting aside the lack of record evidence for the panel majority's conclusion that the "Commissioners affirmatively excluded non-Christian prayer givers, and did so in an effort to control the content of the prayers," Panel Op. at 27, the legislators in *Marsh* "affirmatively excluded" non-Christian prayer givers—and, as the panel majority's discussion reveals, the Commissioners here acted only in the interest of

ensuring that the prayer opportunity maintained its proper role as solemn and respectful. *Id*. at 22.

* * *

The panel majority's conclusion that legislative prayer violates the Constitution when offered by legislators themselves cannot be reconciled with precedent, history, or common sense—particularly given the Supreme Court's instruction that legislative prayer provides *legislators* "an opportunity for them to show who and what they are without denying the right to dissent by those who disagree." *See Town of Greece*, 134 S. Ct. at 1826 (plurality opinion). Appellant is entitled to dissent and to disagree. But his challenge to the County's prayer practice must fail.

CONCLUSION

The judgment of the district court should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of the order, entered February 27, 2017, because this brief contains 25 pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14-point Times New Roman typeface.

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I certify that on April 27, 2017, the foregoing Supplemental Brief of Appellee County of Jackson was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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