No.

IN THE

SUPREME COURT OF THE UNITED STATES

PETER CARL BORMUTH,

Petitioner,

v.

COUNTY OF JACKSON, MICHIGAN

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Three questions are presented:

1. Whether legislative prayers delivered by legislators comports with this Court's decision in *Town of Greece v. Galloway,* 134 S. Ct. 1811 (2014) or whether it constitutes government speech that violates the Establishment Clause and the historical understanding of our Founders as expressed in their statements, practices, and the Treaty of Tripoli?

2. Whether the commands "All rise and assume a reverent position" given by a government official before a prayer opportunity constitutes coercion under the standard created by the plurality opinion in *Town of Greece v. Galloway,* 134 S. Ct. 1811(2014)?

3. Whether Fed. R. Evid. 201 requires an appellate court to take judicial notice of evidence that is not subject to reasonable dispute when a party requests it?

PARTIES TO THE PROCEEDING

The parties to the proceedings include those listed on the cover.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Peter Bormuth respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINION AND ORDERS BELOW

The *en banc* opinion of the court of appeals is reported at 870 F.3d 494 (2017). The panel opinion of the court of appeals is reported at 849 F.3d 266 (2017). The district court order granting summary judgment is reported at 116 F. Supp. 3d 850 (2015).

STATEMENT OF JURISDICTION

The judgment of the *en banc* was entered on September 6, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]

U.S. CONST. amend. I.

TREATIES INVOLVED

The Treaty of Tripoli, Article 11 (1797) provides in relevant part:

> As the government of the United States is not, in any sense, founded on the Christian religion[;]

STATEMENT OF THE CASE

In 1787 the Founding Fathers met and drafted the constitution for our new nation. Their work makes absolutely no reference to Jesus or God, citing as its sole authority "the people of the United States." The stated purposes are secular: "to form a more perfect union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general welfare, and secure the blessings of Liberty." Instead of building a christian nation, the supreme law of the land established a secular state.

The opening clause of the first amendment introduced the radical notion that the state had no voice concerning matters of conscience: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." According to the Annals of Congress, on August 15, 1789 James Madison was queried about the meaning of proposed wording that would become the Establishment Clause. "Mr. Madison said, he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."[1]

The 1797 Treaty of Tripoli included language specifically preventing officials from representing our government as Christian. Article 11 pointedly declares: "...the Government of the United States, is not, in any sense, founded on the Christian religion."

[1] 1 ANNALS OF CONG. (Aug. 15, 1789)

Thomas Jefferson, while President, clearly articulated the historical understanding of the Framers when he wrote in a January 23, 1808 letter to Reverend Samuel Miller, "Certainly no power to proscribe any religious exercise...has been delegated to the general government."[2] Even enemies of the Establishment Clause like Yale Divine Timothy Dwight understood that, "we formed our Constitution without any acknowledgement of God...or even of his existence. Thus we commenced our national existence under the present system, without God."[3]

This case involves a First Amendment challenge to the Jackson County practice of having elected officials offer opening prayers at their monthly meetings. The Jackson County practice is a deliberate attempt to reintroduce God into our government. Following a call to order, Chairman Shotwell typically commands the public to "rise and assume a reverent position" and then one of the Commissioners offer a Christian prayer, followed by the Pledge of Allegiance, and then county business. Jackson County regularly invited school age children (elementary, middle & high school) to lead the Pledge immediately following the prayer. Jackson County is a conservative county with an overwhelming Christian demographic, and all of the elected officials are Christian, leading to a prayer practice that historically has been exclusively Christian.[4] This practice began sometime around 1990 and has continued

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[2] *The Writings of Thomas Jefferson,* ed. A. A. Lipscome and A. E. Bergh, Volume XV, Washington DC: The Thomas Jefferson Memorial Association 1905

[3] Timothy Dwight, *A Discourse in Two Parts,* (Boston, Cummings & Hilliard, 1813), p. 24

[4] With an eye towards this pending petition, the Commissioners invited Bernie Morrison, co-president of Jackson's Temple Beth Israel, to give the invocation at the August 29, 2017 meeting, giving her the honor to be the first non-christian to offer an opening prayer. The hypocrisy of the Commissioners did

to the present day, violating our accepted tradition that "[E]ach separate government in this country should stay out of the business of writing or sanctioning official prayers." *Engle v. Vitale,* 370 U.S. 421 435 (1962).

Routinely trampling on the rights of conscience of all non-believers or members of minority faiths, the commissioners shamelessly coerce citizens "to rise and assume a reverent position" and then recite prayers "in our public institutions in order to promote a preferred system of belief or code of moral behavior." *Town of Greece v. Galloway,* 134 S. Ct. 1811, 1822 (2014). These prayers have advanced one faith, Christianity, providing it with a special endorsed and privileged status. *Marsh v. Chambers,* 463 U.S. 783 (1983) at 794-795. As one commissioner acknowledged, "[e]very board member here who gets up there and says a prayer during invocation, we end our invocation in the name of Jesus Christ." County of Jackson, *Personnel & Finance Committee* November 12, 2013 Jackson County, MI YouTube (Dec. 19, 2013), This clearly indicates the intention of the commissioners to exploit the prayer opportunity to advance the Christian faith. By rejecting any formal policy with regard to the prayer opportunity and by retaining exclusive control, the commissioners have created a deliberate defacto policy of discrimination, ignoring the opinion in *Town of Greece* that the government is required to "maintain...a policy of non-discrimination." *Town of Greece,* 134 S. Ct. at 1824.

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not detract from the dignity of her address, however misguided her premise. Petitioner holds that the Founders utilized models from Pagan Greece, Pagan Rome, English common law, the Iroquois Confederacy and Enlightenment philosophy when framing the Constitution, not the Judeo-Christian tradition of kingship and theocracy.

While prayers by guest chaplains may "reflect the values [lawmakers] hold as private citizens" *Town of Greece* 134 at 1826, prayer by elected officials "entangles governmental and religious functions to a much greater degree than a chaplain praying before the legislature." *North Carolina Civil Liberties Union Legal Foundation v. Constangy*, 947 F.2d 1145, 1149 (4th Cir. 1991). The Commissioners have proclaimed in their prayers that "we will be celebrating the birth of your son jesus christ." They have "ask[ed] that the Holy Spirit will guide what we say and the decisions that we make." They have urged "each and every one of us [to] realize that we serve God first." They have prayed to "make us one people united and praising you through Christ our Lord." They have asked the "Heavenly Father" to "Bless the Christians worldwide who seem to be the targets of killers and extremists." Dkt. 25-2. Ex. A. to Def.'s Mot. For Summ. J., Page ID# 267-270. Dkt 42, Ex. L. to Pl. Mot. To Supp.

All Courts previously considering this matter have held that when a legislator leads constituents in prayer "he is not just another private citizen. He is the representative of the state". *Lund v. Rowan County,* 863 F.3d 268 (4th Cir. 2017) (en banc); *Hudson v. Pittsylvania County, Va.,* Case No. 11-043 (W.D. Va. 2014) (holding "the active role of the Pittsylvania County Board of Supervisors in leading the prayers, and, importantly, dictating their content, is of constitutional dimension and falls outside of the prayer practices approved in Town of Greece."). The Fourth Circuit's holding in *Turner v. City Council of Fredericksburg, VA*, 534 F. 3d 352 (4th Cir. 2008) specifically found that prayers delivered by legislators were government

speech. Each commissioner acts as a representative of all the citizens in their district, not as a private citizen. Under the First Amendment, the fact that the prayers are government speech is pivotal. There is "a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Santa Fe Independent School District v. Doe,* 530 U.S. 290 (2000), quoting *Board of Education v. Mergens*, 496 U.S. 226 (1990) (opinion of O'Connor, J.) (emphasis in original). Correctly perceiving this essential difference, the en banc Fourth Circuit held that the practice of commissioner-led prayer violated the Establishment Clause and "served to identify the government with Christianity and risked conveying to citizens of minority faiths a message of exclusion." *Lund,* 863 at 4. The Sixth Circuit rejected this reasoning and held that "prayers by agents (like in *Marsh* and *Town of Greece*) are not constitutionally different from prayers offered by principals." *Bormuth v. County of Jackson*, 870 F.3d 494 (2017) (en banc).

This Court's opinion in *Town of Greece* held that, "The analysis would be different if town board members directed the audience 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." *Town of Greece,* 134 S. Ct at 1826. Ignoring Justice Kennedy, the Sixth Circuit held, "we do not agree that soliciting adult members of the public to assist in solemnizing the meetings by rising and remaining...in a reverent position is coercive." *Bormuth v. County of Jackson,* 870 F.3d 494 (2017). The Sixth Circuit suggest coercion would only exist if the

commissioners "directed a legislative security officer to 'pressure' them [objectors] to stand." *Id.*

The Sixth Circuit declined to find the fact that commissioners made faces expressing disgust and twice turned their backs on the petitioner during public comment sufficient to establish opprobrium. Commissioner comments calling the Petitioner a "nitwit" and claiming "[Bormuth] is attacking us, and from my perspective, my Lord and Savior Jesus Christ" were written off by the Sixth Circuit as an "unfortunate expression of their own personal sense of affront elicited by [Bormuth's] sentiments."

The Sixth Circuit upheld the district court ruling denying the petitioner the opportunity to depose commissioners on their motives for offering prayers and their motive for rejecting petitioner's requests for appointment to two local government boards ("motive is not a relevant factor") in violation the uniformly held case law holding such an inquiry necessary in Religion Clause cases. *Epperson v. Arkansas*, 393 U.S. 97(1968); *McGowan v. Maryland*, 366 U.S. 420 (1961); cf. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

And the Sixth Circuit declined to take judicial notice of evidence that is not subject to reasonable dispute even though the petitioner requested it.

BACKGROUND TO THE CASE

Respondent Jackson County is one of 83 Michigan Counties, the primary administrative division of Michigan Government. There are nine elected

commissioners, led by a chairman. The commissioners typically meet on the third Tuesday of every month at 7pm in the commissioners chambers on the 5th floor of the Jackson County Building. The meetings are free and open to the public. Children regularly attend to lead the Pledge of Allegiance. The County Commissioner meetings are video recorded and posted on the Jackson County website: www.co.jackson.mi.us. The meetings open with a call to order by Chairman Shotwell, followed by the Commissioner-led invocation/prayer, followed by the Pledge of Allegiance, and then county business. The County of Jackson Policy Manual has no posted rules regarding the commissioner-led invocation/prayer. R.10, Pg. ID #64 (Am. Compl.).

Petitioner Peter Bormuth is a self-described Pagan and Animist who worked for three years (2010-13) to close down the Jackson County Resource Recovery Facility (JCRRF). This county-owned mass burn Class II garbage waste incinerator was discharging 65,000 gallons of ash quench water per day into the Blackman Township sewer system, which transported it to the City of Jackson Wastewater Treatment Plant from where it discharged into the Grand River. The petitioner met individually with County, City and MDEQ officials, attended County Commissioner study sessions and Board of Public Works meetings advocating for the closure of the JCRRF and the testing of the waste stream for dioxins and furans utilizing method 1613B which the EPA adopted in 1994. R.10, Pg. ID #63 (Am. Compl.).

When the petitioner started attending County Commissioner meetings, he was astonished that a Commissioner gave a prayer to open the meeting. The order to "rise and assume a reverent position" and the explicitly Christian prayer made the

petitioner "feel like he was in church" and feel that "he was being forced to worship jesus christ to participate in the business of county government." At the July 23, 2013 meeting, the Commissioners voted 8-1 to close the JCRRF, with only Chairman Shotwell voting in opposition. The August 20, 2013 meeting contained a resolution supporting Second Amendment open carry rights as an agenda item, and having secured the decision to close the JCRRF, the petitioner thought it an appropriate time to raise his First Amendment concerns over the prayer practice. While the petitioner was addressing the Board during public comment, Commissioner Lutchka made faces of disgust and actually swiveled his chair and turned his back to the petitioner while the petitioner was quoting Thomas Jefferson. R.10, Pg. ID #69. (Am. Compl.).

The petitioner then commenced this litigation on August 30, 2013. Doc. #1. A month later the petitioner sought appointment to Jackson County's Solid Waste Planning Committee. Before his public objection to the Commissioner's prayer practice, the petitioner anticipated appointment to this committee. Instead, the Commissioners appointed two christians of lesser qualifications to the SWPC. R. 10, Pg. ID #69, 90. (Am. Compl.). The petitioner then filed an amended complaint on November 14, 2013. R.10. (Am. Compl.).

In response to the petitioner's original filing, and after consulting with their legal counsel, County Administrator Michael Overton proposed Policy No. 4035, which would have established an invocation policy similar to that of Town of Greece, NY. R.14, Pg. ID #145-148. (Pl. M. Sum. J.).This policy was unanimously rejected by the commissioners at their November 12, 2013 Personnel and Finance Committee

meeting. R.14, Pg. ID #149. (Pl. M. Sum. J.). In retaliation for even proposing a non-discriminatory policy, the commissioners then ordered Overton to give the invocation at the January 2, 2014 meeting to insure his loyalty to the "christian nation" dogma they espouse.

Recorded videos posted online by the County provided evidence that all past prayers were Christian. This majority rule in religion would continue since the Commissioners held exclusive control over the prayer opportunity by virtue of their elected office, so the petitioner moved for summary judgment on December 20, 2013. R.14. The petitioner's position was that all legislator-led prayer is unconstitutional based on the historical understanding and practices of the Founders. This was before *Town of Greece* had been decided. Given the prevailing standard of law at the time based on the dicta in *Alleghany* holding sectarian prayer unconstitutional, the facts of this case entitled the petitioner to summary judgement.

The District Court declined a request from Jackson County to freeze this case until *Town of Greece* was decided, but took no action on the petitioner's motion and issued a scheduling order on January 14, 2014 making discovery due by June 30, 2014. R. 19. On May 5, 2014 this Court released its decision in *Town of Greece*. The petitioner thought it prudent to secure additional evidence of improper motive given the new standard of *Greece*, so the petitioner sought to depose the Commissioners and Administrator Overton, R. 24-2, Pg. ID #226 (Not. of Deps). On June 6, 2014 the County filed a Motion to Quash (R. 24), which the Magistrate Judge later granted on December 10, 2014. (R. 46.)

On June 11, 2014 the County filed for Summary Judgment. R. 25. The Magistrate Judge then ordered the petitioner to file a revised Motion for Summary Judgment in light of *Town of Greece* (R. 32), which the petitioner filed on September 11, 2014. (R. 37.). On March 31, 2015 the Magistrate Judge issued his Report recommending that the District Court deny the County's motion for summary judgment and grant the petitioner's motion for summary judgment because "the legislative practice of the Jackson County Board of Commissioners violates the Establishment Clause." R. 50, Pg. ID #914. (Mag. R & R). Both parties filed objections to parts of the Magistrate's report. (R. 51 & 53). On July 22, 2015 the District Court issued an Opinion & Order rejecting the Magistrate's recommendations and granting Jackson County's Motion for Summary Judgment, recognizing that after *Greece* "the outcome of the present case...hinges exclusively on the fact that the prayer was delivered by the Commissioners." R. 61, Pg. ID #1064. (D.C. Order). The District Court declined to find this was "government speech" and held that "the fact that all nine of the Commissioners are Christian is immaterial" and that 'their personal beliefs are...a reflection of the community's own overwhelming Christian demographic." R. 61, Pg. ID #1057. (D.C. Order). The District Court suggested that "as argued by Jackson, the future may bring Commissioners of more diverse religious backgrounds who will deliver invocations in those traditions" thus subjecting freedom of religious conscience in this country to the vagrancies of future elections. R. 61, Pg. ID #1057.

The petitioner appealed (R. 63, Pg. ID 1070) and a divided Sixth Circuit panel reversed in an opinion issued on February 15, 2017. (R. 66). Writing for the majority,

Judge Moore held that Jackson County's prayer practice "is well outside the tradition of historically tolerated prayer, and it coerces Jackson County residents to support and participate in the exercise of religion." R. 66, Pg. ID 1106). The majority also found that the district court abused its discretion in granting the County's motion to quash depositions and in denying the petitioner's second motion to supplement.

Judge Griffin then convinced his colleagues to sua sponte grant rehearing en banc (R. 67) and on September 6, 2017, a divided Sixth Circuit (9-6) issued its en banc opinion affirming the District Court with Judge Griffin writing for the majority that, "neither *Marsh* nor *Greece* restricts *who* may give prayers in order to be consistent with historical practice." The majority erroneously found that legislator-led prayer was a long-standing tradition based on aberrations in the record where legislators who were also ordained ministers led opening prayers in their capacity as ministers. The majority found that coercion would only exist if the Commissioners "directed a legislative security officer to pressure them [objectors] to stand." The majority declined to take judicial notice of conclusive video evidence showing that the Commissioners decided not to adopt a policy like Town of Greece because they were concerned about "certain people coming up here and saying things that we are not going to like." County of Jackson, *Personnel & Finance Committee* November 12, 2013 Jackson County, MI YouTube (Dec. 19, 2013).

Judge Moore, in her able and convincing dissent, noted that "When the Board of Commissioners opens its monthly meetings with prayers, there is no distinction between the government and the prayer giver: they are one in the same." Her

conclusion that the majority took "the additional step of refusing to consider evidence that the legislators intended to proselytize, affirmatively excluded non-Christian prayer givers, and discriminated against a citizen who objected to the prayer practice" is both accurate and sufficient reason to grant certiorari. *Bormuth v. County of Jackson*, 870 F.3d 494 (6th Cir. 2017) (en banc) (Moore, K., dissenting).

REASONS FOR GRANTING THE PETITION

I. *Marsh* And *Town Of Greece* Never Considered Legislator-Led Prayer.

The facts considered in *Marsh v. Chambers*, 463 U.S. 783 (1983) involved the practice of the Nebraska legislature beginning each of its sessions with a prayer offered by a chaplain who was chosen biennially by the Executive Board of the Legislative Council and paid out of public funds. Robert E. Palmer, a Presbyterian Minister, had served as chaplain for 16 years. *Id* at 785. The Court noted that Palmer was not the only clergyman heard by the legislature and that guest chaplains had officiated at the request of various legislators and as substitutes during Palmer's absences. *Id* at 793. Nowhere in the briefing or the Court's opinion was the practice of legislator-led prayer ever considered.

After examining this practice of chaplain-led prayer, the Court concluded that "[t]he men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and [their] opening prayers as a violation of that Amendment..."thus carving out an exception to the Establishment Clause based on

historical tradition.[5] *Id* at 786. Even though the Constitutional Convention of 1787 never appointed a chaplain, and no prayers were ever offered before that body,[6] the Supreme Court thought it significant that the Continental Congress of 1774 "adopted the traditional procedure of opening its session with a prayer offered by a paid chaplain" and the First Congress "adopted the policy of selecting a chaplain to open each session with prayer" and "authorized the appointment of paid chaplains" just three days before it approved the language of the First Amendment. *Id* at 787-88. Based on this historical evidence and the nearly unbroken tradition of having chaplains or guest ministers open legislative sessions with prayers, the Court in *Marsh* carved out an exception to the Establishment Clause and held Nebraska's practice constitutional.

The facts considered in *Town of Greece, NY v. Galloway,* 134 S. Ct. 1811 (2014) differed from *Marsh* in that all prayer givers were unpaid volunteers. A town employee would call the congregations listed in a local directory until she found a minister available for that month's meeting. The town eventually compiled a list of

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[5] This observation by the Court was not entirely accurate. As early as 1785 James Madison vigorously opposed government payment for the religious services of clergymen as an "establishment" of religion. See James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), in NOONAN & GAFFNEY, *supra* note 90, at 174. Madison also wrote on two separate occasions that the legislative chaplaincy in Congress was a violation of the Establishment Clause. See Elizabeth Fleet, *Madison's "Detached Memoranda"* 3 Wm. & Mary Q 534, 536-59 (1946) & Letter from James Madison to Edward Livingston, July 10, 1822 in *The Founders Constitution*, Philip B. Kirkland & Ralph Lerner eds. , 1987.

[6] On June 28, 1787 Benjamin Franklin proposed that one or more clergy from Philadelphia be brought in officiate daily prayers. Franklin's motion was debated, adjourned without a vote, and never brought up again. Franklin's assessment of the situation was that "the convention, except for three or four persons, thought Prayers unnecessary" See 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 112, at 450-52 n.15; see also LEVY, *supra* note 10, at 81; E. Gregory Wallace, *When Government Speaks Religiously*, 21 FLA. ST. U. L. REV. 1183, 1236-37 (1994).

willing "board chaplains" who had accepted invitations and agreed to return in the future. Nearly all of the congregations in town were Christian; and from 1999 to 2007, all of the participating ministers were too. *Id* at 1816. The Court found this was not significant since the town at no point excluded or denied an opportunity to a would-be prayer giver. Its leaders maintained that a minister or layperson of any persuasion, including an atheist, could give the invocation. The Court also found that sectarian prayers by the guest chaplains did not violate the Establishment Clause, overthrowing the case law based on the dictum in *County of Allegheny v. ACLU,* 492 U.S. 573 (1989). However, nowhere in *Town of Greece* did the Court consider legislator-led prayer.

Throughout the *Town of Greece* opinion and the opinion in *Marsh*, this Court consistently discussed legislative prayer practices in terms of invited ministers, clergy, or volunteers providing the prayer, and not once described a situation in which the legislators themselves gave the invocation. Ultimately, the ruling in *Town of Greece* emphasized that a court must conduct "a fact-sensitive review of the prayer practice" and that "the prayer opportunity...must be evaluated against the backdrop of historical practice." Whether legislator-led prayer, without the intermediary of a chaplain or a guest minister, comports with this Court's previous rulings in *Marsh* and *Town of Greece,* or whether it is "a conceptual world apart" as Judge Wilkinson wrote in *Lund* is an issue of such overriding constitutional significance that this Court should grant review.

II. The Circuits Are Split On Whether Legislator-led Prayer is Permitted Under *Marsh* and *Town of Greece.*

On July 14, 2017 the 4th Circuit issued a decision in *Lund v. Rowan County*, 863 F.3d 268 (4th Cir. 2017) (en banc), holding that the Rowan County practice of commissioner-led prayer violated the Establishment Clause and "served to identify the government with Christianity and risked conveying to citizens of minority faiths a message of exclusion." (*Lund,* 863 F.3d, at 4). *Lund* and the instant case encompass the same issues. Both cases involve Legislator-led prayer. Both cases involve coercion. In both cases nearly every prayer is Christian. In both cases you have majority rule in religion. In both cases the plaintiffs were singled out for opprobrium. In both cases questionable language and sentiments are expressed in some prayers. (Compare Commissioner Carl Ford of Rowan County ("I pray that the citizens of Rowan County will love you, Lord, and [that they will] put you first. In Jesus' name, Amen.") (Pet. App. 303 at 233) with Commissioner Carl Rice of Jackson County ("Lord, I just truly thank you for what's coming up here soon and that's Christmas, Lord, and I just thank you for the fact that we will be celebrating the birth of your son Jesus Christ. Lord I just ask tonight that we will move forward and that we will follow your will. In Jesus's name I pray, Amen.") (Dkt. 25-2. Ex. A. to Def.'s Mot. For Summ. J., Page ID# 269).

The *Lund* Court looked at "the totality of circumstances" and concluded that the identity of the prayer-giver is pertinent under the fact sensitive inquiry required by *Town of Greece* (*Id* at 15). The Fourth Circuit held that the closed universe of

commissioner-led prayer is "a conceptual world apart" from *Greece* (*Id* at 15-16) The Court found that when a commissioner leads constituents in prayer "he is not just another private citizen. He is the representative of the state,..." (*Id* at 40-41). In her concurring opinion, Judge Motz noted that the historical tradition argument of the defendants and their amici was "very thin gruel" mostly drawn from contemporary practices, and "certainly no substitute for the Framers own practices and understandings." (*Id* at 51, Motz, D., Concurring).

The Sixth Circuit expressly disagreed with the Fourth Circuit and concluded: "we find it insignificant that the prayer-givers in this case are publicly-elected officials" while holding that "prayers by agents (like in *Marsh* and *Town of Greece*) are not constitutionally different from prayers offered by principals." They determined that "history shows that legislator-led prayer is a long standing tradition" that "is uninterrupted and continues in modern times" and thus "is consistent with *Marsh v. Chambers* and *Town of Greece v. Galloway* and does not violate the Establishment Clause." *Bormuth v. County of Jackson*, 870 F.3d 494 (6th Cir. 2017) (en banc) at 509, 510, 519.

In the five States that make up the Fourth Circuit, legislator-led prayer falls "well outside the confines of *Town of Greece,"* and is constitutionally prohibited. In the four States that make up the Sixth Circuit, minority rights of conscience are routinely trampled by the very same practice, which was held "consistent with...*Town of Greece*." Two *en banc* courts comprising 30 judges have analyzed the issue and

reached opposite conclusions on materially similar facts.[7] There is no possibility that the conflict will resolve itself over time. Additional delay will only make the confusion more widespread as other courts cite the conflicting decisions. This Court has long emphasized that, "[u]nder a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community." *Miller v. California*, 413 U.S. 15, 30 (1973). Failure to accept this petition for review would ensure that First Amendment limitations on prayer will vary from community to community in violation of this Court's clear mandate.

III. The Sixth Circuit's Decision Conflicts With Precedent Of This Court.

This Court in *Town of Greece* specifically found that Legislatures and Courts should not "act as supervisors and censors of religious speech." *Town of Greece,* 134 S. Ct at 1822. But the Jackson County Commissioners are dictating and delivering the content of the prayers in the instant case, thus acting as supervisors and censors of religious speech. Thus, in contrast to Town of Greece, where the town government had no role in determining the content of opening invocations at its board meetings, Jackson County itself, embodied in its elected Board members, dictated the content

[7] In the 6th Circuit panel opinion, Judge Moore wrote that, **"even if the *Lund* majority opinion were correct that the Rowan County prayer practice complies with the Establishment Clause, the Jackson County prayer practice still violates the Establishment Clause."...The combination of factors that, according to Judge Wilkinson, renders the Rowan County Board's prayer practice unconstitutional also exists in Jackson County... the prayer practice that we confront in this case presents even more constitutionally suspect factors than the prayer practice that the Fourth Circuit confronted in *Lund*."** *Bormuth v. County of Jackson*, 849 F. 3d 266, at 289 (6th Cir. 2017) (bold emphasis added). Given that this case presents even more constitutionally suspect factors than *Lund*, it is difficult to see how other Circuits can profit from the confusion that these respective rulings create.

of the prayers opening their official Board meetings. That content was consistently grounded in the tenets of one faith: Christianity. Further, because the Jackson County Board members themselves serve as exclusive prayer providers, persons of other faith traditions and nonbelievers have no opportunity to offer invocations. Put simply, the Jackson County involves itself "in religious matters to a far greater degree" than was the case in *Town of Greece*. *Id* at 1822.

This Court in *Town of Greece* ruled that town officials could not single out dissidents for opprobrium. *Id* at 1826. But on two occasions, Jackson County Commissioners turned their backs on the petitioner while he was politely speaking during public comment. (Dkt. 10, p. 9, ¶ 31) (Dkt. 57, p. 2, ¶ 10; Affidavit 5 of Peter Bormuth, ¶ 12, 13, 14). When Commissioner Lutchka turned his back, the petitioner was speaking against the Commissioner's prayer practice and quoting Thomas Jefferson. When Commissioner Polaczyk turned his back and then left the room, the petitioner was speaking on the Earth Day topic of human population and contraception/abortion. Obviously both these issues involve religion. The petitioner believes that it is an undisputed fact in this case that the Jackson County Commissioners have clearly "singled out a dissident for opprobrium." They called the petitioner a "nitwit" because he believes that the Earth is a living conscious being and because he feels the New Testament is a children's story. County of Jackson, *Personnel & Finance Committee November 12, 2013*, YouTube (Dec. 19, 2013), http://tinyurl.com/2013nov13 (43:11-43:32). If that is not "signaling disfavor" and "diminishing stature within the community" based on religious beliefs and

convictions, then the petitioner does not know what actions would be required to meet the Court's standard in *Town of Greece. Town of Greece,* 134 S. Ct at 1826, 1830.[8]

In *McGowan v. Maryland,* 366 U.S. 420 (1961) this Court wrote:

> The Establishment Clause withdrew from the sphere of legitimate legislative concern and competence a specific, but comprehensive, area of human conduct: man's belief or disbelief in the verity of some transcendental idea and man's expression in action of that belief or disbelief.

In *Zorach v. Clauson,* 374 U.S. 220 (1952) this Court stated:

> There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated...The First Amendment, within the scope of its coverage, permits no exception; the prohibition is absolute.

This Court stated in *Epperson v. Arkansas,* 393 U.S. 97, 103-104 (1968)

> Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and non-religion.

In *U.S. v. Ballard,* 322 US 78 (1944) this Court held:

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[8] The Sixth Circuit glossed over these deliberate expressions of religious intolerance by suggesting that the Commissioners were reacting to being sued. This is clear error. The petitioner never sued Jackson County over the operation of the JCRRF. Instead he worked for 3 years to convince them to close the incinerator. At the meeting directly before Commissioner Lutchka turned his back on the petitioner, Lutchka voted with seven other Commissioners to close the JCRRF! He voted with the petitioner's position! What distinguished the next meeting was that the petitioner questioned the Commissioner's prayer practice, a matter of religion. Petitioner had not yet filed this lawsuit against the Commissioners. Commissioner Polaczyk turned his back on the petitioner because he was unwilling to listen to a Pagan espouse rational and scientific reasons supporting contraception and abortion. The petitioner never addressed or attacked either Commissioner personally during his public comments. Religious animosity, stemming from opposing belief systems, is the only plausible explanation for the inappropriate and unconstitutional behavior of the Commissioners.

> The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.' *Watson v. Jones*, 80 U.S. 679 (1871) The First Amendment has a dual aspect. It not only 'forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship' but also 'safeguards the free exercise of the chosen form of religion.' *Cantwell v. State of Connecticut*, 310 U.S. 296.

In *Torcaso v. Watkins*, 367 U.S. 488 (1961) this Court directed:

> We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person to profess a belief or disbelief in any religion. Neither can constitutionally pass laws or impose requirements which aid all religions as against nonbelievers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.

And in *Larson v. Valente*, 456 U.S. 228, 244 (1982) this Court held: "[t]he clearest command of the Establishment Clause"; is that "one religious denomination cannot be officially preferred over another."

The Sixth Circuit decision conflicts with this Court's ruling in *Town of Greece* and with all past precedent of this Court. The Sixth Circuit has allowed Jackson County to use the limited exception created for legislative prayer in *Marsh* and *Town of Greece* to establish the Christian religion in local government.

IV. The Sixth Circuit Erred In Claiming A Historical Tradition For Legislator-Led Prayer And The Issue Is Of Great Public Importance.

This Court in *Town of Greece* held that "*Marsh* must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation. The case teaches instead that the Establishment Clause must be interpreted "by reference to historical practices and understandings." "[T]he line we must draw between the permissible and the impermissible is one which accords

with history and faithfully reflects the understanding of the Founding Fathers." *School Dist. of Abington Township v. Schempp*, 374 U. S. 203, 294 (1963) (Brennan, J., concurring)." *Town of Greece*, 134 S. Ct. at 1819.

This Court's inquiry, then, must be to determine whether the prayer practice of Jackson County fits within the tradition long followed in Congress and the state legislatures. Judicial review must focus on whether "the specific [prayer] practice is permitted." *Town of Greece* at 1819. The Sixth Circuit review held that "history shows that legislator-led prayer is a long standing tradition" based on a few aberrations in the historical record. Every future case will quote this holding and since the issue is of great public importance, such a completely erroneous conclusion demands review by this Court.

A. Definition Of Tradition And Aberration

The on-line dictionary defines "*tradition*" as: 1) the handing down of customs from generation to generation, especially by word of mouth or practice; 2) a long established or inherited way of thinking or acting; 3) a continuing pattern of cultural beliefs or practices; and 4) a customary or characteristic method or manner. "*Aberration*" is defined as: the act of departing from the normal or usual course.

B. Legislator-led Prayer Was Not A Federal Tradition.

The usual custom in the colonies was for a minister to open sessions of the colonial legislatures with a prayer. This practice continued with the founding of our national government. The tradition at the time of the Founding Fathers was either to have a

minister open legislative sessions with a prayer or to have no prayer at all. This is apparent from the examples provided by the Continental Congress, the Constitutional Convention, and the First Congress.

At the Continental Congress on the evening of September 6, 1774, Mr. Cushing proposed that before actually commencing on the momentous work before the delegates, they should unitedly and publicly implore the blessing of God upon their counsels; and that accordingly *some clergyman* should be invited to open the session with a prayer. This was opposed by Mr. Jay and Mr. Rutledge on sectarian grounds. According to John Adams, Mr. Samuel Adams then arose and said he was no bigot, and could hear a prayer from a Gentleman of Piety and Virtue, who was at the same Time a Friend to his Country. He was a stranger in Phyladelphia, but had heard that Mr. Duche deserved that character, and therefore he moved that Mr. Duche, an Episcopal clergyman, might be desired, to read prayers to the Congress, the following morning.[9]

At the Constitutional Convention in Philadelphia on June 28, 1787 Benjamin Franklin proposed that one or more clergy from Philadelphia be brought in officiate daily prayers. Franklin's motion was debated, adjourned without a vote, and never

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[9] Letter of John Adams to Abigail Adams, September 16, 1774, http://www.masshist.org/digitaladams/archive/doc?id=L17740916ja&bc=%2Fdigitaladams%2Farchive%2Fbrowse%2Fletters_1774_1777.php

brought up again. Franklin's assessment of the situation was that "the convention, except for three or four persons, thought Prayers unnecessary."[10]

As this Court noted in *Marsh,* the First Congress "authorized the appointment of paid chaplains" for the chambers just three days before it approved the language of the First Amendment. 463 U.S. at 787-788. No legislator of either chamber led opening prayers. Chaplains were appointed for that purpose. Significantly, with respect to the Framers view on the entanglement of legislators with religion, the first bill passed by Congress was on the administration of oaths of office on June 1, 1789 and the oath in the final bill differed from the original proposal by excluding the two clauses mentioning God.[11]

Thomas Jefferson shunned the idea of government involvement with prayer. While President, Jefferson wrote in a letter to Reverend Samuel Miller on January 23, 1808, in response to Miller's proposal that he recommend a national day of fasting and prayer: "I consider the government of the U S. as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises... Certainly no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the general government...civil powers alone have been given to the President of the U S. and no authority to direct

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[10] See 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 112, at 450-52 n.15; see also LEVY, *supra* note 10, at 81; E. Gregory Wallace, *When Government Speaks Religiously*, 21 FLA. ST. U. L. REV. 1183, 1236-37 (1994).

[11] Library of Congress, "A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774 - 1875".

the religious exercises of his constituents."[12] Here, the Founder whose Virginia Statute on Religious Freedom served as the model for the Establishment Clause of the First Amendment, specifically repudiates government-led prayer.

Andrew Jackson also refused to issue a prayer proclamation as President, explaining to the New England divines who requested it that he declined to "disturb the security which religion now enjoys in this country, in its complete separation from the political concerns of the General Government."[13]

C. The Treaty of Tripoli Reflects The Historical Understanding Of Our Founders.

The Treaty of Tripoli, Article 11 (1797) gives concrete expression to the historical understanding of our Founders: "As the Government of the United States of America is not, in any sense, founded on the Christian religion." Treaties are to be liberally construed by the Courts and when interpreting the language of a treaty words are to be taken in their ordinary meaning. *Hauenstein v. Lynham*, 100 U.S. 483, 487 (1879). *Geofroy v. Riggs*, 133 U.S. 258 (1890). All treaties are binding. *Baldwin v. Franks*, 120 U.S. 678, 682-683 (1887). Of the twenty-three Senators who approved the Treaty,[14] seventeen were delegates to the Continental Congress or the Congress of

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[12] *The Writings of Thomas Jefferson,* ed. A. A. Lipscome and A. E. Bergh, Washington DC: The Thomas Jefferson Memorial Association 1905.

[13] Arthur M. Schlesinger, Jr., *The Age of Jackson* (Boston: Little, Brown and Company, 1945) p. 16-17, 350-360

[14] Those who voted in the affirmative, were: Bingham, Bloodworth, Blount, Bradford (lawyer), Brown (lawyer), Cocke (lawyer & Justice of First Circuit Court), Foster (lawyer & Judge in Court of Admiralty

the Confederation. Three of them attended the Philadelphia Convention of which two signed the Constitution (Martin of NC left early). One signed the Declaration of Independence and most of them served in some important way in the Revolutionary War. Nearly all of them served in their state legislatures. Five of them helped frame their own state's Constitution and four were crucial in securing ratification of the Federal Constitution in their respective states. Most were attorneys educated at either Harvard, Yale, Princeton, University of Pennsylvania, Brown, or the College of William and Mary, all bastions of liberal thinking during the American Enlightenment. Six were judges of which five became the Chief Justices of their State Supreme Courts. Two of these judges also served as US District Court Judges. One was also a Probate Judge and another also a Naval Admiralty Judge. One of them (Paine-VT) served as Chief Justice of their state's highest court and then as Justice of the US Circuit Court. One was part of his state's War Council, one was Deputy Governor and six became Governors of their states. Their legal training and the historical necessity of their times, which obliged them to create constitutions and lay the foundations of American law, made these men exquisitely sensitive to language. To pretend, as does the District Court and the Sixth Circuit, that they regarded

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), Goodhue, Hillhouse (lawyer), Howard, Langdon, Latimer, Laurance, Livermore (lawyer, New Hampshire Attorney General & Chief Justice of New Hampshire Superior Court), Martin (lawyer & Judge in Guilford County), Paine (lawyer & Chief Justice of Vermont Supreme Court), Read (lawyer), Rutherfurd (lawyer), Sedgwick (lawyer & Judge in the Supreme Judicial Court of Massachusetts), Stockton (lawyer), Tattnall, Tichenor (lawyer & Associate Justice of Vermont Supreme Court), and Tracy (lawyer). See, *The Journal of the Senate including the Journal of the Executive Proceedings of the Senate, John Adams Administration 1791-1801, Volume I: Fifth Congress, First Session; March-July, 1797,* Martin P. Claussen, General Editor. Michael Glazier, Inc. Wilmington, Delaware 19801, (1977) pp 156-57, 160. (I have identified the lawyers and added their future judicial positions to this roll call).

Article 11 as a mere formality is absurd. It is the same thing as declaring an article of the Constitution "a mere formality." Frank Lambert, the expert and historian cited by the District Court, noted that:

> "Ten years after the Constitutional Convention ended its work, the country assured the world that the United States was a secular state, and that its negotiations would adhere to the rule of law, not the dictates of the Christian faith. The assurances were contained in the Treaty of Tripoli of 1997..." [15]

Clearly the historical intention in including and ratifying Article 11 was to insure that no official ever represented the government of the United States as Christian, as the Jackson County Commissioners have chosen to do.

During the 19th century, the Supreme Court of Ohio cited the Treaty of Tripoli as governing law, along with Article 1, Section 7 and Article 6, Section 2 of the Ohio Constitution when the Court held that Bible reading, prayer, and the singing of psalms should be prohibited in the public schools [of Cincinnati]. See *Board of Education v. Minor,* 23 Ohio St. 211; 1872 Ohio LEXIS 113 at ¶ VI. Certainly this

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[15] Frank Lambert, *The Founding Fathers and the Place of Religion in America,* Princeton (2006) (p. 11). The petitioner accepts Lambert' book as an authority, and directs this Court's attention to Chapter 9 for his conclusion: "Throughout their deliberations, the Founders indicated that they were thinking about future generations. They acknowledged that their generation was a particularly liberal one, meaning that it was attuned to the dangers of any form of tyranny including that of a majority. But they knew that if proper constitutional safeguards were not in place, an imaginable political tyrant of the future could make a play for power by giving a popular religious group a position of favor in the eyes of the state." *Id* at p. 264.

Court must consider the Treaty of Tripoli as part of the historical tradition to be examined in this case.[16]

D. There Was No Tradition Of Legislator-led Prayer In The States.

Michigan House and Senate Journals confirm that legislator-led prayer was not a tradition in the state legislature. The MICHIGAN HOUSE JOURNAL shows that for the FIRST SESSION of 1935-36 of 52 days, there were no opening prayers. In the House Session of 1837 of 80 days, there were no opening prayers. In the 1839 session of 85 days, there were 8 days of no prayer; 77 days visiting clergy led prayer; 0 days legislator-led prayer. In the 1845 session of 65 Days there were 7 days no prayer; 5 days visiting clergy led prayer; 52 days chaplain led prayer; 0 days legislator-led prayer. In the 1846 session of 109 Days there were 12 days no prayer; 97 days visiting clergy led prayer; 0 days legislator-led prayer. In the 1895 session of 96 days, there were 78 days of no opening prayer; 18 days visiting clergy led prayer; 0 days legislator-led prayer.

The MICHIGAN SENATE JOURNAL for the 1841 session of 83 days shows there were 35 days of no opening prayer; 48 days of visiting clergy led prayer; 0 days legislator-led prayer. In the 1842 session of 48 days there were 5 days of no prayer, 43 days of visiting clergy-led prayer and 0 days of legislator-led prayer. In the 1848

[16] Article VI of the United States Constitution makes this treaty legally binding U.S. law: "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." U.S. CONST. Art. VI.

session of 78 days there were 5 days of no prayer, 49 days of chaplain-led prayer, 22 days of clergy-led prayer and 0 days of legislator-led prayers. In the 1853 session of 35 days there were 5 days of no prayer, 30 days of visiting clergy-led prayer and 0 days of legislator-led prayer. In the 1895 session of 96 days there were 85 days of no prayer; 11 days visiting clergy led prayer; 0 days legislator-led prayer.

In Michigan between the years 1835 and 1895 there were approximately 10,000 combined House & Senate prayer opportunities. The Respondent's and their amici provided the en banc Sixth Circuit with 3 examples of legislator-led prayer in Michigan in that period and each example involved a legislator who was a minister.[17] Three out of ten thousand! That is not a tradition. That is an aberration in an otherwise firm tradition that legislators did not give prayers.

During the first 100 years of our nation's existence, the rest of the state legislatures follow the same clear tradition: no legislator-led prayer with the rare exception of a minister who was also a legislator giving a prayer in their capacity as minister. Amici for respondent pointed to 25 exceptions from 13 states out of what were upwards of 300,000 possible legislative prayer opportunities in state legislatures between 1776 and 1896 and then claimed a tradition on that basis. These

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[17] Original counsel in this case argued solely from contemporary practice citing the National Conference of State Legislature's publication *Inside the Legislative Process*. During the en banc briefing, Respondent's new counsel and amici provided the Sixth Circuit with historical examples of legislator-led prayer, each example involving a Minister who was also a legislator. In Michigan, the examples involved Rep. Dervin W. Sharts (Shiawassee County, 1877-80), a Presbyterian clergyman ordained by the Catskill presbytery in 1857; Rep. Orsamus Barnes (Eaton County, 1879-80), a farmer and minister by occupation; and Rep. George Robertson (Calhoun County, 1879-82), who graduated from Albion Seminary.

aberrations do not constitute a tradition. And every one of the aberrations involved a minister who was also a legislator.[18]

State Courts historically cast a suspect eye on prayer. In *Board of Education v. Minor*, 23 Ohio St. 211; 248-251 (1873), Justice John Welch wrote for the Ohio Supreme Court that: "Religion is eminently one of those interests, lying outside the true and legitimate province of government." "The state can have no religious opinions" he concluded. In a case involving school prayer and bible reading, Justice Frank K. Dunn wrote for the Illinois Supreme Court in *People ex rel. Ring v. Board of Education*, 245 Ill. 334; 254-256 (1910) that, "Prayer is always worship." "[T]he law knows no distinction between the Christian and the Pagan...All are citizens. Their civil rights are precisely equal...the Constitution has definitely and completely excluded religion from the law's contemplation in considering men's rights. ...[t]he government, is simply a civil institution. It is secular, and not religious, in its purposes."

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[18] Illinois Sen. John Plaster Richmond was a Methodist Minister. In 1840, he officiated at the first Protestant wedding in what is now the state of Washington; Iowa Sen. Joseph J. Watson was the first minister to preach to the people in the northwest corner of Iowa; Iowa Sen. Isaac Pearl Teter was ordained as a Methodist Episcopal clergyman by Bishop Matthew Simpson in 1855 and was the most widely known clergyman in the state; New Hampshire Rep. Isaac D. Stewart was a minister. His marriage license in 1843 lists him as Rev. Isaac D. Steward and the census of 1870 lists his occupation as clergyman; New Hampshire State Representative Robert F. Lawrence (1863) was a Congregational Clergyman; Iowa Sen. Louis Fisher Green was an itinerant preacher in the Methodist Episcopal Church on the Paola and Centeropolis circuits; Connecticut Rep. William Denison was a minister in the town of Saybrook; Connecticut rep. John Mitchell was a minister from Stratford; Connecticut Rep. E. H. Parmelee was a minister from the town of Killingworth; Alabama Rep. Calloway was a minister; Alabama Rep. Harris was a minister; Arkansas Sen. Hogan Allen was a Methodist preacher from 1858 to 1861. He then united with the Baptists, and was at once licensed and ordained the following year (1862); Kansas Sen. Nehemiah Green, President of the Kansas Senate in 1867, was Pastor at the First Methodist Episcopal Church in Manhattan; Ohio Sen. Adam Schafer was a Presbyterian clergyman.

V. The Sixth Circuit Opinion Establishes Majority Rule In Religion In Violation Of The Establishment Clause.

As this Court stated in *McCreary County v. American Civil Liberties Union of Ky.*, 545 US 844 (2005) "the divisiveness of religion in current public life is inescapable. This is no time to deny the prudence of understanding the Establishment Clause to require the government to stay neutral on religious belief, which is reserved for the conscience of the individual."

The en banc Sixth Circuit upheld the District Court opinion that "as argued by Jackson, the future may bring Commissioners of more diverse religious backgrounds who will deliver invocations in those traditions" thus subjecting freedom of religious conscience in this country to the vagrancies of future elections. The practical effect of the Sixth Circuit decision is to establish the Christian religion in our local governments in all conservative counties across this nation. With the passage of laws like South Carolina 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") all of the red states will be virtual theocracies, because wherever a demographic Christian voting majority is present all the elected officials will be Christian. Like the Jackson County Commissioners, their prayers will all be made in the name of jesus christ. And they will require conformity with their religious practice before granting appointment to public offices. This is a repudiation of all previous Establishment Clause jurisprudence. As this Court held in *West Virginia Board of Education v. Barnette,* 319 U.S. 624 (1943): "The very purpose of a Bill of Rights was

to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principals to be applied by the courts...fundamental rights may not be submitted to vote; they depend on the outcome of no election."

It was Thomas Jefferson who observed that it was, "the impious presumption of legislators and rulers..., who, being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes to thinking as the only true and infallible, and as such endeavoring to impose them on others, hath established and maintained false religions over the greatest part of the world and through all time."[19] By siding with the fallible and uninspired legislators of Jackson County, the Sixth Circuit has opened our nation to an electoral contest to establish religion. This will inevitably result in the sectarian strife and violence that the Establishment Clause was intended to prevent.

VI. The Circuits Are Spilt On Whether Commands By Government Officials To Participate In Legislator-Led Prayer Is Coercion.

This Court in *Town of Greece* found that: "It is an elemental First Amendment principle that government may not coerce its citizens "to support or participate in any religion or its exercise." *County of Allegheny*, 492 U. S., at 659 (KENNEDY, J., concurring in judgment in part and dissenting in part); see also *Van Orden*, 545 U.

[19] An Act for Establishing Religious Freedom," *Cornerstones of Religious Freedom in America*, ed. Joseph Blau (Boston, 1949) p. 74-75.

S., at 683 (plurality opinion) (recognizing that our "institutions must not press religious observances upon their citizens")." *Town of Greece N.Y. v. Galloway*, 134 S. Ct. 1811, 1823 (2014). Both the petitioner and the respondent accepted Justice Kennedy's plurality opinion as controlling. Judge Griffin tried, but failed, to convince his colleagues on the Sixth Circuit to accept Justice Thomas's concurring opinion as controlling.[20]

The plurality opinion in *Town of Greece N.Y. v. Galloway,* 134 S. Ct. 1811, 1823 (2014) specifically noted that: "**The analysis would be different if town board members directed the public to participate in the prayers...No such thing occurred in the town of Greece**. Although board members themselves stood, bowed their heads, or made the sign of the cross during the prayer, they at no point solicited similar gestures by the public. Respondents point to several occasions where audience members were asked to rise for the prayer. **These requests, however, came not from town leaders but from the guest ministers**, who presumably are accustomed to directing their congregations in this way and might have done so thinking the action was inclusive, not coercive." *Town of Greece N.Y. v. Galloway,* 134 S. Ct. 1811, 1823 (2014) (bold emphasis added).

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[20] In his concurring opinion, Justice Thomas took exception to the plurality's coercion analysis. In Part I of his opinion, Justice Thomas restated his unique view that the Establishment Clause ought not apply to state governments or to municipalities like the Town of Greece. In Part II, Justice Thomas, joined by Justice Scalia, submitted that claims of religious coercion must be viewed solely through the prism of "force of law and threat of penalty", ignoring the concern of the Founder's for 'rights of conscience.' Justice Thomas proposed that only claims of actual legal coercion violate the Establishment Clause. Claims of subtle pressure, like commands to rise for prayer, would not offend this heightened standard. *Town of Greece* at 1835-38 (Thomas, J., concurring in part and concurring in the judgment).

The petitioner finds this analysis convincing. He is an adult and a neutral observer who can distinguish between a request to rise given by a guest minister, which might represent a reflexive and inclusive action, and a command by a County Commissioner which represents government authority and coercion.

The Fourth Circuit agreed with the petitioner and ruled that government instructions to attendees to participate in prayers in the local government setting amounted to an unconstitutional coercion to participate in a religious exercise. The Court declared, "It is simply wrong to attribute discomfort with the situation here to hyper-sensitivity." *Lund v. Rowan County*, 863 F.3d 268 (4th Cir. 2017) (en banc).

The Sixth Circuit disagreed and citing *Am. Humanist Ass'n. v. McCarty*, 851 F.3d 521, 526 (2017) held that "polite requests" by government officials to stand for invocations "do not coerce prayer." The Sixth Circuit claimed that coercion only would exist if commissioners "publicly singled out [objectors] and ordered them to rise for the invocation" and met with continued refusal, "directed a legislative security officer to 'pressure' them to stand." *Bormuth v. County of Jackson*, 870 F.3d 494 (6th Cir. 2017) (en banc) citing *Fields v. Speaker of the Penn. House of Representatives*, - F. Supp. 3d -, 2017 WL 1541665, at *2, 11 (M.D. Pa. Apr. 28, 2017); compare with *DeStefano v. Emergency Housing Group, Inc.*, 247 F. 3d 397 (2nd Cir. 2001) (observing in the context of adults that, "Government and those funded by the government 'may no more use social pressure to enforce orthodoxy than [they] may use more direct means.'").

State and local officials require guidance on this very important issue of what constitutes government coercion. This case offers a perfect vehicle for this Court to determine whether government officials themselves may command audience participation in prayers by requesting the audience to "rise and assume a reverent position."

VII. The Sixth Circuit Refused To Take Judicial Notice Under Fed. R. Evid. 201 Of Evidence That Shows Clear Discriminatory Intent To Advance The Christian Religion.

This Court in *Town of Greece* held that, "[s]o long as the town maintains a policy of nondiscrimination," "the First Amendment does not require it to achieve religious stasis." 134 S. Ct. at 1820. The Court found no evidence of an "aversion or bias" toward minority faiths by the Town of Greece; contrarily, the town undertook reasonable efforts to identify all prospective guest chaplains, and its policy welcomed ministers and laity of all creeds. *Id* at 1824. In his concurring opinion, Justice Alito suggested that the outcome should differ when omission of a particular religion is "intentional" rather than "at worst careless." *Id* at 1830-31 (Alito J., concurring).

The outcome should differ in this case since the County of Jackson is on the record deliberately stating that the intention of their practice is to exclude diversity of belief. At the November 12, 2013 Personnel & Finance Committee meeting when the Commissioners considered Administrator Overton's Draft Policy No. 4035, which would have established a policy of guest minister invocations similar to Town of Greece, the Commissioners went on the record stating "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 they are an ordained minister we are going to have to allow them as well. And I think we are opening a Pandora's Box here because you are going to get members of the public who are going to come up at public comment and we are going to create a lot of problems here when certain people come up here and say things that they are not going to like." *Personnel & Finance Committee November 12, 2013*, YouTube (Dec. 19, 2013), http://tinyurl.com/2013nov13 (37:47-38:16). This clearly shows that the Commissioners intentionally intended to restrict the prayer opportunity.

Earlier at the same meeting, one Commissioner stated that the petitioner's objection to legislator-led prayer was "an attack on Christianity and it's an attack on our Lord and Savior Jesus Christ. Period." County of Jackson, *Personnel & Finance Committee November 12, 2013*, YouTube (Dec. 19, 2013) http://tinyurl.com/2013nov13 (32:28). The reason why petitioner's request for a nondiscriminatory policy is an attack shortly follows. "[E]very board member here who gets up there and says a prayer during invocation, we end our invocation in the name of jesus christ." County of Jackson, *Personnel & Finance Committee November 12, 2013*, YouTube (Dec. 19, 2013) http://tinyurl.com/2013nov13 (33:14). The Court in *Town of Greece N.Y. v. Galloway* 134 S. Ct. 1811 (2014) ruled that prayers (by guest chaplains) did not have to be nonsectarian to comply with the Establishment Clause provided that: "there is no indication that the prayer opportunity has been exploited to proselytize or advance any one,...faith or belief." (quoting *Marsh* 463 U.S. at 794-795). In this case you have

the Jackson County Commissioners admitting that their intent is to advance the Christian religion.

The petitioner explicitly argued in district court that the Commissioners use the prayer opportunity to promote Christianity to the public. ¶ 19 of his amended complaint states, "Plaintiff he felt like he was in Church...he felt like he was being forced to worship jesus christ in order to participate in the business of County Government." ¶ 37 of his amended complaint states, "These prayers by the commissioners establish a religion and a god, Jesus Christ, in whom Jews, Muslims, Hindus, Buddhists, Sikhs, Wiccans, Pagans Confucians, atheists, agnostics, pantheists, animists, and secular humanists do not believe." ¶ 41 of his amended complaint states, "Defendant's practice...has the deliberate purpose and effect of promoting, advancing, favoring, and endorsing the christian religion." ¶ 43 of his amended complaint states, "these practices convey the message that the Government of Jackson County is Christian and that Christianity is favored and preferred over all other religions and non-religion." R. 10 (Am. Compl.).

The petitioner deliberately notified the district court that Jackson County records the Board of Commissioner's meetings and posts the videos on the County's website. See R.10 (Am. Compl. ¶ 16) (Page ID #64); R. 29 (Pl. Resp. to Def. Mot. For Summ. J. at 11-16) (Page ID #328-33); R. 37-1 (Pl. Mot. For Summ. J., Ex. J) (Page ID #611-614). The petitioner did not attend the November 12, 2013 meeting of the Personnel & Finance Committee and thus did not have direct knowledge of the Commissioner's comments and could not file an affidavit attesting to those comments. The petitioner

thought the Commissioner comments reported in Brad Flory's article in the Brooklyn Exponent significant enough to include the article, though hearsay, in his Motion for Summary Judgement. (Pl. Mot. For Summ. J., Ex. D) (Page ID #595). The video, when first posted on the website by the County, lacked audio. As Administrator Overton stated with regard to the same problem affecting the January 2, 2014 video that documents the prayer the Commissioners forced him to give to prove his loyalty to their 'christian nation' dogma: "[S]ometimes we have technical problems. It happens." (Pl. Mot. For Summ. J., Ex. I) (Page ID # 608-610).

The petitioner believes that circumstances like these are the precise reason that Fed. R. Evid. 201 exists. As Plaintiff, the petitioner made an argument in district court, directed the court to the County's website, and submitted hearsay evidence to support his allegations. Evidence from an undisputed source became available to the appellate court, and the petitioner asked the court to take judicial notice. At oral argument during the panel stage of this proceeding, counsel for the County acknowledged that the official record includes all videos posted on the County website. The petitioner believed the Sixth Circuit "must take judicial notice" because the facts within the November 12, 2013 video "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned" and the court has been "supplied with the necessary information." A court "may take judicial notice at any stage of the proceeding." Fed. R. Evid. 201.

The Sixth Circuit refused to take judicial notice citing *Damiler-Chrysler Corp. Healthcare Benefits Plan v. Durden,* 448 F.3d 918, 922 (6th Cir. 2006) ("In general,

this court will not review issues raised for the first time on appeal."); *Sovereign News Co. v. United States,* 690 F.2d 569, 571 (6th Cir. 1982) ("The government admits that it did not raise this question before the District Court and that the issue does not appear on the record."); and *Conlin v. Mort. Ele. Registration Sys., Inc,* 714 F.3d 355, 360 n.5 (6th Cir. 2013) ("Plaintiff's complaint never once mentions GMAC, and his first appellate brief to this Court does not discuss GMAC in the argument section at all;"). Each of these cases describes the introduction of a new legal issue or argument upon appeal that was not presented in district court. As Judge Moore observed in her dissent, "they do not analyze judicial notice of facts or Federal Rule of Evidence 201." *Bormuth v. County of Jackson,* 870 F.3d 494 (6th Cir. 2017) (en banc) (Moore K., dissenting at n.4).

The Sixth Circuit ruling that "there is no evidence that the Board adopted this [prayer] practice with any discriminatory intent" is impossible to maintain if the Court took judicial notice of the November 12, 2013 Personnel & Finance Committee meeting video. As Judge Moore convincingly wrote, the majority took "the additional step of refusing to consider evidence that the legislators intended to proselytize, affirmatively excluded non-Christian prayer givers, and discriminated against a citizen who objected to the prayer practice." *Bormuth v. County of Jackson,* 870 F.3d 494 (6th Cir. 2017) (en banc) (Moore K., dissenting). This case offers the perfect vehicle for this Court to determine whether Fed. R. Evid. 201 applies at the appellate level of proceedings. No new arguments were introduced during the appellate proceedings, only evidence from an undisputed source agreed upon by the parties.

CONCLUSION

For all of the forgoing reasons, Petitioner Peter Carl Bormuth respectfully requests that his Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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Dated: December 21, 2017