No. 17-7220

In the Supreme Court of the United States

PETER CARL BORMUTH,

Petitioner,

v.

JACKSON COUNTY, MICHIGAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether legislative prayer delivered by legislators comports with this Court's decisions in *Town of Greece* v. *Galloway*, 134 S. Ct. 1811 (2014), and *Marsh* v. *Chambers*, 463 U.S. 783 (1983), as the *en banc* Sixth Circuit has held, or does not, as the *en banc* Fourth Circuit has held.

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STATEMENT OF THE CASE

Petitioner is correct that the *en banc* Fourth and Sixth Circuits have hopelessly divided over a question of critical importance: whether legislators may deliver faith-specific legislative prayers in a local-government setting. This intractable disagreement implicates the constitutionality of a practice connecting local legislators to a tradition extending back to the Founding, and is a question deserving of this Court's review, not least because it subjects local governments in the four States in the Sixth Circuit and the five States in the Fourth Circuit to diametrically opposed legal regimes. But this case is a poor vehicle for resolving the disagreement on this important question. The petition should therefore be denied, as the pending petition in *Rowan County* v. *Lund*, No. 17-565, presents the same certworthy question and is a better vehicle for resolving it.

In *Town of Greece* v. *Galloway*, 134 S. Ct. 1811, 1822-26 (2014), this Court applied *Marsh* v. *Chambers*, 463 U.S. 783 (1983), examining the Nation's historical legislative prayer traditions to uphold prayer practices that are like those at issue here in every respect save one: here, the legislators themselves have the opportunity to deliver the invocations. The *en banc* Sixth Circuit below hewed to the *Town of Greece* majority's approach, determining that legislative prayers offered by legislators themselves fall within those longstanding prayer traditions, and thus comport with the Establishment Clause. App. Exh. A, p. 19;[1] *Town of Greece*, 134 S. Ct. at 1819-20. The *en banc* Fourth Circuit, in contrast, applied the *Town of Greece* dis-

[1] Because the pages in petitioner's Appendix are not sequentially numbered, this brief cites each Appendix Exhibit and then the page of that Exhibit.

sent's totality-of-the-circumstances approach, concluding that when combined with the features expressly approved in *Town of Greece*—i.e., faith-specific language, introductions such as "let us pray," and the local-government setting—legislative prayer by legislators violates the Establishment Clause. *Lund* v. *Rowan County*, 863 F.3d 268, 289 (4th Cir. 2017) (en banc); *Town of Greece*, 134 S. Ct. at 1847-49 (Kagan, J., dissenting).

This Court has already been presented with the better vehicle for resolving this split—the petition in *Rowan County*, No. 17-565. This case presents an inferior vehicle by comparison.

First, the Sixth Circuit's decision is correct: it faithfully follows this Court's analysis in *Town of Greece* to hold that legislator-delivered prayer does not violate the Establishment Clause. The Fourth Circuit, in contrast, took an incorrect but persistent totality-of-the-circumstances approach. *Rowan County* therefore provides this Court with the optimal vehicle for resolving the exceedingly important Establishment Clause question presented by both cases.

Second, this case involves several discovery- and evidentiary-based disputes irrelevant to the significant constitutional question presented. These "discovery disputes," as the principal dissent referred to them, App. Exh. A, p. 47 (Moore, J., dissenting), remain an object of petitioner's concern (at i, 7, 12, 35-39). There are no such issues in *Rowan County* that could detract from this Court's review of an issue of considerable constitutional and practical importance. Indeed, this Court's review is sorely needed to provide guidance to legislatures nationwide. See Br. of Int'l

Mun. Lawyers Ass'n as *Amicus Curiae* in Support of Petitioner in *Rowan County*, No. 17-565, at 7-13. But *Rowan County* is the better vehicle for resolving the conflict. This petition should be denied.

1. Jackson County, Michigan is governed by a nine-member Board of Commissioners, led by a Chairman. App. Exh. A, p. 3. The Board meets monthly to perform typical municipal government functions. *Ibid.* The Board opens its meetings with an opportunity for each Commissioner, on a rotating, voluntary basis, to offer a prayer, as his or her conscience dictates. *Ibid.* After a call to order, the Chairman "typically requests Commissioners and the public alike" to "rise," "bow your heads," or "take a reverent stance." *Ibid.* One of the Commissioners then prays; the Pledge of Allegiance is said; and county business begins. *Ibid.*

2. The Board's prayer practice is "facially neutral regarding religion." *Ibid.* Each elected County Commissioner is afforded an opportunity to provide the invocation "based on the dictates of his own conscience," and does so on a rotating basis. *Ibid.* Many of the prayers refer to "God," "Lord," or "Heavenly Father," as dictated by the individual Commissioner's "spiritual needs." *Id.* at 3, 22 (quoting *Town of Greece*, 134 S. Ct. at 1826 (Kennedy, J., plurality opinion)).

3. "Petitioner Peter Bormuth is a self-described Pagan and Animist" who objects to Jackson County's practice of beginning meetings with legislative prayer. Pet. at 8-9. Petitioner finds the prayers "unwelcome and severely offensive" but has admitted that "he does not stand and participate in the invocation * * * * Nor does he contend that the Commissioners * * * attempted to dissuade him, or any other

member of the public, from leaving the meeting during the prayer, arriving late, or protesting the practice after the fact." App. Exh. A, p. 4.

4. Petitioner brought suit against the County, alleging that its legislative prayer practice violates the Establishment Clause primarily because it involves faith-specific prayers. App. Exh. E, p. 5 (original complaint focusing on "sectarian prayers in the name of Jesus Christ"). Based largely on this Court's intervening decision in *Town of Greece*, the district court ultimately rejected petitioner's claim and granted summary judgment to the County. App. Exh. D, pp. 5-17.

The district court identified the issue presented as "sectarian legislative prayer delivered by a government official." *Id.* at 10. "Contrary to the district court's finding in [*Rowan County*], the [c]ourt maintain[ed] that the present factual circumstances fall within" this Court's legislative prayer doctrine. *Id.* at 11.

5. A divided panel of the Sixth Circuit reversed, determining that "[a] combination of factors" rendered Jackson County's prayer practice unconstitutional, "including one important factor: the identity of the prayer giver." App. Exh. C, p. 19. The panel majority specifically approved the Fourth Circuit panel dissent in *Rowan County* and its "combination of elements" approach in deeming legislators offering prayers unconstitutional when combined with faith-specific language in the local-government setting. See *id.* at 28-29. At the same time, the Sixth Circuit panel dissent approvingly cited the Fourth Circuit panel majority's approach. See *id.* at 61 (Griffin, J., dissenting). Judge Griffin concluded that "[o]ur history clearly indicates a role for legislators to give prayers before legislative bodies." *Id.* at 42.

Twelve days after the panel issued its decision, the Sixth Circuit voted *sua sponte* to grant rehearing *en banc*. App. Exh. A, p. 5.

6. The *en banc* Sixth Circuit affirmed the district court and rendered judgment for the County. After resolving several preliminary evidentiary issues—including the panel majority's reliance upon materials petitioner never presented to the district court, *id.* at 5-9—the *en banc* Sixth Circuit held that the County's legislative prayer practice fits soundly within the tradition long followed in Congress and the state legislatures. *Id.* at 18.

"At the heart of this appeal is whether Jackson County's prayer practice falls outside our historically accepted traditions because the Commissioners themselves, not chaplains, or invited community members, lead the invocations." *Ibid.* The court noted that "[b]efore the founding of our Republic, legislators offered prayers to commence legislative sessions," and provided several historical examples that, the court concluded, established that such prayers fit within the Nation's traditions. *Id.* at 19.

The *en banc* majority divided as to whether Justice Kennedy's plurality opinion or Justice Thomas's concurring opinion in *Town of Greece* controlled the coercion analysis, *id.* at 27 n.10, but ultimately determined that any disagreement was immaterial as Jackson County's practice is not coercive under either opinion. *Id.* at 27-33.

7. Judge Sutton concurred in the majority opinion. *Id.* at 37 (Sutton, J., concurring). He first noted the history of legislative prayers, and then explained

that the Establishment Clause favors neither faith-neutral prayers over faith-specific ones, nor prayers delivered by chaplains over those delivered by legislators. *Id.* at 37-39. In Judge Sutton's view, a legislator's expression of his personal faith during an invocation no more offends the Constitution than a clergy member doing the same. *Id.* at 40-41.

8. Judges Moore and White authored separate dissents. Each hewed to the panel majority's "combination of factors" approach, with Judge Moore specifically agreeing with the *en banc* Fourth Circuit majority. See *id.* at 60-61 (Moore, J., dissenting); *id.* at 72 (White, J., dissenting).

REASONS FOR DENYING CERTIORARI

I. This Case Is A Subpar Vehicle For Resolving The Conflict Over Whether Legislators May Deliver Faith-Specific Legislative Prayers.

Petitioner is correct (at 16) that whether the identity of a legislative prayer giver is constitutionally significant has sharply and intractably divided two *en banc* courts of appeals. In the four States that make up the Sixth Circuit, when a local government's legislators deliver faith-specific legislative prayers, their practice falls well within "American historical practices" by which courts "determine what the Establishment Clause allows and what it does not." App. Exh. A, p. 37 (Sutton, J., concurring). But in the five States that make up the Fourth Circuit, that same practice falls "well outside the confines of *Town of Greece*," and is thus constitutionally prohibited. *Rowan County*, 863 F.3d at 280. This intolerable disagreement significantly affects innumerable cities and counties that rely on legislator prayer-givers. See Br. of Int'l Mun. Lawyers Ass'n as *Amicus Curiae*, supra, at 7-13.

This case, however, is a suboptimal vehicle for resolving that conflict. First, the decision below is correct. Second, the decision below involves several evidentiary issues that, while immaterial to the outcome, nonetheless present an unnecessary distraction. The petition should be denied.

A. The Decision Below Is Correct.

In *Town of Greece*, this Court articulated a clear test for resolving Establishment Clause challenges to legislative-prayer practices: courts must "determine whether the * * * practice fits within the tradition long followed in Congress and the state legislatures." 134 S. Ct. at 1823. If the challenged practice does, it is constitutional. *Ibid.* The *en banc* Fourth and Sixth Circuits sharply disagree about whether faith-specific prayers delivered by legislators fit within this tradition.

As petitioner explains (at 16), the prayer practices considered by the *en banc* Fourth and Sixth Circuits are materially indistinguishable. Jackson and Rowan Counties each began meetings with a board member's voluntary invocation; prayers contained faith-specific language and often began with "let us pray" or a similar phrase; and the invocations all took place during local-government meetings just before official business began. App. Exh. A, pp. 2-4; *Rowan County*, 863 F.3d at 272-73; see also Petition for Writ of Certiorari, *Rowan County* v. *Lund*, No. 17-565, at 21-23 (U.S. 2017). Both practices are likewise materially indistinguishable from those in *Town of Greece*—save for the prayers being offered by the legislators themselves. See App. Exh. A, pp. 23-24 (agreeing with the Fourth Circuit dissent that the prayers in that case were materially indistinguishable from those held permissible in *Marsh* and *Town of Greece*).

Examining the same historical materials, compare *id.* at 18-22, with *Rowan County*, 863 F.3d at 279-80, and *Lund* v. *Rowan County*, 837 F.3d 407, 418-19 (4th Cir. 2016), the *en banc* Sixth and Fourth Circuits flatly disagreed on the historical significance of prayer by legislators (as opposed to paid chaplains or volunteer clergy). The Sixth Circuit held that prayer by legislators "does not violate the Establishment Clause" precisely because "history shows that legislator-led prayer is a long-standing tradition." App. Exh. A, p. 19 (noting "[l]egislator-led prayer has persisted in various state capitals since at least 1849"). The Fourth Circuit, on the other hand, described prayer by legislators as an "exception to the rule" of legislative prayer by chaplains—and thus outside the Nation's traditions as set forth in *Town of Greece*. *Rowan County*, 863 F.3d at 279. The Sixth Circuit found the Fourth Circuit's analysis unpersuasive. App. Exh. A, p. 20 ("[W]e give no credence to * * * the Fourth Circuit's conclusion in *Lund* that legislator-led prayer is a 'phenomenon [that] appears to be the exception to the rule * * * *'").

The same practice fits within the Nation's traditions in one circuit and falls outside it in the next. In the Sixth Circuit, prayer by legislators falls within "American historical practices" by which courts "determine what the Establishment Clause allows." *Id.* at 37 (Sutton, J., concurring). In the Fourth Circuit, prayer by legislators is a "conceptual world apart" from prayer by chaplains or volunteer clergy. *Rowan County*, 863 F.3d at 277. The split is undeniable.

The circuits are also split on whether faith-specific prayers delivered by legislators coerce nonparticipants. See Pet. at 16, 32. As petitioner also explains (at 16),

the Fourth Circuit—unlike the Sixth Circuit—"looked at 'the totality of circumstances' and concluded that the identity of the prayer-giver is pertinent under the fact sensitive inquiry [it held was] required under *Town of Greece*." Indeed, the Fourth Circuit listed four "features" of Rowan County's prayer practice that in "combination" rendered it coercive in the Fourth Circuit's view: (1) the exclusive delivery by legislators, (2) the faith-specific contents, (3) the openings, and (4) the local-government setting. *Rowan County*, 863 F.3d at 280-81, 286-87. Again, the Sixth Circuit openly disagreed with this approach. App. Exh. A, p. 18 n.5; see also Pet. at 17. This, too, demonstrates a split between the circuits.

This Court approved faith-specific prayers that began with phrases like "let us pray" in the local-government setting in *Town of Greece*. 134 S. Ct. at 1822-23, 1825-26. The Sixth Circuit held that a prayer practice permissible under *Town of Greece* remains permissible when offered by a legislator. "We find it insignificant that the prayer-givers in this case are publicly-elected officials." Pet. at 17 (quoting App. Exh. A, p. 22). Whereas the Fourth Circuit found the features approved in *Town of Greece* troubling when legislators offered the prayers, *Rowan County*, 863 F.3d at 285-87, the Sixth Circuit explained that the features approved in *Town of Greece* remain non-coercive when legislators pray. App. Exh. A, pp. 27-32; *id.* at 22 (explaining permissible prayers do not become coercive when said by "principals"—the legislators themselves—rather than by "agents"—chaplains or clergy). Local lawmakers in the Sixth Circuit may (non-coercively) offer faith-specific prayers, but those in the Fourth Circuit who do so necessarily coerce others. Pet. at 17-18.

Indeed, the Sixth Circuit and Fourth Circuit disagree as to how to evaluate coercion under *Town of Greece*. The Sixth Circuit applied the *Town of Greece* plurality's coercion analysis to determine whether, taken together and over time, Jackson County's prayer practice revealed official retaliation against nonparticipants or a pattern of denigrating nonbelievers. App. Exh. A, pp. 28-30. The Fourth Circuit, by contrast, singled out a small handful of prayers to critique—claiming their faith-specific nature and local-government setting made the whole practice coercive. *Rowan County*, 863 F.3d at 284-85, 287-88. The *en banc* circuits' disagreement is thus clear and intractable.

This case is a subpar vehicle for resolving that conflict, however. It is not, as petitioner contends (at 18), "the Sixth Circuit's decision" that "conflicts with precedent of this Court." Rather, the Fourth Circuit's does. The Sixth Circuit faithfully applied this Court's instructions in *Town of Greece*. The Sixth Circuit's decision is correct, and the petition should be denied.

1. The Sixth Circuit properly applied this Court's directive in *Town of Greece* that a long historical tradition would satisfy any of the various Establishment Clause tests. App. Exh. A, pp. 18-20 (quoting *Town of Greece*, 134 S. Ct. at 1819). Petitioner concedes, as he must (at 21), that this analysis must proceed "by reference to historical practices and understandings," but then resorts to an irrelevant discussion of the Treaty of Tripoli supported by a handful of out-of-context quotes from the Founding Fathers. Pet. at 22-27. None of these materials speaks to how state legislators conducted their prayer practices.

But petitioner does not—and cannot—meaningfully respond to the substantial evidence of legislator-delivered legislative prayers dating back to the mid-1800s. App. Exh. A, pp. 18-22.[2] This historical data—which encompasses both federal and state traditions—gave the Sixth Circuit sufficient confidence to "give no credence to [petitioner]'s contention that these examples are just 'historical aberrations.'" *Id.* at 20. Properly so. They represent a longstanding tradition that satisfies this Court's test. No more is required under *Town of Greece*, 134 S. Ct. at 1819.

Petitioner does not dispute the accuracy of these materials; he cannot. Instead, like the *en banc* Fourth Circuit, petitioner casts the historical inquiry under *Town of Greece* as one consideration among many. Thus petitioner pivots (at 18-19), claiming that the Commissioners' delivery of faith-specific prayers condemns the County's prayer practice—or, otherwise (at 4-5), the introductory statements do. But the Sixth Circuit correctly held that the "creed-specific" nature of the prayers or Commissioners offering them with invitations to join did not remove this practice from the robust historical tradition. App. Exh. A, p. 25. Greece's prayer practice possessed these same traits. *Town of Greece*, 134 S. Ct. at 1822-23, 1825-26.

2. The Sixth Circuit correctly applied the *Town of Greece* plurality's coercion analysis to hold the County's prayers non-coercive. App. Exh. A, pp. 28-33. The Sixth Circuit began by "declining to view the coercive effect of prayers at local government meetings differently from * * * [less intimate] legislative sessions." *Id.*

[2] Petitioner's selective statistics from the Michigan state legislature (at 28-29) do no better to rebut the Sixth Circuit's robust historical analysis. App. Exh. A, pp. 18-22.

at 28. The court noted that it did "not agree that soliciting adult members of the public to assist in solemnizing the meetings by rising and remaining quiet in a reverent position is coercive." *Id.* at 29. Nor could it: the *Town of Greece* plurality defined coercion as proselytizing one religion, denigrating or disparaging another, 134 S. Ct. at 1823, and "singl[ing] out dissidents for opprobrium, or indicat[ing] [the Board's] decisions might be influenced by a person's acquiescence in the prayer opportunity." *Id.* at 1826 (plurality opinion). Finding nothing in the record rising to the level of any of these constitutional offenses—especially not when the record is taken, as it must be, as a whole, and over time—the Sixth Circuit properly rejected petitioner's coercion arguments. See *id.* at 1825-27; App. Exh. A, pp. 28-33.

Petitioner of course disagrees, seeking an open-ended coercion inquiry turning on a subjective judicial evaluation of a prayer practice. Pet. at 33-34 (quoting *Rowan County*, 863 F.3d at 288). Yet as the Sixth Circuit aptly observed, petitioner's coercion approach (like the Fourth Circuit's) resembles the *dissent* in *Town of Greece*, not the majority. App. Exh. A, pp. 28-29. Like that dissent, petitioner faults the intimate local-government setting for legislative prayer, construing it as coercive, *Town of Greece*, 134 S. Ct. at 1847 (Kagan, J., dissenting); Pet. at 34; deems introductions like "let us pray" and requests to "rise and assume a reverent position" as forcing citizens to pray, Pet. at 34-35; *Town of Greece*, 134 S. Ct. at 1847-48; and criticizes the faith-specific nature of the prayers offered. Pet. at 18-19; *Town of Greece*, 134 S. Ct. at 1848.

But petitioner cannot reconcile this four-rights-make-a-wrong coercion analysis with *Town of Greece*. That case firmly rejected the idea that "the constitutionality of legislative prayer turns on the neutrality of its content," *Town of Greece*, 134 S. Ct. at 1821 (majority opinion), whether the audience is invited to join in prayer, *id.* at 1826 (plurality opinion), or whether the prayer takes place in a local-government setting. *Id.* at 1824-25 (majority opinion). Particularly given this Court's recognition that legislative prayer is meant to "reflect the values [legislators] hold as private citizens," and to provide an opportunity to show "who and what they are," *id.* at 1826 (plurality opinion), the Sixth Circuit was right to conclude that petitioner's offense at prayers with which he disagreed (as well as with one Commissioner's turning his back on petitioner during public comments) was not enough to demonstrate coercion. App. Exh. A, p. 29.

The Sixth Circuit also considered post-litigation statements from two Commissioners "as reported in a local newspaper" reacting negatively to petitioner's objections and defending their right to pray. *Id.* at 30-31. But the court was right in holding that these statements did not express antagonism for petitioner's *religious beliefs* (as opposed to his longstanding litigious relationship with the County), *id.* at 31, and thus did not represent the Board "singl[ing] out dissidents for opprobrium" based on their religious beliefs. *Town of Greece*, 134 S. Ct. at 1826. And the court considered and properly rejected petitioner's claim that he was not appointed to the Solid Waste Planning Committee or the Board of Public Works because of his views. After considering the evidence in the record (and facts alleged in petitioner's motion

to supplement the record that was *denied* by the district court), the Sixth Circuit found insufficient evidence to conclude that these denials had anything to do with petitioner's beliefs or objections to the prayer practice. App. Exh. A, pp. 31-32 & n.13. The Sixth Circuit correctly concluded that the County's prayer practice no more coerced petitioner than the prayer practice in *Town of Greece* coerced dissenters there.[3]

B. The Petition Raises Several Evidentiary Issues That Unnecessarily Complicate Resolution Of The Establishment Clause Question.

In addition to the correctness of the decision below, this case is an inferior vehicle for resolving the split between the *en banc* Fourth and Sixth Circuits because it carries with it the baggage of several splitless, factbound evidentiary issues. Because the various stages of this case have been "embroiled in [these] disputes," App. Exh. A, p. 47 (Moore, J., dissenting), this case is a poor vehicle for this Court's review of the important Establishment Clause question presented.

For example, there is a "dispute involv[ing] [petitioner]'s efforts to supplement the record." *Id.* at 48. Petitioner sought to supplement the record with the text of a Commissioner's October 2014 prayer and the letter he received "denying him appointment to the Board of Public Works." *Ibid.* The district court eventually granted the first motion but denied the second—noting that it and any effort to depose Commissioners over his rejection for the Public Works position were not germane to the relevant legal issues. *Id.* at 48-49. While the *en banc* Sixth Circuit ma-

[3] By extension, the Sixth Circuit properly disregarded petitioner's arguments (repeated here at 20-21, 31-32) that *all* faith-specific legislative prayer practices are unconstitutional. This Court necessarily rejected that position in *Town of Greece*.

jority considered the letter nonetheless, the *en banc* dissent maintained that the district court got the denial of the motion to supplement wrong. *Id.* at 49.

Additionally, there is an evidentiary dispute regarding judicial notice of a video recording of a Board Personnel and Finance Committee meeting—a recording never presented to the district court, *id.* at 6 (*en banc* majority opinion), but considered on its own initiative by the panel majority (over the strong objections of the panel dissent). App. Exh. C, p. 22 & n.7 (panel majority opinion); *id.* at 54 (panel dissenting opinion). This issue has made its way into petitioner's questions presented (at i), statement of the case (at 7), background (at 12), and reasons for granting certiorari (at 35-39), despite having nothing to do with the constitutional import of legislator-delivered prayers. The *en banc* majority correctly applied the familiar rule that appellate courts do not consider matters not properly presented below (and not properly presented on appeal, either, as petitioner did not raise the issue until his reply brief before the panel). App. Exh. A, pp. 5-8.

The evidentiary dispute does not matter to the ultimate resolution of the case. As the *en banc* majority noted, "even if we were to consider the proffered videos, our disposition would not change." *Id.* at 8 n.2. But it does present an unnecessary distraction. Although petitioner contends (at 39) that "[t]his case offers the perfect vehicle for this Court to determine whether Fed. R. Evid. 201 applies at the appellate level of proceedings," he offers no reason why this Court's review of that issue is warranted. If anything, petitioner's argument (at 35-39) concerning this collateral evidentiary issue that made no difference to the ultimate disposition be-

low only reveals that this case is *not* the best vehicle for resolving the split between the Fourth and Sixth Circuits on a constitutional issue of nationwide importance.

II. *Rowan County* Is A Better Vehicle For Considering The Establishment Clause Question.

As explained above, petitioner is correct that the circuits are split on an issue of nationwide importance that warrants this Court's attention. As also explained above, this case is not the best vehicle for resolving the conflict and providing much needed guidance to municipalities across the Nation. This Court already has before it another petition raising the same issue without the vehicle problems presented here: *Rowan County*, No. 17-565. It should therefore deny this petition.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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