RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 17a0207p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PETER CARL BORMUTH,

Plaintiff-Appellant,

v.

COUNTY OF JACKSON,

Defendant-Appellee.

No. 15-1869

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 2:13-cv-13726—Marianne O. Battani, District Judge.

Argued: June 14, 2017

Decided and Filed: September 6, 2017

Before: COLE, Chief Judge; BATCHELDER, MOORE, CLAY, GIBBONS, ROGERS, SUTTON, COOK, McKEAGUE, GRIFFIN, KETHLEDGE, WHITE, STRANCH, DONALD, and THAPAR, Circuit Judges.*

COUNSEL

ARGUED EN BANC: Peter Bormuth, Jackson, Michigan, pro se. Allyson N. Ho, MORGAN, LEWIS & BOCKIUS LLP, Dallas, Texas, for Appellee. Richard B. Katskee, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, Washington, D.C., Aaron D. Lindstrom, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Amici Curiae. **ON BRIEF:** Peter Bormuth, Jackson, Michigan, pro se. Allyson N. Ho, John C. Sullivan, MORGAN, LEWIS & BOCKIUS LLP, Dallas, Texas, Judd E. Stone, Michael E. Kenneally, MORGAN, LEWIS & BOCKIUS LLP, Washington, D.C., Hiram S. Sasser, III, Kenneth A. Klukowski, FIRST LIBERTY INSTITUTE, Plano, Texas, Richard D. McNulty, COHL, STOKER & TOSKEY, Lansing, Michigan, for Appellee. Richard B. Katskee, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, Washington, D.C.,

*The clerk submitted this case to the en banc panel of the Sixth Circuit Court of Appeals before Judge John K. Bush received his commission on August 31, 2017.

Appendix A

Daniel Mach, Heather L. Weaver, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, Washington, D.C., Daniel S. Korobkin, Michael J. Steinberg, AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN, Detroit, Michigan, Aaron D. Lindstrom, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, Michael B. Kimberly, MAYER BROWN LLP, Washington, D.C., Ed R. Haden, Jason B. Tompkins, Michael P. Taunton, BALCH & BINGHAM LLP, Birmingham, Alabama, Eric C. Rassbach, Daniel H. Blomberg, THE BECKET FUND FOR RELIGIOUS LIBERTY, Washington, D.C., Benjamin L. Ellison, DORSEY & WHITNEY LLP, Wayzata, Minnesota, Bryan H. Beauman, STURGILL, TURNER, BARKER & MOLONEY, PLLC, Lexington, Kentucky, Eric D. McArthur, Benjamin Beaton, SIDLEY AUSTIN LLP, Washington, D.C., Edward L. White III, AMERICAN CENTER FOR LAW & JUSTICE, Ann Arbor, Michigan, Douglas R. Cox, GIBSON, DUNN & CRUTCHER LLP, Washington, D.C., for Amici Curiae.

GRIFFIN, J., delivered the opinion of the court in which BATCHELDER, GIBBONS, ROGERS, SUTTON, COOK, McKEAGUE, KETHLEDGE, and THAPAR, joined. ROGERS, J. (pp. 34–36), delivered a separate concurring opinion in which COOK and McKEAGUE, JJ., joined. SUTTON, J. (pp. 37–43), delivered a separate concurring opinion in which BATCHELDER, McKEAGUE, KETHLEDGE, and THAPAR, JJ., joined. MOORE, J. (pp. 44–71), delivered a separate dissenting opinion in which COLE, C.J., and CLAY, STRANCH, and DONALD, JJ., joined, and WHITE, J., joined in part. WHITE, J. (pp. 72–73), delivered a separate dissenting opinion.

OPINION

GRIFFIN, Circuit Judge. Since the founding of our Republic, Congress, state legislatures, and many municipal bodies have commenced legislative sessions with a prayer. Consonant with this historical practice, defendant Jackson County Board of Commissioners opens its public meetings with a prayer that is generally solemn, respectful, and reflective. Plaintiff Peter Bormuth claims that this custom violates the Establishment Clause of the United States Constitution[1] because the Commissioners themselves offer the invocations. We disagree and affirm the judgment of the district court.

In doing so, we hold that Jackson County's invocation practice is consistent with the Supreme Court's legislative prayer decisions, *Marsh v. Chambers*, 463 U.S. 783 (1983), and

---

[1]The Establishment Clause is applicable to the states by operation of the Due Process Clause of the Fourteenth Amendment. *See, e.g., Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1 (1947).

Town of Greece v. Galloway, 134 S. Ct. 1811 (2014), and does not violate the Establishment Clause.

I.

A.

The Jackson County Board of Commissioners is an elected board of nine individuals that represents the citizens of Jackson County, Michigan. The Board opens its monthly meetings with Commissioner-led prayers. Following a call to order, the Board's Chairman typically requests Commissioners and the public alike to please "rise and assume a reverent position." Other variations include: "Everyone please stand. Please bow your heads"; "Please bow your heads and let us pray"; and "If everyone could stand and please take a reverent stance." One of the Commissioners then offers a prayer, which is followed by the Pledge of Allegiance, and then county business.

The Board's invocation practice is facially neutral regarding religion. On a rotating basis, each elected Jackson County Commissioner, regardless of his religion (or lack thereof), is afforded an opportunity to open a session with a short invocation based on the dictates of his own conscience. Neither other Commissioners, nor the Board as a whole, review or approve the content of the invocations. There is no evidence that the Board adopted this practice with any discriminatory intent.

Prayers offered by the Commissioners are generally Christian in tone and often ask "God," "Lord," or "Heavenly Father" to provide the Commissioners with guidance as they go about their business. Some prayers ask for blessings for others, from county residents suffering particular hardships, to military members, first responders serving in Jackson County, and others. The following is illustrative of the prayers at issue:

> Bow your heads with me please. Heavenly father we thank you for this day and for this time that we have come together. Lord we ask that you would be with us while we conduct the business of Jackson County. Lord help us to make good decisions that will be best for generations to come. We ask that you would bless our troops that protect us near and far, be with them and their families. Now Lord we wanna give you all the thanks and all the praise for all that you do. Lord I wanna remember bereaved families tonight too, that you would be with them and

> take them through difficult times. We ask these things in your son Jesus's name. Amen.

Plaintiff, a "self-professed Pagan and Animist," objects to this practice. In his words, the "prayers are unwelcome and severely offensive to [him] as a believer in the Pagan religion, which was destroyed by followers of Jesus Christ." The distinctly Christian prayers offered by the Commissioners make him feel "like he [i]s in Church" and that "he [i]s being forced to worship Jesus Christ in order to participate in the business of County Government." He admits, however, that he does not stand and participate in the invocation portion of the meetings. Nor does he contend that the Commissioners dissuaded or 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.

And protest after the fact he did. Bormuth first raised his concerns about the invocations during a public comment portion of an August 20, 2013, meeting. While Bormuth was speaking "on the issue of their sectarian prayers," one of the Commissioners "swiveled his chair and turned his back to [Bormuth]." This "insulted and offended" him.

Bormuth commenced this litigation on August 30, 2013. A month later, he sought appointment to Jackson County's Solid Waste Planning Committee. According to Bormuth's Amended Complaint, the Board appointed two other lesser-qualified individuals instead.

Bormuth moved for summary judgment in December 2013. Following the Supreme Court's May 2014 decision in *Town of Greece* and while plaintiff's motion was pending, Jackson County moved for summary judgment. Thereafter, the magistrate judge directed Bormuth to file a revised motion addressing *Town of Greece*. He did so in September 2014.

Ultimately, the magistrate judge issued a report and recommendation granting Bormuth's motion for summary judgment, denying Jackson County's motion for summary judgment, and enjoining Jackson County's invocation practice as violative of the Establishment Clause. However, the district court rejected this portion of the magistrate's report and recommendation and found Jackson County's prayer practice to be consistent with the Supreme Court's holdings in *Marsh* and *Town of Greece*. Bormuth appealed, claiming that the district court erred in

concluding Jackson County's prayer practice does not violate the Establishment Clause and abused its discretion regarding two discovery matters. On appeal, a panel of our court ruled in Bormuth's favor on his Establishment Clause challenge. *Bormuth v. Cty. of Jackson*, 849 F.3d 266 (6th Cir. 2017). Thereafter, we sua sponte granted rehearing en banc. 855 F.3d 694 (6th Cir. 2017) (mem.).

B.

Before turning to the merits of the appeal, we pause to address why our factual recitation excludes certain statements made by Commissioners after Bormuth commenced this litigation (and in particular, during a November 12, 2013, meeting of a subset of the Board to review a proposed revised invocation practice in response to Bormuth's lawsuit—a proposal which was ultimately tabled). Both Bormuth and Amicus Americans United for Separation of Church and State argue that because Jackson County records by video its Board of Commissioners' meetings and makes these videos available online on its website, the videos are either in the record or are judicially noticeable for purposes of this appeal. We disagree, and refuse to fault the district court for failing to address facts that were not before it.

"Our review of a district court's summary-judgment ruling is confined to the record." *E.E.O.C. v. Ford Motor Co.*, 782 F.3d 753, 765 (6th Cir. 2015) (en banc). Under Federal Rule of Civil Procedure 56(c), the opposing party "has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact." *Chicago Title Ins. Corp. v. Magnuson*, 487 F.3d 985, 995 (6th Cir. 2007) (quoting *In re Morris*, 260 F.3d 654, 665 (6th Cir. 2001)). "This burden to respond is really an opportunity to assist the court in understanding the facts. But if the non-moving party fails to discharge that burden—for example, by remaining silent—its opportunity is waived and its case wagered." *Guarino v. Brookfield Twp. Trs.*, 980 F.2d 399, 405 (6th Cir. 1992). Simply stated, we "will not entertain on appeal factual recitations not presented to the district court when reviewing a district court's decision." *Chicago Title Ins. Corp.*, 487 F.3d at 995 (internal citation omitted). And this rule applies even if an appellant proffers evidence "that might . . . show a genuine issue of material fact after the district court had granted the defendants' motion for summary judgment. . . ." *Cacevic v. City of Hazel Park*, 226 F.3d 483, 491 (6th Cir. 2000).

Bormuth did not present any video evidence to the district court. One need look no further than the opinions of the magistrate judge and district judge to confirm this. Like the parties' briefing below, those opinions make no reference to the videos.

We acknowledge that Bormuth's Amended Complaint averred that "[t]he County commissioners meetings are video recorded and posted on the Jackson County website: www.co.jackson.mi.us," and that a transcription of the offered prayers attached to his motion for summary judgment also referred to the videos' availability. In our view, the mere reference to the videos' general availability falls well short of "direct[ing] the court's attention to those specific portions of the record upon which [Bormuth sought] to rely to create a genuine issue of material fact." *Chicago Title Ins. Corp.*, 487 F.3d at 995 (citation omitted). Such a fleeting nonspecific reference did not require the district court to spend countless hours looking for evidence on Bormuth's behalf in response to Jackson County's motion for summary judgment by: (1) surfing the County's website to find the archive of the meetings; (2) watching the several years' worth of monthly meetings (and as but one example, the November 12, 2013, meeting alone lasted over one hour); and (3) attempting to discover facts supporting Bormuth's claim. We have never required such advocacy by a district court, even for a pro se litigant. *See, e.g.*, *Guarino*, 980 F.2d at 410 (a district court is not obligated to "comb the record from the partisan perspective of an advocate for the non-moving party"); *cf. Pliler v. Ford*, 542 U.S. 225, 231 (2004) ("District judges have no obligation to act as counsel or paralegal to *pro se* litigants.").

Furthermore, the manner in which this appeal was briefed is another reason to decline the invitation to supplement the appellate record. Bormuth's initial appellate brief was silent with respect to the videos or their content. It was only in his reply at the panel stage that he first referenced the videos and made an argument regarding the new facts contained therein. "We have consistently held, however, that arguments made to us for the first time in a reply brief are waived." *Sanborn v. Parker*, 629 F.3d 554, 579 (6th Cir. 2010). "[W]here the facts relied upon were presented neither to the district court nor to this Court until Plaintiff Appellant filed his reply, it would be improper for the Court to find that the district court erred in its failure to consider this newly-developed . . . argument," *Overstreet v. Lexington-Fayette Urban Cty. Gov't*, 305 F.3d 566, 578 (6th Cir. 2002), especially, as it is here, "when the issue raised for the first

time in reply is based largely on the facts and circumstances of the case. . . ." *Wright v. Holbrook*, 794 F.2d 1152, 1156 (6th Cir. 1986). The same goes for Amicus's attempt to raise this argument. *See Cellnet Commc'ns, Inc. v. F.C.C.*, 149 F.3d 429, 443 (6th Cir. 1998) ("While an amicus may offer assistance in resolving issues properly before a court, it may not raise additional issues or arguments not raised by the parties.").

That leaves us with Bormuth's and Amicus Americans United's requests that we take judicial notice of the videos under Federal Rule of Evidence 201. Because Jackson County admitted the accuracy of these publicly-available videos, the argument is made that this court "must take judicial notice," because the facts within the videos "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned," and the court has been "supplied with the necessary information." Further, the court "may take judicial notice at any stage of the proceeding." Fed. R. Evid. 201.

Admittedly, there is some tension between these judicial notice procedures and our voluminous case law providing that "[o]ur function is to review the case presented to the district court, rather than a better case fashioned after a district court's unfavorable order." *DaimlerChrysler Corp. Healthcare Benefits Plan v. Durden*, 448 F.3d 918, 922 (6th Cir. 2006); *cf. Sovereign News Co. v. United States*, 690 F.2d 569, 571 (6th Cir. 1982) ("A party may not by-pass the fact-finding process of the lower court and introduce new facts in its brief on appeal."). However, our court recently and persuasively addressed this tension as follows:

> The problem is that taking judicial notice of . . . [new evidence] now might create an evidentiary loophole through which a litigant could present a district court with one record and then ask an appellate court to reverse the district court based on another record. That would subvert the relationship between district and appellate courts. Here, the district court considered and rejected the defendants' . . . arguments. Now the defendants and *amici* urge reversal based in part upon facts that the defendants could have presented to the district court, but chose not to. They are not entitled to burnish the record on appeal. *See Morgan Drexen, Inc. v. Consumer Fin. Prot. Bureau*, 785 F.3d 684, 690 n.2 (D.C. Cir. 2015); *U.S. ex rel. Wilkins v. United Health Grp.*, 659 F.3d 295, 303 (3d Cir. 2011).

United States v. Carpenter, No. 14-1572, Order at 2 (6th Cir. April 11, 2016); *see also Conlin v. Mort. Ele. Registration Sys., Inc.*, 714 F.3d 355, 360 n.5 (6th Cir. 2013); *United States v. Bonds*, 12 F.3d 540, 552–53 (6th Cir. 1993).

For these reasons, we decline to consider the videos presented for the first time on appeal by amicus, and then by Bormuth in his reply.[2]

C.

There is one more preliminary matter to resolve at the outset, relating to a discovery issue.[3] After Bormuth moved for summary judgment, he sought to depose the County's Administrator and three Commissioners. In his Rule 26 disclosures, Bormuth identified these individuals as possessing information regarding "the County Commissioner's practice of offering a prayer invocation at the opening of their regular monthly meetings," "the practice of having children lead the Pledge of Allegiance which directly follows the invocation on the agenda," and "Plaintiff's activities regarding the Jackson County Resource Recovery Facility." He further explained his desire to take these depositions in response to Jackson County's motion to quash, noting he wanted to discover "the practice, intent, and history of the invocations, [County Administrator] Overton's proposed [revised invocation] policy, and the role that religious interest and bias from the Commissioners has played in this case." The magistrate judge granted the motion to quash because of the pending cross-motions for summary judgment. That is, Bormuth did "not indicate[] the need for any additional discovery in order to fully respond to defendant's motion or to support his own motion as required by Federal Rule of Civil Procedure 56(d)." The district court agreed to quash the scheduled depositions for different reasons: under *Town of Greece*, "the Commissioners' private and personal attitudes toward religion or nonreligion are not relevant to the present action." It also ruled that to the extent he sought information about the Jackson County Resource Recovery Facility, it was irrelevant because Bormuth alleged an Establishment Clause claim, not an employment discrimination claim.

We review district court decisions regarding discovery matters for abuse of discretion. *See Himes v. United States*, 645 F.3d 771, 782 (6th Cir. 2011). A district court abuses its

---

[2]We note that even if we were to consider the proffered videos, our disposition would not change.

[3]Bormuth also contends the district court erred by not permitting him to supplement the record with respect to the decision by the Board to not appoint him to a vacancy on the Board of Public Works. We address this claim of error in our text below.

discretion when it relies on clearly erroneous findings of fact, improperly applies the law, or uses an erroneous legal standard. *Cummins v. BIC USA, Inc.*, 727 F.3d 506, 509–10 (6th Cir. 2013).

We conclude that the district court did not abuse its discretion because Bormuth failed to comply with Federal Rule of Civil Procedure 56(d). As the magistrate judge correctly recognized, Bormuth did not assert his need to take these depositions in response to Jackson County's motion for summary judgment. Under Rule 56(d), Bormuth could have opposed this motion on the grounds that he could not "present facts essential to justify its opposition." "We have observed that filing an affidavit that complies with Rule 56(d) is essential, and that in the absence of such a motion or affidavit, 'this court will not normally address whether there was adequate time for discovery.'" *Unan v. Lyon*, 853 F.3d 279, 292 (6th Cir. 2017) (citation omitted). Although we have set aside Rule 56(d)'s formal affidavit requirement "when a party has clearly explained its need for more discovery on a particular topic to the district court prior to or contemporaneously with the motion for summary judgment," *id.* at 293 (citation omitted), there is no need to do so here.

By twice moving for summary judgment, Bormuth conceded his position "that there [wa]s no genuine dispute as to any material fact and that . . . [he wa]s entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Thus, instead of responding to Jackson County's motion for summary judgment by arguing the need for additional discovery, Bormuth's motions for summary judgment expressly disclaimed it. *See Unan*, 853 F.3d at 293 (finding no abuse of discretion where, despite plaintiff's providing of some evidence about the need for additional discovery, the plaintiff subsequently moved for summary judgment). We therefore decline to sanction the "I did not have all the evidence I needed" argument made for the first time following the district court's adverse ruling on the cross-motions for summary judgment.

II.

We review the district court's grant of summary judgment de novo. *Rogers v. O'Donnell*, 737 F.3d 1026, 1030 (6th Cir. 2013). Summary judgment is proper when there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). Although we view the evidence in a light most favorable to the

nonmovant, *Rogers*, 737 F.3d at 1030, "the plain language of Rule 56[] mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

III.

The Supreme Court has recognized "[w]e are a religious people whose *institutions* presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952) (emphasis added). All three of our branches of government have officially acknowledged religion's role in American life. *See Lynch v. Donnelly*, 465 U.S. 668, 674–78 (1984) (detailing the "official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders").

Legislative prayer is part of this tradition: "The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country." *Marsh*, 463 U.S. at 786; *see also Smith v. Jefferson Cty. Bd. of Sch. Comm'rs*, 788 F.3d 580, 588 (6th Cir. 2015) ("At the state and local levels, too, legislative prayer has long been accepted." (citing *Town of Greece*, 134 S. Ct. at 1819)). Indeed, "the Framers considered legislative prayer a *benign acknowledgment* of religion's role in society." *Town of Greece*, 134 S. Ct. at 1819 (emphasis added). It "has become part of our heritage and tradition, part of our expressive idiom, similar to the Pledge of Allegiance, inaugural prayer, or the recitation of 'God save the United States and this honorable Court' at the opening of [the Supreme Court's (and Sixth Circuit's)] sessions." *Id.* at 1825 (Kennedy, J.). That tradition includes offering prayers, even those that reflect "beliefs specific to only some creeds," that "seek peace for the Nation, wisdom for its lawmakers, and justice for its people, values that count as universal and that are embodied not only in religious traditions, but in our founding documents and laws." *Id.* at 1823 (Majority Op.). With this historical grounding, it comes as no surprise that the Supreme Court has twice approved the practice of legislative prayer as consistent with the Framers' understanding of the Establishment Clause. Because these cases shape our inquiry, we examine *Marsh* and *Town of Greece* in detail.

A.

The Supreme Court first rejected an Establishment Clause challenge to legislative prayer in *Marsh*. That case examined the Nebraska Legislature's practice of opening its sessions with a prayer by its chaplain. The salient facts of Nebraska's practice included that the chaplain was of only one denomination (Presbyterian); the Legislature selected the chaplain for sixteen consecutive years and paid him with public funds; and the chaplain gave prayers "in the Judeo-Christian tradition." 463 U.S. at 793.

In rejecting the claim that Nebraska's invocation practice violated the Establishment Clause, the Supreme Court emphasized legislative prayer's deep historical roots: "From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom." *Id.* at 786. Notable to the Court was how the drafters of the Establishment Clause embraced this practice. In 1774, the Continental Congress "adopted the traditional procedure of opening its session with a prayer offered by a paid chaplain." *Id.* at 787. And in one of its "early items of business," 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 "unique," "unambiguous and unbroken history," the Court held that "the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Id.* at 791–792. Stated a different way, "[c]learly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress." *Id.* at 788.

That the Nebraska Legislature selected a chaplain of the same denomination for sixteen consecutive years was of no moment: "Absent proof that the chaplain's reappointment stemmed

from an impermissible motive," one could not "perceive any suggestion that choosing a clergyman of one denomination advances the beliefs of a particular church." *Id.* at 793. Nor was it material that public funds paid for the chaplain, given that the Continental Congress did the same. *Id.* at 794. And finally, the Supreme Court cautioned against the judiciary "embark[ing] on a sensitive evaluation or . . . pars[ing] the content of a particular prayer." *Id.* at 795. That is, "[t]he content of the prayer is not of concern to judges where . . . there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Id.* at 794–95.

B.

Marsh is widely viewed as "carving out an exception to the [Supreme] Court's Establishment Clause jurisprudence . . . because it sustained legislative prayer without subjecting the practice to any of the formal tests that have traditionally structured this inquiry." *Town of Greece*, 134 S. Ct. at 1818 (citation and quotation marks omitted). This includes the generally applicable three-part *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971), test for which Bormuth advocates. *See, e.g., Am. Civil Liberties Union of Ohio v. Capitol Square Review & Advisory Bd.*, 243 F.3d 289, 305–06 (6th Cir. 2001) (en banc); *accord Smith*, 788 F.3d at 589–90.

Unfortunately, dicta in the *Marsh* opinion led to judicial confusion regarding its holding. This arose from a footnote in which the Court explained the "Judeo-Christian" nature of the prayers:

> [Chaplain] Palmer characterizes his prayers as "nonsectarian," "Judeo Christian," and with "elements of the American civil religion." Although some of his earlier prayers were often explicitly Christian, Palmer removed all references to Christ after a 1980 complaint from a Jewish legislator.

463 U.S. at 793 n.14 (internal citations omitted). In *County of Allegheny v. A.C.L.U.*, 492 U.S. 573 (1989), a case involving a crèche placed on the steps of a county courthouse, the Court drew a distinction between sectarian and nonsectarian references based upon this footnote. *Id.* at 603. The nonsectarian reference in *Marsh*, as "recast[]" by *County of Allegheny*, *Town of Greece*, 134 S. Ct. at 1821, led some courts, including our own, to conclude that the constitutionality of ceremonial prayer turned upon content neutrality. *See Stein v. Plainwell Cmty. Sch.*, 822 F.2d

1406, 1410 (6th Cir. 1987); *see also Rubin v. City of Lancaster*, 710 F.3d 1087, 1094 n.6 (9th Cir. 2013) (collecting cases). The Supreme Court corrected this error in *Town of Greece v. Galloway*.

C.

In *Town of Greece*, the town council invited local ministers to give invocations before each town board meeting. 134 S. Ct. at 1816. The town permitted any person of any faith to give the invocation, did not review the prayers in advance, and did not provide any guidance as to tone or content. *Id.* Although some had a "distinctly Christian idiom," and for eight years only Christian ministers gave prayers, upon complaint of such pervasive themes, the town expressly invited persons of other faiths to deliver the prayer. *Id.* at 1816–17. Contending that the Establishment Clause mandated that legislative prayers be "inclusive and ecumenical" to a "generic God," some town residents sued. *Id.* at 1817.

In reversing the Second Circuit's decision that Greece's practice violated the Establishment Clause, the Supreme Court again emphasized the unique nature of legislative prayer: "legislative prayer lends gravity to public business, reminds lawmakers to transcend petty differences in pursuit of a higher purpose, and expresses a common aspiration to a just and peaceful society." *Id.* at 1818. Purposeful prayers seeking to solemnly bind legislators are consistent with our tradition where the prayer givers "ask their own God for blessings of peace, justice, and freedom that find appreciation among people of all faiths. That a prayer is given in the name of Jesus, Allah, or Jehovah, or that it makes passing reference to religious doctrines, does not remove it from that tradition. These religious themes provide particular means to universal ends." *Id.* at 1823. Most importantly, history teaches that these solemn prayers "strive for the idea that people of many faiths may be united in a community of tolerance and devotion." *Id.* They are permissible because "[o]ur tradition assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith." *Id.* This tradition extends not just to state and federal legislatures, but also to local deliberative bodies like city councils. *Id.* at 1819; *see also Am. Humanist Ass'n v.*

McCarty, 851 F.3d 521, 527 (5th Cir. 2017) (applying *Town of Greece* to prayers before school boards).[4]

Accordingly, the Supreme Court in *Town of Greece* directed that a court's "inquiry . . . must be to determine whether the prayer practice [at issue] fits within the tradition long followed in Congress and the state legislatures," and held that Greece's did. 134 S. Ct. at 1819. First, the Court rejected the notion that *Marsh* permits only generic prayers, abrogating *County of Allegheny* and overruling decisions to the contrary. *Id.* at 1820–24. That is, "*Marsh* nowhere suggested that the constitutionality of legislative prayer turns on the neutrality of its content." *Id.* at 1821. *Marsh* revolved not on espousement of "generic theism," but rather on the "history and tradition" showing prayer—even one that is explicitly Christian in tone—"in this limited context could coexist with the principles of disestablishment and religious freedom." *Id.* at 1820 (citation and alteration omitted). Requiring nonsectarian prayers "would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech, a rule that would involve government in religious matters to a far greater degree than is the case under the town's current practice of neither editing or approving prayers in advance nor criticizing their content after the fact." *Id.* at 1822. Put differently, once the government has "invite[d] prayer into the public sphere," it "must permit a prayer giver to address his or her own God or gods as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian." *Id.* at 1822–23. Nonetheless, the Court acknowledged that there are limits to the prayers' *content* to fit within our historical tradition:

> The relevant constraint derives from its place at the opening of legislative sessions, where it is meant to lend gravity to the occasion and reflect values long part of the Nation's heritage. Prayer that is solemn and respectful in tone, that invites lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing, serves that legitimate function. If the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion, many present may consider the prayer to fall short of the desire to elevate the purpose of the occasion and to unite lawmakers in their common effort.

---

[4]In our pre-*Town of Greece* case law, we refused to apply *Marsh*'s historical analysis to prayers offered before public school boards and instead applied *Lemon*'s endorsement test in line with public school prayer cases. *See Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 379–83 (6th Cir. 1999). Because the issue is not before us, now is not the time to decide whether *Coles* is still viable post-*Town of Greece*.

* * *

> Prayer that reflects beliefs specific to only some creeds can still serve to solemnize the occasion, so long as the practice over time is not "exploited to proselytize or advance any one, or to disparage any other, faith or belief."

Id. at 1823 (quoting *Marsh*, 463 U.S. at 794–95).

The Supreme Court in *Town of Greece* had little trouble finding the invocation prayers were in keeping with our tradition. *Id.* at 1824. Though invoking Jesus and other Christian references, the prayers involved "universal themes" such as celebrating the changing of the seasons or calling for a "spirit of cooperation." *Id.* To be sure, some prayers strayed from these themes, with one condemning "objectors [to the prayer practice] as a minority who are ignorant of the history of our country" and another "lament[ing] that other towns did not have God-fearing leaders." *Id.* (quotation marks omitted). But these remarks did not "despoil a practice that on the whole reflects and embraces our tradition." *Id.* That is, "[a]bsent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a prayer will not likely establish a constitutional violation. *Marsh* . . . requires an inquiry into the prayer opportunity as a whole, rather than into the contents of a single prayer." *Id.*

The Court also rejected the claim that the town violated the Establishment Clause by inviting predominantly Christian ministers to lead the prayer, noting that the town made reasonable efforts to identify all congregations within its borders and represented that it would welcome a prayer by anyone who wished to give one. *Id.* Moreover, the town's composition of nearly all Christians did not "reflect an aversion or bias on the part of town leaders against minority faiths. So long as the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing." *Id.*

Next, the Supreme Court addressed the petitioner's claim "that the setting and conduct of the town board meetings create social pressures that force nonadherents to remain in the room or even feign participation in order to avoid offending the representatives who sponsor the prayer and will vote on matters citizens bring before the board." *Id.* at 1820.

Justice Kennedy, joined by Chief Justice Roberts and Justice Alito, analyzed coercion broadly in the context of the "subtle coercive pressures" the audience might feel while listening to the prayer. He emphasized that "[t]he inquiry remains a fact-sensitive one that considers both the setting in which the prayer arises and the audience to whom it is directed," and "must be evaluated against the backdrop of historical practice." *Id.* at 1825. (Kennedy, J.). Notably, Justice Kennedy applied the following presumption: "the reasonable observer is acquainted with this tradition and understands that [legislative prayer's] purposes are to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens, not to afford government an opportunity to proselytize or force truant constituents into the pews." *Id.* It is the "lawmakers themselves," not the public, who are the "principal audience for these invocations" as they "may find that a moment of prayer or quiet reflection sets the mind to a higher purpose and thereby eases the task of governing." *Id.* "For members of town boards and commissions, who often serve part-time and as volunteers, ceremonial prayer may also reflect the values they hold as private citizens. The prayer is an opportunity for them to show who and what they are without denying the right to dissent by those who disagree." *Id.* at 1826. And in concluding that "legislative bodies do not engage in impermissible coercion merely by exposing constituents to prayer they would rather not hear and in which they need not participate," Justice Kennedy emphasized that "[a]dults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum, especially where, as here, any member of the public is welcome in turn to offer an invocation reflecting his or her own convictions." *Id.* at 1826–27.

In one paragraph, the three Justices discussed hypothetical facts that could change their analysis:

> The analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity. 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. Respondents suggest that constituents might feel pressure to join the prayers to avoid irritating the officials who would be ruling on their petitions, but this argument has no evidentiary support. Nothing in the record indicates that town leaders allocated benefits and burdens based on participation in the prayer, or that citizens were received differently depending on whether they joined the invocation or quietly declined. In no instance did town leaders signal disfavor toward nonparticipants or suggest that their stature in the community was in any way diminished. A practice that classified citizens based on their religious views would violate the Constitution, but that is not the case before this Court.

Id. at 1826 (citations omitted). They also noted the audience had options to avoid the prayers altogether:

> Nothing in the record suggests that members of the public are dissuaded from leaving the meeting room during the prayer, arriving late, or even, as happened here, making a later protest. In this case, as in *Marsh*, board members and constituents are "free to enter and leave with little comment and for any number of reasons." Should nonbelievers choose to exit the room during a prayer they find distasteful, their absence will not stand out as disrespectful or even noteworthy. And should they remain, their quiet acquiescence will not, in light of our traditions, be interpreted as an agreement with the words or ideas expressed. Neither choice represents an unconstitutional imposition as to mature adults, who "presumably" are "not readily susceptible to religious indoctrination or peer pressure."

Id. at 1827 (citations omitted).

Justices Thomas and Scalia did not join the coercion section of Justice Kennedy's opinion (Part II-B), but expressly disagreed with it. In a separate opinion, Justice Thomas, joined by Justice Scalia, wrote that coercion is limited to "coercive state establishments" "by force of law or threat of penalty," such as mandatory church attendance, levying taxes to generate church revenue, barring ministers who dissented, and limiting political participation to members of the established church. *Id.* at 1837 (Thomas, J., concurring in part and in the judgment). Therefore, they rejected Justice Kennedy's broadening of coercion to also include social pressures:

> At a minimum, there is no support for the proposition that the framers of the Fourteenth Amendment embraced wholly modern notions that the Establishment Clause is violated whenever the "reasonable observer" feels "subtle pressure," or perceives governmental "endors[ement]."
>
> * * *
>
> Thus, to the extent coercion is relevant to the Establishment Clause analysis, it is actual legal coercion that counts—not the "subtle coercive pressures" allegedly felt by respondents in this case. The majority properly concludes that "[o]ffense . . . does not equate to coercion," since "[a]dults often encounter speech they find disagreeable[,] and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum." I would simply add, in light of the foregoing history of the Establishment Clause, that "[p]eer pressure, unpleasant as it may be, is not coercion" either.

Id. at 1838 (alterations in original and internal citations omitted).

IV.

Our first inquiry is "to determine whether the prayer practice in [Jackson County] fits within the tradition long followed in Congress and the state legislatures." *Id.* at 1819 (Majority Op.). We hold that it does.[5]

A.

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. Bormuth contends legislator-led prayer is per se unconstitutional, and "[b]ecause each Commissioner is Christian . . . , every prayer offered has been Christian" and therefore the Jackson County Board of Commissioners is endorsing the Christian faith. We reject this narrow reading of the Supreme Court's legislative-prayer jurisprudence and our history.

---

[5]We recognize our view regarding Jackson County's invocation practice is in conflict with the Fourth Circuit's recent en banc decision. *See Lund v. Rowan Cty.*, 863 F.3d 268 (4th Cir. 2017) (en banc). However, for the reasons stated in the text of this opinion, and as more fully explained by the dissenting judges in *Lund*, *see id.* at 296–300 (Niemeyer, J., dissenting) and *id.* at 301–323 (Agee, J., dissenting), we find the Fourth Circuit's majority en banc opinion unpersuasive.

1.

There is no support for Bormuth's granular view of legislative prayer. In this regard, neither *Marsh* nor *Town of Greece* restricts *who* may give prayers in order to be consistent with historical practice. In *Marsh*, for example, the Supreme Court separately listed "paid legislative chaplains *and* opening prayers" as consistent with the Framers' understanding of the Establishment Clause. 463 U.S. at 788 (emphasis added). And *Town of Greece* made clear that we are to focus upon "the prayer opportunity as a whole" in light of "historical practices and understandings." 134 S. Ct. at 1819, 1824 (citation omitted).

Most significantly, history shows that legislator-led prayer is a long-standing tradition. Before the founding of our Republic, legislators offered prayers to commence legislative sessions. *See, e.g.*, American Archives, Documents of the American Revolutionary Period, 1774-76, v1:1112 (documenting legislator-led prayer in South Carolina's legislature in 1775); *see also Town of Greece*, 134 S. Ct. at 1833 (Alito, J., concurring); *cf.* S. Rep. No. 32-376, at 4 (1853) ("[The Founders] did not intend to prohibit a just expression of religious devotion by the legislators of the nation, even in their public character as legislators."). Legislator-led prayer has persisted in various state capitals since at least 1849.[6] *See* Brief of Amici Curiae State of Michigan and Twenty-One Other States, at 5–6; Brief of Amici Curiae Local and State Legislators and the Commonwealth of Kentucky, at 5–9; Brief of Amici Curiae Members of Congress, at 4. Indeed, the Michigan House of Representatives and Senate sit just north of Jackson County and have documented legislator-led prayer examples dating back at least to 1879

---

[6]As but one substantive example, consider the following prayer offered by a delegate to Illinois's Constitutional Convention on January 12, 1870, which is not unlike the many prayers offered by the Jackson County Commissioners:

> Almighty God, our Heavenly Father! We recognize Thee as the great Sovereign of the Universe; the Father of our spirits; the Framer of our bodies; the Author of our life, and the Giver of every blessing and comfort that makes life desirable. We thank Thee for the kind care Thou hast exercised over us during the last night. We thank Thee for the blessing of this morning; and we pray Thee, Heavenly Father, that Thy blessing may rest upon us as a Convention, during this day; that we may be wise in our conduct; that we may have reference to the Divine Glory, and regard for the best interests of all who shall be affected by our action, in all we may do. Give us not only a sense of our dependence upon Thee, but give us all necessary wisdom and grace, that we may discharge our duties so that the result shall be conducive to the good of all concerned. We ask in the name of Christ, our Great Redeemer. Amen.

State of Illinois, Debates and Proceedings of the Constitutional Convention of 1869, at 166.

and 1898, respectively. *See* H.R. Journal, at 10, 82, 591, 956 (Mich. 1879) (prayers by representatives); S. Journal, Extra Sess., at 180 (Mich. 1898) (prayer by senator).[7]

These historical examples are consistent with those relied upon by the Supreme Court to find traditions of legislative prayer in *Marsh* and *Town of Greece*. Nebraska's legislature, noted the Court in *Marsh*, paid a chaplain since at least 1867. 463 U.S. at 794. The same is true for *Town of Greece*, where the Court extended *Marsh* from state capitals to town halls by way of one prayer offered before the City Counsel of Boston in 1910. 134 S. Ct. at 1819. Amici's helpful identification of the historical breadth of legislator-led prayer in the state capitals for over one hundred fifty years more than confirms to us that our history embraces prayers by legislators as part of the "benign acknowledgment of religion's role in society." *Id.* Accordingly, we give no credence to Bormuth's contention that these examples are just "historical aberrations." The same can be said for the Fourth Circuit's conclusion in *Lund* that legislator-led prayer is a "phenomenon [that] appears to be the exception to the rule," 863 F.3d at 279, especially because that court apparently did not consider the numerous examples of such prayers presented to us.

As reflected in *Marsh* and *Town of Greece*, this history of legislators leading prayers is uninterrupted and continues in modern time. Take *Marsh*'s conclusion that "the practice of opening sessions with prayer . . . has also been followed consistently in most of the states." 463 U.S. at 788–89. In drawing this conclusion, the Court relied on an amicus brief by the National Conference of State Legislatures ("NCSL"), which surveyed the various practices across the state legislatures. *Id.* at 789 n.11. The NCSL expressly disclaimed the notion that chaplain-only prayers are the norm: "The opening legislative prayer may be given by various classes of individuals. They include chaplains, guest clergymen, *legislators*, and legislative staff members. . . . All bodies, including those with regular chaplains, *honor requests from individual legislators either to give the opening prayer* or to invite a constituent minister to conduct the prayer." Brief of NCSL as Amicus Curiae, *Marsh v. Chambers*, 463 U.S. 783 (1983) (No. 82-83), 1982 WL 1034560, at *2, *3 (emphasis added).

[7]Bormuth suggests these examples do not show a tradition of legislator-led prayer because some "involve prayers led by legislators who were also ministers" and moves that we take notice of these—and other—alleged historical nuances. We find no appreciable difference between prayers by ordained legislators and those legislators who are not, for both reflect prayers given in a capacity as a legislator. Nonetheless, we grant Bormuth's motion, Dkt. #120, which we view as a response to the historical record submitted by the Amici.

The record in *Town of Greece* also shows the long-standing practice of legislator-led prayer has continued to today. Observe the prayer offered by one of Greece's councilmen (and one that is quite similar to the prayers offered here):

> Please bow your heads and join me in prayer. Heavenly Father we thank you for this day. We thank you for the opportunity to now join together here to conduct the important public business that is before us. We ask that you would guide the decision making and the discussions that take place this evening, and that you would bless each of the participants in the town board as well as all of those who are here in the audience and may be viewing on television. We pray this in your name, amen.

Joint Appendix at 66a-67a, *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), 2013 WL 3935056. Other council members offered silent prayers, directing the audience to "remain standing" and "bow heads" while reflecting upon the September 11, 2001, terrorist attacks and Greece residents who recently passed away. *Id.* at 26a–27a, 29a, 45a, 57a.

Here, Jackson County presented a 2002 NCSL study reinforcing the earlier conclusion cited in *Marsh* that chaplains do not exclusively give opening prayers: "Forty-seven chambers allow people other than the designated legislative chaplain or a visiting chaplain to offer the opening prayer. *Legislators*, chamber clerks and secretaries, or other staff may be called upon to perform this opening ceremony." (Emphasis added.) More specifically, legislators gave prayers in thirty-one states. The same study notes that *only* members are permitted to deliver prayers in Rhode Island. Closer to Jackson County, for example, the Michigan House of Representatives permits an invocation to "be delivered *by the Member* or a Member's guest." Mich. H.R. R. 16 (emphasis added). So, too, does Congress. *See, e.g.*, 161 Cong. Rec. S3313 (daily ed. May 23, 2015) (documenting invocation by Oklahoma Senator James Lankford); United States House of Representatives, Office of the Chaplain, Guest Chaplains, http://chaplain.house.gov/chaplaincy/guest_chaplains.html (last visited Aug. 15, 2017) (listing guest chaplains "who have been recommended by the Members of Congress"); Sen. Robert C. Byrd, Senate Chaplain, *in 2 The Senate, 1789-1989, Addresses on the History of the United States Senate* 297, 305 (1982); *see also* Brief of Amici Curiae State of Michigan and Twenty-One Other States, at 10–12 (listing over 100 counties within the Sixth Circuit alone that permit lawmaker-led prayer).

This tradition of legislator-led prayer makes sense in light of legislative prayer's purpose—it "invites lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing." *Town of Greece*, 134 S. Ct. at 1823. Legislative prayer exists "largely to accommodate the spiritual needs of lawmakers and connect them to a tradition dating to the time of the Framers." *Id.* at 1826 (Kennedy, J.). It "reflect[s] the values [public officials] hold as private citizens. The prayer is an opportunity for them to show who and what they are without denying the right to dissent by those who disagree." *Id.* As one of Jackson County's Commissioners stated, "Commissioners, as individuals, have a right to pray as we believe." Preventing Jackson County's Commissioners from giving prayers of their own choosing detracts from their ability to take "a moment of prayer or quiet reflection [to] set[] the[ir] mind to a higher purpose and thereby ease[] the task of governing." *Id.*

Town of Greece instructs that "government must permit a prayer giver to address his or her own God or gods as conscience dictates," and that it is not the role of the judiciary to act "as [a] supervisor[] and censor[] of religious speech." *Id.* at 1822 (Majority Op.). We heed this advice and decline the invitation to find an appreciable difference between legislator-led and legislator-authorized prayer given its historical pedigree. Put simply, we find it insignificant that the prayer-givers in this case are publicly-elected officials. In our view and consistent with our Nation's historical tradition, prayers by agents (like in *Marsh* and *Town of Greece*) are not constitutionally different from prayers offered by principals. *See also Turner v. City Council of City of Fredericksburg*, 534 F.3d 352, 355–56 (4th Cir. 2008) (O'Connor, J., retired) (finding in a pre-*Town of Greece* case that opening prayers offered by *only* city council members were permissible under the Establishment Clause). The Establishment Clause does not tolerate, much less require, such mechanical line drawing. *See Lynch*, 465 U.S. at 678–79 ("The line between permissible relationships and those barred by the [Establishment] Clause can no more be straight and unwavering than due process can be defined in a single stroke or phrase or test.").

Here, the district court correctly concluded that if "the constitutionality of a legislative prayer is predicated on the identity of the speaker, potentially absurd results would ensue. Under such a holding, an invocation delivered in one county by a guest minister would be upheld, while the identical invocation delivered in another county by one of the legislators would be struck

down." *See also Am. Humanist*, 851 F.3d at 529 ("It would be nonsensical to permit legislative prayers but bar the legislative officers for whom they are being primarily recited from participating in the prayers in any way.").

2.

Although the prayers offered before the Board generally espouse the Christian faith, this does not make the practice incompatable with the Establishment Clause. Quite the opposite, the content of the prayers at issue here falls within the religious idiom accepted by our Founders. Consistent with *Town of Greece*, the solemn and respectful-in-tone prayers demonstrate the Commissioners permissibly seek guidance to "make good decisions that will be best for generations to come" and express well-wishes to military and community members. *Cf.* 134 S. Ct. at 1823. The prayers "vary in their degree of religiosity" and often "invoke the name of Jesus, the Heavenly Father, or the Holy Spirit," but *Town of Greece* makes clear the Founders embraced these universal and sectarian references as "particular means to universal ends." *Id.* at 1823–24.

Nor do the prayers themselves fall outside *Town of Greece*'s pertinent constraint on content—there is no evidence that the "invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion" or that there is a "pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose." *Id.* at 1823, 1824. Bormuth has identified one portion of one prayer where a Commissioner stated, "Bless the Christians worldwide who seem to be targets of killers and extremists"; he claims this is evidence of a prayer practice that "denigrates all nonbelievers and minority faiths." Even assuming that such a reference "disparage[s] those who did not accept the . . . prayer practice," this stray remark does "not despoil a practice that on the whole reflects and embraces our tradition." *Id.* at 1824. One stray remark, we might add, pales in comparison to the litany of prayers the Fourth Circuit concluded impermissibly advanced Christianity in *Lund*. 863 F.3d at 284–85 (detailing prayers that "implicitly 'signaled disfavor toward' non-Christians," "characterized Christianity as 'the one and only way to salvation,'" "proclaim[ed] that Christianity is exceptional and suggest[ed] that other faiths are inferior," and "urged attendees to embrace Christianity, thereby preaching conversion") (citations and brackets omitted); *but see id.*

at 313–16 (Agee, J., dissenting) (criticizing majority for condemning prayers similar to those approved in *Marsh* and *Town of Greece*).

That the prayers reflect the individual Commissioners' religious beliefs does not mean the Jackson County Board of Commissioners is "endorsing" a particular religion, Christianity or otherwise. For one, while all the Commissioners presumably believe in Jesus Christ, the faiths of Christianity are diverse, not monolithic. The Reformation of the Sixteenth Century spawned an explosion of Christian faiths. Many of those practicing these new Christian faiths sought religious freedom in America and found refuge from the tyranny inflicted by sectarian governments. To guarantee religious liberty to all persons, including those practicing the emerging Christian religions, the drafters and ratifiers of the First Amendment of our Constitution provided:

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

U.S. CONST. amend. I.

We do not know the religious faiths of the 2013-2014 Jackson County Commissioners. The nine "Christian" Commissioners may have included Roman Catholics, Southern Baptists, Mormons, Quakers, Episcopalians, Lutherans, Methodists, and others.

Nor do we know the religious faiths of the current Commissioners. But we do know that Commissioners of different faiths, or no faith, may be elected. With each election, the people of Jackson County may elect a Commissioner who is Muslim, Buddhist, Hindu, Jewish, Mormon, Roman Catholic, Eastern Orthodox Christian, Baptist, Methodist, Presbyterian, Lutheran, Episcopalian, Congregationalist, Quaker, Amish, Mennonite, Pentecostal, Animist, Pagan, Atheist, or Agnostic (and so on). The religious faiths of periodically elected officials—including Jackson County's Commissioners—are dynamic, not static. In fact, east of Jackson County is the City of Hamtramck, Michigan, which just elected a Muslim majority city council.[8] Were Mr. Bormuth elected to the Jackson County Board of Commissioners, he could freely begin a

---

[8] *See* Kris Maher, *Muslim-Majority City Council Elected in Michigan*, Wall St. J., Nov. 9, 2015, http://www.wsj.com/articles/muslim-majority-city-council-elected-in-michigan- 1447111581.

legislative session with an invocation of his choosing, under the religion-neutral Jackson County prayer practice.

It is clear from *Marsh* and *Town of Greece* that creed-specific prayers alone do not violate the First Amendment. Specifically, in *Marsh*, the Supreme Court sanctioned the practice of selecting the same Presbyterian clergyman for sixteen consecutive years. 463 U.S. at 793. And in *Town of Greece*, the Supreme Court instructed that *Marsh* did not "imply the rule that prayer violates the Establishment Clause any time it is given in the name of a figure deified by only one faith or creed." 134 S. Ct. at 1821. Rather, "[p]rayer that reflects beliefs specific to only some creeds can still serve to solemnize the occasion, so long as the practice over time is not 'exploited to proselytize or advance any one, or to disparage any other, faith or belief.'" *Id.* at 1823 (quoting *Marsh*, 463 U.S. at 794–95).

Thus, in the present case, the district court correctly concluded that the all-Christian makeup of the Commissioners is "immaterial":

> As elected officials, they were chosen as representatives whose interests were most closely aligned with the public's, and their personal beliefs are therefore a reflection of the community's own overwhelmingly Christian demographic. . . . [T]he future may bring Commissioners of more diverse religious backgrounds who will deliver invocations in those traditions. To hold otherwise would contravene *Marsh*'s sanction of legislative prayer delivered for sixteen years by a single Presbyterian clergyman.

This reasoning also aptly applies *Town of Greece*'s express command that once government "invites prayer into the public sphere," it "must permit a prayer giver to address his or her own God or gods as conscience dictates. . . ." *Id.* at 1822.

Marsh and *Town of Greece* do not require Jackson County to provide opportunities for persons of other faiths to offer invocations. Just like Greece, Jackson County maintains a facially neutral prayer policy. *Id.* at 1824. Under this policy, the Board as a whole cannot be said to "act as supervisors and censors of religious speech. . . ." *Id.* at 1822. To the extent the prayer opportunity in *Town of Greece* produced prayers by a variety of faiths, we disagree with the dissent and the Fourth Circuit that *Town of Greece*'s holding is dependent upon religious heterogeneity. *See Lund*, 863 F.3d at 281–82. Its holding on this point is that "[s]o long as the

town maintains a policy of nondiscrimination," the Establishment Clause does not mandate a municipality of predominately one faith to "achieve religious balancing." *Town of Greece*, 134 S. Ct. at 1824. Jackson County's prayer policy *permits* prayers of any—or no—faith, and the County need not adopt a different policy as part of a "quest to promote a diversity of religious views." *Id.* (internal quotation marks omitted). To find otherwise would "require the [County] to make . . . judgments about the number of religions it should sponsor and the relative frequency with which it should sponsor each." *Id.* (alterations and citation omitted). But as *Town of Greece* commands, such "judgments" are "wholly inappropriate." *Id.* (citation omitted).

Finally, religious "endorsement" is a thread woven by the *Lemon* test. *Smith*, 788 F.3d at 587 (explaining that "the Sixth Circuit 'has treated the endorsement test as a refinement or clarification of the *Lemon* test'" (citation omitted)). Were we to agree with our dissenting colleagues that the prayers by the Jackson County Commissioners run afoul of the Establishment Clause because the prayer-givers and the government officials are "one and the same" (i.e., "excessive entanglement") and therefore "the Commissioners are effectively endorsing a specific religion," we would be rewriting thirty-plus years of Supreme Court jurisprudence—by applying *Lemon*'s endorsement rubric in lieu of looking through history's lens as dictated by *Marsh* and *Town of Greece*.

Neither *Marsh* nor *Town of Greece* applies *Lemon*'s balancing of purposes and government entanglement when examining the constitutionality of legislative prayer. Rather, *Marsh* "carv[ed] out an exception to the Court's Establishment Clause jurisprudence, because it sustained legislative prayer without subjecting the practice to any of the formal tests that have traditionally structured this inquiry." *Town of Greece*, 134 S. Ct. at 1818 (internal quotation marks and citation omitted). As we have previously noted en banc before, "even the author of the *Lemon* decision, the late Chief Justice Burger, did not see fit to apply the *Lemon* test when he wrote the Court's opinion in [*Marsh*]." *Am. Civil Liberties Union of Ohio*, 243 F.3d at 305–06. This omission is made all the more notable by the fact that Justice Brennan expressly advocated for application of the *Lemon*-test in dissent, and the lower court opinion applied *Lemon*. *Marsh*, 463 U.S. at 797–801 (Brennan, J., dissenting) (discussing "indirect coercive pressure upon

religious minorities to conform" in the context of the *Lemon* test); *Chambers v. Marsh*, 675 F.2d 228, 233–35 (8th Cir. 1982). Accordingly, we follow the Supreme Court's precedent and conclude *Lemon*'s endorsement test is inapplicable to legislative prayer cases.[9] *See also Elmbrook Sch. Dist. v. Doe*, 134 S. Ct. 2283, 2284 (2014) (Scalia, J., dissenting from the denial of certiorari) ("*Town of Greece* abandoned the antiquated 'endorsement test.'"); *Jones v. Hamilton Cty. Gov't*, 530 F. App'x 478, 487–88 (6th Cir. 2013) (in pre-*Town of Greece* case, stating that "[g]iven the Supreme Court's choice not to apply *Lemon* in *Marsh*, we decline Appellants' invitation" to apply *Lemon*).

B.

On the issue of coercion, the *Town of Greece* decision produced a majority result, but not a majority rationale. Under these circumstances, *Marks v. United States* provides that "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . . ." 430 U.S. 188, 193 (1977) (citation omitted). "Taken literally, *Marks* instructs lower courts to choose the 'narrowest' concurring opinion and to ignore dissents." *United States v. Cundiff*, 555 F.3d 200, 208 (6th Cir. 2009) (citation omitted). That is, we take the "one which relies on the 'least' doctrinally 'far-reaching-common ground' among the Justices in the majority. . . ." *Id.* at 209 (citation omitted).

In our panel opinion, we were divided regarding whether Justice Kennedy's three-Justice plurality opinion or Justice Thomas's two-Justice concurring opinion controls under *Marks* on the question of coercion. *Compare Bormuth v. Cty. of Jackson*, 849 F.3d 266, 279–81 (6th Cir. 2017) (Moore, J.), *with id.* at 304–05 (Griffin, J., dissenting).[10] Because Bormuth's challenge fails under either standard, we need not resolve this issue.

---

[9]Bormuth also claims the 1797 Treaty of Tripoli forbids Jackson County's practice. We find this argument meritless and follow the Supreme Court's instruction to focus on whether the practice "fits within the tradition long followed in Congress and the state legislatures." *Town of Greece*, 134 S. Ct. at 1819. Unrelatedly, we agree with the district court that Bormuth does not have standing to assert an Establishment Clause violation on behalf of the children who sometimes lead attendees in the Pledge of Allegiance following the prayer. *See Valley Forge Christian Coll. v. Am. United for Separation of Church & State, Inc.*, 454 U.S. 464, 489–90 (1982).

[10]Writing not for the court, I remain of the view as expressed in my panel dissent that the concurring opinion of Justice Thomas is narrower on the issue of coercion and therefore controlling. The Supreme Court has told us that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent

1.

First, Justice Kennedy's opinion. The societal "pressures" exerted upon Bormuth during the prayers are consistent with those advanced by the petitioners in *Town of Greece* and rejected by Justice Kennedy. Under his approach, whether a legislative prayer practice rises to the level of coercion "remains a fact-sensitive one that considers both the setting in which the prayer arises and the audience to whom it is directed," and "must be evaluated against the backdrop of historical practice." 134 S. Ct. at 1825 (Kennedy, J.); *see also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000) ("Whether a government activity violates the Establishment Clause is 'in large part a legal question to be answered on the basis of judicial interpretation of social facts. Every government practice must be judged in its unique circumstances.'" (alteration and citation omitted)). We presume that a "reasonable observer . . . understands that . . . [the] purpose [of legislative prayer is] . . . to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens, not to afford government an opportunity to proselytize or force truant constituents into the pews." 134 S. Ct. at 1825 (Kennedy, J.). That we permit legislative prayer "does not suggest that those who disagree are compelled to join the expression or approve its content." *Id.*; *see also id.* at 1827 ("But in the general course legislative bodies do not engage in impermissible coercion merely by exposing constituents to prayer they would rather not hear and in which they need not participate.").

We start, consistent with *Town of Greece*, by declining to view the coercive effect of prayers at local government meetings differently from the effect of prayers at legislative sessions because local government meetings are small, intimate, and often involve citizens raising issues that most immediately affect their lives. In these tightknit gatherings of a few community members, the argument goes, residents who appear before local officials are likely to join in prayers despite misgivings for fear of offending the officials. To be sure, this difference was at

---

of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks*, 430 U.S. at 193 (internal quotation marks and citation omitted). Only five justices concurred in *Town of Greece*. Justices Thomas and Scalia specifically concurred in Justice Kennedy's tradition analysis, but not in his social-coercion analysis. Instead, Justice Thomas offered a narrower definition of coercion: that a more limited set of government actions—those backed "by force of law and threat of penalty"—will constitute coercion. *Town of Greece*, 134 S. Ct. at 1837 (Thomas, J., concurring in part and in the judgment) (quoting *Lee v. Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting)). As such, Justice Thomas's opinion is the narrowest and should control. Judges Batchelder and Thapar concur.

the core of an opinion in *Town of Greece*: Justice Kagan's dissent. *Id.* at 1851–52 (Kagan, J., dissenting) ("The majority thus gives short shrift to the gap—more like, the chasm—between a legislative floor session involving only elected officials and a town hall revolving around ordinary citizens."). However, the five Justices in the *Town of Greece* majority did not adopt these distinctions. Neither do we.

It is significant here, as in *Town of Greece*, that "[n]othing in the record suggests that members of the public are dissuaded from leaving the meeting room during the prayer, arriving late, or even, as happened here, making a later protest." *Id.* at 1827 (Kennedy, J.).[11] Bormuth admitted to not participating in Jackson County's prayer practice. His "quiet acquiescence [should] not, in light of our traditions, be interpreted as an agreement with the words or ideas expressed." *Id.*

Instead of acknowledging this critical concession, Bormuth and Amicus Americans United argue Jackson County's invocation practice is coercive in three ways *Town of Greece* was not: (1) the Board's Chairman (or other Commissioners) preface the prayers with a request to rise and assume a reverent position; (2) two Commissioners turned their backs on Bormuth while he was speaking during public comment, and two others made statements reflecting their dislike of him; and (3) the Board denied Bormuth's requests to sit on two citizen committees. They therefore contend that application of Justice Kennedy's coercion standard requires a different outcome. We disagree.

First of all, we do 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. *See Am. Humanist Ass'n*, 851 F.3d at 526 ("polite requests" by governmental officials to stand for invocations "do not coerce prayer"). These "commonplace" and "reflexive" requests—whether from ministers or elected individuals following their own faith's normative cues—do not alone mandate participation, especially as most are preceded with a polite "please." *Town of Greece*, 134 S. Ct. at 1832 (Alito, J., concurring). We do not think there is a constitutional difference

[11] In *Lund*, the Fourth Circuit concluded "these options, such as they were, served only to marginalize." 863 F.3d at 288. Even if these options so marginalized attendees, they are options Justice Kennedy's plurality opinion expressly approved. *See id.* at 320 (Agee, J., dissenting) (citing *Town of Greece*, 134 S. Ct. at 1827 (Kennedy, J.)).

here, for government-sanctioned prayers by official chaplains or invited community members still fall within the ambit of the Establishment Clause. More importantly, and as the district court stated, "[a]lthough nonadherents to Christianity such as Bormuth may fear that their business before the Board would be prejudiced if the Commissioners observed their noncompliance with the request to stand, the risk of prejudice is no greater if the request is delivered by a Commissioner than if it is delivered by a guest chaplain. In both situations, the Commissioners are equally capable of observing those who comply and those who do not." And, it is not as if a Commissioner specifically ordered Bormuth to stand and remain reverent in the face of Bormuth's protest to the contrary. *See, e.g., Fields v. Speaker of the Penn. House of Representatives*, — F. Supp. 3d —, 2017 WL 1541665, at *2, 11 (M.D. Pa. Apr. 28, 2017) (plaintiffs plausibly pled a violation of the Establishment Clause in a legislative prayer case where the Speaker of the House "publicly singled out [objectors] and ordered them to rise for the invocation," and "[w]hen they refused, the Speaker directed a legislative security officer to 'pressure' them to stand").

Second, that two Commissioners on separate occasions turned their backs on Bormuth during his public comments gives us no constitutional pause. One of these incidents was in response to Bormuth's comments about abortion and thus unrelated to the Board's invocation practice. Rather, as the district court found, "the[] behavior [wa]s likely an unfortunate expression of their own personal sense of affront elicited by [Bormuth's] sentiments." Moreover, these isolated incidents are not indicative of a "pattern and practice" of coercion against nonbelievers of religion. *Town of Greece*, 134 S. Ct. at 1826 (Kennedy, J.).

Bormuth and Amicus Americans United also point to post-litigation statements made by two of the Commissioners as reported in a local newspaper as evidence of him being treated differently on account of his complaints regarding the prayer practice. Those statements are as follows:

- Commissioner Rice: "[Bormuth] is attacking us and, from my perspective, my Lord and savior Jesus Christ. Our civil liberties should not be taken away from us, as commissioners."
- Commissioner Duckham: "What about my rights? . . . If a guy doesn't want to hear a public prayer, he can come into the meeting two minutes late."

- Duckham: "All this political correctness, after a while I get sick of it."
- Rice: "We Commissioners, as individuals, have a right to pray as we believe."

Three are in the context of an individual's right to offer a prayer of his faith, without preclearance by "an administrator or judge," and thus offer no help to Bormuth. *Id.* at 1822–23 (Majority Op.). That is, their comments confirm the prayers accommodate the Commissioners' spiritual needs and are not directed toward the audience. *Id.* at 1826 (Kennedy, J.). The fourth, the political correctness comment, at worst reflects a stray statement by one of the nine Commissioners and is not reflective of the Board as a whole.

Moreover, nothing in the record suggests that the Commissioners who turned their backs on Bormuth or spoke out about him in public were expressing antagonism *for his religious beliefs*. Rather, the record reflects they reacted to *his* antagonism toward *them*. Individuals in Jackson County, including elected officials, know what getting sued by Bormuth feels like, having been in the position many times before. *See, e.g.*, *Bormuth v. City of Jackson*, No. 12-11235, 2013 WL 1944574, at *2 (E.D. Mich. May 9, 2013) (criticizing Bormuth for "inject[ing] into the record venomous, irrelevant, and gratuitous commentary").[12] The Commissioners did react poorly to Bormuth's actions. Context shows, however, that they reacted not to his beliefs but to the litigious way he chose to express them. Indeed, the comments quoted above came after Bormuth had brought yet another lawsuit. The Establishment Clause might prevent government officials from making a practice of "singl[ing] out dissidents for opprobrium," *Town of Greece*, 134 S. Ct. at 1826 (Kennedy, J.), but it does not require them to keep their cool. This point separates this case from *Lund*, where the Fourth Circuit found "[m]ultiple" examples of prayers portraying non-Christians as "spiritual[ly] defect[ive]" and "suggesting that other faiths are inferior." 863 F.3d at 284–85. No such practice of opprobrium has been alleged here, let alone shown.

That leaves us with Bormuth's final coercion claim that Jackson County allocated benefits and burdens due to Bormuth's objection to its prayer practice by not appointing him to

[12] *See also Bormuth v. City of Jackson*, No. 12-11235, 2012 WL 5493599 (E.D. Mich. Nov. 13, 2012); *Bormuth v. Dahlem Conservancy*, 837 F. Supp. 2d 667 (E.D. Mich. 2011); *cf. In re: Peter Carl Bormuth*, No. 13-1194 (6th Cir. April 23, 2013); *Bormuth v. Johnson*, No. 16-13166, 2017 WL 82977 (E.D. Mich. Jan. 10, 2017); *Bormuth v. Grand River Envtl. Action Team*, No. 321885, 2015 WL 6439007 (Mich. Ct. App. Oct. 22, 2015).

the Solid Waste Planning Committee or the Board of Public Works. Assuming appointments to local citizen advisory boards rises to the level of "allocating benefits and burdens" under *Town of Greece*, and including those facts set forth in Bormuth's second motion to supplement that the district court denied, we do not agree.[13]

Beyond a template rejection letter, we know nothing about why Jackson County rejected Bormuth's application to fill a vacancy on the Solid Waste Planning Committee. All we have are unverified assertions from his complaint that he "believes he was excluded deliberately in retaliation for his Pagan religious beliefs, his hostility to an established Christian religion, and his filing of this lawsuit in Federal Court." But in order to defeat Jackson County's motion for summary judgment, Bormuth was required to go "beyond the pleadings" and "do more than simply show that there is some metaphysical doubt as to material facts to survive summary judgment." *Travelers Prop. Cas. Co. of Am. v. Hillerich & Bradsby Co.*, 598 F.3d 257, 270 (6th Cir. 2010) (citation omitted). Bormuth failed to put forth any evidence tying his objection to the invocations to the Board's decision to not appoint him to the Solid Waste Planning Committee, and we therefore give no weight to this allegation.

We know slightly more with respect to his application for an appointment to the Board of Public Works. Yet, other than Bormuth's attestation that he was "the most qualified applicant," there is nothing in the record linking the refusal to appoint Bormuth to the Board of Public Works to his objection to the prayer policy. Bormuth even admits he was told that the candidate selected "was a former township supervisor who was involved with setting up a township recycling station and that his experience with recycling was the focus for his appointment." Accordingly, there is no record evidence indicating Jackson County "allocated benefits and burdens based on participation in the prayer. . . ." *Town of Greece*, 134 S. Ct. at 1826 (Kennedy, J.).

On this record, Bormuth has not carried his burden to set aside Justice Kennedy's presumption that reasonable observers know legislative prayer "lend[s] gravity to public proceedings[,] and . . . acknowledge[s] the place religion holds in the lives of many private

[13]Because we assume those facts not accepted by the district court, the alleged error, if any, in denying Bormuth's second motion to supplement was harmless.

citizens," and does not "afford government an opportunity to proselytize or force truant constituents into the pews." *Id.* at 1825. At bottom, Bormuth has shown he was offended by the Christian nature of the Board's prayers. But "[o]ffense . . . does not equate to coercion." *Id.* at 1826. Jackson County therefore did not "engage in impermissible coercion merely by exposing [Bormuth] to prayer [he] would rather not hear and in which [he] need not participate." *Id.* at 1827.

2.

Finally, under Justice Thomas's legal coercion test, Bormuth's challenge easily fails. In fact, he makes no such argument to the contrary. Bormuth only raises "subtle coercive pressures" which do not remotely approach "actual legal coercion." *Id.* at 1838 (Thomas, J., concurring in part and in the judgment).

C.

In sum, Jackson County's invocation practice is consistent with *Marsh v. Chambers* and *Town of Greece v. Galloway* and does not violate the Establishment Clause.

V.

For these reasons, we affirm the judgment of the district court.

CONCURRENCE

ROGERS, J., concurring. I concur in the majority opinion.

I write separately to explain why Justice Thomas's concurrence in *Town of Greece*, however compelling it may be, does not constitute binding precedent for us in this case.

The general rule of both horizontal and vertical stare decisis is that holdings of the same court, and of a higher court (to which the parties can appeal), not overruled or superseded by later such holdings, constitute binding precedent. Horizontal stare decisis protects the fundamental interest of deciding like cases alike (basic fairness), and the interest of having people know what the law is (notice). Vertical stare decisis in a pyramidal court system, in addition, obviates the need for repeated appeals. A lower federal court should decide the same way as an unsuperseded holding of the U.S. Supreme Court, assuming that the facts are not materially distinguishable. In particular, when there is argument as to whether facts are materially distinguishable, we look to the reasoning of the majority Justices to see what facts and reasoning led to the majority holding.

This is straightforward when five or more members of the Supreme Court agree on the reasoning for the holding. As a matter of long-standing, deeply accepted practice, we do not treat holdings as less binding when the majority members of the precedent-setting Court have been replaced. We assume for stare decisis purposes that the same Justices are still there.

The above analysis also applies quite simply in the case of split majority opinions. To the extent that facts are not materially distinguishable, and the case has not been overruled or superseded, we should reach the same result that the precedent Court would have necessarily reached, to the extent that we can do so, by looking one-by-one at the controlling rationale of each of the various opinions that make up the precedent majority. This serves directly the underlying purposes of horizontal and vertical stare decisis.

The following conclusion of Judge Kavanaugh states with striking elegance the rule that fundamentally serves these purposes:

> Even though it is often not possible to identify a "common rationale" in the multiple opinions from a splintered decision, lower courts can still reach a *result* consistent with the opinions of a majority of the Supreme Court. They can do so by following the opinion that would lead to an outcome that a majority of the Supreme Court in the governing precedent would have reached if confronted with the current case.

United States v. Duvall, 740 F.3d 604, 613 (D.C. Cir. 2013) (Kavanaugh, J., concurring).[1]

This test has the incidental advantage of not foisting a strange meta-analysis on lower courts to determine which of two Supreme Court positions is, for instance, more or less "doctrinally far-reaching." *See United States v. Cundiff*, 555 F.3d 200, 209 (6th Cir. 2009). All the lower court has to do is run its analysis using the various opinions in the split decision, and then see whether now holding the same way as the split precedent majority would have obtained five votes of that majority.

The test is also consistent with the *Marks* narrowest-grounds rubric. *Marks*, like this case, was one in which multiple opinions were "linear" or "nested." *See King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991). A "linear" or "nested" set of rulings is one in which any ruling in the same direction as the majority, under one of the opinions constituting the majority, would logically require the judges of the other decision to rule the same way. *See id.*; *see also Duvall*, 740 F.3d at 610 (Kavanaugh, J., concurring). It is in that context that the controlling opinion is "narrower": the future cases that it would control comprise a smaller set than the set of cases that would be controlled by the other. As Judge Kavanaugh noted, in such linear cases the opinion "that occupies the middle ground" between the "broader opinion supporting the judgment" and the dissent will normally be controlling. *Duvall*, 740 F.3d at 610 (Kavanaugh, J.,

---

[1] In defense of just this test, an obscure legal academic explained twenty years ago that this is what federal courts actually do. Rogers, *"Issue Voting" by Multimember Appellate Courts*, 49 VAND. L. REV. 997, 1007–09 (1996) (citing *Siegmund v. General Commodities Corp.*, 175 F.2d 952 (9th Cir. 1949) (applying *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949)); *Detres v. Lions Building Corp.*, 234 F.2d 596 (7th Cir. 1956) (applying *Tidewater*); *Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875 (2d Cir. 1981) (applying *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972)); *Greene v. Teffeteller*, 90 F. Supp. 387 (E.D. Tenn. 1950) (applying *Tidewater*)).

concurring). The "middle ground" in *Town of Greece* with respect to coercion is clearly Justice Kennedy's opinion.

The test also avoids an anomaly like the one that would result if, for instance, we were to hold that Justice Thomas's opinion was controlling precedent in this case. In a future case, we would have to hold that religious practices that seven *Town of Greece* Justices would clearly find unconstitutional were nonetheless constitutional because of the views of only two Justices. Such an anomalous result would be inconsistent with fundamental principles of stare decisis.

CONCURRENCE

SUTTON, Circuit Judge, concurring.

"Let us pray." Or "Let me pray."

"Please join me in prayer." Or "Please join me, if you wish, in prayer."

"Please stand reverently as we pray." Or "Please stand reverently, if you wish, as we pray."

"Council member Smith will now offer a prayer." Or "Our chaplain will now offer a prayer."

"We pray these things in Jesus's name." Or "We pray these things in God's name."

"We pray these things in God's name" while making the sign of the cross.

Or "We pray these things in God's name" without making the sign of the cross.

In telling Congress and eventually the States that they "shall make no law respecting an establishment of religion," the First Amendment does not preference any of these options. Nor does the guarantee suddenly spring into action based on the percentage of invocation prayers given in one faith tradition over time—25%?, 50%?, 75%?, 100%?—so long as the governmental body does not exclude prayers because of their content.

Good manners might have something to say about all of this and how it is done. So too might the Golden Rule. But the United States Constitution does not tell federal judges to hover over each town hall meeting in the country like a helicopter parent, scolding/revising/okaying the content of this legislative prayer or that one.

Instead of asking judges to referee what will inevitably become arbitrary lines and thus will run the risk of becoming judge-preferenced lines, case law looks to American historical practices to determine what the Establishment Clause allows and what it does not. History judges us in this area. We do not judge history. For all of American history, such prayers have been allowed, whether invoking Jesus, God, or something else, whether by government-paid chaplains or by the elected officials themselves. And for all of American history, the United

States Supreme Court has authorized such prayers. No one doubted the practice for most of our history. And when challenges to the practice first arose about thirty-five years ago, the Supreme Court made clear that such prayers are constitutional so long as they do not coerce non-believers. *See Marsh v. Chambers*, 463 U.S. 783 (1983); *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014).

One point on which we can all agree is that the solemnity of the occasion, then and now, makes spiritual invocations a permissible way to begin work on behalf of the People—in legislative bodies, executive proceedings, or court hearings. I am not aware of a single opinion by a Justice of the United States Supreme Court or by a Judge of our Court who doubts that point.

The point on which we have trouble agreeing is what terms individual chaplains and individual elected officials may use in offering such invocations. But here's the rub: If the explanation for an invocation prayer is the humble act of seeking divine guidance before a session of government, is it not strange for judges to interfere with the content (e.g., God, Allah, or Jesus) or symbols (e.g., making the sign of the cross or not) of that official's prayer? Why permit legislative prayers, then call them a trespass when done sincerely in the manner traditionally used by that individual? So long as the prayer giver does not try to coerce anyone into adopting their faith, so long in other words as the individual gives an invocation, not an altar call, I see no meaningful role for judges to play.

No less importantly, does the prohibition on establishing any one religion really require us to pick one set of the above invocation options over the other? Do we really want to go down the road of telling people how to pray? There would be some irony in accepting this invitation. We have whole bodies of law connected to adjacent guarantees of the First Amendment that confirm the perils of allowing government officials to regulate the content of speech, and still more the content of a religious exercise, unless absolutely necessary. At some point judicial prescription prevents the words of an invocation prayer from being a prayer at all. The courts in this country have set their example by using "God," as in "God save this Honorable Court." Others are free to follow the courts' example and perhaps learn from it. But with the exception of prohibiting coercion or proselytization, I doubt the federal courts can do anything better than

teach by example and trust Americans in large cities and small hamlets to respect our many traditions and to live and learn over time through the experience of using different invocation practices.

Even references to "God," which make most people comfortable, are not a balm for everyone. It's a multi-perspective word, yes. But it's not an all-perspective word, as Mr. Bormuth's position in this case confirms. In his view, *none* of the options listed at the outset of this opinion satisfies the Establishment Clause. All references to any one faith or to religion in general, he says, must be removed from governmental proceedings. Who is coercing whom under that approach? And what are we establishing?

In resolving cases of this sort, I would be mindful about what we are "walling in or walling out." Governmental bodies, courts included, usually strive to be respectful of the diversity of faiths in any one town, region, or the country as a whole. As well they should. But what really counts as respect? And what really counts as tolerance? Different perspectives abound. For some, it's too much information to listen to an individual's traditional way of praying. For others, it conveys more respect, not less, when the individual invokes their God authentically and unguardedly and in the process offers a glimpse into who they are. I am reticent to favor one perspective over the other.

Either way, none of this should obscure the broader point that the terms of the Constitution and the words of our cases do not require, or even allow, us to parse highly personal offerings on the basis of our intuitions or social conventions about how best to foster religious sensitivity in America. Who can say when a prayer offered with humble fervor has too much fervor and too little humility? That's not a line the Constitution asks us to draw, and any efforts to innovate one are apt to do more harm than good for the cause of tolerance.

The idea that the Establishment Clause favors chaplain-led prayers over legislator-led prayers is particularly puzzling. Prayers by their nature are personal, even when offered in a public setting. It is a petition by the individual, not the State or City. And that's the way most people perceive them given our long history of permitting such invocations. Just as we would not mistake a legislator's reference to his or her faith during a floor debate as an establishment of

religion, we should not make that mistake when they invoke their personal faith as part of an invocation. But if there is a message-sending risk with invocation prayers, I would think it grows, rather than diminishes, when the governmental body hires a faith leader (necessarily of one faith) to say the prayers. A government-sponsored faith leader seems closer to an establishment than allowing each official to pray however they wish or to offer no prayer at all.

How, after all, does a pattern of legislator-led prayer with respect to one faith coerce citizens to follow that faith in a way that chaplain-led prayer of a single faith does not? If the elected officials offer an invocation prayer in their own personal way, that coerces no one. If anything, risks of endorsement and any other risks at the outer edges of the Establishment Clause cases increase if the government *must* hire a chaplain to permit an opening prayer. And if Mr. Bormuth succeeds, that of course will be the remedy: Hire a minister. Does that solution really satisfy the concerns of those inclined to adopt it? And what of a legislator who is also a person of the cloth? Could John Danforth but not John McCain give an invocation? When a line offers no meaningful distinctions, it is a good time to ask whether the court should draw it.

One last point deserves emphasis. There is no cognizable evidence that the council excluded any commissioner who asked to give a prayer or who chose not to give a prayer. And there is no evidence that the council adopted its invocation practice with the goal of favoring this religion or that one. The practice was around long before Mr. Bormuth entered the scene, whether in this town or in many others around the country. In a country of this size and diversity, with thousands of local governmental bodies, it should surprise no one that some small towns have elected officials of one faith. Just as many people of like-minded political views sometimes live in the same area, so too do many people of like-minded faiths sometimes live in the same area. That is inevitable in such a large country. Nor is that the only inevitability in this area. Just as often, more often in fact, our pluralism leads to a greater diversity of faith and a greater diversity of prayer across the country or in some instances increases the pressure to abandon invocation prayers altogether. The Establishment Clause does not place a thumb on these local choices.

What I have said so far addresses the main issues presented at the panel stage of this case and the main issues joined at that stage. At the en banc stage, considerable attention has been

given to the discovery issues and the reaction of a few Council members to Mr. Bormuth's complaints. Just as I join Judge Griffin's fine opinion in full with respect to the general legal principles in this area, I join his opinion in full with respect to the other features of this case. Let me add a few points as to these other issues.

Mr. Bormuth cannot have it both ways. He filed this case as a pro se litigant and insisted on not having an attorney, even when one was offered. Having refused to take an attorney, he is not entitled to relaxed pleading standards or relaxed motions standards of the sort we sometimes give to pro se litigants.

Virtually all of the evidence that Mr. Bormuth now wants us to consider is not admissible or even in the record. And it was he, not the county, who first moved—twice—for summary judgment. At the summary judgment phase of a case, parties no longer may rely on the pleadings. To generate a material dispute of fact, they must cite "particular parts of . . . the record" or show the absence of supporting evidence on the other side. Civil Rule 56(c)(1). Rule 56 expressly limits what we may consider to "materials in the record," Civil Rule 56(c)(3), a mandate that applies to all parties—represented or not, willing to accept representation or not.

All of this means we may not consider most of the "evidence" on which Mr. Bormuth now relies: the "Pandora's Box" comment; the "nitwit" remark; the "political correctness nonsense" remark; and the absence of prayer in a meeting without public attendance. A complaint is not evidence. Briefs are not evidence. And Bormuth never asked the district court to take judicial notice of any specific video or videos. The closest he came to introducing the videos was an attachment to his motion for summary judgment. All he did, however, was recite various prayers given at the town council meetings and cite the online videos as his source. But his transcriptions did not include any of the comments or incidents mentioned above. They included only a selection of the prayers given during invocations.

The district court also did not abuse its discretion in rejecting Bormuth's request to depose Council members about their invocation prayers. It concluded that courts should "focus not on the personal motives or biases of government officials, but rather on the objective content of the prayer, the impact it has on the listeners, and any situational aspects of it that could be

unduly coercive." An invocation prayer does not become unconstitutional under the Establishment Clause, or for that matter become constitutional under the Clause, based on the subjective motives of the individual who gave it. Even when the Court has invalidated a display under the Establishment Clause, it did not do so based on the subjective purposes of the local officials. *See McCreary County v. ACLU*, 545 U.S. 844, 861–63 (2005).

But if one prefers to ignore the conventional rules for resolving summary judgment motions, I would ignore them in full. Other materials, including lower court decisions mentioned in one of the amicus briefs, and *all* of the videos, show why the council members became frustrated with Mr. Bormuth and confirm that this frustration had little to do with his religious beliefs and more to do with his methods of advocacy. This was not his first legal grievance, to put it mildly. *See, e.g., Bormuth v. City of Jackson*, No. 12-11235, 2013 WL 1944574, at *2 (E.D. Mich. May 9, 2013) (chronicling Bormuth's penchant for "inject[ing] into the record venomous, irrelevant, and gratuitous commentary"); *Bormuth v. City of Jackson*, 12-11235, 2012 WL 5493599, at *1–2 (E.D. Mich. Nov. 13, 2012) (denying Bormuth's claim that he suffered religious discrimination when, as in his words "one of the best poets in Jackson County" and a "rare 'druidic bard,'" he was asked to stop attending a community college's poetry readings); *Bormuth v. Dahlem Conservancy*, 837 F. Supp. 2d 667, 670 (E.D. Mich. 2011) (denying Bormuth's religious discrimination claim against a private non-profit nature center that asked Bormuth to stop visiting after he emailed this threat: "tell your groundsman that the next time I see him driving that diesel cart just because he is too la[z]y to walk [I] will . . . have the spirits drop a widow maker on him putting him in a wheel chair the rest of his life."); *see also Bormuth v. Johnson*, No. 16-13166, 2017 WL 82977, at *3 (E.D. Mich. Jan. 10, 2017) (rejecting his claim that his loss in the Democratic primary was due to a "deliberate attempt by [a] Christian"—the Secretary of State—"to deny a Pagan candidate" a fair election); *In re Peter Carl Bormuth*, No. 13-1194 (6th Cir. Apr. 23, 2013) (rejecting his mandamus action seeking the recusal of a judge who was a Christian); *Bormuth v. Grand River Envtl. Action Team*, No. 321865, 2015 WL 6439007 (Mich. Ct. App. Oct. 22, 2015) (rejecting his claim that he should be able to conduct groundwater tests on a nonprofit's property).

During the en banc oral argument, the lawyer for the county acknowledged, quite properly, that the council members should not have expressed their frustration with Mr. Bormuth—or for that matter with anyone else who brings a matter to the council. But in the context of these other legal disputes, it is a bit rich to say that the council members reacted negatively to him due to his spiritual views in particular or to his position on council prayers in general.

DISSENT

KAREN NELSON MOORE, Circuit Judge, dissenting. When Peter Bormuth voiced his objection to the Jackson County Board of Commissioners' practice of opening public meetings with exclusively Christian prayers, a Jackson County Commissioner made a disgusted face at Bormuth and turned his chair around, refusing to listen. R. 10 (Am. Compl. ¶ 31) (Page ID #69). One Commissioner called Bormuth a "nitwit" for questioning the prayer practice. County of Jackson, *Personnel & Finance Committee November 12, 2013 Jackson County, MI*, YouTube (Dec. 19, 2013), http://tinyurl.com/2013nov12 (43:29–43:35). One Commissioner referred to Bormuth's objection as an attack on "my lord and savior Jesus Christ." R. 14 (Pl. First Mot. for Summ. J., Ex. C) (Page ID #149); *see also* County of Jackson, *Personnel & Finance Committee November 12, 2013 Jackson County, MI*, YouTube (Dec. 19, 2013), http://tinyurl.com/2013nov12 (32:50–32:59) (characterizing Bormuth's challenge to the prayer practice as "an attack on Christianity and Jesus Christ, period"). The Commissioners, all of whom are Christian, refused to allow any non-Commissioners to give prayers, and did so in order to avoid hearing prayers they would not like. *See* County of Jackson, *Personnel & Finance Committee November 12, 2013 Jackson County, MI*, YouTube (Dec. 19, 2013), http://tinyurl.com/2013nov12 (37:47–38:16). When Bormuth sought to join the County's Solid Waste Planning Commission and then the Board of Public Works, the Commissioners denied his applications. The district court denied Bormuth the opportunity to depose the Commissioners about why they rejected Bormuth's applications, *see* R. 59 (Dist. Ct. Order Granting Mot. to Quash at 2–3) (Page ID #1045–46), but there is reason to believe that they did so because Bormuth objected to the practice of opening public meetings with Christian prayers, *see* R. 10 (Am. Compl. ¶ 33) (Page ID #69).

There is no doubt that some legislative prayer practices are constitutional. *See Town of Greece v. Galloway*, 134 S. Ct. 1811, 1828 (2014); *Marsh v. Chambers*, 463 U.S. 783, 795 (1983). The question in this case is whether the undisputed constitutionality of a practice of solemn, respectful, chaplain-led prayer should protect the Jackson County Board of

Commissioners' prayer practice, which involves having local Commissioners themselves direct the public to participate in prayers; offering prayers from only one faith tradition, Christianity; affirmatively excluding non-Christians from the opportunity to offer prayers or invocations; publicly deriding citizens who voice their objections to the Commissioner-led and exclusively Christian prayer practice; and denying public positions to citizens who object to the prayer practice. *Town of Greece* demands that courts distinguish solemn, respectful practices from practices that "denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion." 134 S. Ct. at 1823. Instead, the majority extends the constitutional protection meant for solemn and respectful prayer traditions to a practice that excludes non-Christians from the prayer opportunity and expresses disgust at people who voice a different opinion. I respectfully dissent.

I. BACKGROUND

Each meeting of the Jackson County Board of Commissioners begins with a call to order, after which the Chairman directs those in attendance to "rise" and "assume a reverent position." R. 10 (Am. Compl. ¶¶ 17, 19) (Page ID #64–65). Then one of the Commissioners—all of whom are Christian—delivers a prayer. *Id.* ¶¶ 19–23 (Page ID #64–66). The Commissioners always end their prayer in the name of Jesus Christ. County of Jackson, *Personnel & Finance Committee November 12, 2013 Jackson County, MI*, YouTube (Dec. 19, 2013), http://tinyurl.com/2013nov12 ("Every board member here who gets up there and says a prayer during invocation, we end our invocation in the name of Jesus Christ."). Immediately after the prayer, the Board of Commissioners invites residents, often children, to lead attendees in the Pledge of Allegiance. *Id.* ¶ 17 (Page ID #64). The Board of Commissioners' meetings are open to the public and, for citizens who are unable to attend, are videotaped and posted on Jackson County's website. *Id.* ¶ 16 (Page ID #64).

Bormuth is a self-described Pagan and Animist. *Id.* ¶ 13 (Page ID #63). Deeply concerned with environmental issues, Bormuth started attending the Board of Commissioners' monthly meetings because he believed that the County was releasing pollutants into a local river. *Id.* In July 2013, Bormuth attended the Board of Commissioners' meeting to speak about closing the Jackson County Resource Recovery Facility, the mass-burn waste combustor that he believed

was polluting the local river. *Id.* ¶ 25 (Page ID #66–67). At the meeting, after the Chairman said "all rise," one of the Commissioners gave the following prayer:

> Bow your heads with me please. Heavenly father we thank you for this day and for this time that we have come together. Lord we ask that you would be with us while we conduct the business of Jackson County. Lord help us to make good decisions that will be best for generations to come. We ask that you would bless our troops that protect us near and far, be with them and their families. Now Lord we wanna [sic] give you all the thanks and all the praise for all that you do. Lord I wanna [sic] remember bereaved families tonight too, that you would be with them and take them through difficult times. We ask these things in your son Jesus's name. Amen.

Id. ¶ 23 (Page ID #65–66). As a Pagan and an Animist, Bormuth was uncomfortable with the Commissioner's prayer. *Id.* ¶ 24 (Page ID #66). He felt like he was being forced to participate in a religion to which he did not subscribe in order to bring a matter of concern to his local government. *Id.*

Bormuth attended the Board of Commissioners' August 2013 meeting as well. *Id.* ¶ 28 (Page ID #68). A Commissioner opened the meeting with the following prayer:

> Please rise. Please bow our heads. Our heavenly father we thank you for allowing us to gather here in your presence tonight. We ask that you watch over us and keep your guiding hand on our shoulder as we deliberate tonight. Please protect and watch over the men and women serving this great nation, whether at home or abroad, as well as our police officers and firefighters. In this we pray, in Jesus name, Amen.

Id. During the prayer, Bormuth was the only one in attendance who did not rise and bow his head. *Id.* ¶ 29 (Page ID #68). Bormuth felt isolated, and he worried that the Board of Commissioners would hold against him his decision to stay seated. *Id.*

During the meeting's public-comment period, Bormuth explained that he thought that the monthly prayers violated the Establishment Clause. *Id.* ¶ 31 (Page ID #69). While Bormuth was speaking, one of the Commissioners "made faces expressing his disgust" and then turned his chair around, refusing to look at Bormuth while he spoke. *Id.* The Commissioner's reaction "confirm[ed] [Bormuth's] fear[]" that his refusal to join the prayers would prejudice the Board of Commissioners against him. *Id.*

Bormuth filed suit against the County ten days later, alleging that the prayer practice violated the Establishment Clause. R. 1 (Compl.) (Page ID #1). While Bormuth's suit was pending before the district court, the Board of Commissioners nominated residents to the County's new Solid Waste Planning Committee. R. 10 (Am. Compl. ¶ 33) (Page ID #69). Although Bormuth had applied to serve on the Solid Waste Planning Committee, and had three years of experience working on related issues, the Board of Commissioners did not nominate him. *Id.* Bormuth surmised that this had something to do with his suit against the County. Indeed, an article published shortly after Bormuth filed his federal complaint revealed the Commissioners' disapproval of the suit, quoting one Commissioner as saying, "Bormuth 'is attacking us and, from my perspective, my Lord and savior Jesus Christ,'" and another Commissioner as remarking, "All this political correctness, after a while I get sick of it." R. 14 (Pl. First Mot. for Summ. J., Ex. C) (Page ID #149).

Bormuth filed an amended complaint addressing the Board of Commissioners' decision not to nominate him to the Solid Waste Planning Committee. R. 10 (Am. Compl. ¶ 33) (Page ID #69). He again alleged that the County was violating the Establishment Clause and asked for declaratory and injunctive relief as well as nominal damages. *Id.* ¶¶ 37, 44–50 (Page ID #70–71, 83–84). The parties filed motions for summary judgment. Bormuth moved for summary judgment before the Supreme Court decided *Town of Greece* and then, after *Town of Greece*, the parties filed cross-motions addressing that case. *See* R. 25 (Def. Mot. for Summ. J.) (Page ID #244); R. 37 (Pl. Second Mot. for Summ. J.) (Page ID #509).

While the parties were briefing their motions for summary judgment, they were also embroiled in two discovery disputes. The first dispute involved Bormuth's efforts to take depositions. Bormuth sent the County notices of his intent to depose the Commissioners, R. 24-2 (Notices of Deps.) (Page ID #226), in order to obtain "information relating to [Bormuth's] activities regarding the Jackson County Resource Recovery Facility," as well as information on the Board of Commissioners' practice of opening meetings with prayer and on its use of children to lead the Pledge of Allegiance following the prayer, R. 24-3 (Pl. Corrected Rule 26(a)(1) Disclosures at 1) (Page ID #236). The County filed a motion to quash, arguing that it had already provided Bormuth with all the information that it had on its practice of opening meetings

with prayer and on its use of children to lead the Pledge of Allegiance, and that any information it had on Bormuth's activities regarding the Jackson County Resource Recovery Facility was immaterial. R. 24 (Mot. to Quash at 3–7) (Page ID #213–17). In response, Bormuth stated that he also wanted to uncover the Commissioners' motives in delivering the prayers. R. 26 (Resp. to Mot. to Quash at 7) (Page ID #296). The County replied that the Commissioners' motives were also immaterial. R. 28 (Reply re: Mot. to Quash at 1) (Page ID #306).

The second dispute involved Bormuth's efforts to supplement the record. Bormuth sought to supplement the record with the text of a Commissioner's October 2014 prayer, R. 42 (Pl. First Mot. to Suppl. Record at 1) (Page ID #790), and with a letter he received from the Board of Commissioners denying him appointment to the Board of Public Works, R. 52 (Pl. Second Mot. to Suppl. Record at 1) (Page ID #932). The County objected to the first motion to supplement the record because the October 2014 prayer was similar to the prayers that Bormuth had included in his amended complaint. R. 43 (Resp. to Pl. First Mot. to Suppl. Record at 1–2) (Page ID #801–02). The County did not respond to the second motion to supplement the record, which was filed just days before the magistrate judge issued a Report and Recommendation.

The magistrate judge recommended that the district court deny Jackson County's motion for summary judgment and grant Bormuth's motion for summary judgment because "the legislative prayer practice of the Jackson County Board of Commissioners violates the Establishment Clause." R. 50 (R. & R. at 39) (Page ID #914). Rejecting this recommendation, the district court granted the county's motion for summary judgment and denied not only Bormuth's summary-judgment motion but also his discovery motions. Beginning with the motion to quash depositions, the district court agreed with the County that the information Bormuth sought in deposing the Commissioners—"information relating to [Bormuth's] activities regarding the Jackson County Resource Recovery Facility," R. 24-3 (Pl. Corrected Rule 26(a)(1) Disclosures at 1) (Page ID #236)—was not germane to the dispute, R. 59 (Dist. Ct. Order Granting Mot. to Quash at 2–3) (Page ID #1045–46). Confusing the Jackson County Resource Recovery Facility with the Solid Waste Planning Committee (or possibly with the Board of Public Works), the district court explained that because Bormuth "ha[d] not brought an employment discrimination claim," "information regarding the Jackson County Resource

Recovery Facility's failure to hire him . . . is not relevant." *Id.* The district court further stated that although Bormuth also sought information on the Commissioners' motives in giving the prayers, "motive is not a relevant factor." *Id.* at 3 (Page ID #1046). The district court then granted Bormuth's first motion to supplement the record with the Commissioner's October 2014 prayer but denied Bormuth's second motion to supplement the record with the letter that he received from the Board of Commissioners denying him appointment to the Board of Public Works. R. 60 (Dist. Ct. Order Re: Mots. to Suppl. Record at 2–3) (Page ID #1048–49). Conflating Bormuth's second motion to supplement the record with his efforts to depose the Commissioners, the district court described the second motion to supplement the record as seeking to introduce "[Bormuth's] application to a position on the Jackson County Resource Recovery Facility," concluding that, "[b]ecause [Bormuth's] complaint makes no employment discrimination claim, instead advancing as the sole cause of action an Establishment Clause violation, his affidavit describing the Board's failure to hire him is irrelevant." *Id.* at 3 (Page ID #1049) (emphasis removed).

The district court then turned to the merits of Bormuth's Establishment Clause claim. The district court considered the content of the Board of Commissioners' prayers first, and concluded that, although the prayers were "exclusively Christian," they were composed of only "benign religious references"—making Bormuth's reaction to them "hypersensitive." R. 61 (Dist. Ct. Op. at 7–8) (Page ID #1057–58). "The fact that all nine of the Commissioners are Christian," the district court stated, "is immaterial, [because] [a]s elected officials, they were chosen as representatives whose interests were most closely aligned with the public's, and their personal beliefs are therefore a reflection of the community's own overwhelmingly Christian demographic." *Id.* at 7 (Page ID #1057). Turning to whether the Board of Commissioners' practice was coercive, the district court noted that Bormuth could have left the room during the prayers, and that nothing in the record indicated that his absence would have been perceived as disrespectful. *Id.* at 12–13 (Page ID #1062–63). Accordingly, the district court held that "Bormuth's subjective sense of affront resulting from exposure to sectarian prayer is insufficient to sustain an Establishment Clause violation." *Id.* at 13 (Page ID #1063) (emphasis removed). Although the district court acknowledged that some citizens may not perceive statements such as "rise" and "assume a reverent position," *see, e.g.*, R. 10 (Am. Compl. ¶ 19) (Page ID #64–65), as

the mere "voluntary invitations" that the district court believed they were, the district court did not discuss the point further, R. 61 (Dist. Ct. Op. at 13–14) (Page ID #1063–64). As for the Commissioners' treatment of Bormuth, the district court stated that, though "evidence of disrespect," the Commissioners' treatment by turning their backs to him "does not demonstrate that the Board was prejudiced against him because he declined to participate in the prayer—rather, their behavior is likely an unfortunate expression of their own personal sense of affront elicited by his sentiments." *Id.* at 15 (Page ID #1065).

II. ANALYSIS

A. Videos of Jackson County Board of Commissioners' Meetings

Some of the evidence that Bormuth presented to the district court comes from videos of the Jackson County Board of Commissioners' meetings, which Jackson County records and posts online. Before analyzing Bormuth's Establishment Clause claims, I will explain why this court should consider the video evidence.

Before that, it is important to explain what the videos show. First, the videos reveal that the Board of Commissioners decided not to let guest ministers or members of the public offer opening prayers at their meetings because they were concerned about "certain people com[ing] up here and say[ing] things that they are not going to like." County of Jackson, *Personnel & Finance Committee November 12, 2013 Jackson County, MI*, YouTube (Dec. 19, 2013), http://tinyurl.com/2013nov12 (38:02–38:16). A Commissioner characterized allowing anyone other than the Commissioners themselves to give prayers as "opening a Pandora's Box." *Id.* After this discussion, the Commissioners decided to continue giving the prayers themselves, at least for the time being, to avoid hearing "things that they are not going to like." *Id.* at 38:02–38:16, 46:51–47:25. Second, the videos reveal that during a two-year span, the Board of Commissioners prayed at every meeting except the one that no members of the public attended. *See* County of Jackson, *November 6, 2014 Special Jackson County Board of Commissioners Meeting Video*, YouTube (Nov. 7, 2014), http://tinyurl.com/2014nov6 (0:01–0:47). This pattern undercuts the argument that the prayers were intended for the Commissioners themselves, not the public. The facts contained in these videos are relevant to a "fact-sensitive" inquiry that

"considers both the setting in which the prayer arises and the audience to whom it is directed," as *Town of Greece* requires. *Town of Greece*, 134 S. Ct. at 1825.[1]

Despite the majority's argument to the contrary, these videos are part of the record. Bormuth called the district court's attention to the videos.[2] Bormuth's pleadings notified the district court about the County's practice of recording the Board of Commissioners' meetings and posting the videos online, and repeatedly referenced the existence of the videos and events from the meetings. *See* R. 10 (Am. Compl. ¶ 16) (Page ID #64) (informing the district court that the County records the Board of Commissioners' meetings and posts the videos on the County's website); R. 29 (Pl. Resp. to Def. Mot. for Summ. J. at 11–16) (Page ID #328–33) (reciting what happened at several Board of Commissioners' meetings, videos of which the County posts online); R. 37-1 (Pl. Mot. for Summ. J., Ex. J) (Page ID #611–614 (including transcripts of three Board of Commissioners' meetings and stating that the County posts videos of Board of Commissioners' meetings online). Including these repeated references to the videos and pointing the district court to the website where the County posted the videos was enough to make them part of the record.[3]

Even if these videos are not part of the record, the Federal Rules of Evidence require this court to take judicial notice of them. "The court . . . must take judicial notice" of "a fact that is

---

[1]Amicus Americans United for Separation of Church and State, not Bormuth, argued that the Commissioners' pattern of praying only at meetings that members of the public attended shows that the Commissioners directed the prayers at citizens, not at themselves. Although amicus made this argument rather than Bormuth, it should be considered for two reasons. First, the Supreme Court has held that it can consider arguments raised only by amicus. *See Davis v. United States*, 512 U.S. 452, 457 n.* (1994) ("[W]e will consider arguments raised only in an amicus brief.") (citing *Teague v. Lane*, 489 U.S. 288, 300 (1989)). If the Supreme Court considers arguments raised only by amicus, there is no reason this court should not do so as well. Second, Americans United's argument is a more specific argument in support of Bormuth's general claim that Jackson County's prayer practice violated the Establishment Clause. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). And in a case, like this one, where a party is pro se, it makes all the more sense to consider arguments by amicus that refine the general arguments made by that party. *See, e.g., McPherson v. Coombe*, 174 F.3d 276, 280 (2d Cir. 1999) (quoting *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994)) ("[W]e read the pleadings of a *pro se* plaintiff liberally and interpret them 'to raise the strongest arguments that they suggest.'"). Regardless of whether the court considers this specific argument about Commissioners praying only at meetings that members of the public attend, it should consider the video evidence more generally.

[2]In fact, at oral argument during the panel stage of this case, counsel for the County stated that the official record includes all of the videos of the Board of Commissioners' meetings.

[3]As discussed below, Bormuth is pro se, so we must construe his pleadings liberally.

not subject to reasonable dispute" "if a party requests it and the court is supplied with the necessary information." Fed. R. Evid. 201(b), (c). A fact "is not subject to reasonable dispute" if it "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). "The court may take judicial notice at any stage of the proceeding." Fed. R. Evid. 201(d). As the majority acknowledges, Jackson County admitted the accuracy of these videos, making the facts contained within not subject to reasonable dispute. Bormuth brought the videos to the attention of the district court (and this court) and supplied the necessary information by pointing the court to Jackson County's YouTube page, where the county publicly posts the videos. As a result, the district court should have at least taken judicial notice of the videos. Because a court can take judicial notice at any point in the proceedings, the district court's failure to take judicial notice of the videos does not affect this court's obligation to take judicial notice of the videos.

The majority attempts to skirt the requirement to take judicial notice of the videos by pointing to an apparent tension between the rule that appellate courts must take judicial notice of facts not subject to reasonable dispute if a party so requests and supplies the necessary information, and the rule that appellate courts cannot consider evidence that was not before the district court. Maj. Op. at 7. Even if this tension exists in some cases, it does not exist here. This tension stems from the concern that appellate courts should not review "a better case fashioned after a district court's unfavorable order." *Id.* (quoting *DaimlerChrysler Corp. Healthcare Benefits Plan v. Durden*, 448 F.3d 918, 922 (6th Cir. 2006)). In this case, Bormuth called the district court's attention to the videos and the facts contained therein. The videos are not part of a better case fashioned for appeal, but part of the very case that Bormuth presented to the district court. The majority's argument that "[o]ne need look no further than the opinions of the magistrate judge and district judge to confirm" that "Bormuth did not present any video evidence to the district court" gets it backward. Maj. Op. at 6. The district court's failure to consider the videos does not mean that Bormuth erred by not presenting the videos to the district court, it means that the district court erred by not considering the videos that Bormuth

presented.[4] The district court's error in refusing to consider all the facts does not preclude this court, in reviewing the district court, from considering facts that the district court erroneously ignored.

B. Establishment Clause framework

Marsh and *Town of Greece* establish that legislative-prayer claims occupy a unique place in First Amendment jurisprudence, and that the question whether a legislative prayer practice violates the Establishment Clause is a fact-sensitive inquiry. *Marsh*, the first Supreme Court case to consider a legislative-prayer claim, bypassed the Court's previously constructed tests for Establishment Clause violations, reasoning that because "the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom," from "colonial times through the founding of the Republic and ever since," those tests did not apply. 463 U.S. at 786. The Court held that a new formal test was unnecessary. As the Court explained, "[t]o invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Id.* at 792. Although the Court still asked whether any features of the practice before it violated the Establishment Clause, it evaluated the parties' arguments "against the historical background" of legislative prayer. *Id.* at 792–93.

Town of Greece confirmed that "*Marsh* stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted." 134 S. Ct. at 1819. However, *Town of Greece* cautioned that "*Marsh* must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation." *Id.* "The case teaches instead that the Establishment Clause must be interpreted 'by reference to historical practices and understandings.'" *Id.* (quoting *Cty. of Allegheny v. Am. Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 670 (1989)

[4]Moreover, *DaimlerChrysler* and *Conlin v. Mortgage Electronic Registration Systems, Inc.*, 714 F.3d 355 (6th Cir. 2013), the published cases that the majority relies on, are cases in which an argument was not presented in the district court, not cases in which a fact was not presented to the district court. They do not analyze judicial notice of facts or Federal Rule of Evidence 201. They are consequently not helpful in analyzing the apparent tension between Federal Rules of Evidence 201 and proper role of appellate courts.

(Kennedy, J., concurring in judgment in part and dissenting in part)). Following the framework set forth in *Marsh*, the Court in *Town of Greece* considered whether the legislative prayer before it "fit[] within the tradition long followed in Congress and the state legislatures." *Id. Town of Greece* also asked whether the prayer violated the Establishment Clause by being coercive. *Id.* at 1825 (controlling opinion).

As the en banc Fourth Circuit recently pointed out, *Marsh* and *Town of Greece* "in no way sought to dictate the outcome of every subsequent case." *Lund v. Rowan Cty.*, 863 F.3d 268, 276 (4th Cir. 2017) (en banc). "The Court acknowledged that it has not 'define[d] the precise boundary of the Establishment Clause.' Accordingly, when the historical principles articulated by the Supreme Court do not direct a particular result, a court must conduct a 'fact-sensitive' review of the prayer practice." *Id.* (quoting *Town of Greece*, 134 S. Ct. at 1819, 1825). Thus, we must determine whether the Board of Commissioners' practice is similar to the practices upheld in *Marsh* and *Town of Greece* or if there are critical differences that take the Board of Commissioners' practice outside the ambit of historically tolerated legislative prayer, either because it does not fit within the protected historical practice or because it is coercive.

1. Historical tradition

The first half of Justice Kennedy's opinion in *Town of Greece*, which addressed the historical tradition of legislative prayer, garnered a majority of the court. The Court held insistence on inclusive and ecumenical prayer was inconsistent with *Marsh*. *Town of Greece*, 134 S. Ct. at 1820–24. The Court explained that *Marsh* had held that the use of prayer to open legislative sessions was constitutional not because the prayer was nonsectarian, but because "prayer in this limited context could 'coexist with the principles of disestablishment and religious freedom.'" *Id.* at 1820 (alteration omitted) (quoting *Marsh*, 463 U.S. at 786). The Court also noted, however, that there were still constraints on the content of legislative prayer. *Id.* at 1823. These constraints came from the prayer's purpose, which is to solemnize the legislative session. *Id.* If the prayer's content strayed from this purpose, the prayer would no longer be consistent with the First Amendment. But "[a]bsent a pattern of prayers that over time

denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a prayer [would] not likely establish a constitutional violation."[5] *Id.* at 1824.

2. Coercion

The second half of Justice Kennedy's opinion addressed coercion. Justice Kennedy's plurality opinion[6] considered the argument that the town's practice was coercive because it pressured members of the public to participate in the prayers in order to appease town board members. *Id.* at 1824–28 (controlling opinion). Justice Kennedy's opinion agreed that this kind of pressure was problematic, stating that "[i]t is an elemental First Amendment principle that government may not coerce its citizens 'to support or participate in any religion or its exercise." *Id.* at 1825 (quoting *Cty. of Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring in judgment in part and dissenting in part)).

However, the opinion stated that there was no evidence of coercion in the record. The opinion explained that the inquiry into whether the government has engaged in such coercion is "a fact-sensitive one that considers both the setting in which the prayer arises and the audience to whom it is directed." *Id.* By "offering a brief, solemn, and respectful prayer to open its monthly meetings," the Town of Greece had not "compelled its citizens to engage in a religious observance." *Id.* "[L]egislative prayer," the opinion explained, "has become part of our heritage and tradition," and "[i]t is presumed that the reasonable observer is acquainted with this tradition and understands that its purposes are to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens, not to afford government an opportunity to proselytize." *Id.* The opinion determined that there was nothing in the record about the setting of the prayer that undermined this presumption. *Id.* As for the principal audience to whom the prayer was directed, the opinion explained that it is presumed that the principal audience is the lawmakers themselves, because legislative prayer is "an internal act" in

---

[5]Because this is one of the Court's more concrete statements, it is tempting to turn it into a test and apply it to the County's prayer practice, as the County endeavored to do in its brief before the panel. *See* Appellee Br. at 23, 25. The Court's statement, however, must be viewed through the lens of Galloway and Stephens's insistence that legislative prayers be ecumenical. In other words, the statement is limited to challenges based on content alone.

[6]Justice Kennedy's plurality opinion is the controlling opinion on the issue of coercion, as discussed more fully below.

which government officials invoke the divine for their own benefit rather than to promote religion to the public. *Id.* (quoting *Chambers v. Marsh*, 504 F. Supp. 585, 588 (D. Neb. 1980)). Again, the opinion determined that there was nothing in the record about the principal audience that undermined this presumption. *Id.* at 1825–26.

The opinion then observed, importantly for our purpose, that "[t]he analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity." *Id.* at 1826.

C. The district court abused its discretion by denying discovery to Bormuth

Because *Town of Greece* establishes that the legislative prayer inquiry is fact-sensitive, before discussing whether Jackson County's prayer practice falls within the historically protected practice of legislative prayer, I first address the district court's rulings on Bormuth's requests for discovery. This court reviews for an abuse of discretion both a district court's ruling on a motion to quash and its ruling on a motion to supplement the record. *Guy v. Lexington-Fayette Urban Cty. Gov't*, 624 F. App'x 922, 928 (6th Cir. 2015) (motion to quash); *see Duha v. Agrium, Inc.*, 448 F.3d 867, 882 (6th Cir. 2006) (motion to supplement the record). "An abuse of discretion occurs if the district court relies on clearly erroneous findings of fact, applies the wrong legal standard, misapplies the correct legal standard when reaching a conclusion, or makes a clear error of judgment." *Louzon v. Ford Motor Co.*, 718 F.3d 556, 560 (6th Cir. 2013) (quoting *Miller v. Countrywide Bank, N.A. (In re Countrywide Fin. Corp. Mortg. Lending Practices Litig.)*, 708 F.3d 704, 707 (6th Cir. 2013)).

In granting the County's motion to quash the depositions of the Commissioners, the district court concluded that because Bormuth "ha[d] not brought an employment discrimination claim," "information regarding the Jackson County Resource Recovery Facility's failure to hire him . . . is not relevant." R. 59 (Dist. Ct. Order Granting Mot. to Quash at 2–3) (Page ID #1045–46). This was a misapprehension of the facts. Bormuth had not sought information regarding the Jackson County Resource Recovery Facility's failure to hire him. He had sought information about his efforts to close it: the Jackson County Resource Recovery Facility was the mass-burn

waste combustor that Bormuth believed was polluting the local river. R. 24-3 (Pl. Corrected Rule 26(a)(1) Disclosures at 1) (Page ID #236). The district court also concluded that, to the extent that Bormuth sought information on the Commissioners' motives in giving the prayers, "motive is not a relevant factor." R. 59 (Dist. Ct. Order Granting Mot. to Quash at 3) (Page ID #1046). This was a misapplication of the law. The Commissioners' purpose in delivering the prayers is highly relevant, because legislative prayer that is intended to proselytize may violate the Establishment Clause by coercing citizens to support and participate in the exercise of religion. *Town of Greece*, 134 S. Ct. at 1825–26 (controlling opinion). The district court's order, therefore, was an abuse of discretion.

In denying Bormuth's second motion to supplement the record, which asked the district court to consider the letter that Bormuth received from the Board of Commissioners denying him appointment to the Board of Public Works, the district court also misapprehended the facts and misapplied the law. The district court characterized Bormuth's second motion to supplement the record as seeking to introduce "his application to a position on the Jackson County Resource Recovery Facility." R. 60 (Dist. Ct. Order Re: Mots. to Suppl. Record at 3) (Page ID #1049). But as explained above, Bormuth never applied for a position at the Jackson County Resource Recovery Facility; he attempted to close it. His second motion to supplement the record concerned his application to the Board of Public Works. R. 52 (Pl. Second Mot. to Suppl. Record at 1) (Page ID #932). The district court then concluded that "[b]ecause [Bormuth's] complaint makes no employment discrimination claim, instead advancing as the sole cause of action an Establishment Clause violation, [the letter and] affidavit describing the Board's failure to hire him [are] irrelevant." R. 60 (Dist. Ct. Order Re: Mots. to Suppl. Record at 3) (Page ID #1049) (emphasis removed). But the letter and affidavit are relevant—they speak to whether the Board of Commissioners is allocating benefits and burdens based on citizens' participation in the prayers, which is a critical part of the analysis of legislative-prayer claims. *See Town of Greece*, 134 S. Ct. at 1826 (controlling opinion). Therefore, the district court's order denying the motion to supplement the record was also an abuse of discretion.

Despite the fact that the district court misapprehended both the facts and the law, the majority concludes that the district court "did not abuse its discretion" in denying Bormuth's

discovery motions because "Bormuth failed to comply with Federal Rule of Civil Procedure 56(d)." Maj. Op. at 9. The majority adds that "[a]lthough we have set aside Rule 56(d)'s formal affidavit requirement 'when a party has clearly explained its need for more discovery on a particular topic to the district court prior to or contemporaneously with the motion for summary judgment,' there is no need to do so here" because Bormuth himself moved for summary judgment. Maj. Op. at 9 (quoting *Unan v. Lyon*, 853 F.3d 279, 293 (6th Cir. 2017)).[7] Contrary to the majority's assertion, this is precisely the type of situation that calls for setting aside Rule 56(d)'s formal affidavit requirement. The majority errs, for two reasons, when it attempts to justify its refusal to set aside Rule 56(d)'s formal affidavit requirement by construing Bormuth's summary-judgment motions as a concession that there are no disputed material facts.

First, Bormuth moved for summary judgment by arguing that legislator-led, exclusively Christian prayer at local government meetings is always unconstitutional. Because there is no dispute that Jackson County Commissioners lead prayers before Board of Commissioners' meetings, or that the prayers are sectarian and exclusively Christian, no further factual development would be necessary to award Bormuth summary judgment on this theory. However, even if, contrary to the broader version of Bormuth's argument, some legislator-led prayer at local government meetings is constitutional, Jackson County's prayer practice could be unconstitutional pursuant to a narrower argument, under the fact-sensitive inquiry *Town of Greece* requires. Bormuth's motion for summary judgment arguing that legislator-led, exclusively Christian prayer at local government meetings is always unconstitutional is not a concession that there are no disputed material facts as to an alternative, narrower argument that Jackson County's prayer practice is unconstitutional because of facts specific to their prayer practice.

The second reason is related to the first. Courts must construe pro se pleadings liberally. *Spotts v. United States*, 429 F.3d 248, 250 (6th Cir. 2005). This requirement underscores why

---

[7] In *Unan*, which the majority relies on, we concluded that the plaintiffs "failed to comply not only with the formal requirements of Rule 56(d), but also its substance" by failing to object to the district court's decision to hold discovery in abeyance and by conceding that they did not indicate who they would seek to depose or what documents they would request. 853 F.3d at 293. By contrast, Bormuth complied with the substance of Rule 56(d) by specifically indicating that he sought to depose the Jackson County Commissioners and to obtain documents related to the Resource Recovery Facility.

we should not interpret Bormuth's motions for summary judgment on a broader theory as a concession that there are no disputed facts as to a narrower theory, given that he also sought discovery to further develop the facts relevant to his narrower theory.[8] Because Bormuth specifically requested additional discovery and is a pro se litigant whose pleadings must be construed liberally, Bormuth's motions for summary judgment do not justify the district court's denial of Bormuth's discovery motions.

The importance of these discovery motions bears emphasis. The district court's erroneous denial of Bormuth's discovery motions deprived Bormuth of an opportunity to fairly litigate the constitutional issues he raised. The majority's decision to affirm these denials is all the more disturbing when combined with its conclusion that the videos of Jackson County Board of Commissioners' meetings are not part of the record. The majority couches its opinion in terms of Bormuth's failure to carry his evidentiary burden, *see* Maj. Op. at 32, but it does so while refusing to consider much of the evidence that Bormuth has presented (the videos) and refusing to allow Bormuth to develop more probative evidence (to depose the Commissioners).

Town of Greece leaves no question that a legislative prayer practice can cross a constitutional line, and that courts should review prayer practices to ensure that they do not fall outside of the tradition of solemn and respectful prayer or coerce participation in a religious exercise. *See Town of Greece*, 134 S. Ct. at 1826–27. In my view, and as discussed more fully below, the facts currently before this court are enough to show that Jackson County's prayer practice crosses a constitutional line. It is one thing for the majority here to disagree with me on this point. It is quite another thing for the majority to take 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. The effect of deciding this case without considering either the County's official video records or the additional evidence Bormuth might have uncovered in discovery is to insulate a practice from any judicial review even though it bears all the markings of an attempt to isolate and denigrate

[8]There is no support for the proposition in Judge Sutton's concurrence that Bormuth should not be treated the same as other pro se litigants because he "insisted on not having an attorney, even when one was offered." Concurrence at 41. I note that the concurrence cites no authority for this proposition, most likely because there is none. I also note that this proposition is as ill-conceived as it is unsupported.

non-Christians, or at least a callous disregard for the possibility of isolating and denigrating non-Christians.

D. Jackson County's prayer practice violates the Establishment Clause because it falls outside of the historical tradition identified in *Marsh*

Even without considering the videos and without the benefit of depositions of the Commissioners, it is clear to me that Jackson County's prayer practice is unconstitutional. First, Jackson County's practice does not fall within the historical tradition of legislative prayer identified in *Marsh* and *Town of Greece*. A combination of factors distinguishes this case from the practice upheld in *Marsh* and *Town of Greece*, including one important factor: the identity of the prayer giver. In *Marsh*, the Nebraska legislature opened its session with a prayer offered by a chaplain, 463 U.S. at 784; in *Town of Greece*, invited clergy and laypersons delivered the invocations, 134 S. Ct. at 1816–17. Here, the Jackson County Commissioners give the prayers. *See* R. 10 (Am. Compl. ¶¶ 19–23) (Page ID #64–66). The difference is not superficial. *See Town of Greece*, 134 S. Ct. at 1826 (distinguishing solicitations to pray by guest ministers from those by town leaders, noting that "[t]he analysis would be different if town board members" themselves engaged in the same actions). 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 and the same. The prayers, in Bormuth's words, are literally "governmental speech." R. 29 (Pl. Resp. to Def. Mot. for Summ. J. at 1) (Page ID #318).

Legislator-led prayer at the local level falls far afield of the historical tradition upheld in *Marsh* and *Town of Greece*. The setting—a local government meeting with constituent petitioners in the audience—amplifies the importance of the identity of the prayer giver in our analysis, and heightens the risks of coercion, as borne out by the facts in this case.

The identity of the prayer giver also leads to other problems with the Board of Commissioners' practice. Because they are the ones delivering the prayers, the Commissioners—and only the Commissioners—are responsible for the prayers' content. And because in Jackson County the prayer content is exclusively Christian, by delivering the prayers, the Commissioners are effectively endorsing a specific religion, Christianity. In *Town of Greece*, the Supreme Court upheld the town's prayer practice in large part because it included prayers

representing a variety of faiths. Although initially all of the prayer givers were Christian ministers, eventually the town invited a Jewish layman and the chairman of the local Baha'i temple to deliver invocations. *See Town of Greece*, 134 S. Ct. at 1817. When a Wiccan priestess asked for an opportunity to deliver the invocation, the town granted her request. *Id.* The Supreme Court emphasized that, "The town made reasonable efforts to identify all of the congregations located within its borders and represented that it would welcome a prayer by any minister or layman who wished to give one." *Id.* at 1824; *see also id.* at 1829 (Alito, J., concurring) ("[T]he town made it clear that it would permit any interested residents, including nonbelievers, to provide an invocation, and the town has never refused a request to offer an invocation. . . . The most recent list in the record of persons available to provide an invocation includes representatives of many non-Christian faiths."). In Jackson County, by contrast, there is no opportunity for members of other faiths to offer invocations. *See Lund*, 863 F.3d at 278 ("The openness evinced by [the] elected bodies [in *Marsh* and *Town of Greece*] contrasts starkly with Rowan County's policy of restricting the prayer opportunity to the commissioners alone."). Instead, there are exclusively Christian prayer givers and a pattern of explicitly Christian prayers.

What is more, in Jackson County the prayer givers are exclusively Christian because of an intentional decision by the Board of Commissioners. Unlike in *Town of Greece*, where the Court found no evidence of sectarian motive in the selection of speakers, at least one Jackson County Commissioner admitted that, in order to control the prayers' content, he did not want to invite the public to give prayers.

At a November 2013 meeting of the Personnel & Finance Committee, one of the Commissioners imagined what would happen if any Jackson County resident could lead the prayer:

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

County of Jackson, *Personnel & Finance Committee November 12, 2013 Jackson County, MI*, YouTube (Dec. 19, 2013), http://tinyurl.com/2013nov12 (37:47–38:01). He continued:

> 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.

Id. at 38:02–38:16. These comments reveal that the Board of Commissioners' control over the content of the prayers is not just a function of the Commissioners' role as prayer givers—it is the result of an affirmative decision by the Commissioners to exclude *other* prayer givers. In other words, the Board of Commissioners is limiting who can give the prayers in order to control the prayers' content. And the effect of the Board of Commissioners' decision is to prevent participation by religious minorities and to endorse a specific religion. This brings the County's use of prayer to open its monthly meetings well outside the ambit of historically tolerated legislative prayer.

Arguing that Jackson County prayer practice is constitutional, the majority opines that legislator-led prayer falls within the historical tradition approved by *Town of Greece* because there are examples showing that legislators have long been permitted to offer prayers before state legislative sessions. But the majority, Defendant, and amici "elide the distinction between extending the prayer opportunity to lawmakers (as many legislatures do) and restricting it to those lawmakers (as [Jackson] County did here)." *Lund*, 863 F.3d at 279. The majority, Defendant, and amici have not cited a single example of *local* legislative prayer practices limited *exclusively* to legislators themselves. The present-day example of the Rhode Island state legislature, Maj. Op. at 21, being both contemporary and at the state level, does not suffice. Maj. Op. at 19–21. Thus, even if there were a tradition of legislator-led prayer at the state level, this tradition would not mean that legislator-led prayer at local government meetings is constitutionally permissible. Nor would it mean that legislator-led prayer is constitutionally permissible even if each and every legislator offered sectarian prayers in the same faith tradition. Nor, especially, would it mean that exclusively legislator-led prayer is constitutionally permissible when it involves a combination of these factors, taking place at local government meetings where each and every legislator offered sectarian prayers in the same faith tradition.

The majority also errs by seeking to analyze each feature of Jackson County's prayer practice separately. The Supreme Court has rejected this "divide-and-conquer" approach to

analyzing the constitutionality of multi-faceted practices, *United States v. Arvizu*, 534 U.S. 266, 274 (2002), and specifically has held that legislative prayer practices must be evaluated based on a totality of the circumstances, *Town of Greece*, 134 S. Ct. at 1823; *see also Lund*, 863 F.3d at 289 (Individuals "are not experiencing the prayer practice piece by piece by piece. It comes at them whole. It would seem elementary that a thing may be innocuous in isolation and impermissible in combination. In fact, the lead [Fourth Circuit] dissent's tired 'divide and conquer' strategy has been frowned upon by the Supreme Court itself.") (citing *Arvizu*, 534 U.S. at 274). Even if each piece of Jackson County's prayer practice is constitutionally permissible, that does not mean that the prayer practice as a whole is constitutional.

The majority also points out that the people of Jackson County can diversify the Board of Commissioners' prayer practice by electing Commissioners of different faiths, or no faith. Maj. Op. at 24. The majority apparently intends for this argument to be a defense of Jackson County's prayer practice, but really it is the worst case scenario. Voting for representatives based on what prayers they say is precisely what the First Amendment's religion clauses seek to prevent. *See Lund*, 863 F.3d at 282 ("For any Buddhists, Hindus, Jews, Muslims, Sikhs, or others who sought some modest place for their own faith or at least some less insistent invocation of the majority faith, the only recourse available was to elect a commissioner with similar religious views. We find this point troubling. [V]oters may wonder what kind of prayer a candidate of a minority religious persuasion would select if elected. Failure to pray in the name of the prevailing faith risks becoming a campaign issue or a tacit political debit, which in turn deters those of minority faiths from seeking office. Further, allowing the county to restrict to one the number of faiths represented at Board meetings would warp our inclusive tradition of legislative prayer into a zero-sum game of competing religious factions. Our Constitution safeguards religious pluralism; it does not sanction activity which would take us one step closer to a de facto religious litmus test for public office.") (internal quotation marks and citations omitted) (alteration in original); *see also W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (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 principles to be applied by the courts. One's right to life, liberty,

and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.").

E. Jackson County's prayer practice violates the Establishment Clause because it is coercive

Jackson County's prayer practice is unconstitutional for another reason, because it is coercive. Justice Kennedy's opinion in *Town of Greece* held that, "[i]t is an elemental First Amendment principle that government may not coerce its citizens 'to support or participate in any religion or its exercise.'" 134 S. Ct. at 1825 (quoting *Cty. of Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring in judgment in part and dissenting in part)).

As a threshold matter, I emphasize that Justice Kennedy's concurrence is the controlling *Town of Greece* opinion. A majority of this court appears to agree that Justice Kennedy's opinion controls, although a few judges have stated their view that Justice Thomas's opinion controls. *See* Maj. Op. at 27 n.10. The parties in this case agree that Justice Kennedy's opinion controls, as Jackson County conceded at the en banc stage that Justice Kennedy's opinion is controlling. Judges from our sister circuit overwhelmingly agree that Justice Kennedy's opinion controls: in *Lund*, although the judges of the Fourth Circuit robustly debated how to apply Justice Kennedy's opinion to the facts before them, no judge took the position that Justice Thomas's opinion was controlling. *See Lund*, 863 F.3d at 297–99 (Niemeyer, J., dissenting); *id.* at 319–21 (Agee, J., dissenting). Finally, Supreme Court and Sixth Circuit precedent dictate that Justice Kennedy's opinion is controlling.[9]

---

[9]The Supreme Court has instructed that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). This court has held that "'narrowest' opinion refers to the one which relies on the 'least' doctrinally 'far-reaching-common ground' among the Justices in the majority: it is the concurring opinion that offers the least change to the law." *United States v. Cundiff*, 555 F.3d 200, 209 (6th Cir. 2009). In *Town of Greece*, Justice Kennedy's opinion is the narrowest. Although Justice Thomas's conception of coercion is more *restrictive*, Justice Kennedy's conception of coercion "offers the least change to the law." *Cundiff*, 555 F.3d at 209. There is controlling precedent supporting Justice Kennedy's opinion and no controlling precedent supporting Justice Thomas's concurrence. Justice Thomas's concurrence is neither the "the least doctrinally far-reaching-common ground among the Justices in the majority," nor the "opinion that offers the least change to the law." *Cundiff*, 555 F.3d at 209 (internal quotation marks omitted). And when viewed within the context of the Court's holding, Justice Kennedy's opinion clearly represents the narrowest grounds. The Court's holding was that there was no

Applying Justice Kennedy's opinion, I emphasize that the inquiry into whether a prayer practice is coercive is "a fact-sensitive one that considers both the setting in which the prayer arises and the audience to whom it is directed." *Town of Greece*, 134 S. Ct. at 1825. Although the Court in *Town of Greece* concluded that there was no evidence of coercion in the record before it, it held that "[t]he analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity." *Id.* at 1826. All three elements are present here.

First, the Board of Commissioners directs the public to participate in the prayers at every monthly meeting. As the Supreme Court has observed, the source of these statements is significant. In *Town of Greece*, "board members themselves stood, bowed their heads, or made the sign of the cross during the prayer," but "*they at no point solicited similar gestures by the public.*" *Id.* (emphasis added). Rather, it was the clergy who asked audience members to participate in the prayer. *Id.* The Supreme Court reasoned that, because this direction came from the clergy, it was inclusive, not coercive. *Id.* Here, it is the Board of Commissioners, and the Board of Commissioners only, that tells the public to join in the prayer. What is more, these instructions are almost always from the Chairman. *See, e.g.*, R. 10 (Am. Compl. ¶¶ 19–23) (Page ID #64–66). The Chairman presides over the meeting; his words are cloaked in procedural formality. The words "rise" and "assume a reverent position" from the Chairman, therefore, are not mere suggestions, they are commands. But even in the infrequent instances where it is the Commissioner giving the prayer who tells the public to "rise" or to "bow [their] head[s]," R. 29-1 (Pl. Resp. to Def. Mot. for Summ. J., Ex. E ¶¶ 9, 13, 22) (Page ID #370–71), the effect is the same: to coerce the public to participate in the exercise of religion.

This coercion is compounded by the setting in which it is exerted. *See Town of Greece*, 134 S. Ct. at 1825 (controlling opinion). Local government meetings are small and intimate. And unlike in federal and state legislative sessions, where the public does not speak to the

---

coercion. According to Justice Kennedy, this was because there was no coercion *in the record.* According to Justice Thomas, this was because there could *never* be coercion absent formal legal compulsion. Within the context of a ruling against the respondents, therefore, the narrower opinion is Justice Kennedy's, not Justice Thomas's. Accordingly, Justice Kennedy's conception of coercion is the holding of the Court.

legislative body except by invitation, citizens attend local government meetings to address issues immediately affecting their lives. Jackson County residents have gone to the Board of Commissioners' monthly meetings to ask for funding for disabled students' transportation to school, County of Jackson, *June 18, 2013 Jackson County Board of Commissioners Meeting*, YouTube (June 19, 2013), http://tinyurl.com/2013jun19 (35:53–38:30), request repairs to roads leading to their homes or businesses, County of Jackson, *July 23, 2013 Jackson County Board of Commissioners Meeting*, YouTube (July 24, 2013), http://tinyurl.com/2015jul23 (24:58–30:19), and redress discrimination, County of Jackson, *March 17, 2015 Jackson County Board of Commissioners Meeting*, YouTube (Mar. 18, 2015), http://tinyurl.com/2015mar17c (5:27–7:42). Thus, there is increased pressure on Jackson County residents to follow the Board of Commissioners' instructions at these meetings, as the residents would not want to offend the local government officials they are petitioning.

Moreover, as amicus Americans United points out, the Commissioners prayed at the beginning of their meetings only when members of the public were in attendance. The decision to pray only when members of the public were present indicates that the prayer was not directed at the Commissioners themselves, and that the purpose of the prayer was not to solemnize the proceedings for the Commissioners, but that the prayer was meant "to afford government an opportunity to proselytize or force truant constituents into the pews." *Town of Greece*, 134 S. Ct. at 1825.

Second, the Board of Commissioners has singled out Bormuth for opprobrium. When Bormuth objected to being forced to acknowledge Jesus Christ as God when he attended a government meeting to discuss environmental issues from a scientific and economic perspective, a Commissioner made a disgusted face and turned his back. County of Jackson, *August 20, 2013 Jackson County Board of Commissioners Meeting*, YouTube (Aug. 21, 2013), https://tinyurl.com/yamjn47a (20:00–21:09); R. 10 (Am. Compl. ¶¶ 31) (Page ID #69). During a public meeting, a Commissioner stated that Bormuth's lawsuit was an "attack on Christianity and Jesus Christ, period." County of Jackson, *Personnel & Finance Committee November 12, 2013 Jackson County, MI*, YouTube (Dec. 19, 2013), http://tinyurl.com/2013nov12 (32:50–32:59). Another Commissioner characterized Bormuth's lawsuit as "political correctness nonsense" and

complained that he has "had political correctness jammed down [his] throat." *Id.* at 43:00–43:18. That Commissioner continued:

> The Federalist Papers, if you read them, tell[] me that it is your duty to disobey an illegal law. And it has taken some *nitwit* two hundred-and-some years to come up with an angle like this to try to deprive me or other people, of my faith, of my rights.

Id. at 43:22–43:41 (emphasis added). In disparaging Bormuth, the Board of Commissioners' message is clear: residents who refuse to participate in the prayers are disfavored. Indeed, when Bormuth expressed his belief that the Board of Commissioners was violating the First Amendment during the public-comment period of the August 2013 meeting, one of the Commissioners made faces and then turned his back on Bormuth, refusing even to look at Bormuth while he spoke. R. 10 (Am. Compl. ¶ 31) (Page ID #69).

The majority brushes these comments aside, first saying that they were a reaction to Bormuth bringing "yet another lawsuit" against the County and "not to [Bormuth's] beliefs but to the litigious way he chose to express them." Maj. Op. at 31. The majority also says that, in any event, "[t]he Establishment Clause . . . does not require [government officials] to keep their cool." *Id.* Neither of the majority's statements is entirely accurate.

As for the claim that the Commissioners were reacting to Bormuth's lawsuit, not his beliefs, the incident where a Commissioner turned his back on Bormuth and made a face occurred the first time Bormuth expressed any objection to the prayer practice, before he filed this lawsuit. The Commissioners certainly continued to express publicly their disdain for Bormuth after he filed this lawsuit, but because they began publicly expressing this disdain the very first time he objected to the prayer practice, it is misleading to downplay their comments as mere frustration at having to defend a lawsuit rather than animosity toward Bormuth, his beliefs, and his objection to Jackson County's prayer practice. That "[t]his was not [Bormuth's] first legal grievance, to put it mildly," Concurrence at 42, is of no moment. Regardless of how "litigious" or "antagoni[zing]" Bormuth may be, Maj. Op. at 31, the fact is that government officials refused to listen to his objection, which he made during a Board of Commissioners meeting's public comment period, to a prayer practice that systematically excluded minority

religious views. The Commissioners also called Bormuth disparaging names and called his views nonsense.

As for the majority's view that "[t]he Establishment Clause . . . does not require [government officials] to keep their cool," the majority acknowledges that the Establishment Clause does prevent government officials from singling out religious minorities for opprobrium. Maj. Op. at 31; *see Town of Greece*, 134 S. Ct. at 1825 ("The analysis would be different if town board members . . . singled out dissidents for opprobrium . . ."). The majority appears to argue that a Commissioner turning his back on Bormuth and refusing to listen to him say that Jackson County's prayer practice disrespected non-Christian citizens is somehow distinct from singling him out for opprobrium. My only response is to ask the reader to imagine making an earnest, public plea to someone in a position of authority—a plea not about just any topic, but about a concern that the authority figure is disrespecting your religious beliefs, or disrespecting some value that you consider central to your life and perhaps definitive of who you are. You might not be troubled if the person told you that they disagreed with your concern, or if they listened but said nothing in response. But imagine if, instead of listening, they made a face of disgust and turned around, refusing to face you. Would you feel like this government official had expressed "contempt or distaste usually mingled with reproach and an implication of inferiority"? *Opprobrium*, *Merriam-Webster Unabridged Dictionary*, http://unabridged.merriam-webster.com/unabridged/opprobrium (last visited Aug. 16, 2017).

Third, Bormuth has submitted evidence suggesting that the Board of Commissioners has "allocated benefits and burdens based on participation in the prayer." *See Town of Greece*, 134 S. Ct. at 1826 (controlling opinion). Shortly after Bormuth filed his complaint, Jackson County officials nominated members for the County's new Solid Waste Planning Committee from a pool of applicants. R. 10 (Am. Compl. ¶ 33) (Page ID #69). Although Bormuth had three years of experience working on related issues, the Board of Commissioners did not nominate him. *Id.* Given that the Commissioners had publicly expressed their contempt for Bormuth, *id.* ¶ 31 (Page ID #69); *see also* R. 14 (Pl. First Mot. for Summ. J., Ex. C) (Page ID #149), the Board of Commissioners' decision not to nominate him could easily be interpreted as a response to Bormuth's refusal to participate in the prayers. Bormuth also sought to supplement

the record with a letter he received from the Board of Commissioners denying him appointment to the Board of Public Works. R. 52 (Pl. Second Mot. to Suppl. Record at 1) (Page ID #932). Although Bormuth is confident that he was "the most qualified applicant," the Board of Commissioners did not name him for the position. *Id.* ¶ 6 (Page ID #933). This rejection came just shy of a month after one of the Commissioners publicly called Bormuth a "nitwit." *See* County of Jackson, *Personnel & Finance Committee November 12, 2013 Jackson County, MI*, YouTube (Dec. 19, 2013), http://tinyurl.com/2013nov12 (43:22–43:41). Like the County's decision not to nominate him to the Solid Waste Planning Committee, this decision suggests that the Board of Commissioners was denying benefits to residents based on their beliefs.

The majority wholly fails to reckon with the possibility that the Board of Commissioners may have denied Bormuth these committee positions because of his refusal to participate in the Christian prayers. Although the majority claims that it "assume[s] those facts not accepted by the district court," it defends the Commissioners' actions by arguing that "[a]ll we have are unverified assertions from [Bormuth's] complaint," that Bormuth "failed to put forth any evidence," and that "there is nothing in the record" supporting Bormuth's allegations. Maj. Op. at 32 & n.13. The reason there is little information in the record about the Commissioners' motivations is that the district court refused to allow Bormuth to depose any of the Commissioners. Had Bormuth been able to depose the Commissioners, he might have developed additional evidence that they denied him positions because of his refusal to pray. All the majority's reasoning accomplishes is to underscore that the district court's error in denying Bormuth's discovery motions was not harmless.

Based on the facts before this court, I would hold that the Jackson County Board of Commissioners' prayer practice violates the First Amendment's Establishment Clause. Not only is the prayer practice well outside the tradition of historically tolerated prayer, but also it coerces Jackson County residents to support and participate in the exercise of religion. Whether or not there were already sufficient facts to hold that the Jackson County prayer practice is unconstitutional, I would allow Bormuth to conduct discovery to gather more information about the Commissioners' purpose in opening their meetings with a prayer and in rejecting Bormuth's applications for positions on county committees.

F. Conclusion

I conclude by underscoring two factual details about Jackson County's prayer practice. First, the Jackson County Board of Commissioners affirmatively excluded non-Christian prayer givers, and did so in an effort to control the content of prayers. *See* County of Jackson, *Personnel & Finance Committee November 12, 2013 Jackson County, MI*, YouTube (Dec. 19, 2013), http://tinyurl.com/2013nov12 (37:47–38:16). Second, Commissioners attempted to silence Bormuth and insulted him for criticizing their prayer practice. For example, when Bormuth voiced his concern about the prayer practice at a meeting, a Commissioner turned his chair around, refusing to listen to him. R. 10 (Am. Compl. at ¶ 31) (Page ID #69). One Commissioner said that Bormuth was "attacking . . . my Lord and savior Jesus Christ." R. 14 (Pl. First Mot. for Summ. J., Ex. C) (Page ID #149). Separately, a Commissioner referred to Bormuth as "a nitwit." County of Jackson, *Personnel & Finance Committee November 12, 2013 Jackson County, MI*, YouTube (Dec. 19, 2013), http://tinyurl.com/2013nov12 (32:50–32:59, 43:00–43:18, 43:22–43:41).

These facts show how far Jackson County's practice strays from the historically tolerated tradition of legislative prayer. In *Town of Greece*, the Supreme Court made clear that its decision about the Town of Greece's prayer practice did not absolve courts of the duty to evaluate the constitutionality of factually distinguishable prayer practices. Instead, it said that "[c]ourts remain free to review the pattern of prayers over time to determine whether they comport with the tradition of solemn, respectful prayer approved in *Marsh*, or whether coercion is a real and substantial likelihood." *Town of Greece*, 134 S. Ct. at 1826–27. "If circumstances arise in which the pattern and practice of ceremonial, legislative prayer is alleged to be a means to coerce or intimidate others, the objection can be addressed in the regular course." *Id.* at 1826; *see also Marsh*, 463 U.S. at 795. Jackson County's prayer practice gives rise to precisely those circumstances, but the majority neglects to address them.

In the closing paragraph of his concurrence in *Town of Greece*, Justice Alito explains the limits of Town of Greece's holding. *Town of Greece*, 134 S. Ct. at 1834 (Alito, J., concurring). Justice Alito underscores the contrast between such obviously unconstitutional scenarios as "a litigant awaiting trial who is asked by the presiding judge to rise for a Christian prayer, of an

official at a polling place who conveys the expectation that citizens wishing to vote make the sign of the cross before casting their ballots," and the scenario presented in *Town of Greece*. *Id.* In *Town of Greece*, the prayers were not invariably Christian, the town made clear that it would allow any interested resident to offer an invocation, and government officials themselves did not say the prayers or direct the public to participate in prayers. *Id.* at 1829.

In the case before us today, the majority is dangerously close to permitting exactly what Justice Alito said *Town of Greece* obviously does not permit—government officials instructing citizens to participate in sectarian prayer before commencing government proceedings. There is no daylight between polling place workers asking individuals to pray before casting their ballots, as in Justice Alito's example, and county commissioners asking individuals to pray before participating in local government meetings, as actually happens in Jackson County. This similarity underscores why a tradition that protects the Town of Greece's right to open its meetings with solemn and respectful prayers, which was targeted at legislators and offered by clergy or volunteers from a variety of faith traditions, does not protect Jackson County's policy to restrict its legislative prayer practice to government officials themselves asking the public to participate in exclusively Christian prayer. And certainly, a tradition of solemn and respectful prayers does not protect Jackson County's engaging in a legislative prayer practice that entails Commissioners turning their chairs when a citizen attempts to voice his objection to the prayer practice, publicly deriding a citizen because he speaks out against the prayer practice, and denying committee positions to a citizen because he will not participate in the prayer practice. For these reasons, I respectfully dissent.

DISSENT

HELENE N. WHITE, Circuit Judge, dissenting. I join in the conclusion of a majority of the judges on this panel that Justice Kennedy's opinion in *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811 (2014) controls our analysis, not Justice Thomas's.

I agree with the dissenting judges that we may properly consider the videos of the Jackson County Board of Commissioners meetings, and that Bormuth should have been permitted to take the discovery he requested and to supplement the record. I also agree that the district court erred in granting summary judgment in favor of Jackson County. I do not agree that Bormuth is entitled to summary judgment. Rather, I would remand.

As all agree, legislator-led prayer is constitutional if it fits within the historical tradition of legislative prayer identified by the Supreme Court. *See Town of Greece*, 134 S. Ct. at 1819-20. Prayer practices within that tradition have an appropriate purpose; they seek to "elevate the purpose of the occasion and to unite lawmakers in their common effort," rather than "denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion." *Id.* at 1823. Similarly, our nation's historical tradition does not include prayer practices that are coercive; legislators may not "single[] out dissidents for opprobrium," "allocate[] benefits and burdens based on participation in the prayer," treat citizens "differently depending on whether they joined the invocation," or "signal disfavor toward nonparticipants or suggest that their stature in the community was in any way diminished." *Id.* at 1826. The majority pays lip service to these principles by largely considering the prayer practice in a vacuum, and drawing the most benign inferences from the facts it actually confronts. In contrast, the dissent examines and analyzes the practice with all its blemishes, as the Court has directed.

Although I would not find any one factor controlling, the factors discussed in the dissenting opinion are important to the requisite "fact-sensitive" inquiry whether the prayer practice is coercive. *Town of Greece*, 134 S. Ct. at 1825. And, on the record before us, these factors strongly support the conclusions that the prayer practice is a far cry from the practice

found constitutional in *Town of Greece*, and that the practice is, and indeed is intended to be, coercive.

Although Jackson County is clearly not entitled to summary judgment, I would not grant summary judgment to Bormuth, either. Because the district court did not consider most of the evidence discussed by the dissent and misunderstood its relevance, it did not consider Jackson County's response to the evidence. Further, although Jackson County has admitted the authenticity of the videos, it challenges the factual inferences drawn by the dissent and should be permitted to support alternative inferences with evidence. For these reasons, I conclude that if the court were to reverse the grant of summary judgment in favor of Jackson County, the proper disposition would be to remand for further proceedings,[1] not for entry of judgment in favor of Bormuth. Of course, none of this matters given the majority's affirmance.

[1]In *Town of Greece*, the Supreme Court had the benefit of a fully developed record, which included affidavits and deposition testimony from several town officials. *See Galloway v. Town of Greece*, 732 F. Supp. 2d 195, 201 (W.D.N.Y. 2010) (subsequent history omitted).

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 17a0047p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PETER CARL BORMUTH,

Plaintiff-Appellant,

v.

COUNTY OF JACKSON,

Defendant-Appellee.

No. 15-1869

Decided and Filed: February 27, 2017

Before: COLE, Chief Judge; BOGGS, BATCHELDER, MOORE, CLAY, GIBBONS, ROGERS, SUTTON, COOK McKEAGUE, GRIFFIN, KETHLEDGE, WHITE, STRANCH, and DONALD, Circuit Judges.

ORDER

A member of the en banc court sua sponte requested a poll in this case pursuant to 6 Cir. I.O.P. 35(e). A majority of the Judges of this Court in regular active service has voted for rehearing en banc of this case. Sixth Circuit Rule 35(b) provides as follows:

> The effect of the granting of a hearing en banc shall be to vacate the previous opinion and judgment of this court, to stay the mandate and to restore the case on the docket sheet as a pending appeal.

Accordingly, it is ORDERED, that the previous decision and judgment of this court are vacated, the mandate is stayed, and this case is restored to the docket as a pending appeal.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Appendix B

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 17a0036p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PETER CARL BORMUTH,

Plaintiff-Appellant,

v.

COUNTY OF JACKSON,

Defendant-Appellee.

No. 15-1869

Appeal from the United States District Court for
the Eastern District of Michigan at Detroit.
No. 2:13-cv-13726—Marianne O. Battani, District Judge.

Argued: April 19, 2016

Decided and Filed: February 15, 2017

Before: MOORE, GRIFFIN, and STRANCH, Circuit Judges.

COUNSEL

ARGUED: Gregory M. Lipper, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, Washington, D.C., for Amicus Curiae. Richard D. McNulty, COHL, STOKER & TOSKEY, P.C., Lansing, Michigan, for Appellee. Peter Bormuth, Jackson, Michigan, pro se. **ON BRIEF:** Gregory M. Lipper, Richard B. Katskee, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, Washington, D.C., for Amicus Curiae. Richard D. McNulty, COHL, STOKER & TOSKEY, P.C., Lansing, Michigan, for Appellee. Peter Bormuth, Jackson, Michigan, pro se.

MOORE, J., delivered the opinion of the court in which STRANCH, J., joined. GRIFFIN, J. (pp. 34–64), delivered a separate dissenting opinion.

Appendix C

OPINION

KAREN NELSON MOORE, Circuit Judge. The Board of Commissioners in Jackson County, Michigan begins its monthly meetings with a prayer. Peter Bormuth, a resident of Jackson County, filed suit against the County asserting that this prayer practice violates the First Amendment's Establishment Clause. The district court granted the County's motion for summary judgment and denied Bormuth's motion for summary judgment, and Bormuth now appeals. We hold that the district court erred in rejecting Bormuth's argument that the prayer practice coerced residents to support and participate in the exercise of religion. Accordingly, we **REVERSE** the district court's grant of summary judgment to the County and **REMAND** for entry of summary judgment in Bormuth's favor and for further proceedings consistent with this opinion.

I. BACKGROUND

The facts in this case are not in dispute. The Jackson County Board of Commissioners has nine members, including a Chairman, who are elected by the people of Jackson County. In addition to overseeing other Jackson County bodies, the Board of Commissioners holds monthly meetings to address matters of local concern. Each meeting begins with a call to order, after which the Chairman directs those in attendance to "rise" and "assume a reverent position." R. 10 (Am. Compl. ¶¶ 17, 19) (Page ID #64–65). Then one of the Commissioners—all of whom are Christian—delivers a prayer. *Id.* ¶¶ 19–23 (Page ID #64–66). Immediately after the prayer, the Board of Commissioners invites residents, often children, to lead attendees in the Pledge of Allegiance. *Id.* ¶ 17 (Page ID #64). The Board of Commissioners' meetings are open to the public and, for citizens who are unable to attend, are videotaped and posted on Jackson County's website. *Id.* ¶ 16 (Page ID #64).

Bormuth is a self-described Pagan and Animist. *Id.* ¶ 13 (Page ID #63). He believes in the "attribution of conscious life to objects in and phenomena of nature" and the "existence of spirits separable from bodies." *Id.* (emphasis removed) (internal quotation marks omitted).

Bormuth worships the Sun and the Moon, as well as ancestral spirits, but his "primary deity is the Mother Earth." *Id.* He has written essays, poetry, and music on the subject. *Id.* Deeply concerned with environmental issues, Bormuth started attending the Board of Commissioners' monthly meetings because he believed that the County was releasing pollutants into a local river. *Id.*

In July 2013, Bormuth attended the Board of Commissioners' meeting to speak about closing the Jackson County Resource Recovery Facility, the mass-burn waste combustor that he believed was polluting the local river. *Id.* ¶ 25 (Page ID #66–67). At the meeting, after the Chairman said "all rise," one of the Commissioners gave the following prayer:

> Bow your heads with me please. Heavenly father we thank you for this day and for this time that we have come together. Lord we ask that you would be with us while we conduct the business of Jackson County. Lord help us to make good decisions that will be best for generations to come. We ask that you would bless our troops that protect us near and far, be with them and their families. Now Lord we wanna [sic] give you all the thanks and all the praise for all that you do. Lord I wanna [sic] remember bereaved families tonight too, that you would be with them and take them through difficult times. We ask these things in your son Jesus's name. Amen.

Id. ¶ 23 (Page ID #65–66). As a Pagan and an Animist, Bormuth was uncomfortable with the Commissioner's prayer. *Id.* ¶ 24 (Page ID #66). He felt like he was being forced to participate in a religion to which he did not subscribe in order to bring a matter of concern to his local government. *Id.*

Bormuth attended the Board of Commissioners' August 2013 meeting as well. *Id.* ¶ 28 (Page ID #68). A Commissioner opened the meeting with the following prayer:

> Please rise. Please bow our heads. Our heavenly father we thank you for allowing us to gather here in your presence tonight. We ask that you watch over us and keep your guiding hand on our shoulder as we deliberate tonight. Please protect and watch over the men and women serving this great nation, whether at home or abroad, as well as our police officers and firefighters. In this we pray, in Jesus name, Amen.

Id. During the prayer, Bormuth was the only one in attendance who did not rise and bow his head. *Id.* ¶ 29 (Page ID #68). Bormuth felt isolated, and he worried that the Board of Commissioners would hold against him his decision to stay seated. *Id.*

On the agenda for the August 2013 meeting was whether Jackson County employees with concealed-weapons permits could carry handguns at work. *Id.* ¶ 30 (Page ID #68–69). Following a discussion of Second Amendment rights, the Board of Commissioners voted in favor of the County employees who wished to carry handguns at work. *See id.* During the public-comment period, Bormuth stood and addressed the Board of Commissioners, calling attention to what he believed was an equally important constitutional issue: First Amendment rights. *Id.* ¶ 31 (Page ID #69). Bormuth told the Commissioners that he thought that the monthly prayers violated the Establishment Clause and criticized the Commissioners for selectively following the Bill of Rights. *Id.* While Bormuth was speaking, one of the Commissioners "made faces expressing his disgust" and then turned his chair around, refusing to look at Bormuth while he spoke. *Id.* The Commissioner's reaction "confirm[ed] [Bormuth's] fear[]" that his refusal to join the prayers would prejudice the Board of Commissioners against him. *Id.* Bormuth filed suit against the County ten days later, alleging that the prayer practice violated the Establishment Clause. R. 1 (Compl.) (Page ID #1).

While Bormuth's suit was pending before the district court, the Board of Commissioners nominated residents to the County's new Solid Waste Planning Committee. R. 10 (Am. Compl. ¶ 33) (Page ID #69). Although Bormuth had applied to serve on the Solid Waste Planning Committee, and had three years of experience working on related issues, the Board of Commissioners did not nominate him. *Id.* Bormuth surmised that this had something to do with his suit against the County. Indeed, an article published shortly after Bormuth filed his federal complaint revealed the Commissioners' disapproval of the suit, quoting one Commissioner as saying, "Bormuth 'is attacking us and, from my perspective, my Lord and savior Jesus Christ,'" and another Commissioner as remarking, "All this political correctness, after a while I get sick of it." R. 14 (Pl. First Mot. for Summ. J., Ex. C) (Page ID #149). Bormuth filed an amended complaint addressing the Board of Commissioners' decision not to nominate him to the Solid Waste Planning Committee. R. 10 (Am. Compl. ¶ 33) (Page ID #69). He again alleged that the

County was violating the Establishment Clause and asked for declaratory and injunctive relief as well as nominal damages. *Id.* ¶¶ 37, 44–50 (Page ID #70–71, 83–84).

Bormuth moved for summary judgment a month later. R. 14 (Pl. First Mot. for Summ. J.) (Page ID #107). In response, the County asked the district court to hold the case in abeyance pending the Supreme Court's decision in *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014). R. 16 (Def. Resp. to Pl. First Mot. for Summ. J. at 18) (Page ID #173). The district court did not hold the case in abeyance, but it did not rule on the motion for summary judgment either, and in May 2014 the Supreme Court issued its decision in *Town of Greece*. The County filed a motion for summary judgment in light of the Court's opinion. R. 25 (Def. Mot. for Summ. J.) (Page ID #244). The district court terminated Bormuth's first motion for summary judgment and invited him to file a second motion for summary judgment addressing *Town of Greece*, which he did. R. 32 (Order Terminating Mot. at 1–2) (Page ID #430–31); R. 37 (Pl. Second Mot. for Summ. J.) (Page ID #509).

While the parties were briefing their motions for summary judgment, they were also embroiled in two discovery disputes. The first dispute involved Bormuth's efforts to take depositions. Bormuth sent the County notices of his intent to depose the Commissioners, R. 24-2 (Notices of Deps.) (Page ID #226), in order to obtain "information relating to [Bormuth's] activities regarding the Jackson County Resource Recovery Facility," as well as information on the Board of Commissioners' practice of opening meetings with prayer and on its use of children to lead the Pledge of Allegiance following the prayer, R. 24-3 (Pl. Corrected Rule 26(a)(1) Disclosures at 1) (Page ID #236). The County filed a motion to quash, arguing that it had already provided Bormuth with all the information that it had on its practice of opening meetings with prayer and on its use of children to lead the Pledge of Allegiance, and that any information it had on Bormuth's activities regarding the Jackson County Resource Recovery Facility was immaterial. R. 24 (Mot. to Quash at 3–7) (Page ID #213–17). In response, Bormuth stated that he also wanted to uncover the Commissioners' motives in delivering the prayers. R. 26 (Resp. to Mot. to Quash at 7) (Page ID #296). The County replied that the Commissioners' motives were also immaterial. R. 28 (Reply re: Mot. to Quash at 1) (Page ID #306).

The second dispute involved Bormuth's efforts to supplement the record. Bormuth sought to supplement the record with the text of a Commissioner's October 2014 prayer, R. 42 (Pl. First Mot. to Suppl. Record at 1) (Page ID #790), and with a letter he received from the Board of Commissioners denying him appointment to the Board of Public Works, R. 52 (Pl. Second Mot. to Suppl. Record at 1) (Page ID #932). The County objected to the first motion to supplement the record because the October 2014 prayer was similar to the prayers that Bormuth had included in his amended complaint. R. 43 (Resp. to Pl. First Mot. to Suppl. Record at 1–2) (Page ID #801–02). The County did not respond to the second motion to supplement the record, which was filed just days before the Magistrate Judge issued a Report and Recommendation.

The Magistrate Judge considered the County's motion to quash depositions first. Although not persuaded by the County's arguments that the information Bormuth sought was immaterial, the Magistrate Judge granted the motion "because both sides ha[d] fully briefed their respective summary judgment motions and responses, and plaintiff ha[d] not indicated the need for any additional discovery." R. 46 (Order Granting Mot. to Quash at 6) (Page ID #820). The Magistrate Judge addressed the parties' motions for summary judgment in another order, recommending that the district court deny the County's motion for summary judgment, grant Bormuth's motion for summary judgment because "the legislative prayer practice of the Jackson County Board of Commissioners violates the Establishment Clause," and enjoin the Board of Commissioners from "utilizing its current prayer practice." R. 50 (R. & R. at 39) (Page ID #914). Finally, the Magistrate Judge denied without prejudice Bormuth's motions to supplement the record because the Magistrate Judge had already recommended that the district court grant summary judgment in Bormuth's favor. R. 54 (Order Denying Mots. to Suppl. Record at 1) (Page ID #998).

The district court rejected the Magistrate Judge's recommendations. Beginning with the motion to quash depositions, the district court agreed with the County that the information Bormuth sought in deposing the Commissioners—"information relating to [Bormuth's] activities regarding the Jackson County Resource Recovery Facility," R. 24-3 (Pl. Corrected Rule 26(a)(1) Disclosures at 1) (Page ID #236)—was not germane to the dispute, R. 59 (Dist. Ct. Order Granting Mot. to Quash at 2–3) (Page ID #1045–46). Confusing the Jackson County Resource

Recovery Facility with the Solid Waste Planning Committee (or possibly with the Board of Public Works), the district court explained that because Bormuth "ha[d] not brought an employment discrimination claim," "information regarding the Jackson County Resource Recovery Facility's failure to hire him . . . is not relevant." *Id.* The district court further stated that although Bormuth also sought information on the Commissioners' motives in giving the prayers, "motive is not a relevant factor." *Id.* at 3 (Page ID #1046). The district court then granted Bormuth's first motion to supplement the record with the Commissioner's October 2014 prayer but denied Bormuth's second motion to supplement the record with the letter that he received from the Board of Commissioners denying him appointment to the Board of Public Works. R. 60 (Dist. Ct. Order Re: Mots. to Suppl. Record at 2–3) (Page ID #1048–49). Conflating Bormuth's second motion to supplement the record with his efforts to depose the Commissioners, the district court described the second motion to supplement the record as seeking to introduce "[Bormuth's] application to a position on the Jackson County Resource Recovery Facility," concluding that, "[b]ecause [Bormuth's] complaint makes no employment discrimination claim, instead advancing as the sole cause of action an Establishment Clause violation, his affidavit describing the Board's failure to hire him is irrelevant." *Id.* at 3 (Page ID #1049) (emphasis removed).

The district court then turned to the merits of Bormuth's Establishment Clause claim. The district court considered the content of the Board of Commissioners' prayers first, and concluded that, although the prayers were "exclusively Christian," they were composed of only "benign religious references"—making Bormuth's reaction to them "hypersensitive." R. 61 (Dist. Ct. Op. at 7–8) (Page ID #1057–58). "The fact that all nine of the Commissioners are Christian," the district court stated, "is immaterial, [because] [a]s elected officials, they were chosen as representatives whose interests were most closely aligned with the public's, and their personal beliefs are therefore a reflection of the community's own overwhelmingly Christian demographic." *Id.* at 7 (Page ID #1057). Turning to whether the Board of Commissioners' practice was coercive, the district court noted that Bormuth could have left the room during the prayers, and that nothing in the record indicated that his absence would have been perceived as disrespectful. *Id.* at 12–13 (Page ID #1062–63). Accordingly, the district court held that "Bormuth's subjective sense of affront resulting from exposure to sectarian prayer is insufficient

to sustain an Establishment Clause violation." *Id.* at 13 (Page ID #1063) (emphasis removed). Although the district court acknowledged that some citizens may not perceive statements such as "rise" and "assume a reverent position," *see, e.g.*, R. 10 (Am. Compl. ¶ 19) (Page ID #64–65), as the mere "voluntary invitations" that the district court believed they were, the district court did not discuss the point further, R. 61 (Dist. Ct. Op. at 13–14) (Page ID #1063–64). As for the Commissioners' treatment of Bormuth, the district court stated that, though "evidence of disrespect," the Commissioners' treatment by turning their backs to him "does not demonstrate that the Board was prejudiced against him because he declined to participate in the prayer—rather, their behavior is likely an unfortunate expression of their own personal sense of affront elicited by his sentiments." *Id.* at 15 (Page ID #1065).

Bormuth timely appeals the district court's order granting the motion to quash, its order denying the second motion to supplement the record, and its order granting the County's motion for summary judgment and denying Bormuth's motion for summary judgment. R. 65 (Notice of Appeal) (Page ID #1072).

II. ANALYSIS

A. Whether the District Court Abused its Discretion by Granting the Motion to Quash and Denying the Motion to Supplement the Record

This court reviews for an abuse of discretion both a district court's ruling on a motion to quash and its ruling on a motion to supplement the record. *Guy v. Lexington-Fayette Urban Cty. Gov't*, 624 F. App'x 922, 928 (6th Cir. 2015) (motion to quash); *see Duha v. Agrium, Inc.*, 448 F.3d 867, 882 (6th Cir. 2006) (motion to supplement the record). "An abuse of discretion occurs if the district court relies on clearly erroneous findings of fact, applies the wrong legal standard, misapplies the correct legal standard when reaching a conclusion, or makes a clear error of judgment." *Louzon v. Ford Motor Co.*, 718 F.3d 556, 560 (6th Cir. 2013) (internal quotation marks omitted).

In granting the County's motion to quash the depositions of the Commissioners, the district court concluded that, because Bormuth "ha[d] not brought an employment discrimination claim," "information regarding the Jackson County Resource Recovery Facility's failure to hire

him . . . is not relevant." R. 59 (Dist. Ct. Order Granting Mot. to Quash at 2–3) (Page ID #1045–46). This was a misapprehension of the facts. Bormuth had not sought information regarding the Jackson County Resource Recovery Facility's failure to hire him. He had sought information about his efforts to close it: the Jackson County Resource Recovery Facility was the mass-burn waste combustor that Bormuth believed was polluting the local river. R. 24-3 (Pl. Corrected Rule 26(a)(1) Disclosures at 1) (Page ID #236). The district court also concluded that, to the extent Bormuth sought information on the Commissioners' motives in giving the prayers, "motive is not a relevant factor." R. 59 (Dist. Ct. Order Granting Mot. to Quash at 3) (Page ID #1046). This was a misapplication of the law. The Commissioners' purpose in delivering the prayers is highly relevant, because legislative prayer that is intended to proselytize may violate the Establishment Clause by coercing citizens to support and participate in the exercise of religion. *Town of Greece*, 134 S. Ct. at 1825–26 (controlling opinion). The district court's order, therefore, was an abuse of discretion.

In denying Bormuth's second motion to supplement the record—which asked the district court to consider the letter that Bormuth received from the Board of Commissioners denying him appointment to the Board of Public Works—the district court also misapprehended the facts and misapplied the law. The district court characterized Bormuth's second motion to supplement the record as seeking to introduce "his application to a position on the Jackson County Resource Recovery Facility." R. 60 (Dist. Ct. Order Re: Mots. to Suppl. Record at 3) (Page ID #1049). But as explained above, Bormuth never applied for a position at the Jackson County Resource Recovery Facility; he attempted to close it. His second motion to supplement the record concerned his application to the Board of Public Works. R. 52 (Pl. Second Mot. to Suppl. Record at 1) (Page ID #932). The district court then concluded that "[b]ecause [Bormuth's] complaint makes no employment discrimination claim, instead advancing as the sole cause of action an Establishment Clause violation, [the letter and] affidavit describing the Board's failure to hire him [are] irrelevant." R. 60 (Dist. Ct. Order Re: Mots. to Suppl. Record at 3) (Page ID #1049) (emphasis removed). But the letter and affidavit are relevant—they speak to whether the Board of Commissioners is allocating benefits and burdens based on citizens' participation in the prayers, which is a critical part of the analysis of legislative-prayer claims. *See Town of Greece*, 134 S. Ct. at 1826 (controlling opinion). Accordingly, the district court's order denying the

motion to supplement the record was also an abuse of discretion. However, because we find that Bormuth is entitled to summary judgment as a matter of law on the record that was before the district court, both of the district court's errors are harmless.

B. Whether the Board of Commissioners' Practice Violates the Establishment Clause

1. Framework

Before considering the merits of Bormuth's arguments, we must first set forth the framework within which to analyze his claim. Unfortunately, our sources are limited. There are only two Supreme Court cases that have considered the constitutionality of legislative prayer—*Marsh v. Chambers* and *Town of Greece*—and neither one provides much instruction beyond establishing that legislative-prayer claims occupy a unique place in First Amendment jurisprudence.

Marsh, the first Supreme Court case to consider a legislative-prayer claim, bypassed the Court's previously constructed tests for Establishment Clause violations, reasoning that because "the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom," from "colonial times through the founding of the Republic and ever since," those tests did not apply. 463 U.S. 783, 786 (1983). The Court held that a new formal test was unnecessary. As the Court explained, "[t]o invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Id.* at 792. Although the Court still asked whether any features of the practice before it violated the Establishment Clause, it evaluated the parties' arguments "against the historical background" of legislative prayer. *Id.* at 792–93.

Town of Greece confirmed that "*Marsh* stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted." 134 S. Ct. at 1819. However, *Town of Greece* cautioned that "*Marsh* must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation." *Id.* "The case teaches instead that the Establishment Clause must be interpreted by reference to historical practices and understandings." *Id.* (internal

quotation marks omitted). Following the framework set forth in *Marsh*, the Court in *Town of Greece* considered whether the legislative prayer before it "fit[] within the tradition long followed in Congress and the state legislatures." *Id.* Examining the prayer "against the backdrop of historical practice," *Town of Greece* asked whether the prayer violated the Establishment Clause by either being sectarian, *id.* at 1820, or coercive, *id.* at 1825 (controlling opinion). The Court found that while sectarian prayers would not necessarily violate the Establishment Clause, coercive prayer practices would. *Id.* at 1821, 1825.

Thus, we must determine whether the Board of Commissioners' practice is similar to the practices upheld in *Marsh* and *Town of Greece* or if there are critical differences that bring the Board of Commissioners' practice outside the ambit of historically tolerated legislative prayer. Legislative prayer may fall outside the bounds of the Establishment Clause if it strays too far from its traditional purpose and effect—respectful solemnification—or if it is unconstitutionally coercive. *Id.* at 1827 (courts should determine whether legislative prayers "comport with the tradition of solemn, respectful prayer approved in *Marsh*, or whether coercion is a real and substantial likelihood"). *Town of Greece* provided several indicators of how a legislative prayer practice might stray from this traditional purpose, including patterns of proselytization, denigration, discrimination, or censorship of religious speech. *Id.* at 1821–24. Alternatively, a legislative prayer practice might be unconstitutionally coercived "if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity." *Id.* at 1826.

2. A Closer Look at *Marsh* and *Town of Greece*

Because we must compare the Board of Commissioners' practice to the practices upheld in *Marsh* and *Town of Greece* in order to determine whether the Board of Commissioners' practice also falls within the tradition of legislative prayer, a closer look at both cases is necessary.

a. *Marsh*

Marsh concerned the Nebraska Legislature's practice of opening its sessions with a prayer delivered by a chaplain. 463 U.S. at 784. Although the Nebraska Legislature could choose a new chaplain biennially, the same chaplain, a Presbyterian minister, had been giving the prayers for sixteen years. *Id.* at 784–85. He was also paid with public funds. *Id.* The Supreme Court's opinion provided little additional detail on the Nebraska Legislature's practice, instead observing that "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country." *Id.* at 786. Indeed, Nebraska had adopted the practice before it had even achieved statehood. *Id.* at 789–90. The Supreme Court concluded that the Nebraska practice fell within the scope of historically tolerated legislative prayer and that no features of the practice—including that the chaplain was paid with public funds—violated the Establishment Clause. *Id.* at 792–95.

b. *Town of Greece*

Town of Greece provides more points of comparison. In 1999, the Town of Greece started opening its monthly town board meetings with prayers delivered by local clergy. 134 S. Ct. at 1816. Unlike in *Marsh*, the clergy were volunteers whom the town typically contacted through their local congregations. *Id.* Although the town never "excluded or denied an opportunity to a would-be prayer giver," the town recruited exclusively Christian clergy for eight years. *Id.* Susan Galloway and Linda Stephens, residents of the Town of Greece, attended the monthly board meetings and objected to the prayers' Christian content. *Id.* at 1817. In response, the town invited a Jewish layman and the chairman of the local Baha'i temple to offer invocations. *Id.* The town also accepted a request to deliver a prayer from a Wiccan priestess, who had read about the controversy in the news. *Id.*

Galloway and Stephens filed a complaint alleging that the town's practice violated the Establishment Clause "by preferring Christians over other prayer givers and by sponsoring sectarian prayers, such as those given 'in Jesus' name.'" *Id.* (quoting *Galloway v. Town of Greece*, 732 F. Supp. 2d 195, 203 (W.D.N.Y. 2010)). They did not, however, seek to enjoin the town's practice in its entirety, "but rather requested an injunction that would limit the town to

'inclusive and ecumenical' prayers that referred only to a 'generic God' and would not associate the government with any one faith or belief." *Id.* (quoting *Galloway*, 732 F. Supp. 2d at 210, 241). Galloway and Stephens believed "that the setting and conduct of the town board meetings create[d] social pressures that force[d] nonadherents to remain in the room or even feign participation in order to avoid offending the representatives who sponsor[ed] the prayer and . . . vote[d] on matters citizens [brought] before the board." *Id.* at 1820. They further argued that "[t]he sectarian content of the prayers compound[ed] the subtle coercive pressures . . . because the nonbeliever who might tolerate ecumenical prayer [was] forced to do the same for prayer that might be inimical to his or her beliefs." *Id.* The district court found no Establishment Clause violation, *Galloway*, 732 F. Supp. 2d at 243, and the Second Circuit reversed, *Galloway v. Town of Greece*, 681 F.3d 20, 34 (2d Cir. 2012).

The Supreme Court reversed the Second Circuit in an opinion written by Justice Kennedy. The first half of Justice Kennedy's opinion, which garnered a majority of the Court, held that Galloway and Stephens's insistence on inclusive and ecumenical prayer was inconsistent with *Marsh*. *Town of Greece*, 134 S. Ct. at 1820–24. The Court explained that *Marsh* had held that the use of prayer to open legislative sessions was constitutional not because the prayer was nonsectarian, but because "prayer in this limited context could 'coexist with the principles of disestablishment and religious freedom.'"[1] *Id.* at 1820 (alteration omitted) (quoting *Marsh*, 463 U.S. at 786). Indeed, the Court noted that the prayers given by one of the Senate's first chaplains were sectarian and warned that "[t]he decidedly Christian nature of these prayers must not be dismissed as the relic of a time when our Nation was less pluralistic than it is today." *Id.*

The Court also expressed concern that Galloway and Stephens's proposed cure would be worse than the disease:

> To hold that invocations must be nonsectarian would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech, a rule that would involve government in religious matters to a far greater degree than is the case under the town's

[1]The Court also repudiated dicta in *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter* characterizing *Marsh* as proscribing sectarian prayer. *Town of Greece*, 134 S. Ct. at 1821–22.

> current practice of neither editing or approving prayers in advance nor criticizing their content after the fact.

Id. at 1822. The Court was quick to note, however, that there were still constraints on the content of legislative prayer. *Id.* at 1823. These constraints came from the prayer's purpose, which is to solemnize the legislative session. *Id.* If the prayer's content strayed from this purpose, the prayer would no longer be consistent with the First Amendment. But "[a]bsent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a prayer [would] not likely establish a constitutional violation."[2] *Id.* at 1824.

The second half of Justice Kennedy's opinion, which was joined by only two other Justices, considered Galloway and Stephens's argument that the town's practice was coercive—specifically, that it pressured members of the public to participate in the prayers in order to appease town board members. *Id.* at 1824–28 (controlling opinion). Justice Kennedy's opinion agreed that this kind of pressure was problematic, stating that "[i]t is an elemental First Amendment principle that government may not coerce its citizens 'to support or participate in any religion or its exercise." *Id.* at 1825 (quoting *Cty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 659 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part)). However, the opinion stated that there was no evidence of coercion in the record. The opinion explained that the inquiry into whether the government has engaged in such coercion is "a fact-sensitive one that considers both the setting in which the prayer arises and the audience to whom it is directed." *Id.* By "offering a brief, solemn, and respectful prayer to open its monthly meetings," the Town of Greece had not "compelled its citizens to engage in a religious observance." *Id.* "[L]egislative prayer," the opinion explained, "has become part of our heritage and tradition," and "[i]t is presumed that the reasonable observer is acquainted with this tradition and understands that its purposes are to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens, not to afford government an opportunity to proselytize." *Id.* The opinion determined that there was nothing

[2]Because this is one of the Court's more concrete statements, it is tempting to turn it into a test and apply it to the County's prayer practice, as the County endeavors to do in its brief. *See* Appellee Br. at 23, 25. The Court's statement, however, must be viewed through the lens of Galloway and Stephens's insistence that legislative prayers be ecumenical. In other words, the statement is limited to challenges based on content alone.

in the record about the setting of the prayer that undermined this presumption. *Id.* As for the principal audience to whom the prayer was directed, the opinion explained that it is presumed that the principal audience is the lawmakers themselves, because legislative prayer is "an internal act" in which government officials invoke the divine for their own benefit rather than to promote religion to the public. *Id.* (quoting *Chambers v. Marsh*, 504 F. Supp. 585, 588 (D. Neb. 1980)). Again, the opinion determined that there was nothing in the record about the principal audience that undermined this presumption. *Id.* at 1825–26.

The opinion then observed, importantly for our purpose, that "[t]he analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity." *Id.* at 1826. The opinion further noted that "[n]othing in the record indicates that town leaders allocated benefits and burdens based on participation in the prayer, or that citizens were received differently depending on whether they joined the invocation or quietly declined," and finally, that "[i]n no instance did town leaders signal disfavor toward nonparticipants or suggest that their stature in the community was in any way diminished." *Id.*

Before we determine whether the Board of Commissioners' practice falls within the bounds of historically tolerated legislative prayer, we must take a short detour. As noted above, the Court in *Town of Greece* was divided: although four Justices signed on to the first half of Justice Kennedy's opinion, only two Justices signed on to the second half. Thus, while Justice Kennedy's analysis of the respondents' content-based argument garnered a majority of the Court, Justice Kennedy's analysis of the respondents' coercion argument did not. Complicating matters, Justice Thomas filed an opinion concurring in part and concurring in the judgment, which Justice Scalia joined, advancing a different theory as to the kind of coercion required to violate the First Amendment's Establishment Clause.

"When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)

(opinion of Stewart, Powell, and Stevens, JJ.)). Thus, we must determine whether Justice Kennedy's or Justice Thomas's conception of coercion constitutes the narrowest grounds.

Although the Supreme Court has applied the "narrowest grounds" rule a number of times, most extensively in *Marks v. United States* and *Gregg v. Georgia*, it has never actually defined the term. Accordingly, we undertook the task in *United States v. Cundiff*, which applied the "narrowest grounds" rule to *Rapanos v. United States*, 547 U.S. 715 (2006), in order to answer a jurisdictional question. *Cundiff*, 555 F.3d 200, 208–09 (6th Cir. 2009). After a detailed examination of *Marks* and *Gregg*, *Cundiff* held,

> As these cases indicate—and contrary to assertions by the Cundiffs and their *amici*—*Marks* does not imply that the "narrowest" *Rapanos* opinion is whichever one restricts jurisdiction the most. But it also makes little sense for the "narrowest" opinion to be the one that restricts jurisdiction the least, as the government's *amici* allege; the ability to glean what substantive value judgments are buried within concurring, plurality, and single-Justice opinions would require something like divination to be performed accurately. Instead, "narrowest" opinion refers to the one which relies on the "least" doctrinally "far-reaching-common ground" among the Justices in the majority: it is the concurring opinion that offers the least change to the law.

Id. at 209 (internal citation omitted). An examination of *Gregg* and *Marks* confirms our understanding of the rule.[3]

Gregg interpreted the Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), where a majority of the Court held that Georgia's death penalty was unconstitutional. *See Gregg*, 428 U.S. at 168–69. The *Furman* Court, however, could not agree on a rationale. The five Justices in the majority all filed separate concurring opinions: Justices Douglas, Stewart, and White concluded that the death penalty was unconstitutional as applied; Justices Brennan and Marshall concluded it was per se unconstitutional. *Gregg* held that "[s]ince five Justices wrote separately in support of the judgments in *Furman*, the holding of the Court may be

[3]In *Cundiff*, we acknowledged that the "narrowest grounds" rule is only "workable" where "one opinion can be meaningfully regarded as 'narrower' than another." *Cundiff*, 555 F.3d at 209 (quoting *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc)). Here, the rule can be applied without too much difficulty.

viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds—Mr. Justice Stewart and Mr. Justice White."[4] *Id.* at 169 n.15.

Marks interpreted *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), a similarly fractured opinion which reversed a state court's declaration that a book was obscene. *Marks*, 430 U.S. at 193. In order to determine which *Memoirs* opinion was based on the narrowest grounds, *Marks* broke *Memoirs* down into its constituent parts. *Id.* at 193–94. In *Memoirs*, Justice Brennan, joined by Chief Justice Warren and Justice Fortas, wrote the opinion reversing the state court, Justices Black and Stewart concurred in the reversal for reasons stated in prior dissenting opinions, and Justice Douglas wrote a separate opinion concurring in the judgment. *Marks* concluded that Justice Brennan's plurality opinion represented the narrowest grounds. *Id.* Before *Memoirs*, the controlling opinion on obscenity defined "obscene material" as "material which deals with sex in a manner appealing to prurient interest." *Roth v. United States*, 354 U.S. 476, 487 (1957). Justice Brennan's plurality opinion set forth a three-part test which incorporated this definition of obscenity. *Marks*, 430 U.S. at 193–94. The other Justices concurred based on their belief either that only hard-core pornography can be suppressed, or that the First Amendment provides an absolute shield against restrictions of obscene material. *Id.* Justice Brennan's plurality opinion, therefore, "offer[ed] the least change to the law." *Cundiff*, 555 F.3d at 209.

Reading *Marks* and *Gregg* with *Cundiff*, we are left with one question: which analysis of coercion in *Town of Greece*—Justice Kennedy's or Justice Thomas's—"relies on the least doctrinally far-reaching-common ground among the Justices in the majority?" *Cundiff*, 555 F.3d at 209 (internal quotation marks omitted). The answer is Justice Kennedy's analysis. Although Justice Thomas's conception of coercion is more *restrictive*, Justice Kennedy's conception of coercion "offers the least change to the law." *Id.*

---

[4]Although Justice Douglas also concluded that the death penalty was unconstitutional as applied, he described the discretionary statutes at issue as "pregnant with discrimination." *Furman*, 408 U.S. at 256–57 (Douglas, J., concurring). Justice Stewart's discussion of race was more measured: "My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race. But racial discrimination has not been proved, and I put it to one side." *Id.* at 310 (Stewart, J., concurring) (footnotes omitted) (internal citations omitted). Justice White did not address race in his opinion. *Id.* at 310–14 (White, J., concurring).

As discussed above, Justice Kennedy's opinion in *Town of Greece* states that "[i]t is an elemental First Amendment principle that government may not coerce its citizens 'to support or participate in any religion or its exercise,'" a quote the opinion draws from *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*. *Town of Greece*, 134 S. Ct. at 1825 (controlling opinion) (quoting *Cty. of Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring in judgment in part and dissenting in part)). Justice Kennedy's opinion further supports this statement with a citation to the plurality opinion in *Van Orden v. Perry*, where the Supreme Court held that "institutions must not press religious observances upon their citizens." *Id.* (quoting *Van Orden*, 545 U.S. 677, 683 (2005)). After finding no coercion in the record, Justice Kennedy's opinion observes that "[t]he analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity." *Id.* at 1826. Thus, Justice Kennedy's opinion leaves the door open to coercion-based challenges to legislative prayer based on context and setting.

Justice Thomas's opinion concurring in part and concurring in the judgment states that "the municipal prayers at issue in this case bear no resemblance to the coercive state establishments that existed at the founding." *Id.* at 1837. Justice Thomas's opinion continues: "The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*." *Id.* (emphasis in original) (quoting *Lee v. Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting)). The remainder of Justice Thomas's opinion cites only Justice Thomas's previous concurrences from cases where there were controlling majority or plurality opinions. *Id.* at 1837–38. Whatever the merits of Justice Thomas's arguments, he does not cite any controlling law to support them. Indeed, in his opinion concurring in the judgment in *Elk Grove Unified School District v. Newdow*, Justice Thomas criticizes the Supreme Court's concern with "subtle coercive pressure" in the Establishment Clause context, acknowledging that the Court has not accepted his conception of the kind of coercion required to violate the Establishment Clause. 542 U.S. 1, 45–46 (2004) (Thomas, J., concurring in the judgment) (quoting *Lee*, 505 U.S. at 592).

Admittedly, the precise role of coercion in an Establishment Clause inquiry is unclear, especially within the context of legislative prayer. In that sense, both Justice Kennedy's and Justice Thomas's opinions involve at least some departure from the state of the law as it existed before *Town of Greece*. However, given that there is controlling precedent supporting Justice Kennedy's opinion and no controlling precedent supporting Justice Thomas's concurrence, Justice Thomas's concurrence is neither the "the least doctrinally far-reaching-common ground among the Justices in the majority," nor the "opinion that offers the least change to the law." *Cundiff*, 555 F.3d at 209 (internal quotation marks omitted). What is more, when viewed within the context of the majority's holding, Justice Kennedy's opinion clearly represents the narrowest grounds. The majority's holding was that there was no coercion. According to Justice Kennedy, this was because there was no coercion *in the record*. According to Justice Thomas, this was because there could *never* be coercion absent formal legal compulsion. Within the context of a ruling against the respondents, therefore, the narrower opinion is Justice Kennedy's, not Justice Thomas's. Accordingly, Justice Kennedy's conception of coercion is the holding of the Court under binding Sixth Circuit precedent.

3. Whether the Board of Commissioners' Practice Falls Within the Tradition of Legislative Prayer

We now turn to whether the Board of Commissioners' practice falls within the tradition of legislative prayer. It does not. A combination of factors distinguishes this case from the practice upheld in *Marsh* and *Town of Greece*, including one important factor: the identity of the prayer giver. In *Marsh*, the Nebraska legislature opened its session with a prayer offered by a chaplain, 463 U.S. at 784; in *Town of Greece*, invited clergy and laypersons delivered the invocations, 134 S. Ct. at 1816–17. Here, the Jackson County Commissioners give the prayers. *See* R. 10 (Am. Compl. ¶¶ 19–23) (Page ID #64–66). The difference is not superficial. 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 and the same. The prayers, in

Bormuth's words, are literally "governmental speech."[5] R. 29 (Pl. Resp. to Def. Mot. for Summ. J. at 1) (Page ID #318).

Legislator-led prayer at the local level falls far afield of the historical tradition upheld in *Marsh* and *Town of Greece*. The setting of the prayer practice by the Jackson County Board of Commissioners—a local governing body with constituent petitioners in the audience—amplifies the importance of the identity of the prayer giver in our analysis, and heightens the risks of coercion, as borne out by the facts in this case. *See infra* at 33–34 [¶¶ 68–69]; *see also Town of Greece*, 134 S. Ct. at 1826 (distinguishing solicitations to pray by guest ministers from those by town leaders, noting that "[t]he analysis would be different if town board members" themselves engaged in the same actions).

a. Whether the Board of Commissioners' Practice Strays from the Traditional Purpose and Effect of Legislative Prayer: Respectful Solemnification

The identity of the prayer giver distinguishes the Board of Commissioners' practice from the practices upheld in *Marsh* and *Town of Greece* and leads to other problems with the Board of Commissioners' practice. Because they are the ones delivering the prayers, the Commissioners—and only the Commissioners—are responsible for the prayers' content. *See id.* And because that content is exclusively Christian, by delivering the prayers, the Commissioners are effectively endorsing a specific religion.[6]

---

[5]The dissent says that it does not matter that the prayers are literally government speech because "[a] public official need not be the one giving a prayer in order for the Establishment Clause to apply." Dissent at 49. In support of that statement, the dissent cites *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009). *Pleasant Grove City* is about the Free Speech Clause, not the Establishment Clause; in fact, it specifically distinguishes the Establishment Clause. *See id.* at 467–68. More importantly, nothing in *Pleasant Grove City*, nor in any cases about the Establishment Clause, changes the fact that the identity of the prayer giver is a relevant consideration in the highly "fact-sensitive" Establishment Clause inquiry. *See Town of Greece*, 134 S. Ct. at 1825.

[6]The dissent argues that whether the Commissioners endorse a particular religion is irrelevant because the *Lemon* test does not apply to this case. Dissent at 47. While we agree that we do not need to apply the *Lemon* test in this case, we disagree that whether the Commissioners' prayer practice endorses one religion over others is entirely irrelevant. *Town of Greece* indicates that "*Marsh* must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation" and that "[i]f the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion, many present may consider the prayer to fall short of the desire to elevate the purpose of the occasion and to unite lawmakers in their common effort." 134 S. Ct. at 1819, 1823. Endorsing a specific religion can be part of a pattern of denigrating religious minorities or preaching conversion.

There are no opportunities for persons of other faiths to counteract this endorsement by offering invocations. In *Town of Greece*, the Supreme Court upheld the town's prayer practice in large part because it included prayers representing a variety of faiths. Although initially all of the prayer givers were Christian ministers, eventually the town invited a Jewish layman and the chairman of the local Baha'i temple to deliver invocations. *See Town of Greece*, 134 S. Ct. at 1817. When a Wiccan priestess asked for an opportunity to deliver the invocation, the town granted her request. *Id.* The Supreme Court emphasized that, "The town made reasonable efforts to identify all of the congregations located within its borders and represented that it would welcome a prayer by any minister or layman who wished to give one." *Town of Greece*, 134 S. Ct. at 1824; *see also id.* at 1829 (Alito, J., concurring) ("[T]he town made it clear that it would permit any interested residents, including nonbelievers, to provide an invocation, and the town has never refused a request to offer an invocation. . . . The most recent list in the record of persons available to provide an invocation includes representatives of many non-Christian faiths."). In Jackson County, there is no opportunity for members of other faiths to offer invocations. Instead, there are exclusively Christian prayer givers and a pattern of explicitly Christian prayers.

What is more, the prayer givers are exclusively Christian because of an intentional decision by the Board of Commissioners. Unlike in *Town of Greece*, where the Court found no evidence of sectarian motive in the selection of speakers, at least one Jackson County Commissioner admitted that, in order to control the prayers' content, he did not want to invite the public to give prayers. At a November 2013 meeting of the Personnel & Finance Committee, one of the Commissioners imagined what would happen if any Jackson County resident could lead the prayer:

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

County of Jackson, *Personnel & Finance Committee November 12, 2013 Jackson County, MI*, YouTube (Dec. 19, 2013), http://tinyurl.com/2013nov12 (37:47–38:01).[7] He continued:

> 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.

Id. at 38:02–38:16. These comments reveal that the Board of Commissioners' control over the content of the prayers is not just a function of the Commissioners' role as prayer givers—it is the result of an affirmative decision by the Commissioners to exclude *other* prayer givers.[8] The Board of Commissioners, in other words, is limiting who can give the prayers in order to control the prayers' content.[9] And the effect is preventing participation by religious minorities and

---

[7]This video, like the other videos we cite in our opinion, was part of the record before the district court. *See* R. 10 (Am. Compl. ¶ 16) (Page ID #64) (informing the district court that the County records the Board of Commissioners' meetings and posts the videos on the County's website); R. 29 (Pl. Resp. to Def. Mot. for Summ. J. at 11–16) (Page ID #328–33) (reciting what happened at several Board of Commissioners' meetings, videos of which the County posts online); R. 37-1 (Pl. Mot. for Summ. J., Ex. J) (Page ID #611–614 (including transcripts of three Board of Commissioners' meetings and stating that the County posts videos of Board of Commissioners' meetings online). Indeed, as counsel for the County stated at oral argument, the "official record" includes all of the videos of the Board of Commissioners' meetings. Despite the fact that Bormuth repeatedly references the videos and recites what happened at Board of Commissioners' meetings in his pleadings, the dissent contends that these videos are not part of the record. For that proposition, it cites *United States v. Crumpton*, 824 F.3d 593 (6th Cir. 2016). In *Crumpton*, the defendant "refer[red] to a video of the execution of the search warrant[.] . . . The video *was not made part of the district court's electronic record*, however, *nor was it forwarded to this court* for purposes of appeal. Because the video has not been made part of the record before us, *we cannot evaluate its effect* on the case." *Id.* at 614 n.6 (emphasis added). There is an obvious distinction between *Crumpton* and this case: In *Crumpton*, we determined that we could not evaluate the video's effect because we did not have access to the video. That determination is entirely distinct from the one we are making here, which is that the parties have made the videos, which we can access, part of the record by repeatedly referencing them in pleadings.

[8]The dissent cautions against "examining the minds of individual legislators as it relates to legislative intent" and advocates "heed[ing] the Supreme Court's admonition that '[i]nquiries into [legislative] motives or purposes are a hazardous matter.'" Dissent at 50. Presumably the dissent is not arguing that legislative purpose and motive are irrelevant. "Examination of purpose is a staple of statutory interpretation that makes up the daily fare of every appellate court in the country, and governmental purpose is a key element of a good deal of constitutional doctrine." *McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 861 (2005) (citation omitted). More likely, the dissent is arguing against relying too much on mere inferences about the motives of individual legislators. Here, we need not rely on inferences because there are clear statements expressing the desire to control the content of prayers. Moreover, *McCreary*, which the dissent relies on for support, indicates that "scrutinizing purpose does make practical sense, as in Establishment Clause analysis, where an understanding of official objective emerges from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts." 545 U.S. at 862. No psychoanalysis is necessary in this case because there are discoverable facts in the form of clear statements and actions that reveal the Commissioners' motives.

[9]The dissent argues that, "Noticeably absent from the majority's opinion is any acknowledgement that Jackson County's invocation practice is facially neutral regarding religion" even though "[n]either other

endorsing a specific religion. This brings the County's use of prayer to open its monthly meetings well outside the ambit of historically tolerated legislative prayer.

Amicus offers another way in which the Board of Commissioners' practice differs from previously upheld practices: its purpose is to promote religion to the public. The Supreme Court found that the prayers in *Town of Greece* were "intended to place town board members in a solemn and deliberative frame of mind," 134 S. Ct. at 1816, and that this was in line with historical practice, as the purpose of legislative prayer is to "accommodate the spiritual needs of lawmakers," *id.* at 1826 (controlling opinion). Amicus contends, however, that the Jackson County Commissioners cannot claim that their prayers are purely "an internal act." *Id.* at 1825 (quoting *Chambers*, 504 F. Supp. at 588). According to Amicus, "[t]he *only* meeting of the full Board of Commissioners during the past two years when no prayer was offered was the meeting that no members of the public attended." Amicus Br. at 12 (citing County of Jackson, *November 6, 2014 Special Jackson County Board of Commissioners Meeting Video*, YouTube (Nov. 7, 2014), http://tinyurl.com/2014nov6 (0:01–0:47)). Thus, although *Town of Greece* stated that prayer should not be used "to afford government an opportunity to proselytize or force truant constituents into the pews," 134 S. Ct. at 1825 (controlling opinion), Amicus insists that the County is doing exactly that: "when members of the public are present, it preaches to them and directs them to participate; when only the Commissioners are present, they omit the prayer entirely," Amicus Br. at 13.

Bormuth has waived this argument, and Amicus cannot make it for him. "While an amicus may offer assistance in resolving issues properly before a court, it may not raise additional issues or arguments not raised by the parties." *Self-Ins. Inst. of Am., Inc. v. Snyder*, 827 F.3d 549, 560 (6th Cir. 2016) (alteration omitted) (quoting *Cellnet Commc'ns, Inc. v. FCC*, 149 F.3d 429, 443 (6th Cir. 1998)), *cert. denied*, --- U.S. ---, 2017 WL 69264 (U.S. Jan. 9, 2017) (No. 16-593). Although Bormuth argued both that the Board of Commissioners' practice "has the effect of proselytizing . . . and advancing the Christian religion," R. 10 (Am. Compl. at 19) (Page ID #78), and that the prayers were "directed at the audience," R. 29 (Pl. Resp. to Def. Mot.

Commissioners, nor the Commission as a whole, review or approve the content of the invocations." Dissent at 46. This acknowledgement is absent from our opinion because, as the affirmative decision to exclude other prayer givers makes plain, Jackson County's invocation practice purposefully discriminated against non-Christian prayer givers.

for Summ. J. at 14) (Page ID #331), he did not explicitly argue that the Commissioners' purpose was to promote religion to the public. And although we are mindful of our rule that pro se filings should be construed liberally, *Spotts v. United States*, 429 F.3d 248, 250 (6th Cir. 2005), we decline to ground our analysis in Amicus's argument.

We hold that the Board of Commissioners' practice strays from the traditional purpose and effect of legislative prayer. A confluence of factors distinguishes the Jackson County practice from the practices upheld in *Marsh* and *Town of Greece*. These factors include the deliverance of the invocations by the Commissioners themselves in a local setting with constituent petitioners in the audience, as well as the Board's intentional decision to exclude other prayer givers in order to control the content of the prayers. We now consider, as a second "independent but mutually reinforcing reason[]" why the prayer practice here falls outside the protective umbrella of tradition, whether the Board of Commissioners' practice is coercive. *Town of Greece*, 134 S. Ct. at 1820. And as stated above, we proceed with the understanding that Justice Kennedy's conception of coercion is controlling.

b. Whether the Board of Commissioners' Practice Is Unconstitutionally Coercive

As the controlling opinion of the Court held in *Town of Greece*, "[i]t is an elemental First Amendment principle that government may not coerce its citizens 'to support or participate in any religion or its exercise.'" *Id.* at 1825 (quoting *Cty. of Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring in judgment in part and dissenting in part)). The inquiry into whether the government has violated this principle is "a fact-sensitive one that considers both the setting in which the prayer arises and the audience to whom it is directed." *Id.* Although the Court in *Town of Greece* concluded that there was no evidence of coercion in the record before it, it held that "[t]he analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity." *Id.* at 1826. All three elements are present here.

First, the Board of Commissioners directs the public to participate in the prayers at every monthly meeting. As the Supreme Court has observed, the source of these statements is

significant. In *Town of Greece*, "board members themselves stood, bowed their heads, or made the sign of the cross during the prayer," but "*they at no point solicited similar gestures by the public*." *Id.* (emphasis added). Rather, it was the clergy who asked audience members to participate in the prayer. *Id.* The Supreme Court reasoned that, because this direction came from the clergy, it was inclusive, not coercive. *Id.* Here, it is the Board of Commissioners, and the Board of Commissioners only, that tells the public to join in the prayer. What is more, these instructions are almost always from the Chairman. *See, e.g.*, R. 10 (Am. Compl. ¶¶ 19–23) (Page ID #64–66). The Chairman presides over the meeting; his words are cloaked in procedural formality. The words "rise" and "assume a reverent position" from the Chairman, therefore, are not mere suggestions, they are commands. But even in the infrequent instances where it is the Commissioner giving the prayer who tells the public to "rise" or to "bow [their] head[s]," R. 29-1 (Pl. Resp. to Def. Mot. for Summ. J., Ex. E ¶¶ 9, 13, 22) (Page ID #370–71), the effect is the same: to coerce the public to participate in the exercise of religion.

This coercion is compounded by the setting in which it is exerted. *See Town of Greece*, 134 S. Ct. at 1825 (controlling opinion). Local government meetings are small and intimate. And unlike in federal and state legislative sessions, where the public does not speak to the legislative body except by invitation, citizens attend local government meetings to address issues immediately affecting their lives. Indeed, as Amicus notes, Jackson County residents have gone to the Board of Commissioners' monthly meetings to ask for funding for disabled students' transportation to school, County of Jackson, *June 18, 2013 Jackson County Board of Commissioners Meeting*, YouTube (Jun.19, 2013), http://tinyurl.com/2013jun19 (35:53–38:30), request repairs to roads leading to their homes or businesses, County of Jackson, *July 23, 2013 Jackson County Board of Commissioners Meeting*, YouTube (Jul. 24, 2013), http://tinyurl.com/2015jul23 (24:58–30:19), and redress discrimination, County of Jackson, *March 17, 2015 Jackson County Board of Commissioners Meeting*, YouTube (Mar. 18, 2015), http://tinyurl.com/2015mar17c (5:27–7:42). Thus, there is increased pressure on Jackson County residents to follow the Board of Commissioners' instructions at these meetings, as the residents would not want to offend the local government officials they are petitioning.

Second, the Board of Commissioners has singled out Bormuth for opprobrium. During a public meeting, a Commissioner stated that Bormuth's lawsuit was an "attack on Christianity and Jesus Christ, period." County of Jackson, *Personnel & Finance Committee November 12, 2013 Jackson County, MI*, YouTube (Dec. 19, 2013), http://tinyurl.com/2013nov12 (32:50–32:59). Another Commissioner characterized Bormuth's lawsuit as "political correctness nonsense" and complained that he has "had political correctness jammed down [his] throat." *Id.* at 43:00–43:18. That Commissioner continued:

> The Federalist Papers, if you read them, tell[] me that it is your duty to disobey an illegal law. And it has taken some *nitwit* two hundred-and-some years to come up with an angle like this to try to deprive me or other people, of my faith, of my rights.

Id. at 43:22–43:41 (emphasis added). In disparaging Bormuth, the Board of Commissioners' message is clear: residents who refuse to participate in the prayers are disfavored. Indeed, when Bormuth expressed his belief that the Board of Commissioners was violating the First Amendment during the public-comment period of the August 2013 meeting, one of the Commissioners made faces and then turned his back on Bormuth, refusing even to look at Bormuth while he spoke. R. 10 (Am. Compl. ¶ 31) (Page ID #69).

Third, Bormuth has submitted evidence suggesting that the Board of Commissioners has "allocated benefits and burdens based on participation in the prayer." *See Town of Greece*, 134 S. Ct. at 1826 (controlling opinion). Shortly after Bormuth filed his complaint, Jackson County officials nominated members for the County's new Solid Waste Planning Committee from a pool of applicants. R. 10 (Am. Compl. ¶ 33) (Page ID #69). Although Bormuth had three years of experience working on related issues, the Board of Commissioners did not nominate him. *Id.* Given that the Commissioners had publicly expressed their contempt for Bormuth, *id.* ¶ 31 (Page ID #69); *see also* R. 14 (Pl. First Mot. for Summ. J., Ex. C) (Page ID #149), the Board of Commissioners' decision not to nominate him could easily be interpreted as a response to Bormuth's refusal to participate in the prayers. Bormuth also sought to supplement the record with a letter he received from the Board of Commissioners denying him appointment to the Board of Public Works. R. 52 (Pl. Second Mot. to Suppl. Record at 1) (Page ID #932). Although Bormuth is confident that he was 'the most qualified applicant,' the Board of

Commissioners did not name him for the position. *Id.* ¶ 6 (Page ID #933). This rejection came just shy of a month after one of the Commissioners publicly called Bormuth a "nitwit." *See* County of Jackson, *Personnel & Finance Committee November 12, 2013 Jackson County, MI*, YouTube (Dec. 19, 2013), http://tinyurl.com/2013nov12 (43:22–43:41). Like the County's decision not to nominate him to the Solid Waste Planning Committee, this decision suggests that the Board of Commissioners was denying benefits to residents based on their beliefs.

Two factual details about Jackson County's prayer practice bear emphasis. First, the Jackson County Board of Commissioners affirmatively excluded non-Christian prayer givers, and did so in an effort to control the content of prayers. *See* County of Jackson, *Personnel & Finance Committee November 12, 2013 Jackson County, MI*, YouTube (Dec. 19, 2013), http://tinyurl.com/2013nov12 (37:47–38:16). Second, Commissioners attempted to silence Bormuth and insulted him for criticizing their prayer practice. For example, when Bormuth voiced his concern about the prayer practice at a meeting, a Commissioner turned his chair around, refusing to listen to him. R. 10 (Am. Compl. at ¶ 31) (Page ID #69). One Commissioner said that Bormuth was "attacking . . . my Lord and savior Jesus Christ." R. 14 (Pl. First Mot. for Summ. J., Ex. C) (Page ID #149). Separately, a Commissioner referred to Bormuth as "a nitwit." County of Jackson, *Personnel & Finance Committee November 12, 2013 Jackson County, MI*, YouTube (Dec. 19, 2013), http://tinyurl.com/2013nov12 (32:50–32:59, 43:00–43:18, 43:22–43:41). These facts show how far Jackson County's practice strays from the historically tolerated tradition of legislative prayer. There is no question that factual details are relevant to the Establishment Clause inquiry. In *Town of Greece*, the Supreme Court made clear that its decision about the Town of Greece's prayer practice did not absolve courts of the duty to evaluate the constitutionality of factually distinguishable prayer practices. "Courts remain free to review the pattern of prayers over time to determine whether they comport with the tradition of solemn, respectful prayer approved in *Marsh*, or whether coercion is a real and substantial likelihood." *Town of Greece*, 134 S. Ct. at 1826–27. "If circumstances arise in which the pattern and practice of ceremonial, legislative prayer is alleged to be a means to coerce or intimidate others, the objection can be addressed in the regular course." *Id.* at 1826; *see also Marsh*, 463 U.S. at 795. Jackson County's prayer practice gives rise to just those circumstances.

C. The Dissent's Reliance on a Recent Fourth Circuit Case

The dissent contends that its "view as to the constitutionality of Jackson County's invocation practice is consistent with the Fourth Circuit's recent opinion in *Lund v. Rowan County*." Dissent at 61. The Fourth Circuit has granted rehearing en banc in *Lund*, undercutting the persuasive value of the now-questioned panel majority. *Lund v. Rowan County*, (No. 15-1519) 2016 WL 6441047, at *1 (4th Cir. Oct. 31, 2016) (granting rehearing en banc). More importantly, regardless of the outcome of the en banc rehearing, the dissent's reliance on *Lund* falls flat for two reasons: First, Judge Wilkinson's panel dissent in *Lund* is much more convincing than the majority opinion (a view that a significant number of Fourth Circuit judges presumably share). Second, contrary to the dissent's assertion that "Rowan County's invocation practice is remarkably similar" to Jackson County's practice, there are significant factual differences. Dissent at 61. Because of these differences, 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.

On the first point, the *Lund* dissent, which is much more convincing than the majority opinion, supports our conclusions in this case. Judge Wilkinson's dissent explains, persuasively, that *Town of Greece* "in no way sought to dictate the outcome of every legislative prayer case. Nor did it suggest that 'no constraints remain on [prayer] content.'" *Lund v. Rowan Cty.*, 837 F.3d 407, 433 (4th Cir. 2016) (Wilkinson, J., dissenting) (quoting *Town of Greece*, 134 S. Ct. at 1823) (alterations in original). While Judge Wilkinson indicates that he "would not for a moment cast all legislator-led prayer as constitutionally suspect," he also understands that, per *Town of Greece*, "[t]he Establishment Clause still cannot play host to prayers that 'over time . . . denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion.'" *Lund*, 837 F.3d at 431 (Wilkinson, J., dissenting) (quoting *Town of Greece*, 134 S. Ct. at 1823). He acknowledges that, "[l]egislator-led prayer, when combined with the other elements, poses a danger not present when ministers lead prayers. The Rowan County commissioners, when assembled in their regular public meetings, are the very embodiment of the state." *Lund*, 837 F.3d at 434 (Wilkinson, J., dissenting). Accordingly, Judge Wilkinson determines that the Rowan County Board of Commissioners' prayer practice is unconstitutional because the

"combination of legislators as the sole prayer-givers, official invitation for audience participation, consistently sectarian prayers referencing but a single faith, and the intimacy of a local governmental setting exceeds even a broad reading of *Town of Greece*." *Id.* at 431.

Judge Wilkinson also rightly points out that there are many ways to solemnize a county board meeting without running afoul of the Establishment Clause. A county board "can solemnize its meetings without creating such tensions" by using "non-denominational prayers or diverse prayer-givers" or prefacing the prayer with a "Message of Religious Welcome" emphasizing that members of all religions (or no religion) are welcome in the meeting and community. *Id.* at 437–38. "Such an expression of religious freedom and inclusion would promote the core idea behind legislative prayer, 'that people of many faiths may be united in a community of tolerance and devotion.'" *Id.* at 438 (quoting *Town of Greece*, 134 S. Ct. at 1823).

The combination of factors that, according to Judge Wilkinson, renders the Rowan County Board's prayer practice unconstitutional also exists in Jackson County (and Jackson County's practice included additional factors that make it even more constitutionally suspect, as discussed below). Additionally, Judge Wilkinson's observation that a county can easily solemnize county board meetings and comply with the Establishment Clause is as true in Jackson County as in Rowan County.

On the second point, 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*. The factual distinctions are important because "[t]he [Establishment Clause] inquiry remains a fact-sensitive one." *Town of Greece*, 134 S. Ct. at 1825. To structure this fact-sensitive inquiry, the *Lund* panel majority focuses on four "guideposts for analyzing whether a particular practice goes beyond constitutional bounds." *Lund*, 837 F.3d at 420. Examining the facts of this case through those four guideposts shows that even if the *Lund* majority is correct that the Rowan County prayer practice complies with the Establishment Clause, the Jackson County prayer practice nevertheless violates the Establishment Clause.

Addressing the first panel guidepost, "selection of the content of legislative prayer," the *Lund* majority explains that it is important to "look[] to the activities of the legislature as a whole

in considering legislative prayer." *Id.* at 421. The *Lund* majority determines that the Rowan County Board "never altered its practice to limit a non-Christian commissioner or attempted to silence prayers of any viewpoint." *Id.* at 424. Based on this determination, the *Lund* majority concluded that, "[t]he Board's practice here, where each commissioner gives their own prayer without oversight, input, or direction by the Board simply does not present the same concerns of the 'government [attempting] to define permissible categories of religious speech.'" *Id.* at 420 (quoting *Town of Greece*, 134 S. Ct. at 1822) (emphasis and second alteration in original). Even if this assessment is correct, there is a difference between the actions of the Rowan County Board and those of the Jackson County Board: Unlike the Rowan County Board, the Jackson County Board, as a governing body, did affirmatively exclude other prayer givers in order to control the content of the prayers. *See* County of Jackson, *Personnel & Finance Committee November 12, 2013 Jackson County, MI*, YouTube (Dec. 19, 2013), http://tinyurl.com/2013nov12 (37:47–38:16). By excluding other prayer givers to control the content of prayers, the Jackson County Board was exercising "oversight" and "'[attempting] to define permissible categories of religious speech.'" *Lund*, 837 F.3d at 420 (quoting *Town of Greece*, 134 S. Ct. at 1822) (alteration in original).

In addition, the Jackson County Board of Commissioners attempted to silence Bormuth's criticism of the prayer practice, insulting Bormuth in the process. When Bormuth complained about the prayer practice at a meeting, one of the Commissioners made a disgusted face and turned his chair around, refusing to look at Bormuth while he spoke. R. 10 (Am. Compl. at ¶ 31) (Page ID #69). Later, discussing Bormuth's complaints about the prayer practice, a Commissioner said that he "get[s] sick of" "[a]ll this political correctness" and another said that Bormuth was "attacking . . . my Lord and savior Jesus Christ." R. 14 (Pl. First Mot. for Summ. J., Ex. C) (Page ID #149). Accordingly, the Board not only purposefully excluded non-Christian prayer, but also insulted and attempted to silence Bormuth's complaints about their exclusionary prayer practice.

The Jackson County Board of Commissioners' affirmative decision to exclude other prayer givers also requires us to consider the second *Lund* panel majority guidepost, the content of the prayers, in a different light. Addressing the second guidepost, the *Lund* majority explains,

"'If the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion,' a constitutional line can be crossed." *Lund*, 837 F.3d at 421 (quoting *Town of Greece*, 134 S. Ct. at 1823). Considering the content of the prayers over time, we must be mindful of the difference between unthinkingly failing to include non-Christian prayer, as the Rowan County Board apparently did, and intentionally excluding non-Christian prayer, as the Jackson County Board did. Unthinkingly excluding non-Christian prayer does not necessarily equate to denigrating other religions. The Jackson County Commissioners' affirmative decision to exclude other prayer givers to ensure that any sectarian content would be Christian, on the other hand, does denigrate other religions. Affirmative exclusion communicates that non-Christian prayers are not welcome, which communicates that non-Christians are not welcome. Affirmative exclusion also communicates that only Christian prayers are adequate to solemnize county board meetings, which communicates that other prayers are inferior. Indicating that only Christians are welcome and that other prayers are inferior denigrates other religions.

The Jackson County Board of Commissioners' affirmative decision to exclude other prayer givers is also relevant to the third *Lund* panel majority guidepost, "the selection of the prayer-giver." *Lund*, 837 F.3d at 423. The *Lund* majority notes that in *Town of Greece*, the Supreme Court upheld the town's practice because the town "'represented that it would welcome a prayer by any minister or layman who wished to give one,'" which indicated that the town "'maintain[ed] a policy of nondiscrimination.'" *Id.* (quoting *Town of Greece*, 134 S. Ct. at 1824). Even if the Rowan County Board's decision to allow only Commissioners to give prayers can somehow be characterized as "'a policy of nondiscrimination,'" the Jackson County Board did discriminate. *Lund*, 837 F.3d at 423 (quoting *Town of Greece*, 134 S. Ct. at 1824). To exclude prayers that Jackson County Commissioners did not want to hear, the Board of Commissioners forbade anyone but Commissioners from giving prayers. Excluding unwanted prayers is not a policy of nondiscrimination. Excluding unwanted prayers is discrimination.

Finally, the Jackson County Board of Commissioners' affirmative decision to exclude other prayer givers is also significant when considering the fourth *Lund* guidepost, whether "'over time'" "'the prayer practice'" was "'exploited to . . . advance any one . . . faith or belief.'"

Lund, 837 F.3d at 424 (quoting *Town of Greece*, 134 S. Ct. at 1823) (alterations in original). The Jackson County Board of Commissioners' affirmative exclusion of non-Christian prayers puts one faith, Christianity, in a privileged position. It ensures that only Christians will hear prayers that speak to their religious beliefs at Board of Commissioners meetings. Worse, it ensures that only Christians will hear prayers that speak to their religious beliefs because the government has singled out Christian prayer as uniquely able to solemnize these meetings. The affirmative exclusion thus advances one faith over others.

The *Lund* panel majority also concludes that Rowan County's prayer practice is not coercive. The *Lund* panel majority focuses on whether the Board "'directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity.'" *Lund*, 837 F.3d at 427 (quoting *Town of Greece*, 134 S. Ct. at 1826). Here again, factual distinctions between this case and *Lund* mean that even if the *Lund* majority is correct that the Rowan County Board of Commissioners' prayer practice is not coercive, the Jackson County Board of Commissioners' prayer practice is coercive.

Although both Boards of Commissioners directed the public to participate in prayers, there is no evidence that the Rowan County Board of Commissioners singled out dissidents for opprobrium or allowed their decisions to be influenced by a constituent's acquiescence (or refusal to acquiesce) to the prayer opportunity. The Jackson County Commissioners, on the other hand, did single out Bormuth for opprobrium. Commissioners stated that Bormuth's lawsuit was "nonsense" and "an attack on Christianity and Jesus Christ, period" and called Bormuth a "nitwit" who was "try[ing] to deprive me or other people, of my faith, of my rights." County of Jackson, *Personnel & Finance Committee November 12, 2013 Jackson County, MI*, YouTube (Dec. 19, 2013), http://tinyurl.com/2013nov12 (32:50–32:59, 43:00–43:18, 43:22–43:41). There is also evidence that some of Jackson County Commissioners' official decisions were influenced by Bormuth's refusal to acquiesce to the prayer opportunity. They denied Bormuth a nomination for the Solid Waste Planning Committee and, less than a month after a Commissioner publicly called him a nitwit, denied him an appointment to the Board of Public

Works. R. 10 (Am. Compl. at ¶ 33) (Page ID #69); R. 52 (Pl. Second Mot. to Suppl. Record at 1) (Page ID #932).

The distinctions between the actions of the Jackson County Board of Commissioners in the case before us and the actions of the Rowan County Board of Commissioners in *Lund* are significant. Because of these distinctions, even if the panel majority's opinion in *Lund* is correct, it does not influence our assessment of the facts before us in this "fact-sensitive" inquiry. *Town of Greece*, 134 S. Ct. at 1825.

Accordingly, we hold that the Board of Commissioners' use of prayer to begin its monthly meetings violates the First Amendment's Establishment Clause. The 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.[10]

III. CONCLUSION

For the reasons stated above, we **REVERSE** the grant of summary judgment to the County and **REMAND** for entry of summary judgment in favor of Bormuth and for further proceedings consistent with this opinion.

---

[10]Bormuth's remaining arguments, including that the panel must apply the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), as well as the Treaty of Tripoli (a 1797 treaty with Tripolitania (now Libya) which states that "the Government of the United States of America is not, in any sense, founded on the Christian religion") are meritless. Bormuth also does not have standing to assert an Establishment Clause violation on behalf of the children who lead attendees in the Pledge of Allegiance. *See Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 489–90 (1982).

DISSENT

GRIFFIN, Circuit Judge, dissenting. Since the founding of our Republic, Congress, state legislatures, and many municipal bodies have commenced each legislative session with a prayer. Contrary to today's decision, the Supreme Court has ruled twice that legislative prayer does not violate the Establishment Clause of the United States Constitution.[1] *Marsh v. Chambers*, 463 U.S. 783 (1983); *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014). Moreover, today's decision conflicts with the recent decision of the Court of Appeals for the Fourth Circuit upholding the constitutionality of legislator-led prayer. *Lund v. Rowan Cty.*, 837 F.3d 407 (4th Cir. 2016). Because the majority's opinion declaring Jackson County's invocation practice unconstitutional contravenes the First Amendment and Supreme Court precedent, I respectfully dissent.

I.

Marsh v. Chambers was the first Supreme Court decision upholding legislative prayer against an Establishment Clause challenge. In *Marsh*, the plaintiffs claimed that the Nebraska Legislature's practice of opening its sessions with a prayer by its chaplain violated the First Amendment. The salient facts of Nebraska's practice included that the chaplain was only of one denomination (Presbyterian); the Legislature selected the chaplain for sixteen consecutive years; paid him with public funds; and the chaplain gave prayers "in the Judeo-Christian tradition." 463 U.S. at 793. The Supreme Court emphasized that these facts must be viewed against the historical background of legislative prayer, which dates back to our Republic's founding: "The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country." *Id.* at 786. The Continental Congress, for example, "adopted the traditional procedure of opening its session with a prayer offered by a paid chaplain." *Id.* at 787. Moreover, the First Congress "authorized the appointment of paid chaplains" for the chambers just three days before it approved the language of the First

[1]The Establishment Clause is applicable to the states by operation of the Due Process Clause of the Fourteenth Amendment. *See, e.g., Everson v. Bd. of Ed. of Ewing Tp.*, 330 U.S. 1 (1947).

Amendment. *Id.* at 787–88. Given this historical foundation, the Supreme Court rejected the claim that Nebraska's invocation practice violated the Establishment Clause: "Clearly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress." *Id.* at 788. Based on this "unique," "unambiguous and unbroken history . . . , the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Id.* at 791, 792.

That the Nebraska Legislature selected a chaplain of the same denomination for sixteen consecutive years was of no moment: "Absent proof that the chaplain's reappointment stemmed from an impermissible motive," one could not "perceive any suggestion that choosing a clergyman of one denomination advances the beliefs of a particular church." *Id.* at 793. Nor was it material that public funds paid for the chaplain, given that the Continental Congress did the same. *Id.* at 794. And finally, the Supreme Court cautioned against the judiciary "embark[ing] on a sensitive evaluation or . . . pars[ing] the content of a particular prayer." *Id.* at 795. That is, "[t]he content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Id.* at 794–95.

Marsh is widely viewed as "carving out an exception" to Establishment Clause jurisprudence "because it sustained legislative prayer without subjecting the practice to any of the formal tests that have traditionally structured th[e] inquiry." *Town of Greece*, 134 S. Ct. at 1818 (citation omitted). This includes the generally applicable three-part *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971), test for which Bormuth advocates. *See, e.g., Am. Civil Liberties Union of Ohio v. Capitol Square Review & Advisory Bd.*, 243 F.3d 289, 305–06 (6th Cir. 2001) (en banc) ("It is worth mentioning, perhaps, that even the author of the *Lemon* decision, the late Chief Justice Burger, did not see fit to apply the *Lemon* test when he wrote the Court's opinion in

[*Marsh*]."); *accord Smith v. Jefferson Cty. Bd. of Sch. Commr's*, 788 F.3d 580, 589–90 (6th Cir. 2015).

Unfortunately, dicta in the *Marsh* opinion led to judicial confusion regarding its holding. This arose from a footnote in which the Court explained the "Judeo-Christian" nature of the prayers:

> [Chaplain] Palmer characterizes his prayers as "nonsectarian," "Judeo Christian," and with "elements of the American civil religion." Although some of his earlier prayers were often explicitly Christian, Palmer removed all references to Christ after a 1980 complaint from a Jewish legislator.

463 U.S. at 793 n.14.

In *County of Allegheny v. A.C.L.U.*, 492 U.S. 573 (1989), a case involving a crèche placed on the steps of a county courthouse, the Court drew a distinction between sectarian and nonsectarian references based upon this footnote. *Id.* at 603. The nonsectarian reference in *Marsh*, as "recast[]" by *County of Allegheny*, *Town of Greece*, 134 S. Ct. at 1821, led some courts, including our own, to conclude that the constitutionality of legislative prayer turned upon content neutrality. *See Stein v. Plainwell Cmty. Sch.*, 822 F.2d 1406, 1410 (6th Cir. 1987); *see also Rubin v. City of Lancaster*, 710 F.3d 1087, 1094 n.6 (9th Cir. 2013) (collecting cases). The Supreme Court corrected this error in *Town of Greece v. Galloway*.

II.

In *Town of Greece*, the town council invited local ministers to give invocations before each town board meeting. 134 S. Ct. at 1816. The town permitted any person of any faith to give the invocation, did not review the prayers in advance, and did not provide any guidance as to tone or content. *Id.* Although some had a "distinctly Christian idiom," and for eight years only Christian ministers gave prayers, upon complaint of such pervasive themes, the town expressly invited persons of other faiths to deliver the prayer. *Id.* at 1816–17. Contending that the Establishment Clause mandated legislative prayers be "inclusive and ecumenical" to a "generic God," some town residents sued. *Id.* at 1817.

In reversing the Second Circuit's decision that Greece's practice violated the Establishment Clause, the Supreme Court emphasized again the unique nature of legislative prayer: "legislative prayer lends gravity to public business, reminds lawmakers to transcend petty differences in pursuit of a higher purpose, and expresses a common aspiration to a just and peaceful society." *Id.* at 1818. Purposeful prayers seeking to solemnly bind legislators are consistent with our tradition where the prayer givers "ask their own God for blessings of peace, justice, and freedom that find appreciation among people of all faiths. That a prayer is given in the name of Jesus, Allah, or Jehovah, or that it makes passing reference to religious doctrines, does not remove it from that tradition. These religious themes provide particular means to universal ends." *Id.* Most importantly, history teaches that these solemn prayers "strive for the idea that people of many faiths may be united in a community of tolerance and devotion." *Id.* They are permissible because "[o]ur tradition assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith." *Id.* at 1823. This tradition extends not just to state and federal legislatures, but also to local legislative bodies. *Id.* at 1819.

Accordingly, the Supreme Court in *Town of Greece* addressed the issue of "whether the prayer practice in the town of Greece fit[] within the tradition long followed in Congress and the state legislatures," and held that it did. *Id.* First, the Court rejected the notion that *Marsh* permits only generic prayers, abrogating *County of Allegheny* and overruling decisions to the contrary. *Id.* at 1820–24. That is, "*Marsh* nowhere suggested that the constitutionality of legislative prayer turns on the neutrality of its content." *Id.* at 1821. *Marsh* turned not on espousement of "generic theism," but rather on the "history and tradition" showing prayer—even one that is explicitly Christian in tone—"in this limited context could coexist with the principles of disestablishment and religious freedom." *Id.* at 1820 (citation and alteration omitted). Moreover, requiring nonsectarian prayers "would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech, a rule that would involve government in religious matters to a far greater degree than is the case under the town's current practice of neither editing or approving prayers in advance nor criticizing their content after the fact." *Id.* at 1822. Put differently, once the government has "invite[d] prayer into the public sphere," it "must permit a prayer giver to address his or her own

God or gods as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian." *Id.* at 1822–23. Nonetheless, the Court acknowledged that there are limits:

> If the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion, many present may consider the prayer to fall short of the desire to elevate the purpose of the occasion and to unite lawmakers in their common effort.
>
> * * *
>
> Prayer that reflects beliefs specific to only some creeds can still serve to solemnize the occasion, so long as the practice over time is not "exploited to proselytize or advance any one, or to disparage any other, faith or belief."

Id. at 1823 (quoting *Marsh*, 463 U.S. at 794–95).

The Supreme Court in *Town of Greece* had little trouble finding the invocation prayers were in keeping with our tradition. *Id.* at 1824. Though invoking Jesus and other Christian references, the prayers involved "universal themes" like celebrating the changing of the seasons or calling for a "spirit of cooperation." *Id.* To be sure, some prayers went astray of these themes, with one condemning "objectors [to the prayer practice] as a minority who are ignorant of the history of our country" and another "lament[ing] that other towns did not have God-fearing leaders." *Id.* (quotations omitted). But these remarks did not "despoil a practice that on the whole reflects and embraces our tradition." *Id.* That is, "[a]bsent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a prayer will not likely establish a constitutional violation. *Marsh* . . . requires an inquiry into the prayer opportunity as a whole, rather than into the contents of a single prayer." *Id.*

The Court also rejected the argument that the town violated the Establishment Clause by inviting predominantly Christian ministers to lead the prayer, noting that the town made reasonable efforts to identify all congregations within its borders and represented that it would welcome a prayer by anyone who wished to give one. *Id.* Moreover, the town's composition of nearly all Christians did not "reflect an aversion or bias on the part of town leaders against minority faiths. So long as the town maintains a policy of nondiscrimination, the Constitution

does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing." *Id.*

Second, the Supreme Court in *Town of Greece* rejected the argument that the intimate nature of a town board meeting—where citizens attend meetings to "accept awards; speak on matters of local importance; and petition the board for action that may affect their economic interests"—coerces citizens to support a religion through legislative prayer. *Id.* at 1824–25.

Justice Kennedy, joined by Chief Justice Roberts and Justice Alito, analyzed coercion broadly in the context of the "subtle coercive pressures" the audience might feel while listening to the prayer. He emphasized that "[t]he inquiry remains a fact-sensitive one that considers both the setting in which the prayer arises and the audience to whom it is directed." *Id.* at 1825 (Kennedy, J.). It must also be evaluated "against the backdrop of historical practice" and "presumed that the reasonable observer is acquainted with this tradition and understands that its purposes are to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens, not to afford government an opportunity to proselytize or force truant constituents into the pews." *Id.* It is the "lawmakers themselves," not the public, who are the "principal audience for these invocations" as they "may find that a moment of prayer or quiet reflection sets the mind to a higher purpose and thereby eases the task of governing." *Id.* "For members of town boards and commissions, who often serve part-time and as volunteers, ceremonial prayer may also reflect the values they hold as private citizens. The prayer is an opportunity for them to show who and what they are without denying the right to dissent by those who disagree." *Id.* at 1826. And in concluding that "legislative bodies do not engage in impermissible coercion merely by exposing constituents to prayer they would rather not hear and in which they need not participate," Justice Kennedy emphasized that "[a]dults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum, especially where, as here, any member of the public is welcome in turn to offer an invocation reflecting his or her own convictions." *Id.* at 1826–27.

In one paragraph, the three Justices discussed hypothetical facts that could change their *analysis*:

> The analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity. 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. . . . Respondents suggest that constituents might feel pressure to join the prayers to avoid irritating the officials who would be ruling on their petitions, but this argument has no evidentiary support. Nothing in the record indicates that town leaders allocated benefits and burdens based on participation in the prayer, or that citizens were received differently depending on whether they joined the invocation or quietly declined. In no instance did town leaders signal disfavor toward nonparticipants or suggest that their stature in the community was in any way diminished. A practice that classified citizens based on their religious views would violate the Constitution, but that is not the case before this Court.

Id. at 1826. They also noted the audience had options to avoid the prayers altogether:

> Nothing in the record suggests that members of the public are dissuaded from leaving the meeting room during the prayer, arriving late, or even, as happened here, making a later protest. In this case, as in *Marsh*, board members and constituents are "free to enter and leave with little comment and for any number of reasons." Should nonbelievers choose to exit the room during a prayer they find distasteful, their absence will not stand out as disrespectful or even noteworthy. And should they remain, their quiet acquiescence will not, in light of our traditions, be interpreted as an agreement with the words or ideas expressed. Neither choice represents an unconstitutional imposition as to mature adults, who "presumably" are "not readily susceptible to religious indoctrination or peer pressure."

Id. at 1827 (citations omitted).

Justices Thomas and Scalia did not join the coercion section of Justice Kennedy's opinion (Part II-B), but expressly disagreed with it. In a separate opinion, Justice Thomas, joined by Justice Scalia, wrote that coercion is limited to "coercive state establishments" "by

force of law or threat of penalty," such as mandatory church attendance, levying taxes to generate church revenue, barring ministers who dissented, and limiting political participation to members of the established church. *Id.* at 1837 (Thomas, J., concurring in part and in the judgment). Most importantly, Justices Thomas and Scalia rejected Justice Kennedy's broadening of coercion to also include social pressures:

> At a minimum, there is no support for the proposition that the framers of the Fourteenth Amendment embraced wholly modern notions that the Establishment Clause is violated whenever the "reasonable observer" feels "subtle pressure," or perceives governmental "endors[ement]."
>
> * * *
>
> Thus, to the extent coercion is relevant to the Establishment Clause analysis, it is actual legal coercion that counts—not the "subtle coercive pressures" allegedly felt by respondents in this case. The majority properly concludes that "[o]ffense . . . does not equate to coercion," since "[a]dults often encounter speech they find disagreeable[,] and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum." I would simply add, in light of the foregoing history of the Establishment Clause, that "[p]eer pressure, unpleasant as it may be, is not coercion" either.

Id. at 1838 (alterations in original and internal citations omitted).

III.

In the present case, my colleagues refuse to follow *Marsh* and *Town of Greece*, concluding Jackson County's prayer practice falls outside of the traditional understanding of legislative prayer. They do so by setting aside this historical-based analysis, and reviving *Lemon*'s endorsement test based upon three alleged distinctions: the identity of the prayer giver, the lack of non-Christian prayer givers, and the Commissioners' purpose for giving the prayer. I respectfully disagree.

A.

The Supreme Court has recognized "[w]e are a religious people whose *institutions* presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952) (emphasis added). All three of our branches of government have officially acknowledged religion's role in

American life. *See Lynch v. Donnelly*, 465 U.S. 668, 674–78 (1984) (detailing the "official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders").

Legislative prayer is part of this tradition: "The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country." *Marsh*, 463 U.S. at 786. On this point, the Supreme Court has stated: "[T]he Framers considered legislative prayer a *benign acknowledgment* of religion's role in society." *Town of Greece*, 134 S. Ct. at 1819 (emphasis added). It "has become part of our heritage and tradition, part of our expressive idiom, similar to the Pledge of Allegiance, inaugural prayer, or the recitation of 'God save the United States and this honorable Court' at the opening of [the Supreme Court's (and Sixth Circuit's)] sessions." *Id.* at 1825 (Kennedy, J.). Thus, we must evaluate Jackson County's prayer practice in light of our history, asking whether it "fits within the tradition followed in Congress and the state legislatures." *Id.* at 1819. That tradition includes offering prayers, even those that reflect "beliefs specific to only some creeds," that "seek peace for the Nation, wisdom for its lawmakers, and justice for its people, values that count as universal and that are embodied not only in religious traditions, but in our founding documents and laws." *Id.* at 1823.

Contrary to the majority's approach, the Supreme Court has never taken a granular view of the practice, focusing not on who gives a prayer, but rather whether there is a general practice consistent with our historical traditions. *Marsh*, 463 U.S. at 792–95; *Town of Greece*, 134 S. Ct. at 1819. Absent is any restriction as to *who* may give the prayer in order to be consistent with historical practice. *Marsh*, for example, reasoned that "[c]learly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of [the First] Amendment." 463 U.S. at 788. The Supreme Court's reasoning omits the majority's qualifier: "opening prayers *by non-governmental officials*." Our history clearly indicates a role for legislators to give prayers before legislative bodies. *See, e.g.*, S. Rep. No. 32-376, at 4 (1853) ("[The founders] did not intend to prohibit a just expression of religious devotion by the legislators of the nation, even in their public character as legislators."); American Archives, Documents of the American Revolutionary Period, 1774-76, v1:1112 (documenting

legislator-led prayer in South Carolina's legislature in 1775); *see also Town of Greece*, 134 S. Ct. at 1833 (Alito, J., concurring) (discussing proposal by Samuel Adams to have a delegate "open the session with a prayer," but which was later opposed on sectarian grounds, not on the grounds that the prayer giver was a delegate).

Indeed, as reflected in the records in *Marsh*, and *Town of Greece*, this history of legislators leading prayers is uninterrupted. Take *Marsh*'s conclusion that "the practice of opening sessions with prayer . . . has been followed consistently in most of the states." 463 U.S. at 789–90. In drawing this conclusion, the Court relied on an amicus brief by the National Conference of State Legislatures ("NCSL"), which surveyed the various practices across the state legislatures. *Id.* at n.11. The NCSL expressly disclaimed the notion that chaplain-only prayers are the norm: "The opening legislative prayer may be given by various classes of individuals. They include chaplains, guest clergymen, *legislators*, and legislative staff members. . . . All bodies, including those with regular chaplains, *honor requests from individual legislators either to give the opening prayer* or to invite a constituent minister to conduct the prayer." Brief of NCSL as Amicus Curiae, *Marsh v. Chambers*, 463 U.S. 783 (1983) (No. 82-83), 1982 WL 1034560, at *2, *3 (emphasis added).

The record in *Town of Greece* also emphasizes the long-standing practice of legislator-led prayer. Observe the prayer offered by one of Greece's councilmen (and one that is quite similar to the prayers offered here):

> Helfer: Please bow your heads and join me in prayer. Heavenly Father we thank you for this day. We thank you for the opportunity to now join together here to conduct the important public business that is before us. We ask that you would guide the decision making and the discussions that take place this evening, and that you would bless each of the participants in the town board as well as all of those who are here in the audience and may be viewing on television. We pray this in your name, amen.

Joint Appendix at 66a-67a, *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), 2013 WL 3935056. Other council members offered a silent prayer, directing the audience to "remain standing" and "bow heads" while reflecting upon the September 11, 2001, terrorist attacks and Greece residents who recently passed away. *Id.* at 26a–27a, 29a, 45a, 57a.

Here, Jackson County presented a 2002 NCSL study reinforcing its earlier conclusion that chaplains do not exclusively give opening prayers: "Forty-seven chambers allow people other than the designated legislative chaplain or a visiting chaplain to offer the opening prayer. *Legislators*, chamber clerks and secretaries, or other staff may be called upon to perform this opening ceremony." (emphasis added). More specifically, legislators gave prayers in thirty-one states. The same study notes that *only* members are permitted to deliver prayers in Rhode Island. Closer to Jackson County, for example, the Michigan House of Representatives permits an invocation to "be delivered *by the Member* or a Member's guest." Mich. H.R. R. 16 (emphasis added). So too does Congress. *See, e.g.*, 161 Cong. Rec. S3313 (daily ed. May 23, 2015) (documenting invocation by Oklahoma Senator James Lankford); United States House of Representatives, Office of the Chaplain, Guest Chaplains, http://chaplain.house.gov/chaplaincy/guest_chaplains.html (last visited Feb. 10, 2017) (listing guest chaplains "who have been recommended by the Members of Congress").

Jackson County's prayer practice is consistent with this tradition, and, therefore, the district court correctly ruled Bormuth had not established facts rendering the prayer practice outside the realm of *Marsh* and *Town of Greece*. One of the prayers Bormuth complains about is illustrative of typical prayers given by the Commissioners:

> Bow your heads with me please. Heavenly father we thank you for this day and for this time that we have come together. Lord we ask that you would be with us while we conduct the business of Jackson County. Lord help us to make good decisions that will be best for generations to come. We ask that you would bless our troops that protect us near and far, be with them and their families. Now Lord we wanna give you all the thanks and all the praise for all that you do. Lord I wanna remember bereaved families tonight too, that you would be with them and take them through difficult times. We ask these things in your son Jesus's name. Amen.

As in *Town of Greece*, this and other prayers "do not fall outside the tradition [the Supreme Court] has recognized. A number of the prayers did invoke the name of Jesus, the Heavenly Father, or the Holy Spirit, but they also invoked universal themes," 134 S. Ct. at 1824, such as asking for guidance to "make good decisions that will be best for generations to come," and to express well-wishes to military and community members. There is no evidence that the prayers "denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion" or

that there is a "pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose." *Id.* at 1823, 1824.

There is a bit of irony in the majority opinion's per se condemnation of legislator prayer. The purpose of legislative prayer is to "invite[] lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing." *Id.* at 1823. As Justice Kennedy recognized, legislative prayer exists "largely to accommodate the spiritual needs of lawmakers and connect them to a tradition dating to the time of the Framers." *Id.* at 1826 (Kennedy, J.). It "reflect[s] the values [public officials] hold as private citizens. The prayer is an opportunity for them to show who and what they are without denying the right to dissent by those who disagree." *Id.* As one of Jackson County's Commissioners stated, "Commissioners, as individuals, have a right to pray as we believe."

Preventing Jackson County's Commissioners from giving prayers of their own choosing detracts from their ability to take "a moment of prayer or quiet reflection [to] set[] the[ir] mind to a higher purpose and thereby ease[] the task of governing." *Id.* *Town of Greece* tells us that "government must permit a prayer giver to address his or her own God or gods as conscience dictates," and that it is not the role of the judiciary to act "as [a] supervisor[] and censor[] of religious speech." *Id.* at 1822. That is exactly the role the majority assumes by finding an appreciable difference between legislator-led and legislator-authorized prayer.

B.

The majority opinion jettisons the historical overlay, and instead applies, in effect, the inapplicable *Lemon* test. It tells us, for example, that because the Commissioners give the prayers, "there is no distinction between the government and the prayer giver: they are one and the same." Accordingly, Jackson County is "effectively endorsing a specific religion" because all of the commissioners were "Christian." In doing so, it misconstrues the facts and Supreme Court precedent.

1.

Noticeably absent from the majority's opinion is any acknowledgment that Jackson County's invocation practice is facially neutral regarding religion. In Jackson County, on a rotating basis, each elected Commissioner, regardless of his or her religion (or lack thereof), is afforded an opportunity to open a session with a short invocation based on the dictates of his own conscience. Neither other Commissioners, nor the Commission as a whole, review or approve the content of the invocations.

The majority finds it significant that at the time of the sessions referenced in plaintiff's complaint, all the elected Jackson County Commissioners were "Christian." While all the Commissioners presumably believed in Jesus Christ, the faiths of Christianity are diverse, not monolithic. The Reformation of the Fifteenth Century spawned an explosion of these diverse Christian faiths. Many of those practicing these new Christian faiths sought religious freedom in America and found refuge from the tyranny inflicted by sectarian governments. To guarantee religious liberty to all persons, including those practicing the emerging Christian religions, the drafters and ratifiers of the First Amendment of our Constitution provided:

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

U.S. Const. amend. I.

My colleagues do not know the religious faiths of the 2013-2014 Jackson County Commissioners. Nor does the majority know the religious faiths of the current Commissioners. In this regard, the religious allegiance of the members of the Commission is subject to change with each election cycle. A process, of course, that guarantees, "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." U.S. Const. art. VI, cl. 3. With each election, the people of Jackson County may elect a Commissioner who is Muslim, Buddhist, Hindu, Jewish, Mormon, Roman Catholic, Eastern Orthodox Christian, Baptist, Methodist, Presbyterian, Lutheran, Episcopalian, Congregationalist, Quaker, Amish, Mennonite, Pentecostal, "Animist," Pagan, Atheist, Agnostic, and so on. The religious faiths of the periodically elected officials—including Jackson County's Commissioners—are dynamic, not static. In fact, east of Jackson County is the City of Hamtramck, Michigan, which just

elected a Muslim majority city council.[2] Were Mr. Bormuth elected to the Jackson County Board of Commissioners, under the religious-neutral Jackson County legislative prayer practice, he could freely begin a legislative session with a prayer of his choosing—to "Mother Earth," the sun, the moon (or otherwise).

2.

The conclusion in the majority opinion that Jackson County is "effectively endorsing a specific religion" is one borne out of *Lemon*, not *Marsh* or *Town of Greece*. Yes, the prayer giver and the government may be "one and the same," but religious endorsement is a thread woven by the *Lemon* test. *Smith*, 788 F.3d at 587 (explaining that "the Sixth Circuit 'has treated the endorsement test as a refinement or clarification of the *Lemon* test'") (citation omitted). If *Lemon* applied, whether the prayer givers and the government are "one and the same" (read, "excessive entanglement") could go to endorsement of religion. But as the majority properly concludes in a later footnote, *Lemon* does not control this case.[3] Neither *Marsh* nor *Town of Greece* speak in *Lemon*'s terms—i.e., balancing purposes and government entanglement—when examining the constitutionality of legislative prayer. In viewing Jackson County's prayer practice through an endorsement rubric in lieu of through history and tradition, the majority effectively rewrites over thirty-plus years of Supreme Court jurisprudence—applying the *Lemon* rule instead of *Marsh*'s exception. *See Town of Greece*, 134 S. Ct. at 1818 ("*Marsh* is sometimes described as carving out an exception to the Court's Establishment Clause jurisprudence, because it sustained legislative prayer without subjecting the practice to any of the formal tests that have traditionally structured this inquiry.") (internal quotation marks and citation omitted).[4]

---

[2]*See* Kris Maher, *Muslim-Majority City Council Elected in Michigan*, Wall St. J, Nov. 9, 2015, http://www.wsj.com/articles/muslim-majority-city-council-elected-in-michigan-1447111581.

[3]I also concur with the majority's rulings that the Treaty of Tripoli does not govern this matter and that Bormuth does not have standing to assert his Pledge-of-Allegiance argument on behalf of other children.

[4]Query whether even the *Lemon*-test supports the majority's reasoning, for the Supreme Court has told us in that context that "prayers by legislators do not insistently call for religious action on the part of citizens." *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 877 n.24 (2005).

For example, the majority opinion reasons Jackson County is "effectively endorsing a specific religion" because the Commissioners are all themselves of Christian faith. This does not comport with *Marsh*, where the Supreme Court sanctioned the practice of selecting the same Presbyterian clergyman for sixteen consecutive years. 463 U.S. at 793. It also conflicts with *Town of Greece*, which held that "[p]rayer that reflects beliefs specific to only some creeds can still serve to solemnize the occasion, so long as the practice over time is not 'exploited to proselytize or advance any one, or to disparage any other, faith or belief.'" 134 S. Ct. at 1823 (quoting *Marsh*, 463 U.S. at 794–95). Thus, the district court correctly concluded that the all-Christian makeup of the Commissioners is "immaterial":

> As elected officials, they were chosen as representatives whose interests were most closely aligned with the public's, and their personal beliefs are therefore a reflection of the community's own overwhelmingly Christian demographic. . . . [T]he future may bring Commissioners of more diverse religious backgrounds who will deliver invocations in those traditions. To hold otherwise would contravene Marsh's sanction of legislative prayer delivered for sixteen years by a single Presbyterian clergyman.

(internal citations omitted). This reasoning also aptly applies *Town of Greece*'s express command that legislative bodies "must permit a prayer giver to address his or her own God or gods as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian." *Id.* at 1822.

Jackson County is also not required to provide "opportunities for persons of other faiths" to offer invocations. Just like Greece, Jackson County maintains a facially-neutral prayer policy. *Id.* at 1824. The majority discards this similarity, telling us instead that the Supreme Court upheld the prayer practice in *Town of Greece* "in large part because it included prayers representing a variety of faiths." In no part did *Town of Greece* depend upon religious heterogeneity. Its holding on this point is that "[s]o long as the town maintains a policy of nondiscrimination," the Establishment Clause does not mandate a municipality of predominately one faith to "achieve religious balancing." *Id.* Contrary to the majority's assertion, Jackson County's prayer policy *permits* prayers of any—or no—faith, and the County need not adopt a different policy as part of a "quest to promote a diversity of religious views." *Id.* (internal quotation marks omitted). However, my colleagues "require the [County] to make . . . judgments

about the number of religions it should sponsor and the relative frequency with which it should sponsor each." *Id.* (alterations and citation omitted). But as *Town of Greece* commands, such "judgments" are "wholly inappropriate." *Id.* (citation omitted).

Nor does it matter that the Commissioners' invocations "are literally 'governmental speech.'" A public official need not be the one giving a prayer in order for the Establishment Clause to apply. *Cf. Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 468 (2009) ("A government entity may exercise this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message."). An official chaplain (*Marsh*), invited members of the community (*Town of Greece*), and county commissioners (this case) are all government speakers when giving their respective prayers. Under the majority's theory, prayers by agents (like in *Marsh* and *Town of Greece*) are somehow constitutionally different than prayers offered by principals. The Establishment Clause does not tolerate, much less require, such mechanical line drawing. *Cf. Lynch*, 465 U.S. at 678–79 ("The line between permissible relationships and those barred by the [Establishment] Clause can no more be straight and unwavering than due process can be defined in a single stroke or phrase or test."); *see also Simpson v. Chesterfield Cty. Bd. of Sup'rs*, 404 F.3d 276, 289 (4th Cir. 2005) (Niemeyer, J., concurring) (stating in a pre-*Town of Greece* case that "when members of a governmental body participate in a prayer for themselves and do not impose it on or prescribe it for *the people*, the religious liberties secured *to the people* by the First Amendment are not *directly* implicated, and the distinct, more tolerant analysis articulated in *Marsh* governs").[5]

[5]Pre-*Town of Greece* case law from other circuits (some albeit abrogated because they relied on the notion that prayers must be ecumenical) supports the conclusion that the prayer giver's identity is not dispositive under the *Marsh* analysis. In a line of legislative prayer cases, the Fourth Circuit, for example, has characterized this position as "miss[ing] the forest for the trees." *Joyner v. Forsyth Cty.*, 653 F.3d 341, 350 (4th Cir. 2011) ("It [is] the governmental setting for the delivery of . . . prayers that court[s] constitutional difficulty, not those who actually gave the invocation."); *see also Simpson*, 404 F.3d at 286 ("The Court, neither in *Marsh* nor in *Allegheny*, held that the identity of the prayer-giver, rather than the content of the prayer, was what would affiliate the government with any one specific faith or belief.") (quotations and alterations omitted). And retired Justice O'Connor, sitting by designation, authored an opinion holding that prayers *only* given by city council members were permissible. *See Turner v. City Council of City of Fredericksburg*, 534 F.3d 352, 355–56 (4th Cir. 2008). Other circuits are in accord. *See Pelphrey v. Cobb Cty.*, 547 F.3d 1263, 1281 (11th Cir. 2008) (listing "the identity of the speaker" as one of many factors to consider); *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1233 (9th Cir. 1998) (en banc) ("[T]here can be no Establishment Clause violation merely in the fact that a legislative body chooses not to appoint a *certain person* to give its prayers.") (emphasis added).

Finally, the majority relies on statements by Commissioner Rice to conclude Jackson County desired to control prayer content. There are several problems with this conclusion. As set forth in much more detail in Part IV-B-1 of this opinion, the most important is that these statements fall within those prohibited from consideration by our appellate review principles. They are lifted from a November 12, 2013, meeting that Bormuth neither directed the district court to below, nor raised in his appellate brief to us. Bormuth has thus waived any argument as to these statements. *Chicago Title Ins. Corp. v. Magnuson*, 487 F.3d 985, 995 (6th Cir. 2007); *Overstreet v. Lexington-Fayette Urban Cty. Gov't*, 305 F.3d 566, 578 (6th Cir. 2002).

Even if we were to consider these statements, they do not support the majority's reasoning. In *Town of Greece*, the Court rejected the notion that isolated objectionable prayers—those given by ministers who "disparaged those who did not accept the town's prayer practice"—voided the entire practice. 134 S. Ct. at 1824. Plucking stray examples, concluded the Court, "do[es] not despoil a practice that on the whole reflects and embraces our tradition." *Id.* Only upon presentment of "a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose" will "a challenge based solely on the content of a prayer"—here, the limiting of the prayer giver's identity to elected officials who happen to all be one faith—likely succeed. *Id.*

Moreover, this use flies in the face of guidance eschewing examining the minds of individual legislators as it relates to legislative intent: "a judiciary must judge by results, not by the varied factors which may have determined legislators' [actions]. We cannot undertake a search for motive in testing constitutionality." *Daniel v. Family Sec. Life Ins. Co.*, 336 U.S. 220, 224 (1949); *see also Tenney v. Brandhove*, 341 U.S. 367, 378 (1951) ("In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies.") (footnote omitted). Rather, we must heed the Supreme Court's admonition that "[i]nquiries into [legislative] motives or purposes are a hazardous matter." *United States v. O'Brien*, 391 U.S. 367, 383 (1968). This is a concern, I might add, that the Court has emphasized in Establishment Clause cases, which are to be reviewed objectively, "without any judicial psychoanalysis of a drafter's heart of hearts."

McCreary Cty., 545 U.S. at 862. Stated differently, "Establishment Clause analysis does not look to the veiled psyche of government officers." *Id.* at 863.[6]

In sum, the record before us is one that fits neatly within the legislative invocation jurisprudence as set forth by the Supreme Court in *Marsh* and *Town of Greece*.

IV.

I also disagree with the majority's second holding—that even if Jackson County's prayer practice fits within the legislative prayer exception, it is unduly coercive.

A.

The majority opinion applies Part II-B of Justice Kennedy's opinion as if it were the opinion of the Court. It is not.

On the issue of coercion, the *Town of Greece* decision produced a majority result, but not a majority rationale. Under these circumstances, *Marks v. United States* provides that "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . . ." 430 U.S. 188, 193 (1977) (citation omitted). "Taken literally, *Marks* instructs lower courts to choose the 'narrowest' concurring opinion and to ignore dissents." *United States v. Cundiff*, 555 F.3d 200, 208 (6th Cir. 2009) (citation omitted). That is, we take the "one which relies on the 'least' doctrinally 'far-reaching-common ground' among the Justices in the majority." *Id.* at 209 (citation omitted).

Justice Thomas's concurring opinion (joined by Justice Scalia) is "a logical subset" of Justice Kennedy's opinion, *see, e.g.*, *United States v. Kratt*, 579 F.3d 558, 562 (6th Cir. 2009), and is the "narrowest" ground of the judgment. Therefore, Justice Thomas's opinion is controlling under *Marks*. In his concurrence, Justice Thomas traced the historical roots of coercion to "coercive state establishments"—coercion only "*by force of law and threat of*

[6]The majority also takes these statements out of context. During that meeting, Jackson County's administrator proposed a policy (in response to this litigation) that allowed clergy to present opening prayers. Rice's statements are made within the context of *who is defined* as one who can present the prayer *after* being advised by the administrator that the policy seeks to codify a nondiscriminatory selection of clergy: i.e., the Board cannot "give direction" as to what kind of prayer can be offered and that "[t]hey can say whatever they want to say." http://tinyurl.com/2013nov12 (29:30, 32:00).

penalty." 134 S. Ct. at 1837 (Thomas, J., concurring in part and in the judgment). This would include, for example, mandatory church attendance, levying taxes to generate church revenue, barring ministers who dissented, and limiting political participation to members of the established church. *Id.*

In the instant case, the majority reasons to the contrary, claiming that Justice Kennedy's coercion test applies because it "offers the least change to the law." This is so, they argue, because Justice Kennedy cites concurring and plurality opinions while Justice Thomas relies upon dissents (and concurrences where there were controlling majority or plurality opinions). From this, my colleagues conclude that Justice Thomas's concurrence "does not cite any controlling law to support" his theories and, therefore, is not the "opinion that offers the least change to the law."

As the majority opinion admits, this premise is faulty: "the precise role of coercion in an Establishment Clause inquiry is unclear, *especially within the context of legislative prayer.* In that sense, both Justice Kennedy's and Justice Thomas's opinions *involve at least some departure from the state of the law* as it existed before *Town of Greece*." (emphasis added). This puts it mildly. *Marsh* "carv[ed] out an exception" to the Supreme Court's Establishment Clause jurisprudence. *Id.* at 1818 (citation omitted). This is "because it sustained legislative prayer without subjecting the practice to any of the formal tests that have traditionally structured [the Establishment Clause] inquiry." *Id.* (internal quotation marks and citation omitted). *Marsh* took no effort to evaluate legislative prayer through a coercive lens, and it did so over Justice Brennan's dissenting opinion, which advocated *for* a coercion analysis. 463 U.S. at 798 (Brennan, J., dissenting) (discussing "indirect coercive pressure upon religious minorities to conform" in the context of the *Lemon* test).

Town of Greece introduces coercion as an element to legislative prayer cases for the first time. There is no dispute that Chief Justice Roberts, Justice Kennedy, and Justice Alito agree that legal coercion constitutes coercion. On this, a majority of Justices agree. However, Justice Kennedy's position offers *more* of a change in the law because his opinion would introduce a broader coercion analysis—as compared to Justice Thomas—where one never existed.

Fundamentally, *Marks* may not be used to create the fiction of Justices Thomas and Scalia joining the portion of Justice Kennedy's opinion to which they expressly disagreed. The rationale of *Marks* that a Justice implicitly agrees with a more narrow holding is inapposite to the positions of Justices Thomas and Scalia in *Town of Greece* who did not implicitly agree with Part II-B of Justice Kennedy's opinion, but expressly disagreed with it in a separate, concurring opinion. For these reasons, the majority errs in applying Justice Kennedy's test of coercion.

Under Justice Thomas's opinion, Bormuth's challenge easily fails. (In fact, he makes no such argument to the contrary.) Bormuth only raises "subtle coercive pressures" which do not remotely approach rising to "actual legal coercion." 134 S. Ct. at 1838 (Thomas, J., concurring in part and in the judgment). This resolves the issue in the County's favor.

B.

Furthermore, even if Part II-B of Justice Kennedy's opinion were precedent, it does not change the result in the present case. Under Justice Kennedy's proposed rule, we presume that a "reasonable observer . . . understands that . . . [the] purpose[of legislative prayer is] . . . to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens, not to afford government an opportunity to proselytize or force truant constituents into the pews." *Id.* at 1825 (Kennedy, J.). That we permit legislative prayer "does not suggest that those who disagree"—like Bormuth—"are compelled to join the expression or approve its content"—as Bormuth admits he is not. *Id.*; *see also id.* at 1827 ("But in the general course legislative bodies do not engage in impermissible coercion merely by exposing constituents to prayer they would rather not hear and in which they need not participate."). Whether a legislative prayer practice rises to the level of coercion "remains a fact-sensitive one that considers both the setting in which the prayer arises and the audience to whom it is directed." *Id.* at 1825; *see also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000) ("Whether a government activity violates the Establishment Clause is 'in large part a legal question to be answered on the basis of judicial interpretation of social facts. Every government practice must be judged in its unique circumstances.'" (alteration and citation omitted)).

1.

I begin with what should always shape our cases: the record on appeal. The majority relies heavily on a video—a recording of a November 12, 2013, meeting of a subset of the Board—to draw its conclusions. To be sure, Jackson County records its Board of Commissioners' meetings and makes these videos available online on its website.[7] However, the simple fact is that Bormuth did not present this video, or any other, to the district court. One need look no further than the opinions of the magistrate judge and district judge to confirm these newly found facts were not presented below. Like the parties' briefing, those opinions touch only on the prayers' content and make no such reference to the videos. Yet, at the suggestion not by Bormuth, but by Amicus on appeal, the majority has elected to expand the record. By relying upon these videos, the majority ignores a fundamental appellate principle: we cannot fault a district court for failing to address facts that were not before it.

"Our review of a district court's summary-judgment ruling is confined to the record." *E.E.O.C. v. Ford Motor Co.*, 782 F.3d 753, 765 (6th Cir. 2015) (en banc). Under Rule 56(c), the opposing party "has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact." *Chicago Title Ins.*, 487 F.3d at 995 (quoting *In re Morris*, 260 F.3d 654, 665 (6th Cir. 2001)). "This burden to respond is really an opportunity to assist the court in understanding the facts. But if the non-moving party fails to discharge that burden—for example, by remaining silent—its opportunity is waived and its case wagered." *Guarino v. Brookfield Twp. Trs.*, 980 F.2d 399, 405 (6th Cir. 1992). Simply stated, we "will not entertain on appeal factual recitations not presented to the district court when reviewing a district court's decision." *Chicago Title Ins. Corp.*, 487 F.3d at 995 (internal citation omitted); *cf. United States v. Crumpton*, 824 F.3d 593, 614 n.6 (6th Cir. 2016) (Moore, J.) (declining to consider a video introduced at trial and played for the jury in part because "[t]he video was not made part of the district court's record"). And this rule applies even if an appellant proffers evidence "that might . . . show a genuine issue of material fact after the district court had granted the defendants' motion for summary judgment." *Cacevic v. City of Hazel Park*, 226 F.3d 483, 491 (6th Cir. 2000).

---

[7] https://www.co.jackson mi.us/1673/Board-of-Commissioners

The majority opinion wholly ignores this well-established appellate principle, burying a footnote toward the end of its opinion stating that the videos were "part of the record before the district court." Its only plausible support for this assertion is that Bormuth's Amended Complaint averred that "[t]he County commissioners meetings are video recorded and posted on the Jackson County website: www.co.jackson.mi.us," and that a transcription of the offered prayers attached to his motion for summary judgment also referenced the videos' availability. In my view, the mere reference to the videos' general availability falls well short of "direct[ing] the court's attention to those specific portions of the record upon which [Bormuth sought] to rely to create a genuine issue of material fact." *Chicago Title Ins. Corp.*, 487 F.3d at 995. But in the majority's view, such fleeting references somehow required the district court to spend countless hours litigating on Bormuth's behalf in response to Jackson County's motion for summary judgment by: (1) surfing the County's website to find the archive of the meetings; (2) watching the several years' worth of monthly meetings (and as but one example, the November 12, 2013, Personnel & Finance Committee meeting alone lasted over one hour); and (3) finding facts supporting Bormuth's claim. We never require such advocacy by a district court, whether it be for a pro se litigant like Mr. Bormuth, or otherwise. *See, e.g.*, *Guarino*, 980 F.2d at 410 (a district court is not obligated to "comb the record from the partisan perspective of an advocate for the non-moving party"); *cf. Pliler v. Ford*, 542 U.S. 225, 231 (2004) ("District judges have no obligation to act as counsel or paralegal to *pro se* litigants.").[8]

There is yet another appellate procedure problem unresolved by the majority opinion. Outside of repeating the above statement from his Amended Complaint, Bormuth's appellate brief is similarly silent with respect to the videos or their content. It is only in his reply on appeal—i.e., after reviewing Amicus's briefing raising these additional materials—that he first referenced the videos and made an argument regarding the new facts contained therein. "We have consistently held, however, that arguments made to us for the first time in a reply brief

[8]The majority also relies upon Bormuth's response to Jackson County's motion for summary judgment, but that response makes no reference to the videos or their express content. Noticeably absent are the statements referenced by the majority regarding controlling prayer content, the content of other meetings, and calling Bormuth a "nitwit." Finally, the majority incorrectly states Jackson County admitted at oral argument that the videos were part of the "official record" before the district court. Rather, counsel stated the videos were part of the *County's* official public records.

are waived." *Sanborn v. Parker*, 629 F.3d 554, 579 (6th Cir. 2010). "[W]here the facts relied upon were presented neither to the district court nor to this Court until Plaintiff Appellant filed his reply, it would be improper for the Court to find that the district court erred in its failure to consider this newly-developed . . . argument," *Overstreet*, 305 F.3d at 578, especially, as it is here, "when the issue raised for the first time in reply is based largely on the facts and circumstances of the case." *Wright v. Holbrook*, 794 F.2d 1152, 1156 (6th Cir. 1986).

The problem becomes magnified when considering the majority's irreconcilable decision to use these new facts, but yet rightfully rejects Amicus's argument regarding prayer purpose (based upon yet another video) because Bormuth did not raise that argument below or in his appellate brief. There is no difference between this newly raised argument based on evidence not presented to the district court that the majority rejects, and the newly raised argument based on evidence not presented to the district court that the majority accepts. This dichotomy is unexplainable.

Based upon its expanded record, the majority concludes Jackson County's prayer practice is coercive under Justice Kennedy's test. I respectfully disagree.

2.

In this regard, I concur with District Judge Marianne O. Battani's ruling that Jackson County's invocation practice is not coercive:

> The Court is not persuaded that the legislative prayer at issue here is unduly coercive based on the identity of the prayer-giver. As a practical matter, nonadherents had several options available to them: leave for the duration of the prayer; remain for the prayer without rising; or remain for the prayer while rising, in which case their acquiescence would not have been interpreted as agreement with the religious sentiments. It is not clear that the direction to "Please rise" carries more coercive weight when voiced by the Commissioners themselves than by a guest chaplain selected by the Board of Commissioners. Although nonadherents to Christianity such as Bormuth may fear that their business before the Board would be prejudiced if the Commissioners observed their noncompliance with the request to stand, the risk of prejudice is no greater if the request is delivered by a Commissioner than if it is delivered by a guest chaplain. In both situations, the Commissioners are equally capable of observing those who comply and those who do not. The language in *Greece* regarding requests to participate in prayer being made by legislators does not provide clear guidance on

> the outcome of this case—it is dicta contained in a plurality opinion and is therefore not binding. Additionally, the opinion states merely that "[t]he *analysis* would be different," not that the *outcome* would be different had the instruction to rise been delivered by one of the legislators. Bormuth's attestation that two Commissioners turned their backs to him during his presentations, while evidence of disrespect, does not demonstrate that the Board was prejudiced against him because he declined to participate in the prayer—rather, their behavior is likely an unfortunate expression of their own personal sense of affront elicited by his sentiments.
>
> * * *
>
> [I]f the Court determined that the constitutionality of a legislative prayer is predicated on the identity of the speaker, potentially absurd results would ensue. Under such a holding, an invocation delivered in one county by a guest minister would be upheld, while the identical invocation delivered in another county by one of the legislators would be struck down. In light of these considerations, the Court finds that the present legislative prayer practice is not coercive.

3.

My colleagues rule to the contrary, concluding that we must view coercion differently from prayers at legislative sessions because local government meetings are small, intimate, and often involve citizens "address[ing] issues immediately affecting lives." To be sure, this difference was at the core of an opinion in *Town of Greece*: Justice Kagan's dissent. 134 S. Ct. at 1851–52 (Kagan, J., dissenting) ("The majority thus gives short shrift to the gap—more like, the chasm—between a legislative floor session involving only elected officials and a town hall revolving around ordinary citizens."). However, the five Justices in the *Town of Greece* majority did not adopt these distinctions. For this reason, my colleagues err in finding hypothetical coercion because "residents would not want to offend the local government officials they are petitioning."

The majority opinion in the present case also makes much of the fact that Commissioners asked audience members to stand and assume a reverent position before giving the prayers. This point of distinction from *Town of Greece* leads my colleagues to rely upon this passage from Part II-B of Justice Kennedy's opinion:

> The analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that

> their decisions might be influenced by a person's acquiescence in the prayer opportunity. . . . 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.

Id. at 1826 (Kennedy, J.). The analytical fallacy of focusing on this list of distinctions is that it ignores that "[o]ur tradition assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith"; and that a reasonable person understands that the purpose of legislative prayer is "to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens, not to afford government an opportunity to proselytize or force truant constituents into the pews." *Id.* at 1823, 1825. Bluntly, "[t]hat many appreciate these acknowledgments of the divine in our public institutions does not suggest that those who disagree are compelled to join the expression or approve its content." *Id.* at 1825. As the district court stated, "[a]lthough nonadherents to Christianity such as Bormuth may fear that their business before the Board would be prejudiced if the Commissioners observed their noncompliance with the request to stand, the risk of prejudice is no greater if the request is delivered by a Commissioner than if it is delivered by a guest chaplain. In both situations, the Commissioners are equally capable of observing those who comply and those who do not." The majority's application thus flips Justice Kennedy's presumption against Jackson County, not in its favor.

And more importantly, just as in *Town of Greece*, "[n]othing in the record suggests that members of the public are dissuaded from leaving the meeting room during the prayer, arriving late, or even, as happened here, making a later protest." *Id.* at 1827. (Commissioner Rice even suggested as much.) Bormuth admits that he refused to stand for the prayers and his "quiet acquiescence [should] not, in light of our traditions, be interpreted as an agreement with the words or ideas expressed." *Id.* On this record, I refuse to equate these "commonplace" and "reflexive" requests as mandating prayer participation. *Id.* at 1832 (Alito, J., concurring) (noting, among other things, that the words "Let us pray" are "commonplace" and "reflexive").

There is also nothing in the record indicating that the Commissioners treated Bormuth differently on account of his complaints regarding the prayer practice. That record is: two Commissioner's comments regarding the draft prayer policy, and one turning his back on Bormuth when he criticized the sectarian prayer practice.[9] On the former, the statements discussing "attacks" on Jesus Christ and the Commissioners are in the context of an individual's right to offer a prayer of his or her faith, without preclearance by "an administrator or judge": "Bormuth is attacking us and, from my perspective, my Lord and savior Jesus Christ. Our civil liberties should not be taken away from us, as Commissioners"; "We Commissioners, as individuals, have a right to pray as we believe"; and "What about my rights?" *See id.* at 1823. And on the latter, I agree with the district court that however uncourteous, a Commissioner turning his back to Bormuth one time certainly does not constitute "strong criticism or disapproval." *Opprobrium*, Black's Law Dictionary (10th ed. 2014).

That leaves us with the majority opinion's final conclusion: Jackson County allocated benefits and burdens due to Bormuth's objection to its prayer practice by not appointing him to the Solid Waste Planning Committee or the Board of Public Works. Taking the facts that were properly before the district court (including those proposed in Bormuth's second motion to supplement),[10] I do not agree.

Beyond a template rejection letter, we know nothing about why Jackson County rejected Bormuth's application to fill a vacancy on the Solid Waste Planning Committee. All we have are unverified assertions from his complaint. But in order to defeat Jackson County's motion for summary judgment, Bormuth was required to go "beyond the pleadings" and "do more than simply show that there is some metaphysical doubt as to material facts to survive summary

---

[9]Citing comments from the November 12, 2013, Personnel & Finance Committee meeting, the majority concludes Jackson County singled Bormuth out for opprobrium. These comments were, of course, not presented to the district court and were not raised by Bormuth in his appellate brief and, therefore, are not properly before us.

[10]Given this, I disagree with the majority opinion's conclusion that the district court abused its discretion by denying Bormuth's second motion to supplement.

judgment." *Travelers Prop. Cas. Co. of Am. v. Hillerich & Bradsby Co.*, 598 F.3d 257, 270 (6th Cir. 2010) (citation omitted).[11]

We know slightly more with respect to his application for an appointment to the Board of Public Works. Bormuth contends he was "the most qualified applicant," yet the Commissioners appointed an individual who had run against one of the Commissioners. The Commissioners told Bormuth that they appointed the other person because he "was a former township supervisor who was involved with setting up a township recycling station and that his experience with recycling was the focus of his appointment." Bormuth contends that he was more qualified than this person: "I was the primary person working for the closure of the JCRRF [Jackson County Resource Recovery Facility]"; "I have been one of the primary voices seeking to maximize recycling in Jackson County before the Solid Waste Planning Committee"; "I am the reason Jackson County now has a part time recycling coordinator to gather numbers on recycling volumes within the County"; and "I had been dialoguing with Commissioner Duckham on ways to get glass used as a recycled material in our roads." Bormuth was "incredulous" about the appointment of another individual and therefore drew the conclusion that "the Commissioners will not grant an appointment to anyone who does not believe in the evil scum jesus [sic] story."

It is an evidentiary supposition to suggest, as the majority does, that, as a matter of law, "the County's decision not to nominate [Bormuth] . . . suggests that the Board of Commissioners was denying benefits to residents based on their beliefs." Other than Bormuth's attestation that he was "the most qualified applicant," there is nothing in the record linking the refusal to appoint Bormuth to the Board of Public Works to his objection to the prayer policy. Bormuth even admits he was told that the candidate selected had prior governmental experience in setting up a recycling station. Without more facts about the selection process, this court should not, as a matter of law, draw the conclusion made by the majority.

---

[11]Citing Bormuth's initial disclosures, the majority invents the argument that Bormuth sought to depose the Commissioners for more information about Bormuth's efforts to close the Jackson County Resource Facility. The record shows, however, that in response to the County's motion to quash these depositions, he made no such argument and instead focused solely on Jackson County's prayer practice and the individual Commissioners' intent in giving prayers. As set forth in the text, individual Commissioners' intent is not pertinent to our inquiry. For these reasons, the majority wrongly concludes the district court erred in quashing Bormuth's deposition notices for the Commissioners.

V.

I note my view as to the constitutionality of Jackson County's invocation practice is consistent with the Fourth Circuit's recent opinion in *Lund v. Rowan County*, 837 F.3d 407 (4th Cir. 2016).[12] Rowan County's invocation practice is remarkably similar: the Rowan County Board opens its sessions with a commissioner-led invocation; the content of each invocation is at each commissioner's discretion, without preclearance by the board as a whole; the invocations have predominantly Christian tones; the commissioners typically say "let us pray" or "please pray with me" before giving the invocations; and members of the public who object to the practice can leave before, arrive after, or remain without participation. *Id.* at 411, 413.

In *Lund v. Rowan County*, the Court of Appeals for the Fourth Circuit held that this practice was consistent with the Supreme Court's legislative prayer jurisprudence. First, it rejected the argument that the identity of the prayer giver is dispositive because "the Supreme Court attached no significance [in *Marsh* and *Town of Greece*] to the speakers' identities in its analysis and simply confined its discussion to the facts surrounding the prayer practices before it." *Id.* at 418. Rather, and relying upon some of the same historical documents I reference, the Fourth Circuit concluded "the very 'history and tradition' anchoring the Supreme Court's holding in *Town of Greece* underscores a long-standing practice not only of legislative prayer generally but of lawmaker-led prayer specifically."[13] *Id.* And as the Fourth Circuit aptly points out, this historical practice makes sense in light of legislative prayer's purpose—"If legislative prayer is intended to allow lawmakers to 'show who and what they are' in a public forum, then it stands to reason that they should be able to lead such prayers for the intended audience: themselves." *Id.* at 420.

Second, the Fourth Circuit highlighted four "guideposts for analyzing whether a particular practice goes beyond constitutional bounds": the selection of the content; the content; the selection of the prayer giver; and whether over time the practice conveys the view that the

[12]I recognize the Fourth Circuit is reconsidering *Lund* en banc, but still find its reasoning to be persuasive.

[13]On this point, even the dissenting judge in *Lund* agreed. 837 F.3d at 432–33 (Wilkinson, J., dissenting) ("As the majority . . . rightly remind[s], there exists a robust tradition of prayers delivered by legislators.").

government advanced one religion over other creeds. *Id.* at 420–25. Each of these are just as applicable to Jackson County's practice.

Selection of the content. Just like the majority here, the district court in *Lund* found commissioner-led prayers amounted to government supervision of prayer. *Id.* at 420. The Fourth Circuit disagreed, emphasizing that individual commissioners could "give[] their own prayer without oversight, input, or direction" from the board. *Id.* Put another way, "each commissioner is a free agent like the ministers in *Town of Greece* and the chaplain in *Marsh* who gave invocations of their own choosing." *Id.* at 421. Moreover, there was no evidence indicating the prayers given were "anything but a personal creation of each commissioner acting in accord with his or her own personal views." *Id.* So too in Jackson County.

The content. As here, the content of the invocations given before Rowan County's Board of Commissioners "largely encompassed universal themes, such as giving thanks and requesting divine guidance in deliberations. . . . There [wa]s no prayer in the record asking those who may hear it to convert to the prayer-giver's faith or belittling those who believe differently." *Id.* at 422. The illustrative prayer given by the Fourth Circuit is universal, and neither proselytizes nor disparages:

> Let us pray. Father we do thank you for the privilege of being here tonight. We thank you for the beautiful day you've given us, for health and strength, for all the things we take for granted. Lord, as we read the paper today, the economic times are not good, and many people are suffering and doing without. We pray for them; we pray that you would help us to help. We pray for the decisions that we will make tonight, that God, they will honor and glorify you. We pray that you would give us wisdom and understanding. We'll thank you for it. In Jesus' name. Amen.

Id. This prayer, as with the prayers about which Bormuth complains, "comes nowhere near the realm of prayer that is out of bounds under the standards announced in *Town of Greece*." *Id.*

The selection of the prayer giver. As does the majority opinion for Jackson County, the district court in *Lund* faulted Rowan County for failing to promote religious diversity by only permitting commissioners to give invocations. *Id.* at 423. I agree with our sister circuit's response to this point—"[D]iversity among the beliefs represented in a legislature has never been the measure of legislative prayer." *Id.* Rather, *Town of Greece* makes clear that legislative

bodies need not "promote a diversity of religious views." *Id.* (citing *Town of Greece*, 134 S. Ct. at 1824). Accordingly, "[a]bsent proof the Board restricted the prayer opportunity among the commissioners as part of an effort to promote only Christianity, we must view its decision to rely on lawmaker-led prayer as constitutionally insignificant." *Id.* at 424. This is especially true given that—just like Jackson County's practice—"[a] person of any creed can be elected to the Board and is entitled to speak without censorship." *Id.*

Advancement of one religion over other creeds. The Fourth Circuit concluded that Rowan County's prayer practice did not, over time, advance Christianity over other creeds. *Id.* at 424–25. The invocations offered before Rowan County were "largely generic petitions to bless the commissioners before turning to public business. . . . Had a chaplain offered prayers identical to those [in *Lund*], *Town of Greece* and *Marsh* would unquestionably apply to uphold the Board's practice." *Id.* at 425. "In other words, the degree of denominational preference projected onto the government with lawmaker-led prayer is not significantly different from selecting denominational clergy to do the same. Both prayers arise in the same context and serve the same purpose." *Id.* The same is true in the present case.

Third, the Fourth Circuit found that Rowan County's practice was not impermissibly coercive. Preliminarily, it rejected the district court's view that the Supreme Court's prior coercion cases are applicable to legislative prayer cases, emphasizing the unique nature of this area of the law. *Id.* at 427 ("[L]egislative prayer [is] a field of Establishment Clause jurisprudence with its own set of boundaries and guidelines.") (citation omitted). The Fourth Circuit did not address the *Marks* issue, however. Instead, it recognized "that the Board clearly did not engage in coercion under the view expressed by Justices Scalia and Thomas," but nonetheless gave the plaintiffs the benefit of the doubt by also applying Justice Kennedy's plurality opinion. *Id.*

Even under Justice Kennedy's "more favorable" standard, the Court of Appeals for the Fourth Circuit held that the plaintiffs failed to demonstrate coercion. *Id.* In large part, the Fourth Circuit emphasized the voluntariness of participating in the prayers, especially when evaluated in light of the fact that "[a]dults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront

from the expression of contrary religious views." *Id.* (quoting *Town of Greece*, 134 S. Ct. at 1826 (Kennedy, J.)); *see also id.* at 428–29. Just like Bormuth, who admits he did not participate in Jackson County's prayers, citizens attending Rowan County Board of Commissioner meetings "who found the prayer unwanted had several options available – they could arrive after the invocation, leave for the duration of the prayer, or remain for the prayer without participating." *Id.* at 428. And the same is true with why the Rowan County Commissioners' requests to stand and pray before the giving of an invocation does not constitute coercion: viewing this "routine courtesy" through the lens of legislative prayer's purpose "'to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens,' . . . no reasonable person would interpret the commissioners' commonplace invitations as government directives commanding participation in the prayer." *Id.* at 429–30 (quoting *Town of Greece*, 134 S. Ct. at 1826 (Kennedy, J.)).[14]

Finally, whether the *Lund* majority's opinion will stand as a matter of Fourth Circuit precedent will soon be decided. I take exception to my colleagues following Judge Wilkinson's suggestion that public entities mandate non-denominational prayers and diverse prayer givers, or even offer a prophylactic "Message of Religious Welcome," in order to cure any perceived Establishment Clause problems. *See id.* at 437–38 (Wilkinson, J., dissenting). This suggestion, as discussed, runs headlong into *Marsh* and *Town of Greece*—the constitutionality of legislative prayer does not turn on content neutrality, prayer-giver diversity, or advance trigger warnings, for one "may safely assume that mature adults, like [Bormuth himself admits], can follow such contextual cues without the risk of religious indoctrination." *Id.* at 430.

VI.

For these reasons, I respectfully dissent. I would affirm the judgment of the district court.

---

[14]Moreover, the Fourth Circuit rejected the plaintiffs' claim that they were singled out for opprobrium based upon several statements by commissioners that "were critical of those in the religious minority": "[s]uch isolated incidents do not come close to showing . . . 'a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose.'" *Id.* at 430 (quoting *Town of Greece*, 134 S. Ct. at 1824). These statements—"I am sick and tired of being told by the minority what's best for the majority. My friends, we've come a long way—the wrong way. We call evil good and good evil," for example—are akin to those the majority relies upon in the present case. *Id.*

UNTIED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PETER BORMUTH,

Plaintiff,

v.

COUNTY OF JACKSON,

Defendant.

_____/

CASE NO. 2:13-cv-13726

HON. MARIANNE O. BATTANI

OPINION AND ORDER OVERRULING THE PLAINTIFF'S OBJECTIONS, OVERRULING IN PART AND SUSTAINING IN PART DEFENDANT'S OBJECTIONS, ADOPTING IN PART THE REPORT AND RECOMMENDATION, GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The present case arises from Plaintiff Peter Bormuth's ("Bormuth's") *Establishment Clause* challenge to Defendant County of Jackson's ("Jackson's") practice of opening its Board of Commissioner meetings with prayer invocations delivered by members of the Board. Before the Court are Bormuth's and Jackson's objections to Magistrate Judge Hluchaniuk's March 31, 2015, Report and Recommendation ("R&R"). (Docs. 51, 53.) In the R&R (Doc. 50), the Magistrate Judge recommended that the Court grant Bormuth's motion for summary judgment (Doc. 37) and deny Jackson's motion for summary judgment (Doc. 25). For the reasons that follow, the Court **OVERRULES** Bormuth's objections, **OVERRULES IN PART AND SUSTAINS IN PART** Jackson's objections, **ADOPTS IN PART** the R&R, **GRANTS**

Appendix D

Jackson's Motion for Summary Judgment, and **DENIES** Bormuth's Motion for Summary Judgment.

I. STATEMENT OF FACTS

As the parties have not objected to the R&R's recitation of the facts, the Court adopts that portion of the R&R. (See Doc. 50, pp. 2-6.)

II. STANDARD OF REVIEW

A. Report and Recommendations

Pursuant to statute, this Court's standard of review for a magistrate judge's report and recommendation requires a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made. 28 U.S.C. § 636(b)(1)(C). A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. Id.

B. Summary Judgment

Summary judgment is appropriately rendered "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Redding v. St. Eward, 241 F.3d 530, 532 (6th Cir. 2001). The court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." State Farm Fire & Cas. Co. v. McGowan, 421 F.3d 433, 436 (6th Cir. 2005) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986)). The evidence and all reasonable inferences must be construed in the light

most favorable to the non-moving party. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

Where the movant establishes the lack of a genuine issue of material fact, the burden of demonstrating the existence of such an issue shifts to the non-moving party to come forward with "specific facts showing that there is a genuine issue for trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). That is, the party opposing a motion for summary judgment must make an affirmative showing with proper evidence and must "designate specific facts in affidavits, depositions, or other factual material showing 'evidence on which the jury could reasonably find for the plaintiff.'" Brown v. Scott, 329 F. Supp. 2d 905, 910 (6th Cir. 2004). In order to fulfill this burden, the non-moving party need only demonstrate the minimal standard that a jury could ostensibly find in his favor. Anderson, 477 U.S. at 248; McLean v. 988011 Ontario, Ltd., 224 F.3d 797, 800 (6th Cir. 2000). However, mere allegations or denials in the non-movant's pleadings will not satisfy this burden, nor will a mere scintilla of evidence supporting the non-moving party. Anderson, 477 U.S. at 248, 251.

III. DISCUSSION

A. Sectarian Prayer

As a preliminary matter, the Court briefly addresses Bormuth's objection that the Magistrate Judge failed to determine the merits of the case in accordance with the Treaty of Tripoli of 1797. The Court agrees with the Magistrate Judge's conclusion that the Treaty of Tripoli is nothing more than a confirmation that the treaty was executed by the United States not as a religious power but as a secular state. Frank Lambert, The Founding Fathers and the Place of Religion in America 11 (2006) ("The assurances . . .

were intended to allay the fears of the Muslim state by insisting that religion would not govern how the treaty was interpreted and enforced . . . . [and] that the pact was between two sovereign states, not between two religious powers."). Therefore, the appropriate authority controlling this case is the *First Amendment.*

Though the *Establishment Clause* mandates government neutrality amongst religions, the Supreme Court has carved out a narrow exception to this guaranty in the case of legislative prayer. Marsh v. Chambers, 463 U.S. 783, 796 (1983) (Brennan, J., dissenting). In light of the historical tradition of legislative prayer tracing back to the First Congress, the Supreme Court found counstitutional the Nebraska Legislature's practice of opening its sessions with prayer delivered by an official chaplain who had held this position for sixteen consecutive years. Id. at 794-95. In deciding this case, the court did not apply the familiar tripartite test set forth in Lemon v. Kurtzman, 403 U.S. 602 (1971) but rather introduced the following standard:

> The content of the prayer is not of concern where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.

Id. Likewise, following Marsh, the Sixth Circuit expressly declined to apply the Lemon test in a case involving legislative prayer. Jones v. Hamilton County Gov't, 530 F. App'x 478, 487 (6th Cir. 2013). Contrary to Bormuth's objection, the fact that the prayer at issue in this case is government speech does not place it within the realm of the Lemon test. See Simpson v. Chesterfield County Bd. of Supervisors, 404 F.3d 276, 288 (4th Cir. 2005) (applying the standard set forth in Marsh after finding prayers delivered by

chaplains to be government speech). Therefore, the Court agrees with the Magistrate Judge's conclusion that the Lemon test does not apply in the present case.

The Supreme Court later confronted a case challenging the constitutionality of a religious holiday display at a government building. County of Allegheny v. ACLU, 492 U.S. 573, 597-80 (1989). The court distinguished the outcome of Allegheny from that in Marsh by noting that the legislative prayer at issue in Marsh was nonsectarian in that it had "removed all references to Christ." Id. at 603 ("Indeed, in *Marsh* itself, the Court recognized that not even the 'unique history' of legislative prayer can justify contemporary legislative prayers that have the effect of affiliating the government with any one specific faith or belief.") (citations omitted) (quoting Marsh, 463 U.S. at 793 n.14). In the wake of Allegheny, many courts' decisions were therefore premised on the understanding that sectarian legislative prayer amounts to a constitutional violation. See, e.g., Joyner v. Forsyth County, 653 F.3d 341, 348-49 (4th Cir. 2011); Hinrichs v. Bosma, 440 F.3d 393, 401-02 (7th Cir. 2006), *rev'd on other grounds*, 506 F.3d 584; Wynne v. Town of Great Falls, 376 F.3d 292, 301 (4th Cir. 2004); Hudson v. Pittsylvania County, No. 4:11cv00043, 2013 U.S. Dist. LEXIS 43012 at *31-32 (W.D.Va. March 27, 2013).

Most recently, the Supreme Court has dismantled this line of jurisprudence in Town of Greece v. Galloway. 134 S. Ct. 1811 (2014). Greece scrutinized the constitutionality of a town's practice of opening its monthly board meetings with an invocation delivered by a local clergyman. Id. at 1816. The town solicited guest chaplains by placing calls to local congregations listed in a local directory, ultimately compiling a list of willing chaplains. Id. Although the town never excluded or denied an

opportunity to deliver the invocation, nearly all of the local congregations were Christian and, consequently, so too were the guest chaplains. Id. Accordingly, the content of the invocations frequently made sectarian references to Jesus and the Christian faith. Id. The town never reviewed the content prior to the board meetings or provided guidance on the content. Id.

Beginning with a summary of Marsh's historical analysis of legislative prayer, the Supreme Court's decision in Greece repudiated the notion that legislative prayer must be completely nonsectarian in order to pass constitutional muster. Id. at 1820 ("An insistence on nonsectarian or ecumenical prayer as a single, fixed standard is not consistent with the tradition of legislative prayer outlined in the Court's cases."). The decision proceeded to dismiss Allegheny's interpretation of Marsh as mere dictum "that was disputed when written" and that is "irreconcilable with the facts of *Marsh*." Id. at 1821 ("*Marsh* nowhere suggested that the constitutionality of legislative prayer turns on the neutrality of its content."). The Court reasoned that to hold otherwise would compel legislatures and reviewing courts to censor religious speech, leading to a far greater degree of governmental entanglement with religion than to allow sectarian prayer. Id. at 1822. Nor did Greece find problematic the fact that the guest chaplains invited to deliver invocations were predominantly Christian, as it was merely representative of the town's demographic. Id. at 1824 ("So long as the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers."). Nonetheless, Greece imposed the following constraints on the content of legislative prayer, similar to the standard set forth in Marsh:

> If the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach

> conversion, many present may consider the prayer to fall short of the desire to elevate the purpose of the occasion and to unite lawmakers in their common effort.
>
> . . .
>
> Absent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a prayer will not likely establish a constitutional violation.

Id. at 1823-24.

Firstly, given the clear holding of Greece, there can be no dispute that the sectarian and exclusively Christian nature inherent to Jackson's prayer invocations does not alone render the practice unconstitutional. The fact that all nine of the Commissioners are Christian is immaterial. As elected officials, they were chosen as representatives whose interests were most closely aligned with the public's, and their personal beliefs are therefore a reflection of the community's own overwhelmingly Christian demographic. Like the Town of Greece, Jackson was under no obligation to ensure representation by all religions. See Greece, 134 S. Ct. at 1824. As argued by Jackson, the future may bring Commissioners of more diverse religious backgrounds who will deliver invocations in those traditions. To hold otherwise would contravene Marsh's sanction of legislative prayer delivered for sixteen years by a single Presbyterian clergyman. See 403 U.S. at 793.

Secondly, there has there been no showing that the invocations delivered at Jackson's board meetings have denigrated or attempted to proselytize nonbelievers. Indeed, the content of the invocations incorporates rather benign religious references, such as blessing America's troops and requesting divine guidance during deliberation. Bormuth objects in particular to a prayer entreating God to "[b]less the Christians

worldwide who seem to be targets of killers and extremists." He contends that this prayer was "violently offensive" because of its exclusive protection of Christians. This hypersensitive interpretation is patently misguided, as the prayer's sentiment is innocuous and unlikely to give offense to any reasonable person – the prayer did not seek to bless Christians to the detriment of non-Christians. Given the respectful tone of the prayers, the Court finds that they are consistent with the constitutional boundaries applicable to sectarian legislative prayer as delineated in Greece. This conclusion comports with the most recent outcome in Joyner v. Forsyth County, which vacated its previous findings that the sectarian legislative prayer was unconstitutional. See Order, No. 1:07-cv-00243, M.D.N.C. (Nov. 21, 2014) (Doc. 136) ("[T]he Court will lift the injunction without prejudice to the Plaintiffs presenting a proper case . . . that Defendant's prayer policy represents . . . a constitutional violation as envisioned by Town of Greece. Such a proper case may also include a claim by Plaintiffs that Defendant coerces public participation in its legislative prayers.").

B. Coercion

The more difficult inquiry presented by this case is whether the fact that the prayer invocations were delivered by government officials rather than by volunteers or members of the clergy distinguishes this case from the outcome reached in Greece by rendering the prayer unduly coercive. Many of Jackson's invocations contained cues from the Commissioners, such as: "Everyone please stand. Please bow your heads," "All rise," and "All rise and assume a reverent position." Bormuth maintains that these directions were commands amounting to coercion by forcing citizens to respect the Christian religion when they come before the Commissioners on secular business.

Meanwhile, Jackson contends that no authority subjects invocations delivered by government officials to a higher standard than those delivered by guest chaplains. Neither Greece nor Marsh directly confronts this precise question. Accordingly, the instant case presents a matter of first impression within the Sixth Circuit.

Greece recognized the "elemental *First Amendment* principle that government may not coerce its citizens 'to support or participate in any religion or its exercise.'" Id. at 1825 (quoting Allegheny, 492 U.S. at 659). When determining whether a government entity has coerced the practice of a religion, the inquiry is a fact-sensitive one to be made on a case-by-case basis. Id. In ultimately determining that the Town of Greece's practices were not coercive, the Supreme Court adduced that adults are often confronted with speech they find disagreeable and that a sense of affront resulting from exposure to religious views contrary to their own does not give rise to an *Establishment Clause* violation. Id. at 1826. The court also considered that any member of the public was welcome to offer an invocation reflecting his own beliefs; that the prayers were delivered in the solemn, respectful tradition authorized in Marsh; and that members of the public were free to leave during the prayer. Id. at 1826-27.

Although the Supreme Court ultimately found that the invocation at issue in Greece was not coercive, the plurality opinion noted in dicta:

> The analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity . . . . 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 . . . .

Id. at 1826. While the Court agrees with Jackson that legislative prayer delivered by government officials themselves is not *per se* unconstitutional, it is clear from the cautionary language in the Greece plurality opinion that the identity of the speaker is a significant factor distinguishing the present case from the reasoning in Greece. See Lund v. Rowan County, No. 1:13CV207, 2015 U.S. Dist. LEXIS 57840 at *24 (M.D.N.C. May 4, 2015) (finding the distinction between legislative prayer delivered by clergymen and prayer delivered by the legislators themselves to be significant for *Establishment Clause* purposes). Language from Joyner v. Forsyth County, relied upon by Jackson for the proposition that the identity of a speaker is immaterial, is taken out of context. In that case, the Fourth Circuit stated, "With respect to *Wynne*, the Board is right to observe that the prayers were delivered by members of the town council. But that fact was not dispositive. It was the governmental setting for the delivery of sectarian prayers that courted constitutional difficulty, not those who actually gave the invocation." See 653 F.3d at 350 (citations omitted). That excerpt simply notes that the basis for the decision in Wynne v. Town of Great Falls, 376 F.3d 292, rested on the sectarian references included in the prayer and not on the fact that the prayers were delivered by government officials. Id. It does not follow, however, that the identity of the speaker is never pertinent.

Since the Supreme Court decided Greece, at least one other district court has had the opportunity to confront the issue of sectarian legislative prayer delivered by a government official. In Lund v. Rowan County, county board meetings were opened with sectarian prayers delivered by the commissioners, all of whom were Christian. See 2015 U.S. Dist. LEXIS 57840 at *2-3. The prayers frequently began with phrases such

as "let us pray" or "please pray with me." From 2007 onwards, because all commissioners identified as Christian, the invocations were delivered exclusively in the Christian tradition. Id. at *3. The district court struck down the county's prayer practice and distinguished the case from Greece on the grounds that Greece did not concern legislative prayer delivered by government officials. Id. at *24-30. The court further determined that because the case did not fall within the legislative prayer exception as carved out in Marsh and Greece, whether the practice violated the *Establishment Clause* must be determined by applying the Lemon and coercion tests. Id. at *33. Although the court briefly discussed the Lemon test, it decided that the prayer at issue was unconstitutional by conducting a fact-driven coercion analysis. Id. at 40-45.

Consistent with the above discussion of sectarian prayer, the Court declines to apply the Lemon test when analyzing whether legislative prayer is coercive. Contrary to the district court's finding in Lund, the Court maintains that the present factual circumstances fall within the legislative prayer exception. That the conclusion in Greece regarding coercion is not controlling does not remove the present case from the realm of legislative prayer jurisprudence. As Justice Brennan's dissent in Marsh demonstrates, applying the Lemon test in legislative prayer cases would essentially result in a *per se* ban on all legislative prayer, even where the majority opinion deemed it constitutional. See Marsh, 463 U.S. at 797-98 (Brennan, J., dissenting). When engaging in a coercion analysis, the plurality opinion in Greece did not apply the Lemon test but rather conducted a fact-sensitive inquiry "that considers both the setting in which the prayer arises and the audience to whom it is directed." See Greece, 134 S. Ct. at 1825. Indeed, the Supreme Court also dispensed with the Lemon test in favor of

a "psycho-coercion test" when determining that a religious benediction at middle school graduation placed primary and secondary school students in a coercive situation. See Lee v. Weisman, 505 U.S. 577, 644 (1992) (Scalia, J., dissenting). Ultimately, application of the Lemon test is unnecessary because, as recognized in Lund, a government act that fails the coercion analysis would necessarily also fail the Lemon test. See 2015 U.S. Dist. LEXIS 57840 at *34. A fact-sensitive inquiry is thus the order of the day.

Whether the prayer practice at issue is coercive, in spite of potential tension amongst the implications of certain factual elements, is not a question of fact to be reserved for trial but rather a legal question. First, the identical issue was decided on summary judgment in both Greece and Lund. Secondly, in the analogous examination of whether a city's inclusion of a crèche in a holiday display communicated an impermissible endorsement of religion under the Lemon test, Justice O'Connor's concurring opinion implied that the issue presented a legal question. See Lynch v. Donnelly, 465 U.S. 668, 695 (1984) (O'Connor, J., concurring) ("Although evidentiary submissions may help answer it, the question is, like the question whether racial or sex-based classifications communicate an invidious message, in large part a legal question to be answered on the basis of judicial interpretation of social facts.").

Many aspects of the prayer at issue here support a finding that the practice is not coercive. The prayers "neither chastised dissenters nor attempted lengthy disquisition on religious dogma." See Greece, 134 S. Ct. at 1826. Rather, as discussed above, the content comports with the spirit of solemn, respectful prayer approved in Marsh. See id. at 1827. Nothing in the record suggests that members of the public are prevented from

leaving the meeting room for the duration of the prayer or that their absence would be remarkable or perceived as disrespectful. See id. Furthermore, should nonbelievers have chosen to stay for the duration of the prayer, "their quiet acquiescence [would] not, in light of our traditions, be interpreted as an agreement with the words or ideas expressed." Id. Indeed, contrary to Bormuth's allegations regarding the psychosocial pressures to join the prayer, neither of these two options "represents an unconstitutional imposition as to mature adults, who 'presumably' are 'not readily susceptible to religious indoctrination or peer pressure.'" See id. (quoting Marsh, 463 U.S. at 792). Accordingly, Bormuth's subjective sense of affront resulting from exposure to sectarian prayer is insufficient to sustain an *Establishment Clause* violation.

Conversely, certain other elements of the legislative prayer in the present case could be construed as coercive. First, the invocations are delivered exclusively in the Christian tradition, without the opportunity for members of the public to offer invocations according to their own convictions. Second, by exercising exclusive dominion over the content of the prayers, the legislators may be acting as "supervisors and censors of religious speech," potentially running afoul of Greece's caution against excessive entanglement with religion. See id. at 1822. Third, the Commissioners invited the public to participate in the prayers by beginning the invocations with statements such as "Please rise," "Please bow your heads," and "Let us pray." Greece may be interpreted to imply that such invitations made by government officials are coercive. See id. at 1826 ("The analysis would be different if town board members directed the public to participate in the prayers . . . ."). As articulated in Lund, members of the public may not perceive such cues, particularly from the Commissioners, as voluntary invitations that

may be declined but rather as commands that must be obeyed. See 2015 U.S. Dist. LEXIS 57840 at *42. See also Hudson, 2014 U.S. Dist. LEXIS 106401 at *6 (finding legislative prayer delivered by county board members unconstitutional based in part on the members' requests that the public stand for the prayer – as directed by one member, "If you don't want to hear this prayer, you can leave. Please stand up."). Indeed, Bormuth claims that on two occasions, when he addressed the Commissioners during Board meetings on the subjects of sectarian prayer and abortion, two of the Commissioners swiveled their chairs and turned their backs to Bormuth while he spoke.

From this analysis, the Court gleans that nothing about the content of these prayers is objectionable – the trouble arises wholly because of the surrounding circumstances. However, as discussed *supra*, the Supreme Court has already determined that legislative prayer delivered exclusively according to one religious tradition, even over many years, does not violate the constitution. Marsh, 463 U.S. at 794-95. The Supreme Court has also decided that requests to rise for sectarian prayer, when delivered by a guest minister, likewise pass constitutional muster. Greece, 134 S. Ct. at 1826. Had prayers identical to those in the instant case been delivered by a chaplain rather than the legislators, the Court would not be faced with such a heavy conundrum, as the outcome in Greece would unquestionably apply. The outcome of the present case therefore hinges exclusively on the fact that the prayer was delivered by the Commissioners.

The Court is not persuaded that the legislative prayer at issue here is unduly coercive based on the identity of the prayer-giver. As a practical matter, nonadherents had several options available to them: leave for the duration of the prayer; remain for

the prayer without rising; or remain for the prayer while rising, in which case their acquiescence would not have been interpreted as agreement with the religious sentiments. See id. at 1827. It is not clear that the direction to "Please rise" carries more coercive weight when voiced by the Commissioners themselves than by a guest chaplain selected by the Board of Commissioners. Although nonadherents to Christianity such as Bormuth may fear that their business before the Board would be prejudiced if the Commissioners observed their noncompliance with the request to stand, the risk of prejudice is no greater if the request is delivered by a Commissioner than if it is delivered by a guest chaplain. In both situations, the Commissioners are equally capable of observing those who comply and those who do not. The language in Greece regarding requests to participate in prayer being made by legislators does not provide clear guidance on the outcome of this case – it is dicta contained in a plurality opinion and is therefore not binding. Additionally, the opinion states merely that "[t]he *analysis* would be different," not that the *outcome* would be different had the instruction to rise been delivered by one of the legislators. See id. (emphasis added). Bormuth's attestation that two Commissioners turned their backs to him during his presentations, while evidence of disrespect, does not demonstrate that the Board was prejudiced against him because he declined to participate in the prayer – rather, their behavior is likely an unfortunate expression of their own personal sense of affront elicited by his sentiments.

Further, in the opinion of this Court, the Commissioners' development of the prayers' content does not foster an entanglement with religion. Indeed, the hiring and payment of an official chaplain as upheld in Marsh may be regarded as a greater governmental

entanglement with religion than the Commissioners' rather benign religious references at issue in the present case. That is, the presence of a religious figure could serve to strengthen perceived governmental ties to religion, not to distance them. Moreover, if the Court determined that the constitutionality of a legislative prayer is predicated on the identity of the speaker, potentially absurd results would ensue. Under such a holding, an invocation delivered in one county by a guest minister would be upheld, while the identical invocation delivered in another county by one of the legislators would be struck down. In light of these considerations, the Court finds that the present legislative prayer practice is not coercive.

C. Pledge of Allegiance

Bormuth also objects to the Magistrate Judge's R&R on the grounds that it does not discuss the Board's practice of inviting children to lead the Pledge of Allegiance, immediately following the prayer invocation. Bormuth contends that the children's exposure to prayer in the context of a civic meeting forms an indelible connection between religion and the government in their impressionable minds.

In order to meet the minimum constitutional standards for individual standing,

> [A] plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc., 528 U.S. 167, 180-81 (2000). Although ordinarily, one may not claim standing to vindicate the rights of some third party, this rule is not absolute. Smith v. Jefferson County Bd. of Sch. Comm'rs, 641 F.3d 197, 208 (2011). A party may assert the rights of another where "the party

asserting the right has a 'close' relationship with the person who possesses the right," and where "there is a 'hindrance' to the possessor's ability to protect his own interests." Id. (citing Kowalski v. Tesmer, 543 U.S. 125, 130 (2004)). Here, Bormuth's claim rests on the constitutional rights of the children leading the Pledge of Allegiance. There is no indication anywhere in the record that he had any relationship whatsoever with these children, let alone a "close" relationship. Moreover, there is no indication that the children's ability – or rather their parents' ability – to protect their own rights is hindered in any way. Accordingly, Bormuth lacks standing to assert his *Establishment Clause* and coercion claims on these grounds.

IV. CONCLUSION

For the reasons articulated above, the Court finds that Jackson's legislative prayer practice does not violate the *Establishment Clause*. Although the Court believes the better practice would be to exclude legislative prayer from governmental proceedings altogether, it is constrained to follow the Supreme Court precedents set forth in Marsh and Greece by upholding the practice presently at issue. Accordingly, the Court **OVERRULES** Bormuth's objections, **OVERRULES IN PART AND SUSTAINS IN PART** Jackson's objections, **ADOPTS IN PART** the R&R, **GRANTS** Jackson's Motion for Summary Judgment, and **DENIES** Bormuth's Motion for Summary Judgment.

IT IS SO ORDERED.

Date: July 22, 2015

s/Marianne O. Battani
MARIANNE O. BATTANI
United States District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Order was served upon counsel of record via the Court's ECF System to their respective email addresses or First Class U.S. mail to the non-ECF participants on July 22, 2015.

s/ Kay Doaks
Case Manager

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PETER BORMUTH,

Plaintiff,

v.

COUNTY OF JACKSON,

Defendant.

_____/

Case No. 13-13726

Marianne O. Battani
United States District Judge

Michael Hluchaniuk
United States Magistrate Judge

REPORT AND RECOMMENDATION
CROSS-MOTIONS FOR SUMMARY JUDGMENT (Dkt. 25, 37)

I. PROCEDURAL HISTORY

On August 30, 2013, plaintiff filed this complaint for violations of First Amendment Establishment Clause by the Jackson County Commissioners. (Dkt. 1). Plaintiff filed an amended complaint on November 14, 2013. (Dkt. 10). Defendant filed an answer to the amended complaint on November 27, 2013. (Dkt. 11). On June 11, 2014, defendant filed its motion for summary judgment. (Dkt. 25). Plaintiff filed his response on June 27, 2014. (Dkt. 29). Defendant filed its reply on July 11, 2014. (Dkt. 30). On September 11, 2014, plaintiff filed his motion for summary judgment. (Dkt. 37). On October 6, 2014, defendant filed its response. (Dkt. 39). On October 20, 2014, plaintiff filed his reply. (Dkt. 41). These matters are now ready for report and recommendation.

Appendix E

For the reasons set forth below, the undersigned **RECOMMENDS** that the plaintiff's motion for summary judgment be **GRANTED**, that defendant's motion for summary judgment be **DENIED** and that an **INJUNCTION** precluding the County of Jackson's Board of Commissioners from utilizing its current legislative prayer practice be entered.

II. FACTUAL BACKGROUND

Plaintiff contends that the practice of the Jackson County Board of Commissioners (the Board) to open its meetings with a invocation given by individual members of the Board on a rotating basis violates the Establishment Clause of the First Amendment. Jackson County's invocation practice permits one of the nine individual Commissioners, on a rotating basis, to give a short invocation before its Board of Commissioners meetings. Commissioners of any religion (or no religion) are permitted to offer an invocation based on the dictates of his/her own conscience. According to defendant, the County, and the Board of Commissioners as a body, does not engage in any prior inquiry, review of, or involvement in, the content of any invocation to be offered. Defendant maintains that no Commissioner has ever been disallowed from the rotating opportunity to provide an invocation based on the Commissioners beliefs or the contents of the invocation and that all Commissioners are treated equally irrespective of an individual Commissioners' beliefs. (Dkt. 25-4, Affidavit of Michael Overton,

Administrator/Controller for Defendant).

Plaintiff bases his claims on seven invocations (Dkt. 10, ¶¶ 19- 23, 28, 35), which plaintiff claims are unconstitutional because they included sectarian references such as "Jesus," "in your holy name," "heavenly father," "lord," "amen," or "bless our troops." Plaintiff asserts, on numerous occasions, that the inclusion of sectarian references violates the Establishment Clause or the rights of non-Christians. Jackson County opens its County Commissioners meetings with an invocation. (Dkt. 11, p. 1, ¶ 1). The Commissioners themselves lead the invocations on a rotating basis. (Dkt. 11, p. 1, ¶ 1). Citizens who attend the meetings have been asked to rise and bow their heads. (Dkt. 11, p. 1, ¶ 1). These prayers are often made in the name of Jesus Christ. (Dkt. 11, ¶¶ 19-23). The County of Jackson Policy manual has no posted rules regarding this invocation prayer. (Dkt. 11, p. 1, ¶ 2). The invocation/prayer is immediately followed by the Pledge of Allegiance on the meeting agenda. (Dkt. 11, p. 1, ¶ 3). Children are regularly invited to the Commissioners meeting to lead the Pledge of Allegiance. (Dkt. 11, p. 1, ¶ 3).

Plaintiff attended the July 23, 2013 Commissioner's meeting and after Chairman Shotwell directed "all rise," Commissioner Gail Mahoney led the following prayer:

Bow your heads with me please. Heavenly father we

> thank you for this day and for this time that we have come together. Lord we ask that you would be with us while we conduct the business of Jackson County. Lord help us to make good decisions that will be best for generations to come. We ask that you would bless our troops that protect us near and far, be with them and their families. Now Lord we wanna give you all the thanks and all the praise for all that you do. Lord I wanna remember bereaved families tonight too, that you would be with them and take them through difficult times. We ask these things in your son Jesus's name. Amen.

(Dkt. 11, p. 1, ¶ 23). This was immediately followed by two children, Eli and Gavin Lattner, coming forward to lead the Pledge of Allegiance. (Dkt. 11, p. 1, ¶ 23).

On August 17, 2013, plaintiff stopped by Chairman Shotwell's shoe store, Miller's Shoe Parlor at 103 W. Michigan Ave in downtown Jackson to communicate his feelings that the invocations to Jesus Christ violated the Establishment Clause and were offensive to non-believing citizens. (Dkt. 11, p. 1, ¶ 27). On Tuesday August 20, 2013, plaintiff attended the County Commissioner's Meeting. The meeting opened with the following invocation by Commissioner David Elwell:

> Please rise. Please bow our heads. Our heavenly father we thank you for allowing us to gather here in your presence tonight. We ask that you watch over us and keep your guiding hand on our shoulder as we deliberate tonight. Please protect and watch over the men and women serving this great nation, whether at home or abroad, as well as our police officers and firefighters. In

this we pray, in Jesus name, Amen.

(Dkt. 11, p. 1, ¶ 28).

On August 30, 2013 plaintiff filed his original complaint with this Court seeking an injunction to prevent this establishment of the Christian religion; these sectarian prayers in the name of Jesus Christ; and what he characterizes as "deliberate religious coercion of the worst possible kind affecting young impressionable minds." (Dkt. 10, ¶ 32). On September 9, 2013, Jackson County officials (Agencies and Affairs committee) voted on a pool of applicants and nominated members for the county's new Solid Waste Planning Committee. Plaintiff, who had applied and who had been working on related issues for the last three years, was not nominated. On September 17, 2013 the Commissioners approved the nominations. (Dkt. 10, ¶¶ 33-34).

On Tuesday October 15, 2013, plaintiff again attended the County Commissioner's meeting. After Chairman Shotwell directed "All rise," Commissioner David Lutchka gave the following invocation:

> Our Heavenly Father, watch over us tonight, help us to make the best decisions for the total population of the County of Jackson. And I know you're tough so give all those guys in Washington a two by four upside the head and tell them to start working together. In Jesus name we pray. Amen.

(Dkt. 11, ¶ 35). This was followed by a child, David Rice, coming forward to lead

the Pledge of Allegiance. (Dkt. 11, ¶ 36).

III. PARTIES' ARGUMENTS

According to defendant, the facts in *Town of Greece v. Galloway*, 134 S. Ct. 1811, 188 L. Ed. 2d 835 (2014) are virtually identical to the facts in this case. In *Town of Greece*, the plaintiffs claimed that prayers provided during a town board meeting improperly included sectarian references such as "Jesus" or other sectarian references in alleged violation of the Establishment Clause or the rights of non-Christians; that aspects of the town meeting, such as the presence of children, the public being "asked" to rise or bow their heads, the local nature of the business of a town, or the direct participation by Town board members in the prayer cumulatively took such actions outside of the legislative prayer which was permitted in *Marsh v. Chambers*, 463 U.S. 783 (1983). The Supreme Court rejected this argument and reversed. The Court made clear that:

> Ceremonial prayer is but a recognition that, since this Nation was founded and until the present day, many Americans deem that their own existence must be understood by precepts far beyond the authority of government to alter or define and that willing participation in civic affairs can be consistent with a brief acknowledgment of their belief in a higher power, always with due respect for those who adhere to other beliefs. The prayer in this case has a permissible ceremonial purpose. It is not an unconstitutional establishment of religion.

Town of Greece, 134 S.Ct. at 1827, 1828. The Court further noted that:

> For members of town boards and commissions, who often serve part-time and as volunteers, ceremonial prayer may also reflect the values they hold as private citizens. The prayer is an opportunity for them to show who and what they are without denying the right to dissent by those who disagree.

Id. at 1826.

Defendant maintains that the Supreme Court rule is directly contrary to plaintiff's position in this case -- that legislative prayers by a town (or other municipal) board as part of their meeting was Constitutional even if such prayers contained sectarian references:

> Respondents maintain that prayer must be nonsectarian, or not identifiable with any one religion; and they fault the town for permitting guest chaplains to deliver prayers that "use overtly Christian terms" or "invoke specifics of Christian theology." Brief for Respondents 20. A prayer is fitting for the public sphere, in their view, only if it contains the "'most general, nonsectarian reference to God,'" *id.*, at 33 (quoting M. Meyerson, Endowed by Our Creator: The Birth of Religious Freedom in America 11-12 (2012)), and eschews mention of doctrines associated with any one faith, Brief for Respondents 32-33.

Town of Greece, 134 S.Ct. at 1820. Further, the Court held: "This proposition is irreconcilable with the facts of *Marsh* and with its holding and reasoning. *Marsh* nowhere suggested that the constitutionality of legislative prayer turns on the neutrality of its content. *Id.* at 1821. In rejecting the suggestion that legislative prayer must be nonsectarian, the Court in *Town of Greece* did not hold that no

constraints remain on its content. The *Town of Greece* Court found sectarian invocations constitutional at the opening of legislative sessions, where it is meant to lend gravity to the occasion and reflect values long part of the Nation's heritage. Prayer that is solemn and respectful in tone, that invites lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing, serves that legitimate function. *Town of Greece*, 134 S.Ct. at 1814, 1815. However, the Court noted:

> If the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion, many present may consider the prayer to fall short of the desire to elevate the purpose of the occasion and to unite lawmakers in their common effort. That circumstance would present a different case than the one presently before the Court.

Id. at 1823. Given the facts and holding of *Town of Greece*, defendant contends that there is no meaningful basis to distinguish *Town of Greece* from the matter presently before the Court.

Defendant also asserts that plaintiff's attempt to distinguish *Marsh* and *Town of Greece* based on members of the Board giving the invocation is without merit. According to defendant, no such distinction is made in *Marsh* or *Town of Greece*. Rather, defendant maintains that the majority and plurality decision in *Town of Greece* contains language which supports the freedom of local legislators

in offering invocations. Moreover, defendant contends that nothing in *Town of Greece* supports an assertion that the standards established are limited to outside clergy, or do not apply where the invocation is given by a member of the legislative body.

Defendant also argues that other cases on legislative prayer have made clear that the issue is not who gives the invocation, but rather whether such invocation is given in a setting as to make the invocation "government speech." Defendant points out that courts have historically faced a variety of factual scenarios regarding whether or not a legislative prayer violates the Establishment Clause, including situations in which the invocation is given by a member of the governing body, a chaplain employed by the body (as in *Marsh*), volunteer religious leaders, or even members of the public. Courts, prior to *Town of Greece*, made clear that it is not the identity of the speaker, but whether the speech is attributed to government, which makes it subject to Establishment Clause scrutiny. *Simpson v. Chesterfield County Board of Supervisors*, 404 F.3d 276 (4th Cir.), cert. denied, 546 U.S. 937 (2005). Defendant also points to *Turner v. City Council of City of Fredericksburg, VA*, 534 F.3d 352, 355 (4th Cir. 2008) which noted that "[t]he identity of the speaker, and the responsibility for the speech, was, in that case, less clearly attributable to the government than the speech here, because the speakers there were not government officials." *Simpson* nonetheless held that 'the

speech ... was government speech.'" *Id.* at 355, quoting *Simpson*, 288. Likewise, in *Joyner v. Forsyth Cnty., NC.*, 653 F.3d 341, 350 (4th Cir. 2011), the Fourth Circuit held "It was the governmental setting for the delivery of sectarian prayers that courted constitutional difficulty, not those who actually gave the invocation." *Id.* at 350. Thus, defendant maintains that, in deciding whether such invocations may violate the Establishment Clause, the relevant inquiry is not based on the identity of the person who gave the invocation, but rather whether the setting made the invocation part of government (as opposed to personal) speech. Once determined to be government speech, courts then advance to the *Marsh/Town of Greece* analysis as to whether the content of the invocation violates the Establishment Clause (i.e. a legislature's "exploitation" of the prayer opportunity to achieve the promotion or disparagement of a particular religious view).

According to defendant, plaintiff's position that invocations given by members of a governing body are somehow different and subject to different standards than an invocation by an outside clergy member was specifically addressed, and rejected in *Joyner v. Forsyth County, N.C.*, 653 F.3d 341 (4th Cir. 2011). In *Joyner*, the defendant attempted to claim the existence of a legal distinction under the Establishment Clause between a member of a governing body giving an invocation as opposed to outside clergy, which was rejected by the Fourth Circuit.

In response, plaintiff argues 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 v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 659 (1989), (KENNEDY, J., concurring in judgment in part and dissenting in part); *see also Van Orden v. Perry*, 545 U.S. 677, 683 (2005) (plurality opinion) (recognizing that our "institutions must not press religious observances upon their citizens"). Plaintiff also points out that, in allowing the legislative prayers by guest chaplains, including requests to rise and bow heads, the majority opinion in *Town of Greece* specifically noted that:

> The analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity. 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, 134 S. Ct. at 1823. According to plaintiff, the present facts obviously differ from those in *Town of Greece*. Specifically, after the gavel

sounds opening the meeting, Chairman Shotwell commands the audience to "All rise and assume a reverent position" (April 16, 2013) or "Everyone rise and assume a reverent position" (January 15, 2013). Similarly, Commissioner John Polaczyk demands "All rise. Please bow your head" Commissioner Gail Mahoney requests "Bow your heads with me please" (July 23, 2013). Commissioner David Elwell directs the audience to "Please rise" (August 20, 2013). Plaintiff points out that these instructions are directed specifically to the audience. Plaintiff contends that words like "everyone" and "all" clearly indicate that the Jackson County Commissioners are coercing citizens to participate in and support a Christian religious exercise.

According to plaintiff, every Commissioner is Christian, and thus every prayer in this case has been Christian, to a complete exclusion of other beliefs or nonbelief. Plaintiff contends that defendant seeks to establish majority rule in matters of religion, something the Court in *Town of Greece* specifically disallowed. Plaintiff asserts that the lack of separation in this case is apparent to any neutral observer, given that every invocation/prayer has been Christian. In *Larson v. Valente*, 456 U.S. 228, 244 (1982) the Court held: "[t]he clearest command of the Establishment Clause"; is that "one religious denomination cannot be officially preferred over another." In Jackson County, plaintiff asserts that the Christian religion is being preferred and that the Commissioners are

officially practicing a form of Christian worship and compelling the acceptance of the Christian creed by coercing citizens to pray to Jesus Christ.

Plaintiff also distinguishes *Town of Greece* by pointing out that the prayers were being made by guest chaplains and directed at the City Council members, while, in this case, the prayers are being made by the Commissioners themselves and directed at the audience. Plaintiff contends that the Court in *Town of Greece* found this distinction to be of significant importance. The majority opinion held that: "The case [*Marsh*] teaches instead that the Establishment Clause must be interpreted by reference to historical practices and understandings." *Town of Greece*, 134 S. Ct. at 1823, quoting *County of Allegheny*, 492 U. S. at 670.

According to plaintiff, there is not a single case where a court has ruled that prayers by government officials themselves in the course of their official duties are Constitutional. Rather, plaintiff maintains that historical practices and understanding have always held such activity to be problematic and a violation of the Establishment Clause. Such a practice removes this case from the *Marsh/Town of Greece* exception and demands that it be scrutinized under the standard of *Lemon v. Kurtzman*, 403 U.S. 602 (1971) in which the Court held that to survive an Establishment Clause challenge, the governmental action must satisfy three independent requirements: 1) "it must have a secular legislative purpose, 2) its principal or primary effect must be one that neither advances nor

inhibits religion; and 3) it must not foster an excessive governmental entanglement with religion." Plaintiff contends that the practice at issue before this Court does not survive scrutiny under any of the three prongs of the *Lemon* test. Plaintiff contends that the invocation/prayers by the Jackson County Commissioners: (1) are government speech that lacks a secular legislative purpose and they advance the Christian religion; (2) intrude on the right to conscience by forcing some citizens either to participate in an invocation/prayer with which they are in basic disagreement, or to make their disagreement a matter of public comment by declining to stand and participate; (3) force all residents of Jackson County to support a religious exercise that may be contrary to their own beliefs; (4) require the State to commit itself on fundamental theological issues such as the divinity of Jesus Christ; and (5) inject religion into the political sphere. According to plaintiff, this is excessive government entanglement with religion.

Plaintiff also relies on *Wynne v. Town of Great Falls, South Carolina*, 376 F.3d 292 (4th Cir. 2004), in which the Fourth Circuit Court of Appeals stated: "*Marsh* does not permit legislators ... to engage, as part of public business and for the citizenry as a whole, in prayers that contain explicit references to a deity in whose divinity only those of one faith believe." The Court in *Wynne* determined that the practice of Great Falls violated the *Marsh* prohibition against advancing a particular religion, as does the practice of Jackson County, but plaintiff contends

that *Lemon v. Kurtzman*, 403 U.S. 602 (1971) should be applied to this case.

Plaintiff also seeks to distinguish *Simpson v. Chesterfield County Board of Supervisors*, 404 F.3d 276 (4th Cir. 2005). In *Simpson*, the Fourth Circuit considered the prayer practice of the Board and upheld it because the County Policy asked private religious leaders to give non-sectarian prayers. The Chesterfield Board had a formal policy and they used private religious leaders to give invocations. They required nonsectarian prayers. Plaintiff contends that, unlike the Chesterfield Board of Supervisors policy, which states that each "invocation must be non-sectarian with elements of the American civil religion and must not be used to proselytize or advance any one faith or belief or to disparage any other faith or belief," the County of Jackson has no posted rules in their Policy Manual. Jackson County brings forward an Affidavit by Michael Overton in lieu of a formalized policy, which plaintiff contends does not comprise a formal policy and it contains statements that are false.

Plaintiff acknowledges that the majority in *Town of Greece* found that the occasional presence of students did not require drawing a distinction. Here, however, plaintiff says that children are routinely present at these Jackson County Commissioner's meetings to lead the Pledge of Allegiance, which immediately follows the prayer by the Commissioner on the agenda. They are specifically invited for this purpose. Plaintiff maintains that this is "deliberate religious

coercion of the worst possible kind affecting young impressionable minds" and is prohibited by *Lee v. Weisman*, 505 U.S. 577 (1992) and *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000). These prayers by the Commissioners carried an "obvious and inherent risk" of affiliation and coercion. Plaintiff notes that these children invited to lead the Pledge of Allegiance do not stay for the entire Commissioners meeting, but depart immediately after leading the pledge. They do not see the Commissioners engage in rational discussion on items of community business. Rather, they are only exposed to two ritual ceremonies: a religious invocation/prayer led by an elected official made in the name of Jesus Christ and the public patriotic ritual of the Pledge of Allegiance. According to plaintiff, this is clearly intended to establish in these young impressionable minds a connection between the religion of Jesus Christ and the government of the United States. The Supreme Court has ruled that prayer exercises involving elementary or secondary school children carry a particular risk of indirect coercion (*see Engel v. Vitale*, 370 U.S. 421 (1962); *Abington School District v. Schempp*, 374 U.S. 203 (1963)) and that standard must be applied to this case.

While this Court is not to parse content of prayers, plaintiff contends that the repeated inclusion of content to "bless our troops" allows defendant to challenge the patriotism of anyone who objects to these unconstitutional prayers to Jesus Christ. According to plaintiff, this content is deliberately included by

defendant to produce this result and plaintiff suggests that this practice is particularly insidious. Plaintiff contends that the facts in *Town of Greece* and *Marsh* are not analogous because this case involves "government speech." The Jackson County Commissioners are leading prayer as part of their official duties and they are coercing citizen participation in religion while deliberately inviting children with young impressionable minds to witness this conjunction of Christian prayer with the Pledge of Allegiance. Plaintiff asserts that defendant seeks to enlarge the limited historical exemption created in *Marsh* and *Town of Greece*, thus swallowing the Establishment Clause. They make the exception the rule, and establish the Christian religion.

Plaintiff also argues that the Treaty of Tripoli specifically states that the Government of the United States shall not be officially be associated with the Christian religion. The Treaty of Tripoli, Article 11 (1797) gives expression to the doctrine and law which the Court must apply in this case: "As the Government of the United States of America is not, in any sense, founded on the Christian religion; ..." According to plaintiff, this treaty was debated and ratified by the full U.S. Senate and signed into law by President John Adams in 1797 without any objection being expressed to this specific language. Plaintiff asserts that the

ratification of this Treaty made it law which the Courts are bound to uphold.[1]

IV. ANALYSIS AND CONCLUSIONS

It is quite clear that neither the *Lemon* test nor the principles set forth in school prayer jurisprudence apply to the controversy in this matter as the Supreme Court has specifically articulated standards for the evaluation of legislative prayer. *See e.g.*, *Jones v. Hamilton Cnty., Tenn.*, 891 F. Supp. 2d 870, 880 (E.D. Tenn. 2012) aff'd sub nom. *Jones v. Hamilton Cnty. Gov't, Tenn.*, 530 Fed. Appx. 478 (6th Cir. 2013) ("The Court's research yielded – and the parties have identified – no legislative prayer case that post-dates *Marsh* and either (1) disregards *Marsh* or (2) relies on *Lemon* to test the constitutionality of a challenged prayer practice."). In the view of the undersigned, the analysis of this dispute neither begins nor ends with the *Town of Greece*. Moreover, contrary to defendant's position, this controversy cannot be decided solely by an examination of the content of the prayers at issue. It is constitutionally significant, contrary to defendant's argument that the prayer givers in this case were the Commissioners themselves, as opposed to either a paid chaplain or members of the community invited to give invocations.

An examination of the Supreme Court's first legislative prayer case is an appropriate starting point. In *Marsh*, a state legislator challenged the Nebraska

[1] The undersigned agrees with defendant that the Treaty of Tripoli is nothing more than a pronouncement that Christianity, as a formal institution, is not part of the Federal government and has nothing to do with whether a given legislative prayer practice is constitutional.

legislature's practice of opening sessions with a prayer led by a Presbyterian chaplain, Robert Palmer, who was paid by the State. *See Jones v. Hamilton Co. Gov't, Tenn.*, 530 Fed.Appx. 478, 484 (6th Cir. 2013), citing *Marsh*, 463 U.S. at 784-85. For sixteen years, Palmer was the only clergyman selected to conduct the prayers, which were of the Judeo-Christian tradition. *Jones*, 530 Fed.Appx. at 484, citing *Marsh*, 463 U.S. at 793. While the Eighth Circuit applied the three-part *Lemon* test to strike down Nebraska's prayer practice, in reversing and upholding Nebraska's practice, the Supreme Court abandoned the *Lemon* test in favor of a history-based analysis. *Jones*, 530 Fed.Appx. at 484, citing *Marsh*, 463 U.S. at 786.

As explained in *Jones*, the *Marsh* majority began its opinion by explaining the historical tradition of opening legislative sessions with a prayer. Tracing legislative prayer to "colonial times through the founding of the Republic and ever since," the Supreme Court recognized that the First Congress, "as one of its early items of business, adopted the policy of selecting a chaplain to open each session with prayer." *Marsh*, 463 U.S. at 787-88. The Senate and House elected their first chaplains in 1789. *Id.* at 788. As the Supreme Court explained, "[i]t can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a Chaplain for each House and also voted to approve the draft of the First Amendment" that "they intended the Establishment Clause of the Amendment to

forbid what they had just declared acceptable." *Id.* at 790. The Supreme Court concluded that, "[i]n light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society." *Id.* at 792. Thus, the Supreme Court reasoned that, "[t]o invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment." *Id.*

As the *Jones* Court explained, in applying these historical principles, the Supreme Court held that Nebraska's policy passed constitutional muster:

> First, the Supreme Court reasoned that the Presbyterian clergyman's long tenure—sixteen years—standing alone, did not "advance[ ] the beliefs of a particular church. To the contrary, the evidence indicat[ed] that [the clergyman] was reappointed because his performance and personal qualities were acceptable to the body appointing him." *Id.* at 793, 103 S.Ct. 3330. Second, because of its historical roots, the Supreme Court stated that the public funds used to compensate the clergyman did not violate the Establishment Clause. *Id.* at 794, 103 S.Ct. 3330. Finally, the Supreme Court stated that "[t]he content of the prayer is not of concern to judges where ... there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Id.* at 794-95, 103 S.Ct. 3330. The Supreme Court reasoned that it is not for courts to "embark on a sensitive evaluation or to parse the content of a particular prayer." *Id.* at 795, 103 S.Ct. 3330.

Jones, 530 Fed.Appx. at 485. As observed in *Jones*, ultimately, the Supreme

Court in *Marsh* permitted legislative prayer as long as "there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Marsh*, 463 U.S. at 794-95. Unless there is an indication that the prayer opportunity has been exploited to advance one faith or belief over another, the Supreme Court cautioned that courts should not "embark on a sensitive evaluation or ... parse the content of a particular prayer." *Id.* at 795.

After *Marsh*, the most notable legislative prayer cases came from the Eleventh and Fourth Circuit Courts of Appeal. In *Wynne v. Town of Great Falls, South Carolina*, 376 F.3d 292 (4th Cir. 2004), the court had occasion to examine the prayer practices of a town council, concluding that the practice at issue violated the Establishment Clause. In *Wynne*, it was established that "Town Council meetings always open with prayer," that the Mayor and all Council Members are Christian, and that Council Member John Broom "often" leads the prayer. *Id.* at 293. It was further established that the opening prayer "frequently refers to Jesus, Jesus Christ, Christ or Savior in the opening or closing portion" of the prayer. *Id.* The records established that, during the prayers, "citizens attending the meetings customarily stand and bow their heads." *Id.* The record also contained uncontroverted evidence that residents of the Town participated in the prayers by saying "amen" at the end. *Id.* The plaintiff, a member of the

Wiccan faith, filed suit to stop the practice of Christian prayers. She asked the Court to decide that prayers should only refer to a generic deity such as "God" without reference to any deity that is associated with one religion. After a trial, the lower court granted judgment to the plaintiff and permanently enjoining the Town Council "from invoking the name of a specific deity associated with any one specific faith or believe in prayers given at Town Council meetings." *Id.* at 296.

On appeal, the Fourth Circuit upheld the lower court's ruling. According to the Fourth Circuit, the prayers challenged stood in "sharp contrast" to the prayer practice held not to constitute an "'establishment' of religion" in *Marsh*. The *Wynne* court pointed out that, in *Marsh*, the approved prayer was characterized as "nonsectarian" and "civil" and the chaplain had affirmatively "removed all references to Christ." *Id.* at 298, citing *Marsh*, 463 U.S. at 793 n. 14. In contrast, the prayers sponsored by the Town Council "frequently" contained references to "Jesus Christ," and "thus promoted one religion over all others, dividing the Town's citizens along denominational lines." *Id.* at 298-299. In reaching this conclusion, the Court concluded that the "prayers sponsored by the Town Council have invoked a deity in whose divinity only those of the Christian faith believe," which was not a "prayer within the embrace of what is known as the Judeo-Christian tradition," *id.* at 300 – a "nonsectarian prayer" without "explicit references ... to Jesus Christ, or to a patron saint" – references that can "foster a

different sort of sectarian rivalry than an invocation or benediction in terms more neutral." *Wynne*, 376 F.3d at 300, quoting *Lee v. Weisman*, 505 U.S. 577, 589 (1992). Thus, the Court rejected the Town Council's contention that the *Marsh* Court's approval of a nonsectarian prayer "within the Judeo-Christian tradition" equates to approval of prayers that invoke the exclusively Christian deity, Jesus Christ. *Id.*

The Fourth Circuit also rejected the Town Council's argument that, although its prayers frequently referred to Christ, because each did so only once, the prayers did not "advance" Christianity. The Council contended that in warning legislators against "exploit[ing]" a "prayer opportunity" to "proselytize or advance any one ... faith or belief," *Marsh*, 463 U.S. at 794-95, the *Marsh* Court intended "advance" simply to be a synonym for "proselytize." *Wynne*, 376 at 300. Rather, the Fourth Circuit concluded that "proselytize" and "advance" have different meanings and denote different activities. *Id.* To "proselytize" on behalf of a particular religious belief necessarily means to seek to "convert" others to that belief, whereas to "advance" a religious belief means simply to "forward, further, [or] promote" the belief. *Id.*, quoting Webster's Third New International Dictionary 30, 1821 (3d ed. 1993). Advancement could include "conversion" but it does not necessarily contain any "conversion" or "proselytization" element. Similarly, although proselytization involves some element of advancement, the

word "proselytize" stresses conversion in a manner that the word "advance" does not. Thus, according each word—"proselytize" and "advance"—its particular, ordinary meaning does not render the other "meaningless." *Id.* at 300. The court concluded that to adopt the Town Council's contrary view and interpret "advance" as merely a synonym for "proselytize," would most certainly render the word "advance" meaningless, and would force us to ignore the *Marsh* Court's use of the disjunctive in cautioning against "proselytiz[ation] or advance[ment]" of a particular religious creed. *Id.* at 300, quoting *Marsh*, 463 U.S. at 794. The court concluded that *Marsh* simply does not allow legislators to engage – "as part of public business and for the citizenry as a whole" – in prayers that contain specific references to a deity in whose divinity only one faith believes. A key factor in the *Wynne* court's analysis, which distinguished the facts before it from *Marsh*, was not just the nonsectarian nature of the prayer, but the fact that the prayers were not simply directed at the legislators themselves.

In 2005, the Fourth Circuit revisited *Marsh* and *Wynne*, finding constitutional a county's practice of inviting clergy from diverse faiths to offer "a wide variety of prayers" at meetings of its governing body. *Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276, 284 (4th Cir. 2005). The prayers included "wide and embracive terms" such as " 'Lord God, our creator,' 'giver and sustainer of life,' 'the God of Abraham, Isaac and Jacob,' 'the God of

Abraham, of Moses, Jesus, and Mohammad,' 'Heavenly Father,' 'Lord our Governor,' 'mighty God,' 'Lord of Lords, King of Kings, creator of planet Earth and the universe and our own creator.'" *Id.* at 284. The court stated that "a practice would remain constitutionally unremarkable where 'there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.'" *Id.* at 283, quoting *Marsh*, 463 U.S. at 794-95. The court distinguished *Wynne* on the ground that the prayers of the city council had been exploitive because their "pervasively and exclusively sectarian nature" had "undermined ... participation by persons of all faiths in public life." *Id.*

In *Turner v. City Council of City of Fredericksburg, Va.*, 534 F.3d 352, 354-356 (4th Cir. 2008), the city council permitted only nondenominational prayers at its meetings, and Turner, a member of the council who had not been allowed to offer a sectarian prayer, challenged that policy. The Fourth Circuit upheld the policy and concluded that "[s]o long as the prayer is not used to advance a particular religion or to disparage another faith or belief, courts ought not to 'parse the content of a particular prayer.'" *Id.* at 356, quoting *Marsh*, 463 U.S. at 795. Notably, the Fourth Circuit expressly declined to hold that *Marsh* required a policy of nondenominational prayers: "We need not decide whether the Establishment Clause compelled the Council to adopt their legislative prayer

policy, because the Establishment Clause does not absolutely dictate the form of legislative prayer." *Id.*

In 2008, the Eleventh Circuit decided *Pelphrey v. Cobb Co., GA*, 547 F.3d 1263 (11th Cir. 2008), in which taxpayers sued the county, claiming that its practice of offering religious invocations at the beginning of county commission sessions violated the Establishment Clause. Examining all of these above described cases, the *Pelphrey* court rejected the taxpayers argument that *Marsh* permits only "nonsectarian" prayers for commission meetings. In addition, the court concluded that the taxpayers' reading of *Marsh* was contrary to its command that courts must not evaluate the content of the prayers absent evidence of exploitation. *Id.* at 1271. While the taxpayers relied on the acknowledgment by the Supreme Court in *Marsh* that the chaplain had "removed all references to Christ" after 1980 and offered "nonsectarian" prayers at the time of the challenge, *Marsh*, 463 U.S. at 793 n. 14, the *Pelphrey* court observed that the Supreme Court never held that the prayers in *Marsh* were constitutional because they were "nonsectarian." *Id. Pelphrey* concluded that "[t]o read *Marsh* as allowing only nonsectarian prayers is at odds with the clear directive by the Court that the content of a legislative prayer 'is not of concern to judges where ... there is no indication that the prayer opportunity has been exploited to proselytize or advance any one ... faith or belief.'" *Id.* at 1271, quoting *Marsh*, at 794-95. Indeed, the

Pelphrey court points out that the *Marsh* Court considered *several factors* to determine whether the legislative prayers had been exploited to advance one faith such as the chaplain's religious affiliation, his tenure, and the overall nature of his prayers. *Pelphrey*, at 1271, citing *Marsh*, at 792-95. Thus, the "'nonsectarian' nature of the chaplain's prayers was one factor in this fact-intensive analysis; it did not form the basis for a bright-line rule." *Id.*

The *Pelphrey* court indicated that it must first determine, in accordance with *Marsh*, whether there was any "indication that the prayer opportunity ha[d] been exploited to proselytize or advance any one or to disparage any other faith or belief" at the Commission meetings. *Id.* at 1273, 1277. To make that determination, the court applied a three-factor test analyzing "[(1)] the identity of the invocational speakers, [(2)] the selection procedures employed, and [(3)] the nature of the prayers." *Id.* at 1277. As to the first factor, the court affirmed the trial court's determination "that the [Cobb County Board] did not exploit the prayers to advance one faith by using predominantly Christian speakers. Although the majority of speakers were Christian, the parties agree that prayers were also offered by members of the Jewish, Unitarian, and Muslim faiths." *Id.* at 1277. The court also concluded that the district court's "finding that the diverse references in the prayers, viewed cumulatively, did not advance a single faith" was not clearly erroneous. *Id.* As to the second factor, the court agreed with the

district court that the Cobb County Board's selection process was "not motivated by an improper motive" because its "list of potential speakers [included clergy] from various sources and included diverse religious institutions, including a mosque and three synagogues." *Id.* at 1278. "Because there [was] no clear error in the findings that the prayers of the County Commission were not exploited to advance one faith or belief, we need not evaluate the content of the prayers. The federal judiciary has no business in 'compos[ing] official prayers for any group of American people to recite as a part of religious program carried on by government....'" *Id.*, quoting *Lee v. Weisman*, 505 U.S. 577, 588 (1992). Indeed, the *Pelphrey* courted held that "we read *Marsh* ... to forbid judicial scrutiny of the content of prayers absent evidence that the legislative prayers have been exploited to advance or disparage a religion." 547 F.3d at 1274.

As to the Cobb County Planning Commission's prayer practices, the Court also affirmed the district court's conclusion that the prayers offered "during 2003-2004 were unconstitutional because the selection procedures violated the 'impermissible motive' standard of *Marsh*," since the evidence showed that the Planning Commission expressly "exclud[ed] certain faiths because of their beliefs." *Id.* at 1281-82. The court explained that "[t]he 'impermissible motive' standard does not require that all faiths be allowed the opportunity to pray[, but] instead prohibits purposeful discrimination." *Id.* at 1281-82 (holding that

"categorical exclusion of certain faiths based on their beliefs is unconstitutional"). In declaring the 2003 and 2004 prayers unconstitutional, the court rejected the Planning Commission's argument that "the selection process is immaterial when the content of the prayer is constitutional," because "[t]he central concern of *Marsh* is whether the prayers have been exploited to created an affiliation between the government and a particular belief or faith." *Id.* at 1281, citing *Marsh*, 463 U.S. at 794-95.

The Fourth Circuit returned to the issue of legislative prayer in 2011 in *Joyner v. Forsyth Co.*, 653 F.3d 341 (4th Cir. 2011). In *Joyner*, residents of Forsyth County brought suit against the County Board of Commissioners, claiming that the practice of having invocations at the opening of public board meetings violated the Establishment Clause. The Fourth Circuit concluded that the prayer practice at issue was unconstitutional. In 2007, Forsyth County adopted a formal written policy. *Id.* at 343. "Using the Yellow Pages, [I]nternet research, and consultation with the local Chamber of Commerce, the clerk to the Board compiled and maintained the 'Congregations List'—a database of all religious congregations with an established presence in the community." *Id.* The list was updated once a year, and "any congregation could confirm its inclusion by writing to the clerk." *Id.* The clerk mailed a letter to all religious leaders on the Congregations List and "informed those individuals that they were eligible to

deliver an invocation and could schedule an appointment on a first-come, first-serve basis." *Id.* The letter informed the religious leaders that the opportunity was voluntary, and that "the Board requests only that the prayer opportunity not be exploited as an effort to convert others to the particular faith of the invocational speaker, nor to disparage any faith or belief different than that of the invocational speaker." *Id.* Speakers were not scheduled for consecutive meetings, nor were they scheduled for more than two meetings in any calendar year. *Id.* The Fourth Circuit held that Forsyth County's policy, "as implemented, cannot withstand scrutiny" because "[t]he undisputed record shows that the prayers delivered at the outset of Board meetings from May 29, 2007 through December 15, 2008 referred to Jesus, Jesus Christ, Christ, or Savior with overwhelming frequency." *Id.* at 349 (internal quotation marks omitted). Because almost four-fifths of prayers contained such explicit sectarian references, the court of appeals held that the application of the policy ran afoul of the Supreme Court's decision in *Marsh*. *Id.* at 349-50. Notably, in *Joyner*, the pastor giving the invocation asked the audience and the commissioners to stand for the prayer. *Id.* at 344.

The issue of legislative prayer returned to the Eleventh Circuit in *Atheists of Florida, Inc. v. City of Lakeland, Fla.*, 713 F.3d 577 (11th Cir. 2013). In *Atheists of Florida*, the Court first turned to the "*Pelphrey* factors," observing that, as

required by *Marsh*, the court considers whether there was any "indication that the prayer opportunity ha[d] been exploited to proselytize or advance any one or to disparage any other faith or belief." And, to make that determination, the court applied a three-factor test analyzing "[(1)] the identity of the invocational speakers, [(2)] the selection procedures employed, and [(3)] the nature of the prayers." *Atheists of Floria*, 713 F.3d at 591, quoting *Pelphrey*, at 1277. Under the first and second factors, the court concluded that inclusive identity of the speakers and the practices of selecting invocation speakers paralleled the post-suit practices found to be constitutional in *Pelphrey*. As to the third factor, the court re-affirmed the conclusion in *Pelphrey* that the content of the prayers themselves should not be scrutinized absent evidence that the legislative prayers have been exploited to advance or disparage a religion, which was not presented by the plaintiff in *Atheists of Florida*. *Id.* at 592-593

This post-*Marsh* history now brings us to *Town of Greece v. Galloway*. In the view of the undersigned, *Town of Greece* did not greatly alter the landscape of Establishment Clause jurisprudence as it relates to legislative prayer, especially in those cases where the persons offering the prayers were the legislators themselves, a fact that is far more significant than defendant posits. Rather, the *Town of Greece* focused on the issue of the sectarian versus nonsectarian nature of the legislative prayer, concluding that legislative prayer need not be nonsectarian to

pass constitutional muster. The limited scope of the holding in *Town of Greece* has not been lost on the courts in the short time since *Town of Greece* was decided. For example, in *Joyner v. Forsyth Co.*, the North Carolina District Court has vacated the injunction upheld in *Joyner v. Forsyth County*, 653 F.3d 341 (4th Cir. 2011). *See* Case No. 07-243 (M.D. N.C. 2014), Dkt. No. 136, Order Granting Motion for Relief from Order Enjoining the Continuation of the Invocation Policy of the Forsyth County Board of Commissioners. As the *Joyner* district court explained:

> In May of this year, in the decision of *Town of Greece v. Galloway*, 134 S. Ct. 1811, 188 L. Ed. 2d 835 (2014), the Supreme Court held that sectarian legislative prayer does not violate the First Amendment. Relying on the history and tradition of legislative prayer, the Supreme Court held that "[a]n insistence on nonsectarian or ecumenical prayer as a single, fixed standard is not consistent with the tradition of legislative prayer outlined in the Court's cases." *Id.* at 1820. The Supreme Court rejected a rule that legislative prayer must be nondenominational and invoke only a generic God, because sectarian prayer can still serve the legitimate function of solemnizing the proceedings and invoke universal goals of cooperation: "Prayer that reflects beliefs specific to only some creeds can still serve to solemnize the occasion . . . ." *Id.* at 1823.
>
> Moreover, the Supreme Court determined that the fact that the Town of Greece's nondiscriminatory policy resulted in the majority of prayers being Christian and the fact that they were being delivered by Christian ministers did not contravene the First Amendment of the Constitution. The Supreme Court explained:

> That nearly all of the congregations in town turned out to be Christian does not reflect an aversion or bias on the part of town leaders against minority faiths. So long as the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing.

Id. at 1824.

See Case No. 07-243 (M.D. N.C. 2014), Dkt. No. 136, pp. 1-2. The court concluded that because *Town of Greece* "effected a significant change in the law of legislative prayer, the Court finds that Defendant is entitled to relief. Thus, to the extent that the injunction entered by this Court against Defendant enjoined the delivery of per se sectarian legislative prayers at Forsyth County Board meetings, the injunction must be dissolved in light of *Town of Greece*." *Id.* at p. 3. Notably, the prayer policy and practice in *Joyner* involved members or the clergy and other religious leaders offering invocations and not legislators themselves delivering prayers.

In *Hudson v. Pittsylvania County, Va.*, Case No. 11-43 (W.D. Va. 2013), Dkt. 83, the district court entered an order granting summary judgment in favor of the plaintiff and against the defendants and entered a permanent injunction against the legislative prayer policies and practices of defendants. In *Hudson*, the prayers at issue were given by legislators themselves, not by religious leaders or clergy.

Id. at Pg ID 1762. Relying on Fourth Circuit precedent, in particular, *Wynne*, the court found the Pittsylvania practices to be unconstitutional; indeed, the court concluded that this matter was factually and legally indistinguishable from *Wynne*. *Id.* at Pg ID 15. After the decision in *Town of Greece*, defendants moved the district court to dissolve the injunction. *Id.* at Dkt. 103. The district court preliminarily granted this motion in part and denied it in part. *Id.* at Dkt. 107. The court indicated that it was inclined to grant the defendants' motion to the limited extent necessary to make it clear that, consistent with *Town of Greece*, that opening prayers offered at the board of supervisors meetings need not be generic or nonsectarian. *Id.* at Dkt. 107, Pg ID 1931-1932.

The court preliminarily denied, however, the request to dissolve the injunction, finding that the facts stood in stark contrast to those presented in *Town of Greece*. The court explained those critical distinctions and the need for a modified injunction to remedy the violation of the Establishment Clause as follows:

> There are several critical points of distinction between the facts of *Town of Greece* and the prayer practice of the Board of Supervisors of Pittsylvania County. First and foremost, unlike in *Town of Greece*, where invited clergy and laypersons offered the invocations, the Board members themselves led the prayers in Pittsylvania County. Thus, in contrast to *Town of Greece*, where the town government had no role in determining the content of the opening invocations at its

board meetings, the government of Pittsylvania County itself, embodied in its elected Board members, dictated the content of the prayers opening official Board meetings. Established as it was by the Pittsylvania County government, that content was consistently grounded in the tenets of one faith. Further, because the Pittsylvania County Board members themselves served as exclusive prayer providers, persons of other faith traditions had no opportunity to offer invocations. Put simply, the Pittsylvania County Board of Supervisors involved itself "in religious matters to a far greater degree" than was the case in *Town of Greece*. 134 S. Ct. at 1822. In so doing, the prayer practice in Pittsylvania County had the unconstitutional effect, over time, of officially advancing one faith or belief, violating "the clearest command of the Establishment Clause . . . that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982).

Not only did the Pittsylvania County Board members determine the content of the opening prayers at Board meetings, the Board members often directed the assembled citizens to participate in the prayers by asking them to stand. For example, on September 20, 2011, the Pittsylvania County supervisor delivering the opening prayer directed: "If you don't want to hear this prayer, you can leave. Please stand up." Second Suppl. Decl. of Rebecca K. Glenberg, Dkt. No. 24, at ¶ 5. In *Town of Greece*, the majority opinion noted that such a request from the government makes a difference. 134 S. Ct. at 1826. ("The analysis would be different if town board members directed the public to participate in the prayers.").

In sum, 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*. Thus, while *Town of Greece* calls for a limited modification of the existing injunction in this case, it does not support its dissolution.

Id. at Dkt. 107, Pg ID 1932-1933. Based on the foregoing, the district court indicated that it was inclined to grant the motion in part and deny it in part. It determined that it could not, at that time, enter an order modifying the existing injunction, given the pendency of the appeal. *Id.* at Dkt. 107, Pg ID 1933.[2]

The undersigned is persuaded that *Town of Greece* is distinguishable from the present factual circumstances and that *Wynne* and *Hudson v. Pittsylvania Co.* provide the proper construct, to the extent that they are not based solely on the sectarian nature of the prayers and prayer practices at issue. Here, unlike in *Town of Greece*, it is undisputed that it was the general practice of the Commissioners to ask the audience to rise and bow their heads, thus requesting participation in the prayers.[3] The invocations in *Town of Greece* were deemed not coercive because

---

[2] The request for attorney fees was affirmed on appeal. The Fourth Circuit determined, however, that the appeal of the substantive issues was untimely and declined review. *Hudson v. Pittsylvania Co.*, 774 F.3d 231 (4th Cir. 2014). A new motion to dissolve the injunction remains pending in *Hudson*, having been filed after the Fourth Circuit issued its decision on appeal. *Hudson v. Pittsylvania Co.*, Case No. 11-043 (W.D. Va. 2014), Dkt. 113, 114. The district court held a hearing on March 16, 2015 and no decision has yet been issued. *Id.* at Dkt. 120. Notably, there is a similar matter pending in the District of Maryland where members of the county board of commissioners are also the persons offering the prayers. *Hake v. Carroll Co., Md.*, Case No. 13-01312 (D. Md.). In that case, cross-motions for summary judgment remain pending, with supplemental briefs having recently been filed.

[3] While Mr. Overton's affidavit states that there "is no requirement that the public participate in the invocation," (Dkt. 25-4), the Answer to the Complaint also admits that "a Commissioner has asked citizens who come to the meetings to rise and bow their heads." (Dkt. 11, p. 1, ¶ 1). Additionally, defendant offers no contrary evidence to plaintiff's claims that

"the reasonable observer is acquainted with this tradition and understands that its purposes are to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens, not to afford government an opportunity to proselytize or force truant constituents into the pews." *Id.* at 1825. The Court noted, however:

> *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.*

Id. at 1826 (emphasis added). In this case, the it was the government officials themselves who asked the public to rise and bow their heads for prayers. *See also Simpson v. Chesterfield Cnty. Bd. of Supervisors*, 404 F.3d 276, 284 (4th Cir. 2005) (upholding legislative prayer where the county, "unlike Great Falls, did not invite the citizenry at large to participate during its invocations .... Chesterfield's invocations are 'directed only at the legislators themselves,' as the court in *Wynne* explained that they should be.").

The undersigned also finds it quite significant, contrary to defendant's point

---

members of the public were asked on several occasions to rise and bow their heads. *See* Factual Background, *supra*.

of view, that the County Commissioners exclusively delivered and controlled the content of the prayers, per their policy and practice. Defendant would like the court to conclude that the identity of the speaker is irrelevant. It is not. Indeed, such a conclusion is contrary to the holding in *Town of Greece*. Specifically, the Supreme Court noted that "Greece neither reviewed the prayers in advance of the meetings nor provided guidance as to their tone or content, in the belief that exercising any degree of control over the prayers would infringe both the free exercise and speech rights of the ministers." *Town of Greece*, 134 S.Ct. at 1816; *see also Pelphry*, at 1281, citing *Marsh*, 463 U.S. at 794-95 (In declaring the 2003 and 2004 prayers unconstitutional, the court rejected the Planning Commission's argument that "the selection process [of the speaker] is immaterial when the content of the prayer is constitutional," because "[t]he central concern of *Marsh* is whether the prayers have been exploited to created an affiliation between the government and a particular belief or faith."). To restrict private clergy to nonsectarian prayers would require government officials "to act as supervisors and censors of religious speech, a rule that would involve government in religious matters to a far greater degree than is the case under the town's current practice of neither editing or approving prayers in advance nor criticizing their content after the fact." *Id.* at 1822. Here, as the speakers are drafting and offering the prayers, the Commissioners are acting as "supervisors and censors of religious speech,"

which involves the government in religious matters to a far greater degree than in *Town of Greece* and which crosses the constitutional line.

For these reasons, the undersigned concludes that the legislative prayer practice of the Jackson County Board of Commissioners violates the Establishment Clause.

V. RECOMMENDATION

For the reasons set forth above, the undersigned **RECOMMENDS** that the plaintiff's motion for summary judgment be **GRANTED**, that defendant's motion for summary judgment be **DENIED** and that an **INJUNCTION** precluding the County of Jackson's Board of Commissioners from utilizing its current prayer practice be entered.

The parties to this action may object to and seek review of this Report and Recommendation, but are required to file any objections within 14 days of service, as provided for in Federal Rule of Civil Procedure 72(b)(2) and Local Rule 72.1(d). Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985); *Howard v. Sec'y of Health and Human Servs.*, 932 F.2d 505 (6th Cir. 1981). Filing objections that raise some issues but fail to raise others with specificity will not preserve all the objections a party might have to this Report and Recommendation. *Willis v. Sec'y of Health and Human Servs.*, 931 F.2d 390, 401 (6th Cir. 1991); *Smith v. Detroit Fed'n of*

Teachers Local 231, 829 F.2d 1370, 1373 (6th Cir. 1987). Pursuant to Local Rule 72.1(d)(2), any objections must be served on this Magistrate Judge.

Any objections must be labeled as "Objection No. 1," "Objection No. 2," etc. Any objection must recite precisely the provision of this Report and Recommendation to which it pertains. Not later than 14 days after service of an objection, the opposing party may file a concise response proportionate to the objections in length and complexity. Fed.R.Civ.P. 72(b)(2), Local Rule 72.1(d). The response must specifically address each issue raised in the objections, in the same order, and labeled as "Response to Objection No. 1," "Response to Objection No. 2," etc. If the Court determines that any objections are without merit, it may rule without awaiting the response.

Date: March 31, 2015

s/Michael Hluchaniuk
Michael Hluchaniuk
United States Magistrate Judge

CERTIFICATE OF SERVICE

I certify that on March 31, 2015, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send electronic notification to all counsel of record and to the following non-ECF participant: Peter Bormuth, 142 West Pearl Street, Jackson, MI 49201.

s/Tammy Hallwood
Case Manager
(810) 341-7887
tammy_hallwood@mied.uscourts.gov

MICHIGAN SENATE JOURNAL - 1841 SESSION: 83 Days; 35 days no prayer; 48 days visiting clergy led prayer; 0 days legislator-led prayer

Jan 4
Jan 5
Jan 6
Jan 7
Jan 8
Jan 9 – Rev. Kundig
Jan 11
Jan 12 – Rev. Kundig
Jan 13 – Rev. Kundig
Jan 14 – Rev. Kundig
Jan 15 – Rev. Kundig
Jan 18 – Rev. Duffield
Jan 19
Jan 20 – Rev. Duffield
Jan 21 – Rev. Duffield
Jan 22 – Rev. Duffield
Jan 23 – Rev. Duffield
Jan 25 – Rev. H. Smith
Jan 26 – Rev. H. Smith
Jan 27
Jan 28 – Rev. H. Smith
Jan 29 - Rev. John T. Fulton
Jan 30 – Rev. H. Smith
Feb 1 - Rev. H. Colclazer
Feb 2 – Rev. H. Colclazer
Feb 3
Feb 4
Feb 5 – Rev. H. Colclazer
Feb 6 – Rev. H. Colclazer
Feb 8
Feb 9
Feb 10 – Rev. H. Colclazer
Feb 11 - Rev. H. Colclazer
Feb 12 - Rev. H. Colclazer
Feb 13 - Rev. H. Colclazer
Feb 15
Feb 16
Feb 17 - Rev. H. Colclazer
Feb 18 - Rev. H. Colclazer
Feb 19
Feb 22
Feb 23 – Rev. Mr. Duffield
Feb 24 - Rev. Mr. Duffield
Feb 25 - Rev. Mr. Duffield
Feb 26 - Rev. Mr. Duffield
Feb 27 – Rev. Mr. Fitch
Mar 1 – Right Rev. Bishop McCoskry
Mar 2 - Right Rev. Bishop McCoskry
Mar 3 - Right Rev. Bishop McCoskry
Mar 4
Mar 5
Mar 6
Mar 8
Mar 9
Mar 10 – Rev. Mr. Comstock
Mar 11 – Rev. H. Colclazer
Mar 12
Mar 15 – Rev. O.C. Comstock
Mar 16 - Rev. O.C. Comstock
Mar 17 - Rev. O.C. Comstock
Mar 18 - Rev. O.C. Comstock
Mar 19 - Rev. O.C. Comstock
Mar 20 - Rev. O.C. Comstock
Mar 22
Mar 23
Mar 24
Mar 25
Mar 26
Mar 27
Mar 29 – Rev. Mr. Duffield
Mar 30 – Rev. Mr. Duffield
Apr 1 - Rev. Mr. Duffield
Apr 2 - Rev. Mr. Duffield
Apr 3 - Rev. Mr. Duffield
Apr 5 – Rev. O.C. Comstock
Apr 6
Apr 7
Apr 8
Apr 9
Apr 10
Apr 12 – Rev. O.C. Comstock
Apr 13

Appendix F

MICHIGAN SENATE JOURNAL - 1842 SESSION: 48 Days; 5 days no prayer; 43 days visiting clergy led prayer; 0 days legislator-led prayer

Jan 3
Jan 4
Jan 5
Jan 6
Jan 7 – Rev. Mr. Duffield
Jan 8 – Rev. Mr. Duffield
Jan 10 – Rev. Mr. Duffield
Jan 11 – Rev. Mr. Duffield
Jan 12 – Rev. Mr. Duffield
Jan 13 – Rev. Mr. Duffield
Jan 14 – Rev. A.M. Fitch
Jan 15 - Rev. A.M. Fitch
Jan 17 – Bishop McCoskry
Jan 18 - Bishop McCoskry
Jan 19 - Bishop McCoskry
Jan 20 - Bishop McCoskry
Jan 21 - Bishop McCoskry
Jan 22 – Rev. C.W. Fitch
Jan 24 – Rev. Mr. Ten Brook
Jan 25 – Rev. Mr. Ten Brook
Jan 26 – Rev. A.M. Fitch
Jan 27 – Rev. Mr. Fitch
Jan 28 – Rev. A.M. Fitch
Jan 29 – Rev. A.M. Fitch
Jan 31 – Rev. A.M. Fitch
Feb 1 – Rev. A.M. Fitch
Feb 2 - Rev. A.M. Fitch
Feb 3 - Rev. A.M. Fitch
Feb 4 - Rev. A.M. Fitch
Feb 5 - Rev. A.M. Fitch
Feb 7 – Rev. Mr. Duffield
Feb 8 – Rev. Mr. Duffield
Feb 9 – Rev. Mr. Duffield
Feb 10
Feb 11 – Rev. Mr. Duffield
Feb 12 – Rev. Mr. Duffield
Feb 14 – Rev. A.M. Fitch
Feb 15 – Rev. A.M. Fitch
Feb 16 – Rev. R. Smith
Feb 17 – Rev. A.M. Fitch

MICHIGAN SENATE JOURNAL - 1848 SESSION: 78 Days; 5 days no prayer; 49 days chaplain-led prayer; 22 days clergy led prayer; 0 days legislator-led prayer

Jan 3
Jan 4
Jan 5 – Rev. Mr. Blades
Jan 6 – Rev. Mr. Cummings
Jan 7
Jan 10 – Rev. Mr. Blader
Jan 11 – Rev. Mr. Blader
Jan 12 – Rev. Mr. Hill
Jan 13 – Rev. Mr. Sanford
Jan 14 – Rev. Mr. Shaw
Jan 15 – Rev. Mr. Shaw
Jan 17 – Rev. Mr. Shaw
Jan 18 – Rev. Mr. Shaw
Jan 19 – chaplain
Jan 20 – chaplain
Jan 21 – Rev. B.F. Millerd
Jan 24
Jan 25 – chaplain
Jan 26 – chaplain
Jan 27 – chaplain
Jan 28 – chaplain
Jan 29 – chaplain
Jan 31 – chaplain
Feb 1 – Rev. Mr. Baughman
Feb 2 – chaplain
Feb 3 – chaplain
Feb 4 – chaplain
Feb 5 – chaplain
Feb 7 – chaplain
Feb 8 – chaplain
Feb 9 – chaplain
Feb 10 – chaplain
Feb 11 – Rev. Mr. Brown
Feb 12 – Rev. Mr. Brown
Feb 14 – Rev. Mr. Brown
Feb 15 – chaplain
Feb 16 – chaplain
Feb 17 – chaplain
Feb 18 – chaplain
Feb 19 – chaplain
Feb 21 – chaplain
Feb 22 - chaplain
Feb 23 - chaplain
Feb 24 - chaplain
Feb 25 - chaplain
Feb 26 - chaplain
Feb 28 – Rev. D. A. Curtiss
Feb 29 - chaplain
Mar 1 - chaplain
Mar 2 - chaplain
Mar 3 – Rev. Mr. Brown
Mar 4 – Rev. Mr. Brown
Mar 6 – Rev. Mr. Brown
Mar 7 – Rev. Mr. Brown
Mar 8 - chaplain
Mar 9 - chaplain
Mar 10 - chaplain
Mar 11 - chaplain
Mar 13 - chaplain
Mar 14 - chaplain
Mar 15 - Rev. E.H. Parker
Mar 16 – chaplain
Mar 17 - Rev. Mr. Chatfield
Mar 18 – chaplain
Mar 20 - chaplain
Mar 21 - chaplain
Mar 22 - chaplain
Mar 23 - chaplain
Mar 24 - chaplain
Mar 25 - chaplain
Mar 27 - chaplain
Mar 28 - chaplain
Mar 29 - chaplain
Mar 30 - chaplain
Mar 31
Apr 1 - chaplain
Apr 3 - chaplain

MICHIGAN SENATE JOURNAL - 1853 SESSION: 35 Days; 5 days no prayer; 30 days visiting clergy led prayer; 0 days legislator-led prayer

Jan 5
Jan 6
Jan 7
Jan 8 – Rev. Mr. Chatfield
Jan 10 – Rev. Mr. Knickerbacker
Jan 11 – Rev. Mr. Chatfield
Jan 12 - Rev. Mr. Dayfoot
Jan 13 – Rev. Mr. Dayfoot
Jan 14 _ Rev. Mr. Knickerbacker
Jan 15 – Rev. Mr. Chatfield
Jan 17 – Rev. Mr. Atterbury
Jan 18 – Rev. Mr. Chatfield
Jan 19 – Rev. Mr. Knickerbacker
Jan 20
Jan 21 – Rev. Mr. Dayfoot
Jan 22 – Rev. Mr. Dayfoot
Jan 24 – Rev. Mr. Atterbury
Jan 25 – Rev. Mr. Chatfield
Jan 26 – Rev. Mr. Chatfield
Jan 27 – Rev. Mr. Dayfoot
Jan 28 – Rev. Mr. Knickerbacker
Jan 29 – Rev. Mr. Chatfield
Jan 31 – Rev. Mr. Atterbury
Feb 1 – Rev. Mr. Dayfoot
Feb 2 – Rev. Mr. Knickerbacker
Feb 3 – Rev. Mr. Chatfield
Feb 4 – Rev. Mr. Chatfield
Feb 5 – Rev. Mr. Chatfield
Feb 7 – Rev. Mr. Gosse
Feb 8 – Rev. Mr. Fitch
Feb 9 – Rev. Mr. Atterbury
Feb 10 - Rev. Mr. Dayfoot
Feb 11 – Rev. Mr. Knickerbacker
Feb 12 – Rev. Mr. Chatfield
Feb 14

MICHIGAN SENATE JOURNAL – 1895 SESSION: 95 days; 84 days no prayer; 11 days visiting clergy led prayer; 0 days legislator-led prayer

Jan 2 – Rev. Mr. Swift
Jan 3
Jan 8
Jan 9 – Rev. Mr. Temple
Jan 10 – Rev. Mr. Osborne
Jan 11
Jan 14 – Rev. Mr. Patterson
Jan 15 – Rev. Mr. Jordan
Jan 16
Jan 17
Jan 18
Jan 29
Jan 30 – Rev. Mr. Patterson
Jan 31 – Rev. Mr. Zimmerman
Feb 1
Feb 4
Feb 5 – Rev. Mr. Osborne
Feb 7
Feb 8
Feb 11
Feb 12
Feb 13
Feb 14
Feb 15
Feb 18
Feb 19
Feb 20
Feb 25
Feb 26 – Rev. Mr. McCarroll
Feb 27
Feb 28
Mar 1
Mar 4
Mar 5
Mar 6
Mar 7
Mar 8
Mar 11
Mar 12
Mar 13
Mar 14
Mar 15
Mar 18
Mar 19
Mar 20
Mar 21
Mar 25
Mar 26
Mar 27
Mar 28
Mar 29
Apr 2
Apr 3
Apr 4
Apr 5
Apr 8
Apr 9
Apr 10
Apr 11
Apr 12
Apr 15
Apr 16
Apr 17
Apr 18
Apr 19
Apr 22
Apr 23
Apr 24
Apr 25 – Rev. Mr. McDaniels
Apr 26
Apr 29
Apr 30
May 1
May 2
May 3
May 6
May 7
May 8
May 9 – Rev. Mr. Patterson
May 10
May 13
May 14
May 15
May 16
May 17
May 20
May 21
May 22
May 23
May 24
May 25
May 27
May 28
May 29
May 30
May 31

MICHIGAN HOUSE JOURNAL – FIRST SESSION 1935-36 – 72 DAYS: 72 days no prayers; 0 visiting clergy led prayers; 0 legislator-led prayers

1835

Nov 2
Nov 3
Nov 4
Nov 5
Nov 6
Nov 7
Nov 9
Nov 10
Nov 11
Nov 12
Nov 13
Nov 14

1836

Feb 1	Feb 26	Mar 22
Feb 2	Feb 27	Mar 23
Feb 3	Feb 29	Mar 24
Feb 4	Mar 1	Mar 25
Feb 5	Mar 2	Mar 26
Feb 6	Mar 3	Mar 28
Feb 8	Mar 4	
Feb 9	Mar 5	**Extra Session**
Feb 10	Mar 7	
Feb 11	Mar 8	Jul 13
Feb 13	Mar 9	Jul 14
Feb 15	Mar 10	Jul 15
Feb 16	Mar 11	Jul 16
Feb 17	Mar 12	Jul 18
Feb 18	Mar 14	Jul 19
Feb 19	Mar 15	Jul 20
Feb 20	Mar 16	Jul 21
Feb 22	Mar 17	Jul 22
Feb 23	Mar 18	Jul 23
Feb 24	Mar 19	Jul 25
Feb 25	Mar 21	Jul 26

MICHIGAN HOUSE JOURNAL – 1837 Session – 80 DAYS: 80 days no prayers; 0 visiting clergy led prayers; 0 legislator-led prayers

Jan 2	Feb 15	Jun 16
Jan 3	Feb 16	Jun 17
Jan 4	Feb 17	Jun 19
Jan 5	Feb 18	Jun 20
Jan 6	Feb 20	Jun 21
Jan 7	Feb 21	Jun 22
Jan 9	Feb 22	
Jan 10	Feb 23	
Jan 11	Feb 24	
Jan 12	Feb 25	
Jan 13	Feb 27	
Jan 14	Feb 28	
Jan 16	Mar 1	
Jan 17	Mar 2	
Jan 18	Mar 3	
Jan 19	Mar 4	
Jan 20	Mar 6	
Jan 21	Mar 7	
Jan 23	Mar 8	
Jan 24	Mar 9	
Jan 25	Mar 10	
Jan 26	Mar 11	
Jan 27	Mar 13	
Jan 28	Mar 14	
Jan 30	Mar 15	
Jan 31	Mar 16	
Feb 1	Mar 17	
Feb 2	Mar 18	
Feb 3	Mar 20	
Feb 4	Mar 21	
Feb 6	Mar 22	
Feb 7		
Feb 8	**Extra session**	
Feb 9		
Feb 10	Jun 12	
Feb 11	Jun 13	
Feb 13	Jun 14	
Feb 14	Jun 15	

MICHIGAN HOUSE JOURNAL – 1839 SESSION: 85 Days; 8 days no prayer; 77 days visiting clergy led prayer; 0 days legislator-led prayer

Jan 7
Jan 8
Jan 9
Jan 10 – Rev. Mr. Comstock
Jan 11 - Rev. Mr. Comstock
Jan 12 - Rev. Mr. Comstock
Jan 14 - Rev. Mr. Comstock
Jan 15 - Rev. Mr. Comstock
Jan 16 - Rev. Mr. Comstock
Jan 17 – Bishop McCoskry
Jan 18 - Bishop McCoskry
Jan 21 – Rev. Mr. Comstock
Jan 22 - Rev. Mr. Comstock
Jan 23 - Rev. Mr. Comstock
Jan 24 - Rev. Mr. Comstock
Jan 25 - Rev. Mr. Comstock
Jan 28 – Rev. Mr. Badin
Jan 29 - Rev. Mr. Badin
Jan 30 - Rev. Mr. Badin
Jan 31 - Rev. Mr. Badin
Feb 1 - Rev. Mr. Badin
Feb 2 - Rev. Mr. Badin
Feb 4 - Rev. Mr. Badin
Feb 5 - Rev. Mr. Badin
Feb 6 - Rev. Mr. Badin
Feb 7 - Rev. Mr. Badin
Feb 8 - Rev. Mr. Badin
Feb 9 - Rev. Mr. Badin
Feb 11 - Rev. Mr. Badin
Feb 12 – Rev. Mr. Chaplin
Feb 13 - Rev. Mr. Chaplin
Feb 14 - Rev. Mr. Chaplin
Feb 15 - Rev. Mr. Chaplin
Feb 18 – Rev. Mr. Duffield
Feb 19 – Rev. Mr. Duffield
Feb 20
Feb 21 - Rev. Mr. Chaplin
Feb 22 – Rev. Mr. Duffield
Feb 25
Feb 26 – Rev. Mr. Bury
Feb 27 - Rev. Mr. Bury
Feb 28 - Rev. Mr. Bury
Mar 1 - Rev. Mr. Bury
Mar 2 - Rev. Mr. Bury
Mar 4 - Rev. Mr. Comstock
Mar 5 - Rev. Mr. Comstock
Mar 6 - Rev. Mr. Comstock
Mar 7 - Rev. Mr. Comstock
Mar 8 - Rev. Mr. Comstock
Mar 9 - Rev. Mr. Comstock
Mar 11 - Rev. Mr. Comstock
Mar 12 - Rev. Mr. Comstock
Mar 13 - Rev. Mr. Comstock
Mar 14 - Rev. Mr. Comstock
Mar 15 - Rev. Mr. Comstock
Mar 16 - Rev. Mr. Comstock
Mar 18 – Rev. Mr. Chaplin
Mar 19 - Rev. Mr. Chaplin
Mar 20 - Rev. Mr. Chaplin
Mar 21 - Rev. Mr. Chaplin
Mar 22 - Rev. Mr. Chaplin
Mar 23 – Rev. Mr. _____
Mar 26 – Rev. Mr. Duffield
Mar 27 - Rev. Mr. Duffield
Mar 28 - Rev. Mr. Duffield
Mar 29 - Rev. Mr. Duffield
Apr 1 - Rev. Mr. Bury
Apr 2 - Rev. Mr. Bury
Apr 3 - Rev. Mr. Bury
Apr 4
Apr 5 - Rev. Mr. Bury
Apr 6 - Rev. Mr. Bury
Apr 8
Apr 9 – Rev. Mr. Chaplin
Apr 10
Apr 11- Rev. Mr. Chaplin
Apr 12 - Rev. Mr. Chaplin
Apr 13
Apr 15 - Rev. Mr. Chaplin
Apr 16 - Rev. Mr. Chaplin
Apr 17 - Rev. Mr. Chaplin
Apr 18 - Rev. Mr. Chaplin
Apr 19 - Rev. Mr. Chaplin
Apr 20 - Rev. Mr. Chaplin

MICHIGAN HOUSE JOURNAL – 1845 SESSION: 65 Days; 7 days no prayer; 5 days visiting clergy led prayer; 52 days chaplain led prayer; 0 days legislator-led prayer

Jan 6
Jan 7
Jan 8 – Rev. Mr. Duffield
Jan 9 – Rev. Mr. Duffield
Jan 10
Jan 13
Jan 14 – Rev. Mr. Watson
Jan 15 – Rev. Mr. Watson, chaplain
Jan 16 - Rev. Mr. Watson, chaplain
Jan 17 – Rev. Mr. Inglis, Chaplain
Jan 18 – Rev. Mr. Inglis
Jan 20 – Rev. Mr. Inglis, Chaplain
Jan 21 – Rev. Mr. Inglis
Jan 22 – Rev. Mr. Watson
Jan 23
Jan 24 – Rev. Mr. Watson
Jan 27 – Rev. Mr. Inglis
Jan 28 – Rev. Mr. Watson, chaplain
Jan 29 – Rev. Mr. Inglis
Jan 30 – Rev. Mr. Inglis, Chaplain
Jan 31 – Rev. Mr. Watson
Feb 1 – Rev. Mr. Watson, chaplain
Feb 3 – Rev. Mr. Inglis, Chaplain
Feb 4 – Rev. Mr. Watson, chaplain
Feb 5 – Rev. Mr. Inglis, Chaplain
Feb 6 – Rev. Mr. Watson
Feb 7 – Rev. Mr. Inglis
Feb 8 – Rev. Mr. Watson, Chaplain
Feb 10 – Rev. Mr. Inglis, Chaplain
Feb 11 – Rev. Mr. Beckman
Feb 12 – Rev. Mr. Inglis, chaplain
Feb 13 – Rev. Mr. Watson, chaplain
Feb 14 – Rev. Mr. Watson, Chaplain
Feb 15 – Rev. Mr. Piper
Feb 17 – Rev. Mr. Piper
Feb 18 – Rev. Mr. Watson (Chaplain)
Feb 19 – Rev. Mr. Inglis (Chaplain)
Feb 20 – Rev. Mr. Inglis (Chaplain)
Feb 21 – Rev. Mr. Watson
Feb 22 – Rev. Mr. Watson, chaplain
Feb 24 – Rev. Mr. Inglis, Chaplain
Feb 25 – Rev. Mr. Watson, chaplain
Feb 26 – Rev. Mr. Inglis, Chaplain
Feb 27 – Rev. Mr. Watson, chaplain
Feb 28
Mar 1 – Rev. Mr. Watson, chaplain
Mar 3 – Rev. Mr. Inglis, Chaplain
Mar 4 – Rev. Mr. Watson, chaplain
Mar 5 – Rev. Mr. Inglis, Chaplain
Mar 6 – Rev. Mr. Watson
Mar 7 – Rev. Mr. Inglis, Chaplain
Mar 8 – Rev. Mr. Watson
Mar 10 – Rev. Mr. Inglis, Chaplain
Mar 11 – Rev. Mr. Watson, chaplain
Mar 12 – Rev. Mr. Inglis, Chaplain
Mar 13 – Rev. Mr. Watson, chaplain
Mar 14
Mar 15 – Rev. Mr. Watson, chaplain
Mar 17 – Rev. Mr. Inglis, Chaplain
Mar 18 – Rev. Mr. Watson, chaplain
Mar 19 – Rev. Mr. Inglis, Chaplain
Mar 20 – Rev. Mr. Watson, chaplain
Mar 21 - page missing
Mar 22 – Rev. Mr. Watson, chaplain
Mar 24 – Rev. Mr. Inglis

MICHIGAN HOUSE JOURNAL – 1846 SESSION: 109 Days; 12 days no prayer; 97 days visiting clergy led prayer; 0 days legislator-led prayer

Jan 5
Jan 6
Jan 7
Jan 8
Jan 9
Jan 10 – Rev. Mr. Harrison
Jan 12 – Rev. Mr. Harrison
Jan 13 – Rev. Mr. Harrison
Jan 14 – Rev. Mr. Harrison
Jan 15 – Rev. Mr. Harrison
Jan 16 – Rev. Mr. Inglis
Jan 17 – Rev. Mr. Harrison
Jan 19 – Rev. Mr. Inglis
Jan 20 – Rev. Mr. Inglis
Jan 21 - Rev. Mr. Inglis
Jan 22 - Rev. Mr. Inglis
Jan 23 - Rev. Mr. Inglis
Jan 24 - Rev. Mr. Inglis
Jan 26 – Rev. Mr. Harrison
Jan 27
Jan 28 – Rev. Mr. Harrison
Jan 29 - Rev. Mr. Harrison
Jan 30 - Rev. Mr. Harrison
Jan 31 - Rev. Mr. Harrison
Feb 2
Feb 3 – Rev. Mr. Inglis
Feb 4 - Rev. Mr. Inglis
Feb 5 - Rev. Mr. Inglis
Feb 6 - Rev. Mr. Inglis
Feb 9 – Rev. Mr. Harrison
Feb 10 - Rev. Mr. Harrison
Feb 11 - Rev. Mr. Harrison
Feb 12 - Rev. Mr. Harrison
Feb 13 – Rev. Mr. Harrison
Feb 14 - Rev. Mr. Harrison
Feb 16 - Rev. Mr. Inglis
Feb 17 - Rev. Mr. Inglis
Feb 18 - Rev. Mr. Inglis
Feb 19 - Rev. Mr. Inglis
Feb 20 - Rev. Mr. Inglis
Feb 21
Feb 22 – Rev. Mr. Harrison
Feb 24 - Rev. Mr. Harrison
Feb 25 – Rev. Mr. Pilcher
Feb 26 - Rev. Mr. Harrison
Feb 27 - Rev. Mr. Harrison
Feb 28 - Rev. Mr. Harrison
Mar 2 – Rev. Mr. Inglis
Mar 4
Mar 5 - Rev. Mr. Inglis
Mar 6 - Rev. Mr. Inglis
Mar 7 - Rev. Mr. Inglis
Mar 10 - Rev. Mr. Harrison
Mar 11 - Rev. Mr. Harrison
Mar 12 - Rev. Mr. Harrison
Mar 13 - Rev. Mr. Harrison
Mar 14 - Rev. Mr. Harrison
Mar 16
Mar 17
Mar 18 – Rev. Mr. Inglis
Mar 19 – Rev. Mr. Inglis
Mar 20
Mar 23 – Rev. Mr. Harrison
Mar 24 – Rev. Mr. Harrison
Mar 25 – Rev. Mr. Harrison
Mar 26 – Rev. J.S. Harrison
Mar 27 – Rev. Mr. Harrison
Mar 28 – Rev. Mr. Harrison
Mar 30 – Rev. Mr. Inglis
Mar 31 – Rev. Mr. Inglis
Apr 1 – Rev. Mr. Inglis
Apr 2 – Rev. Mr. Inglis
Apr 3 – Rev. Mr. Inglis
Apr 7 – Rev. Mr. Harrison
Apr 8 - Rev. Mr. Harrison
Apr 9 - Rev. Mr. Harrison
Apr 10 - Rev. Mr. Harrison
Apr 11 - Rev. Mr. Harrison
Apr 13 – Rev. Mr. Inglis
Apr 14 - Rev. Mr. Inglis
Apr 15 - Rev. Mr. Inglis
Apr 16 - Rev. Mr. Inglis
Apr 17 - Rev. Mr. Inglis
Apr 18 - Rev. Mr. Inglis
Apr 20 – Rev. Mr. Harrison
Apr 21 – Rev. Mr. Pilcher
Apr 22 – Rev. Mr. Harrison
Apr 23 - Rev. Mr. Harrison
Apr 24 - Rev. Mr. Harrison
Apr 25 - Rev. Mr. Harrison
Apr 27 – Rev. Mr. Inglis
Apr 28 – Rev. Mr. Inglis
Apr 29 – Rev. Mr. Inglis
Apr 30
May 1 – Rev. Mr. Inglis
May 2 – Rev. Mr. Inglis
May 4 – Rev. Mr. Harrison
May 5 - Rev. Mr. Harrison
May 6 - Rev. Mr. Harrison
May 7 - Rev. Mr. Harrison
May 8 - Rev. Mr. Harrison
May 9 - Rev. Mr. Harrison
May 11 – Rev. Mr. Inglis
May 12 - Rev. Mr. Inglis
May 13 - Rev. Mr. Inglis
May 14 - Rev. Mr. Inglis
May 15 - Rev. Mr. Inglis
May 16 - Rev. Mr. Inglis
May 18 – Rev. Mr. Stillman

MICHIGAN HOUSE JOURNAL – 1895 SESSION: 96 DAYS; 78 days no prayer; 18 days visiting clergy led prayer; 0 days legislator-led prayer

Jan 2 – Rev. Mr. Patterson
Jan 3
Jan 8 – Rev. Mr. Jordan
Jan 9
Jan 10
Jan 11
Jan 14
Jan 15
Jan 16
Jan 17
Jan 18
Jan 29
Jan 30
Jan 31
Feb 1 – Rev. Mr. Jordan
Feb 4
Feb 5 – Rev. Mr. Swift
Feb 6 - Rev. Mr. Baughman
Feb 7 – Rev. Mr. Howell
Feb 8
Feb 11
Feb 12
Feb 13
Feb 14
Feb 15
Feb 18
Feb 19 – Rev. Mr. Jordan
Feb 20
Feb 25
Feb 26 – Rev. Mr. Collins
Feb 27
Feb 28
Mar 1
Mar 4 – Rev. Mr. Osborne
Mar 5
Mar 6 – Rev. Mr. Patterson
Mar 7 – Rev. Mr. Jordan
Mar 8 – Rev. Mr. Arney
Mar 11
Mar 12
Mar 13
Mar 14 – Rev. Mr. Luther
Mar 15
Mar 18 – Rev. Mr. Hartness
Mar 19
Mar 21
Mar 25
Mar 26 – Rev. Mr. Temple
Mar 27
Mar 28
Mar 29
Apr 2
Apr 3
Apr 4
Apr 5
Apr 8
Apr 9 – Rev. Mr. Collins
Apr 10
Apr 11 – Rev. Mr. Zimmerman
Apr 12
Apr 15
Apr 16
Apr 17
Apr 18
Apr 19
Apr 22
Apr 23
Apr 24
Apr 25
Apr 26
Apr 29
Apr 30
May 1
May 2
May 3
May 6
May 7
May 8 – Rev. Mr. Davison
May 9
May 10
May 11
May 13
May 14
May 15
May 16
May 17
May 20
May 21
May 22
May 23
May 24
May 25
May 27
May 28
May 29
May 30

COMMISSIONER INSTRUCTIONS TO AUDIENCE

January 3, 2011: Commissioner Cliff Herl approached the podium to give the invocation and demanded, ***"All stand. I think everybody is."***

March 15, 2011: Commissioner Phil Duckham requests, ***"Everyone please stand. Please bow your heads."***

April 19, 2011: Chairman Shotwell commands the audience to ***"All rise"*** before Commissioner Julie Alexander gives the invocation.

July 19, 2011: Commissioner Jon Williams requests, ***"Would you please rise?"***

January 3, 2012: Before Commissioner Cliff Herl leads the invocation, Jackson County Clerk Amanda Riska directs the audience to ***"Please rise."***

March 20, 2012: Commissioner Phil Duckham instructs the audience to ***"Please bow your heads and let us pray."***

June 19, 2012: Chairman Shotwell commands the audience to ***"All rise"*** before he leads the invocation.

July 17, 2012: Chairman Shotwell commands the audience to ***"All rise"*** before he again leads the invocation.

October 23, 2012: Chairman Shotwell commands the audience to ***"All rise and assume a reverent position"*** before Commissioner David Elwell leads the invocation.

Appendix G

November 20, 2012: Chairman Shotwell requests, ***"If everyone could stand and please take a reverent stance"*** before Commissioner David Elwell leads the prayer.

January 15, 2013: Chairman Shotwell commands, ***"Everyone rise and assume a reverent position"*** before Commissioner Carl Rice leads the prayer.

February 19, 2013: Chairman Shotwell demands, ***"All rise and assume a reverent position"*** before Commissioner Phil Duckham leads the prayer.

April 16, 2013: Chairman Shotwell commands the audience to ***"All rise and assume a reverent position"*** before Commissioner Julie Alexander leads the invocation.

May 15, 2013: Chairman Shotwell commands, ***"All rise"*** before Commissioner Mahoney leads the prayer.

June 18, 2013: Commissioner John Polaczyk demands, ***"All rise. Please bow your head."***

July 23, 2013: Chairman Shotwell commands ***"All rise"*** before Commissioner Gail Mahoney requests the audience to ***"Bow your heads with me please."***

August 20, 2013: Commissioner David Elwell directs the audience to ***"Please rise."***

October 15, 2013: Chairman Shotwell demands, ***"All rise"*** before Commissioner David Lutchka leads the prayer.