No. 17-7220

IN THE

SUPREME COURT OF THE UNITED STATES

PETER CARL BORMUTH,

Petitioner,

v.

COUNTY OF JACKSON, MICHIGAN

Respondent.

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

REPLY BRIEF OF THE PETITIONER

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REPLY BRIEF OF THE PETITIONER

I. Petitioner is reliant on the majority opinion in *Town of Greece.*

Respondent errs when claiming the petitioner is reliant on Justice Kagan's dissent in *Town of Greece.* The petitioner relies on the majority opinion and Justice Alito's concurring opinion with regard to the unconstitutionality of the Jackson County prayer practice, and relies on Justice Kennedy's plurality opinion with regard to the coercion analysis. Justice Kagan's worthy dissent contains many elements that can be applied to the different factual situation in the instant case, but the petitioner did not argue from that position in his petition and never cited Justice Kagan's dissent.

II. *Bormuth v. Jackson County* is a better vehicle than *Lund*

Respondent errs when they claim *Lund* is a better vehicle. *Lund* lacks the expansive historical analysis the petitioner provided the Sixth Circuit with regard to legislator-led prayer. Counsel for Lund, Christopher Brook, despite repeated urging from this petitioner, never included a comprehensive response to the historical evidence advanced by counsel for Rowan County and their amici. Meanwhile the petitioner provided the Sixth Circuit with a wealth of historical evidence and argument responding to the "thin gruel" advanced by the respondent and their amici in this case.

The Sixth Circuit referenced a single prayer by Reverend Paul Turquand before the First Provincial Congress of South Carolina in 1775. At the time of Rev. Turquand's invocation, South Carolina did not have a Constitution. The First

Provincial Congress created a *General Committee*, with both judicial and executive powers, and made non-subscribers punishable "according to sound policy." One of the first actions taken under this ambiguous and expansive phrasing was to deny the right of Catholics to bear arms. Two Catholics who protested this order, James Dealy and Laughlin Martin, were tarred and feathered.[1] Does this historical tradition in the colony of South Carolina now give our States the right to prevent Catholics or Muslims from bearing arms? That would be the logical outcome of the Sixth Circuit's reasoning from a single pre-constitutional example. More importantly, this example did not reoccur after South Carolina adopted its constitution. Prior to 1776, most of the 13 Colonies had some form of an established or government-sponsored church and ministers routinely opened legislative sessions with a prayer. But it was an aberration for ministers to hold legislative office in the colonies. Some colonies had laws preventing ministers from holding public office and many sects thought that that their ministers should focus on spiritual issues and refrain from involvement in politics, creating an unofficial barrier to ministerial office holding. Ultimately 6 of the original 13 colonies included articles in their state constitutions banning ministers from holding legislative office. South Carolina was one of those states, adopting the South Carolina Constitution on March 19, 1778 with Article XXI preventing ministers from holding public office. The historical aberration of legislator-led prayer

[1] Edward McCrady, *The History of South Carolina, Vol. 3 1775-1780* New York (Russell & Russell 1901) p.23-24, 153-156.

always involves ministers who were also legislators, so there will be no examples of legislator-led prayer in South Carolina under their first Constitution.

The Sixth Circuit referenced Senate Report No. 32-376 which was issued by Senator George Edmund Badger in 1853 in response to nearly 50 petitions submitted to Congress between 1849-52 by citizens from nearly every state seeking to terminate the Congressional Office of Chaplaincy. Many states had terminated their own chaplaincies during this period of anti-religious sentiment in the United States. Congress was so besieged with petitions to abolish congressional chaplaincies that they actually issued three separate reports from 1850-1854. All three reports recommended keeping the chaplains. Despite the recommendations, the political pressure mounted and the House and Senate actually suspended their regular chaplaincies and went with a rotation system where unpaid local ministers gave invocations. In the House, the change passed 84-39. The only recorded opposition claimed that the change did not go far enough. For the whole Thirty-fifth Congress, neither the House nor the Senate had an institutional chaplain."[2] Senator Badger wrote a book on Christian theology and thought "[m]odern abolitionism is a wanton and mischievous interference with the property of others." Senator Badger was also a traitor to the Constitution. Badger was a delegate from Wake County to the North Carolina Secession Convention of 1861. When the convention met in Raleigh on May

[2] Christopher Lund, *The Congressional Chaplaincies*, 17 Wm. & Mary Bill Rts. J. 1171, 1199-1200, n. 126-127 (2009).

20, 1861, Badger was among the delegates who signed the Ordinance of Secession from the Union.[3]

The petitioner also directed the Sixth Circuit to a previous Senate (and House report) on Sunday Mail delivery that is historically relevant to the issue at hand because it clearly demonstrates the position of the Founders as understood in 1830 by the generation that came after them. The Senate Committee Report, commonly known as the Sunday Mail Report of Richard M. Johnson of Kentucky was presented to Congress on January 19, 1829. In it Johnson states: "Our government is a civil, and not a religious, institution. It is not the legitimate province of the legislature to determine what religion is true, or what is false."[4]

The Sixth Circuit also relied on evidence from the Illinois Constitutional Convention in 1870, and the Brief of Members of Congress as Amici Curiae in support of petitioner Rowan County has cited other state conventions. In each case cited, the member giving the opening prayer was a Christian minister.[5] Because of all the

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[3] Lawrence Foushee London, *The North Carolina Historical Review*, Vol. 15, No. 3 (July, 1938), pp. 231-250

[4] Register of Debates in Congress, App 26-27 (Gales & Seaton, eds, 1829); see also 28 Annals of Congress 1064-65 (Gales & Seaton, eds, 1834)

[5] The sole citation from 1 Debates and Proceedings of the Constitutional Convention [Illinois] 166 (1870) involves the Rev. James S. Poage, preacher of Aledo (166); Citations from the Journal of the Constitutional Convention of the State of North Carolina 7, 9, 18, 249 (1868) involve Rev. G.W. Walker (7); Rev. W.H. Logan (9); Rev. Mr. Lennon (18); and 249 is apparently an error - no prayer on that date/page. Citations from the (2) Report of the Debates and Proceedings of the Convention [Indiana] 1141, 1294, 1311, 1431 (1850) involve Rev. Mr. Crumbacker (1141); Rev. Mr. Farrow (1294); Rev. Mr. Farrow (1311); and Rev. Mr. Badger (1431). Citations from the Journal of the Constitutional Convention of the State of Ohio 5, 45, 53, 63 (1912) involve Rev. McClelland (5); Rev. McClelland (45); Rev. Mr. Dunn (53); and Rev. Mr. Walker (63). Citations from 1 Official Report of the Proceedings and Debates [Ohio] 100, 345, 358 (1873) involve Rev. Samuel W. Clark (100); Rev. W.G. Waddle (345); and Rev. Samuel W. Clark (358). Citations from 1 Official Report of the Proceedings and Debates [Utah] 59, 975 (1898) involve Francis A. Hammond, stake president (In the Church of the LDS the members

historical evidence the petitioner has provided, this case is a far better vehicle for an examination of the historical tradition than the barren record provided in Lund.

III. The evidentiary issue reflects on the impartiality of our Courts.

The petitioner raised the evidentiary issue for the benefit of future litigants. As Justice Ginsberg recently noted, the public may soon regard the Courts as purely partisan, and not as a separate and impartial branch of government. The Sixth Circuit decision not to take judicial notice under Fed. R. Evid. 201 of the facts within the November 12, 2013 video was a partisan decision that should not be allowed to stand. A court "may take judicial notice at any stage of the proceeding." Fed. R. Evid. 201 should apply impartially to litigants, whether Christian or Pagan, especially when such evidence is decisive under Justice Alito's concurring opinion in *Town of Greece.*

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of the stake presidency and stake high council hold the priesthood office of high priest) (59); and Henry Hughes, who was ordained to the office of a Bishop on October 7th, 1872 by President Brigham Young (975). All the individual citations from 2 Report of the Proceedings and Debates of the Constitutional Convention of the State of Virginia 1721, 1728, 1780, 1871, 2228, 2404, 2512, 2672, 3154 (1906) involve Rev. W.F. Dunaway; Citations from the Debates and Proceedings of the First Constitutional Convention of West Virginia (1861-62) involve: Nov. 30, 1861 - Rev. Gordon Battelle; Dec. 2, 1861 - Rev. R. L. Brooks; Dec. 11, 1861 - Rev. Joseph S. Pomeroy; Dec. 12, 1861 – Rev. Thomas H. Trainer; Dec. 14, 1861 - Reverend Gordon Battelle; Dec. 16, 1861 - Rev. R. L. Brooks; Dec. 18, 1861 - Rev. T. H. Trainer; Dec. 19, 1861 - Rev. J. M. Powell; Dec. 20, 1861 - Rev. James G. West; Jan. 7, 1862 - Rev. Jos. S. Pomeroy; Jan. 8, 1862 - Rev. R. L. Brooks; Jan. 9, 1862 - Rev. T. H. Trainer; Jan.10, 1862 - Rev. James G. West; Jan. 13, 1862 - Rev. Gordon Battelle; Jan. 14, 1862 - Rev. Josiah Simmons; Jan. 15, 1862 - Rev. Joseph S. Pomeroy; Jan. 16, 1862 - Rev. Robert Hagar; Jan. 20, 1862 - Rev. R. L. Brooks; Jan. 24, 1862 - Rev. J. M. Powell; Jan. 25, 1862 - Rev. Robert Hagar; Jan. 27, 1862 - Rev. R. L. Brooks; Jan. 28, 1862 - Rev. James G. West; Jan. 29, 1862 - Rev. Joseph S. Pomeroy; Jan. 30, 1862 - Rev. R. L. Brooks; Feb. 1, 1862 - Rev. Josiah Simmons; Feb. 3, 1862 - Rev. Gordon Battelle; Feb. 4, 1862 – Rev. Josiah Simmons; Feb. 5, 1862 – Rev. Gordon Battelle; Feb. 6, 1862 – Rev. Mr. McCutchen; Feb. 7, 1862 – Rev. Mr. Pomeroy; Feb. 8, 1862 – Rev. Mr. Powell; Feb. 10, 1862 - Rev. Mr. Hagar; Feb. 11, 1862 – Rev. Mr. Simmons; Feb. 12, 1862 – Rev. Mr. Ryan; Feb. 13, 1862 - Rev. Mr. Pomeroy; Feb. 14, 1862 - Rev. Mr. Brooks; Feb. 17, 1862 - Rev. Mr. Simmons; Feb. 18, 1862 - Rev. Mr. Battelle.

IV. Jackson County is a stronghold of "Christian nation" dogma.

The "Christian nation" dogma espoused by the Jackson County Commissioners is simply the same old Christian patriarchal, racist, sexist, and homophobic agenda that enslaved Africans, committed genocide against Native Americans, burnt European women as witches, and gassed Jews, Gypsies and homosexuals. As Randall Terry, head of the anti-abortion group Operation Rescue, told his followers in 1993: "I want you to just let a wave of intolerance wash over you." "I want you to let a wave of hatred wash over you. Yes, hate is good...Our goal is a Christian nation. We have a biblical duty, we are called by God, to conquer this county. We don't want equal time. We don't want pluralism."[6] As evidenced in a complaint filed in the Eastern District of Michigan, such attitudes are a part of the "Christian nation" tradition of Jackson County. The case alleges that Jackson County Sheriff Steve Rand referenced a former Black deputy as a "dumb nigger" and other Blacks as "monkeys" and suggested that "we should step on their necks like we used to." Rand supposedly made frequent reference to Schuette as a "fag" or a "queer." Referencing a female court employee, Rand apparently stated that "I always wanted to do a snuff film with her and she could be the star, I would put one in the back of her head as I [ejaculate]." Rand referred to a local female judge as a "scatter brained cunt" and he suggested to a City of Jackson police officer of Hispanic descent: "don't you have any gardens to go pick?" *Schuette v. Rand & Jackson County*, 5:18-cv-10497-LJM-SDD at ¶¶ 28, 30.[7] The only

[6] Frank Lambert, *The Founding Fathers and the Place of Religion in America,* Princeton (2006) p. 295.

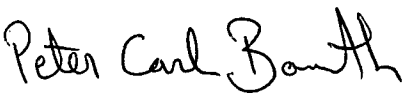
[7] http://www.mlive.com/news/jackson/index.ssf/2018/02/recordings_show_rand_made_dero.html

thing lacking is a slur against Muslims. Other than the snuff and sexual fantasies which are particular to Sheriff Rand, the petitioner can assure this Court that the other attitudes are common in the white Christian voting electorate of Jackson County. Whether it is calling a Pagan a "nitwit" because of his religious beliefs, or calling a Judge a "scatter-brained cunt" because of her gender, the attitudes and expressions of the Christian elected officials of Jackson County simply mirror the beliefs held by a majority of their constituents. One suspects that after the election of President Donald Trump, local officials like Sheriff Rand feel less constrained by political correctness and more emboldened in expressing their Christian prejudices.

CONCLUSION

The Petition for a Writ of Certiorari should be GRANTED.

Respectfully submitted,



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Dated: February 20, 2018