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## Praying for Clarity: *Lund, Bormuth*, and the Split Over Legislator-Led Prayer

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# PRAYING FOR CLARITY: *LUND*, *BORMUTH*, AND THE SPLIT OVER LEGISLATOR-LED PRAYER

**Abstract:** On September 6, 2017, the en banc U.S. Court of Appeals for the Sixth Circuit released its opinion in *Bormuth v. County of Jackson*, finding prayers offered by the Jackson County Board of Commissioners constitutional under the Establishment Clause. That decision involved detailed factual analysis, which varied greatly from the analysis used by the en banc U.S. Court of Appeals for the Fourth Circuit to find nearly identical prayers by the Rowan County Board of Commissioners unconstitutional in *Lund v. Rowan County* on July 14, 2017. This Comment argues that the method of analysis conducted by the en banc Fourth Circuit in *Lund* is the more comprehensive and, therefore proper, method of factual analysis contemplated by the U.S. Supreme Court in *Town of Greece v. Galloway*. In contrast, the analysis employed by the en banc Sixth Circuit’s decision in *Bormuth* fails to fully consider the challenged practice, and is therefore flawed.

## INTRODUCTION

The Rowan County Board of Commissioners has opened its public meetings with prayers for at least forty-six years.<sup>1</sup> In 2013, three citizens of Rowan County filed suit against their Board of Commissioners challenging those prayers.<sup>2</sup> In *Lund v. Rowan County* (“*Lund I*”), the U.S. District Court for the Middle District of North Carolina determined that the prayers in Rowan County violated the Establishment Clause of the First Amendment.<sup>3</sup> On appeal, the U.S. Court of

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<sup>1</sup> See Minutes of the Meeting of the Bd. of Rowan Cty. Comm’rs 1 (Mar. 1, 1971) (detailing, in the Rowan County Board’s oldest publically available minutes, the opening of a board meeting with prayer). The history of legislative prayer in the United States as a whole dates back as far the founding of the country, with its roots in the practices of colonial governing bodies. See *infra* notes 45–48 and accompanying text (providing detailed history of legislative prayer in the United States). The Rowan County Board of Commissioners is the body in charge of the government of Rowan County, which is located in central North Carolina. See *Lund v. Rowan County (Lund I)*, 103 F. Supp. 3d 712, 714 (M.D.N.C. 2015) (identifying the Board of Commissioners’ role as the body through which the county “exercises its powers as a governmental entity”).

<sup>2</sup> *Lund I*, 103 F. Supp. 3d at 715. The plaintiffs in *Lund I*, Nancy Lund, Liesa Montag-Siegel, and Robert Voekler, are all non-Christian residents of Rowan County. Verified Complaint for Declaratory and Injunctive Relief and Nominal Damages ¶¶ 8–13, *Lund I*, 103 F. Supp. 3d 712 (No. 1:13-CV-00207). The *Lund* plaintiffs have attended meetings of the Rowan County Board of Commissioners for various reasons, some since the early 2000s. See *id.* ¶¶ 8, 10, 12 (detailing Lund’s attendance at meetings since 2004, Montag-Siegel’s attendance at meetings since the early 2000s, and Voekler’s attendance at meetings to follow “the Board’s consideration of educational issues”).

<sup>3</sup> *Lund I*, 103 F. Supp. 3d at 712, 734. The Establishment Clause of the First Amendment provides that “Congress shall make no law respecting an establishment of religion . . .” U.S. CONST. amend. I. For a more detailed explanation of the trial proceedings in *Lund I*, see *infra* notes 26–29 and accompanying text.

Appeals for the Fourth Circuit subsequently reversed *Lund I* in *Lund v. Rowan County* (“*Lund II*”), finding the prayers constitutional.<sup>4</sup> The en banc Fourth Circuit Court of Appeals then reviewed the case and found the prayers unconstitutional in *Lund v. Rowan County* (“*Lund III*”).<sup>5</sup>

Five months after the *Lund* plaintiffs filed suit, Peter Bormuth, a citizen of Jackson County, Michigan, filed suit against his county, alleging that the county’s nearly identical practice of opening the Board of Commissioners’ meetings with prayers was unconstitutional.<sup>6</sup> In *Bormuth v. County of Jackson* (“*Bormuth I*”), the U.S. District Court for the Eastern District of Michigan found Jackson County’s prayer practice constitutional.<sup>7</sup> Jackson County then appealed, and the U.S. Court of Appeals for the Sixth Circuit reversed *Bormuth I*, and found Jackson County’s prayers unconstitutional in *Bormuth v. County of Jackson* (“*Bormuth II*”).<sup>8</sup> The en banc Sixth Circuit Court of Appeals then vacated *Bormuth II*, and found the prayers constitutional.<sup>9</sup>

The current split between the Fourth and Sixth Circuit Courts of Appeals over the proper analysis of challenges to legislator-led prayers raises concerns of judicial consistency in an area with far-reaching implications.<sup>10</sup> Alterations to the

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<sup>4</sup> *Lund v. Rowan County (Lund II)*, 837 F.3d 407, 411 (4th Cir. 2016). For a more detailed explanation of the circuit-level proceedings in *Lund*, see *infra* notes 34–41 and accompanying text.

<sup>5</sup> *Lund v. Rowan County (Lund III)*, 863 F.3d 268, 275 (4th Cir. 2017) (en banc). En banc refers to the practice of U.S. Courts of Appeals reviewing a case with every member present. See 28 U.S.C. § 46(c) (2012) (outlining normal practice of U.S. Courts of Appeals hearing cases in panels of three, and enabling en banc review by a larger selection of judges); *En Banc*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining en banc as “[w]ith all judges present and participating”); see also *En Banc Sitting*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining “en banc sitting” as “[a] court session in which all the judges . . . participate”).

<sup>6</sup> *Bormuth v. County of Jackson (Bormuth II)*, 849 F.3d 266, 271 (6th Cir. 2017). Mr. Bormuth is a pagan resident of Jackson County, who began attending meetings of the County of Jackson Board of Commissioners after becoming concerned about pollution of a local river. Plaintiff’s Amended Complaint at ¶ 13, *Bormuth v. County of Jackson (Bormuth I)*, 116 F. Supp. 3d 850 (E.D. Mich. 2015) (No. 2:13-CV-13726). The Jackson County Board of Commissioners is the government entity in charge of Jackson County, a county in southern Michigan. See *Bormuth II*, 849 F.3d at 269 (identifying Board of Commissioners as presiding over government meetings, and conducting government business).

<sup>7</sup> *Bormuth I*, 116 F. Supp. 3d at 850, 860. The *Bormuth I* court considered facts that weighed for and against a finding of coercion, including the lack of chastisement of dissenters, the ability of dissenters to leave or abstain, the purely Christian nature of the prayers, the instruction from Commissioners to participate in the prayers, as well as other factors. See *id.* at 857–58 (weighing those factors).

<sup>8</sup> *Bormuth II*, 849 F.3d at 291.

<sup>9</sup> *Bormuth v. County of Jackson (Bormuth III)*, 870 F.3d 494, 497–99 (6th Cir. 2017) (en banc).

<sup>10</sup> See Patrick L. Gregory, *Circuit Split on Legislator-Led Prayer Could Entice Supreme Court*, BLOOMBERG LAW (Sept. 13, 2017), <https://www.bna.com/circuit-split-legislatorled-n57982087849/> [<https://perma.cc/Y6LF-K7ZJ>] (noting the direct disagreement between the Fourth and Sixth Circuits over the extent of *Town of Greece v. Galloway*, and the likelihood of review by the Supreme Court given the importance of the right at stake). See generally *Petition for Writ of Certiorari, Bormuth v. County of Jackson*, No. 17-7220 (Dec. 21, 2017) (detailing Mr. Bormuth’s request for further appel-

standard for judging legislative prayers would have profound effects on prayers currently offered at the state and local level across the country.<sup>11</sup>

Part I of this Comment examines the factual and procedural backgrounds of both *Lund* and *Bormuth*.<sup>12</sup> Part II discusses the historical practices surrounding the Establishment Clause, as well as the currently murky status of the law defining the prohibitions of the Clause.<sup>13</sup> Finally, Part III argues that the analysis employed by the Fourth Circuit in *Lund III* is more faithful to Establishment Clause precedent, and therefore more correct, than that used by the Sixth Circuit in *Bormuth III*.<sup>14</sup>

## I. THE COUNTIES' PRAYER PRACTICES AND ENSUING LITIGATION

The county governments of Rowan County, North Carolina and Jackson County, Michigan are both led by a Board of Commissioners.<sup>15</sup> The chairpersons of both Boards open their public meetings by calling the meetings to order and then announcing that everyone should rise for prayer.<sup>16</sup> Members of the Boards, all of whom are Christian, then led the attendants in overwhelming Christian

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late review); Petition for Writ of Certiorari, *Rowan County v. Lund*, No. 17-565 (Oct. 12, 2017) (detailing Rowan County's request for further appellate review).

<sup>11</sup> See Brief of Amici Curiae State of Michigan and Twenty-One Other States in Support of Jackson County and Affirmance at 9–11, *Bormuth II*, 849 F.3d 266 (No. 15-1869) (detailing a 2002 study finding thirty-one state legislative bodies that employ legislative prayers in some capacity, and a separate study of counties within the Sixth Circuit finding that at least 26.9% of the counties in Michigan, Ohio, Tennessee, and Kentucky have legislator-led prayers before some of their county government meetings); Brief of Amici Curiae State of West Virginia and 12 Other States Supporting Defendant-Appellant at 15, add. 2–8, *Lund II*, 837 F.3d 407 (No. 15-1591) (detailing the practice of legislator-led prayers in at least one chamber in thirty-seven of the United States' fifty-six state, territorial, and district governments, and finding that at least 52% of the counties in the Fourth Circuit used legislator-led prayers on some occasions at some county government meetings); see, e.g., Cory Vaillancourt, *In Whose Name? Haywood Commissioners Asking for Trouble in Prayer Case*, SMOKY MOUNTAIN NEWS (Aug. 2, 2017), <http://www.smokymountainnews.com/news/item/20475-in-who-s-name-haywood-commissioners-asking-for-trouble-in-prayer-case> [<https://perma.cc/PA9N-R3S9>] (detailing change of prayer practice by the Board of Commissioners in Haywood County, North Carolina, in light of *Lund III* resulting in prayers that “didn’t even attempt to comply with the [*Lund III*] ruling”).

<sup>12</sup> See *infra* notes 15–41 and accompanying text.

<sup>13</sup> See *infra* notes 42–72 and accompanying text.

<sup>14</sup> See *infra* notes 73–86 and accompanying text.

<sup>15</sup> *Lund III*, 863 F.3d at 272; *Bormuth II*, 849 F.3d at 269. Both boards are elected by the people of their counties, and are led by a chairperson. *Lund III*, 863 F.3d at 272; *Bormuth II*, 849 F.3d at 269. Both boards also hold public meetings to conduct business and accept public comments. *Lund III*, 863 F.3d at 272; *Bormuth II*, 849 F.3d at 269. The Rowan County Board of Commissioners holds two meetings each month, whereas the Jackson County Board of Commissioners meets once each month. *Lund III*, 863 F.3d at 272; *Bormuth II*, 849 F.3d at 269.

<sup>16</sup> *Lund III*, 863 F.3d at 272; *Bormuth II*, 849 F.3d at 269. The chairperson of the Jackson County Board also occasionally tells those at the meeting to “assume a reverent position.” *Bormuth II*, 849 F.3d at 269.

prayers.<sup>17</sup> Following the prayers given by the Commissioners, both Boards proceed to the formal business part of the meeting.<sup>18</sup> The plaintiffs in both *Bormuth I* and *Lund I* became concerned after attending a number of meetings that started with prayers.<sup>19</sup> Both sets of plaintiffs raised their concerns to their Board of Commissioners informally prior to filing suit.<sup>20</sup> Mr. Bormuth's verbal opposition to the prayers at the Jackson County Board's August meeting was met with negative reactions from board members during the meeting.<sup>21</sup> Members of the Jackson County Board also made numerous statements to the local press denigrating both the lawsuit and Mr. Bormuth.<sup>22</sup> The Lund plaintiffs raised their concerns via

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<sup>17</sup> See *Lund III*, 863 F.3d at 273, 283 (internal quotations omitted) (quoting *Lund I*, 103 F. Supp. 3d at 714) (noting that two members of the Board of Commissioners are Methodist, and three are some variety of Baptist and that over a five and a half year period, 97% of the prayers offered mentioned "Jesus, Christ, or Savior"); *Bormuth II*, 849 F.3d at 270 (detailing two prayers thanking a "Heavenly father" in "Jesus's name[.]" and concluding with "Amen"). No other religions were ever represented in prayers, and the prayers often featured implications that Christianity is the superior religion, and that the public should become Christian. See *Lund III*, 863 F.3d at 273 (detailing prayers calling Christianity "the only way to eternal life," and asking "that [the public] may be one with [God]"); *Lund I*, 103 F. Supp. 3d at 714 (finding that "[n]o invocation delivered since November 5, 2007, referenced a deity specific to a faith other than Christianity").

<sup>18</sup> *Lund III*, 863 F.3d at 272; *Bormuth II*, 849 F.3d at 269. Following its prayers, the Board of Commissioners in both counties discuss matters of public import, and elicit comments and concerns from the citizens in attendance. See *Lund III*, 863 F.3d at 272 (detailing the practice in Rowan County of following the prayers with the Pledge of Allegiance, approval of the prior meetings' minutes, scheduling, and receiving public comment); *Bormuth II*, 849 F.3d at 269–70 (outlining the general practice in Jackson County of discussing public matters, and the specific discussions of County policy regarding possession of firearms by county employees on county property).

<sup>19</sup> *Lund III*, 863 F.3d at 273; *Bormuth II*, 849 F.3d at 270. In July and August 2013, Mr. Bormuth attended the Board of Commissioners' public meetings, which were both opened with prayers that thanked a "heavenly father[.]" were given in "Jesus's name[.]" and concluded with "amen." *Bormuth II*, 849 F.3d at 270. Those prayers made Mr. Bormuth uncomfortable, and made him feel that he was being forced to participate in a religion in order to appear before his local government. *Id.* Similarly, every board meeting that the *Lund* plaintiffs attended started with prayers. See *Lund I*, 103 F. Supp. 3d at 715 (detailing those allegations in Mr. Bormuth's complaint). All of the *Lund* plaintiffs indicated that the prayers made them feel excluded from their community and its government, and that they felt coerced to join in the prayers. *Id.*

<sup>20</sup> *Bormuth II*, 849 F.3d at 270; *Lund I*, 103 F. Supp. 3d at 714. During the Rowan County Board's August 2013 meeting, Mr. Bormuth raised his concerns about the prayer practice. *Bormuth II*, 849 F.3d at 270. The *Lund* plaintiffs raised their concerns to the American Civil Liberties Union (ACLU) of North Carolina, which wrote a letter informing Rowan County that the prayers offered before meetings were violations of the Establishment Clause. *Lund I*, 103 F. Supp. 3d at 714. The ACLU is "a national organization whose primary purpose is to help enforce and preserve individual rights and liberties guaranteed by federal and state constitutions." *American Civil Liberties Union*, BLACK'S LAW DICTIONARY (10th ed. 2014). The letter indicated that the prayers were unconstitutional under then-valid Fourth Circuit precedent, which held that sectarian prayer was unconstitutional. *Lund I*, 103 F. Supp. 3d at 714 n.3 (citing *Joyner v. Forsyth County*, 653 F.3d 341, 349 (4th Cir. 2011), *abrogated by Town of Greece v. Galloway*, 134 S. Ct. 1811, 1821 (2014)).

<sup>21</sup> See *Bormuth II*, 849 F.3d at 270–71 (detailing reactions by a board member, including disgusted facial expressions and "refus[al] to look at [Mr.] Bormuth" while he spoke).

<sup>22</sup> See *id.* at 283, 286 (quoting a member of the Board explaining that only board members were allowed to pray in order to control the prayers' message, calling the lawsuit "political correctness

a letter from the ACLU of North Carolina, and faced similar comments from members of the Rowan Board.<sup>23</sup> When both Boards indicated their unwillingness to change practices, the plaintiffs filed suit.<sup>24</sup>

### A. Lund's Procedural History

The Lund plaintiffs filed suit in March 2013 and sought a preliminary injunction, alleging that Rowan County's prayer practice was a violation of the Establishment Clause.<sup>25</sup> The district court granted the preliminary injunction based on then-standing Fourth Circuit precedent that sectarian prayers were unconstitutional.<sup>26</sup> After the district court issued its preliminary injunction, the U.S. Supreme Court announced its decision in *Town of Greece v. Galloway*.<sup>27</sup> The parties then cross-motivated for summary judgment in light of *Town of Greece*, and the district court granted the plaintiffs' motion, finding the prayers unconstitutional.<sup>28</sup> The district court found the prayers distinguishable from those at issue in *Town of Greece*, and determined that the prayers were coercive, as defined by the plurality's test in *Town of Greece*.<sup>29</sup> Rowan County then appealed the district

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nonsense" being "jammed down [his] throat," saying that it was an "attack on Christianity and Jesus Christ," and calling Mr. Bormuth a "nitwit").

<sup>23</sup> See *Lund I*, 103 F. Supp. 3d at 714–15 (detailing comments by a member of the Rowan County Board of Commissioners indicating his intent to continue praying before meetings, while another stated he would be willing to go to jail rather than stop "pray[ing] in JESUS name").

<sup>24</sup> *Bormuth II*, 849 F.3d at 270–71; *Lund I*, 103 F. Supp. 3d at 714–15.

<sup>25</sup> *Lund I*, 103 F. Supp. 3d at 715–16. Preliminary injunctions are among the most immediate types of relief that can be sought by a party because they are issued before a trial has been conducted. See *Injunction*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining preliminary injunction as "a temporary injunction issued before or during trial to prevent an irreparable injury from occurring before the court has a chance to decide the case").

<sup>26</sup> *Lund I*, 103 F. Supp. 3d at 716. The district court based its decision on *Joyner*, which as previously noted, dictated a per se ban on sectarian legislative prayers, but has since been abrogated. See *Joyner*, 653 F.3d at 340; *Per Se*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining per se as "of, in, or by itself; standing alone, without reference to additional facts" or "as a matter of law"); *supra* note 20 and accompanying text (explaining the history of the *Joyner* decision and its abrogation by *Town of Greece*).

<sup>27</sup> *Lund III*, 863 F.3d at 274. *Town of Greece* is instrumental in *Lund* and *Bormuth* for two reasons: first, the case substantially altered the governing law, and second, the case was decided during the trial court proceedings in both *Lund I* and *Bormuth I*. *Town of Greece*, 134 S. Ct. at 1822; see *Bormuth II*, 849 F. 3d at 271 (identifying that *Town of Greece* was decided after filing, but before decision on Mr. Bormuth's first summary judgment motion); *Lund II*, 837 F. 3d at 412 (noting that *Town of Greece* was decided after the district court issued a preliminary injunction, but before the parties cross-motivated for summary judgment).

<sup>28</sup> *Lund III*, 863 F.3d at 274. Summary judgment motions are governed by Federal Rule of Civil Procedure 56, and are granted when the party moving for summary judgment shows that there is no genuine issue of material fact, and that the party is entitled to judgment as a matter of law. FED. R. CIV. P. 56.

<sup>29</sup> See *Lund I*, 103 F. Supp. 3d at 724, 727 (noting the distinguishing facts between *Lund* and *Town of Greece*, and employing the *Town of Greece* plurality's test). The court also addressed coercion through other Supreme Court precedent prior to *Town of Greece*, finding the prayers equally

court's ruling to the Fourth Circuit, which reversed the district court, and found the prayers constitutional.<sup>30</sup> The Fourth Circuit specifically noted that the prayers at issue did not fall beyond the scope of historic prayers, and were not coercive under the *Town of Greece* plurality's test.<sup>31</sup> The *Lund* plaintiffs subsequently made a motion for rehearing on the basis of the importance of the matter, which was granted en banc.<sup>32</sup> The en banc Fourth Circuit affirmed the district court's ruling, agreeing that the prayers in Rowan County were unconstitutional.<sup>33</sup>

### B. Bormuth's Procedural History

Mr. Bormuth filed suit against Jackson County in August of 2013 in the U.S. District Court for the Eastern District of Michigan, alleging that Jackson County's prayer practice was unconstitutional.<sup>34</sup> Mr. Bormuth then moved for summary judgment, but before the court ruled on that motion, the United States Supreme Court released its decision in *Town of Greece*.<sup>35</sup> Jackson County then cross-motivated for summary judgment, and the district court allowed Mr. Bormuth to file a new summary judgment motion in light of *Town of Greece*.<sup>36</sup>

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coercive under those standards. *See id.* at 729–33 (addressing “the Coercion Doctrine pre-*Town of Greece*[,]” and finding the prayers coercive under those tests as well).

<sup>30</sup> *Lund III*, 863 F.3d at 274.

<sup>31</sup> *See Lund II*, 837 F.3d at 418–19, 427–28 (explaining that the prayers did not go beyond the legislator-led prayers that had existed in the United States since 1775, and noting that the prayers did not require participation, chastise non-participants, or incur consequences to non-participants).

<sup>32</sup> *Lund III*, 863 F.3d at 275; *Lund v. Rowan County*, 670 F. App'x 106, 106 (4th Cir. 2016) (granting rehearing en banc and vacating *Lund II*); Petition for Panel Rehearing or Rehearing en banc at 1, *Lund III*, 863 F.3d 268 (No. 15-1591). A motion for rehearing is a post-determination motion to the court, allowed in appellate cases to seek rehearing by a panel, or en banc. FED. R. APP. P. 35, 40; *see Motion for Rehearing*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining term as “a party's request that the court allow another hearing of a case, motion, or appeal, usually to consider an alleged error or omission in the court's judgment or opinion”). The *Lund* plaintiffs also argued that the panel decision failed to perform the “content-sensitive analysis mandated by *Town of Greece*,” and essentially found “nearly all legislative prayer practices beyond review” as the first circuit court to apply *Town of Greece*. Petition for Panel Rehearing or Rehearing en banc, *supra*, at 2.

<sup>33</sup> *Lund III*, 863 F.3d at 275.

<sup>34</sup> *Bormuth II*, 849 F.3d at 271. The complaint was later amended to add more Establishment Clause claims after Mr. Bormuth's application to serve as the County's Solid Waste Planning Commissioner was denied. *Id.*

<sup>35</sup> *Id.* Although the district court did not agree with Jackson County that it should delay ruling on the motion until after the Court's ruling in *Town of Greece*, it did not rule on the plaintiff's motion until after the Court's decision was released. *Id.*

<sup>36</sup> *Id.* Mr. Bormuth was permitted to file a renewed motion for summary judgment in light of *Town of Greece* based on the fact that *Town of Greece* made clear that the constitutionality of legislative prayer did not depend on whether the prayer was sectarian. *See Town of Greece*, 134 S. Ct. at 1820 (noting that requiring prayers to be nonsectarian “is not consistent with the tradition of legislative prayer outlined in the [Supreme] Court's cases”); Order Terminating Motion, *Bormuth II*, 116 F. Supp. 3d 850 (2:13-cv-13726) (terminating Mr. Bormuth's first summary judgment motion to allow briefing in light of *Town of Greece*). Compare Plaintiff's Motion for Summary Judgment at 9–10, *Bormuth I*, 116 F. Supp. 3d 850 (2:13-cv-13726), ECF No. 14 (arguing for summary judgment based on the Christian nature of the prayers in Jackson County), with Plaintiff's Motion for Summary Judgment

The parties' motions were heard before a magistrate judge, who recommended that the district court grant Mr. Bormuth's motion on the ground that the county's prayers violated the Establishment Clause.<sup>37</sup> The district court rejected the Magistrate Judge's recommendation, finding the County's prayer practice constitutionally permissible.<sup>38</sup> Mr. Bormuth appealed the district court's ruling to the Sixth Circuit, which reversed the decision and found the County's prayer practice unconstitutional.<sup>39</sup> A member of the Sixth Circuit then sua sponte requested that the case be reheard en banc, and a majority of the justices voted to rehear the case.<sup>40</sup> The en banc Sixth Circuit subsequently affirmed the district court's decision, finding Jackson County's prayer practice constitutional.<sup>41</sup>

## II. TESTING THE EXTENT OF THE ESTABLISHMENT CLAUSE'S PROHIBITIONS

The U.S. Supreme Court has directly addressed legislative prayers in only two cases: *Marsh v. Chambers* and *Town of Greece v. Galloway*.<sup>42</sup> That limited precedent highlights the importance of historical practices, while also consider-

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ment, *supra*, at 11–12, ECF No. 37 (arguing, based on *Town of Greece*, for summary judgment the fact that the prayers were delivered by Commissioners rather than a paid chaplain).

<sup>37</sup> *Bormuth II*, 849 F.3d at 272. U.S. magistrate judges are Article I judges, appointed for eight year terms, with the power to hear pretrial motions and preside over civil and criminal misdemeanor trials. See 28 U.S.C. § 636 (2012) (outlining duties of a U.S. magistrate judge); *United States Magistrate Judge*, BLACK'S LAW DICTIONARY (10th ed. 2014) (specifying that magistrate judges are appointed to eight year terms). Magistrate judges, however, do not have the power to issue rulings on summary judgment motions or certain other dispositive motions, and in those cases must submit a report and recommendation to the district judge assigned to the case. 28 U.S.C. § 636(b)(1).

<sup>38</sup> *Bormuth I*, 116 F. Supp. 3d at 860. In his Report and Recommendation, the judge specifically noted at length the significance of the Jackson County Commissioners' practice of limiting the prayer givers to Commissioners, as well as asking the public to public to aid in the selection of the County's prayers, unconstitutional. See Report and Recommendation: Cross-Motions for Summary Judgment (Dkt. 25, 37) at 36–39, *Bormuth I*, 116 F. Supp. 3d 850 (2:13-CV-13726), ECF No. 50 (distinguishing the facts of *Bormuth* from those in *Town of Greece*). The district court judge rejected the recommendation and the contention that the constitutionality of prayers should turn on the identity of the prayer giver, finding that the prayers at issue would have been constitutional if delivered by an invitee of the Board. See *Bormuth I*, 116 F. Supp. 3d at 858–59 (finding unpersuasive arguments that board members' delivery of the prayers made them coercive). The judge also explicitly rejected the analysis employed by the court in *Lund I* as to whether the prayers fell outside traditional legislative prayers, and whether the prayers were coercive. *Id.* at 856–57.

<sup>39</sup> *Bormuth II*, 849 F.3d at 273, 291. The court specifically examined the significance of the prayer-giver's identity as a Commissioner, the fact that the Commissioners instructed participation in the prayers, that they attacked Mr. Bormuth because of his opposition to the prayers, and that an adverse appointment decision was made against him following his lawsuit. *Id.* at 285–87.

<sup>40</sup> *Bormuth III*, 870 F.3d at 499 (citing *Bormuth v. County of Jackson*, 855 F.3d 694, 694 (6th Cir. 2017) (granting en banc review and vacating *Bormuth II*)). Sua sponte refers to the judicial practice of judges either raising issues, or taking action, on their own without any action required of the parties. See *Sua Sponte*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining sua sponte as “[w]ithout prompting or suggestion; on its own motion”).

<sup>41</sup> *Bormuth III*, 870 F.3d at 519.

<sup>42</sup> See *Bormuth II*, 849 F.3d 266, 275 (6th Cir. 2017) (finding that “[t]here are only two Supreme Court cases that have considered the constitutionality of legislative prayer[s]”).



ing coercion without clearly addressing how it fits within the constitutional analysis.<sup>43</sup> The varying opinions in *Lund* and *Bormuth* illustrate the unclear standard left by the Supreme Court in *Town of Greece*, the most recent case involving legislative prayers.<sup>44</sup>

### A. The U.S. Supreme Court's Deference to History in Establishment Clause Analysis

In *Marsh*, the Supreme Court traced the origins of legislative prayer back to Colonial America, where the practice of convening legislative bodies with prayers was commonplace throughout the colonies.<sup>45</sup> The Supreme Court also noted the presence of prayers in the earliest meetings of the U.S. Congress.<sup>46</sup> Those early legislative prayers were rooted in the days of a state-sponsored religion under the British Empire.<sup>47</sup> Following the overthrow of British rule, the Founders included in the First Amendment to the United States Constitution a provision prohibiting the establishment of a religion by the government.<sup>48</sup> Nevertheless, contemporaneous with the ratification of the First Amendment, both the

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<sup>43</sup> See *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014) (quoting County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in part and dissenting in part)) (finding that “the Establishment Clause must be interpreted ‘by reference to historical practices and understandings’”).

<sup>44</sup> See generally *Bormuth III*, 870 F.3d 494 (6th Cir. 2017) (en banc); *Lund III*, 863 F.3d 268 (4th Cir. 2017) (en banc); *Bormuth II*, 849 F.3d 266; *Lund II*, 837 F.3d 407 (4th Cir. 2016); *Bormuth I*, 116 F. Supp. 3d 850 (E.D. Mich. 2015); *Lund I*, 103 F. Supp. 3d 712 (M.D.N.C. 2015).

<sup>45</sup> See *Marsh v. Chambers*, 463 U.S. 783, 787 n.5 (1983) (detailing practice of opening legislative sessions with prayers in Virginia as early as 1712, and Rhode Island in 1790).

<sup>46</sup> *Id.* at 787. The Court noted that in 1774, the Continental Congress began paying a chaplain to open its sessions with prayers. *Id.* The first prayer offered by the Continental Congress’s chaplain was replete with Christian themes and was given in the name “of Jesus Christ, Thy Son and our Saviour.” *Town of Greece*, 134 S. Ct. at 1823.

<sup>47</sup> *Marsh*, 462 U.S. at 786–87. Throughout the period under British rule, various colonies maintained government support for religion beyond the basic requirements of adhering to the religion of the Church of England. See, e.g., LIONEL DE LEON, UNITED STATES FACTS AND DATES 1 (2008) (detailing a decree by the Governor of Virginia in 1617 stating “Every Person should go to church, Sundays and Holidays, or lye Neck and Heels that Night, and be a Slave to the Colony the following Week; for the second Offence, he should be a Slave for a Month; and for the third, a Year and a Day”).

<sup>48</sup> See U.S. CONST. amend. I (establishing that “Congress shall make no law respecting an establishment of religion . . .”). The First Amendment, and the Framers’s arguments for its ratification, is the consolidation and legislative pronouncement of the separation of church and state. See Letter from Thomas Jefferson, President of the U.S., to Nehemiah Dodge, Ephraim Robbins, & Stephen S. Nelson, A Comm. of the Danbury Baptist Ass’n in the State of Conn. (Jan. 1, 1802) (on file with the Library of Congress) (addressing concerns that Congress could strip religious liberties, stating “that act . . . which declared that their legislature should ‘make no law respecting an establishment of religion . . . [.]’ thus building a wall of separation between Church & State[.]” ensured that Congress could not repeal religious liberty).

House and the Senate selected chaplains during the first Congress.<sup>49</sup> Congress's embrace of prayers has been mirrored by numerous states from the time of the Bill of Rights until the present.<sup>50</sup>

The U.S. Supreme Court has gone to great lengths in its opinions analyzing the Establishment Clause to make clear that the historical practice detailed above is the cornerstone of that analysis.<sup>51</sup> The Court has been equally clear that a history of uncorrected Constitutional violations alone is insufficient to allow continued violations to take place.<sup>52</sup> The Court has therefore established a fine line between reverence to history and faithfulness to the First Amendment, which requires courts to look to historical practices to establish the Framers' intent, without relying solely on those practices.<sup>53</sup>

### *B. Establishment Clause Limits on Legislative Prayer Before Lund and Bormuth*

The Court's first foray into legislative prayers arose out of the Nebraska Legislature's hiring of a legislative chaplain.<sup>54</sup> A legislator challenged the prayers as a violation of the Establishment Clause, seeking to enjoin the prayers.<sup>55</sup> In

<sup>49</sup> H.R. JOUR., 1st Cong., 1st Sess., 26 (1826); S. JOUR., 1st Cong., 1st Sess., 16 (1820). Congress subsequently enacted legislation to provide a salary of \$500 per year for each chaplain of the Congress. An Act for Allowing Compensation to the Members of the Senate and House of Representatives of the United States, and to the Officers of Both Houses, § 4, 1 Stat. 71 (1789). The language of the Bill of Rights was agreed upon three days after Congress authorized payment of the chaplains. H.R. JOUR., *supra*, at 121; S. JOUR., *supra*, at 88.

<sup>50</sup> See *Marsh*, 463 U.S. at 790 n.11, 794 n.18 (detailing the practice of legislative prayers during the 1980s in twenty-one states, and noting eleven states where legislative chaplain were paid from public funds during the 1980s).

<sup>51</sup> *Town of Greece*, 134 S. Ct. at 1819 (explaining that the Establishment Clause inquiry requires a "determin[ation] whether the prayer practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures"); *Marsh*, 463 U.S. at 792–93 (analyzing prayer practices of legislature's paid chaplain "against the historical background" of legislative prayers).

<sup>52</sup> See *Town of Greece*, 134 S. Ct. at 1819 (finding that "*Marsh* must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation"); *Marsh*, 463 U.S. at 790 (finding that "[s]tanding alone, historical patterns cannot justify contemporary violations of constitutional guarantees").

<sup>53</sup> See *Town of Greece*, 134 S. Ct. at 1819 (quoting *County of Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring in part and dissenting in part)) (finding that "the Establishment Clause must be interpreted 'by reference to historical practices and understandings'"); *Marsh*, 463 U.S. at 790 (describing the importance of contemporaneous adoption of the First Amendment and hiring of legislative chaplain as evidence of the Framers' intent that the Establishment Clause not be a blanket prohibition of legislative prayers).

<sup>54</sup> See *Bormuth II*, 849 F.3d at 275 (noting that *Marsh* was the first case to address the issue). Robert E. Palmer, a Presbyterian minister, was selected as the Nebraska Legislature's chaplain for sixteen consecutive years, beginning in 1965. *Marsh*, 463 U.S. at 785. In addition to being selected to serve as chaplain by the Executive Board of the Legislative Council, Reverend Palmer was paid \$319.75 per month from public funds. *Id.* at 784–85.

<sup>55</sup> *Id.* at 785. The district court found the prayers themselves did not violate the Establishment Clause, but that the practice of paying the chaplain did. *Id.* After cross-appeals were filed, the Court of

its decision in *Marsh*, the Supreme Court specifically considered the fact that the legislative chaplain represented only one denomination, that the chaplain received a salary from the government, and that the prayers were all Christian in nature.<sup>56</sup> The Court found all three arguments insufficient to prohibit the prayer practice on constitutional grounds, and reversed the Eighth Circuit's prior decision, finding the prayers constitutional.<sup>57</sup>

Following the Court's decision in *Marsh*, the Court did not address the practice of legislative prayers again until residents of Greece, New York challenged the town's use of prayers to open town board meetings.<sup>58</sup> The town of Greece had adopted a practice of opening its monthly town board meetings with prayers offered by a clergyman at the request of the town supervisor.<sup>59</sup> The town selected the prayer givers, who were referred to as "chaplain for the month," by calling local congregations until it found a minister willing to give the prayers.<sup>60</sup> Although the Board did not review the prayers or provide guidance as to their contents, nearly all of the ministers invited to give prayers were Christian.<sup>61</sup> Two residents of the town brought suit seeking to force the town to allow only non-sectarian prayers.<sup>62</sup> The Supreme Court weighed arguments by the plaintiffs con-

Appeals for the Eighth Circuit applied the *Lemon* test and found the practice wholly unconstitutional. See *Chambers v. Marsh*, 675 F.2d 228, 233–35 (8th Cir. 1982) (citing *Lemon v. Kurtzman*, 403 U.S. 602, 615 (1971)) (noting that, per *Lemon*, the prayers had to be analyzed as a whole, and subsequently finding the prayers unconstitutional). The court of appeals specifically found the prayers' purpose "must be to advance and give preference to one religious view over others," that the effect of the prayers was "unmistakably to advance religion and to give preference to one religious view," and that "[t]he prayer practice also entangles the state with religion . . ." *Id.* at 234–35.

<sup>56</sup> *Marsh*, 463 U.S. at 792–93 (noting those three facts before specifically refuting the court of appeals' finding that the prayers were unconstitutional on that basis).

<sup>57</sup> *Id.* at 793–95. The Court specifically stated that the practice of appointing a chaplain of only one faith was not an Establishment Clause violation "[a]bsent proof that the chaplain's reappointment stemmed from an impermissible motive," that the manner in which the chaplain was paid did not conflict with the historical practice of legislative prayers, and that the Judeo-Christian nature of the prayers also did not violate the Establishment Clause as the prayers "[had not] been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Id.* at 794–95.

<sup>58</sup> *Bormuth II*, 849 F.3d at 275 (identifying *Marsh* and *Town of Greece* as the Supreme Court's only decisions addressing legislative prayers); see *Town of Greece*, 134 S. Ct. at 1817 (detailing events that gave rise to the *Town of Greece* plaintiffs' suit).

<sup>59</sup> *Town of Greece*, 134 S. Ct. at 1816. Unlike in *Marsh*, the clergymen invited to pray at the town of Greece's board meetings did so on a purely voluntary basis. Compare *id.* (detailing rotating, volunteer chaplains from the community offering prayers), with *Marsh*, 463 U.S. at 784–85 (identifying the practice of paying chaplains).

<sup>60</sup> *Town of Greece*, 134 S. Ct. at 1816 (detailing practice of having a "town employee . . . call the congregations listed in the local directory until she found a minister available for that month's meeting").

<sup>61</sup> See *id.* (noting the tone and theme of the prayers). The Court identified that the majority of Greece's congregations, and therefore ministers invited to pray, were Christian. *Id.*

<sup>62</sup> *Id.* at 1817. The District Court for the Western District of New York ruled on summary judgment that the town's prayer practice was constitutional, specifically indicating that the town had not excluded any faith from offering prayers, that the benign references to Christianity were not impermissible proselytizing, and that there was no requirement that legislative prayers be purged of sectarian content. *Id.* The

tending that *Marsh* did not sanction the language and themes used in the town's prayers, and the fact that the prayers took place in town hall meetings forced attendants to pretend to join in, or at least stay for the prayers.<sup>63</sup> Justice Kennedy's majority opinion soundly rejected the first argument, finding that nothing in *Marsh*, or any other area of constitutional jurisprudence, premised the constitutionality of prayers on non-sectarian messaging.<sup>64</sup>

The current split between the *Lund* and *Bormuth* courts arises out of the remaining portion of Justice Kennedy's *Town of Greece* opinion, which was unable to gain the support of a majority of the justices.<sup>65</sup> Justice Kennedy's opinion in Part II-B of *Town of Greece*, in which the Chief Justice and Justice Alito joined, indicated a number of factors that, if different, could have been coercive in that case.<sup>66</sup> In Part II-B, Justice Kennedy specifically indicated that the question of coercion in cases involving legislative prayers is fact sensitive, and it is that undefined factual analysis that caused the various courts to come to six conclusions in *Lund* and *Bormuth*.<sup>67</sup> Some of the courts focused only on the identity

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Second Circuit reversed, finding that the town's prayers conveyed the message that it "was endorsing Christianity." *Id.* at 1818. The Court found that the totality of the circumstances showed the town selected prayer givers in a practice that "ensured a Christian viewpoint," the constantly Christian prayers tended to affiliate the town with Christianity, and that the board members' participation further evidenced endorsement of Christianity. *Town of Greece*, 134 S. Ct. at 1818 (quoting *Galloway v. Town of Greece*, 681 F.3d 20, 30–32 (2d Cir. 2012)).

<sup>63</sup> *See id.* at 1820 (identifying the plaintiff's two main arguments being directed at the sectarian language of the prayers, and their delivery in the setting of a local government meeting).

<sup>64</sup> *See id.* at 1821 (noting that the language the Second Circuit cited from *County of Allegheny* was dicta "that was disputed when written and has been repudiated," and that the true test for the constitutionality of legislative prayers under *Marsh* was not related to content, but rather proselytization).

<sup>65</sup> *Id.* at 1815. Justice Kennedy's opinion in Part II-B of *Town of Greece* was joined by the Chief Justice and Justice Alito, and contemplates the analysis used to determine whether the prayer practice was coercive, which would have made it an Establishment Clause violation. *Id.* at 1815, 1825–26 (Kennedy, J., delivering the opinion of the court). Justice Thomas, with whom Justice Scalia joined (both of whom joined the majority in all except Part II-B), noted in his concurrence that the coercion necessary for an Establishment Clause violation is true legal coercion, not merely a feeling imposed by legislators or other that may coerce individuals into participating. *Id.* at 1838 (Thomas, J., concurring in part and concurring in the judgment).

<sup>66</sup> *Id.* at 1825–26 (Kennedy, J., delivering the opinion of the court) (noting that the outcome would be different if "board members directed the public to participate in the prayers, singled out dissenters for opprobrium, or indicated their decisions might be influenced by" joining in the prayers or not). Justice Thomas's opinion, on the other hand, discarded the proposition that any non-legal coercion could ever serve as grounds for an Establishment Clause claim, stating instead that only "actual legal coercion" could support such a claim. *Id.* at 1837–38 (Thomas, J., concurring in part and concurring in the judgment). Justice Thomas defined "actual legal coercion" as "financial support of the church, compel[led] religious observance, or control[led] religious doctrine" by the government. *Id.* at 1837.

<sup>67</sup> *See Bormuth III*, 870 F.3d at 516–19 (performing the analysis proscribed in Justice Kennedy's *Town of Greece* plurality opinion); *Lund III*, 863 F.3d at 281 (noting that the fact that board members wrote and delivered the prayers "interacts with the other aspects of the county's practice, altering their constitutional significance"); *Bormuth II*, 849 F.3d at 282, 285 (examining the factual significance of the identity of the prayer-giver, the government's actions related to the prayers both before and after deliverance of the prayers, and the government's treatment of those that object to the prayers); *Lund*

of the prayer-giver, relying on earlier Supreme Court precedent to address other facts surrounding the prayers, whereas other courts examined anew all the facts involved.<sup>68</sup>

### C. Bormuth III and Lund III's Divergent Analysis

The Courts in *Lund III* and *Bormuth III* both began their analysis of the challenged prayer practices by analyzing whether or not the prayers at issue fell within the area of historically constitutional prayers.<sup>69</sup> Even in that preliminary question, the Fourth and Sixth Circuits took divergent views of the types of legislative prayers sanctioned by the Supreme Court in *Marsh* and *Town of Greece*.<sup>70</sup> The two courts continued to diverge in their analysis as they proceeded to determine whether the prayers in question were coercive.<sup>71</sup> Based on that divergent analysis, the Fourth and Sixth Circuits came to opposite conclusions, with the Fourth Circuit deciding that the prayers were coercive and fell outside

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*II*, 837 F.3d at 420–25 (noting that the identity of the prayer-giver, the selection of the prayers content, and the purpose of the prayers are all relevant considerations); *Bormuth I*, 116 F. Supp. 3d at 858 (indicating that the constitutional determination “hinges exclusively on the fact that the prayer[s] [were] delivered by the Commissioners”); *Lund I*, 108 F. Supp. 3d at 721–24 (detailing all facts that distinguish Rowan County’s prayers from those in *Town of Greece*).

<sup>68</sup> Compare *Bormuth III*, 870 F.3d at 509 (noting the inquiry regarding legislative prayers focuses on “the prayer opportunity as a whole, in light of historical practices”), with *Bormuth I*, 116 F. Supp. 3d at 858 (noting the factual analysis makes the constitutional determination “hinge[] exclusively on the fact that the prayer[s] [were] delivered by the Commissioners”).

<sup>69</sup> See *Bormuth III*, 870 F.3d at 509 (stating that “at the heart of this appeal is whether Jackson County’s prayer practice falls outside [of] our historically accepted traditions”); *Lund III*, 863 F.3d at 279 (beginning by addressing the question of whether Rowan County’s prayers fit within the historical practice of legislative prayers, based on statistics provided by the County and amici).

<sup>70</sup> Compare *Bormuth III*, 870 F.3d at 509 (noting that *Marsh* independently approved both “paid legislative chaplains and opening prayers,” and that neither *Marsh* nor *Town of Greece* limit the historical practice to a question of who gives the prayers), with *Lund III*, 863 F.3d at 277–78 (stating that *Town of Greece* “does not address legislator-led prayer[s]” because it “takes for granted the use of outside clergy” to lead prayers).

<sup>71</sup> Compare *Bormuth III*, 870 F.3d at 507–08 (finding no significant difference between the coercion in *Town of Greece* and the coercion in the case at bar, no significant difference between the requests to join in prayers by Commissioners and those by ministers, and finding no significance in the act of several board members turning their backs on Mr. Bormuth as he spoke against the prayers), with *Lund III*, 863 F.3d at 286–88 (noting the significant difference between requests to join in prayers from ministers and Commissioners, the difference in coercive effect of prayers offered by Commissioners, and the coercive effect of prayers in a local government meeting with other members of the public participating). The *Bormuth III* court declined to decide whether Justice Kennedy or Justice Thomas’s coercion analysis was the proper coercion test, stating instead that the prayers would be coercive under either theory of coercion. See 870 F.3d at 515–16 (noting that “because Bormuth’s challenge fails under either standard, we need not resolve this issue”). On the other hand, although the *Lund III* court did not specifically state that it was applying Justice Kennedy’s coercion analysis, it cited heavily to the areas of Justice Kennedy’s opinion that gave examples of when practices would become coercive. See 863 F.3d at 285–87 (citing Justice Kennedy’s guidance on legislators “signal[ing] disfavor toward non-Christians” and legislative instructions to participate in the prayers).

the historical practice of legislative prayer, while the Sixth Circuit determined the prayers were not coercive and in line with history.<sup>72</sup>

### III. FAITHFULLY PERFORMING A COMPLETE FACTUAL ANALYSIS IN COERCION INQUIRIES

The Sixth Circuit failed to faithfully apply Supreme Court precedent to the factual circumstances of the prayers in *Bormuth III* when it found the prayers constitutional.<sup>73</sup> Specifically, the *Bormuth III* court employed dicta from the plurality opinion in *Town of Greece v. Galloway*, which stated that adults could withstand exposure to differing religious ideas by their local government through guest chaplains to reach the same conclusions about prayers offered by those government officials, preceded by instructions to participate.<sup>74</sup> The court also indicated that *Marsh v. Chambers* endorsed legislative prayers and paid chaplains separately, although in reality *Marsh* considered the historical prevalence of legislative prayers with the limiting function of its performance by a paid chaplain.<sup>75</sup> Finally, the *Bormuth III* court held that, in light of *Town of Greece*, there was no difference in prayers in local government meetings and larger state or national legislatures, despite the fact that *Town of Greece* stated that proposition in the context of prayers delivered by invitees.<sup>76</sup> By analyzing the array of facts surrounding the challenged prayer practice, similar to the court's analysis in *Bormuth II*, the *Lund III* court faithfully performed the detailed factual analysis required in analyzing Establishment Clause claims.<sup>77</sup>

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<sup>72</sup> See *Bormuth III*, 870 F.3d at 497–98 (finding Jackson County's prayers in line with Supreme Court precedent and constitutional, and that the prayers were not coercive under any version of coercion analysis); *Lund III*, 863 F.3d at 272 (finding Rowan County's prayers unconstitutional and noting the coercive effect of the prayers on the members of the public present at the Board of Commissioners meetings).

<sup>73</sup> See *Bormuth III*, 870 F.3d 494, 507–10, 516 (6th Cir. 2017) (en banc) (relying on erroneously stated Supreme Court precedent and findings from different factual scenarios rather than conducting its own analysis).

<sup>74</sup> See *id.* at 516 (noting that *Town of Greece* required a finding that the coercive effect of prayers given at local government meetings was no different than the coercive effect of prayers given at legislative sessions, without reference to *Town of Greece*'s consideration of the prayer-giver being an invitee).

<sup>75</sup> See *Marsh v. Chambers*, 463 U.S. 783, 787–88 (1983) (noting that “opening [legislative] sessions with a prayer offered by a paid chaplain” began as early as 1774 in the Continental Congress); *Bormuth III*, 870 F.3d at 510 (indicating that, in *Marsh*, the Supreme Court recognized both “paid legislative chaplains and opening prayers as consistent with . . . the Establishment Clause”) (internal quotations omitted).

<sup>76</sup> See *Town of Greece v. Galloway* 134 S. Ct. 1811, 1824–25 (2014) (finding no difference between the prayers offered in the town of Greece and historically protected prayers in that they were both “directed at” members of the board); *Bormuth III*, 870 F.3d at 516 (noting that *Town of Greece* mandates finding no difference between prayers at local meetings and legislative sessions).

<sup>77</sup> See *Lund III*, 863 F.3d 268, 281–82 (4th Cir. 2017) (en banc) (performing detailed recitation of the facts of the Rowan County prayer practice, including a comparison of the control and content of the prayers to the open and inclusive prayer practice approved by the Supreme Court in *Town of*

First, looking to Supreme Court precedent it is clear that the question of faithfulness to the Establishment Clause cannot turn on one fact alone, but rather requires careful consideration of all factors surrounding the challenged prayers.<sup>78</sup> The fact sensitive nature of that analysis, which was recognized in *Town of Greece, Lund*, and *Bormuth*, necessitates an in depth analysis of all of the facts surrounding a challenged practice, rather than merely those that the Supreme Court has not previously addressed.<sup>79</sup> The *Bormuth III* court failed to perform that in depth analysis when it imported Supreme Court precedent to limit its analysis.<sup>80</sup> Looking to the prior decisions in *Lund* and *Bormuth*, the factual analysis performed by the circuit court in *Bormuth III* is an insufficient attempt at weighing the interplay of factors relevant to a constitutional determination.<sup>81</sup> Even the *Lund II* decision, which for a time upheld similar prayers, does not contemplate an analysis that would so easily cast aside relevant factors and turn primarily on the prayer-giver's identity.<sup>82</sup>

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*Greece*); *Bormuth II*, 849 F.3d 266, 285–87 (6th Cir. 2016) (giving special attention to the Board's practice of directing participation in the prayers, criticizing those that did not participate, and "indicat[ing] that their decisions might be influenced by" participation in the prayers, as required under *Town of Greece*).

<sup>78</sup> See *Town of Greece*, 134 S. Ct. at 1825–28 (detailing numerous facts about Greece's prayer practice, including what the prayers said, who gave the prayers, and when the prayers took place). The Supreme Court's most recent foray into legislative prayers involved a detailed resuscitation of the facts surrounding the challenged prayers, including the content of the prayer, the prayer-giver's identity, and when the prayers were given. See *id.* The Court also specifically noted that the coercion inquiry in cases involving legislative prayers "remains a fact-sensitive one that considers both the setting in which the prayer[s] arises and the audience to whom it is directed." *Id.* at 1825.

<sup>79</sup> See *id.* at 1825 (describing legislative prayer inquiries as "fact-sensitive"); *Lund III*, 863 F.3d at 280–81 (recognizing that a court looking into a challenge to legislative prayers must examine the "prayer opportunity as a whole" and perform a "fact-sensitive review" of those prayers); *Bormuth II*, 849 F.3d at 285 (noting that Establishment Clause analysis of legislative prayers is a "fact-sensitive one").

<sup>80</sup> See *Bormuth III*, 870 F.3d at 516 (noting that "consistent with *Town of Greece*," the court would not view the coercive effect of prayers at local government meetings differently than those at legislative sessions, without recognizing that the *Town of Greece* finding was based on prayers given by invited clergy). Compare *Town of Greece*, 134 S. Ct. at 1816 (detailing prayers delivered by invited ministers and the public), with *Bormuth II*, 849 F.3d at 269–70 (detailing Jackson County's practice of maintaining Commissioner control over the prayers by delivering all the prayers).

<sup>81</sup> Compare *Bormuth III*, 870 F.3d at 516 (noting that the fact that the prayers were delivered in a local government meeting by government officials is immaterial to the constitutional outcome of the case), with *Bormuth II*, 849 F.3d at 282, 285 (discussing the importance of considering both the prayer-giver's identity and the fact that the prayers took place in an intimate, local government setting), and *Lund I*, 103 F. Supp. 3d 712, 722–23 (M.D.N.C. 2015) (noting the importance of the prayer-giver's identity, as well as the implications of commissioner, and by proxy the government, determining the content of the prayers).

<sup>82</sup> See *Lund II*, 837 F.3d 407, 424 (4th Cir. 2016) (noting that a decision by "the Board restrict[ing] the prayer opportunity among the commissioners as part of an effort to promote only Christianity" would raise constitutionally significant questions). That evidence is present in the *Bormuth* cases, as shown by a member of the Jackson County Board of Commissioners' public comments that the prayers were limited to Commissioners based on the statements public prayer-givers would make. See *Bormuth II*, 849 F.3d at 283 (detailing comments made by a Commissioner that opening the prayers to the public would

On the other hand, the Fourth Circuit's factual analysis in *Lund III* applies the correct factual analysis to determine the constitutionality of the prayers in Rowan County.<sup>83</sup> Rather than relying on the Supreme Court's previous findings on the factual implications of prayers in a town meeting setting, or of the public being asked to stand, the *Lund III* court engaged in a new factual analysis, taking into consideration the facts that distinguish *Lund* from *Town of Greece*.<sup>84</sup> The *Lund III* court specifically, and correctly, considered the identity of the prayer giver, the board members' deliberate choice to exercise control over prayers with constant Christian messages, and the exact language of the prayers used to proselytize.<sup>85</sup> The *Lund III* court thereby remained faithful to *Town of Greece*'s instruction to perform independent analysis in every legislative prayer case.<sup>86</sup>

### CONCLUSION

The U.S. Court of Appeals for the Sixth Circuit conducted an incomplete factual analysis to hold unconstitutionally coercive prayers constitutional in *Bormuth III*. The court's approach to its analysis of the Jackson County Board of Commissioners' prayer practice strayed from the analysis mandated by Supreme Court precedent, which was dutifully followed by the courts in *Bormuth II* and *Lund III*. Without reference to the bigger picture of the facts of the practice, the *Bormuth III* court used Supreme Court precedent analyzing a different factual scenario to shorten its only analysis. By disregarding the interplay between facts when determining coercion, the *Bormuth III* court failed to abide by precedent, which was correctly followed in *Lund III*.

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“create a lot of problems . . . when certain people come up here and say things that they are not going to like”).

<sup>83</sup> See *Lund III*, 863 F.3d at 277–79 (comparing and contrasting all relevant facts from Rowan County's prayer practice to those the Court addressed in *Marsh* and *Town of Greece*).

<sup>84</sup> See *id.* at 281–85 (detailing all facts relevant to prayers conducted at meetings of the Rowan County Board of Commissioners, and examining those facts against the backdrop of historic prayer practices to determine the constitutionality of those prayers).

<sup>85</sup> See *id.* at 277, 282, 284–85 (noting that the Supreme Court has only “discussed legislative prayer practices in terms of invited ministers, clergy, or volunteers,” that the board members, all of whom were Protestant Christians, only allowed themselves to pray at meetings, and noting that the prayers used asked “that the world may believe that you sent Jesus to save us” and indicated Jesus Christ as “the one and only way to salvation”).

<sup>86</sup> See *Town of Greece*, 134 S. Ct. at 1825 (noting the importance of an inquiry that considers both the setting and audience of the prayers); *Lund III*, 863 F.3d at 287–88 (noting the timing of the delivery of the prayers and indicating that the prayers were directed at the public).