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God Save the United States and this Honorable County Board of Commissioners: *Lund, Bormuth,* and the Fight Over Legislative Prayer

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I. Introduction

Imagine you are at the Supreme Court of the United States. You walk the famed marble steps, and enter under the motto "Equal Justice Under Law."[1] You are at the Court to watch oral arguments, and are ushered into the gallery. You are captivated by the breathtaking grandeur of the ornate courtroom.[2] You rise as the Justices enter and the Marshal announces "God save the United States, and this Honorable Court."[3]

Now imagine you are at a local board of commissioners meeting. Rather than just attending as a spectator, you have come to request a zoning variance for an addition to your house or to ask for a traffic light to be put up in your neighborhood.[4] You stand in a conference room in your county's administrative building,

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1. *See The Court and Constitutional Interpretation*, SUP. CT. U.S., https://www.supremecourt.gov/about/constitutional.aspx (last visited Jan. 22, 2019) (recounting that this motto "express[es] the ultimate responsibility of the Supreme Court of the United States") (on file with the Washington and Lee Law Review).

2. *See Photographs*, SUP. CT. U.S., https://www.supremecourt.gov/about/photos.aspx (last visited Jan. 22, 2019) (providing photographs of the exterior and inside of the United States Supreme Court building) (on file with the Washington and Lee Law Review).

3. *See The Court and Its Procedures*, SUP. CT. U.S., https://www.supremecourt.gov/about/procedures.aspx (last visited Jan. 22, 2019) (specifying that this exact statement is said every morning before oral arguments before the Supreme Court) (on file with the Washington and Lee Law Review); *see also* Michael I. Meyerson, *The Original Meaning of "God": Using the Language of the Framing Generation to Create a Coherent Establishment Clause Jurisprudence*, 98 MARQ. L. REV. 1035, 1042–43 (2015) (referring to the earliest record of this proclamation in a book from 1857 about a hearing in 1827).

4. *See* Town of Greece v. Galloway, 572 U.S. 565, 630–31 (2014) (Kagan, J., dissenting) (posing a hypothetical of the potential implications of legislative prayer at the local government level).

surrounded by industrial carpeting and community members milling about. When the board enters the room, they stand facing you just a few feet away.[5] The chairman of the board asks for everyone to stand and bow their heads in prayer. Everyone in the room rises from their plastic chairs as the chairman begins to say "Holy Spirit, open our hearts to Christ's teachings, and enable us to spread His message amongst the people we know and love through the applying of the sacred words in everyday lives. In Jesus' name I pray. Amen."[6] As soon as the prayer concludes, the chair asks for public comments. Is the proclamation by the Marshal considered to be an establishment of religion by the government? Is the prayer by the chairman? Where does the line fall between what is constitutional, and what is not? Supreme Court has previously ruled on the issue of legislative prayer[7] in only two cases—Marsh v. Chambers[8] in 1983 and *Town of Greece v. Galloway*[9] in 2014—and in both cases, the Court found the

5. *See, e.g.*, County of Jackson, *May 24, 2016 Jackson County Board of Commissioners Meeting*, YOUTUBE (May 25, 2016), https://www.youtube.com/watch?v=V-dOx_W9-yw (last visited Jan. 22, 2019) (providing a video of a meeting of the Jackson County, Michigan Board of Commissioners that shows the meeting settings and the proximity of the commissioners to the audience) (on file with the Washington and Lee Law Review); Josh Bergeron, *Rowan County Commissioners' Prayer Practice Again Ruled Unconstitutional*, SALISBURY POST (July 14, 2017, 10:02 AM), http://www.salisburypost.com/2017/07/14/county-commissioners-prayer-practices-again-ruled-unconstitutional/ (last visited Jan. 22, 2019) (providing a photograph of the Rowan County, North Carolina Board of Commissioners praying at a meeting that shows the meeting room and the close proximity between the commissioners and audience members) (on file with the Washington and Lee Law Review).

6. *See* Lund v. Rowan County, No. 1:13CV207, 2013 WL 12137142, at *2 (M.D.N.C. July 23, 2013) (listing examples of prayers given by the Rowan County Board of Commissioners, including this one from March 7, 2011), *rev'd and remanded*, 837 F.3d 407 (4th Cir. 2016), *as amended* (Sept. 21, 2016), *on reh'g en banc*, 863 F.3d 268 (4th Cir. 2017).

7. The term "legislative prayer" denotes "[t]he practice of opening governmental sessions with prayer." *See* Kenneth A. Klukowski, *In Whose Name We Pray: Fixing the Establishment Clause Train Wreck Involving Legislative Prayer*, 6 GEO. J.L. & PUB. POL'Y 219, 221 (2008) (outlining the rise of the controversy surrounding legislative prayer).

8. *See* 463 U.S. 783, 786 (1983) ("We granted certiorari limited to the challenge to the practice of opening sessions with prayers by a State-employed clergyman . . . .").

9. *See* 572 U.S. 565, 569–70 (2014) ("The Court must decide whether the town of Greece, New York, imposes an impermissible establishment of religion by

challenged practices to be constitutional.[10] However, in both instances the Court cautioned that legislative prayer practices are not always permissible and that courts must engage in a "fact-sensitive" inquiry "that considers both the setting in which the prayer arises and the audience to whom it is directed."[11] The Supreme Court has refused to set forth a clear test for evaluating the constitutionality of legislative prayer;[12] and as a result of this lack of clear doctrinal guidance,[13] a circuit split has arisen.[14]

On July 14, 2017, in Lund v. Rowan County,[15] the United States Court of Appeals for the Fourth Circuit found that a county board's practice of opening its meetings with prayer was unconstitutional.[16] In so holding, the court relied on four factors which, taken together, created an impermissible prayer practice.[17]

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opening its monthly board meetings with a prayer.").

10. *See id.* at 570 (concluding that "no violation of the Constitution has been shown"); *Marsh*, 463 U.S. at 793–95 (deciding that the Nebraska Legislature's prayer practice was valid).

11. *Town of Greece*, 572 U.S. at 587.

12. *See id.* at 577 ("*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.").

13. *See* Lund v. Rowan County, 863 F.3d 268, 276 (4th Cir. 2017) (en banc) ("*Marsh* and *Town of Greece* do not settle whether Rowan County's prayer practice is constitutional."), *cert. denied*, 138 S. Ct. 2564 (2018).

14. *See* Bormuth v. County of Jackson, 870 F.3d 494, 509 n.5 (6th Cir. 2017) (en banc) ("We recognize our view regarding Jackson County's invocation practice is in conflict with the Fourth Circuit's recent en banc decision." (citing Lund v. Rowan County, 863 F.3d 268 (4th Cir. 2017))), *cert. denied*, 138 S. Ct. 2708 (2018); Nicholas J. Hunt, *Let Us Pray: The Case for Legislator-Led Prayer*, 54 TULSA L. REV. 49, 76 (2018) ("The courts in *Bormuth* and *Lund* caused a jurisprudential 'split' regarding sectarian, legislator-led prayer." (citing David L. Hudson Jr., *Circuit Split on Constitutionality of Legislator-Led Prayer May Lead to SCOTUS Review*, ABA JOURNAL (Feb. 2018), http://www.abajournal.com/magazine/article/circuit_split_on_legislator_led_prayer (last visited Jan. 22, 2019) (on file with the Washington and Lee Law Review)).

15. 863 F.3d 268 (4th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 2564 (2018).

16. *See id.* at 272 (observing that "[t]he prayer practice served to identify the government with Christianity and risked conveying to citizens of minority faiths a message of exclusion").

17. *See id.* at 281 (articulating that "it is the combination of these elements—not any particular feature alone—that 'threatens to blur the line between church and state to a degree unimaginable in *Town of Greece*'" (quoting Lund v. Rowan County, 837 F.3d 407, 435 (4th Cir.), *as amended* (Sept. 21, 2016) (Wilkinson, J., dissenting), *reh'g en banc granted*, 670 F. App'x 106 (4th Cir. 2016), *and on reh'g*

The four factors were (1) the role of the commissioners as the exclusive prayer-givers; (2) their invocation of a single faith; (3) their instructions to the audience; and (4) the local government setting of the prayers.[18] Two months later, on September 6, 2017, the United States Court of Appeals for the Sixth Circuit, in Bormuth v. County of Jackson,[19] found that a prayer practice that exhibited the same four factors was constitutional.[20] This split is important because it reveals that, a mere three years after the Supreme Court last addressed this issue,[21] there is still significant confusion among the courts concerning how to evaluate the constitutionality of legislative prayer practices.[22]

This Note will address whether, and to what extent, the four factors proposed by the Fourth Circuit, and subsequently rejected by the Sixth Circuit, are an appropriate test of the constitutionality of a legislative prayer practice under United States Supreme Court jurisprudence. Part II explores the background of the Establishment Clause[23] and legislative prayer.[24] The Supreme Court has placed significant emphasis on the history of legislative prayer in evaluating modern prayer practices, as seen in its two cases *Marsh v. Chambers*[25] and *Town of Greece v. Galloway*.[26] Part

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en banc, 863 F.3d 268 (4th Cir. 2017), *cert. denied* 138 S. Ct. 2564 (2018))).

18. *See id*. (explaining that the court would "examine each of these features in turn").

19. 870 F.3d 494 (6th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 2708 (2018).

20. *See id*. at 498 (holding that the County's prayer practice was consistent with the Supreme Court's legislative prayer jurisprudence).

21. *See* Town of Greece v. Galloway, 572 U.S. 565, 565, 570 (2014) (addressing legislative prayer for the first time since 1983).

22. *See* Krista M. Pikus, *Hopeful Clarity or Hopeless Disarray?: An Examination of* Town of Greece v. Galloway *and the Establishment Clause*, 65 CATH. U. L. REV. 387, 404–05 (2015) (critiquing *Town of Greece* for its lack of clarity and consistency); Nicholas C. Roberts, *The Rising None:* Marsh*,* Galloway*, and the End of Legislative Prayer*, 90 IND. L.J. 407, 415–16 (2015) (articulating the continuing questions lower courts face following *Town of Greece*).

23. *See infra* Part II.A (explaining the Establishment Clause as the cause of action for legislative prayer challenges and discussing the Court's interpretation of the Establishment Clause as a whole).

24. *See infra* Part II.B (mapping the early history of legislative prayer in the United States and how the Supreme Court has interpreted this history).

25. *See infra* Part II.C.1 (explaining the facts underlying *Marsh v. Chambers* and the Supreme Court's reasoning in finding the prayer practice constitutional).

26. *See infra* Part II.C.2 (detailing the Supreme Court's second and most

III examines the first two circuit court decisions to consider challenges to local legislative prayer in the wake of *Town of Greece*.[27] Though factually identical, the Fourth Circuit in Lund[28] and the Sixth Circuit in *Bormuth*[29] arrived at opposite holdings concerning the constitutionality of the contested prayer practices.[30] Part IV assesses each of the Lund four factors, comparing the Fourth Circuit's reasoning in favor of these factors with the Sixth Circuit's explanation for why they are an inaccurate measure under the Supreme Court's guidance.[31] In considering both the constitutionality and applicability of these four factors in legislative prayer challenges, this Note ultimately concludes that until the Supreme Court articulates a clearer test, these factors provide a valuable tool for lower courts.[32]

II. Overview of the Establishment Clause and Prior Jurisprudence

The Establishment Clause of the First Amendment of the United States Constitution governs challenges to legislative prayer practices.[33] Courts consider these prayers to be government

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recent legislative prayer case, *Town of Greece v. Galloway*, in 2014).

27. *See infra* Part III (outlining the differences between the Fourth and Sixth Circuit decisions).

28. *See infra* Part III.A (exploring the facts and procedural history that gave rise to the Fourth Circuit's decision in *Lund v. Rowan County*, and the court's reasoning for finding the prayer practice unconstitutional).

29. *See infra* Part III.B (summarizing the Sixth Circuit's analysis in *Bormuth v. County of Jackson* and the surrounding facts and procedural history).

30. *See infra* notes 129–38 and accompanying text (examining the points of digression between the Fourth and Sixth Circuits).

31. *See infra* Part IV (analyzing the four factors of the commissioners as the sole prayer-givers; the exclusive reference to one faith, and the advancement of that faith; the invitations for meeting attendees to participate in the prayers; and the local government setting).

32. *See infra* Part V (explaining the role of the *Lund* factors in the current judicial context).

33. *See* Simpson v. Chesterfield County Bd. of Supervisors, 404 F.3d 276, 288 (4th Cir. 2005) (establishing that legislative prayer is "subject only to the proscriptions of the Establishment Clause" (internal citation omitted)); Coleman v. Hamilton County, 104 F. Supp. 3d 877, 891 (E.D. Tenn. 2015) ("[L]egislative prayer cases . . . are subject to analysis only under the Establishment Clause of the First Amendment, and not under the Equal Protection Clause of the Fourteenth Amendment."); Atheists of Fla., Inc. v. City of Lakeland, 779 F. Supp. 2d 1330, 1342 (M.D. Fla. 2011) (explaining that "[t]he proper analytical

speech.[34] Such government speech is not subject to the same restrictions as private speech,[35] and "[c]ourts have thus declined to entertain legislative prayer challenges cast under the Free Speech, Free Exercise, and Equal Protection Clauses."[36] However, government speech must conform with the Establishment Clause.[37] Aside from legislative prayer, the Establishment Clause has been applied to challenges to religion in schools,[38] government

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device in this [legislative prayer] case is the Establishment Clause, and not the Equal Protection or Free Speech clauses").

34. *See* Turner v. City Council of Fredericksburg, 534 F.3d 352, 355 (4th Cir. 2008) (O'Connor, J., retired, sitting by designation) (articulating that a city council's legislative prayer practice constituted government speech rather than private speech); *Simpson*, 404 F.3d at 288 (concluding that legislative prayer is government speech); Fields v. Speaker of the Pa. House of Representatives, 251 F. Supp. 3d 772, 792 (M.D. Pa. 2017) (rejecting plaintiffs' contention that "case law construing legislative prayer as government speech either predates *Town of Greece* or fails to account for it"); *see also* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 302 (2000) ("These invocations are authorized by a government policy and take place on government property at government-sponsored . . . events.").

35. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 467–68 (2009) (recapping numerous cases establishing the ways in which the government may express its views (citing Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553 (2005); Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 229 (2000); Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in judgment); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995); Rust v. Sullivan, 500 U.S. 173, 194 (1991); Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 139 n.7 (1973) (Stewart, J., concurring))).

36. *Fields*, 251 F. Supp. 3d at 791 (citing *Simpson*, 404 F.3d at 287–88; *Coleman*, 104 F. Supp. 3d at 890–91; *Atheists of Fla.*, 779 F. Supp.2d at 1341–42).

37. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 468 (2009) ("[G]overnment speech must comport with the Establishment Clause."); *see also id.* at 468–69 (recognizing the various restrains on government speech); Bruce Ledewitz, *Could Government Speech Endorsing a Higher Law Resolve the Establishment Clause Crisis?*, 41 ST. MARY'S L.J. 41, 42–43 (2009) ("Without specifying the relationship to the Establishment Clause, the Court used the government speech doctrine to decide *Pleasant Grove City, Utah v. Summum*, a Ten Commandments case, suggesting the doctrine's utility in this field." (internal citations omitted)).

38. *See Santa Fe*, 530 U.S. at 301 (student-led prayers at football games); Lee v. Weisman, 505 U.S. 577, 599 (1992) (prayers at public school graduations); Edwards v. Aguillard, 482 U.S. 578, 580–81 (1987) (creation science in public schools); Wallace v. Jaffree, 472 U.S. 38, 61 (1985) (prayers in public schools); Stone v. Graham, 449 U.S. 39, 40–41 (1980) (posting of the Ten Commandments in public schoolrooms); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 205 (1963) (Bible reading in schools); Engel v. Vitale, 370 U.S. 421, 424 (1962) (prayers in public schools).

aid to religious institutions,[39] and governmental religious displays.[40]

A. Establishment Clause Interpretation

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[41] The Supreme Court has continually stated that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."[42] As the Fourth Circuit noted in *Lund*, "[t]he great

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39. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 643–44 (2002) (school vouchers and religious schools); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 822–23 (1995) (university funding to student religious publication); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 3 (1993) (Individuals with Disabilities Education Act benefits for religious school students); Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 666–67 (1970) (tax exemptions for religious organizations).

40. *See* McCreary County v. Am. Civil Liberties Union of Ky., 545 U.S. 844, 850–51 (2005) (Ten Commandments display in courthouses); Van Orden v. Perry, 545 U.S. 677, 681 (2005) (Ten Commandments display on state capitol grounds); Lynch v. Donnelly, 465 U.S. 668, 670–71 (1984) (government Nativity scene).

41. U.S. CONST. amend. I. The Supreme Court has interpreted the word "Congress" in the First Amendment to apply to the entire federal government, not just the legislative branch. *See* Engel v. Vitale, 370 U.S. 421, 429–30 (1962) (explaining the meaning of the First Amendment in terms of restraining the federal government rather than just Congress). The First Amendment has also been applied to the states through incorporation. *See infra* notes 46–49 and accompanying text (discussing the Supreme Court's incorporation jurisprudence). *See also* Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 371 (2011)

> In First Amendment doctrine, narrow parsing of the words of the Amendment has not determined its reach. By its terms, the Amendment binds only Congress. Yet the First Amendment applies to actions of the federal executive and judiciary, and the First Amendment constrains the states not by virtue of its text, but because of incorporation through the due process clause.

42. Larson v. Valente, 456 U.S. 228, 244 (1982). The Supreme Court has frequently quoted the language from *Larson v. Valente* in subsequent Establishment Clause decisions. *E.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2417 (2018); Town of Greece v. Galloway, 572 U.S. 565, 619 (2014) (Kagan, J., dissenting); *Van Orden*, 545 U.S. at 719 (Stevens, J., dissenting); Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 714 (1994) (O'Connor, J., concurring)); *see also McCreary County*, 545 U.S. at 860 ("[T]he First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." (quoting Wallace v. Jaffree, 472 U.S. 38, 53 (1985); Epperson v. Arkansas, 393 U.S. 97, 104 (1968); Everson v. Bd. of Educ. of Ewig

promise of the Establishment Clause is that religion will not operate as an instrument of division in our nation."[43] Although the clause was ratified in 1791,[44] the Supreme Court had little opportunity to interpret the Establishment Clause prior to the mid-twentieth century.[45] *Everson v. Board of Education of Ewing Township*[46] in 1947 applied the Establishment Clause to the states through incorporation via the Fourteenth Amendment[47] and marked the beginning of the Supreme Court's modern era of Establishment Clause jurisprudence.[48] Since *Everson*, the Court

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Twp., 330 U.S. 1, 15–16 (1947)) (internal quotation marks omitted)).

43. *See* Lund v. Rowan County, 863 F.3d 268, 272 (4th Cir. 2017) (en banc) ("[T]here is a time-honored tradition of legislative prayer that reflects the respect of each faith for other faiths and the aspiration, common to so many creeds, of finding higher meaning and deeper purpose in these fleeting moments each of us spends upon this earth."), *cert. denied*, 138 S. Ct. 2564 (2018).

44. *See The Bill of Rights: A Transcription*, NAT'L ARCHIVES, https://www.archives.gov/founding-docs/bill-of-rights-transcript (last updated Sept. 24, 2018) (last visited Jan. 22, 2019) (explaining that Congress proposed the amendment on September 25, 1789, and it was ratified by three-fourths of the state legislatures on December 15, 1791) (on file with the Washington and Lee Law Review).

45. *See* David W. Cook, *The Un-Established Establishment Clause: A Circumstantial Approach to Establishment Clause Jurisprudence*, 11 TEX. WESLEYAN L. REV. 71, 76–77 (2004) (positing that, before this time, "few people were bothered by prayers and the teachings of Christian beliefs"); Mark C. Rahdert, *Court Reform and Breathing Space Under the Establishment Clause*, 87 CHI.-KENT L. REV. 835, 842 (2012) ("Before *Everson*, Supreme Court decisions on the establishment of religion were exceedingly rare.").

46. 330 U.S. 1 (1947).

47. *See id*. at 14–15.

> The meaning and scope of the First Amendment, preventing establishment of religion or prohibiting the free exercise thereof, in the light of its history and the evils it was designed forever to suppress, have been several times elaborated by the decisions of this Court prior to the application of the First Amendment to the states by the Fourteenth.

48. *See* Aaron Cain, *Faith-Based Initiative Proponents Beware: The Key in* Zelman *is Not Just Neutrality, but Private Choice*, 31 PEPP. L. REV. 979, 991 (2004) ("Scholars widely regard the Supreme Court's *Everson v. Board of Education* decision in 1947 as the beginning of modern Establishment Clause jurisprudence."); Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673, 680 (2002) (arguing that "[w]hen in 1947 the Court turned its attention to the Establishment Clause, it acted as if it had a blank slate upon which to write"); Mark C. Rahdert, *Forks Taken and Roads Not Taken: Standing to Challenge Faith-Based Spending*, 32 CARDOZO L. REV. 1009, 1017 (2011) (explaining that *Everson* "ushered in the modern era of

has frequently grappled with the application of the Establishment Clause to government actions.[49]

The first clear Establishment Clause analysis[50] was the so called "*Lemon* test," developed by Chief Justice Warren Burger in *Lemon v. Kurtzman*[51] in 1971. This test focused on "the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'"[52] The test asked (1) whether the government act had a secular, legislative purpose; (2) whether the primary effect either advanced or inhibited religion; and (3) whether the action fostered government entanglement with religion.[53] The *Lemon* test has arguably

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Establishment Clause jurisprudence"); Lisa Shaw Roy, *History, Transparency, and the Establishment Clause: A Proposal for Reform*, 112 PA. ST. L. REV. 683, 693 (2008) (discussing the *Everson* decision and its significance in the Court's Establishment Clause cases).

49. *See, e.g.*, William P. Marshall, *"We Know It When We See It" the Supreme Court Establishment*, 59 S. CAL. L. REV. 495, 496–97 (1986) ("It is . . . no wonder that establishment jurisprudence has been universally criticized. The Court itself has acknowledged its own 'considerable internal inconsistency,' candidly admitting that it has 'sacrifice[d] clarity and predictability for flexibility.'" (citing *Walz*, 397 U.S. at 668; Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 662 (1980))); *see also* Jay Alan Sekulow, James Matthew Henderson, Sr., & Kevin E. Broyles, *Religious Freedom and the First Self-Evident Truth: Equality as a Guiding Principle in Interpreting the Religion Clauses*, 4 WM. & MARY BILL RTS. J. 351, 354–57 (1995) (summarizing the Supreme Court's history of applying the Establishment Clause to governmental religious activity).

50. *See* Marcia S. Alembik, *The Future of the* Lemon *Test: A Sweeter Alternative for Establishment Clause Analysis*, 40 GA. L. REV. 1171, 1176–77 (2006) (reviewing the history of the Court's Establishment Clause jurisprudence from *Everson* to *Lemon*); Roxanne L. Houtman, A.C.L.U. v. McCreary County*: Rebuilding the Wall Between Church and State*, 55 SYRACUSE L. REV. 395, 400 (2005) (exploring the significance of the *Lemon* test); *see also* John M. Bickers, *False Facts and Holy War: How the Supreme Court's Establishment Clause Cases Fuel Religious Conflict*, 51 IND. L. REV. 305, 308 (2018) ("There was likely hope that the *Lemon* formation would serve as a Grand Unified Theory of the Establishment Clause, but that was not to be.").

51. 403 U.S. 602 (1971).

52. *Id.* at 612 (quoting Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 668 (1970)); *see also* Gary J. Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court's Approach*, 72 CORNELL L. REV. 905, 915–17 (1987) (exploring a more practical test for Establishment Clause constitutionality based on these "three main evils").

53. *See Lemon*, 403 U.S. at 612–13 ("Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases.").

remained the most prevalent Establishment Clause test;[54] however, it has also garnered significant opposition from Supreme Court Justices[55] and scholars alike.[56]

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54. *See* Wallace v. Jaffree, 472 U.S 38, 63 (1985) (Powell, J., concurring) (acknowledging that the *Lemon* test is "the only coherent test a majority of the Court has ever adopted"); Allison Hugi, *A Borderline Case: The Establishment Clause Implications of Religious Questioning by Government Officials*, 85 U. CHI. L. REV. 193, 198 (2018) ("The *Lemon* test is generally considered the guiding, if flickering, light in Establishment Clause jurisprudence." (internal citations omitted)).

55. *See, e.g.*, McCreary County v. Am. Civil Liberties Union of Ky., 545 U.S. 844, 890 (2005) (Scalia, J., dissenting) (highlighting that over the years a majority of the Justices had "repudiated the brain-spun '*Lemon* test'" (citations omitted)); County of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part) ("I am content for present purposes to remain within the *Lemon* framework, but do not wish to be seen as advocating, let alone adopting, that test as our primary guide in this difficult area."), *abrogated by* Town of Greece v. Galloway, 572 U.S. 565 (2014); Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 346 (1987) (O'Connor, J., concurring) ("I write separately to note that this action once again illustrates certain difficulties inherent in the Court's use of the test articulated in *Lemon v. Kurtzman*." (internal citations omitted)); Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting) (expressing his disapproval of "continuing with the sisyphean task of trying to patch together the blurred, indistinct, and variable barrier described in *Lemon v. Kurtzman*" (internal citations and quotation marks omitted)). Justice Antonin Scalia, a particularly outspoken critic of the *Lemon* test, once famously wrote that

> Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. . . . Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart (the author of today's opinion repeatedly), and a sixth has joined an opinion doing so.

Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398–99 (1993) (Scalia, J., concurring in judgment) (internal citations omitted).

56. *See, e.g.*, Emily D. Newhouse, *I Pledge Allegiance to the Flag of the United States of America: One Nation Under No God*, 35 TEX. TECH L. REV. 383, 394–95 (2004) (quoting one commentator who stated that "[t]he literal language of *Lemon* has remained intact but the meaning attached to each of the three test questions has fluctuated depending on which Justice wrote the Court's decision" (quoting Timothy V. Franklin, Commentary, *Squeezing the Juice Out of the* Lemon *Test*, 72 EDUC. L. REP. 1, 2 (1992))); Karthik Ravishankar, *The Establishment Clause's Hydra: The* Lemon *Test in the Circuit Courts*, 41 U. DAYTON L. REV. 261, 262–63 nn.7–8 (2016) (citing numerous examples of scholarly criticism of the *Lemon* test); *see also* Penny J. Meyers, Lemon *is Alive and Kicking: Using the* Lemon *Test to Determine the Constitutionality of Prayer at High School Graduation Ceremonies*,

In light of the criticisms surrounding *Lemon*, Justices have proposed other approaches to the Establishment Clause.[57] Justice Sandra Day O'Connor's endorsement test first questions, "whether a reasonable person would believe that the government is, through its conduct or expression, endorsing religion."[58] Justice Anthony Kennedy, writing in *Lee v. Weisman*,[59] highlighted the need for actual coercion before government crosses a line, stating that government may not "coerce anyone to support or participate in religion or its exercise."[60] Out of the often-confusing jurisprudence

34 VAL. U. L. REV. 231, 267 (1999) ("Rumors of *Lemon*'s death have been, in Mark Twain's words, 'greatly exaggerated.'" (quoting Carole F. Kagan, *Squeezing the Juice from* Lemon*: Toward a Consistent Test for the Establishment Clause*, 22 N. KY. L. REV. 621, 633 (1995))).

57. *See, e.g.*, Josh Blackman, *This* Lemon *Comes as a Lemon: The* Lemon *Test and the Pursuit of a Statute's Secular Purpose*, 20 GEO. MASON U. CIV. RTS. L.J. 351, 358 (2010) ("Unsatisfied with the *Lemon* test, Justices O'Connor and Kennedy have proposed alternative tests that require a showing of 'endorsement' or 'coercion' of religion to constitute a violation of the First Amendment." (internal citations omitted)).

58. *See* Caroline Mala Corbin, *Ceremonial Deism and the Reasonable Religious Outsider*, 57 UCLA L. REV. 1545, 1557 (2010) (synthesizing the various iterations of the endorsement test). Justice O'Connor's endorsement test was first proposed in her 1984 concurrence to *Lynch v. Donnelly*. *See* Lynch v. Donnelly, 465 U.S. 668, 687–88 (1984) (O'Connor, J., concurring) (exploring two ways the government can run afoul of the Establishment Clause, and "[t]he second and more direct infringement is government endorsement or disapproval of religion").

59. 505 U.S. 577 (1992).

60. *See id.* at 577 (explaining that this test exemplifies the "fundamental limitations" of the Establishment Clause).

on this issue,[61] the Court has created an exception to all of these tests when it comes to legislative prayer.[62]

B. History of Legislative Prayer Under the Establishment Clause

Legislative prayer is a widespread practice at every level of government across the country, dating back to the founding of the United States.[63] The Supreme Court has relied heavily on the historical practice of legislative prayer in the United States as a key reason for its constitutionality.[64] In 1774, the Continental Congress adopted the practice of beginning sessions with prayers given by a paid chaplain.[65] The First Congress formalized this

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61. Even Supreme Court Justices have commented on the inconsistent and confusing interpretation of the Establishment Clause. In one 1985 dissent Justice William Rehnquist lamented that

> [I]n the 38 years since *Everson* our Establishment Clause cases have been neither principled nor unified. Our recent opinions, many of them hopelessly divided pluralities, have with embarrassing candor conceded that the "wall of separation" is merely a "blurred, indistinct, and variable barrier," which "is not wholly accurate" and can only be "dimly perceived."

Wallace, 472 U.S. at 107 (Rehnquist, J., dissenting) (quoting *Lemon*, 403 U.S. at 614; Tilton v. Richardson, 403 U.S. 672, 677–78 (1971); Wolman v. Walter, 433 U.S. 229, 236 (1977); *Lynch*, 465 U.S. at 673). Justice Clarence Thomas has complained that "our Establishment Clause jurisprudence is in hopeless disarray." Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 861 (1995) (Thomas, J., concurring).

62. *See* Town of Greece v. Galloway, 572 U.S. 565, 575 (2014) ("*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." (quoting Marsh v. Chambers, 463 U.S. 783, 796, 813 (1983) (Brennan, J., dissenting)).

63. *See* Pelphrey v. Cobb County, 547 F.3d 1263, 1273 (11th Cir. 2008) (explaining that legislative prayer has been practiced and upheld by the Supreme Court at the federal, state, and local levels of government (citing Marsh v. Chambers, 463 U.S. 783, 795 (1983))); Scott W. Gaylord, *When the Exception Becomes the Rule:* Marsh *and Sectarian Legislative Prayer Post*-Summum, 79 U. CIN. L. REV. 1017, 1037 (2011) (describing the widespread nature of legislative prayer).

64. *See* Marsh v. Chambers, 463 U.S. 783, 792 (1983) ("In 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.").

65. *Id*. at 787.

practice in 1789 by adopting a policy resolving that each house of Congress would appoint a chaplain, which the Senate did on April 25, 1789, and the House on May 1, 1789.[66] On September 22, 1789, Congress passed a statute clarifying various aspects of the chaplaincies, including salaries.[67] Three days after Congress authorized paid chaplains, the language of the Bill of Rights was finalized.[68] Later, Chief Justice Burger would cite this fact as an endorsement of legislative prayer by the Founding Fathers.[69] He noted that because Congress passed the chaplaincy legislation and approved the First Amendment language in the same week, "[i]t can hardly be thought that . . . they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable."[70]

The practice of opening each day of Congress with prayer has endured since 1789.[71] While there has been criticism over the lack of diversity in the appointed congressional chaplains,[72] both the

66. *See* Christopher C. Lund, *The Congressional Chaplaincies*, 17 WM. & MARY BILL RTS. J. 1171, 1184 (2009) [hereinafter *Congressional Chaplaincies*] (recounting that the First Congress resolved that the two chaplains would be of different denominations and that the chaplains would alternate between the two houses regularly).

67. *See id*. (clarifying that the legislation set forth the salaries of numerous congressional officials, not just the chaplains).

68. *See Marsh*, 463 U.S. at 788 ("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 . . . .").

69. *See id*. at 790 ("[H]istorical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress—their actions reveal their intent.").

70. *Id*.

71. *See Chaplains of the House*, HIST., ART & ARCHIVES, U.S. HOUSE REPRESENTATIVES, http://history.house.gov/People/Office/Chaplains/ (last visited Jan. 22, 2019) (detailing the continued tradition of congressional prayer by the House Chaplain) (on file with the Washington and Lee Law Review); *Chaplain's Prayer*, U.S. SENATE, https://www.senate.gov/reference/Sessions/Traditions/Chaplains_Prayer.htm (last visited Jan. 22, 2019) (describing the Senate's "enduring tradition [of] the chaplain's daily prayer") (on file with the Washington and Lee Law Review).

72. *See Congressional Chaplaincies*, *supra* note 66, at 1203 (commenting that the positions have been largely held by Caucasian, Protestant men); Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements*, 94 MINN. L. REV. 972, 1025 (2010) [hereinafter *Secret Costs*] ("When it comes to getting a job as a congressional chaplain, a Jewish rabbi almost assuredly does not stand on equal ground with comparably credentialed

House and the Senate have invited visiting ministers of a variety of faiths to serve as guest chaplains.[73] For example, both houses of Congress have hosted Muslim,[74] Hindu,[75] and Native American[76] guest chaplains, as well as women[77] and African Americans.[78]

C. Prior Supreme Court Cases Concerning Legislative Prayer

The Supreme Court has addressed the issue of legislative prayer under the Establishment Clause in only two cases:[79] *Marsh v. Chambers* in 1983[80] and *Town of Greece v. Galloway* in 2014.[81] These cases provide the "doctrinal starting point" for courts

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mainline Protestant ministers. After all, we have had hundreds of Protestant chaplains and no Jewish ones.").

73. *See Congressional Chaplaincies*, *supra* note 66, at 1204 n.169 (indicating that it is unclear when the House and Senate established these guest chaplaincy programs, however there are records showing that the practice dates back to at least 1960); *see also* Fields v. Speaker of Pa. House of Representatives, 327 F. Supp. 3d 748, 757 (M.D. Pa. 2018) (citing one expert witness for the proposition that "[g]uest chaplains did not exist at the federal level until 1855").

74. *See* Irshad Abdal-Haqq, *The Muslim Invocation on Capitol Hill: Revisiting the Legality of Prayer in Congress*, 3 J. ISLAMIC L. 197, 197 (1998) (stating that Imam Siraj Wahaj of New York became the first Muslim guest minister for the House of Representatives on June 25, 1991, followed by Imam W. Deen Mohammed in the Senate on February 6, 1992).

75. *See Congressional Chaplaincies*, *supra* note 66, at 1205–06 (elaborating on the controversies and protests surrounding Venkatachalapathi Samuldrala, the first Hindu guest chaplain to the House in 2000, and Rajan Zed, the first Hindu guest chaplain to the Senate in 2007).

76. *See* 2 ROBERT C. BYRD, THE SENATE 1789–1989: ADDRESSES ON THE HISTORY OF THE UNITED STATES SENATE 304 (Wendy Wolff ed., 1991) (detailing various Senate guest chaplains, including the first American Indian who was an "eighty-three-year-old Sioux who brought his peace pipe").

77. *See Wilmina Rowland Smith, 91, Guest Chaplain in Senate*, N.Y. TIMES (June 14, 1999), http://www.nytimes.com/1999/06/14/us/wilmina-rowland-smith-91-guest-chaplain-in-senate.html (last visited Jan. 22, 2019) (recounting that in 1971 Wilmina Rowland Smith became the first woman to serve as guest chaplain of the Senate) (on file with the Washington and Lee Law Review).

78. *See Congressional Chaplaincies*, *supra* note 66, at 1202 (discussing Barry Black, the Senate's first African-American chaplain).

79. *See* Williamson v. Brevard County, 276 F. Supp. 3d 1260, 1272 (M.D. Fla. 2017) (acknowledging that in these two cases the Supreme Court departed from the traditional Establishment Clause tests, declining to apply tests such as the *Lemon* test, the endorsement test, and the coercion test).

80. 463 U.S. 783 (1983).

81. 572 U.S. 565 (2014).

considering legislative prayer challenges.[82] While numerous circuit and district courts decided cases on this topic in the time between these two decisions,[83] the Fourth and Sixth Circuits were the first courts of appeals to do so after *Town of Greece*.[84]

1. Marsh v. Chambers and the Supreme Court's Initial Approach to Legislative Prayer

The question before the Supreme Court in *Marsh v. Chambers* was whether the Nebraska state legislature's practice of paying a chaplain to open each legislative session with a prayer violated the Establishment Clause.[85] Rather than applying the traditional *Lemon* test,[86] Chief Justice Burger looked to the history of

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82. Lund v. Rowan County, 863 F.3d 268, 276 (4th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 2564 (2018); *see also* Freedom from Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132, 1143 (9th Cir. 2018) ("*Marsh* and *Town of Greece* together identify certain characteristics of setting and content that mark legislative prayer.").

83. *See, e.g.*, Rubin v. City of Lancaster, 710 F.3d 1087, 1101–02 (9th Cir. 2013) (concluding that a city's policy of opening meetings with privately-led prayers did not violate the Establishment Clause); Joyner v. Forsyth County, 653, F.3d 341, 355 (4th Cir. 2011) (deciding that a county board of commissioners' practice of using sectarian prayers to open meetings was unconstitutional); Turner v. City Council of Fredericksburg, 534 F.3d 352, 353 (4th Cir. 2008) (O'Connor, J., retired, sitting by designation) (upholding a city council's policy requiring legislative prayers to be nondenominational as constitutional); Pelphrey v. Cobb County, 547 F.3d 1263, 1266–67 (11th Cir. 2008) (resolving that the practice of two county commissions allowing for volunteer leaders to give prayers at meetings did not violate the Establishment Clause); Simpson v. Chesterfield County Bd. of Supervisors, 404 F.3d 276, 278 (4th Cir. 2005) (finding a local government's legislative prayer policy constitutional, even though it required the prayer givers to be of Judeo-Christian or monotheistic religions); Wynne v. Town of Great Falls, 376 F.3d 292, 302 (4th Cir. 2004) (highlighting the fact that a town council's legislative prayer practice violated the Establishment Clause because it favored and advanced one religion over others); Snyder v. Murray City Corp., 159 F.3d 1227, 1228 (10th Cir. 1998) (concluding that a city council did not violate the Establishment Clause by denying a citizen from giving a prayer at a council meeting based on the content of that prayer).

84. *See* Brief in Opposition at 9, Rowan County v. Lund, No. 17-565 (U.S. Dec. 15, 2017), 2017 WL 6508403, at *9 (outlining the circuit split that has arisen from the first two appellate decisions to interpret *Town of Greece*).

85. *See Marsh*, 463 U.S. at 784–85 (addressing a challenge brought by Ernest Chambers, a member of the Nebraska legislature).

86. *See supra* notes 50–56 and accompanying text (discussing the three-part *Lemon* test for Establishment Clause constitutionality); *see also Marsh*, 463 U.S.

legislative prayer[87] and concluded that, on its face, legislative prayer did not violate the Constitution.[88] In that holding, the Supreme Court created a critical exception to its Establishment Clause jurisprudence and allowed a regularly occurring government practice to incorporate religion.[89]

The Court also found that the specific practice of the Nebraska legislature, when considered against the historical background, was not unconstitutional.[90] The case concerned the employment of Robert E. Palmer, a Presbyterian minister who had been paid to pray before each legislative session for sixteen years.[91] While the Court found that nothing in this practice violated the Establishment Clause, Chief Justice Burger made it clear that the prayer opportunity could not be exploited "to proselytize or advance any one, or disparage any other, faith or belief."[92] He also stated that in considering such practices, judges should not parse

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at 800–01 (Brennan, J., dissenting) ("I have no doubt that if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional."); Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2125 (1996) ("Between 1971 and 1984, the Court faithfully applied the *Lemon* test to every Establishment Clause challenge except the legislative prayer case of *Marsh v. Chambers*."). Interestingly, Chief Justice Burger authored the majority opinions for both *Lemon v. Kurtzman* and *Marsh v. Chambers*. Lemon v. Kurtzman, 403 U.S. 602, 606 (1971); *Marsh*, 463 U.S. at 784.

87. *See Marsh*, 463 U.S. at 792 ("In 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.").

88. *See id.* ("To invoke Divine guidance on a public body entrusted with making the laws is not . . . an 'establishment' of religion or a step toward establishment . . . .").

89. *See, e.g.*, Anne Abrell, *Just a Little Talk with Jesus: Reaching the Limits of the Legislative Prayer Exception*, 42 VAL. U. L. REV. 145, 152 (2007) (discussing the Supreme Court's "special exception to the usual Establishment Clause doctrines for legislative prayer" stemming from *Marsh v. Chambers*); Mary Jean Dolan, *Government Identity Speech and Religion: Establishment Clause Limits After* Summum, 19 WM. & MARY BILL RTS. J. 1, 26 (2010) (characterizing the legislative prayer exception as the only Supreme Court-sanctioned exception to the Establishment Clause).

90. *See Marsh*, 463 U.S. at 792–93 (rejecting the argument that these three factors were unconstitutional: a clergyman of only one denomination had been selected for sixteen years; the chaplain was paid at public expense; and the prayers were in the Judeo-Christian tradition).

91. *See id.* at 784–85 (elaborating that Palmer had been chosen biennially by the Legislature and was paid $319.75 per month out of public funds).

92. *Id.* at 794–95.

the contents of a particular prayer,[93] a directive that has since drawn significant attention and analysis from lower courts.[94]

Given *Marsh*'s focus on tradition as a value in legislative prayer analysis, many commentators have questioned whether and how the decision should apply to local government prayer challenges.[95] Because local government prayer may lack the same history as federal or state legislative prayer, judges and scholars were concerned about *Marsh*'s usefulness.[96] The Court addressed these challenges thirty-five years later in *Town of Greece*.[97]

2. The Supreme Court's Refinement of Marsh in Town of Greece v. Galloway

The Supreme Court was again confronted with the issue of legislative prayer in *Town of Greece*.[98] There, plaintiffs challenged the practice of the town board of Greece, New York for beginning

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93. *See id*. ("[I]t is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.").

94. *See, e.g.*, Joyner v. Forsyth County, 653 F.3d 341, 352 (4th Cir. 2011) (observing that "courts need to assure themselves that legislative prayer opportunities are not being exploited before they abdicate all constitutional scrutiny" of the contents of prayers); Pelphrey v. Cobb County, 547 F.3d 1263, 1274 (11th Cir. 2008) (reading *Marsh* as forbidding "judicial scrutiny of the content of prayers absent evidence that the legislative prayers have been exploited to advance or disparage a religion").

95. *See, e.g.*, Abrell, *supra* note 89, at 187 (arguing that *Marsh* should only apply to state legislative prayer, not local government prayer); Marc Rohr, *Can the City Council Praise the Lord? Some Ruminations About Prayers at Local Government Meetings*, 36 NOVA L. REV. 481, 486–87 (2012) (reviewing lower court decisions that considered *Marsh*'s implications at the local level).

96. *See* Abrell, *supra* note 89, at 187 (theorizing that because *Marsh* was "based on the specific facts of the prayer practice in the Nebraska legislature, including: the unique history of prayer in state legislative bodies; the large size of such groups; and the allowance of individuals coming and going throughout the session. Local government entities . . . should receive a different analysis."); Eric J. Segall, *Mired in the* Marsh*: Legislative Prayers, Moments of Silence, and the Establishment Clause*, 63 U. MIAMI L. REV. 713, 723–28 (2009) (criticizing *Marsh*'s tradition-based standard, musing that "[i]f James Madison and the boys thought legislative chaplains were okay, who are we to disagree?").

97. *See* Town of Greece v. Galloway, 572 U.S. 565, 565 (2014) (deciding the case on May 5, 2014).

98. *See id*. at 569–70 ("The Court must decide whether the town of Greece, New York, imposes an impermissible establishment of religion by opening its monthly meetings with a prayer.").

each of its meetings with a prayer given by a local clergyman.[99] The clergymen were solicited from a local directory by a town employee and were almost entirely Christian.[100] After the plaintiffs complained about the overwhelmingly Christian nature of the prayers, the board invited a Jewish layman and the chairman of the local Baha'i temple to give a prayer, and a Wiccan priestess who volunteered was permitted to give a prayer as well.[101]

The plaintiffs attempted to distinguish the town's prayer practice from that permitted in *Marsh* in two ways, citing both the sectarian nature of the prayers and the local government setting of the practice.[102] The district court granted the town's motion for summary judgment,[103] but the United States Court of Appeals for the Second Circuit reversed this decision.[104] Judge Guido Calabresi, writing for the Second Circuit, referenced the town's prayer-giver selection process, the prayer contents, and the context of the prayer practice, concluding that "the town's prayer practice

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99. *See id.* at 570–72 (specifying that both plaintiffs had attended town meetings and objected to the pervasively Christian prayers).

100. *See id.* at 571 (detailing how nearly all of the congregations in the town of Greece were Christian); *see also* Galloway v. Town of Greece, 681 F.3d 20, 23 (2d Cir. 2012) (indicating that between 1999 and 2007, every prayer giver was Christian), *rev'd*, 572 U.S. 565 (2014).

101. *See Town of Greece*, 572 U.S. at 572 (determining that the town only invited these non-Christian prayer givers following complaints from the plaintiffs); *see also Galloway*, 681 F.3d at 23 (asserting that in 2008, after the plaintiffs complained, non-Christians gave four out of the twelve prayers at town board meetings).

102. *See Town of Greece*, 572 U.S. at 577–78 ("Respondents assert that the town's prayer exercise falls outside that tradition [discussed in *Marsh*] and transgresses the Establishment Clause for two independent but mutually reinforcing reasons.").

103. *See* Galloway v. Town of Greece, 732 F. Supp. 2d 195, 243 (W.D.N.Y. 2010) ("[I]n light of the undisputed facts of this case, the Court finds as a matter of law that the Town did not violate the Establishment Clause."), *rev'd*, 681 F.3d 20 (2d Cir. 2012), *rev'd*, 572 U.S. 565 (2014).

104. *See Galloway*, 681 F.3d at 34 ("What we do hold is that a legislative prayer practice that, however well-intentioned, conveys to a reasonable objective observer under the totality of the circumstances an official affiliation with a particular religion violates the clear command of the Establishment Clause."); *see also id.* (finding a constitutional violation "[w]here the overwhelming predominance of prayers offered are associated, often in an explicitly sectarian way, with a particular creed, and where the town . . . conveys the impression that town officials themselves identify with the sectarian prayers and that residents in attendance are expected to participate in them").

must be viewed as an endorsement of a particular religious viewpoint."[105] Judge Calabresi was careful to reaffirm the need for context-based analysis, noting the "delicate balancing act" of Establishment Clause claims.[106]

The Supreme Court reversed the decision of the Second Circuit and ruled that legislative prayers need not be nonsectarian in order to be constitutional[107] and that the town's prayer practice was permissible.[108] Regarding the sectarian nature of the prayers, the Court again looked to the tradition of legislative prayer in the United States.[109] Justice Kennedy, writing for the majority,

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105. *See id.* at 30 (emphasizing that the court did "not rely on any single aspect of the town's prayer practice, but rather on the totality of the circumstances present in this case").

106. *See id.* at 33 (clarifying that courts should undertake a careful consideration of the facts, rather than relying on governmental claims of religious neutrality). Judge Calabresi also clarified the court's holding by stating:

> People with the best of intentions may be tempted, in the course of giving a legislative prayer, to convey their views of religious truth, and thereby run the risk of making others feel like outsiders. Even if all prayer-givers could resist this temptation, municipalities with the best of motives may still have trouble preventing the appearance of religious affiliation. Ours is a society splintered, and joined, by a wide constellation of religious beliefs and non-beliefs. Amidst these many viewpoints, even a single circumstance may appear to suggest an affiliation. To the extent that the state cannot make demands regarding the content of legislative prayers, moreover, municipalities have few means to forestall the prayer-giver who cannot resist the urge to proselytize. These difficulties may well prompt municipalities to pause and think carefully before adopting legislative prayer, but they are not grounds on which to preclude its practice.

Id. at 34.

107. *See Town of Greece*, 572 U.S. at 582 (contending that "[o]nce [the government] invites prayer into the public sphere, government 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").

108. *See id.* at 584 ("The prayers delivered in the town of Greece do not fall outside the tradition this Court has recognized.").

109. *See id.* at 578 ("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."). Additionally, the majority in *Town of Greece* does not even mention the *Lemon* test, cementing *Marsh*'s rejection of the test for legislative prayer challenges. *See id.* at 569–92 (failing to discuss or cite *Lemon v. Kurtzman* in the majority opinion); *supra* notes 86–88 (discussing the Court's rejection of the *Lemon* test in *Marsh*); *see also* Kondrat'yev v. City of Pensacola, 903 F.3d 1169, 1178 (11th Cir. 2018) (Newsom, J., concurring in the judgment) (noting that "the [*Town of Greece*] Court never so much as mentioned *Lemon*" in

referenced the explicit religious themes of early prayers given by congressional chaplains[110] as evidence that legislative prayer can "coexist with the principles of disestablishment and religious freedom."[111] Furthermore, *Marsh* had not based the constitutionality of the prayer practice there on the neutrality of its content; rather, requiring prayers to be nonsectarian would compel legislators to supervise and censor the content of religious speech.[112] Justice Kennedy also stated that a town is not required to search beyond its borders in order to ensure diversity in religious viewpoints.[113]

Additionally, *Town of Greece* held that the local government's role in arranging the prayer schedule did not, by itself, invalidate the practice of legislative prayer.[114] The question of constitutionality was a "fact-sensitive one" that must consider "both the setting in which the prayer arises and the audience to whom it is directed."[115] Justice Kennedy invoked Justice O'Connor's "reasonable observer" standard,[116] according to which a practice is considered from the perspective of a reasonable observer who is aware of the tradition in question and understands

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holding that the prayer practice was constitutional). The only reference to *Lemon* in *Town of Greece* appeared in Justice Breyer's dissent. *See Town of Greece*, 572 U.S. at 614–15 (Breyer, J., dissenting) ("The question in this case is whether the prayer practice . . . , by doing too little to reflect the religious diversity of its citizens, did too much . . . to promote the 'political division along religious lines' that 'was one of the principal evils against which the First Amendment was intended to protect.'" (quoting Lemon v. Kurtzman, 403 U.S. 602, 622 (1971)).

110. *See Town of Greece*, 572 U.S. at 579 ("The 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.").

111. *Id.* at 578 (quoting Marsh v. Chambers, 463 U.S. 783, 786 (1983)).

112. *See id.* at 581 (maintaining that requiring nonsectarian prayers "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").

113. *See id.* at 585–86 ("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.").

114. *See id.* at 586 (evaluating the plaintiffs' argument that the local government setting necessarily coerced nonadherents into participating).

115. *Id.* at 587.

116. *See supra* note 58 and accompanying text (explaining Justice O'Connor's endorsement test for Establishment Clause constitutionality).

the purpose of the practice.[117] The audience for the challenged prayers was the legislators themselves, rather than the public, and the "internal act" was constitutional.[118] Notably, Justice Kennedy warned 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."[119] To assess violations of his own coercion test,[120] Justice Kennedy asserted that courts should consider the "pattern and practice" of prayer over time, rather than isolated events of offense.[121] In reviewing the record, there was no evidence that the prayers "chastised dissenters" or "attempted lengthy disquisition on religious dogma."[122] The Court concluded that the pattern in *Town of Greece* aligned with the tradition of legislative prayer; there was no evidence of coercion for nonadherents; and the prayer practice was thus constitutional.[123]

Whereas *Marsh* centered on the tradition of legislative prayer,[124] *Town of Greece* focused on the value of inclusivity in

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117. *See* Town of Greece v. Galloway, 572 U.S. 565, 587 (2014) (clarifying that the purposes of legislative prayer 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" (citing Salazar v. Buono, 559 U.S. 700, 720–21 (2010) (plurality opinion); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000)). Justice O'Connor first proposed the reasonable observer standard in her concurrence to *Lynch v. Donnelly*, which held that, notwithstanding the religious significance of the display, a city's crèche did not violate the Establishment Clause. *See* 465 U.S. 668, 693 (1984) (O'Connor, J., concurring) (explaining that the crèche served a secular purpose and "[i]t cannot fairly be understood to convey a message of government endorsement of religion").

118. *See Town of Greece*, 572 U.S. at 587–88 (explaining that the lawmakers were permitted to have a moment of prayer to set their minds to "a higher purpose" in order to ease "the task of governing") (quoting Chambers v. Marsh, 504 F. Supp. 585, 588 (D. Neb. 1980), *aff'd in part, rev'd in part*, 675 F.2d 228 (8th Cir. 1982), *rev'd*, 463 U.S. 783 (1983)).

119. *Id*. at 588.

120. *See supra* notes 59–60 and accompanying text (outlining Justice Kennedy's coercion test).

121. *See Town of Greece*, 572 U.S. at 589–90 (warning that speech that is disagreeable or offensive to an audience is not inherently coercive).

122. *See id*. (clarifying that offense does not equal coercion in Establishment Clause cases).

123. *Id*. at 591–92.

124. *See supra* Part II.C.1 (discussing the Court's analysis in *Marsh v.*

legislative prayer challenges.[125] The dissenters in *Town of Greece* argued that the disputed practice was not inclusive enough,[126] illustrating the importance of this value in the eyes of the Court.[127] While neither *Marsh* nor *Town of Greece* set forth an explicit test for lower courts to apply to legislative prayer cases, the Court began exploring the issues that underlie the constitutionality of these practices.[128]

III. Recent Circuit Split Concerning Local Legislative Prayer

A circuit split has arisen recently between the Fourth[129] and Sixth[130] Circuits over the issue of legislative prayer at the local government level. While the facts of these cases are remarkably

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Chambers).

125. *See* Williamson v. Brevard County, 276 F. Supp. 3d 1260, 1276 (M.D. Fla. 2017) ("The *Town of Greece* Court upheld an invited-speaker invocation practice that resulted in the prayers being given predominantly by Christians, but in doing so it repeatedly emphasized the inclusiveness of the town's practice.").

126. *See Town of Greece*, 572 U.S. at 611–13 (Breyer, J., dissenting) (pointing to the numerous ways in which the town board could have made the prayer practice more inclusive of other faiths and religious minorities); *see also id*. at 622 (Kagan, J., dissenting) (arguing that the highly individualized nature of local government "calls for Board members to exercise special care to ensure that the prayers offered are inclusive—that they respect each and every member of the community as an equal citizen").

127. *See* Eric Rassbach, Town of Greece v. Galloway*: The Establishment Clause and the Rediscovery of History*, 2014 CATO SUP. CT. REV. 71, 87–88 (2014) (commenting on the points of agreement in the *Town of Greece* opinion, particularly the shared value of "pluralism and the protection of religious minorities" between the majority and the dissents).

128. *See* Recent Case, Lund v. Rowan County*, 863 F.3d 268 (4th Cir. 2017) (En Banc)*, 131 HARV. L. REV. 626, 631 (2017) ("*Town of Greece* acknowledged it could not address every situation, but its instruction for cases outside its bounds was simply to conduct a 'fact-sensitive' review, while noting that general Establishment Clause values are still at play in legislative prayer cases." (internal citations omitted)).

129. *See* Lund v. Rowan County, 863 F.3d 268, 272 (4th Cir. 2017) (en banc) (resolving that the Rowan County Board of Commissioners' prayer practice was unconstitutional under the Establishment Clause), *cert. denied*, 138 S. Ct. 2564 (2018).

130. *See* Bormuth v. County of Jackson, 870 F.3d 494, 498, 514 (6th Cir. 2017) (en banc) (recognizing the court's disagreement with the Fourth Circuit and holding that the Jackson County Board of Commissioners' legislative prayer practice was constitutional), *cert. denied*, 138 S. Ct. 2708 (2018).

similar, the two courts, following a series of appeals[131] and rehearings,[132] came to opposite holdings. This split stems from a lack of clear guidance from the Supreme Court on the application of the Establishment Clause to legislative prayer cases.[133] In *Lund v. Rowan County*, the Fourth Circuit focused on the differences between Rowan County's prayer practice and the practices approved of in *Marsh* and *Town of Greece*.[134] The court considered four factors of the County's prayer practice: (1) the commissioners as the exclusive prayer-givers; (2) the consistent invocation of the Christian faith, which sometimes served to advance that religion; (3) lawmakers' invitations for audience members to participate in the prayers; and (4) the local government setting.[135] The Fourth Circuit concluded that these factors rendered the prayer practice unconstitutional.[136] The same four factors were also present in *Bormuth v. County of Jackson*, but the Sixth Circuit did not find that case distinguishable from the practice in *Marsh* and *Town of*

131. *See* Bormuth v. County of Jackson, 849 F.3d 266, 281 (6th Cir.) (considering on appeal the issue of whether the Board of Commissioner's prayer practice was constitutional under the tradition of legislative prayer), *reh'g en banc granted*, *opinion vacated*, 855 F.3d 694 (6th Cir.), *and on reh'g en banc*, 870 F.3d 494 (6th Cir. 2017), *cert denied*, 138 S. Ct. 2708 (2708); Lund v. Rowan County, 837 F.3d 407, 413 (4th Cir.), *as amended* (Sept. 21, 2016) (reviewing the district court's decision de novo), *reh'g en banc granted*, 670 F. App'x 106 (4th Cir. 2016), *and on reh'g en banc*, 863 F.3d 268 (4th Cir. 2017), *cert denied*, 138 S. Ct. 2564 (2018).

132. *See* Bormuth v. County of Jackson, 855 F.3d 694, 694–95 (6th Cir. 2017) (granting rehearing en banc); Lund v. Rowan County, 670 F. App'x 106, 107 (4th Cir. 2016) (same).

133. *See* Bormuth v. County of Jackson, 849 F.3d 266, 275 (6th Cir.) ("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."), *reh'g en banc granted*, *opinion vacated*, 855 F.3d 694 (6th Cir.), *and on reh'g en banc*, 870 F.3d 494 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 2708 (2018).

134. *See Lund*, 863 F.3d at 276 ("*Marsh* and *Town of Greece* do not settle whether Rowan County's prayer practice is constitutional. Those decisions did not concern lawmaker-led prayer, nor did they involve the other unusual aspects of the county's prayer practice.").

135. *See id.* at 281 (pointing to the Supreme Court's prescribed "fact-sensitive inquiry" as the basis for examining these four factors).

136. *See id.* (determining that while some of these factors may be permissible, when considered "through the lens of the prayer-giver's identity" they created an unconstitutional prayer practice).

Greece.[137] The Sixth Circuit therefore held that the practice was constitutional.[138]

A. The Fourth Circuit's Distinguishing of Town of Greece

On July 14, 2017, in a 10–5 decision,[139] an en banc panel of the Fourth Circuit held that the Rowan County Board of Commissioners' prayer practice "served to identify the government with Christianity and risked conveying to citizens of minority faiths a message of exclusion" and was therefore unconstitutional.[140]

The Rowan County Board of Commissioners, the governing body of Rowan County, North Carolina, held meetings twice a month that were open to the public.[141] From at least 2007 until 2013, when the litigation began, the Board began each of its meetings with a prayer given by one of the commissioners.[142] No one outside of the Board was permitted to give the prayers, and the Board members rotated the prayer opportunity among themselves.[143] The content of the prayers was up to the individual commissioners; however, over the five-and-a-half year period mentioned in the complaint, the prayers were overwhelmingly and explicitly Christian in content, and no other religion was represented.[144] In addition to referencing only one faith, these

137. *See Bormuth*, 870 F.3d at 498, 519 ("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.").

138. *Id*.

139. *Lund*, 863 F.3d at 271.

140. *See id*. at 272 ("We conclude that the Constitution does not allow what happened in Rowan County.").

141. *See id*. (explaining that the Board is comprised of five elected members).

142. *See* Lund v. Rowan County, 103 F. Supp. 3d 712, 714 n.1 (M.D.N.C. 2015) (clarifying that the plaintiffs provided the website address for video recordings of the board meetings, which were available beginning with the November 5, 2007 meeting), *rev'd and remanded*, 837 F.3d 407 (4th Cir. 2016), *as amended* (Sept. 21, 2016), *on reh'g en banc*, 863 F.3d 268 (4th Cir. 2017), *and aff'd*, 863 F.3d 268 (4th Cir. 2017).

143. *See* Lund v. Rowan County, 863 F.3d 268, 273 (4th Cir. 2017) (en banc) (explaining that this practice was "a matter of long-standing custom"), *cert. denied*, 138 S. Ct. 2564 (2018).

144. *See id*. (reporting that 97% of the prayers in this period "mentioned 'Jesus,' 'Christ,' or the 'Savior,'" and some of the prayers professed the superiority

prayers "veered from time to time into overt proselytization,"[145] implying that those who did not practice Christianity were spiritually defective.[146] Prior to each prayer, the Board would ask the audience members to rise and to pray with the commissioners.[147] The three plaintiffs, all of whom were long-time residents of Rowan County who did not identify as Christians,[148] encountered these prayers at Board meetings and felt coerced into participating.[149] The plaintiffs believed that the prayers conveyed the sense that the Board favored Christians, and the plaintiffs contended that they therefore felt "excluded from the community and the local political process."[150]

Following the Supreme Court's decision in *Town of Greece*,[151] the district court found that the prayer practice was unconstitutional, stating that the "closed-universe of prayer-givers" deviated from the permissible tradition of legislative prayer.[152] On appeal, the Fourth Circuit initially

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of the Christian faith or urged listeners to accept Christianity (internal citation omitted)); *see also id.* at 272 ("For years on end, the elected members of the county's Board of Commissioners composed and delivered pointedly sectarian invocations.").

145. *Id.* at 272.

146. *See id.* at 284–85 (providing examples of prayers and noting that many characterized Christianity as "the one and only way to salvation" (internal citation omitted)).

147. *See id.* at 285 (characterizing the commissioners' prayers as "portraying the failure to love Jesus or follow his teachings as spiritual defects").

148. *See id.* at 273 (explaining that plaintiff Nancy Lund was a volunteer tutor, Liesa Montag-Siegel was a retired middle school librarian, and Robert Voelker was interested in education policy and social services).

149. *Id.* at 273–74.

150. *See id.* at 274 (highlighting a particular instance in which one plaintiff proposed a nondenominational prayer and feared that his questioning of the practice would negatively affect his advocacy on other issues before the Board) (citation omitted). This language recalls Justice Sandra Day O'Connor's concurrence to *Lynch v. Donnelly* in which she stated that "[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community . . . ." 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

151. *See Lund*, 103 F. Supp. 3d at 716 ("On May 5, 2014, the Supreme Court issued its opinion in *Town of Greece v. Galloway* . . . . On January 20, 2015, the Parties here filed their respective Motions for Summary Judgment, arguing the merits of the present case predominantly based upon the holdings of *Town of Greece*." (internal citation omitted)).

152. *See id.* at 723 (pointing out that because the commissioners were the exclusive prayer givers, the policy could not be nondiscriminatory, which was a

reversed the district court's decision and held that the Board's prayer practice was constitutional.[153] The panel of appellate judges said that the identity of the prayer- giver was not a critical factor to the analysis, and thus the practice aligned with the history and tradition sanctioned by *Town of Greece*.[154] However, upon request, the court granted a rehearing en banc[155] and affirmed the district court, holding that the Board's prayer practice was unconstitutional under the Establishment Clause.[156]

The Fourth Circuit cited four key features of Rowan County's legislative prayer practice which, taken together, created an unconstitutional pattern of prayer.[157] The court focused on the fact that the lawmakers were the sole prayer-givers as the critical distinction from *Marsh* and *Town of Greece*.[158] And within the context of legislator-led prayer, the court found that four factors of the operation of the prayer practice—the commissioners being the exclusive prayer-givers; the consistent, singular faith of the prayers; the commissioners' invitation for the meeting attendees to participate in the prayers; and the local government setting—rendered the practice unconstitutional.[159] The court analyzed each of these four factors and emphasized that the court must consider the interplay of the factors, not isolated facts.[160] The

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critical characteristic of constitutionality under *Town of Greece* (citing Town of Greece v. Galloway, 572 U.S. 565, 585–86 (2014))).

153. *See* Lund v. Rowan County, 837 F.3d 407, 430–31 (4th Cir.) ("The Board's legislative prayer practice falls within our recognized tradition and does not coerce participation by nonadherents."), *as amended* (Sept. 21, 2016), *reh'g en banc granted*, 670 F. App'x 106 (4th Cir. 2016), *and on reh'g en banc*, 863 F.3d 268 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 2564 (2018).

154. *See id.* at 418 (recalling that several pre-*Town of Greece* Fourth Circuit decisions held that the identity of the prayer giver was not a relevant consideration).

155. Lund v. Rowan County, 670 F. App'x 106, 107 (4th Cir. 2016).

156. *See* Lund v. Rowan County, 863 F.3d 268, 275 (4th Cir. 2017) (en banc) (declaring that the rehearing was reviewed de novo (citation omitted)), *cert. denied*, 138 S. Ct. 2564 (2018).

157. *See id.* at 280 ("Within the universe of prayers delivered by legislators, the constitutionality of a particular government's approach ultimately will depend on other aspects of the prayer practice.").

158. *See id.* ("The Board's prayer practice thus pushes this case well outside the confines of *Town of Greece* and indeed outside the realm of lawmaker-led prayer itself.").

159. *Id.* at 281.

160. *See id.* at 289 ("But when a court looks to the totality of the circumstances

court stressed the holistic consideration of the context and pattern of the prayer practice because "the citizens of Rowan County 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."[161] Judge Wilkinson, writing for the majority, concluded his analysis by finding that this case pushed beyond any potential line of constitutionality, observing that "[i]f the prayer practice here were to pass constitutional muster, we would be hard-pressed to identify any constitutional limitations on legislative prayer."[162]

B. The Sixth Circuit's Rejection of Lund

In *Bormuth v. County of Jackson*, the Sixth Circuit sharply split with the Fourth in holding that Jackson County's legislative prayer practice was constitutional under the Establishment Clause.[163] While the Board of Jackson County, Michigan mirrored Rowan County's prayer practices, the court found in a 9–6 decision that the pattern of prayer was consistent with Supreme Court jurisprudence.[164] The Sixth Circuit's decision was issued on September 6, 2017,[165] a mere two months after the Fourth Circuit's.[166]

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to assess the constitutionality of a prayer practice, as the Supreme Court says we must, a fact may be relevant to the court's inquiry while not outcome-determinative.").

161. *See id*. (rejecting the dissent's argument that each factor "standing alone [is] undoubtedly constitutional").

162. *See id*. at 290 (deriding the dissent's suggestion that the Board would still be barred from endorsing a particular church or issuing official decisions on the basis of an individual's participation, or lack thereof, in the prayers).

163. *See* Bormuth v. County of Jackson, 870 F.3d 494, 519 (6th Cir. 2017) (en banc) (determining that the invocation practice was consistent with Supreme Court precedent), *cert. denied*, 138 S. Ct. 2708 (2018); *see also id*. at 509 n.5 ("We recognize our view regarding Jackson County's invocation practice is in conflict with the Fourth Circuit's recent en banc decision. However . . . we find the Fourth Circuit's majority en banc opinion unpersuasive." (citations omitted)).

164. *See id*. at 519 ("Jackson County's invocation practice is consistent with *Marsh v. Chambers* and *Town of Greece v. Galloway* and does not violate the Establishment Clause.").

165. *Id*. at 494.

166. *See Lund*, 863 F.3d at 268 (deciding the rehearing on July 14, 2017).

Similar to the Board in *Lund*, the Jackson County Board of Commissioners opened its monthly meetings with prayers given exclusively by the commissioners.[167] The Board's chairman began each meeting by asking both the commissioners and attendees to "rise and assume a reverent position."[168] While the Board's prayer policy was facially neutral with respect to the religion of the invocations, the prayers given were consistently Christian in tone and content.[169] The plaintiff, who identified as a Pagan and Animist,[170] objected to the practice and stated that the prayers made him feel like "he [was] being forced to worship Jesus Christ in order to participate in the business of County Government."[171] Unlike the plaintiffs in *Lund*,[172] he did not stand and participate in the prayer portions of the meetings.[173] Notably, when the plaintiff voiced his concerns about the prayer practice during the public comment portion of a meeting, one of the commissioners swiveled his chair around in order to turn his back to the plaintiff.[174] A month after filing this case in August of 2013, the Board rejected the plaintiff's application for appointment to Jackson County's Solid Waste Planning Committee in favor of two

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167. *See Bormuth*, 870 F.3d at 498 (explaining that the Board was comprised of nine elected representatives and governed Jackson County, Michigan).

168. *See id.* (expanding that other variations used by the chairman included statements such as: "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").

169. *See id.* (providing that the prayers often asked "'God,' 'Lord,' or 'Heavenly Father' to provide the Commissioners with guidance as they go about their business").

170. *See id.* ("In [the plaintiff's] 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.'").

171. *See id.* at 498–99 (adding that the plaintiff felt "like he [was] in Church" during the "distinctly Christian prayers offered by the Commissioners").

172. *See* Lund v. Rowan County, 863 F.3d 268, 274 (4th Cir. 2017) (en banc) (explaining that the plaintiffs stood for the prayers to avoid standing out), *cert. denied*, 138 S. Ct. 2564 (2018).

173. *Bormuth*, 870 F.3d at 499.

174. *See id.* (stating that the plaintiff was "insulted and offended" by this action); *see also* Bormuth v. County of Jackson, 849 F.3d 266, 270–71 (6th Cir.) (adding that the commissioner "made faces expressing his disgust" at the plaintiff), *reh'g en banc granted*, *opinion vacated*, 855 F.3d 694 (6th Cir.), *and on reh'g en banc*, 870 F.3d 494 (6th Cir. 2017), *cert denied*, 138 S. Ct. 2708 (2018).

lesser-qualified applicants, cementing the plaintiff's fears of retaliation for not participating in the prayers.[175]

The plaintiff moved for summary judgment in December of 2013.[176] After the Supreme Court issued its opinion in *Town of Greece*, the plaintiff filed a revised motion for summary judgment at the direction of the magistrate judge.[177] The district court rejected the magistrate judge's recommendation that the court find for the plaintiff and instead found that the prayer practice was consistent with Supreme Court jurisprudence.[178] On appeal, a panel of the Sixth Circuit reversed in favor of the plaintiff, finding that the prayer practice strayed "too far from [the Establishment Clause's] purpose and effect" and was therefore unconstitutional.[179] However, on rehearing en banc, the Sixth Circuit affirmed the district court and held that the prayer practice did not violate the Establishment Clause.[180]

The Sixth Circuit framed its inquiry in reference to the historical practices previously permitted by the Supreme Court.[181] The majority focused on whether the fact that the legislators themselves were the exclusive prayer-givers was significant enough to deviate from the *Marsh* and *Town of Greece* holdings.[182]

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175. Bormuth v. County of Jackson, 870 F.3d 494, 499 (6th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 2708 (2018).

176. *Id.*

177. *See id.* (explaining that the plaintiff filed his revised motion in September 2014, four months after the Supreme Court decided *Town of Greece*).

178. *See id.* (recounting that the district court "found Jackson County's prayer practice to be consistent with the Supreme Court's holdings in *Marsh* and *Town of Greece*").

179. *See Bormuth v. County of Jackson*, 849 F.3d 266, 275–76, 291 (6th Cir.) (recalling that *Town of Greece* gave several examples of when a prayer practice might deviate from this tradition, including "patterns of proselytization, denigration, discrimination, or censorship of religious speech" (citing *Town of Greece v. Galloway*, 572 U.S. 565, 579–86 (2014))), *reh'g en banc granted*, *opinion* 694 (6th Cir.), *and on reh'g en banc*, 870 F.3d 494 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 2708 (2018).

180. *See Bormuth*, 870 F.3d at 498 (concluding that the prayer practice was consistent with *Town of Greece* and *Marsh*).

181. *See id.* at 509 ("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.").

182. *See id.* at 509–10 (recounting the historical practice of legislative prayer in reference to *Marsh* and *Town of Greece*).

The court relied on data from an amicus brief showing the prevalence of legislative prayer at all levels of government across the country, particularly noting jurisdictions that featured primarily or exclusively lawmaker-led prayer.[183] By continually referencing the "long-standing tradition"[184] of legislative prayer, the Sixth Circuit focused on the overarching similarities between the permitted *Marsh* and *Town of Greece* practices and the prayers given in Jackson County, rather than on the key factual differences that motivated the Fourth Circuit decision.[185] The Sixth Circuit called the Fourth Circuit's majority opinion "unpersuasive"[186] and the factors "insignificant"[187] in assessing the constitutionality of the legislative prayer practice.

IV. An Examination of Lund*'s Four Factors for Unconstitutional Prayer*

In *Lund*, the Fourth Circuit referenced four factors that, when considered through the framework of legislator-led prayer, created an unconstitutional prayer practice:[188] "(1) commissioners as the sole prayer-givers; (2) invocations that drew exclusively on Christianity and sometimes served to advance that faith; (3) invitations to attendees to participate; and (4) the local government setting."[189] While each of these four factors was

183. *See id.* at 510–11 (contextualizing the practice by noting that forty-seven state chambers allow individuals other than legislative chaplains to give prayers, including legislators).

184. *See id.* at 509 ("Most significantly, history shows that legislator-led prayer is a long-standing tradition.").

185. *See id.* at 512 (declining "the invitation to find an appreciable difference between legislator-led and legislator-authorized prayer given its historical pedigree" and finding it "insignificant that the prayer-givers in this case are publicly-elected officials").

186. *See id.* at 509 n.5 (addressing the conflicted holding with that in *Lund*).

187. *See id.* at 512 (affirming the district court's holding that there was no appreciable difference between prayers given by clergy and prayers given by lawmakers).

188. *See* Lund v. Rowan County, 863 F.3d 268, 281 (4th Cir. 2017) (en banc) (clarifying that it is the combination of these factors, rather than any one factor, which created an unconstitutional practice), *cert. denied*, 138 S. Ct. 2564 (2018).

189. *See id.* ("As the exclusive prayer-givers, Rowan County's elected representatives—the very embodiment of the state—delivered sectarian invocations referencing one and only one religion. They asked their constituents

present in *Bormuth*, the Sixth Circuit did not find them significant enough to render the prayer practice impermissible.[190] In light of the lack of clear guidance on this issue from the Supreme Court,[191] these four factors can serve as a helpful framework for other courts considering legislator-led prayer cases.

The importance of these factors lies not in their application as a bright line test of constitutionality, but rather in the values that underlie each factor. These values must align not only with *Marsh* and *Town of Greece*,[192] but also with the Supreme Court's broader Establishment Clause jurisprudence.[193] And while the Sixth Circuit was more accepting of the factual contentions at issue, the Fourth Circuit took a more skeptical approach, seeing each of the four factors as the antithesis of the values espoused in *Marsh* and *Town of Greece*.[194]

A. The Commissioners as the Sole Prayer-Givers

The first factor the Fourth Circuit examined in *Lund* was the fact that the five commissioners "maintain[ed] exclusive and

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to join them in worship. They did so at every meeting of a local governing body for many years.").

190. *See* Bormuth v. County of Jackson, 870 F.3d 494, 518 (6th Cir. 2017) (en banc) (distinguishing between the Jackson County Board's actions and Rowan County's), *cert. denied*, 138 S. Ct. 2708 (2018).

191. *See* Bormuth v. County of Jackson, 849 F.3d 266, 275 (6th Cir.) ("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."), *reh'g en banc granted*, *opinion vacated*, 855 F.3d 694 (6th Cir.), *and on reh'g en banc*, 870 F.3d 494 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 2708 (2018).

192. *See* Barry P. McDonald, *Democracy's Religion: Religious Liberty in the Rehnquist Court and into the Roberts Court*, 2016 U. ILL. L. REV. 2179, 2228–29 (2016) (discussing the values at play in *Marsh* and *Town of Greece*).

193. *See, e.g.*, Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL L. REV. 9, 37–63 (2004) (proposing a list of Establishment Clause values); *see also* Caroline Mala Corbin, *The Continuing Relevance of the Establishment Clause: A Reply to Professor Richard C. Schragger*, 89 TEX. L. REV. SEE ALSO 125, 136–38 (2011) (discussing the Supreme Court's Establishment Clause values).

194. *See Lund*, 863 F.3d at 282 (stating that "Rowan County regrettably sent the opposite message" to the religious pluralism in *Town of Greece*).

complete control over the content of the prayers."[195] This was critical because it was the only factor that the Supreme Court did not encounter in either *Town of Greece* or *Marsh*.[196] In *Marsh*, the prayers were given by a chaplain who was paid at public expense.[197] In *Town of Greece*, they were given by unpaid volunteer clergy from the community.[198] In both *Lund*[199] and *Bormuth*,[200] the invocations were given exclusively by the legislators themselves. The Fourth Circuit viewed this factor as containing two critical features: (1 that it was government actors themselves giving the prayers, rather than outside clergy; and (2) that the legislators had the exclusive prayer opportunity, creating a "closed-universe" of prayer-givers.[201] When the legislators are the ones consistently giving the prayers, the line between church and state begins to blur.[202]

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195. *See id*. at 281 (contrasting Rowan County's practice with that in *Town of Greece*) (citation omitted).

196. *See id*. ("In *Marsh* the prayer-giver was paid by the state. In *Town of Greece*, the prayer-giver was invited by the state. But in Rowan County, the prayer-giver was the state itself."); *see also* Bormuth v. County of Jackson, 849 F.3d 266, 281 (6th Cir.) ("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."), *reh'g en banc granted*, *opinion vacated*, 855 F.3d 694 (6th Cir.), *on reh'g en banc*, 870 F.3d 494 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 2708 (2018).

197. *See* Marsh v. Chambers, 463 U.S. 783, 784–85 (1983) ("The Nebraska Legislature begins each of its sessions with a prayer offered by a chaplain who is chosen biennially by the Executive Board of the Legislative Council and paid out of public funds.").

198. *See* Town of Greece v. Galloway, 572 U.S. 565, 571 (2014) (detailing the town's procedure of inviting clergy from the congregations listed in the town directory to give the opening prayer).

199. *See Lund*, 863 F.3d at 272–73 (reporting that every board meeting began "with a prayer composed and delivered by one of the commissioners" and that "[n]o one outside the Board [was] permitted to offer an invocation").

200. *See Bormuth*, 870 F.3d at 509 ("At the heart of this appeal is whether Jackson County's prayer practice falls outside our historically accepted tradition because the Commissioners themselves, not chaplains, or invited community members, lead the invocations.").

201. *See Lund*, 863 F.3d at 277 (establishing that these two features are critical in combination with the other factors in creating an unconstitutional practice).

202. *See* Hudson v. Pittsylvania County, 107 F. Supp. 3d 524, 533 (W.D. Va. 2015) (contending, in a case factually similar to *Lund* and *Bormuth*, that where the legislators are the exclusive prayer givers "there is no distinction between the prayer giver and the government. They are one and the same").

The Fourth Circuit did not find that lawmaker-led prayer is per se unconstitutional; rather, the court concluded that the "identity of the prayer-giver is relevant to the constitutional inquiry."[203] By not allowing others to give the invocation, the Board was "arrogating the prayer opportunity to itself," which the Supreme Court had previously struck down in cases concerning state-prescribed prayer.[204] In *Engel v. Vitale*,[205] the Supreme Court found that a New York law directing public schools to recite a state-written prayer every morning constituted a "religious activity" which violated the Establishment Clause.[206] The Court stated that "it is no part of the business of the government to compose official prayers."[207] Later, the Court quoted this "cornerstone principle"[208] of Establishment Clause jurisprudence in *Lee v. Weisman*,[209] which found that a public school's practice of inviting a rabbi or other clergy to pray at graduation ceremonies and providing the prayer-giver with a pamphlet containing guidelines for the prayer's contents violated the Establishment Clause.[210] Because the prayers constitute government speech,[211]

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203. *Lund*, 863 F.3d at 280.

204. *See id.* at 281 (recalling the Supreme Court's prohibitions on government-composed prayer in *Engel v. Vitale* and *Lee v. Weisman*).

205. 370 U.S. 421 (1962).

206. *See id*. at 424–25 ("There can, of course, be no doubt that New York's program of daily classroom invocation of God's blessings as prescribed in the Regents' prayer is a religious activity.").

207. *Id*. at 425.

208. Lund v. Rowan County, 863 F.3d 268, 281 (4th Cir. 2017) (en banc) (quoting Lee v. Weisman, 505 U.S. 577, 588 (1992)), *cert. denied*, 138 S. Ct. 2564 (2018).

209. 505 U.S. 577 (1992).

210. *See id*. at 588–89 ("The question is not the good faith of the school in attempting to make the prayer acceptable to most persons, but the legitimacy of its undertaking that enterprise at all when the object is to produce a prayer to be used in a formal religious exercise . . . .").

211. *See Lund*, 863 F.3d at 290 ("When one of Rowan County's commissioners leads his constituents in prayer, he is not just another private citizen. He is the representative of the state, and he gives the invocation in his official capacity as a commissioner."); *see also supra* notes 34–37 and accompanying text (explaining legislative prayer as government speech); Turner v. City Council of Fredericksburg, 534 F.3d 352, 354 (4th Cir. 2008) (O'Connor, J., retired, sitting by designation) (articulating that legislative prayer given exclusively by members of a city council constituted government speech). In *Turner*, Justice O'Connor, retired and sitting by designation with the Fourth Circuit, based its conclusion on a four-factor test for assessing when speech is government speech. *Id*. The four

the Fourth Circuit found that "[t]he Board was thus 'elbow-deep in the activities banned by the Establishment Clause—selecting and prescribing sectarian prayers.'"[212]

Rather than focusing on the underlying implications of the legislators as the exclusive prayer-givers, the Sixth Circuit relied on the pervasive nature of legislator-led prayer across the country and the Supreme Court's stated purpose for constitutional legislative prayer in finding it "insignificant that the prayer-givers in this case are publicly-elected officials."[213] The Sixth Circuit cited studies presented by Jackson County finding that in forty-seven state legislative chambers, prayers are given by someone other than a legislative or visiting chaplain.[214] Specifically, in Rhode Island, members are the only individuals allowed to pray, and in the Michigan House of Representatives, prayers are to be given "*by the Member* or a Member's guest."[215] The court finally noted an example of legislator-led prayer in Congress.[216]

The Sixth Circuit observed that legislator-led prayer made sense given legislative prayer's constitutionally permitted

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factors included:

> (1) the central "purpose" of the program in which the speech in question occurs; (2) the degree of "editorial control" exercised by the government or private entities over the content of the speech; (3) the identity of the "literal speaker"; and (4) whether the government or the private entity bears the "ultimate responsibility" for the content of the speech.

Id. (numbers in original) (quoting Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles, 288 F.3d 610, 618 (4th Cir. 2002)).

212. *Lund*, 863 F.3d at 281 (quoting Lund v. Rowan County, 837 F.3d 407, 434 (4th Cir.), *as amended* (Sept. 21, 2016), *reh'g en banc granted*, 670 F. App'x 106 (4th Cir. 2016), *and on reh'g en banc*, 863 F.3d 268 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 2564 (2018) (panel dissent)).

213. *See* Bormuth v. County of Jackson, 870 F.3d 494, 512 (6th Cir. 2017) (en banc) ("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." (citations omitted)), *cert. denied*, 138 S. Ct. 2708 (2018).

214. *See id*. at 511 (pointing out that in those chambers "[*l*]*egislators*, chamber clerks and secretaries, or other staff" may give the prayers (emphasis in original)).

215. *See id*. (emphasis in original) (citation omitted) (reporting that in the Sixth Circuit there are over one-hundred counties that permit lawmaker-led prayer).

216. *See id*. (referencing Oklahoma Senator James Lankford's prayer on May 23, 2015).

purpose.[217] In *Town of Greece*, the Supreme Court stated that legislative prayer is "meant to lend gravity to the occasion and reflect values long part of the Nation's heritage," and that "[p]rayer 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."[218] In light of the prevalence and purpose of legislative prayer, the Sixth Circuit found no issue with the legislators' giving prayers.[219]

While the constitutionality of legislator-led prayer is debatable, the significance of this first *Lund* factor hinges on the "closed-universe" of prayer-givers present in both in *Lund*[220] and *Bormuth*.[221] In *Marsh*[222] and *Town of Greece*,[223] the Supreme Court stated that the inclusive nature of the prayer practices was critical to its constitutionality. In *Marsh*, the Court considered the fact that a clergyman of the same faith had been continually reappointed for sixteen years, but found there was no conflict with the Establishment Clause because "Palmer was not the only clergyman heard by the Legislature; guest chaplains have officiated at the request of various legislators and as substitutes during Palmer's absences."[224] And while the town in *Town of*

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217. *See id.* ("This tradition of legislator-led prayer makes sense in light of legislative prayer's purpose . . . .").

218. Town of Greece v. Galloway, 572 U.S. 565, 582–83 (2014).

219. *See Bormuth*, 870 F.3d at 512 (concluding that "prayers by agents (like in *Marsh* and *Town of Greece*) are not constitutionally different from prayers offered by principals").

220. *See* Lund v. Rowan County, 863 F.3d 268, 273 (4th Cir. 2017) (en banc) (focusing on the fact that the board members were the only ones permitted to give a prayer at meetings), *cert. denied*, 138 S. Ct. 2564 (2018).

221. *See Bormuth*, 870 F.3d at 498 (describing Jackson County's "rotating basis" by which board members gave their prayers).

222. *See* Marsh v. Chambers, 463 U.S. 783, 793 (1983) (highlighting the fact that the Nebraska state legislature received prayers from guest chaplains at the request of various legislators in addition to the legislative chaplain on staff).

223. *See Town of Greece*, 572 U.S. at 585 (evaluating that the town had made "reasonable efforts" to ensure religious representation in its pre-meeting prayers and that the town had made clear that it "would welcome a prayer by any minister or layman who wished to give one").

224. *See Marsh*, 463 U.S. at 793 (asserting that the inclusive nature of the prayer practice indicated that the clergyman was reappointed due to his personal qualities, rather than his specific faith); *see also* Chambers v. Marsh, 504 F. Supp. 585, 592 (D. Neb. 1980) ("From time to time various senators have asked whether

Greece initially used an informal method for soliciting prayer-givers, which yielded exclusively Christian ministers from 1999 to 2007, once the plaintiffs complained about the overtly Christian nature of the prayers, the town invited a Jewish layman and the chairman of the local Baha'i temple to pray, and granted the request of a Wiccan priestess to pray as well.[225] In the words of the Court, "[t]he town made reasonable efforts to identify all of the congregations located within its borders and represented that it would welcome a prayer by any minster or layman who wished to give one."[226]

Conversely, the Boards of Commissioners in both Rowan and Jackson Counties made the conscious decision to deny members of the public the opportunity to pray before meetings.[227] In defending the Board's decision to exclude outside prayers, one Jackson County commissioner stated that

> 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.[228]

Similarly, with respect to religious minorities, one Rowan County commissioner commented to a newspaper, "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

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their own clergypersons might be invited, and in those instances the chaplain has always honored the requests, including one of the Jewish faith."), *aff'd in part, rev'd in part*, 675 F.2d 228 (8th Cir. 1982), *rev'd*, 463 U.S. 783 (1983).

225. *Town of Greece*, 572 U.S. at 571–73.

226. *See id*. at 585 (indicating further 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").

227. *See Lund*, 863 F.3d at 272 (demonstrating that the lawmakers being the exclusive prayer-givers distinguished the case from the "more inclusive, minister-oriented" practice in *Town of Greece*).

228. Bormuth v. County of Jackson, 849 F.3d 266, 283 (6th Cir.), *reh'g en banc granted*, *opinion vacated*, 855 F.3d 694 (6th Cir.), *and on reh'g en banc*, 870 F.3d 494 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 2708 (2018). At the same meeting, that Jackson County commissioner also expressed his worries that:

> 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. *Id*.

evil."[229] Rather than fostering inclusive environments for audience members of minority or no faiths, these Boards have used their role as exclusive prayer-givers to effectively shut out faiths they do not agree with.

This factor is a necessary one because, if left unchecked, the practice of exclusively legislator-led prayer could result in religious entanglement with elections, where voters are hyper-concerned with the religious views of candidates and with what kinds of prayers they would give once in office.[230] The Sixth Circuit applauded the use of elections to ensure that legislators represent the faiths the voters desire, noting that "[w]ith 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 . . . ."[231] However, the Supreme Court has expressly stated that "fundamental rights may not be submitted to vote; they

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229. Lund v. Rowan County, 103 F. Supp. 3d 712, 715 (M.D.N.C. 2015), *rev'd and remanded*, 837 F.3d 407 (4th Cir.), *as amended* (Sept. 21, 2016), *on reh'g en banc*, 863 F.3d 268 (4th Cir.), *and aff'd*, 863 F.3d 268 (4th Cir. 2017) (originally quoted in *School Board: Bible Classes Stay, Curriculum to Undergo Evaluation*, SALISBURY POST (Oct. 10, 2014, 12:00 AM), http://www.salisburypost.com/2014/10/10/school-board-bible-classes-stay-curriculum-to-undergo-evaluation/ (last visited Jan. 22, 2019) (on file with the Washington and Lee Law Review)).

230. *See Lund*, 863 F.3d at 282 ("Voters may wonder what kind of prayer a candidate of a minority religious persuasion would select if elected." (internal citation and quotation marks omitted)).

231. *See* Bormuth v. County of Jackson, 870 F.3d 494, 513 (6th Cir. 2017) (en banc) (expanding on the idea that there was no evidence concerning the commissioners' religious denominations, so the denominations "may have included Roman Catholics, Southern Baptists, Mormons, Quakers, Episcopalians, Lutherans, Methodists, and others"), *cert. denied*, 138 S. Ct. 2708 (2018); *see also id*. (recalling that the Supreme Court upheld the Presbyterian clergyman's sixteen-year employment in *Marsh* (citing Marsh v. Chambers, 463 U.S. 783, 793 (1983))); *but see* Fields v. Speaker of Pa. House of Representatives, 327 F. Supp. 3d 748, 761 (M.D. Pa. 2018) ("As evinced by modern legislative prayer cases and other Establishment Clause jurisprudence, constitutional challenges to prayer practices typically allege an impermissible government preference for Christianity in general, rather than one particular Christian denomination." (internal citations omitted)); *id*. ("None of these [legislative prayer] decisions suggests that if different Christian sects were represented, a legislative prayer practice solely advancing Christianity would pass constitutional muster.").

depend on the outcome of no elections."[232] As the lead dissent in the original Fourth Circuit decision noted, allowing this "single faith reality" to continue "takes us one step closer to a de facto religious litmus test for public office."[233] If these prayer patterns were permitted, it would not only unjustly exclude minority faiths from legislative prayer practices, but it would also entangle religion and government in an unprecedented way.[234]

Underlying the consideration of the commissioners as the sole prayer-givers is the idea of control.[235] By allowing outsiders to give the opening invocations at meetings, the government is yielding some of its control over the proceedings.[236] While there are certainly logistical arguments to be made in favor of legislator-led prayer, courts should look to the ways in which this practice

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232. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 304–05 (2000) (quoting W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)); *see also* Ledewitz, *supra* note 37, at 104 ("If the Constitution does not aid us in finding common ground among all these groups, we will end up voting for and against God in all future elections. This possibility promises deep political strife.").

233. Lund v. Rowan County, 837 F.3d 407, 435 (4th Cir.), *as amended* (Sept. 21, 2016), *reh'g en banc granted*, 670 F. App'x 106 (4th Cir. 2016), *and on reh'g en banc*, 863 F.3d 268 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 2564 (2018) (Wilkinson, J., dissenting). Judge J. Harvie Wilkinson, who authored the dissent in the original Fourth Circuit decision and the majority in the rehearing opinion, further noted that

> When delivering the same sectarian prayers becomes embedded legislative custom, voters 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. It should not be so.
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> *Id*.

234. *See* Lemon v. Kurtzman, 403 U.S. 602, 615 (1971) (clarifying that courts should consider governmental entanglement with religion by assessing the character and purposes of the relationship, the nature of the aid being provided, and the resulting relationship between the religious institution and the state).

235. *See* James H. Knippen II & Elizabeth M. Farmer, *Does Prayer Before Public Bodies Violate the Establishment Clause of the First Amendment?*, 24 DCBA BRIEF 28, 33 (2011) ("If legislative invocations constitute government speech, then applying this doctrine means the government has 'unqualified control over the religious message.'" (quoting Christopher C. Lund, *Keeping the Government's Religion Pure:* Pleasant Grove City v. Summum, 104 NW. U. L. REV. COLLOQUY 46, 56 (2009))).

236. *See Secret Costs*, *supra* note 72, at 1030–31 (discussing the issue of control with public forums as a potential solution to legislative prayer concerns).

becomes an instrument of government control.[237] In *Lund* and *Bormuth*, the control was being used to regulate the content of the prayers and the religious doctrine in an impermissible way.[238] This control sends the "opposite message" of the inclusivity in *Town of Greece*,[239] and thereby defies the values espoused by the Supreme Court.

B. Promotion of a System of Beliefs

The second factor the Fourth Circuit discussed was that the invocations "drew exclusively on Christianity and sometimes served to advance that faith."[240] While the courts are not to parse the contents of particular prayers,[241] they are free to assess an overall pattern of prayer to determine if a practice is permissible under the Establishment Clause or if it is coercive and therefore unconstitutional.[242] In considering this factor, it is important to remember the "clearest command of the Establishment Clause"—that "one religious denomination cannot be officially preferred over another."[243] The purpose of the Establishment

237. *See* Rubin v. City of Lancaster, 710 F.3d 1087, 1100 (9th Cir. 2013) ("It is a cornerstone principle of our Establishment Clause jurisprudence that 'it is no part of the business of government to compose official prayers,' or 'direct[ ] and control[ ]' their content." (quoting Lee v. Weisman, 505 U.S. 577, 588 (1992); Engel v. Vitale, 370 U.S. 421, 425 (1962))).

238. *See infra* Part IV.B (exploring the exclusively-Christian nature of the prayers).

239. *See* Lund v. Rowan County, 863 F.3d 268, 282 (4th Cir. 2017) (en banc) (contrasting the prayer practice in *Lund* with the practice in *Town of Greece*), *cert. denied*, 138 S. Ct. 2564 (2018).

240. *Id.* at 281.

241. *See* Marsh v. Chambers, 463 U.S. 783, 794–95 (1983) (articulating that, where there is no evidence of prayer exploitation or proselytization, "[t]he content of the prayer is not of concern to judges . . .").

242. *See* Town of Greece v. Galloway, 572 U.S. 565, 590 (2014) ("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.").

243. Larson v. Valente, 456 U.S. 228, 244 (1982). The Supreme Court has since quoted this language in subsequent Establishment Clause cases. Trump v. Hawaii, 138 S. Ct. 2392, 2417 (2018); *Town of Greece*, 572 U.S. at 619 (Kagan, J., dissenting); Van Orden v. Perry, 545 U.S. 677, 719 (2005) (Stevens, J., dissenting); Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 714 (1994) (O'Connor, J., concurring); *see also supra* notes 41–43 and accompanying text

Clause is to protect religious freedom and prevent "political division along religious lines"[244] by "ensuring governmental neutrality in matters of religion."[245] This protection is to be based on the perceptions of a reasonable person, one who is aware of the tradition and the purpose of legislative prayer.[246] In these circumstances, it is safe to assume that a reasonable observer would be mindful that the purpose of legislative prayer is to provide a moment of reflection for legislators as they embark on the task of governing.[247] However, as noted by the Fourth Circuit, a reasonable observer would also note the overall pattern of a consistent invocation of a singular faith[248] and would rationally believe that the government is supporting that one faith.[249]

This observation is corroborated by the commissioners' statements to the media concerning the prayer practice. In *Lund*, various commissioners made comments to the local television news

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(discussing the meaning and implications of the Establishment Clause).

244. *See Lemon*, 403 U.S. at 622 (adding that "[t]he political divisiveness of such conflict is a threat to the normal political process"

(internal citations omitted)).

245. *See* Gillette v. United States, 401 U.S. 437, 449 (1971)

The metaphor of a "wall" or impassable barrier between Church and State, taken too literally, may mislead constitutional analysis, but the Establishment Clause stands at least for the proposition that when government activities touch on the religious sphere, they must be secular in purpose, evenhanded in operation, and neutral in primary impact.

(Internal citations omitted).

246. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000) ("In cases involving state participation in a religious activity, one of the relevant questions is 'whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools.'" (quoting Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring)).

247. *See Town of Greece*, 572 U.S. at 587–88 (describing the audience of legislative prayers as being lawmakers who "may find that a moment of prayer or quiet reflection sets the mind to a higher purpose and thereby eases the task of governing").

248. *See Lund*, 863 F.3d at 283 (detailing how over the course of five years, 139 out of 143 prayers were sectarian, and those 139 (or 97%) all "use[d] ideas or images identified with [Christianity]" (quoting Lee v. Weisman, 505 U.S. 577, 588 (1992))).

249. *See id.* at 284 ("When the state's representatives so emphatically evoke a single religion in nearly every prayer over a period of many years, that faith comes to be perceived as the one true faith, not merely of individual prayer-givers, but of government itself." (internal quotation marks and citations omitted)).

and other media in which they clearly articulated their intentions to continue to give Christian prayers at Board meetings.[250] One commissioner stated that he would "continue to pray in JESUS name," and he volunteered "to be the first to go to jail for this cause"; if another commissioner paid his bail "in time for the next meeting, [he would] go again!"[251] Similarly, in *Bormuth*, commissioners spoke to the local media frankly about their personal beliefs and the purpose of the pre-meeting prayers.[252] One commissioner was reported to say that the plaintiff was attacking the Board and, in his eyes, his beliefs.[253] The commissioner further stated that "[o]ur civil liberties should not be taken away from us, as commissioners."[254] In response to the plaintiff's contention about the prayers, another commissioner commented that

> 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.[255]

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250. Lund v. Rowan County, 103 F. Supp. 3d 712, 714–15 (M.D.N.C. 2015), *rev'd and remanded*, 837 F.3d 407 (4th Cir. 2016), *as amended* (Sept. 21, 2016), *on reh'g en banc*, 863 F.3d 268 (4th Cir.), *and aff'd*, 863 F.3d 268 (4th Cir. 2017).

251. *See id.* at 715 (quoting another commissioner as stating "I will continue to pray in Jesus' name. I am not perfect so I need all the help I can get, and asking for guidance for my decisions from Jesus is the best I, and Rowan County, can ever hope for"); *see also id.* (quoting the same commissioner as stating, concerning religious minorities, that, "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").

252. *See* Bormuth v. County of Jackson, 870 F.3d 494, 517–18 (6th Cir. 2017) (en banc) (quoting several of the commissioners' statements as reported in a local newspaper), *cert. denied*, 138 S. Ct. 2708 (2018).

253. *See id.* (quoting another commissioner as stating that "[a]ll this political correctness, after a while I get sick of it").

254. *See id.* (adding that another commissioner commented "[w]hat about my rights? . . . If a guy doesn't want to hear a public prayer, he can come into the meeting two minutes late").

255. *See* Bormuth v. County of Jackson, 849 F.3d 266, 286 (6th Cir.) (elaborating that in that same public meeting, a different commissioner asserted that the pending lawsuit was an "attack on Christianity and Jesus Christ, period." (citing CountyofJackson, *Personnel & Finance Committee November 12, 2013 Jackson County, MI*, YOUTUBE (Dec. 19, 2013), https://www.youtube.com/watch?v= yOOClwZpaXc (last visited Jan. 22, 2019) (on file with the Washington and Lee Law Review))) (emphasis in original), *reh'g en banc granted*, *opinion vacated*, 855 F.3d 694 (6th Cir.), *and on reh'g en banc*, 870 F.3d 494 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 2708 (2018).

These public comments, combined with the overwhelming pattern of Christian prayer, paint a clear picture of an intent by the legislators to associate the government with one faith.

The Sixth Circuit did not find that the prayers offered were unconstitutional, relying on *Town of Greece*'s insistence that a board need not seek out a diverse range of religious views, which would require the town "to make wholly inappropriate judgments about the number of religions [it] should sponsor and the relative frequency with which it should sponsor each."[256] But while the singular faith of the prayers may not need to be determinative of legislative prayer challenges, the consistent discrimination against minority faiths should not be ignored by courts.[257] This factor requires courts to consider the singularity of the challenged practices, giving specific factual consideration to the surrounding context.[258] When, as here, this singularity is used to shut minority faiths out of the prayer process, it becomes impermissible.[259]

C. Invitations for Attendees to Participate

The third factor the Fourth Circuit cited was that the commissioners would tell meeting attendees to rise and participate

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256. Town of Greece v. Galloway, 572 U.S. 565, 585–86 (2014) (quoting Lee v. Weisman, 505 U.S. 577, 617 (1992) (Souter, J., concurring)).

257. *See* Robert Luther III, *"Unity Through Division": Religious Liberty and the Virtue of Pluralism in the Context of Legislative Prayer Controversies*, 43 CREIGHTON L. REV. 1, 32 (2009) ("Indeed, a twenty-first century reading of *Marsh* requires greater latitude for judicial interpretation in this area when legislatures engage in viewpoint discrimination to prohibit individuals from minority religions equal access to the legislative prayer podium."); *see also* Williamson v. Brevard County, 276 F. Supp. 3d 1260, 1277 (M.D. Fla. 2017) ("[W]hile legislative prayer—even sectarian legislative prayer—is, as a general matter, constitutional, intentional discrimination and improper motive can take a prayer practice beyond what the Establishment Clause permits.").

258. *See supra* notes 114–123 and accompanying text (outlining *Town of Greece*'s instructions for a context and fact-sensitive inquiry).

259. *See* Simpson v. Chesterfield County Bd. of Supervisors, 404 F.3d 276, 283 (4th Cir. 2005) ("[R]epeated invocation of the tenets of a single faith undermined our commitment to participation by persons of all faiths in public life."); *id.* ("Advancing one specific creed at the outset of each public meeting runs counter to our credo of American pluralism and discourages the diverse views on which our democracy depends."); Hudson v. Pittsylvania County, 107 F. Supp. 3d 524, 534 (W.D. Va. 2015) (discussing the unconstitutional relationship between the control exercised by the board and the singularity of faith).

in the invocations.[260] This factor is especially salient, given the Supreme Court's statement in *Town of Greece* 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."[261] In his opinion Justice Kennedy continued to note that, while occasionally meeting attendees were asked to stand for the prayer, those "requests, however, came not from town leaders but from the guest ministers, who presumably [were] accustomed to directing their congregations in this way and might have done so thinking the action was inclusive, not coercive."[262] The Supreme Court's express caution about calls to worship by town board members validates the legitimacy of this factor as one that courts should consider in legislative prayer questions.

The request for meeting attendees to rise and participate in the prayer makes it harder for individuals to opt out if the prayer is not in line with their beliefs or if they do not feel comfortable participating.[263] Many courts, including the Supreme Court, have offered the option for those who do not wish to participate in the prayer to leave the room during the invocation.[264] However, it is hard to imagine that in the local government setting, with

260. *See* Lund v. Rowan County, 863 F.3d 268, 286 (4th Cir. 2017) (en banc) (providing various examples of such statements, including "[p]lease pray with me"; "[l]et's pray together"; and "[l]et us pray" (citations omitted)), *cert. denied*, 138 S. Ct. 2564 (2018).

261. *Town of Greece*, 572 U.S. at 588 (emphasis added).

262. *See id.* (acknowledging that town board members often stood for the prayers, bowed their heads, or made the sign of the cross during the prayer).

263. *See id.* at 620–21 (Kagan, J., dissenting) (describing the thought process of a citizen of a minority faith faced with the decision of how to proceed in the face of a call to legislative prayer).

264. *See id.* at 590 ("Nothing in the record suggests that members of the public are dissuaded from leaving the meeting room during the prayer [or] arriving late . . . . Should nonbelievers choose to exit the room during a prayer they find distasteful, their absence will not stand out as disrespectful or even noteworthy."); Lee v. Weisman, 505 U.S. 577, 597 (1992) (contrasting a public school graduation ceremony with "[t]he atmosphere at the opening of a session of a state legislature where adults are free to enter and leave with little comment and for any number of reasons"); Am. Humanist Ass'n v. McCarty, 851 F.3d 521, 526 (5th Cir.), *cert. denied sub nom.* Am. Humanist Ass'n v. Birdville Indep. Sch. Dist., 138 S. Ct. 470 (2017) (contrasting the coercive pressures of school prayer with "ceremonial" prayer at a school board meeting).

meetings attended by a small number of people, that leaving the room or coming in late at every prayer would go unnoticed.[265] Furthermore, these invitations to participate may send a signal to those who do not wish to participate that they are outsiders to the political process.[266] This message to nonadherents has been confirmed by scientific studies, which have found that lawmakers tend to favor individuals who share their faith,[267] that majorities are inclined to question the motives of "outgroup" minority members,[268] and that these suspicions are heightened in public settings, such as government meetings.[269] When attendees are asked to stand and participate, it is easier to take note of nonadherents, and those who are uncomfortable with the prayer may feel pressured to follow along.[270] In both *Lund*[271] and

265. In *Hudson v. Pittsylvania County*, a district court was faced with a case that is factually on all fours with *Lund* and *Bormuth*. *See* 107 F. Supp. 3d at 525 (recounting the County's prayer practice as being entirely legislator-led and exclusively of one faith, with invitations for attendees to participate at the local government level). In that case, prior to the prayer a commissioner would say: "If you don't want to hear this prayer, you can leave. Please stand up." *Id.* at 535. The court there found that this came "far too close to 'singl[ing] out dissidents for opprobrium'" and transcended "the boundaries of permissible legislative prayer demarcated in *Town of Greece*." *Id.* (quoting *Town of Greece*, 572 U.S. at 588).

266. *See* Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring) ("Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.").

267. *See* David Yamane, *Faith and Access: Personal Religiosity and Religious Group Advocacy in a State Legislature*, 38 J. FOR SCI. STUDY RELIGION 543, 548–49 (1999) (discussing religious interest groups and the increased access they have to lawmakers who share their faith).

268. *See* Cecilia L. Ridgeway, *Conformity, Group-Oriented Motivation, and Status Attainment in Small Groups*, 41 SOC. PSYCHOL. 175, 187 (1978) ("[Nonconformity] attracts the group's attention, but it also predisposes the group to negatively assess the nonconformer's motivation . . . .").

269. *See* Jeffrey G. Noel, Daniel L. Wann, & Nyla R. Branscombe, *Peripheral Ingroup Membership Status and Public Negativity Toward Outgroups*, 68 J. PERSONALITY & SOC. PSYCHOL. 127, 134–35 (1995) (reviewing research concerning ingroup perceptions of outgroup members).

270. *See* Engel v. Vitale, 370 U.S. 421, 430–31 (1962) ("When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.").

271. *See* Lund v. Rowan County, 863 F.3d 268, 274 (4th Cir. 2017) (en banc) (highlighting the fact that plaintiffs felt excluded from the political process during

Bormuth,[272] the plaintiffs expressed fears of standing out by not participating and stated that they had stood for the prayers out of pressure to do so.

Additionally, the Supreme Court has stated that questions about legislative prayer are fact-sensitive and that courts must consider "both the setting in which the prayer arises and the audience to whom it is directed."[273] Legislative prayer is permissible when the audience is the lawmakers themselves, rather than the public.[274] However, when the legislators ask meeting attendees to participate in a prayer, the audience shifts from the lawmakers to the public, where the invocation is a tool used to promote religious observation.[275] One particularly salient example of this shift in audience was discussed in an amicus brief for *Bormuth v. County of Jackson*.[276] The brief noted that "[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."[277] The fact that the Board gave an opening invocation only in the presence of a public audience supports the need for courts to consider the audience of legislative

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the prayers and felt compelled to participate in order to not stick out), *cert. denied*, 138 S. Ct. 2564 (2018).

272. *See* Bormuth v. County of Jackson, 870 F.3d 494, 498–99 (6th Cir. 2017) (en banc) (recounting that the plaintiff felt like he was in church during the prayers and that he was being forced to worship), *cert. denied*, 138 S. Ct. 2708 (2018).

273. Town of Greece v. Galloway, 572 U.S. 565, 587 (2014).

274. *See id.* at 587–88 ("The principal audience for these invocations is not, indeed, the public but lawmakers themselves, who may find that a moment of prayer or quiet reflection sets the mind to a higher purpose and thereby eases the task of governing.").

275. *See Lund*, 863 F.3d at 286–87 (describing the purpose of an internally focused prayer practice by the legislators in contrast with an externally focused practice for the audience).

276. *See* Brief of Amicus Curiae Americans United for Separation of Church & State in Support of Appellant & Reversal at 12–13, Bormuth v. County of Jackson, 870 F.3d 494 (6th Cir. 2017) (No. 15-1869), 2015 WL 5896215 ("[T]he Commissioners treat the prayers not as an opportunity to seek spiritual guidance for their own work, but as an opportunity to direct religious messages at Jackson County's citizens.").

277. *Id.* at 12 (citing CountyofJackson*, November 6, 2014 Special Jackson County Board of Commissioners Meeting*, YOUTUBE (Nov. 7, 2014), http://tinyurl.com/2014nov6 (last visited Jan. 22, 2019) (on file with the Washington and Lee Law Review) (emphasis in original).

prayer and the ways in which meeting attendees are necessarily involved in such prayer.

This factor points to the underlying coercive nature of the prayer practice. A prayer practice is coercive if there is a threat that benefits or burdens will be allocated based on participation in the prayer.[278] Courts should consider instances where lawmakers are using their authority to pressure audience members into religious participation when legislative prayer challenges appear before them.[279] This factor is of particular concern at the local government level, where lawmakers' perceptions can have real and direct consequences on audience members' lives.[280]

D. The Local Government Setting

The final factor considered by the Fourth Circuit was the local government setting of the prayer practice.[281] While the Supreme Court did not find the local government setting to be definitive in *Town of Greece*,[282] Justice Kennedy did charge courts with a

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278. *See Town of Greece*, 572 U.S. at 589 (discussing the lack of coercion in the practice at issue).

279. *See* Lee v. Weisman, 505 U.S. 577, 604 (1992) (Blackmun, J., concurring) ("Government pressure to participate in a religious activity is an obvious indication that the government is endorsing or promoting a religion."); Alan Brownstein, *Constitutional Myopia: The Supreme Court's Blindness to Religious Liberty and Religious Equality Values in* Town of Greece v. Galloway, 48 LOY. L.A. L. REV. 371, 403 (2014)

> [C]oercive circumstances arise when an individual seeks a determination of his or her eligibility for benefits from a government bureaucrat or when a small town legislature deliberates on a matter of particular importance to a small group of residents. The pressure to comply with the invitation to rise and join in the offered prayer should be obvious to anyone.

280. *See infra* Part IV.D (assessing courts' consideration of the local government setting in legislative prayer challenges).

281. *See Lund*, 863 F.3d at 287 ("The prayers here were delivered at the public meetings of a local government body, a fact that makes the other aspects of the county's prayer practice even more questionable.").

282. *See Town of Greece*, 572 U.S. at 586 (rejecting the contention that the local government setting of the prayer practice meant that the practice was unconstitutional). Because *Marsh* concerned prayer at the state level, the opinion did not address concerns surrounding the level of government. *See* Marsh v. Chambers, 463 U.S. 783, 784–85 (1983) (explaining the facts of the case arising from prayers at the Nebraska Legislature).

consideration of "the setting in which the prayer arises" in such cases.[283] Given the intimate setting of local government meetings and the different role audience members may play, this factor is important to consider to ensure that legislator-led prayer does not act as a barrier to entry for civic engagement.[284]

One key feature that heightens the importance of a local government setting over a state or federal one is that citizens tend to be more affected by actions of their local government.[285] While individuals attending congressional or state legislature meetings are usually passive observers,[286] citizens attend town meetings to, in the words of the Supreme Court, "accept awards; speak on

283. *Town of Greece*, 572 U.S. at 587.

284. *See* Joyner v. Forsyth County, 653 F.3d 341, 342–43 (4th Cir. 2011) ("Sectarian prayers must not serve as the gateway to citizen participation in the affairs of local government. To have them do so runs afoul of the promise of public neutrality among faiths that resides at the heart of the First Amendment's religion clauses."). *Joyner v. Forsyth County* was a pre-*Town of Greece* Fourth Circuit decision which was also authored by Judge Wilkinson, who wrote the majority opinion for the *Lund* rehearing. *Id.* at 342. In that case, the court concluded that sectarian prayer by local clergy before county board meetings was barred by the Establishment Clause. *See id.* at 355 (clarifying that "citizens should come to public meetings confident in the assurance that government plays no favorites in matters of faith but welcomes the participation of all").

285. *See* Jeffrey M. Berry, *Urban Interest Groups*, *in* THE OXFORD HANDBOOK OF AMERICAN POLITICAL PARTIES AND INTEREST GROUPS 502, 505 (L. Sandy Maisel & Jeffrey M. Berry eds., 2010) (arguing that, at the local level, "fights are often over what is going to happen to a particular place and these experiential facts are forcefully articulated by those who live or work in that particular place"); James A. Hill, *Thou Shalt Not Speak: Why the Establishment Clause Should Be Concerned with Legislative Prayer in* Bormuth v. County of Jackson, 23 TRINITY L. REV. 1, 30 (2018) ("Congress and state assemblies differ greatly from local town boards in size, function, and constituent responsiveness.").

286. *See* Town of Greece v. Galloway, 572 U.S. 565, 586 (2014) (acknowledging the argument that "prayer conducted in the intimate setting of a town board meeting differs in fundamental ways from the invocations delivered in Congress and state legislatures, where the public remains segregated from legislative activity and may not address the body except by occasional invitation."); *Watching Congress in Session*, U.S. CAPITOL VISITOR CTR., https://www.visitthecapitol.gov/plan-visit/watching-congress-session (last visited Jan. 22, 2019) (outlining the policies and procedures of watching congressional sessions) (on file with the Washington and Lee Law Review); *Visitor Info*, N.C. GEN. ASSEMBLY, https://www.ncleg.gov/About/VisitorInfo (last visited Jan. 22, 2019) (clarifying that visitors are not allowed on the floor of the North Carolina House or Senate, only in the public galleries) (on file with the Washington and Lee Law Review). Visitor information for the Michigan State Legislature was unavailable online.

matters of local importance; and petition the board for action that may affect their economic interest, such as the granting of permits, business licenses, and zoning variances."[287] Further, the citizens who attend local government meetings are likely to have a vested interest in the board's decisions or actions.[288] A citizen with a significant personal or economic interest in a local government decision may feel compelled to participate in the legislative prayer in order to gain favor with the lawmakers who will be acting upon their request shortly thereafter.[289] Additionally, members of local boards are frequently involved with the community and are likely to have relationships with meeting attendees outside of the governmental setting.[290] This intimacy means that what happens at local meetings could percolate to other aspects of citizens' lives, exacerbating the pressure to participate in the local government's prayer.[291] And, while attendees at state and congressional

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287. *Town of Greece*, 572 U.S. at 586; *see also* Abrell, *supra* note 89, at 189 ("[U]nlike at the state or national legislative levels where the average citizen is only present for an opening invocation in a singular or sporadic observance of his government . . . at the local level a citizen is usually present at a government meeting to accomplish a goal.").

288. *See* Lund v. Rowan County, 863 F.3d 268, 287 (4th Cir. 2017) (en banc) ("[C]itizens attend meetings to petition for valuable rights and benefits, to advocate on behalf of cherished causes, and to keep tabs on their elected representatives—in short, to participate in democracy."), *cert. denied*, 138 S. Ct. 2564 (2018); *see also* Judith E. Innes & David E. Booher, *Reframing Public Participation: Strategies for the 21st Century*, 5 PLAN. THEORY & PRAC. 419, 424 (2004) (explaining that local meetings "typically are attended primarily, if not uniquely, by avid proponents and opponents of a measure affecting them personally . . . "); Brian Adams, *Public Meetings and the Democratic Process*, 64 PUB. ADMIN. REV. 43, 44 (2004) (discussing the importance of public hearings for citizen participation); Katherine A. McComas, John C. Besley, & Craig W. Trumbo, *Why Citizens Do and Do Not Attend Public Meetings About Local Cancer Cluster Investigations*, 34 POL'Y STUD. J. 671, 675 (2006) ("[R]esearch has shown that people with higher levels of concern about a specific topic are more likely to attend public meetings about that topic." (internal citations omitted)).

289. *See Lund*, 863 F.3d at 288 (clarifying that the court was not implying that the board made decisions based off of acquiescence to the prayers, "[b]ut the fact remains that the Board considered individual petitions on the heels of the commissioners' prayers").

290. *See* Karen Tracy & Margaret Durfy, *Speaking Out in Public: Citizen Participation in Contentious School Board Meetings*, 1 DISCOURSE & COMM. 223, 225 (2007) (explaining that local lawmakers and citizens "frequently have ongoing relationships with each other," and they are "not just unknown 'authorities' and 'public audiences'").

291. *See Lund*, 863 F.3d at 288 (recounting that the Board exercised authority

legislative meetings are usually seated in a gallery separate from the lawmakers, the physical setting of a local government meeting, whose attendees sit at a close distance facing the legislators, means that lawmakers are acutely aware of who is attending the meeting and when they do, or do not, participate in prayer.[292] Although the intimate, familiar setting of local government activity can be beneficial for lawmakers and citizens alike,[293] courts should consider the ways in which this setting could intensify pressure to participate in a legislative prayer.

Additionally, while federal and state legislatures generally do not require participation from citizens in lawmaking, it is often necessary for citizens to attend and participate in local government meetings in order to receive a favorable ruling.[294] In an Eleventh Circuit case considering legislative prayer, the court noted:

> It is fundamentally illogical for our Establishment Clause jurisprudence to forbid cadets from hearing grace before a meal at VMI, yet require members of the public who attend zoning meetings in Cobb County, Georgia, to hear a prayer asking for guidance—from a deity which may not be their own—on the decision over a parking lot variance.[295]

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over "zoning petitions, permit applications, and contract awards," and an unfavorable decision by the Board on these sorts of decisions could have serious economic impacts on the petitioner).

292. *See* FRANK M. BRYAN, REAL DEMOCRACY: THE NEW ENGLAND TOWN MEETING AND HOW IT WORKS 93 (2004) (demonstrating the ways in which the physical setting of local government meetings creates an intimate environment between lawmakers and attendees); *see also* Roberts, *supra* note 22, at 425 ("The direct interaction between citizens and government officials in the town meeting context creates a greater risk of infringing on individuals' First Amendment rights and a greater risk of conveying the impression that the government prefers certain religious views over others.").

293. *See* Joseph Zelasko, *The Reverse-Commandeering System: A Better Way to Distribute State and Local Authority*, 112 NW. U. L. REV. 83, 107–10 (2017) (discussing the benefits of local governance, particularly as a means to address local issues).

294. *See* Pelphrey v. Cobb County, 547 F.3d 1263, 1288 (11th Cir. 2008) (contrasting the atmosphere of a state legislature with the quasi-adjudicative role of a local county commission, "deciding whether to terminate an employee, suspend a liquor license, or grant a zoning variance").

295. *Id.* The Eleventh Circuit was referring to *Mellen v. Bunting*, a Fourth Circuit case that determined that the Establishment Clause precluded school officials at the Virginia Military Institute, a state-operated military college, from sponsoring an official prayer before supper each day. *See* 327 F.3d 355, 371–72 (4th Cir. 2003) ("Because of VMI's coercive atmosphere, the Establishment Clause

A willingness, or lack thereof, to participate in prayer should not be a barrier to actively participating in local government.[296]

The concept of ceremonial deism may also highlight the importance of considering the local government setting. Ceremonial deism is defined as "a longstanding religious practice—sometimes extending back to the nation's founding—with de minimis and nonsectarian religious content."[297] Ceremonial deism has been used to justify religious government symbols or activities, such as the national motto ("In God We Trust") and the opening of each Supreme Court session with the statement, "God save the United States and this honorable Court."[298] At the local government level, it is harder to argue for the innocuousness of ceremonial deism where citizens are being personally confronted with personal invocations of faith.[299] The local government setting presents a different environment for prayer than is seen in state or federal government, and while there are benefits of civic participation at this level, the negative impact of legislator-led prayer are exacerbated.[300]

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precludes school officials from sponsoring an official prayer, even for mature adults.").

296. *See* Hudson v. Pittsylvania County, 107 F. Supp. 3d 524, 535 (W.D. Va. 2015) ("When Plaintiffs wish to advocate for local issues in front of the Board, they should not be faced with the choice between staying seated and unobservant, or acquiescing to the prayer practice of the Board, as joined by most, if not all, of the remaining public in attendance.").

297. *See* Corbin, *supra* note 58, at 1546 ("Any reasonable person, the argument continues, would recognize that the state is not endorsing one version of religious truth or favoring one religion over others.").

298. *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 37 (2004) (O'Connor, J., concurring) (invoking the "history, character, and context" of such religious references as a basis for constitutionality), *abrogated on other grounds by* Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014); *see also supra* note 3 (contextualizing the use of this invocation by the Supreme Court).

299. *See, e.g.*, Lund v. Rowan County, No. 1:13CV207, 2013 WL 12137142, at *2–3 (M.D.N.C. July 23, 2013) (illustrating the personal nature of the prayer practice through thirteen different examples of prayers given by the Rowan County Board of Commissioners), *rev'd and remanded*, 837 F.3d 407 (4th Cir. 2016), *as amended* (Sept. 21, 2016), *on reh'g en banc*, 863 F.3d 268 (4th Cir. 2017).

300. Ceremonial deism has also been criticized for favoring religion over non-religion, by telling "atheists that their beliefs don't count and aren't worthy of being expressed at governmental occasions." *See* Segall, *supra* note 96, at 730 (contending that ceremonial deism also requires judges to "parse" the contents of prayers to assess if they are referring to a generic or specific god).

This factor, while not outcome-determinative, should be considered by courts confronted with legislative prayer challenges.[301] It can reveal a value of intimacy or smallness, depending on the nature of its interaction with other factors.[302] Courts must assess whether the local government setting of the prayers is being used to create direct community between the government and citizens, or if it is being used to intimidate audience members into participation.[303]

V. Conclusion

Throughout the Supreme Court's Establishment Clause jurisprudence, there has been significant confusion and an overall lack of clarity.[304] Nowhere is this struggle more evident than in the legislative prayer context.[305] Although the Supreme Court has seemingly created an exception for legislative prayer,[306] the Court's insistence on a fact-sensitive inquiry has left lower courts struggling to define the line of what constitutes impermissible legislative prayer.[307] While *Marsh* and *Town of Greece* both provide clear examples of permissible legislative prayer practices, the Court has yet to define a clear boundary for lower courts to operate within.[308] However, as Justice Benjamin Cardozo once wrote,

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301. *See supra* notes 160–161 and accompanying text (discussing the Fourth Circuit's holistic consideration of the four factors).

302. *See* Richard Thompson Ford, *Bourgeois Communities: A Review of Gerald Frug's City Making*, 56 STAN. L. REV. 231, 234 (2003) (observing the "civic virtues of relative intimacy, opportunities for meaningful citizen participation, and proximity to specific local concerns" at the local government level).

303. *See* Town of Greece v. Galloway, 572 U.S. 565, 589 (2014) (clarifying that legislative prayer may not be "a means to coerce or intimidate others").

304. *See supra* Part II.A (reviewing the history of Establishment Clause interpretation).

305. *See supra* Part II.C (discussing the Supreme Court's prior legislative prayer jurisprudence).

306. *See Town of Greece*, 572 U.S. at 575 ("*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." (quoting Marsh v. Chambers, 463 U.S. 783, 796, 813 (1983) (Brennan, J., dissenting))).

307. *See supra* notes 129–138 (outlining the disharmony between the two circuit court decisions).

308. *See Town of Greece*, 572 U.S. at 577 ("A test that would sweep away what

courts should operate "with insight into social values, and with suppleness of adaptation to changing social needs."[309] Even given the lack of a doctrinal test, the Supreme Court has set forth values surrounding legislative prayer to guide analysis of constitutionality.[310] In *Marsh v. Chambers* the Court expressed a societal value in honoring tradition.[311] In *Town of Greece v. Galloway* the Court stressed the inclusivity of each prayer practice.[312] The Court's articulation of these values reflects the broader Establishment Clause jurisprudence and should not be dismissed by lower courts just because there is no clear legislative prayer test.[313]

In attempting to navigate the grey area of constitutionality, the Fourth Circuit has devised a four-factor test to aid in judging when a prayer practice has gone beyond what has been sanctioned by the Court.[314] In many ways these factors reflect the values set forth by the Supreme Court and can inform courts' determinations of constitutionality, depending on the findings of the fact-sensitive inquiry.[315] For example, by considering the commissioners as the sole prayer-givers, a court is not only deciding whether or not the

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has so long been settled would create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent.").

309. *See* BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 58 (2010) (observing that the judiciary should find "its chief worth in making vocal and audible the ideals that might otherwise be silenced, in giving them continuity of life and expression, in guiding and directing choice within the limits where choice ranges").

310. *See* Recent Case, *supra* note 128, at 629–30 (discussing the Establishment Clause values at play in post-*Town of Greece* legislative prayer cases).

311. *See* Marsh v. Chambers, 463 U.S. 783, 792 (1983) ("In 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.").

312. *See Town of Greece*, 572 U.S. at 584–85 (praising the town for its nondiscriminatory prayer practice).

313. *See* Daniel O. Conkle, *The Establishment Clause and Religious Expression in Governmental Settings: Four Variables in Search of a Standard*, 110 W. VA. L. REV. 315, 318–22 (2007) (identifying seven key values underlying Establishment Clause jurisprudence, including inclusivity and tradition).

314. *See supra* notes 188–189 and accompanying text (laying out the Fourth Circuit's proposed factors).

315. *See supra* notes 114–123 and accompanying text (summarizing *Town of Greece*'s requirement of a fact-sensitive inquiry).

commissioners may be the only ones to offer prayers, but rather the court is contemplating whether the board is impermissibly concentrating government control of a religious message in themselves.[316] And because there are likely legitimate justifications for legislator-led prayer,[317] the fact-sensitive inquiry is of the utmost importance to delineate between a constitutional practice and an unconstitutional one.[318] Furthermore, these considerations highlight the need to consider the factors in conjunction with one another.[319] The commissioners as sole prayer-givers may not be fatal if the lawmakers are gathering in a corner to pray for themselves before a meeting, but when combined with directives to the audience to stand and participate in the prayers and the other factors, it can be deadly.[320]

The Fourth Circuit test correctly determined that the practice at issue in *Lund*, and by extension in *Bormuth*, is not faithful to the Supreme Court's values of tradition and multiplicity in legislative prayer.[321] These practices are used to force religion through control and conformity, rather than using religion to

316. *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 586–87 (1992) (stressing the government's complete control over the graduation prayers as evidence of an Establishment Clause violation).

317. For example, an amicus brief for *Bormuth v. County of Jackson* raised a concern the administrative costs and burden of arranging for volunteer clergy to pray before each meeting. Brief of Amici Curiae State of Michigan & Twenty-One Other States in Support of Jackson County & Affirmance at 10, Bormuth v. County of Jackson, 870 F.3d 494 (6th Cir. 2017) (No. 15-1869), 2017 WL 1710341, at *10.

318. *See* Paul Horwitz, *The Religious Geography of* Town of Greece v. Galloway, 2014 SUP. CT. REV. 243, 285–87 (2014) (highlighting the importance of the fact-sensitive inquiry, particularly at the local government level).

319. *See supra* notes 160–162 and accompanying text (detailing the Fourth Circuit's rationale for a holistic factual review).

320. *See* Brief of Amicus Curiae Americans United, *supra* note 276, at 11–13 (emphasizing that the only meetings at which the Board did not pray were the meetings where no audience members were in attendance was evidence of an intent to proselytize).

321. *See* Recent Case, *supra* note 128, at 632 ("With no guidance on how to review Rowan County's prayer practice, the Fourth Circuit conducted an analysis based on a collection of principles and values it drew from across establishment jurisprudence."); *see also id.* (listing the Fourth Circuit's values as "nonpreference for any religion, the prohibition on the government composing prayers, accommodation of religion, noncoercion, avoiding 'political division along religious lines,' protecting religious minorities, and encouraging ecumenical prayer that is welcoming to all" (internal citations omitted)).

remind the lawmakers of the ideals of democracy.[322] The Sixth Circuit's rejection of this test shines a light on the need for further guidance from the Supreme Court on this issue, particularly in cases concerning legislator-led prayer.[323] The Supreme Court recently denied petitions for certiorari[324] and rehearing[325] for both *Lund*[326] and *Bormuth*,[327] signaling that there is no relief in sight for lower courts grappling with these cases.[328] Justice Thomas,

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322. *See* Simpson v. Chesterfield County Bd. of Supervisors, 404 F.3d 276, 283 (4th Cir. 2005) ("[O]urs is a diverse nation not only in matters of secular viewpoint but also in matters of religious adherence. Advancing one specific creed at the outset of each public meeting runs counter to the credo of American pluralism and discourages the diverse views on which our democracy depends.").

323. *See* Petition for Writ of Certiorari at 25, Rowan County v. Lund, No. 17-565 (U.S. Oct. 12, 2017) ("Only [the Supreme] Court can resolve the intractable conflict between two *en banc* courts of appeals and provide state and local officials with much-needed guidance on this important, frequently recurring Establishment Clause question.").

324. *See id*. at 1 (filing Rowan County's petition for certiorari on October 12, 2017); Petition for Writ of Certiorari at 1, Bormuth v. County of Jackson, No. 17-7220 (U.S. Dec. 21, 2017) (filing Peter Bormuth's petition for certiorari on December 21, 2017).

325. *See* Petition for Rehearing at 1, Rowan County v. Lund, No. 17-565 (U.S. July 23, 2018), 2018 WL 3584721 ("Petitioner Rowan County understands that this Court grants Rule 44.2 rehearing petitions exceedingly rarely. But this petition presents one of those very rare situations."); Corrected Petition for Rehearing at 1, Bormuth v. County of Jackson, No. 17-7220 (U.S. July 23, 2018) (arguing that the Supreme Court should grant rehearing under Supreme Court Rule 44.2).

326. *See* Rowan County v. Lund, 138 S. Ct. 2564, 2564 (2018) (denying Rowan County's petition for certiorari); Rowan County v. Lund, No. 17-565, 2018 WL 4037498, at *1 (U.S. Aug. 24, 2018) (denying Rowan County's petition for rehearing).

327. *See* Bormuth v. Jackson County, 138 S. Ct. 2708 (2018) (denying Peter Bormuth's petition for certiorari), *reh'g denied*, No. 17-7220, 2018 WL 4037507 (U.S. Aug. 24, 2018); Bormuth v. Jackson County, No. 17-7220, 2018 WL 4037507, at *1 (U.S. Aug. 24, 2018) (denying Peter Bormuth's petition for rehearing).

328. *See* Robert W. T. Tucci, *A Moral Minefield: Resolving the Dispute Over Legislator-Led Invocations*, 53 WAKE FOREST L. REV. 601, 602–04 (2018) ("[E]ven if the Supreme Court did not take the opportunity presented by the petition for certiorari filed in *Lund v. Rowan County*, it should nevertheless quickly resolve the moral minefield created by the existing circuit split."). Interestingly, the Supreme Court took its time before denying both petitions for certiorari, rescheduling Conference on *Lund* fifteen times and *Bormuth* thirteen times. *Rowan County, North Carolina v. Lund*, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/rowan-county-north-carolina-v-lund/ (last visited Jan. 22, 2019) (on file with the Washington and Lee Law Review); *Bormuth v. Jackson County, Michigan*, SCOTUSBLOG, http://www.scotus

joined by Justice Gorsuch, dissented from the denial of certiorari for *Lund*, arguing that "[t]his Court should have stepped in to resolve this conflict."[329] But until the Supreme Court provides more clarity, the Fourth Circuit's test provides a useful tool for other courts to assesses legislative prayer.

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blog.com/case-files/cases/bormuth-v-jackson-county-michigan/ (last visited Jan. 22, 2019) (on file with the Washington and Lee Law Review).

329. *See Rowan*, 138 S. Ct. at 2567 ("[T]he Sixth and Fourth Circuits are now split on the legality of legislator-led prayer. States and local lawmakers can lead prayers in Tennessee, Kentucky, Ohio, and Michigan, but not in South Carolina, North Carolina, Virginia, Maryland, or West Virginia.").