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GOVERNMENT SPEECH DOCTRINE— LEGISLATOR-LED PRAYER’S SAVING GRACE

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INTRODUCTION

Scholars and law students alike have described the Supreme Court’s Establishment Clause jurisprudence as “confused,”¹ a “mess,”² and “chaos.”³ Supreme Court justices have also expressed disapproval and frustration.⁴ Legislative prayer, the custom of beginning governmental sessions with prayer, is one particular facet of Establishment Clause jurisprudence that lacks

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¹ *E.g.*, Steven G. Gey, *Reconciling the Supreme Court’s Four Establishment Clauses*, 8 U. PA. J. CONST. L. 725, 725 (2006); Douglas G. Smith, *The Establishment Clause: Corollary of Eighteenth-Century Corporate Law?*, 98 NW. U. L. REV. 239, 294 (2003).

² *E.g.*, 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, 315 (2007); Gey, *supra* note 1, at 725.

³ *E.g.*, Lawrence J. Chanice, Comment, *Sante Fe Independent School District v. Doe: Establishment Clause Chaos on the High School Gridiron*, 75 ST. JOHN’S L. REV. 137, 137 (2001); John W. Huleatt, Comment, *Accommodation or Endorsement? Stark v. Independent School District: Caught in the Tangle of Establishment Clause Chaos*, 72 ST. JOHN’S L. REV. 657, 657 (1998).

⁴ *See, e.g.*, *Utah Highway Patrol Assoc. v. Am. Atheists, Inc.*, 132 S. Ct. 12, 13 (2011) (Thomas, J., dissenting from the denial of certiorari) (mem.) (describing the Court’s Establishment Clause jurisprudence as “in shambles”); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45 n.1 (2004) (Thomas, J., concurring) (“Our jurisprudential confusion [under the Establishment Clause] has led to results that can only be described as silly.”); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 861 (1995) (Thomas, J., concurring) (“[O]ur Establishment Clause jurisprudence is in hopeless disarray”); *Edwards v. Aguillard*, 482 U.S. 578, 639 (1987) (Scalia, J., dissenting) (describing the Court’s Establishment Clause jurisprudence as “embarrassing”).

clarity.⁵ The Supreme Court has only ever decided two legislative prayer cases—*Marsh v. Chambers*⁶ in 1983 and *Town of Greece v. Galloway*⁷ in 2014—denying certiorari in seven other cases.⁸

Legislative prayer doctrine is “sometimes described as ‘carving out an exception’ to the Court’s Establishment Clause jurisprudence.”⁹ Unlike most other Establishment Clause claims, the Court has refrained from applying one of its pre-existing “tests”¹⁰—in particular, the *Lemon* test¹¹—because

⁵ 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, 222 (2008) (noting the “fundamental[] flaw[s]” in the Court’s Establishment Clause framework and describing legislative prayer as an “unworkable situation”); Christopher C. Lund, *Leaving Disestablishment to the Political Process*, 10 DUKE J. CONST. L. & PUB. POL’Y 45, 53 (2014) (describing the constitutional standards of legislative prayer as “unclear”).

⁶ 463 U.S. 783 (1983).

⁷ 572 U.S. 565 (2014).

⁸ See *Bormuth v. Jackson County*, 138 S. Ct. 2708 (2018) (mem.); *Rowan County v. Lund*, 138 S. Ct. 2564 (2018) (mem.); *Rubin v. City of Lancaster*, 571 U.S. 944 (2013) (mem.); *Forsyth County v. Joyner*, 565 U.S. 1157 (2012) (mem.); *Turner v. City Council of Fredericksburg*, 555 U.S. 1099 (2009) (mem.); *Simpson v. Chesterfield Cty. Bd. of Supervisors*, 546 U.S. 937 (2005) (mem.); *Snyder v. Murray City Corp.*, 526 U.S. 1039 (1999) (mem.).

⁹ *Town of Greece*, 572 U.S. at 575 (quoting *Marsh*, 463 U.S. at 796, 813 (Brennan, J., dissenting)). The Court’s reasoning in its most recent Establishment Clause case, which involved the constitutionality of a large cross-shaped World War I memorial on public land, indicates that the general approach taken by the Court in its legislative prayer cases—that is, a history-and-tradition-based approach—is broader than some may have first thought. See generally Am. Legion v. Am. Humanist Ass’n., 139 S. Ct. 2067 (2019). For a broad survey of the Court’s use of tradition as a means of constitutional interpretation, see generally Marc O. DeGirolami, *The Traditions of American Constitutional Law*, 95 NOTRE DAME L. REV. (forthcoming 2020) (St. John’s Sch. of Law Legal Studies Research Paper Series, Paper No. 19-0019, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3349187.

¹⁰ See *Marsh*, 463 U.S. at 796 (Brennan, J., dissenting) (“The Court makes no pretense of subjecting Nebraska’s practice of legislative prayer to any of the formal ‘tests’ that have traditionally structured our inquiry under the Establishment Clause.”). For an in-depth discussion of Establishment Clause standards and theories, see Gey, *supra* note 1, at 728–64.

¹¹ Under the *Lemon* test, courts must determine whether the challenged government action (1) has a secular purpose; (2) has a “principal or primary effect . . . that neither advances nor inhibits religion”; and (3) does “not foster ‘an excessive government entanglement with religion.’” *Lemon v. Kurtzman*, 403 U.S. 603, 612–13 (1971) (first citing *Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 243 (1968); then quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970)). In *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O’Connor, J., concurring), Justice O’Connor proposed a refinement to *Lemon*’s effect prong: that governmental action “not have the effect of communicating a message of government endorsement or disapproval of religion.” This standard was adopted by a majority of the Court in

“history support[s] the conclusion that legislative invocations are compatible with the Establishment Clause.”¹² This is not to say legislative prayer is per se constitutional, because the Court has made clear it is not. Only prayer practices that “fit[] within the tradition long followed in Congress and the state legislatures” accord with the Establishment Clause.¹³ While the Supreme Court strongly suggests that legislative prayer, as a general matter, is constitutional, there is tremendous confusion over how to adjudicate challenges to legislative prayer practices, especially prayer practices that differ factually from those upheld in *Marsh* and *Town of Greece*.

Two recent circuit court decisions highlight this confusion. First, in *Lund v. Rowan County*, the Fourth Circuit, sitting en banc, held that the Rowan County Board of Commissioners’ practice of beginning board meetings with a prayer composed and delivered by one of its members violated the Establishment Clause for the following four reasons: (1) the commissioners served as the sole prayer givers; (2) the prayers exclusively invoked, and sometimes advanced, Christianity; (3) the commissioners invited attendees to participate in the prayers; and (4) the local government setting increased the potential for coercion.¹⁴ Two months later, in *Bormuth v. County of Jackson*, the Sixth Circuit, also sitting en banc, upheld the Jackson

Wallace v. Jaffree, 472 U.S. 38, 69, 76 (1985), and has come to be known as the “endorsement test.” For further discussion of the endorsement test, see generally Mark Strasser, *The Endorsement Test Is Alive and Well: A Cause for Celebration and Sorrow*, 39 PEPP. L. REV. 1273 (2013). The *Lemon* test has been criticized by Supreme Court justices, lower court judges, and scholars for decades. See, e.g., *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2081 nn.13–15 (2019) (collecting criticisms). And although five or more sitting justices have, on multiple occasions, rejected or expressed disapproval of the *Lemon* test in at least some contexts, see, e.g., *Am. Legion*, 139 S. Ct. 2067 *passim*; *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 890 (2005) (Scalia, J., dissenting), it is yet to be explicitly overruled by a majority of the Court, leaving scholars to speculate its fate, see, e.g., Marc O. DeGirolami, *Cross Purposes*, PUB. DISCOURSE (June 24, 2019), <https://www.thepublicdiscourse.com/2019/06/53508/>.

¹² *Town of Greece*, 572 U.S. at 575. Kent Greenawalt writes that the Court dispensed with the *Lemon* test in the legislative prayer context because sometimes “accurate application of the test yields results that are mistaken under the constitutional provision.” KENT GREENAWALT, 2 RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS 50 (Princeton Univ. Press 2008).

¹³ *Town of Greece*, 572 U.S. at 577.

¹⁴ 863 F.3d 268, 281 (4th Cir. 2017) (en banc) (10-5 decision), *cert denied*, 138 S. Ct. 2564 (2018).

County Board of Commissioners' commissioner-led invocation practice¹⁵—which was practically identical to Rowan County's. The Supreme Court denied certiorari in both cases.¹⁶

Justice Thomas dissented from the denial of Rowan County's petition for certiorari and authored an opinion joined by Justice Gorsuch.¹⁷ He began his dissent rather bluntly: "This Court's Establishment Clause jurisprudence is in disarray."¹⁸ He then criticized the Fourth Circuit's decision as "both unfaithful to [the Court's] precedents and a historical [sic]."¹⁹ Lastly, he highlighted the Fourth Circuit's failure to consider the country's long history of legislator-led prayer and argued the Court should have taken the case to resolve the circuit split.²⁰

One reason for the conflict between the Fourth and Sixth Circuits' rulings, as well as the general confusion over legislative prayer—in *Lund* and *Bormuth*, legislator-led prayer—is the Supreme Court's failure to confront a doctrinal dichotomy: whether legislative prayer constitutes government or private speech and how classifying legislative prayer as one or the other affects the Establishment Clause analysis.

This Note argues that *Lund* was decided incorrectly in part because the Fourth Circuit failed to analyze the type of speech at issue before assessing the constitutionality of the prayer practice. This Note is composed of four parts. Part I surveys the Supreme Court's legislative prayer jurisprudence—*Marsh* and *Town of Greece*. Part II outlines *Lund* and *Bormuth*, and the Fourth and Sixth Circuits' dissimilar applications of the Supreme Court's precedent. Part III argues that courts must first classify legislative prayers as either government or private speech before assessing whether a prayer practice violates the Establishment Clause. It further argues that legislator-led prayer is a form of government speech. Lastly, Part IV, the most extensive of this Note, argues that because legislator-led prayer is government speech, courts must focus on the intent underlying legislator-led prayer practices, and only practices motivated by impermissible purposes should be deemed unconstitutional. It then proposes a

¹⁵ 870 F.3d 494, 498 (6th Cir. 2017) (en banc) (9-6 decision), *cert denied*, 138 S. Ct. 2708 (2018).

¹⁶ *Bormuth v. Jackson County*, 138 S. Ct. 2708 (2018) (mem.); *Rowan County v. Lund*, 138 S. Ct. 2564 (2018) (mem.).

¹⁷ *Lund*, 138 S. Ct. 2564 (Thomas, J., dissenting from the denial of certiorari).

¹⁸ *Id.*

¹⁹ *Id.* at 2566.

²⁰ *Id.* at 2566–67.

framework to determine whether a legislative prayer practice classified as government speech is motivated by impermissible intent and analyzes under this framework the legislator-led prayer practices in *Lund* and *Bormuth*.

I. THE SUPREME COURT'S LEGISLATIVE PRAYER JURISPRUDENCE

A. *Marsh v. Chambers*

The Supreme Court first addressed the constitutionality of legislative prayer in *Marsh v. Chambers*.²¹ In 1980, Nebraska State Senator Earnest Chambers brought an action challenging the legislature's custom of beginning each session with a prayer delivered by a paid chaplain.²² The chaplain was a Presbyterian minister who had served in that post since 1965.²³ Both the District Court of Nebraska and the Eighth Circuit found that the practice violated the Establishment Clause.²⁴ The Supreme Court disagreed.

The Court, in an opinion authored by Chief Justice Burger, found that legislative prayer is “deeply embedded in the history and tradition of this country” and has always coexisted with the Establishment Clause.²⁵ The Court highlighted that one of the First Congress's actions was to adopt a policy to appoint a paid chaplain to deliver invocations at each congressional session, with most states, including Nebraska, following its lead.²⁶ Because the language of the Bill of Rights was agreed upon three days after this policy was enacted, the Court concluded that the Framers did not understand the Establishment Clause to prohibit legislative prayer.²⁷

²¹ 463 U.S. 783 (1983).

²² *Chambers v. Marsh*, 504 F. Supp. 585, 586 (D. Neb. 1980).

²³ *Id.*

²⁴ The district court found that although the prayers themselves did not violate the Establishment Clause under the *Lemon* test, the use of public funds to finance a chaplain “of one faith, of one denomination, of one set of religious beliefs, embodied in one person” was impermissible. *Id.* at 588–89, 592. The Eighth Circuit affirmed the judgment but held that the practice taken as a whole violated all three prongs of *Lemon*. *Chambers v. Marsh*, 675 F.2d 228, 234–35 (8th Cir. 1982).

²⁵ *Marsh*, 463 U.S. at 786.

²⁶ *Id.* at 787–89.

²⁷ *Id.* at 788, 791.

The Court went on to dismiss arguments contesting three specific features of the Nebraska Legislature's prayer practice. First, the Court held that "[a]bsent proof that the chaplain's reappointment stemmed from an impermissible motive, . . . his long tenure does not in itself conflict with the Establishment Clause."²⁸ Second, the Court took no issue with the chaplain's remuneration because the Continental Congress and some of the early states compensated their chaplains.²⁹ Finally, the Court held that the Judeo-Christian nature of the prayers was acceptable because "there [wa]s no indication that the prayer opportunity ha[d] been exploited to proselytize or advance any one, or to disparage any other, faith or belief."³⁰ Accordingly, the Court held that Nebraska's prayer practice did not violate the Establishment Clause.

In dissent, Justice Brennan argued that the prayer practice would fail any of the Court's Establishment Clause tests.³¹ He also expressed concerns that legislative prayer would spark political controversies along religious lines and ultimately alienate religious minorities.³² Justice Stevens, also in dissent, argued that the chaplain's sixteen-year tenure reflected an unconstitutional preference for Presbyterianism.³³

B. *County of Allegheny v. ACLU Greater Pittsburgh Chapter*

Nine years later, in *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, a case involving the constitutionality of a crèche displayed in a courthouse, the Court discussed its holding in *Marsh* and indicated that legislative prayers must be nonsectarian, to avoid unconstitutional endorsement of a particular creed or sect.³⁴ This generated tremendous confusion among lower courts³⁵ and spurred rigorous debate among scholars.³⁶

²⁸ *Id.* at 793–94 (explaining that the chaplain “was reappointed because his performance and personal qualities were acceptable to the body appointing him”).

²⁹ *Id.* at 794.

³⁰ *Id.* at 794–95 (“That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.”).

³¹ *Id.* at 800–01, 801 n.11 (Brennan, J., dissenting).

³² *Id.* at 808.

³³ *Id.* at 823 (Stevens, J., dissenting).

³⁴ 492 U.S. 573, 603 (1989) (explaining that the prayers at issue in *Marsh* were constitutional because “the particular chaplain had ‘removed all references to Christ’” (quoting *Marsh*, 463 U.S. at 793 n.14)).

³⁵ *Compare Wynne v. Town of Great Falls*, 376 F.3d 292, 298–99 (4th Cir. 2004) (holding unconstitutional a town council's prayer practice because the prayers

C. Town of Greece v. Galloway

In 2014, the Supreme Court decided its second legislative prayer case: *Town of Greece v. Galloway*.³⁷ In 1999, Greece, New York, began opening its town board meetings with invocations delivered by local volunteer ministers.³⁸ Greece selected these ministers through an informal process of calling congregations listed in the town directory.³⁹ The town welcomed invocations from clergymen or laypeople of any faith—or no faith—and never denied a would-be prayer-giver’s request.⁴⁰ However, almost all of the congregations in Greece were Christian; and until 2007, all of the prayer-givers were too.⁴¹ Susan Galloway and Linda Stephens sued, claiming the town was sponsoring sectarian prayers and expressing a preference for Christian prayer-givers, in violation of the Establishment Clause.⁴²

The Supreme Court ruled in the town’s favor. The Court, in an opinion authored by Justice Kennedy, began by noting that the Establishment Clause—legislative prayer practices in particular—“must be interpreted ‘by reference to historical practices and understandings.’”⁴³ The Court framed the issue as

“‘frequently’ contained references to ‘Jesus Christ,’ and thus promoted one religion over all others” (footnote omitted), *with Snyder v. Murray City Corp.*, 159 F.3d 1227, 1234 n.10 (10th Cir. 1998) (en banc) (“[T]he context of the decision in *Marsh* . . . underscores the conclusion that the mere fact a prayer evokes a particular concept of God is not enough to run afoul of the Establishment Clause.”).

³⁶ Compare Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements*, 94 MINN. L. REV. 972, 995–96 (2010) (arguing that *County of Allegheny* created a “nonsectarian standard” for legislative prayer), *with* Robert Luther III & David B. Caddell, *Breaking Away from the “Prayer Police”: Why the First Amendment Permits Sectarian Legislative Prayer and Demands a “Practice Focused” Analysis*, 48 SANTA CLARA L. REV. 569, 571 (2008) (“*Marsh* permits the use of sectarian references despite the confusion within lower federal courts generated by reliance on dicta contained in *County of Allegheny* . . .”).

³⁷ 572 U.S. 565 (2014).

³⁸ *Id.* at 570.

³⁹ *Id.* at 571.

⁴⁰ *Id.*

⁴¹ *Id.* Once litigation commenced, however, Greece invited a Jewish layman and the chairman of a Baha’i temple to deliver invocations and granted a Wiccan priestess’s request to do so. *Id.* at 572.

⁴² *Id.*

⁴³ *Id.* at 576–77 (quoting *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in part and dissenting in part)) (“*Marsh* stands for the proposition that it is not necessary to define the precise boundaries of the Establishment Clause where history shows that the specific practice is permitted.”).

“whether the prayer practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures.”⁴⁴

The Court held that Greece’s sectarian invocations were well within the scope of traditional legislative prayer, dismissing *County of Allegheny’s* discussion of *Marsh* as sheer dictum.⁴⁵ The Court found that requiring legislative prayer to be nonsectarian would force legislatures and judges to monitor and censor religious speech, impermissibly entangling government in religious affairs.⁴⁶ It further explained that once prayer is invited into the public domain, the government cannot restrict speakers from praising their deity as conscience dictates.⁴⁷ The Court made clear, however, that the content of legislative prayers is not unrestrained: the prayers must serve a legitimate purpose—for example, “to unite lawmakers in their common effort” or “to lend gravity to the occasion and reflect values long part of the Nation’s heritage.”⁴⁸ Prayer practices that over time reflect a “pattern” of denigration or proselytization will necessarily fall short of these permissible purposes and trigger constitutional limits.⁴⁹ Lastly, the Court held that the eight-year span of solely Christian ministers was constitutionally insignificant because Greece never discriminated against non-Christian prayer-givers.⁵⁰ Accordingly, the Court upheld Greece’s prayer practice.⁵¹

⁴⁴ *Id.* at 577.

⁴⁵ *Id.* at 579–80.

⁴⁶ *Id.* at 581 (citing *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 187–89 (2012)).

⁴⁷ *Id.* at 582.

⁴⁸ *Id.* at 582–83.

⁴⁹ *Id.* at 583, 585. Two remarks explicitly denigrated nonbelievers and religious minorities, but the Court found that these two instances “d[id] not despoil a practice that on the whole reflect[ed] and embrace[d] our tradition.” *Id.* at 585.

⁵⁰ *Id.* at 585–86 (cautioning against affirmative steps to “promote ‘a “diversity” of religious views’ ” (quoting *Lee v. Weisman*, 505 U.S. 577, 617 (1992) (Souter, J., concurring))).

⁵¹ The Court also dismissed arguments that the prayers were unduly coercive. A plurality of the Court found that a reasonable observer would likely be familiar with the tradition of legislative prayer and understand that the practice is not meant to proselytize. *Id.* at 587 (plurality opinion) (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)). The plurality also acknowledged alternatives for attendees who disagree with the prayers: exit the room, arrive after the invocation, or voice a later protest. *Id.* at 590. Justice Thomas wrote a concurring opinion joined by Justice Scalia, arguing that only “actual legal coercion” by “force of law and threat of penalty” is relevant to the Establishment Clause, not psychological coercion as alleged by the

The case drew several other opinions. Justice Alito, in concurrence, stressed that the predominance of Christian ministers resulted from carelessness, not discriminatory intent.⁵² He also discussed how the delegates to the First Continental Congress, despite being divided in religious sentiments, approved of emphatically Christian prayer as a means to unite, not divide.⁵³ Justice Kagan, in dissent, conceded that *Marsh* was correctly decided, but she distinguished Greece's practice in that the prayers offered "were predominantly sectarian."⁵⁴ She also argued that Greece's failure to recognize and accommodate pluralism violated the constitutional command of religious neutrality.⁵⁵

II. ENTER LEGISLATOR-LED PRAYER

Town of Greece was harshly criticized by scholars for its inconsistent and contradictory language and for its failure to dictate a definitive test.⁵⁶ Even after *Town of Greece*, tremendous uncertainty and confusion remains regarding the proper standard to adjudicate challenges to legislative prayer practices; hence, the conflicting outcomes in *Lund* and *Bormuth*.

A. Lund v. Rowan County

In March 2013, Nancy Lund, Liesa Montag-Siegal, and Robert Voelker sued Rowan County, North Carolina, over its commissioner-led prayer practice.⁵⁷ The county board would begin each bimonthly meeting with an invocation delivered by

plaintiffs. *Id.* at 608–10 (Thomas, J., concurring) (quoting *Lee*, 505 U.S. at 640 (Scalia, J., dissenting)).

⁵² *Id.* at 593–94 (Alito, J., concurring).

⁵³ *Id.* at 600–01.

⁵⁴ *Id.* at 616 (Kagan, J., dissenting).

⁵⁵ *Id.*

⁵⁶ See, e.g., Paul Horwitz, *The Religious Geography of Town of Greece v. Galloway*, 2014 SUP. CT. REV. 243, 257 n.93 (2014) (stating that a "flat contradiction" concerning coercion "reflects poorly on the coherence of the opinion"); Lund, *supra* note 5, at 52–53 ("While the Court is clear about its desire to raise the bar, it is profoundly unclear on where exactly it means to set it. The Court offers a multitude of vague and slightly inconsistent phrases. . . . The predictable result is that no one has any idea where the line is."); Krista M. Pikus, *Hopeful Clarity of Hopeless Disarray?: An Examination of Town of Greece v. Galloway and the Establishment Clause*, 65 CATH. U. L. REV. 387, 408 (2015) (opining that the Court "was unwilling or unable to" clarify Establishment Clause jurisprudence); see also *infra* text accompanying notes 103, 228–230.

⁵⁷ *Lund v. Rowan County*, 863 F.3d 268, 273–74 (4th Cir. 2017) (en banc).

one of its five elected commissioners.⁵⁸ Only commissioners were permitted to deliver the invocation, doing so on a rotating basis as an incident of time-honored custom.⁵⁹ All in attendance would be asked to rise and join in the prayer.⁶⁰ Over a five-and-a-half-year period, “Jesus,” “Christ,” or “Savior” were referenced in ninety-seven percent of the board’s prayers.⁶¹

In July 2017, the Fourth Circuit, sitting en banc, held that the Rowan County Board of Commissioners’ prayer practice violated the Establishment Clause.⁶² In an opinion authored by Judge Wilkinson, the majority emphasized two conceptual differences in Rowan County’s practice from those upheld by the Supreme Court: (1) legislators themselves, not outside ministers, led the prayers; and (2) the prayer opportunity was restricted to legislators.⁶³ Thus, the court found that Rowan County’s prayer practice created a higher risk of religious endorsement and coercion than the prayer practices upheld in *Marsh* and *Town of Greece*.⁶⁴

Judge Wilkinson acknowledged the history and tradition of lawmaker-led prayer in federal, state, and local governments but found that while such prayer “is not inherently unconstitutional,” “the identity of the prayer-giver is relevant to the constitutional inquiry.”⁶⁵ He stressed the distinction between extending, as opposed to restricting, the prayer opportunity to legislators.⁶⁶ By limiting the prayer opportunity to commissioners—all of whom were Protestant Christian—the board restricted what faiths could be referenced, “creat[ing] a ‘closed universe’ of prayer-givers dependent solely on election outcomes.”⁶⁷ Judge

⁵⁸ *Id.* at 272.

⁵⁹ *Id.* at 272–73.

⁶⁰ *Id.* at 272.

⁶¹ *Id.* at 273 (citing *Lund v. Rowan County*, 103 F. Supp. 3d 712, 714 (M.D.N.C. 2015)).

⁶² *Id.* at 272.

⁶³ *Id.* at 277.

⁶⁴ *Id.* at 278–79.

⁶⁵ *Id.* at 280.

⁶⁶ *Id.* at 279.

⁶⁷ *Id.* at 281–82 (quoting *Lund v. Rowan County*, 103 F. Supp. 3d 712, 723 (M.D.N.C. 2015)).

Wilkinson expressed concerns over the potential for “political division along religious lines” should prayer-giver selection be left to the political process.⁶⁸

Judge Wilkinson then analyzed three additional aspects of the board’s prayer practice. First, he reviewed the content of the prayers.⁶⁹ He found that the board unconstitutionally advanced Christianity “[b]y proclaiming the spiritual and moral supremacy of Christianity, characterizing the political community as a Christian one, and urging adherents of other religions to embrace Christianity.”⁷⁰ Second, Judge Wilkinson assessed the commissioners’ requests for attendees to stand and join in the prayers. These requests, he determined, were indicative of “an effort ‘to promote religious observance among the public.’”⁷¹ He also emphasized the proselytizing effect of such invitations coming from town leaders, which *Town of Greece* explicitly cautioned against.⁷² Finally, the local intimate setting was deemed unduly coercive because the attendees’ alternatives—arrive late, leave the room, or remain seated—“served only to marginalize.”⁷³ Accordingly, given “the totality of the circumstances,” the Fourth Circuit held that the Rowan County Board of Commissioners’ prayer practice violated the Establishment Clause.⁷⁴

B. *Bormuth v. County of Jackson*

In August 2013, Peter Bormuth brought an action challenging the constitutionality of the Jackson County, Michigan, Board of Commissioners’ commissioner-led prayer practice.⁷⁵ At the start of each board meeting, the chairman of the board would request all present to stand and bow their heads.⁷⁶ On a rotating basis, one of the board’s nine elected

⁶⁸ *Id.* at 282 (quoting *Lemon v. Kurtzman* 403 U.S. 602, 622 (1971)). The prayer practice did in fact create a contentious campaign issue in the 2016 board elections, with two incumbents who favored the practice prevailing over two challengers. *Id.*

⁶⁹ The court acknowledged the Supreme Court’s warning to not supervise and censor religious speech but explained that an inquiry into the “entire record” was necessary. *Id.* at 283.

⁷⁰ *Id.* at 286.

⁷¹ *Id.* at 287 (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 588 (2014) (plurality opinion)).

⁷² *Id.* (quoting *Town of Greece*, 572 U.S. at 588 (plurality opinion)).

⁷³ *Id.* at 288.

⁷⁴ *Id.* at 289.

⁷⁵ *Bormuth v. County of Jackson*, 870 F.3d 494, 498 (6th Cir. 2017) (en banc).

⁷⁶ *Id.*

commissioners would then deliver a solemn, often Christian, invocation.⁷⁷ Other commissioners would not review the content of prayers individually or as a board.⁷⁸ Bormuth, a self-professed Pagan and Animist, found the prayers “severely offensive” and raised his concerns to the board during the public comment segment of a meeting.⁷⁹ Bormuth claimed that when he did so, a commissioner “swiveled his chair and turned his back to [him].”⁸⁰ He alleged further that after he commenced this lawsuit, the board declined to appoint him to a planning committee, selecting two less-qualified candidates instead.⁸¹

In September 2017, an en banc court of the Sixth Circuit upheld the Jackson County Board of Commissioners’ prayer practice.⁸² In an opinion authored by Judge Griffin, the majority emphasized *Town of Greece*’s instruction “to focus upon ‘the prayer opportunity as a whole’ in light of ‘historical practices and understandings.’”⁸³ Judge Griffin found that legislator-led prayer was amply supported by history and tradition.⁸⁴ In addition, he noted the Supreme Court’s recognition of legislator-led prayer. He pointed to the *Marsh* Court citing an amicus brief describing how numerous legislatures permit member-led invocations and how in *Town of Greece* a councilman had delivered an invocation and others had offered silent prayers.⁸⁵ Accordingly, the court found no constitutionally significant distinction between lawmaker-led and lawmaker-approved prayer.⁸⁶

Next, Judge Griffin considered the content of the prayers. The predominantly Christian prayers were consistent with those accepted by the Framers and in compliance with the content restrictions dictated in *Town of Greece*.⁸⁷ Further, the individual

⁷⁷ *Id.* at 497–98.

⁷⁸ *Id.* at 498.

⁷⁹ *Id.* at 498–99.

⁸⁰ *Id.* at 499.

⁸¹ *Id.*

⁸² *Id.* at 498. The court acknowledged at the outset that its decision conflicts with the Fourth Circuit’s *Lund* decision, but it found the Fourth Circuit’s reasoning “unpersuasive.” *Id.* at 509 n.5.

⁸³ *Id.* at 509 (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576, 585 (2014)).

⁸⁴ *Id.* at 509–10.

⁸⁵ *Id.* at 510–11.

⁸⁶ *Id.* at 512.

⁸⁷ *Id.* Bormuth cited part of a prayer that he claimed denigrated minority faiths: “Bless the Christians worldwide who seem to be targets of killers and extremists.” *Id.* However, the court found that even assuming this language signaled disfavor

faiths of the commissioners—all nine of whom were Christian—were deemed insignificant given the diversity of faiths—that is, the many different denominations—within Christianity and the “dynamic, not static,” composition of the board, which is subject to change with each election.⁸⁸ Judge Griffin emphasized that the policy was facially neutral and nondiscriminatory; and given *Marsh*’s rejection of the *Lemon* test, the court dismissed claims of religious endorsement.⁸⁹

Lastly, the court dismissed Bormuth’s arguments regarding coercion. First, Judge Griffin found that the commissioners’ “commonplace,” “reflexive” requests for attendees to rise and remain silent in no way mandated participation.⁹⁰ Further, leaving the room, arriving late, or protesting after the prayer were deemed sufficient alternatives to protect against perceived pressure to participate.⁹¹ Second, while the commissioners “did react poorly to Bormuth’s actions,” context showed that “they reacted not to his beliefs but to the litigious way he chose to express them”—that is, filing another lawsuit.⁹² Third, there was no support in the record for Bormuth’s assertion that he did not receive his desired appointment because he objected to the prayer practice.⁹³ Accordingly, the Sixth Circuit upheld Jackson County’s prayer practice.

toward dissenters, this sole remark did not despoil the board’s prayer practice. *Id.* (quoting *Town of Greece*, 572 U.S. at 585).

⁸⁸ *Id.* at 513.

⁸⁹ *Id.* at 513–15.

⁹⁰ *Id.* at 517 (quoting *Town of Greece*, 572 U.S. at 599 (Alito, J., concurring)).

⁹¹ *Id.* at 516 (quoting *Town of Greece*, 572 U.S. at 590 (plurality opinion)). The court reasoned that despite the Fourth Circuit finding that these options only marginalized the attendees, “they [were] options Justice Kennedy’s plurality opinion expressly approved.” *Id.* at 516 n.11 (citing *Lund v. Rowan County*, 863 F.3d 268, 320 (4th Cir. 2017) (en banc) (Agee, J., dissenting)).

⁹² *Id.* at 518 & n.12 (citing five additional cases where Bormuth sued government officials).

⁹³ *Id.* at 519.

III. GOVERNMENT SPEECH AND LEGISLATOR-LED PRAYER

Much has since been written about legislator-led prayer.⁹⁴ Amid this growing body of scholarship, there is no consensus on how courts should assess the constitutionality of legislator-led prayer practices. Many authors criticize the Supreme Court for failing to sufficiently clarify a standard for legislative prayer that can apply broadly to the many unique prayer practices legislative bodies engage in.⁹⁵ Some authors have even advanced new standards or tests for legislator-led prayer.⁹⁶

This Note argues that the general confusion over legislative prayer is due in part to courts' failure to first classify the prayers as either government or private speech. This speech inquiry is imperative because "different Establishment Clause rules apply to different types of speakers."⁹⁷ Considering First Amendment

⁹⁴ See generally, e.g., 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 (2018); Nicholas J. Hunt, *Let Us Pray: The Case for Legislator-Led Prayer*, 54 TULSA L. REV. 49 (2018); John Gavin, Comment, *Praying for Clarity: Lund, Bormuth, and the Split over Legislator-Led Prayer*, 59 B.C. L. REV. E-SUPPLEMENT 104 (2018); Mary Nobles Hancock, Note, *God Save the United States and This Honorable County Board of Commissioners: Lund, Bormuth, and the Fight over Legislative Prayer*, 76 WASH. & LEE L. REV. 397 (2019); Joe H. Nguyen, Note, *The Establishment Clause: The Lemon and Marsh Conflict, Where Lund and Bormuth Leave Us, and the Constitutionality of Exclusive, Legislator-Led Prayer*, 52 SUFFOLK U. L. REV. 135 (2019); Samuel Taxy, Comment, *Pressure to Pray? Thinking Beyond the Coercion Test for Legislator-Led Prayer*, 86 U. CHI. L. REV. 143 (2019); Robert W. T. Tucci, Comment, *A Moral Minefield: Resolving the Dispute over Legislator-Led Invocations*, 53 WAKE FOREST L. REV. 601 (2018).

⁹⁵ See, e.g., Gavin, *supra* note 94, at 111 (noting that *Town of Greece* left an "unclear standard"); Nguyen, *supra* note 94, at 155 ("[T]he area of legislative prayer requires further clarification by the Supreme Court."); Recent Cases, *Lund v. Rowan County*, 863 F.3d 268 (4th Cir. 2017) (*en banc*), 131 HARV. L. REV. 626, 630 (2017) (claiming the Fourth Circuit was "without a framework" and "left with little guidance" due to the factual distinctions between legislator-led prayer and the prayer practices in *Marsh* and *Town of Greece*); Taxy, *supra* note 94, at 184 ("Due to the lack of clarity in *Town of Greece*, many questions pending its resolution went unanswered, particularly how courts should analyze prayer given at local government meetings by councilmembers themselves."); see also sources cited *supra* note 56.

⁹⁶ See, e.g., Hunt, *supra* note 94, at 69 (proposing a "hybrid assessment" consisting of "a historical inquiry" and "an 'actual legal coercion' test"); Taxy, *supra* note 94, at 143 (arguing the practice "should be per se forbidden"); Tucci, *supra* note 94, at 619 (proposing a "strict scrutiny standard").

⁹⁷ Scott W. Gaylord, *When the Exception Becomes the Rule: Marsh and Sectarian Legislative Prayer Post-Summum*, 79 U. CIN. L. REV. 1017, 1061 (2011) [hereinafter Gaylord, *When the Exception*]; see also Scott W. Gaylord, *Licensing Facially Religious Government Speech: Summum's Impact on the Free Speech and Establishment Clauses*, 8 FIRST AMEND. L. REV. 315, 391 (2010) [hereinafter

speech principles when assessing the constitutionality of legislative prayer practices would clarify how courts should apply the limits on legislative prayer dictated in *Marsh* and *Town of Greece*. Specifically, First Amendment speech principles bear on issues including the claims challengers may pursue,⁹⁸ prayer-giver selection,⁹⁹ content-based restrictions or requirements imposed by the legislature,¹⁰⁰ and the content of the prayers.¹⁰¹

The Supreme Court sidestepped the speech issue entirely in *Town of Greece*.¹⁰² Some parts of *Town of Greece* lend credence to a finding that the prayers were government speech, while other parts suggest private speech.¹⁰³ Thus, this doctrinal dichotomy—whether legislative prayer is government or private speech and how classifying legislative prayer as one or the other affects the Establishment Clause analysis—remains unanswered by the Court.¹⁰⁴

A. *Legislative Prayer as Government Speech*

Classifying legislative prayer as government speech is a fairly well-explored proposition. Professor Gaylord writes that legislative prayer is “a specific form of facially religious government speech” because the government controls the speech and conveys its own message.¹⁰⁵ He writes further that where a third party—for example, a guest minister—offers the invocation,

Gaylord, *Facially Religious Government Speech*] (“One must know whether the speech is government speech to know which Establishment Clause test to apply.”).

⁹⁸ See *infra* note 115 and accompanying text.

⁹⁹ See *infra* Section IV.C.2.

¹⁰⁰ See *infra* Section IV.C.3.

¹⁰¹ See *infra* Section IV.C.4.

¹⁰² Both parties and several amici raised arguments over whether the prayers were private or government speech. See, e.g., Brief Amicus Curiae of the Freedom from Religion Foundation in Support of Respondents at 27–31, *Town of Greece v. Galloway*, 572 U.S. 565 (2014) (No. 12-696), 2013 WL 5348583 (arguing that legislative prayer is government speech); Brief for Seven Prayer-Givers as Amici Curiae in Support of Petitioner at 3–9, *Town of Greece*, 572 U.S. 565 (No. 12-696), 2013 WL 4011047 (arguing that legislative prayer is private speech).

¹⁰³ See Caroline Mala Corbin, *Commentary: Exploiting Mixed Speech*, 6 CAL. L. REV. CIR. 37, 41–44 (2015).

¹⁰⁴ Justice Kavanaugh, joined by Justices Alito and Gorsuch, recently cited *Marsh* as a case concerning “government-sponsored prayer” in which “the government itself is engaging in religious speech.” *Morris Cty. Bd. of Chosen Freeholders v. Freedom from Religion Found.*, 139 S. Ct. 909, 910–11 (2019) (mem.) (Kavanaugh, J., respecting the denial of certiorari). This suggests that these three justices would classify legislative prayer as government speech.

¹⁰⁵ Gaylord, *When the Exception*, *supra* note 97, at 1049–50.

the government essentially “adopt[s]” the speech as its own and conveys the speaker’s message.¹⁰⁶ Professor Haupt asserts that *Marsh* was a case “decided on the merits as government speech.”¹⁰⁷ But Haupt, unlike Gaylord, claims that assigning responsibility for speech is not as easy when a third party delivers the invocation.¹⁰⁸

Some, however, disagree that legislative prayer is government speech. For example, Robert Luther III contends that legislative prayer cannot be government speech because “government cannot itself pray.”¹⁰⁹ Professor Corbin argues that the prayers in *Town of Greece* were neither government nor private speech, but “mixed speech”—that is, speech that contains both governmental and private elements and “cannot be cleanly designated into one category or the other.”¹¹⁰ While there is a significant body of scholarship on mixed speech,¹¹¹ including proposed standards for mixed speech cases,¹¹² the Supreme Court has consistently classified expression as either exclusively governmental or exclusively private.¹¹³

¹⁰⁶ *Id.* at 1051.

¹⁰⁷ Claudia E. Haupt, *Mixed Public-Private Speech and the Establishment Clause*, 85 TUL. L. REV. 571, 617 (2011).

¹⁰⁸ *Id.*

¹⁰⁹ 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, 20 (2009).

¹¹⁰ Corbin, *supra* note 103, at 38, 41 (“The message is the result of private and government control—the government created the prayer program and invited clergy to give prayers, while the clergy determined the content of the prayers.”).

¹¹¹ See generally, e.g., Corbin, *supra* note 103; Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 603 (2008); Haupt, *supra* note 107.

¹¹² Professor Corbin argues mixed speech should be recognized as its own category and regulations should be subject to intermediate scrutiny. Corbin, *supra* note 111, at 671–72, 675. For a critique of this argument, see Andy G. Olree, *Identifying Government Speech*, 42 CONN. L. REV. 365, 408–10 (2009). Alternatively, Professor Haupt champions a continuum framework that assigns speech responsibility based on who maintains “effective control” over the message. Haupt, *supra* note 107, at 587–92. Further, she argues that where effective control is equally distributed between private and government actors, speech should be classified as “truly hybrid,” with “First Amendment policy interests support[ing] a finding of private speech despite considerable government involvement.” *Id.* at 618–19, 628.

¹¹³ Corbin, *supra* note 111, at 672; see, e.g., *Matal v. Tam*, 137 S. Ct. 1744, 1760 (2017) (“Trademarks are private, not government, speech.”); *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2246 (2015) (“[S]pecialty license plates . . . convey government speech.”).

Lower courts tend to favor the government speech approach.¹¹⁴ Courts that have classified legislative prayer as government speech have held that this finding restricts the type of claims challengers may pursue, permitting only Establishment Clause claims and foreclosing claims under the Free Exercise, Free Speech, and Equal Protection Clauses.¹¹⁵ But courts have not considered government speech principles beyond this threshold matter. Arguments to consider government speech principles were advanced in dissenting opinions in both *Lund* and *Bormuth*,¹¹⁶ but the majority opinions are devoid of any application of such principles.¹¹⁷

B. *Classifying Legislator-Led Prayer as Government Speech*

Legislator-led prayer should be classified as government speech. When assigning responsibility for speech, courts must decide “whether a government entity is speaking on its own behalf or is providing a forum for private speech.”¹¹⁸ The Supreme Court has acknowledged that this is not always easy.¹¹⁹ Notwithstanding, when legislators themselves offer prayers,

¹¹⁴ See, e.g., *Fields v. Speaker of the Pa. House of Representatives*, 936 F.3d 142, 158–59 (3d Cir. 2019) (classifying legislative prayer offered by a guest chaplain as government speech); *Turner v. City Council of Fredericksburg*, 534 F.3d 352, 354 (4th Cir. 2008) (O’Connor, J., retired, sitting by designation) (classifying legislator-led prayer as government speech); *Simpson v. Chesterfield Cty. Bd. of Supervisors*, 404 F.3d 276, 279, 288 (4th Cir. 2005) (classifying legislative prayer offered by a guest minister as government speech).

¹¹⁵ See, e.g., *Fields*, 936 F.3d at 163 (rejecting claims under the Free Exercise, Free Speech, and Equal Protection Clauses); *Turner*, 534 F.3d at 356 (rejecting a claim under the Free Exercise Clause); *Simpson*, 404 F.3d at 287–88 (rejecting claims under the Free Exercise, Free Speech, and Equal Protection Clauses).

¹¹⁶ In *Lund*, Judge Agee argued that the majority erred in treating significant the prayer-givers’ identities. *Lund v. Rowan County*, 863 F.3d 268, 308 (4th Cir. 2017) (en banc) (Agee, J., dissenting). More specifically, he argued that because legislative prayer is a form of government speech, the public would see no difference between paid chaplains, guest ministers, and the lawmakers who select them. *Id.* Conversely, in *Bormuth*, Judge Moore emphasized the prayer-givers’ identities, arguing that because the prayers are government speech, there is increased potential for endorsement of Christianity and coercion. *Bormuth v. County of Jackson*, 870 F.3d 494, 537 (6th Cir. 2017) (en banc) (Moore, J., dissenting).

¹¹⁷ Judge Wilkinson seemingly recognized that legislator-led prayer is government speech, see *Lund*, 863 F.3d at 281 (“[I]n Rowan County, the prayer-giver was the state itself.”); *id.* at 290 (“When one of Rowan County’s commissioners leads his constituents in prayer, he is not just another private citizen. He is a representative of the state, and he gives the invocation in his official capacity as a commissioner.”), but he failed to consider the effects of this in his analysis.

¹¹⁸ *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 470 (2009).

¹¹⁹ *Id.*

determining who is speaking is rather straightforward. Legislator-led prayer is prayer by a legislator—“it is government speech by definition.”¹²⁰ To be sure, a formal analysis is warranted.

The Supreme Court considers three factors in determining whether speech is attributable to the government. First, the Court looks to whether the mode of expression is “often closely identified in the public mind with the government.”¹²¹ Rather than speculate to the public’s perception, the Court analyzes whether the speech has a governmental purpose and is governmental in nature.¹²² For example, in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, the Court found that members of the public perceive Texas specialty license plates as government messages because the designs are owned by the state, the plates serve to register and identify vehicles, and the top of each plate reads “TEXAS.”¹²³ Legislator-led prayer similarly serves governmental purposes. It “lend[s] gravity to the occasion,” “unite[s] lawmakers in their common effort,”¹²⁴ and “eases the task of governing.”¹²⁵ Furthermore, legislator-led prayer is governmental in nature. The invocations are delivered by legislators at government meetings moments before policymaking¹²⁶ or other governmental functions.¹²⁷ And just as

¹²⁰ Lund, *supra* note 36, at 1017; *cf.* *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (“[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes . . .”).

¹²¹ *Summum*, 555 U.S. at 472.

¹²² *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2248 (2015). In *Bormuth*, Judge Sutton, in a rather perfunctory manner, stated that most people perceive legislative prayer as “a petition by the individual, not the State or City.” *Bormuth v. County of Jackson*, 870 F.3d 494, 523 (6th Cir. 2017) (en banc) (Sutton, J., concurring). But this unsupported statement is nothing more than armchair speculation, which undermines Judge Sutton’s determination. *See* Daniel J. Hemel & Lisa Larrimore Ouellette, *Public Perceptions of Government Speech*, 2017 SUP. CT. REV. 33, 36–37, 66 (2017) (arguing that judicial speculation with regard to public perception is “likely to be biased and inaccurate” and “colored by ideological motivation”).

¹²³ 135 S. Ct. at 2248.

¹²⁴ *Town of Greece v. Galloway*, 572 U.S. 565, 583, 587 (2014).

¹²⁵ *Id.* at 587 (plurality opinion).

¹²⁶ *See* *Lund v. Rowan County*, 863 F.3d 268, 290 (4th Cir. 2017) (en banc) (“[T]he commissioner remains on the scene to participate in the Board’s decision-making.”); *see also, e.g., Commissioner Meeting*, ROWAN COUNTY (Feb. 18, 2013) (00:00–01:50), http://rowancountync.granicus.com/MediaPlayer.php?view_id=2&clip_id=357 (approving the prior meeting’s minutes and moving to add a public hearing to the consent agenda directly after a legislator-led invocation).

license plates bear the state's name or insignia, a town seal or flag is often displayed at public meetings.¹²⁸

Second, the Court considers whether the form of expression “long ha[s] communicated messages from the States.”¹²⁹ In *Pleasant Grove City v. Summum*, a Ten Commandments monument in a public park met this criterion because governments have historically used monuments “to convey some thought or instill some feeling in those who see the structure.”¹³⁰ Legislator-led prayers also communicate state messages. The prayers are delivered by lawmakers, and the custom, which has been practiced for centuries,¹³¹ conveys “a tolerable acknowledgement of beliefs widely held among the people of this country”¹³² and “expresses a common aspiration to a just and peaceful society.”¹³³ Moreover, legislators are the principal audience for the prayers.¹³⁴ Just as government monuments instill some feeling in observers, legislator-led prayer “accommodate[s] the spiritual needs of lawmakers”¹³⁵ and “invites [them] to reflect upon shared ideals and common ends.”¹³⁶

Lastly, the Court evaluates whether the government “maintains direct control over the messages conveyed.”¹³⁷ For example, in *Johanns v. Livestock Marketing Association*, a government advertising campaign promoting beef consumption constituted government speech because the government “effectively controlled” the message and “exercise[d] final

¹²⁷ See *Town of Greece*, 572 U.S. at 591 (plurality opinion) (explaining that board members at this time may be swearing in new police officers or presenting residents with proclamations).

¹²⁸ See *id.* at 624 (Kagan, J., dissenting) (describing a prayer giver “step[ping] up to a lectern (emblazoned with the Town’s seal) at the front of the dais”); Rowan County NC (@rowancountync), TWITTER (Nov. 20, 2017, 6:37 PM), <https://twitter.com/rowancountync/status/932800218403352576> (featuring image of county seal on display).

¹²⁹ *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2248–49 (citing *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009)).

¹³⁰ 555 U.S. at 470.

¹³¹ See *infra* text accompanying note 154.

¹³² *Marsh v. Chambers*, 463 U.S. 783, 792 (1983).

¹³³ *Town of Greece*, 572 U.S. at 575 (citing *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984) (O’Connor, J., concurring)).

¹³⁴ *Id.* at 587 (plurality opinion).

¹³⁵ *Id.* at 588.

¹³⁶ *Id.* at 583 (majority opinion).

¹³⁷ *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2249 (2015).

approval authority” over each advertisement.¹³⁸ Similarly, the government controls the messages conveyed through legislator-led prayer. If a policy contains content-based restrictions, or requires fellow legislators to pre-approve the content of each prayer, then the legislature “itself exercises substantial editorial control over the speech.”¹³⁹ Even absent such a policy, government officials deliver the invocations while acting in their official capacities as legislators.¹⁴⁰ Their status as legislators grants them the opportunity to deliver the invocation.¹⁴¹ Therefore, the government, through its legislators, “maintain[s] exclusive and complete control over the content of the prayers.”¹⁴² Accordingly, legislator-led prayer constitutes government speech.¹⁴³

Under the First Amendment, “the government may not regulate speech based on its substantive content” or “favor one speaker over another.”¹⁴⁴ But when the government speaks, it is immune from the strictures of the Free Speech Clause.¹⁴⁵ The government “‘is entitled to say what it wishes’ and to select the

¹³⁸ 544 U.S. 550, 560–61 (2005).

¹³⁹ *Turner v. City Council of Fredericksburg*, 534 F.3d 352, 354–55 (4th Cir. 2008) (O'Connor, J., retired, sitting by designation); cf. *Pleasant Grove City v. Summum*, 555 U.S. 460, 472 (2009) (internal quotation marks omitted) (“[M]unicipalities generally exercise editorial control over donated monuments through prior submission requirements, design input, requested modifications, written criteria, and legislative approvals of specific content proposals.”).

¹⁴⁰ *Lund v. Rowan County*, 863 F.3d 268, 289–90 (4th Cir. 2017) (en banc).

¹⁴¹ *Id.* at 290; see also *Turner*, 534 F.3d at 355 (“While *Turner* is the literal speaker, he is allowed to speak only by virtue of his role as a Council member.”); *Lund*, *supra* note 36, at 1017 (“When a city councilman or county commissioner has the chance to offer a prayer because of his governmental position, such a prayer is government speech.”).

¹⁴² *Lund*, 863 F.3d at 281 (quoting *Lund v. Rowan County*, 103 F. Supp. 3d 712, 733 (M.D.N.C. 2014)).

¹⁴³ It does not necessarily follow that everything legislators say is government speech subject to the Establishment Clause. For example, legislators referencing their religious faiths during a floor debate would likely not trigger Establishment Clause scrutiny. *Bormuth v. County of Jackson*, 870 F.3d 494, 523 (6th Cir. 2017) (en banc) (Sutton, J., concurring); cf. *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984) (“In each case, the inquiry calls for line drawing; no fixed, *per se* rule can be framed.”). And if such references were subject to Establishment Clause scrutiny, they would be analyzed under a different standard than legislative prayer, including, quite possibly, the *Lemon* test. See *supra* note 11.

¹⁴⁴ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) (first citing *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 96 (1972); then citing *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)).

¹⁴⁵ *Pleasant Grove City v. Summum*, 555 U.S. 460, 467–68 (2009).

views that it wants to express.”¹⁴⁶ Without this power, the government could not function because whenever the government acts, it necessarily takes a particular viewpoint and favors that viewpoint over those it rejects.¹⁴⁷

While acknowledging the necessity of the government speech doctrine, the Court recently cautioned against its expansion because of the potential for misuse—that is, the “government could silence or muffle the expression of disfavored viewpoints.”¹⁴⁸ While this is true, the government’s ability to speak freely is not limitless: government speech is subject to the proscriptions of the Establishment Clause.¹⁴⁹

IV. THE ESTABLISHMENT CLAUSE’S CONSTRAINTS ON LEGISLATIVE PRAYER

The Establishment Clause is the sole constitutional constraint on government speech.¹⁵⁰ As Justice Souter noted in *Summum*, “The interaction between the ‘government speech doctrine’ and Establishment Clause principles has not, however, begun to be worked out.”¹⁵¹ While *Marsh* and *Town of Greece* prescribe several Establishment Clause principles that regulate legislative prayer, neither case considered First Amendment speech principles. Before *Town of Greece*, several scholars theorized how government speech doctrine affects Establishment

¹⁴⁶ *Id.* at 467–68 (first quoting *Rosenberger*, 515 U.S. at 833; then citing *Rust v. Sullivan*, 500 U.S. 173, 194 (1991); and then citing *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring)).

¹⁴⁷ *Matal v. Tam*, 137 S. Ct. 1744, 1757 (2017).

¹⁴⁸ *Id.* at 1758.

¹⁴⁹ *Summum*, 555 U.S. at 468. Government speech is also constrained by the political process. *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000) (“If the citizenry objects, newly elected officials later could espouse some different or contrary position.”). This Note does not explore the political implications of legislator-led prayer and whether, if at all, such implications should provide a basis to invalidate a prayer policy. Compare *West Virginia v. Barnette*, 319 U.S. 624, 638 (1943) (“The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy [and] to place them beyond the reach of majorities and officials . . . [F]undamental rights may not be submitted to vote; they depend on the outcome of no elections.”), with *Emp’t Div. v. Smith*, 494 U.S. 872, 890 (1990) (“Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process.”). For an argument that the effects legislator-led prayer can have on the political process are grounds alone to forbid the practice, see *Taxy*, *supra* note 94, at 177–83.

¹⁵⁰ See *Summum*, 555 U.S. at 468.

¹⁵¹ *Id.* at 486 (Souter, J., concurring).

Clause doctrine—legislative prayer in particular.¹⁵² This Note builds upon this pre-*Town of Greece* literature, proposing an analytical rubric for courts to use in determining whether legislative prayer classified as government speech violates the Establishment Clause.

A. *The Practice Must Be Rooted in History and Tradition*

The threshold inquiry for any legislative prayer case is whether the challenged practice “fits within the tradition long followed in Congress and the state legislatures.”¹⁵³ Legislator-led prayer plainly does. History reflects a tradition of legislator-led prayer dating back to before the Founding. For example, in 1775, the South Carolina Provincial Congress appointed one of its members to offer prayers at the start of each session.¹⁵⁴ Moreover, in 1853, the Senate Judiciary Committee reconsidered the constitutionality of its chaplaincy program following calls for its abolition.¹⁵⁵ It opted to retain the program, stating that the Founders “had no fear or jealousy of religion itself, nor did they wish to see us an irreligious people; they did not intend to prohibit a just expression of religious devotion by the *legislators* of the nation, *even in their public character as legislators*.”¹⁵⁶ For well over a century, Congress has begun legislative sessions with member-led prayer.¹⁵⁷ In addition, records of various state legislatures are replete with instances of lawmaker-led prayer. To name a few, the Illinois Senate has permitted legislator-led prayer since at least 1849,¹⁵⁸ the Connecticut Senate since at least 1861;¹⁵⁹ the Iowa Senate since at least 1862;¹⁶⁰ the New

¹⁵² See generally Gaylord, *When the Exception*, *supra* note 97; Gaylord, *Facially Religious Government Speech*, *supra* note 97; James H. Knippen II & Elizabeth M. Farmer, *Does Prayer Before Public Bodies Violate the Establishment Clause of the First Amendment?*, DUPAGE COUNTY B. ASS'N BRIEF, Oct. 2011, at 28; Christopher C. Lund, *Keeping the Government's Religion Pure: Pleasant Grove City v. Summum*, 104 NW. U. L. REV. COLLOQUY 46 (2009).

¹⁵³ *Town of Greece v. Galloway*, 572 U.S. 565, 577 (2014).

¹⁵⁴ 1 AMERICAN ARCHIVES: FOURTH SERIES 1112 (Peter Force ed., 1837).

¹⁵⁵ S. REP. NO. 32-376, at 1 (1853).

¹⁵⁶ *Id.* at 4 (emphasis added).

¹⁵⁷ *E.g.*, 26 CONG. REC. 5878 (1894) (Rep. Everett); 27 CONG. REC. 1584 (1895) (Rep. Everett); 27 CONG. REC. 1629 (1895) (Rep. Everett); 23 CONG. REC. 5571 (1892) (Rep. McKinney).

¹⁵⁸ JOURNAL OF THE SENATE OF THE SIXTEENTH GENERAL ASSEMBLY OF THE STATE OF ILLINOIS 51 (1849) (Sen. Richmond).

¹⁵⁹ JOURNAL OF THE SENATE OF THE STATE OF CONNECTICUT, MAY SESSION, 1861, at 231 (1861) (Rep. Denison); *id.* at 258 (Rep. Mitchell); *id.* at 406 (Rep. Parmelee).

Hampshire House of Representatives since at least 1863;¹⁶¹ the Kansas Senate since at least 1867;¹⁶² the Alabama Senate since at least 1873;¹⁶³ and the Michigan House of Representatives and Senate since at least 1879 and 1883, respectively.¹⁶⁴ These examples sufficiently demonstrate a rich historical tradition of legislator-led prayer.¹⁶⁵

It must be acknowledged that the First Congress only engaged in chaplain-led prayer, not legislator-led prayer.¹⁶⁶ But the Court's reliance on one record of a single prayer offered at a Boston City Council meeting in 1910 to support a finding that local legislative bodies have historically engaged in legislative prayer¹⁶⁷ precludes any basis to undermine the conclusion that, as a general matter, lawmaker-led prayer is a tradition long followed in Congress and state legislatures.¹⁶⁸ The Court even recently reaffirmed its reasoning, explaining that although "the specific practice challenged in *Town of Greece* lacked the very direct connection, via the First Congress, to the thinking of those

¹⁶⁰ JOURNAL OF THE SENATE OF THE NINTH GENERAL ASSEMBLY OF THE STATE OF IOWA 70 (1862) (Sen. Watson); *id.* at 503 (Sen. Teter).

¹⁶¹ JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE STATE OF NEW HAMPSHIRE, JUNE SESSION, 1863, at 90 (1863) (Rep. Stewart); *id.* at 169, 293, 312 (Rep. Lawrence); *see also* JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE STATE OF NEW HAMPSHIRE, JUNE SESSION, 1865, at 51 (1865) (Rep. Humphrey); *id.* at 58 (Rep. Cutting).

¹⁶² SENATE JOURNAL OF THE LEGISLATIVE ASSEMBLY OF THE STATE OF KANSAS 120 (1867) (Sen. Green); *id.* at 316 (President of the Senate).

¹⁶³ JOURNAL OF THE SESSION OF 1872–73 OF THE SENATE OF ALABAMA 561 (1873) (Rep. Howell).

¹⁶⁴ 1 JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE STATE OF MICHIGAN 10 (1879) (Rep. Sharts); 1 JOURNAL OF THE SENATE OF THE STATE OF MICHIGAN 228, 303 (1883) (Rep. La Du); *see also* 1 JOURNAL OF THE SENATE OF THE STATE OF MICHIGAN 12 (1887) (Sen. Westgate); 1 JOURNAL OF THE SENATE OF THE STATE OF MICHIGAN 94 (1897) (Sen. Campbell).

¹⁶⁵ The plaintiff in *Bormuth* argued that many historical examples involve prayers given by legislators who were also ministers. *Bormuth v. County of Jackson*, 870 F.3d 494, 510 n.7 (6th Cir. 2017) (en banc). As the Sixth Circuit recognized, this is of no constitutional significance because when the prayers were delivered, the legislators were not acting as ministers but in their official capacities as legislators. *Id.*; *see also id.* at 523 (Sutton, J., concurring) ("And what of a legislator who is also a person of the cloth? Could John Danforth but not John McCain give an invocation? When a line offers no meaningful distinctions, it is a good time to ask whether the court should draw it.").

¹⁶⁶ *Lund v. Rowan County*, 863 F.3d 268, 294 (4th Cir. 2017) (en banc) (Motz, J., concurring).

¹⁶⁷ *See Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014).

¹⁶⁸ *Bormuth*, 870 F.3d at 510.

who were responsible for framing the First Amendment,” the practice nevertheless “fi[t] within the tradition long followed in Congress and the state legislatures.”¹⁶⁹

In addition to having deep historical roots, legislator-led prayer remains prevalent across all levels of government today. In Congress, members of both chambers lead opening prayers.¹⁷⁰ Furthermore, thirty-one state legislatures permit legislator-led prayer.¹⁷¹ Some states have enacted legislation or rules permitting the practice.¹⁷² In fact, the Rhode Island Legislature and Maryland’s House of Delegates only allow legislator-led invocations.¹⁷³ Finally, countless local legislative bodies across the country open meetings with legislator-led prayer, many of which engage in exclusively legislator-led prayer.¹⁷⁴ The robust, long-standing tradition of legislator-led prayer establishes that the custom is not per se unconstitutional.

¹⁶⁹ Am. Legion v. Am. Humanist Ass’n, 139 S. Ct. 2067, 2088–89 (2019) (alteration in original) (quoting *Town of Greece*, 572 U.S. at 577).

¹⁷⁰ See 161 CONG. REC. S3313 (daily ed. May 23, 2015) (Sen. Lankford); 159 CONG. REC. S3915-01 (daily ed. June 4, 2013) (Sen. Cowan); 155 CONG. REC. S13401 (daily ed. Dec. 18, 2009) (Sen. Barrasso); 119 CONG. REC. 17,441 (1973) (Rep. Hudnut III).

¹⁷¹ See NAT’L CONF. OF STATE LEGISLATURES, INSIDE THE LEGISLATIVE PROCESS 5-151 to -152 tbl. 02-5.52 (2002).

¹⁷² See, e.g., S.C. CODE ANN. § 6-1-160(B)(1) (West, Westlaw through 2019 Act No. 90) (authorizing local governments to adopt policies to permit lawmaker-led prayer); MICH. LEGISLATURE, MICHIGAN LEGISLATIVE HANDBOOK & DIRECTORY: 99TH LEGISLATURE 2017–2018, at 153 (2017) (“The Clerk shall arrange for a Member to offer an invocation . . . at the opening of each session of the House.”).

¹⁷³ See NAT’L CONF. OF STATE LEGISLATURES, *supra* note 171, at 5-152 tbl. 02-5.52; Kate Havard, *In Delegates They Trust: Md. House Members Lead Secular Prayer*, WASH. POST (Mar. 9, 2013), https://www.washingtonpost.com/local/md-politics/in-delegates-they-trust-md-house-members-lead-secular-prayer/2013/03/09/571fef8e-810a-11e2-8074-b26a871b165a_story.html?noredirect=on&utm_term=.7c9bf1d695a1.

¹⁷⁴ See, e.g., Brief of Amici Curiae State of Michigan and Twenty-One Other States in Support of Jackson County and Affirmance at 10–12, *Bormuth v. County of Jackson*, 870 F.3d 494 (6th Cir. 2017) (en banc) (No. 15-1896), 2017 WL 1710341 (collecting data on counties in the Sixth Circuit that engage in lawmaker-led prayer); Brief of Amici Curiae State of West Virginia and 12 Other States Supporting Defendant-Appellant at 12–19, 23–26, *Lund v. Rowan County*, 837 F.3d 407 (4th Cir. 2016), *rev’d en banc*, 863 F.3d 268 (4th Cir. 2017) (No. 15-1591), 2015 WL 4692468 (collecting data on counties and cities in the Fourth Circuit that engage in lawmaker-led prayer).

B. Government Speech Doctrine Requires a Showing of Impermissible Intent for a Prayer Practice To Violate the Establishment Clause

Marsh and *Town of Greece* prescribe several limits on legislative prayer generally. First, the prayer opportunity must not be “exploited to proselytize or advance any one, or to disparage any other, faith or belief.”¹⁷⁵ Second, prayer-giver selection must not “stem[] from an impermissible motive.”¹⁷⁶ Finally, the legislature must “maintain[] a policy of nondiscrimination” and not demonstrate “aversion or bias . . . against minority faiths.”¹⁷⁷ All of these limits hinge on the legislature’s subjective intent.¹⁷⁸

Government speech doctrine demands that these limits be applied to require a manifestation of impermissible intent on behalf of the legislature for a prayer practice to run afoul of the Establishment Clause. First and foremost, a prayer practice must not be exploited. As Professor Gaylord explains, “as a speaker, the government violates the Establishment Clause not simply by engaging in facially religious speech *but by engaging in such speech for the purpose of promoting or advancing religion.*”¹⁷⁹ Thus, the legislature must have a legitimate purpose for engaging in legislative prayer,¹⁸⁰ and that purpose “must ‘be sincere and not a sham.’”¹⁸¹

¹⁷⁵ *Town of Greece v. Galloway*, 572 U.S. 565, 581 (2014) (quoting *Marsh v. Chambers*, 463 U.S. 783, 794–95 (1983)).

¹⁷⁶ *Marsh*, 463 U.S. at 793–94.

¹⁷⁷ *Town of Greece*, 572 U.S. at 585.

¹⁷⁸ See *Marsh*, 463 U.S. at 823 n.1 (Stevens, J., dissenting) (“[T]he Court makes the subjective motivation of legislators the decisive criterion for judging the constitutionality of a state legislative practice.”). Judge Sutton argued that the subjective intent of lawmakers should not be relevant to an Establishment Clause analysis and that courts should look to the “objective content of the prayer [and] the impact it has on the listeners.” *Bormuth v. County of Jackson*, 870 F.3d 494, 524 (Sutton, J., concurring). This approach is irreconcilable with government speech doctrine and Supreme Court precedent. See *infra* notes 179–190 and accompanying text.

¹⁷⁹ Gaylord, *Facially Religious Government Speech*, *supra* note 97, at 401 (emphasis added).

¹⁸⁰ The Supreme Court has recognized several legitimate purposes for engaging in legislative prayer, including to “remind[] lawmakers to transcend petty differences in pursuit of a higher purpose,” “to lend gravity to the occasion and reflect values long part of the Nation’s heritage,” to “unite lawmakers in their common effort,” *Town of Greece*, 572 U.S. at 575, 583, “to acknowledge the place religion holds in the lives of many private citizens,” “to accommodate the spiritual needs of lawmakers and connect them to a tradition dating to the time of the Framers” to “reflect the values [lawmakers] hold as private citizens,” and to provide

Second, absent proof of impermissible intent, incidental advancement or endorsement of a particular religion should not render a prayer practice unconstitutional.¹⁸² This is because government messages are susceptible to various interpretations.¹⁸³ As the Court explained in *Summum* with regard to the Ten Commandments monument that constituted government speech, “Even when a monument features the written word, the monument may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways.”¹⁸⁴ How a prayer practice is perceived objectively by observers should therefore not be relevant to the constitutional analysis: “there is no place for a ‘heckler’s veto.’”¹⁸⁵ Furthermore, if a legislature is required to offer prayers of a variety of faiths—that is, alter its message—to prevent observers from perceiving advancement or endorsement of one faith, it loses its fundamental right as speaker to determine the content of its message.¹⁸⁶

This intent-focused approach fits comfortably within the Court’s existing legislative prayer jurisprudence. Generally, the Establishment Clause forbids the government from expressing messages that endorse, favor, or promote religion irrespective of the government’s purpose for engaging in that expression.¹⁸⁷ But this principle does not apply with like force in the legislative prayer context. In *Marsh*, the Presbyterian chaplain’s sixteen-year tenure did not in itself unconstitutionally advance that faith because no “impermissible motive” was shown; the chaplain was selected for his “performance and personal qualities,” not his religious faith.¹⁸⁸ And in *Town of Greece*, eight

“an opportunity for [lawmakers] to show who and what they are,” *id.* at 587–88 (plurality opinion).

¹⁸¹ Gaylord, *When the Exception*, *supra* note 97, at 1056; Gaylord, *Facially Religious Government Speech*, *supra* note 97, at 402.

¹⁸² See Kristopher L. Caudle, Note, *Unanswered Prayers: Lund v. Rowan County and the Permissiveness of Sectarian Prayers in Municipalities*, 12 FIRST AMEND. L. REV. 625, 659–60 (2014).

¹⁸³ Gaylord, *When the Exception*, *supra* note 97, at 1054; Gaylord, *Facially Religious Government Speech*, *supra* note 97, at 393.

¹⁸⁴ *Pleasant Grove City v. Summum*, 555 U.S. 460, 474 (2009); *see also id.* at 475 (“[T]ext-based monuments are almost certain to evoke different thoughts and sentiments in the minds of different observers . . .”).

¹⁸⁵ Gaylord, *When the Exception*, *supra* note 97, at 1052; Gaylord, *Facially Religious Government Speech*, *supra* note 97, at 339.

¹⁸⁶ Gaylord, *When the Exception*, *supra* note 97, at 1054.

¹⁸⁷ *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O’Connor, J., concurring).

¹⁸⁸ *Marsh v. Chambers*, 463 U.S. 783, 793–94 (1983).

years of exclusively Christian prayer-givers did not violate the Establishment Clause because the town did not select its prayer-givers in an intentionally discriminatory manner.¹⁸⁹ Accordingly, the relevant inquiry must be “whether the legislature’s practice—whatever that practice might be—evinces an unlawful discriminatory motive.”¹⁹⁰

C. *Areas of Inquiry That May Evince Impermissible Intent*

Determining the intent behind a lawmaker-led prayer policy is no different than any other legislative prayer policy. The following subsections provide a framework based on four particular aspects of prayer practices, or areas of inquiry, that may evince impermissible intent: (1) the stated purpose of the prayer practice; (2) the prayer-giver selection process; (3) content-based restrictions or requirements imposed by the legislature; and (4) the content of the prayers. Further, each subsection analyzes the legislator-led prayer practices in *Lund* and *Bormuth* and the Fourth and Sixth Circuits’ reasoning.

1. The Stated Purpose of the Prayer Practice

A first area of inquiry to identify impermissible intent is the stated purpose of the prayer practice. Take, for example, the following resolution: “The Town of Utopia Board of Trustees hereby adopts the following prayer policy for the purpose of advancing the teachings of Jesus Christ, God the Father’s only Son, the one and only Lord and Savior.” The board’s express purpose—to advance Christianity—renders the policy facially unconstitutional.

Courts can also identify impermissible intent in remarks made by lawmakers during public meetings—separate from the prayers—or through deposition testimony. For example, in *Williamson v. Brevard County*, commissioners stated in deposition testimony that the opening prayer is “a long-standing tradition of honoring the Christian community” and that “allowing Christian invocations show[s] the board’s support for Christianity.”¹⁹¹ As the Eleventh Circuit held, engaging in

¹⁸⁹ *Town of Greece v. Galloway*, 572 U.S. 565, 585–86 (2014).

¹⁹⁰ *Lund v. Rowan County*, 863 F.3d 268, 311 (4th Cir. 2017) (en banc) (Agee, J., dissenting).

¹⁹¹ 928 F.3d 1296, 1312 (11th Cir. 2019) (alteration in original).

legislative prayer for these purposes violates the Supreme Court's command that the custom not be exploited to advance one religion to the exclusion of others.¹⁹²

Neither board of commissioners in *Lund* and *Bormuth* adopted a formal resolution stating the purpose of the invocations. During the litigation, Rowan County averred that the prayers at its meetings were offered "for the edification and benefit of the commissioners and to solemnize the meeting."¹⁹³ Similarly, Jackson County claimed its prayers served a ceremonial function, similar to those in *Town of Greece*.¹⁹⁴ Both purported purposes are legitimate, and there was no evidence that these purported purposes were insincere or a pretext.

2. The Prayer-Giver Selection Process

A second area of inquiry is prayer-giver selection. A legislator-led prayer policy can either extend the prayer opportunity to legislators or restrict it to them. The policies in *Lund* and *Bormuth* fell into the latter category. Adopting a policy that simply extends the prayer opportunity to legislators cannot in itself, at least facially, violate the Establishment Clause.¹⁹⁵ But a policy that restricts the opportunity to them can, if adopted for impermissible reasons.

There are at least three legitimate reasons for a legislature to restrict the prayer opportunity to its members. First, the legislature may wish to maintain absolute control over the content of the prayers. If the legislature extends the prayer opportunity to nonmembers, it necessarily forfeits that control. A legislature may fear that guest prayer-givers will offer disparaging or offensive invocations, which would defeat the unifying purpose of legislative prayer.¹⁹⁶ The Maryland House of

¹⁹² *Id.* at 1315 (quoting *Marsh*, 463 U.S. at 794–95).

¹⁹³ *Lund*, 863 F.3d at 274.

¹⁹⁴ See Defendant's Brief in Support of Its Motion for Summary Judgment at 4–6, *Bormuth v. County of Jackson*, 116 F. Supp. 3d 850 (E.D. Mich. 2014), *rev'd*, 849 F.3d 266 (4th Cir.), *rev'd en banc*, 870 F.3d 494 (4th Cir. 2017) (No. 2:13-cv-1376-MOB-MJH), 2014 WL 12768703.

¹⁹⁵ See discussion *supra* Section IV.A.

¹⁹⁶ It is not uncommon for guest prayer-givers to deliver controversial invocations. For example, a member of the Satanic Temple concluded her prayer before the Kenai Peninsula Borough Assembly in Alaska with "Hail Satan," prompting legislators and attendees to walk out. Brie Stimson, *Woman's 'Hail Satan' Invocation Prompts Walkout from Alaska Town Meeting*, FOX NEWS (June 21, 2019), <https://www.foxnews.com/politics/hail-satan-invoked-during-alaska-government-meeting-prayer>. In addition, a guest minister concluded his prayer before the

Delegates, for example, switched to a strictly legislator-led prayer policy after some guest ministers offended members with “overly Christian prayers that sometimes veered into politically touchy subjects, such as abortion.”¹⁹⁷ Because the House of Delegates acted with a permissible purpose—to foster a more inclusive atmosphere and to prevent further offense—it would be insignificant whether all legislators and subsequent prayers were of one faith.

Second, a legislature may be concerned over the threat of litigation. Denying any prospective prayer-giver’s request to deliver an invocation risks creating a misperception that the legislature is discriminating among prayer-givers.¹⁹⁸ Indeed, multiple courts have struck down prayer policies on the basis of discriminatory prayer-giver selection.¹⁹⁹ As Justice Alito explained in *Town of Greece*:

The effect of requiring such exactitude would be to pressure towns to forswear altogether the practice of having a prayer before meetings of the town council. Many local officials, puzzled by our often puzzling Establishment Clause jurisprudence and terrified of the legal fees that may result from a lawsuit claiming a constitutional violation, already think that the safest course is to ensure that local government is a religion-free zone.²⁰⁰

Minnesota House of Representatives by insinuating that President Obama is not a Christian, sparking outrage among legislators. Jay Weiner, *Legislative Firestorm Erupts Over Bradlee Dean’s Prayer*, MINNPOST (May 20, 2011), <https://www.minnpost.com/politics-policy/2011/05/legislative-firestorm-erupts-over-bradlee-deans-prayer/>.

¹⁹⁷ Havard, *supra* note 173.

¹⁹⁸ *Cf.* *Town of Greece v. Galloway*, 572 U.S. 565, 585 (2014) (finding the town’s policy nondiscriminatory in part because the town “would welcome a prayer by any minister or layman who wished to give one”).

¹⁹⁹ *See, e.g., Williamson v. Brevard County*, 928 F.3d 1296, 1316 (11th Cir. 2019) (holding a prayer practice unconstitutional in part because “[t]he selection procedures as practiced t[ook] religious beliefs into account, . . . favoring some creeds over others”); *Hunt v. Kenai Peninsula Borough*, No. 3AN-16-10652 CI, slip op. at 15–17 (Alaska Super. Ct. Oct. 9, 2018) (holding unconstitutional a prayer policy that opened the invocation opportunity only to leaders of “religious associations with an established presence in the Kenai Peninsula Borough” because faiths practiced by some residents of the borough, including Judaism and Satanism, were excluded under the policy).

²⁰⁰ *Town of Greece*, 572 U.S. at 597 (Alito, J., concurring); *see also* *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2097 (2019) (Thomas, J., concurring) (“[G]overnment bodies trying to comply with the inevitably arbitrary decisions of the courts would face . . . intractable questions.” (citing *Town of Greece*, 572 U.S. at 596 (Alito, J., concurring))).

Accordingly, a desire to avoid the threat of litigation is adequate justification to restrict a prayer opportunity to lawmakers.²⁰¹

Lastly, legislator-led prayer better “accommodate[s] the spiritual needs of lawmakers,” one of the primary purposes of legislative prayer.²⁰² As the Supreme Court explained, legislative prayer “reflect[s] the values [legislators] hold as private citizens.”²⁰³ Allowing legislators to offer the prayers themselves gives them the opportunity to personally “show who and what they are.”²⁰⁴

There are ways courts can determine whether a legislature’s decision to restrict the prayer policy to its members is motivated by impermissible intent. First, courts can look to legislators’ deposition testimony and public statements. For example, if members of an all-Christian legislature state that the prayer opportunity is reserved to lawmakers to ensure all prayers are Christian, the policy would be plainly unconstitutional. Second, courts can infer an impermissible, discriminatory purpose in how the legislator-led prayer policy is carried out. If, for example, a board rescinds the prayer opportunity from a commissioner of a minority faith or discontinues the practice altogether when a new commissioner of a minority faith is elected, such action would indicate disfavor toward the minority commissioner’s faith.²⁰⁵

Williamson provides an excellent example of intentional discriminatory prayer-giver selection. In *Williamson*, the Eleventh Circuit held unconstitutional a practice of each commissioner selecting a guest minister on a rotating basis because the commissioners “used [their plenary discretion] to discriminate on the basis of religious beliefs, favoring some monotheistic religions over others and disfavoring and excluding—at least—religions that are polytheistic, pantheistic, or otherwise outside of the ‘mainstream.’”²⁰⁶ In deposition testimony, all but one commissioner indicated that prospective

²⁰¹ Rowan County, for example, was ordered to pay \$285,000 in legal fees to the American Civil Liberties Union. Caleb Parke, *Cost of Prayer: North Carolina County Pays \$285K for Opening Meetings in Jesus’ Name*, FOX NEWS (Jan. 9, 2019), <https://www.foxnews.com/us/cost-of-prayer-north-carolina-county-pays-285k-for-opening-meetings-in-jesus-name>.

²⁰² *Town of Greece*, 572 U.S. at 588 (plurality opinion).

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ See *Lund v. Rowan County*, 863 F.3d 268, 310 (4th Cir. 2017) (en banc) (Agee, J., dissenting).

²⁰⁶ *Williamson v. Brevard County*, 928 F.3d 1296, 1311 (11th Cir. 2019).

prayer-givers' religious beliefs would significantly affect whether or not they would be invited to deliver an invocation.²⁰⁷ In addition, some commissioners expressed that the prayer opportunity was meant only for people of particular types of religions, indicating that prospective prayer-givers of certain faiths would either be more closely scrutinized or outright banned from offering an invocation.²⁰⁸ Accordingly, the prayer-giver selection procedure had been unconstitutionally exploited for an impermissible purpose—to favor monotheistic religions to the exclusion of others.²⁰⁹

Under the prayer policy in *Lund*, each commissioner was afforded the opportunity to offer the opening prayer on a rotating basis.²¹⁰ When the plaintiffs brought this action, all five commissioners were Protestant Christian.²¹¹ Judge Wilkinson concluded that the board restricted the prayer opportunity to its members to ensure that the prayers remained Christian.²¹² This conclusion is sheer judicial *ipse dixit*. The board rotated the prayer opportunity among its members as a matter of long-standing tradition.²¹³ The record did not indicate when the tradition began or why the board that adopted the practice chose to restrict the prayer opportunity to commissioners. Thus, there was no basis to conclude that the board sought to advance Christianity; and because there was no evidence of purposeful exploitation, any perceived advancement of Christianity was merely incidental and therefore constitutionally insignificant.

Judge Wilkinson also emphasized that the policy was too “rigid” and “restrictive” and failed to embrace religious pluralism.²¹⁴ This reasoning is flawed. First, municipalities are only required to maintain a policy of nondiscrimination; they are not required to “promote ‘a “diversity” of religious views.’”²¹⁵ Second, a strictly legislator-led prayer policy can be more flexible and inclusive than the policies upheld in *Marsh* and *Town of*

²⁰⁷ *Id.* at 1313.

²⁰⁸ *Id.* at 1313–14.

²⁰⁹ *Id.* at 1314–15.

²¹⁰ *See Lund*, 863 F.3d at 273.

²¹¹ *Id.* at 282.

²¹² *Id.* at 282–83.

²¹³ *Id.* at 273.

²¹⁴ *Id.* at 282.

²¹⁵ *Town of Greece v. Galloway*, 572 U.S. 565, 586 (2014) (quoting *Lee v. Weisman*, 505 U.S. 577, 617 (1992) (Souter, J., concurring)).

Greece.²¹⁶ Under a fixed-chaplain policy, a Christian chaplain can offer Christian prayers throughout the course of his tenure, and absent an impermissible motive, the chaplain can be reappointed over and over again, up to at least sixteen years.²¹⁷ This could effectively undermine some of the purposes of legislative prayer. Christian prayers referencing Jesus Christ would neither “reflect the values” Muslim legislators hold nor give Muslim legislators the opportunity “to show who and what they are.”²¹⁸ The same might be true for Muslim legislators under a rotating guest minister policy in a municipality with no mosque.²¹⁹

The prayer policy in *Bormuth* was nearly identical to the policy in *Lund*. The Sixth Circuit found no evidence that the board adopted its practice with discriminatory intent.²²⁰ Accordingly, because the prayer practice was “facially neutral,” Judge Griffin found it “immaterial” that all nine commissioners were Christian at the time the practice was challenged.²²¹

One commentator writes that Jackson County’s policy allows the board to “choose[] which persons can and cannot give the opening prayers based solely on their religious sect.”²²² This is an utter mischaracterization of the policy. The board does not pick and choose prayer-givers. Each commissioner is afforded the opportunity to deliver the invocation when his or her turn in the rotation arises. As Judge Griffin explained, “Were Mr. Bormuth elected to the Jackson County Board of Commissioners, he could freely begin a legislative session with an invocation of his choosing, under the religion-neutral Jackson County prayer practice.”²²³ If anyone selects prayer-givers based on their religious sect, it is the voters of Jackson County.²²⁴

The Sixth Circuit also addressed evidentiary challenges over whether statements contained in video recordings of committee meetings published to the board’s website after litigation

²¹⁶ *Lund*, 863 F.3d at 310 (Agee, J., dissenting).

²¹⁷ See *Marsh v. Chambers*, 463 U.S. 783, 784–86 (1983).

²¹⁸ *Town of Greece*, 572 U.S. at 588 (plurality opinion).

²¹⁹ See *id.* at 585–86 (majority opinion) (“[T]he Constitution does not require [a town] to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing.”).

²²⁰ *Bormuth v. County of Jackson*, 870 F.3d 494, 513 (6th Cir. 2017) (en banc); *id.* at 523 (Sutton, J., concurring).

²²¹ *Id.* at 513–14 (majority opinion).

²²² Hill, *supra* note 94, at 37.

²²³ *Bormuth*, 870 F.3d at 513.

²²⁴ See *id.* at 523 (Sutton, J., concurring).

commenced were part of the record and should be considered on appeal.²²⁵ At one meeting in particular where the board discussed potential alternatives to its legislator-led prayer policy, a commissioner expressed the following concern:

If somebody from the public wants to come before us and say they are an ordained minister, we are going to have to allow them as well. And I think we are opening a Pandora's Box here because you are going to get members of the public who are going to come up at public comment, and we are going to create a lot of problems here when certain people come up here and say things that they are not going to like.²²⁶

The court ultimately declined to consider these remarks, noting that “even if [it] were to consider the proffered videos, [its] disposition would not change.”²²⁷

This statement, standing alone, does not evince an impermissible, discriminatory motive. As discussed, there are several legitimate reasons for restricting the prayer opportunity to lawmakers, including to control the prayer content to prevent controversial invocations. The commissioner's remarks, rationally construed, express a concern over guest prayer-givers delivering controversial invocations. Thus, this statement does not suggest that the board acted with discriminatory intent in adopting and maintaining its strictly legislator-led prayer practice.

3. Content-Based Restrictions or Requirements Imposed by the Legislature

A third area of inquiry to identify impermissible intent is content-based restrictions or requirements imposed by the legislature. In *Town of Greece*, the Court rejected arguments that the guest ministers' prayers must be nonsectarian because such a requirement would force the government to “act as *supervisors* and *censors* of religious speech.”²²⁸ The Court concluded that “[o]nce it invites prayer into the public sphere, government must permit a prayer giver to address his or her own

²²⁵ *Id.* at 499 (majority opinion).

²²⁶ CountyofJackson, *Personnel & Finance Committee Hearing November 12, 2013 Jackson County, MI*, YOUTUBE (Dec. 19, 2013) (37:55–38:16), <https://www.youtube.com/watch?v=yOOClwZpaXc>. These statements were neither presented to the district court nor mentioned in Bormuth's initial appellate brief, though they were mentioned in his reply. *Bormuth*, 870 F.3d at 500.

²²⁷ *Bormuth*, 870 F.3d at 501 & n.2.

²²⁸ *Town of Greece v. Galloway*, 572 U.S. 565, 581 (2014) (emphasis added).

God or gods as conscience dictates.”²²⁹ As Professor Corbin points out, censorship indicates the government is acting as a sovereign and regulating private speech, and inviting prayer into the public sphere suggests the government is hosting a forum for private speech.²³⁰

But when legislative prayer is classified as government speech, *Town of Greece's* instruction that a legislature must forfeit control over the content of the prayers should not apply. If the government is speaking, it has absolute authority to select the content of its message.²³¹ Thus, a legislature could, to an extent, impose content restrictions on its individual members' prayers to maintain control over its message.

To illustrate, a requirement that prayers not denigrate religious minorities or nonbelievers would likely be lawful because it is motivated by a legitimate purpose—to ensure the legislature's message conforms to the Establishment Clause.²³² Conversely, a prohibition of Muslim prayers, or references to “Allah,” would likely be unlawful because it reflects disfavor toward Islam. Likewise, a requirement that prayers be exclusively Christian would also likely be unlawful because it manifests a motive to advance Christianity.

Moreover, a legislator-led prayer policy with a requirement that all prayers be nonsectarian would likely be constitutional. The Fourth Circuit confronted this issue in *Turner v. City Council of Fredericksburg*,²³³ a case decided before *Town of Greece*. In *Turner*, the court classified the prayers as government speech and upheld the nonsectarian requirement because it was “designed to make the prayers accessible to people who come from a variety of backgrounds, not to exclude or disparage a particular faith.”²³⁴ The court noted that as speaker, the government may select the messages it would, and would not,

²²⁹ *Id.* at 582.

²³⁰ See Corbin, *supra* note 103, at 42.

²³¹ *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995) (“[T]he fundamental rule under the First Amendment [is] that a speaker has the autonomy to choose the content of his own message.”); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) (“[W]hen the State is the speaker, it may make content-based choices.”); see also *Knippen II & Farmer*, *supra* note 152, at 33 (“[T]he government, as speaker, has free reign [sic] over the content of the religious message.”).

²³² See Gaylord, *When the Exception*, *supra* note 97, at 1064.

²³³ 534 F.3d 352, 354 (4th Cir. 2008) (O'Connor, J., retired, sitting by designation).

²³⁴ *Id.* at 356.

like to express.²³⁵ This reasoning remains sound even after *Town of Greece*. First, a nonsectarian requirement does not reflect an impermissible motive, but rather a desire to be inclusive. Second, *Town of Greece* spoke to a nonsectarian requirement in the context of the government regulating speech, not the government itself speaking. Lastly, if “[p]rayer that reflects beliefs specific to only some creeds can still serve to solemnize the occasion,” so too can prayers specific to no religion that invoke universal themes.²³⁶

Similarly, a legislator-led prayer policy that requires that all prayers be sectarian or theistic would also likely be constitutional. Such a policy does not “advance any *one*” religion;²³⁷ if anything, it advances religion over irreligion. By holding that prayers need not be nonsectarian, *Town of Greece* permits government to favor religion over irreligion in the legislative prayer context.²³⁸ To illustrate, in *Barker v. Conroy*, the D.C. Circuit held that the House of Representatives’ chaplain did not violate the Establishment Clause when he denied an atheist’s request to deliver a nonreligious invocation because the House’s rules require that all invocations be religious.²³⁹ The court reasoned that, “although the Court has warned against discriminating among religions or tolerating a pattern of prayers that proselytize or disparage certain faiths or beliefs, it has never suggested that legislatures must allow secular as well as religious prayer.”²⁴⁰

The prayer policies in *Lund* and *Bormuth* were neutral with respect to prayer content. The boards did not impose any content-based restrictions or requirements on their members.²⁴¹ The commissioners were free to offer a prayer to their God or gods—or to no god at all—as their consciences dictated.

²³⁵ *Id.* (quoting *Simpson v. Chesterfield Cty. Bd. of Supervisors*, 404 F.3d 276, 288 (4th Cir. 2005)).

²³⁶ *Town of Greece v. Galloway*, 572 U.S. 565, 583 (2014).

²³⁷ *Id.* (emphasis added) (quoting *Marsh v. Chambers*, 463 U.S. 783, 794–95 (1983)).

²³⁸ See Gaylord, *When the Exception*, *supra* note 97, at 1065 (“[B]ecause *Marsh* permits the government to advance religion over nonreligion by allowing prayer at the beginning of its meetings, the government must be able to exclude nonreligious or anti-religious speakers . . .”).

²³⁹ 921 F.3d 1118, 1130–31 (D.C. Cir. 2019).

²⁴⁰ *Id.* at 1131.

²⁴¹ *Lund v. Rowan County*, 863 F.3d 268, 272–73 (4th Cir. 2017) (en banc); *Bormuth v. County of Jackson*, 870 F.3d 494, 498 (6th Cir. 2017) (en banc).

Accordingly, the absence of content-based restrictions or requirements is no basis to question the constitutionality of a legislative prayer practice.

4. The Prayers Themselves: Advance, Disparage, and Proselytize

The fourth and final area of inquiry to identify impermissible intent that this Note explores is prayer content. In reviewing a prayer practice, impermissible intent may seem apparent from the prayers. *Marsh*, however, instructs that judges should not concern themselves with the content of the prayers absent indicia of exploitation.²⁴² *Town of Greece* reaffirmed this directive in dismissing arguments that prayers must be nonsectarian, but it subsequently approved judicial review of prayers in stating that “[a]bsent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a prayer will not likely establish a constitutional violation.”²⁴³ Thus, judicial review of prayers is permitted—and indeed necessary—to determine whether a practice over time has been exploited to advance a particular religion, proselytize, or disparage nonbelievers or religious minorities. But to what extent? How closely should judges parse the content of prayers? Line-drawing problems are inevitable.

Without supplementary proof of purposeful exploitation, the content of prayers alone cannot unconstitutionally “advance” a particular religion. *Town of Greece* clarified that sectarian legislative prayer is permissible “so long as the practice over time is not ‘exploited to proselytize or advance any one, or to disparage any other, faith or belief.’”²⁴⁴ Prayer is inherently religious. “The Supreme Court has long taken as given that prayer presumes a higher power.”²⁴⁵ And as the Tenth Circuit has explained, “all prayers ‘advance’ a particular faith or belief in one way or another. The act of praying to a supreme power assumes

²⁴² *Marsh*, 463 U.S. at 794–95.

²⁴³ *Town of Greece v. Galloway*, 572 U.S. 565, 581–83, 585 (2014).

²⁴⁴ *Id.* at 583 (quoting *Marsh*, 463 U.S. at 794–95).

²⁴⁵ *Fields v. Speaker of the Pa. House of Representatives*, 936 F.3d 142, 152 (3d Cir. 2019).

the existence of that supreme power.”²⁴⁶ Therefore, the content of prayers in and of itself cannot demonstrate intent to exploit a prayer practice to advance a particular religion.

Prayer content can, however, reflect intent to proselytize. Proselytization has been invoked in several facets of Establishment Clause jurisprudence.²⁴⁷ But the Supreme Court has neither articulated a concrete definition of proselytization nor provided a practical standard or test to identify it.²⁴⁸ In the legislative prayer context, many lower courts have sought to delineate what constitutes proselytization, but no clear judicial consensus has emerged.²⁴⁹ In *Wynne v. Town of Great Falls*, the Fourth Circuit distinguished proselytizing from advancing, stating, “To ‘proselytize’ on behalf of a particular religious belief necessarily means to seek to ‘convert’ others to that belief, whereas to ‘advance’ a religious belief means simply to ‘forward, further, [or] promote’ the belief.”²⁵⁰ The Tenth Circuit drew a similar distinction in *Snyder v. Murray City Corp.*, describing proselytization as “a more aggressive form of advancement”—specifically, an “effort by the government to convert citizens to particular sectarian views.”²⁵¹ The Tenth Circuit concluded that

²⁴⁶ *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1234 n.10 (10th Cir. 1998) (en banc).

²⁴⁷ See *Van Orden v. Perry*, 545 U.S. 677, 692 (2005) (Scalia, J., concurring) (Ten Commandments display); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 296–97 (2000) (student-led, student-initiated prayer); *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 661 (1989) (Kennedy, J., concurring in part and dissenting in part) (passive religious displays); *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 9 (1989) (tax exemptions regarding religious periodicals); *Marsh*, 463 U.S. at 794–95 (legislative prayer); *Lemon v. Kurtzman*, 403 U.S. 602, 627 (1971) (Douglas, J., concurring) (state aide to church-related schools); *Ill. ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 235–36 (1948) (Jackson, J., concurring) (religious instruction in public schools).

²⁴⁸ Christian M. Keiner, *Preaching from the State’s Podium: What Speech Is Proselytizing Prohibited by the Establishment Clause?*, 21 *BYU J. PUB. L.* 83, 85 (2007).

²⁴⁹ See Caudle, *supra* note 182, at 659.

²⁵⁰ 376 F.3d 292, 300 (4th Cir. 2004) (alteration in original). In *Wynne*, the Fourth Circuit invalidated a town council’s prayer practice because it *advanced* Christianity by frequently referencing “Jesus Christ” to the exclusion of other faiths. *Id.* at 301.

²⁵¹ 159 F.3d at 1234 n.10 (citing *Marsh*, 463 U.S. at 793 n.14, 794–95).

only legislative prayer that “aggressively advocates a specific religious creed, or that derogates another religious faith or doctrine” will violate the Establishment Clause.²⁵²

Prayer content can also reflect intent to disparage. Prayer content may be so explicit that it unquestionably and unambiguously reflects a motive to denigrate—for example, an invocation that explicitly states another faith is inferior and believers of that faith are damned. In *Snyder*, a private citizen sought to deliver an invocation that condemned politicians who believe in legislative prayer as “self-righteous,” “hypocritical,” “mis-guided, weak and stupid.”²⁵³ The Tenth Circuit held that denying this prospective prayer-giver’s request was lawful because “[n]ot only does [the] prayer explicitly attack the genre itself, it also disparages those who believe that legislative prayer is appropriate.”²⁵⁴

Government speech doctrine demands that the subjective intent of the prayer-giver determines whether invocations constitute proselytization or disparagement. Christian Keiner proposes a standard of proselytizing that is primarily objective, considering the potential impact the expression would have on a reasonable observer.²⁵⁵ But such a definition cannot apply to legislator-led prayer because, as government speech, the government’s message is not determined by how others perceive it.²⁵⁶ As Professor Gaylord explains, “[T]he government’s reasons for engaging in the speech (*e.g.*, solemnizing an event or participating in the long-standing tradition of legislative prayer) may differ significantly from how others interpret that message.”²⁵⁷ A legislator who offers a prayer for the purpose of solemnizing the meeting is not proselytizing simply because someone construes the prayer in that manner.²⁵⁸

Judge Wilkinson found that the Rowan County commissioners’ prayers advanced Christianity, proselytized, and

²⁵² *Id.* at 1234–35 (“Because Snyder’s prayer seeks to convert his audience to his belief in the sacrilegious nature of governmental prayer, his prayer is itself proselytizing.”).

²⁵³ *Id.* at 1228 n.3.

²⁵⁴ *Id.* at 1235.

²⁵⁵ See Keiner, *supra* note 248, at 105–06.

²⁵⁶ See *supra* notes 183–185 and accompanying text.

²⁵⁷ Gaylord, *When the Exception*, *supra* note 97, at 1054–55.

²⁵⁸ See *id.* at 1054 (“[T]he fact that third parties might ascribe different meanings to the government’s speech does not change the fact that the government intended a specific message . . .”).

disparaged non-Christians. Before reviewing the content of the prayers, he noted that “*Town of Greece* instructs courts to consider a prayer practice from the perspective of the ‘reasonable observer.’”²⁵⁹ This interpretation of *Town of Greece* is misguided. First, the reasonable observer standard was invoked with respect to whether the prayers were unduly coercive, not whether the legislature exploited the prayer practice to proselytize.²⁶⁰ The standards are distinct. Second, a reasonable observer, or endorsement, standard cannot be applied to legislative prayer because it “presupposes a premise that [government speech doctrine] rejects—that the government’s message can be determined by the meaning that others attribute to the government.”²⁶¹

In reviewing the content of the prayers, Judge Wilkinson erroneously made his subjective perception the determining criterion for whether the commissioners were advancing Christianity, proselytizing, or denigrating religious minorities. For example, he construed the following prayer as an “invocation advocat[ing] that the community take up the Christian faith”:

Father, I pray that all may be one as you, Father, are in Jesus, and He in you. I pray that they may be one in you, that the world may believe that you sent Jesus to save us from our sins. May we hunger and thirst for righteousness, be made perfect in holiness, and be preserved, whole and entire, spirit, soul, and body, irreproachable at the coming of our Lord Jesus Christ.²⁶²

A construction that this prayer “urged attendees to embrace Christianity”²⁶³ is one of many possible meanings a listener could attribute to it—and, frankly, a very attenuated one. Others may think that this is simply a legislator calling for his fellow lawmakers to unite “before they embark on the fractious business of governing.”²⁶⁴ One commissioner maintained, “We are not

²⁵⁹ *Lund v. Rowan County*, 863 F.3d 268, 283–84 (4th Cir. 2017) (en banc) (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 586–87 (2014) (plurality opinion)).

²⁶⁰ *See Town of Greece*, 572 U.S. at 587 (plurality opinion).

²⁶¹ Gaylord, *Facially Religious Government Speech*, *supra* note 97, at 393; *see also supra* notes 182–186 and accompanying text.

²⁶² *Lund*, 863 F.3d at 285.

²⁶³ *Id.*

²⁶⁴ *Town of Greece*, 572 U.S. at 583; *see also id.* at 587 (first citing *Salazar v. Buono*, 559 U.S. 700, 720–21 (2010) (plurality opinion); then citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)) (“It is presumed that the reasonable observer is acquainted with this tradition and understands that its purposes are to lend gravity to public proceedings and to acknowledge the place religion holds in the

proselytizing; we are just praying in the only way that we know how.”²⁶⁵ In a similar vein, Judge Wilkinson thought the following prayer denigrated religious minorities:

Lord, we confess that we have not loved you with all our heart, and mind and strength, and that we have not loved one another as Christ loves us. We have also neglected to follow the guidance of your Holy Spirit and have allowed sin to enter into our lives.²⁶⁶

This prayer, “implicitly ‘signal[ed] disfavor toward’ non-Christians,” Judge Wilkinson stated.²⁶⁷ Note the use of the word “implicitly.” Disfavor toward non-Christians is simply the message Judge Wilkinson himself implied.²⁶⁸ Others may have perceived a different message—perhaps a call for commissioners to reflect upon past disagreements with one another and to be mindful of their future words, actions, or both. Observers and judges are bound to perceive prayers differently.²⁶⁹ The Fourth Circuit’s failure to recognize the inapplicability of a reasonable observer standard in light of the prayers being government speech was fatal to its analysis.

In *Bormuth*, Judge Griffin similarly reviewed the content of several prayers offered by commissioners. But rather than parsing the content of individual prayers, he evaluated the prayers more generally. He found the prayers to be solemn and

lives of many private citizens, not to afford government an opportunity to proselytize or force truant constituents into the pews.”).

²⁶⁵ Tim Funk & Michael Gordon, *Prayer Delivery May Change at Many NC Government Meetings After Supreme Court Action*, CHARLOTTE OBSERVER (June 28, 2018), <https://www.charlotteobserver.com/living/religion/article213983094.html>.

²⁶⁶ *Lund*, 863 F.3d at 284.

²⁶⁷ *Id.* at 285 (alteration in original) (quoting *Town of Greece*, 572 U.S. at 589 (plurality opinion)).

²⁶⁸ *Id.* at 316–17 (Agee, J., dissenting) (“At most, [the majority] subjectively intuits the prayers ‘implicitly signaled disfavor toward non-Christians’ whenever they ‘portrayed the failure to love Jesus or follow his teachings as spiritual defects.’” (quoting *id.* at 285 (majority opinion))).

²⁶⁹ *Compare, e.g., id.* at 286 (majority opinion) (“By proclaiming the spiritual and moral supremacy of Christianity, characterizing the political community as a Christian one, and urging adherents of other religions to embrace Christianity as the sole path to salvation, the Board in its prayer practice stepped over the line.”), *with id.* at 316 (Agee, J., dissenting) (“[T]he prayers by the commissioners never explicitly or implicitly ask the hearers to change beliefs, to adopt as true any principles of the Christian faith, or anything else traditionally understood to be words imploring conversion. In addition, none of the prayers here threaten damnation to those of different faiths, belittle or chastise dissenters, or denigrate any other religious viewpoints.” (citing *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1235 (10th Cir. 1998) (en banc))).

respectful and used as a means to invoke Divine guidance before engaging in lawmaking, similar to those in *Town of Greece*.²⁷⁰ Bormuth called the court's attention to one portion of one prayer, which he believed denigrated nonbelievers and religious minorities: "Bless the Christians worldwide who seem to be targets of killers and extremists."²⁷¹ But the court found that this one remark, even if it were construed as a form of denigration—which would be quite an attenuated construction²⁷²—did not despoil the Board's practice, which overall fit within this country's tradition of legislator-led prayer.²⁷³ The Sixth Circuit concluded that the Jackson County Board of Commissioners used the prayers to "seek guidance to 'make good decisions that will be best for generations to come' and express well-wishes to military and community members."²⁷⁴ Accordingly, because the board used its prayer practice for permissible purposes, the content of the prayers was constitutionally insignificant.

CONCLUSION

The Supreme Court must clarify the uncertainties surrounding legislative prayer. The Court's failure to address whether legislative prayers are government or private speech risks the continued invalidation of prayer practices that adhere to the "tradition long followed in Congress and the state legislatures."²⁷⁵ Legislator-led prayer is one such tradition. Legislator-led prayer constitutes government speech; therefore, only prayer policies motivated by impermissible intent should violate the Establishment Clause. Had the Fourth Circuit considered that the prayers were government speech, and how government speech doctrine affects the Establishment Clause inquiry, it would have had no basis to strike down Rowan County's prayer practice. Government speech doctrine is, in effect, legislator-led prayer's saving grace.

²⁷⁰ *Bormuth v. County of Jackson*, 870 F.3d 494, 512 (6th Cir. 2017) (en banc).

²⁷¹ *Id.*

²⁷² See, e.g., *Death Toll Rises to 359 in Sri Lanka Bombings, More Arrested*, FOX NEWS (Apr. 23, 2019), <https://www.foxnews.com/world/death-toll-rises-to-359-in-sri-lanka-bombings-more-arrested>.

²⁷³ *Bormuth*, 870 F.3d at 512–13.

²⁷⁴ *Id.* at 512 (citing *Town of Greece v. Galloway*, 572 U.S. 565, 583 (2014)).

²⁷⁵ *Town of Greece*, 572 U.S. at 577.