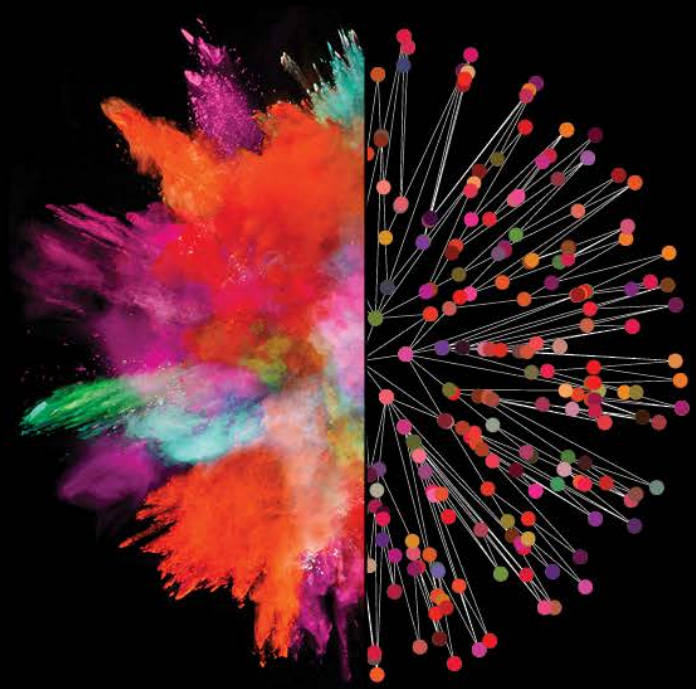
Legislative Prayer in Rowan County and Jackson County

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Background *Town of Greece*

- In 2014, the Supreme Court upheld the historical practice of **local legislative prayer** in *Town of Greece v. Galloway*.
- Because the practice of inviting local clergy members or a legislative chaplain to open town meetings in prayer fit within the tradition followed by Congress and the State legislatures, it did not violate the Establishment Clause.
- And the Court held the prayers in Greece were not "coercive" even though they were delivered in local-government settings, many were faith-specific, and many opened with introductions like "let us pray."

Background Rowan & Jackson Counties

- The lawsuits against legislative prayer did not stop after *Town of Greece*.
- In both Rowan County, North Carolina, and Jackson County, Michigan, County residents sued the local Boards of Commissioners for their legislative prayer practices—and those lawsuits continued after *Town of Greece*.
- According to the plaintiffs in both cases, prayers before Board meetings violate the Establishment Clause when offered by **Board members themselves**, rather than local clergy or chaplains.
- The cases against Rowan and Jackson Counties have run nearly simultaneously—coming to opposite results at every stage.

Rowan County Timeline

- Rowan County, North Carolina, is governed by a five-member Board of Commissioners. The Board meets twice monthly to perform typical municipal government functions: e.g., zoning and permits.
- The County began each of its meetings with a brief invocation by a Commissioner, followed by the Pledge of Allegiance. Commissioners rotated in delivering the prayer, and could say anything (or nothing) according to their own conscience.
- The Plaintiffs brought suit against the County for its legislative prayer practice before *Town of Greece* was decided—arguing the faith-specific nature of the prayers violated Fourth Circuit precedent.

Rowan County District Court

- While the challenge against Rowan County was pending, the Supreme Court decided *Town of Greece*, approving sectarian prayers that fall within the Nation's traditions.
- After *Town of Greece*, both Rowan County and the Plaintiffs sought summary judgment.
  - Rowan County argued that sectarian prayers delivered by legislators fit within the Nation's tradition.
  - The Plaintiffs switched strategies and argued prayer delivered by legislators violated the Establishment Clause.
- The District Court held that legislator-delivered prayers were uniquely troubling and enjoined Rowan County's invocation practice.

Rowan County Fourth Circuit

- A divided panel of the Fourth Circuit reversed—holding that invocations by lawmakers are permissible under *Town of Greece* because they fit within the Nation's longstanding traditions and are not coercive.

- Judge Wilkinson's panel dissent sharply disagreed, arguing that when legislators are the sole-prayer givers, a consistently sectarian prayer practice in a local-government setting crosses the line.

Rowan County 4th Circuit *En Banc*

- The Fourth Circuit granted rehearing *en banc* and affirmed the district court on a 10-5 vote.
- Judge Wilkinson's *en banc* majority decision held legislator-delivered invocations are unconstitutional when combined with other features including (1) continuous references to a specific faith, (2) the intimate local-government setting, and (3) introductions like "let us pray."
- The principal dissent would have held that because these other three factors were already approved by *Town of Greece*, and because prayer by legislators dates back to the Founding, the practice is constitutional.

Jackson County Timeline

- Jackson County, Michigan, is governed by a nine-member Board of Commissioners which meets monthly to perform municipal functions.
- The Board begins its meetings with an opportunity for each Commissioner, on a rotating, voluntary basis, to offer a prayer as dictated by his or her own conscience (just as in Rowan County).
- The Plaintiff sued, arguing initially (like the Plaintiffs in Rowan County) that sectarian prayers violate the Constitution.

Jackson County District Court

- As in *Rowan County*, *Town of Greece* was decided after the Plaintiff's complaint was filed.

- The district court in *Jackson County* identified the issue as sectarian legislative prayers delivered by government officials—and held contrary to the district court in *Rowan County* that the practice is constitutionally permissible.

Jackson County Sixth Circuit

- A divided Sixth Circuit reversed the district court, relying heavily on Judge Wilkinson's *Rowan County* dissent to hold that a combination of factors (including the identity of the prayer giver) rendered Jackson County's prayer practice unconstitutional.
- At the same time, the Sixth Circuit panel dissent cited approvingly the Fourth Circuit panel majority's approach—concluding the Nation's history clearly supports a role for legislators to give prayers in legislative bodies.

Jackson County 6th Circuit *En Banc*

- After *sua sponte* granting rehearing *en banc*, the Sixth Circuit affirmed the district court, approving the County's practice.
- After resolving a few preliminary evidentiary issues, the *en banc* Court held that legislative prayer delivered by legislators fits within the tradition long followed by Congress and State legislatures.
- Judge Sutton concurred, noting the Constitution favors neither faith-neutral prayers over faith-specific ones nor prayers delivered by chaplains over those delivered by legislators.
- Two dissents hewed to the panel majority's combination of factors approach, and one dissent specifically agreed with the *en banc* Fourth Circuit majority in *Rowan County*.

SUPREME COURT BRIEFING

Rowan County Petition

- Rowan County—enjoined from continuing its legislative prayer practice—filed a petition for writ of certiorari in October 2017.
- The near simultaneous proceedings in the Jackson County case led to a rare *en banc* Circuit split: the Fourth and Sixth Circuits are split on the issue of legislative prayer delivered by legislators and there is no possibility that the split will resolve itself because both *en banc* Courts have spoken.

Rowan County Petition

- Rowan County's cert petition emphasized (1) the intractable split between the Circuits, alongside (2) the exceedingly important nature of the issues involved and (3) the *en banc* Fourth Circuit's misapplication of *Greece*.
- First, Rowan County noted the Circuits are split on the question of whether legislator-delivered invocations fit within the Nation's traditions *and* whether combining legislators praying with other factors approved in *Greece* can become coercive under the Establishment Clause.

Rowan County Petition

- Second, Rowan County argued resolution of this issue is exceedingly important because it implicates the participation by thousands of public servants in unbroken history of more than 200 years. The current split puts lawmaking bodies across the country in an impossible situation—continue legislator prayer practices and risk litigation and potentially hefty attorneys' fees or forgo such prayer altogether, a response deemed unacceptable in *Town of Greece*.
- Third, Rowan County argued that the *en banc* Fourth Circuit misapplied *Town of Greece*'s historical and coercion tests.

Rowan County Petition

- The Plaintiffs filed a brief in opposition, arguing there is actually no circuit split because the factual circumstances are not identical between the prayers in Jackson County and Rowan County, and putting most of their emphasis on the Fourth Circuit's purportedly faithful application of the Supreme Court's *Town of Greece* decision.
- Shortly before Rowan County filed its Reply Brief in support of cert—rebutting the Plaintiffs' claims—the Plaintiff in *Jackson County* filed a cert petition from the Sixth Circuit decision.

Jackson County Petition

- The Plaintiff's cert petition also argued there is a split between the Fourth and Sixth Circuits on the issue of prayer delivered by legislators.
- The petition went on to argue that the Sixth Circuit is on the wrong side of the split because the practice does not fit in the Nation's tradition, Jackson County's practice is coercive, and *Town of Greece* required the opposite result.

Jackson County Petition

- After Rowan County filed its Reply Brief in support of cert from the Fourth Circuit, Jackson County filed a brief in opposition to the *Jackson County* petition.
- While agreeing with the Plaintiff that the Circuits are split, Jackson County argued this case is a poor vehicle for resolving the split because the *en banc* Sixth Circuit's decision was correct and that case also raised evidentiary issues that could unnecessarily complicate the Supreme Court's review.
- Jackson County thus urged the Court to decide the *Rowan County* case instead.

Reschedule After Reschedule

- The *Rowan County* cert petition was originally distributed for the Supreme Court's conference on January 19, 2018, but it has since been **Rescheduled** and **Distributed** seven (7) times*—each time rescheduled before the conference where the Court was set to discuss the petition.
- Similarly, the *Jackson County* cert petition was originally distributed for conference on March 3, 2018, but it has been Rescheduled and Distributed five (5) times*—always in tandem with the *Rowan County* rescheduling.

* Eight (8) and six (6) times, respectively, if it is rescheduled again before the Friday, April 20 conference.

Timing for Decision

- The Supreme Court will likely consider the cert petitions in *Rowan County v. Lund* (No. 17-565) and *Bormuth v. Jackson County* (No. 17-7220) sometime this Term.
- Were the Court to grant cert in either case (or both cases), it will likely not hear argument until the next Term, beginning in October 2018.

Prayer Practices Going Forward

- The Supreme Court has made clear in *Marsh* and *Town of Greece* that legislative prayer does not violate the Establishment Clause when it fits within the traditions historically followed in Congress and State legislatures.
- And *Town of Greece* made clear that local government prayers fit in that tradition even if they are sectarian (mentioning nearly exclusively one religion) and even if they begin with invitations to join in the prayer (like “let us pray”).

Prayer Practices Going Forward (cont.)

- Given the existing split, the need for the Supreme Court to step in and clarify that legislators can deliver invocations consistent with *Town of Greece* is great.
- While we await that guidance, *Town of Greece* remains the touchstone. It bears repeating that under *Town of Greece*, legislative prayer practices are permissible if, ***over time and as a whole***, they do not:
  - Proselytize one religion over others or denigrate or disparage another religion, or
  - Single out dissidents for opprobrium.

Wait and See…

- In the meantime, we will wait and see whether the Supreme Court decides to take up the issue of whether legislators delivering prayers makes them unconstitutional.

- Under *Town of Greece*, so long as such prayers fit in the Nation's traditions and are non-coercive, they should be permissible.

- But the Fourth and Sixth Circuits have disagreed on that question, and the Court has yet to answer it directly.

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THANK YOU



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