UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 15-1869

PETER BORMUTH,

Appellant

v.

COUNTY OF JACKSON,

Appellee

On Appeal from United States District Court, Eastern District of Michigan,

Southern Division, Case No. 13-cv-13726

District Judge, Hon. Marianne O. Battani

APPELLANT'S BRIEF

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ORAL ARGUMENT REQUESTED

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CONSTITUTIONAL PROVISIONS

U.S. Constitution, Article 2, Section 3 in pertinent part holds:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;…

U.S. Constitution, Article 6, Section 2 in pertinent part holds:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land;…

U.S. Constitution, Article 6, Section 3 in pertinent part holds:

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

U.S. Constitution, Amendment 1 in pertinent part holds:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…

U.S. Constitution, Amendment 14 in pertinent part holds:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS

Title 42 U.S.C. Section 1983 in pertinent part holds:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress…

JURISDICTIONAL STATEMENT

This is an appeal from a final order granting summary judgment to Defendant, Jackson County, on Plaintiffs' Establishment Clause challenge to Defendants' practice having elected government officials offer prayers at monthly County Commissioner meetings. The order was issued on July 22, 2015 and entered on July 23, 2015, and the Plaintiff filed a timely notice of appeal on July 27, 2015 and filed a corrected notice of appeal on July 28, 2015. The District Court had subject-matter jurisdiction under Article 2, § 3 & Article 6, § 2 of the U.S. Constitution, and under 28 U.S.C. § 1331 & 28 U.S.C. § 1343(a)(3), and this Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT ON ORAL ARGUMENT

Following F.R.C.P. 34(a)(1) the Appellant respectfully requests oral argument. Oral argument would be helpful to the panel in clarifying the District Court's erroneous findings of fact and subsequent misapplications of law.

STATEMENT OF THE ISSUES

The District Court has established the right of elected governmental officials to compose and offer prayers to Jesus Christ in the course of their official duties violating the Establishment Clause and Article 2, § 3, and Article 6, § 2 of the U.S. Constitution. The District Court has established the right of Jackson County to impose a religious test for appointment to official governmental bodies. The District Court has established majority rule in religion. The District Court has ruled that the defendants can contaminate young impressionable minds with the idea that the government of the United States is associated with the Christian religion. The District Court has

denied the Appellant the basic legal right to take depositions under F.R.C.P. 26(b). The District Court has denied (in part) the Appellant's right to supplement the record under F.R.C.P. 15(d). The District Court has made clearly erroneous findings of facts. The District Court has misapplied the law. The District Court has misinterpreted history and ignored the intent of our Founding Fathers.

Thomas Jefferson held it was "the impious presumption of legislators and rulers…, who, being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes to thinking as the only true and infallible, and as such endeavoring to impose them on others, hath established and maintained false religions over the greatest part of the world and through all time." ("An Act for Establishing Religious Freedom," *Cornerstones of Religious Freedom in America*, ed. Joseph Blau (Boston, 1949) p. 74-75). While acknowledging that the revolutionary era had created an atmosphere that alerted Americans to ecclesiastical tyranny, Jefferson feared for the future. "Let us…get rid, while we may, of those tyrannical laws. It is true, we are as yet secured against them by the spirit of the times. I doubt whether the people of this country would suffer an execution for heresy, or a three year imprisonment for not comprehending the mysteries of the Trinity." He prophetically declared, "the spirit of the times may alter, will alter. Our rulers will become corrupt, our people careless. A single zealot may commence persecutor, and better men be his victims." (Thomas Jefferson, *Notes on the State of Virginia*, ed. William Peden (Chapel Hill, 1982), p. 161). A simple perusal of the statements being made by Christian Republican candidates for President make it abundantly clear that Jefferson's fears are materializing and that the unique Constitutional protection our Founders provided against the tyranny of established religion is in danger of being overthrown.

The following issues are presented for review:

1) Did the District Court abuse its discretion when it adopted (in part) the Magistrate Judge's Order granting Defendant's Motion to Quash?
2) Did the District Court commit clear error when it adopted (in part) the Magistrate Judge's Order denying Plaintiff's second Motion to Supplement (Dkt. 52)?
3) Did the District Court err when it applied the ruling in *Town of Greece v. Galloway* to the facts of this case and was the Plaintiff entitled to summary judgement, injunctive relief, and nominal damages on his claim that the Establishment Clause is violated when elected governmental officials compose and offer prayers in the name of Jesus Christ to open monthly County Commissioner meetings?
4) Did the District Court err by ruling that Article 2, § 3 & Article 6, § 2 of the U.S. Constitution & the Treaty of Tripoli (Article 11) do not apply to this case?
5) Was the Plaintiff entitled to summary judgement, injunctive relief, and nominal damages under the standard of *Lemon v. Kurtsman* on his claims that the Establishment Clause was violated by the County Commissioners when they prayed to Jesus Christ, coerced audience participation, and denied the Plaintiff appointments based on a standard of religious conformity or silence?
6) Did the District Court err by denying the Plaintiff standing to bring his Establishment Clause claim against the Defendants for their Pledge of Allegiance practice?

STATEMENT OF THE CASE

Plaintiff/Appellant, Peter Bormuth, is a Pagan who filed this lawsuit against the County of Jackson (Michigan) on August 30, 2013 for their practice of opening monthly County Commissioner meetings with a Christian prayer given by one of the Commissioners. Under the Establishment Clause, Article 2, § 3 and Article 6, § 2 of the U.S. Constitution and the Treaty of Tripoli (Article 11) and the Plaintiff challenged this formal practice of Christian prayer by governmental officials, the coercive commands requiring the audience to participate by standing and assuming a reverent position, and Jackson County's practice of inviting young impressionable schoolchildren to lead the Pledge of Allegiance directly after this opening Christian prayer. The Plaintiff also alleged that he had been denied appointment to the Solid Waste Planning Committee because of his opposition to the Commissioner's prayer practice and his adamant refusal to honor the Christian god of the Commissioners. The Plaintiff sought declaratory and injunctive relief along with nominal damages. The Plaintiff has attended every meeting of the Board of Commissioners since this lawsuit was filed and has been subjected to Christian prayers at each monthly meeting. The Plaintiff filed three separate motions to supplement (Dkt. 42, filed October 29, 2014; Dkt. 52, filed April 13, 2015, and; Dkt. 57, filed April 27, 2015) based on the Defendant's continuing illegal conduct subsequent to the filing of the complaint. The Plaintiff sought to depose the Commissioners under F.R.C.P. 26 within the period allotted by the Court's Scheduling Order entered on January 14, 2014.

Honorable Magistrate Michael J. Hluchaniuk issued an Order on December 10, 2014 (Dkt. 46) granting the Defendant's Motion to Quash Depositions. The Plaintiff filed a timely objection with

the Court on December 15, 2014 (Dkt. 47) and filed a corrected objection on December 18, 2014 (Dkt. 48).

Honorable Magistrate Michael J. Hluchaniuk issued an Order on April 17, 2015 (Dkt. 54) denying the Plaintiff's first (Dkt. 42) and second (Dkt. 52) motions to supplement. The Plaintiff filed a timely objection on April 27, 2015 (Dkt 56) which was entered on April 28, 2015.

After reviewing cross-motions for summary judgment Honorable Magistrate Michael J. Hluchaniuk issued a Report and Recommendation on March 31, 2015 recommending that the Plaintiff's Motion for Summary Judgment be granted, that the Defendant's Motion for Summary Judgment be denied, and that an Injunction precluding the County of Jackson's Board of Commissioners from utilizing its current prayer practice be entered. Both parties filed timely objections with the Court.

On July 22, 2015 the Honorable Marianne O. Battani issued an Opinion and Order overruling the Plaintiff's objections, overruling in part and sustaining in part the Defendant's objections, granting Defendant's Motion for Summary Judgment and denying Plaintiff's Motion for Summary Judgment. The Court found that the Treaty of Tripoli does not apply despite the Court's use of the *Greece/Marsh* historical tradition standard. The Court found that the *Lemon* test did not apply, even though this case involves direct government speech. The Court found that the fact that all nine Commissioners are Christian and thus every prayer is Christian was immaterial. The Court noted this was just a reflection of the community's own overwhelming Christian demographic and held majority rule in religion to be Constitutional while adopting Defendant's argument that the Appellant should seek reprieve at the ballot box. The Court found that the commands of the Commissioners ("All rise and assume a reverent position") were not unduly

coercive. The Court held that even though the Commissioners served as exclusive prayer providers and dictated the content of each prayer, this did not foster an excessive government entanglement with religion. Finally, the Court held that the Appellant did not have standing to object to the Commissioner's practice of having young impressionable children lead the Pledge of Allegiance immediately following the prayer invocation.

In separate orders issued on the same date the Court overruled in part and adopted in part the Magistrate Judge's order granting Defendant's Motion to Quash Depositions, thus denying the Appellant the basic right to take depositions under F.R.C.P. 26. The Court also adopted in part the Magistrate Judge's Order denying the Plaintiff's second motion to supplement.

STATEMENT OF FACTS

Background

The Jackson County Commissioners typically meet on the third Tuesday of every month at 7pm in the commissioners chambers on the 5th floor of the Jackson County Building. (Dkt. 10, p.4, ¶ 16). The meetings are free and open to the public. (Dkt. 10, p.4, ¶ 16). The County Commissioners meetings are video recorded and posted on the Jackson County website: www.co.jackson.mi.us. (Dkt. 10, p.4, ¶ 16). Jackson County opens its County Commissioner meetings with an invocation/prayer. (Dkt. 10 p. 1. ¶ 1). The Commissioners themselves lead the invocation/prayers on a somewhat rotating basis. (Dkt. 10, p.1. ¶ 1). All of the Commissioners are Christian. (Dkt. 10, p.1. ¶ 1). Therefore all of the prayers are Christian. (Dkt. 10, p.1. ¶ 4). Citizens who attend the meetings are commanded to rise and bow their heads. (Dkt. 10, p.1 ¶ 1). The County of Jackson policy manual has no posted rules regarding this invocation/prayer. (Dkt. 10, p. 1, ¶ 2, 18, 26).

The invocation/prayer is immediately followed by the Pledge of Allegiance on the meeting agenda. (Dkt. 10, p. 1 ¶ 3). Children are regularly invited to the Commissioners meeting to lead the Pledge of Allegiance. (Dkt. 10, p. 1 ¶ 3).

On January 15, 2013, after Chairman Shotwell directed **“all rise and assume a reverent position”** Commissioner Carl Rice Jr. led a Christian invocation ending with **“in Jesus name I pray, Amen.”** This was immediately followed by the 5th grade class from Northwest Elementary School coming forward to lead the Pledge of Allegiance. (Dkt. 10, p. 5, ¶ 19).

On April 16, 2013, after Chairman Shotwell directed **“all rise and assume a reverent position”** Commissioner Julie Alexander led a Christian prayer ending with **“in your holy name, Amen.”** This was immediately followed by the Jackson Autism Support Group (children) coming forward to lead the Pledge of Allegiance. (Dkt. 10, p. 5, ¶ 20).

On May 21, 2013, after Chairman Shotwell directed **“all rise”** Commissioner Gail Mahoney led a Christian prayer ending with **“in your son Jesus name, Amen.”** This was immediately followed by a cute young blond girl of maybe 6 or 7 years old, identified only as Kalie, who led the Pledge of Allegiance. (Dkt. 10, p. 5, ¶ 21).

On June 18, 2013 Commissioner John Polaczyk led a Christian prayer ending with **“in your name, Amen.”** This was immediately followed by Eagle Scout Kim O’Connell (age 15?) leading the Pledge of Allegiance. (Dkt. 10, p. 5, ¶ 22).

On July 23, 2013 after Chairman Shotwell directed **“all rise”** Commissioner Gail Mahoney led the following prayer:

> **Bow your heads with me please.** Heavenly father we thank you for this day and for this time that we have come together. Lord we ask that you would be with us while we conduct the business of Jackson County. Lord help us to make good decisions that will be best for generations to come. We ask that you would bless our troops that protect us near and far, be with them and their families. Now Lord we wanna give you all the thanks and all the praise for all that you do. Lord I wanna remember bereaved families tonight too, that you would be with them and take them through difficult times. We ask these things **in your son Jesus's name. Amen.**

This was immediately followed by two children, Eli and Gavin Lattner, coming forward to lead the Pledge of Allegiance. (Dkt. 10, p. 5, ¶ 23).

On Tuesday August 20, 2013, Commissioner David Elwell led the following prayer:

> **Please rise. Please bow our heads.** Our heavenly father we thank you for allowing us to gather here in your presence tonight. We ask that you watch over us and keep your guiding hand on our shoulder as we deliberate tonight. Please protect and watch over the men and women serving this great nation, whether at home or abroad, as well as our police officers and firefighters. **In this we pray, in Jesus name, Amen.**

This was immediately followed by the Pledge of Allegiance, which was led by two children, Jamison and Gerald Maitland. (Dkt. 10, p. 8, ¶ 28, 29). The Commissioner's meeting on August 20, 2013 included an agenda item involving the Second Amendment, and the Commissioners later voted to allow County employees with CWP's to carry handguns at work. Administrator/Controller Michael Overton stated in a newspaper story posted on M/Live that Jackson County was being proactive in support of the Second Amendment. (Dkt. 10, p.8, ¶ 30). The Plaintiff addressed the First Amendment Establishment Clause prayer issue before this Court during his 5 minute public comment at that meeting. While the Plaintiff was speaking, Commissioner David Lutchka made faces expressing his disgust and actually swiveled his chair

and turned his back to the Plaintiff, confirming the Plaintiff's fears that his refusal to honor the Christian religion would prejudice his reception by the Commissioners on all other issues he chose to address. (Dkt. 10, p. 9, ¶ 31)

On September 9, 2013 Jackson County officials (Agencies and Affairs committee) voted on a pool of applicants and nominated members for the County's new Solid Waste Planning Committee. The Plaintiff, who had applied and who had been working on related issues for the last three years was not nominated, while two Christian "environmentalists" with limited activity were nominated. (Dkt. 10, p. 9, ¶ 33). On September 17, 2013 the Commissioners approved the nominations. (Dkt. 10, p.10, ¶ 34).

On Tuesday October 15, 2013 after Chairman Shotwell directed **"All rise"** Commissioner David Lutchka gave the following invocation:

> Our Heavenly Father, watch over us tonight, help us to make the best decisions for the total population of the County of Jackson. And I know your tough so give all those guys in Washington a two by four upside the head and tell them to start working together**. In Jesus name we pray. Amen.**

This was followed by a child, David Rice, coming forward to lead the Pledge of Allegiance. (Dkt. 10, p. 10, ¶ 35, 36).

On Tuesday October 21, 2014 Commissioner Phil Duckham gave the following prayer/invocation:

> **Please bow your heads, please.** Heavenly father, we gather here tonight under your watchful eye to do the business of Jackson County. Please grant us the wisdom and guidance to make intelligent and proper decisions that benefit the citizens of Jackson County. Bless our troops. **Bless the Christians worldwide who**

seem to be the targets of killers and extremists. Lord we ask this in your holy name. Amen.

This was followed by the Springport High School student members of the Parliamentary procedure team who led the Pledge of Allegiance and gave a demonstration of their parliamentary skills. (Dkt. 42, Exhibit L, Affidavit 3 of Peter Bormuth, ¶ 3, 4, 7).

On Tuesday April 21, 2015 Commissioner John Polaczyk acted in a rude and disturbed manner while the Plaintiff was politely addressing the Commissioners during the (second) public comment period on the Earth Day topic of human population and abortion. (Dkt. 57, p. 2, ¶ 10). The Plaintiff noted that there are approximately 7 billion human beings on this planet and that human population has doubled in the Plaintiff's lifetime. (Dkt. 57: Affidavit 5 of Peter Bormuth, ¶ 4). The Plaintiff noted the incredible demand this places on the Earth's resources. (Dkt. 57: Affidavit 5 of Peter Bormuth, ¶ 5). The Plaintiff noted that the ancient pagan law of the Goddess holds that: **"She who gives birth, may terminate."** (Dkt. 57: Affidavit 5 of Peter Bormuth, ¶ 6). The Plaintiff noted that an abortion is just a planned miscarriage and that miscarriages are natural, normal events that women frequently experience. (Dkt. 57: Affidavit 5 of Peter Bormuth, ¶ 7, 8). The Plaintiff noted that the Biblical injunction to be fruitful and multiply was an appropriate morality for the wandering Israelites but that this morality and the prohibition on abortion has no application to the situation we currently face on this planet. (Dkt. 57: Affidavit 5 of Peter Bormuth, ¶ 9, 10). The Plaintiff stated that given the rise of human population, any woman who sought abortion should be applauded and not prohibited. (Dkt. 57: Affidavit 5 of Peter Bormuth, ¶ 11). While the Plaintiff was speaking in a calm and rational manner, Commissioner Polaczyk first swiveled his chair and turned his back to the Plaintiff, then stood up

and partially exited the chambers before returning to his seat. (Dkt. 57: Affidavit 5 of Peter Bormuth, ¶ 12, 13, 14). Commissioner Polaczyk had previously refused to nominate the Plaintiff for the open vacancy on the Board of Public Works at the December 8, 2014 meeting of the Commissioners despite the fact that the Plaintiff was the most qualified applicant and a fellow Democrat. (Dkt. 57, p.2, ¶ 11, Affidavit 5 of Peter Bormuth, ¶ 15).

Former M/Live award winning reporter, Lisa Satayut, was transferred from her beat covering Jackson County government after the Plaintiff publicized her statement that the prayer/invocations of the Commissioners "felt uncomfortable." (Dkt. 57, Affidavit of Peter Bormuth, ¶ 18).

The Plaintiff and his Complaint

The Plaintiff, Peter Bormuth is a citizen of the State of Michigan and grew up in Jackson County, attending the Public Schools. The Plaintiff is a self-professed Pagan. The Online Dictionary observes that pagan comes from Latin meaning *"rural dweller",* connoting a *"non-christian"* or *"follower of a polytheistic religion"* but notes that the word *"has recently evolved to become a general term for the followers of magical, shamanistic, and polytheistic religions which hold a reverence for nature as a central characteristic of their belief system."* The Plaintiff has held these views publicly and sincerely since 1978, publishing books, essays, poetry, & music on the subject. The Civil Rights Act of 1964 states: **"To be a bona fide religious belief entitled to protection under either the First Amendment or Title VII, a belief must be sincerely held, and within the believer's own scheme of things religious."** (USCA Const. Amend 1: Civil Rights Act 1964 701 et seq., 717 as amended 42 USCA 2000-16). As the dictionary definition indicates, Pagans are

Polytheists. Pagans worship the Milky Way, the Sun, the Moon, the Planets, and the spirits of ancestors, but our primary deity is the Mother Earth. The Commissioner's invocations to a Father God and his son Jesus Christ are a personal affront to the Plaintiff. The Plaintiff believes in a Mother Goddess. This Father God is just a projection of the human psyche and the patriarchal social structure while the Mother Earth is a real living planet. The Plaintiff feels that the New Testament is a children's story and that Jesus Christ is a mythic figment of the Christian imagination. (Dkt 10, p. 3, ¶ 13, 24). As a Pagan Druid, the Plaintiff is a student of history and knows that whenever Christianity has been united with secular government, the Christians have committed atrocities, including the slaughter and forced conversion of ancient Pagans, the enslavement and transport of Africans, the genocide against Native Americans, and the burning of women, witches, heretics, gypsies and Jews in Europe. All of these actions have been taken in the name of Jesus Christ. In the last century, this pattern culminated in the Christian Nazi genocide during which six million Jews went up in smoke. In Israel, in 1985, Elie Wiesel commented on the Holocaust: **"All the killers were Christians…The Nazi system was a consequence of a movement of ideas and followed a strict logic; it did not arise in a void but had roots deep in a tradition that prophesized it, prepared for it, and brought it to maturity."**

These evils are compounded by the Christian attitude of dominion towards our environment. Pagans hold that water is sacred and that rivers are the bloodstream of the Mother Earth. For the last 20 years (until 2014) Jackson County has been dumping untested wastewater from the Resource Recovery Facility containing dioxins/furans and mercury into the Grand River, literally poisoning the Plaintiff's Deity. (Dkt 10, p. 6, 7, ¶ 25). And then when the Plaintiff came to this secular governmental body to comment on these matters involving Jackson County's waste

stream, and came to argue from a sound scientific and economic perspective and not from his personal religious feelings, he was subjected to Christian prayers and coerced to acknowledge Jesus Christ as god. (Dkt 10, p. 8, ¶ 29).

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment de novo. *City Management Corp. v. United States Chem. Co.,* 43 F.3d 244 (6th Cir. 1994). Summary judgment is appropriate only if the pleadings, together with the affidavits, show there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. FED. R. CIV. P. 56(A); *Tucker v. Tennessee*, 539 F.3d 526, 531 (6th Cir. 2008). The burden is on the moving party to show that no genuine issue of material fact exists. FED. R. CIV. P. 56(C)(1); *Bennett v. City of Eastpointe,* 410 F.3d 810, 817 (6th Cir. 2005). The facts, and the inferences drawn from them, must be viewed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986). The central issue is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 255 (1986).

Appellate courts "review a district court's decision as to the scope of discovery…under an abuse of discretion standard." *Audi AG v. D'Amato*, 469 F.3d 534, 541 (6th Cir. 2006). "An abuse of discretion occurs when the reviewing court is left with the definite and firm conviction that the trial court committed a clear error of judgment." *United States v. Hunt*, 521 F.3d 636, 648 (6th Cir. 2008). The district court abuses its discretion when it "relies on clearly erroneous findings of fact…, improperly applies the law, or…employs an erroneous legal standard," *United States v.*

Baldwin, 418 F.3d 575, 579 (6th Cir. 2005) (quoting *United States v. Cline*, 362 F.3d 343, 348 (6th Cir. 2004).

Filings by pro se litigants are to be construed liberally. *Haines v. Kerner*, 404 U.S. 519, 520 (1972); see also *McPherson v. Coombe*, 174 F.3d 276, 280 (2d Cir. 1999) (pro se party's pleadings should be read liberally and interpreted "to raise the strongest arguments that they suggest").

SUMMARY OF THE ARGUMENT

The Magistrate Judge and the District Judge made (separate) erroneous findings of fact in granting the Defendant's Motion to Quash and misapplied the law based on their erroneous perceptions.

The District Court committed clear error (on a question involving mixed Constitutional fact and law) in denying the Plaintiff's second motion to supplement.

The District Court misapplied the Supreme Court ruling in *Town of Greece v. Galloway,* 134 S. Ct. 1811, 188 L. Ed. 2d 835 (2014) to the facts of this case. This case does not involve legislative prayer within our historical tradition as defined by the Supreme Court in the *Greece/Marsh* exception. Rather, this case involves a clear violation of the Establishment Clause and the intent of our Founders. The prayers in this case are being composed and offered by the Commissioners themselves, during the course of their official duties after the gavel sounds opening their monthly meetings. As the Supreme Court said in *Engle*: [I]t is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves, and

to those the people choose to look to for religious guidance. *Engel v. Vitale*, 370 U.S. 421 at 435 (1962).

Because each Commissioner is Christian (reflecting the religious demographics of Jackson County), every prayer offered has been Christian. The ruling of the District Court establishes majority rule in religion, the very evil the Establishment Clause was designed to prohibit. Our Founders took matters of religion out of the hands of the government and secured them from the vagrancies of election results. As Mr. Justice Jackson writing for the Court in *West Virginia Board of Education v. Barnette,* 319 U. S. 624, 638 (1943) noted: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts. One's right to . . . freedom of worship . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

The prayer practice of Jackson County also falls outside the *Greece/Marsh* exemption because the Commissioners are coercing the audience to participate by commanding them to rise and assume a reverent position. As the majority opinion in *Town of Greece* noted, such a command from the government makes a difference. 134 S. Ct. at 1826 ("The analysis would be different if own board members directed the audience to participate in the prayers. Singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity"). The *Town of Greece* opinion reaffirmed earlier rulings that the government may not press religious observances on its citizens. "It is an elemental First Amendment principle that government may not coerce its citizens "to support or participate in any religion or its exercise." *County of Allegheny*, 492 U. S., at 659 (KENNEDY, J., concurring in

judgment in part and dissenting in part); see also *Van Orden*, 545 U. S., at 683 (plurality opinion) (recognizing that our "institutions must not press religious observances upon their citizens")." 134 S. Ct. at 1823.

The Court in *Town of Greece* reiterated that Establishment Clause cases demand a fact sensitive inquiry. *Id* at 1825 (see also *Van Orden v. Perry*, 545 U.S. 677, 700, 125 S. Ct. 2854, 162 L. Ed. 2d 607 (2005) (Breyer, J., concurring in the judgment) (emphasizing that the Establishment Clause inquiry "must take account of context and consequences"); *Lee v. Weisman,* 505 U.S. 577, 597, 112 S. Ct. 2649, 120 L. Ed. 2d 467 (1992) ("Our Establishment Clause jurisprudence remains a delicate and fact-sensitive one."). Assessing the factual record in Town of Greece, the Court found: "Nothing in the record indicates that the town leaders allocated benefits and burdens based on participation in the prayer, or that citizens were received differently depending on whether they joined the invocation or quietly declined. In no instance did town leaders signal disfavor towards nonparticipants or suggest that their stature in the community was in any way diminished." *Id* at 1830. The facts of this case stand diametrically opposed to that assessment of the record in *Town of Greece*. On two separate occasions, Commissioners singled out the Plaintiff for opprobrium by turning their backs on the Plaintiff while he was politely addressing the Board during the public comment period on matters involving religion. And twice the Plaintiff has been unjustly denied appointment to governmental boards or committees by the Commissioners because of his opposition to the christian religion. The Commissioners have created a religious test for appointments to governmental positions. The Commissioners in this case have signaled disfavor towards a non-participant and allocated benefits based on their standard of religious conformity or silence.

The District Court followed the Supreme Court in *Town of Greece* and applied a historical understanding and coercion standard to this case. The Supreme Court specifically noted that the Establishment Clause must be interpreted with reference to **“historical practices and understandings.”** *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811 (2014) quoting *County of Allegheny v. ACLU Greater Pittsburg Chapter*, 492 U.S. 573 (1989). The Treaty of Tripoli, Article 11 (1797) specifically states the understanding of our Founders with regard to any entanglement of the Christian religion with our government and Article 2, § 3 and Article 6, § 2 of the U.S. Constitution require this Court to apply that historical understanding to this case.

Since there is no historical basis supporting the prayer practice of Jackson County, the Supreme Court standard articulated in *Lemon v. Kurtzman,* 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971) should have been applied to this case. The Sixth Circuit recently upheld such analysis in *Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, 788 F.3d 580 (6th Cir. 2015). Since the prayer practice of Jackson County falls outside the historical tradition standard of *Greece/Marsh* and both endorses a specific religion and fosters an excessive entanglement with religion, the application of the Lemon test was the appropriate standard in this case.

Finally the Plaintiff argues that Judge Alito’s brief one-line mention in *Town of Greece* that “Nor is there anything unusual about the occasional attendance of students” 134 S. Ct. (Justice Alito concurring) does not legitimize Jackson County’s practice of regularly inviting children to every single meeting to witness this ritual prayer before they are called upon to lead the audience in the Pledge of Allegiance. They are specifically invited for this purpose and the attempt by the Commissioners to associate the government of the United States with the Christian religion in these young impressionable minds is deliberate and coercive and completely unsanctioned by

the ruling in *Town of Greece.* The District Court inexplicably chose to deny the Plaintiff standing to bring this argument even though the Supreme Court considered the similar, though weaker, argument from the Plaintiff's in *Town of Greece.* This issue must be considered by the Court. The Plaintiff asks this Court to apply the reasoning of *Lee* v. *Weisman,* 505 U.S. 577 (1992) and *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000) to this insidious practice. The Courts have ruled that prayer exercises involving elementary or secondary school children carry a particular risk of indirect coercion (see *Engel* v. *Vitale,* 370 U.S. 421 (1962) & *Abington School District* v. *Schempp,* 374 U.S. 203 (1963)) and the defendant's practice clearly violates that standard. The Plaintiff will argue that the Defendants' practice violates that standard, even if guest ministers were to give the invocations, and not the Commissioners themselves.

This Court should grant the Plaintiff summary judgment, nominal damages, and injunctive relief on all his Constitutional and Title 42 U.S.C. § 1983 claims. His right to take depositions and to supplement the record should also be upheld by this Court.

LEGAL ARGUMENT

1. THE DISTRICT COURT ABUSED ITS DISCRETION BY DENYING THE PLAINTIFF THE RIGHT TO DEPOSE COMMISSIONERS AND ADMINISTRATOR OVERTON UNDER F.R.C.P. 26.

A. The Magistrate Judge relied on a clearly erroneous finding of fact and misapplied the law when he ruled that the Plaintiff was seeking additional discovery under F.R.C.P. 56(d).

Honorable Magistrate Michael Hluchaniuk, in his Order Granting Motion to Quash Depositions (Dkt. 46), does an admirable job disposing of the Defendant's arguments to quash. First he correctly rules that the defendant's relevance *Greece*-based objection was meritless. (Dkt. 46, p. 4). Then he correctly finds that case law quoted by the defendant to support their

separation of power argument was distinguishable or inapplicable and correctly concludes this argument to be meritless. (Dkt. 46, p. 5). Then he correctly disposes of the defendant's argument that the deliberate process privilege applies by citing *Board of Educ. of Shelby Cnty., Tenn. V. Memphis City Board of Educ*., 2012 WL 6003540 (E.D. Tenn 2012) (holding in cases "when a plaintiff's cause of action turns on the government's intent," the deliberate-process privilege has been held not to apply) (quoting *In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 145 F. 3d 1422, 1424 (D. D.C. 1998)). (Dkt. 46, p. 6). As the Plaintiff noted in his response brief in his discussion of standard of review (Dkt. 26, p. 3-4), the defendants were seeking a new evidentiary privilege and Federal Courts have generally declined to grant requests for new privileges.[1]

After this tour de force the Magistrate inexplicably changes direction and rules for the Defendant on the basis that the Plaintiff was seeking additional discovery under F.R.C.P. 56(d). (Dkt. 46, p. 7).

> Rather, the Court is inclined to grant the motion to quash because both sides have fully briefed their respective summary judgment motions and responses, and the plaintiff has not indicated any need for additional discovery…as required by Federal Rule of Civil Procedure 56(d).

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[1] See, e.g. *University of Pennsylvania v. EEOC*, 493 U.S. 182, 189 (1990) (declining to adopt academic peer-review privilege); *In re Sealed Case*, 148 F.3d 1073 (D.C. Cir. 1998) (declining to adopt "protective function" privilege requested by the Secret Service), cert. denied, *Rubin v. United States*, 119 S. Ct. 461 (1998); *Carman v. McDonnell Douglas Corp.,* 114 F.3d 790, 794 (8th Cir. 1997) (rejecting a corporate ombudsman privilege and stating that "[t]he creation of a wholly new evidentiary privilege is a big step"); *Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp*., 5 F.3d 1508, 1514 (D.C. Cir. 1993) ("Federal courts have never recognized an insured-insurer privilege as such."); *EEOC v. Illinois Dept. of Employment Sec*., 995 F.2d 106 (7th Cir. 1993) (rejecting Rule 501 privilege for records of unemployment hearings); *United States v. Holmes*, 594 F.2d 1167 (8th Cir. 1979) (declining to recognize probation officer privilege).

The Court adds an extensive footnote quoting distinguishable or inapplicable case law with regard to discovery sought under F.R.C.P. 56(d)).

The facts completely contradict this interpretation. A proposed Discovery Plan was filed in this case on January 8, 2014 pursuant to the requirements of F.R.C.P. 26(f). The Discovery Plan stipulated that all discovery would proceed simultaneously and that all non-expert discovery should close on June 30, 2014. (Dkt. 15). A Scheduling Order was filed by the Court on January 14, 2014 that incorporated this timeline. (Dkt 19). On June 2, 2014 the Plaintiff issued notices under F.R.C.P. 26(b)(1) for the taking of written depositions of Administrator Michael Overton; Commissioner David Lutchka; Commissioner David Elwell; and Commissioner Gail Mahoney to be conducted on June 26, 2014. On June 6, 2014 Defendant filed a Motion for a Protective Order to Quash Depositions. (Dkt. 24). Plaintiff filed a response on June 13, 2014. (Dkt. 26). Defendant filed a reply on June 20, 2014. (Dkt. 28). The Plaintiff was proceeding under F.R.C.P. 26(b)(1) and was seeking his first opportunity to depose the defendants. He was not seeking additional discovery.

The Magistrate Judge relied on a clearly erroneous finding of fact and then misapplied the law by making a *sua sponte* argument for the defendant while citing distinguishable or inapplicable case law.

The Magistrate also ignored the fact that the Plaintiff made a showing of need in Exhibit F (Dkt. 37, Affidavit (2) of Peter Bormuth) and ignored Rule 56(c)(1)(A) which required the Court to consider Exhibit G, Jackson County Letter of Notification dated September 20, 2013, (Dkt. 37) showing that the Board of Commissioners denied the Plaintiff an appointment to the Solid Waste

Planning Committee. The Magistrate Judge incorrectly applied the law even under the mistaken factual assumption that the Plaintiff was proceeding under F.R.C.P. 56(d).

B. The District Court relied on a clearly erroneous finding of fact and misapplied the law when adopting the Magistrate Judge's Order granting the defendant's Motion to Quash Depositions.

Honorable Judge Marianne Battani glosses over the Magistrate Judge's erroneous finding of fact (that the Plaintiff was proceeding under F.R.C.P. 56(d) rather than Rule 26(b)(1)) by noting that the same test is applied to both rules.[2] The Appellant notes that "It is very unusual for a court to prohibit the taking of a deposition altogether and absent extraordinary circumstances, such an order would likely be in error." *Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979). (See J. Moore & J. Lucas, Moore's Federal Practice P 26.69 (3d ed. 1976); C. Wright & A. Miller, Federal Practice & Procedure § 2037 (1970)). The Honorable Judge justifies this ruling by stating:

> Plaintiff's complaint alleges a cause of action based only upon the *Establishment Clause*; he has not brought an employment discrimination claim. Therefore, to the extent that Plaintiff sought to obtain information regarding the Jackson County Resource Recovery Facility's failure to hire him, this information is not relevant to his claim.
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> (Dkt 59, p. 2, 3)

The District Court apparently has not read the Plaintiff's amended complaint and misunderstands the facts of this case. The Plaintiff's Amended Complaint states he brought this

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[2] Whether the line of interrogation is relevant to a party's claim or defense and is reasonably calculated to lead to the discovery of admissible evidence. See *Martinez v. McGraw,* 581 F. App'x 512, 517 (6th Cir. 2014).

action under the Establishment Clause, and Title 42 U.S.C. Section 1983. (Dkt. 10, p. 2, ¶ 8, 11; Dkt. 10, p. 23, ¶ 45, 46, 49). The Court is correct that the Plaintiff is not alleging employment discrimination. The Plaintiff never sought employment from the JCRRF. As a private citizen/activist, the Plaintiff worked for three years to shut the JCRRF down. And in summer of 2013 after the Commissioners voted 8-1 to close the facility (with only Chairman Shotwell voting to continue running that polluting monstrosity), the Plaintiff sought appointment to the Solid Waste Planning Committee.[3] In Michigan, one of the functions of the Board of Commissioners is to make appointments to Committees, Boards, Agencies, Advisory Councils, and other governmental bodies. These various bodies play a significant role in County Government.[4] These appointments are a permanent agenda item at every meeting, although some months there are no appointments to make.

[3] The Michigan Department of Environmental Quality (MDEQ) requires each county in Michigan to have a Solid Waste Management Plans under Part 115 of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended. The State requires Michigan Counties to have plans updated when directed. When the Jackson County Resource Recovery Facility was closed, the former approved solid waste plan was required to be amended. Amending the plan required the Board of Commissioners to identify the designated planning agency and provide a notice of intent to prepare an amendment. After the designated planning agency was identified (Region 2 Planning Commission & Jackson County Board of Public Works), a solid waste planning committee must be appointed by the Board of Commissioners. The 14 member committee consists of various representatives from local government, the solid waste industry, environmental interest groups, and citizens from the surrounding area. State law requires the membership to included: 4 solid waste management industry representatives; 2 environmental interest groups representatives; 1 county government representative; 1 city government representative; 1 township government representative; 1 regional solid waste planning agency representative; 1 industrial waste generator representative; **and 3 general public representatives**.

[4] Along with the Solid Waste Planning Committee and the Board of Public Works, which are relevant to this action, other official bodies to which the Commissioners make appointments include: the Fair Board, FEMA, Traffic Safety, District Library, Jackson Area Transportation Authority, Emergency Management Advisory Council, Community Action Agency, Domestic Violence Coordinating Council, Parks Board, Veterans, Economic Development Council, Lifeways, Agricultural Preservation Board, Region 2 Planning Commission, Hospital Finance Authority, Land Bank Authority, Airport Zoning Board, Retirement Board, etc, etc.

Before the Commissioners made their appointments to the SWPC, the Plaintiff used his 5 minute public comment period at August 20, 2013 meeting to speak against the Commissioner's prayer practice. This is the meeting when (former) Commissioner David Lutchka made faces expressing his disgust and actually swiveled his chair and turned his back to the Plaintiff while the Plaintiff was quoting Thomas Jefferson. (Dkt. 10, p. 9, ¶ 31). On September 9, 2013 the Commissioners (Agencies and Affairs Committee) voted on a pool of applicants and nominated members to the SWPC. The Plaintiff, who was previously a virtual lock to be appointed, was not appointed, while two Christian "environmentalists" with limited activity were nominated. (Dkt. 10, p. 9, ¶ 33). On September 17, 2013 the Commissioners approved the nominations. (Dkt. 10, p.10, ¶ 34). Honorable Judge Marianne Battani has completely misunderstood the facts. The Commissioners denied the Plaintiff appointment to the SWPC based on a standard of religious conformity or silence. Because the Plaintiff challenged their prayer practice, he was excluded. The Constitutional guarantee that there be no religious test for public office extends to governmental appointments, not just elected office.[5] Since this case before the Court is a civil case that involves Constitutional questions, Federal Rule of Evidence 501 provides that federally evolved rules on privilege apply. Federal Rule of Evidence 601 specifically allows an inquiry into religious beliefs for the purpose of showing interest or bias because of them. The Plaintiff's line of inquiry was protected and the District Court abused its discretion when it "relie[d] on clearly

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[5] United States Constitution, Article VI, paragraph 3 states: "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but **no religious test shall ever be required as a qualification to any office or public trust under the United States."** (bold emphasis added).

erroneous findings of fact…, improperly applie[d] the law, or…employ[ed] an erroneous legal standard," *United States v. Baldwin*, 418 F.3d 575, 579 (6th Cir. 2005) (quoting *United States v. Cline*, 362 F.3d 343, 348 (6th Cir. 2004). Clearly the Plaintiff's line of interrogation was relevant to his claim and was reasonably calculated to lead to the discovery of admissible evidence. The Plaintiff had a right to depose the Commissioners regarding their bias and motives stemming from their private and personal attitudes towards religion and he is entitled to nominal damages under Title 42 U.S.C. Section 1983 for the Constitutional violation he suffered.

2. THE DISTRICT COURT COMMITTED CLEAR ERROR (ON MIXED CONSTITUTIONAL QUESTIONS OF FACT AND LAW) WHEN IT DENIED THE PLAINITFF'S SECOND MOTION TO SUPPLEMENT (Dkt. 52).

The Plaintiff's Second Motion to Supplement (Dkt. 52) sets out the following facts.[6] On December 3, 2014 the Plaintiff submitted an application to Jackson County for appointment to the open (member of public) slot on the Board of Public Works. (Dkt. 52, Ex. O, ¶ 1). On the same date, the Plaintiff contacted Commissioners John Polaczyk and Julie Alexander by e-mail requesting that they bring his name forward for nomination. (Dkt. 52, Ex. O, ¶ 2). The Plaintiff had attended nearly every Board of Public Works meeting over the last two years, was familiar

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[6] The Appellant leaves the standard of review to the discretion of the Court. Pure questions of law and mixed questions of law and fact are reviewed *de novo*; pure questions of fact, by contrast, are reviewed for clear error. *See United States v. Layne*, 324 F.3d 464, 468 (6th Cir. 2003) (explaining that this Court reviews both pure questions of law and mixed questions *de novo*, while reviewing pure factual findings for clear error); *United States v. Clark*, 982 F.2d 965, 968 (6th Cir. 1993) (explaining that "mixed questions," including whether proceedings are "fundamentally unfair," are reviewed *de novo*). An appellate court is to conduct an independent review of the record when constitutional facts are at issue. See *Jacobellis v. Ohio*, 378 U.S. 184, 190 & n.6, 12 L. Ed. 2d 793, 84 S. Ct. 1676 (1964).

with all current issues before the Board, and was easily the most qualified candidate. (Dkt. 52, Ex. O, ¶ 3). Both of these Commissioners had separately, in private conversation, called the Plaintiff, "the conscience of Jackson." (Dkt. 52, Ex. O, ¶ 4). At the December 8, 2014 Jackson County Commissioner's meeting neither Commissioner nominated the Plaintiff. (Dkt. 52, Ex. O, ¶ 5). Commissioner John Polaczyk claimed he deferred to Commissioner David Lutchka who wished to make the appointment. (Dkt. 52, Ex. O, ¶ 6). Commissioner Lutchka told the Plaintiff that the accepted applicant had been involved in setting up a township recycling station and that this experience was the reason for his appointment. (Dkt. 52, Ex. O, ¶ 7). But the Plaintiff had been the primary person working for the closure of the JCRRF and one of the primary advocates of recycling in Jackson County. (Dkt. 52, Ex. O, ¶ 8, 9). The Plaintiff's vocal activism encouraged (some of) Jackson's private waste haulers to upgrade their recycling operations and the Plaintiff's advocacy is the reason Jackson County now has a part-time Recycling Coordinator to gather recycling volume numbers in Jackson County. (Dkt. 52, Ex. O, ¶ 10, 11). Given these realities, as the Plaintiff told Commissioners Polaczyk and Alexander by e-mail, he believes the Commissioners simply refuse to grant an appointment to anyone who does not believe in the jesus story. (Dkt. 52, Ex. O, ¶ 13). Since Commissioner Lutchka twice nominated Valarie Cochran-Toops to board appointments (Ms. Toops is a Native American, Christian, and was a losing Democratic candidate for Commissioner in the 2014 election) it is clear that party affiliation was not the reason for the Plaintiff's exclusion. (Dkt. 52, p. 2, ¶ 7). This material further shows that the Commissioners a employing a religious test when making appointments to public bodies.

Additionally, the Plaintiff sought to supplement the record with the fact that Commissioner Julie Alexander, on the day she was sworn in to uphold the Constitution (January 2, 2015),

solicited the audience for young children to lead the Pledge of Allegiance which directly follows the prayer/invocation on the regular agenda. (Dkt 52, p. 2, ¶ 8; Ex. O, ¶14).

The District Court's rational for denying the Plaintiff's Motion to Supplement was once again based on a mistaken interpretation of the facts. Honorable Judge Battani states:

> In another motion to supplement, Plaintiff seeks to introduce his affidavit regarding his application to a position on the Jackson County Resource Recovery Facility and the Board's failure to hire him for this position. Plaintiff's affidavit also briefly mentions the Board's solicitation of children to recite the Pledge of Allegiance. Because Plaintiff's complaint makes no employment discrimination claim, instead advancing as sole cause of action an *Establishment Clause* violation, his affidavit describing the Board's failure to hire him is irrelevant to the case at hand. Although the Plaintiff also attests to the solicitation of schoolchildren to deliver the Pledge of Allegiance, his description of and objections to this practice are adequately set forth elsewhere in the record. Therefore it is within the broad discretion accorded to the Court by Rule 15(d) to **DENY** this motion to supplement.
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> (Dkt. 60, p. 3)

The Court shows a complete lack of comprehension of the facts and simply reiterates her erroneous rationale for granting the defendant's motion to quash. The Plaintiff's affidavit never mentions the JCRRF. The Plaintiff never sought employment. The Plaintiff sought appointment to the Board of Public Works and was denied appointment based on a standard of religious conformity or silence. Because the Plaintiff challenged the Commissioner's prayer practice and refused to honor the Christian religion, he has been excluded. The Constitution guarantees that there be no religious test for public office including governmental appointments, and the Plaintiff is clearly entitled to nominal damages for his exclusion under Title 42 U.S.C. Section 1983 for the Constitutional violation he suffered.

This affidavit also contains the only factual example of a Commissioner actively soliciting the audience for young children to lead the Pledge. The prior descriptions in the record just attest to the children leading the Pledge.

The District Court committed clear error and then misapplied the law. The Sixth Circuit has instructed that Rule 15(d) should be given a "liberal construction," so as "to permit amendments freely." *McHenry v. Ford Motor Co.,* 269 F.2d 18, 24, 25 (6th Cir. 1959). "The purpose of Rule 15(d) is to promote as complete an adjudication of the dispute between the parties as possible by allowing the addition of claims which arise after the initial pleadings are filed." *William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co*., 668 F.2d 1014, 1057 (9th Cir. 1981) (citing *Swayne Co. v. Sunkist Growers, Inc.,* 369 F.2d 449, 462 (9th Cir. 1966); 6 C. Wright & A. Miller, Federal Practice and Procedure § 1504 (1971)). This Court must overrule the District Court and grant the Plaintiff's second motion to supplement.

3. THE DISTRICT COURT ERRED BY APPLYING THE SUPREME COURT RULING IN *TOWN OF GREECE V. GALLOWAY* TO THE FACTS OF THIS CASE AND HAS ESTABLISHED MAJORITY RULE IN RELIGION IN VIOLATION OF THE ESTABLISHMENT CLAUSE.

A. The facts of this case fall outside of the historical tradition as defined by the *Marsh/Greece* exception.

The District Court misapplied the Supreme Court ruling in *Town of Greece v. Galloway,* 134 S. Ct. 1811, 188 L. Ed. 2d 835 (2014) to the facts of this case. This case does not involve legislative prayer within our historical tradition as defined by the Supreme Court in the *Greece/Marsh* exception. The prayers in this case are not being offered by a guest chaplain. The prayers in this case are being composed and offered by the Commissioners themselves, acting as supervisors

and censors of religious speech, during the course of their official duties after the gavel sounds opening their monthly meetings. The identity of the speaker is an issue of great significance which separates this case from *Town of Greece*. The defendant seeks to enlarge the limited historical exception created in *Marsh* and *Town of Greece*, thus swallowing the Establishment Clause. As the Supreme Court said in *Engel v. Vitale*, 370 U.S. 421 at 435 (1962):

> [I]t is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves, and to those the people choose to look to for religious guidance.

There is no historical or legal tradition in our country for allowing government officials to offer christian prayers. Indeed, it has been specifically prohibited by the Courts. See *North Carolina Civil Liberties Union Legal Foundation v. Constangy*, 947 F.2d 1145, 1149 (4th Cir. 1991) (observing in case where judge routinely opened court by delivering a prayer that judge acts as the court itself, and accordingly, **"[f]or a judge to engage in prayer in court entangles governmental and religious functions to a much greater degree than a chaplain praying before the legislature").** (bold emphasis added). Following this logic, the commissioners are acting as the government of Jackson County and the entanglement is unconstitutional. Even in the avowed Christian states of Puritan Massachusetts and Anglican Virginia, the tradition was for ministers to offer opening legislative prayers. There is no historical support for the defendant's position. In 1776 the Virginia Legislature passed Jefferson's Statute on Religious Freedom[7] with the wise and unrelenting assistance of James Madison (Jefferson was in France). An amendment was proposed to insert

[7] The Virginia Statute on Religious Freedom served as the model for the Establishment Clause of the First Amendment of the U.S. Constitution. Jefferson was so proud of his achievement in restoring the religious freedom of the ancient Pagan world after 15 centuries of Christian oppression that he had the text inscribed on his tombstone.

the words ‘Jesus Christ’ in the preamble so that it would read “coercion is a departure from the plan of Jesus Christ, the holy author of our religion.” Jefferson noted, “the insertion was rejected by a great majority, in proof that they meant to comprehend, within the mantle of its protection, the Jew and the Gentile, the Christian and the Mohometan, the Hindoo, and infidel of every description.” And privately he wrote: “I find nothing of value in orthodox Christianity.” (see *The Writings of Thomas Jefferson,* ed. A. A. Lipscome and A. E. Bergh, Volume XV (Washington DC: The Thomas Jefferson Memorial Association 1905). Jefferson also wrote, "Difference of opinion is advantageous in religion. Is uniformity attainable? Millions of innocent men, women and children, since the introduction of Christianity, have been burnt, tortured, fined, imprisoned: yet we have not advanced one inch towards uniformity. What has been the effect of coercion? To make one half the world fools, and the other half hypocrites. To support roguery and error all over the earth." In the same text Jefferson goes on to say “…it does me no injury for my neighbor to say there are twenty gods or no God. It neither picks my pocket nor breaks my leg.” (Thomas Jefferson, *Notes On the State of Virginia*, Query XVII, 1782).

Jefferson also noted his disbelief in “artificial systems invented by ultra-Christian sects” such as the doctrines of “the immaculate conception of Jesus, his deification, the creation of the world by him, his miraculous powers, his resurrection & visible ascension, his corporeal presence in the Eucharist, the Trinity, original sin, atonement, regeneration, election orders of Hierarchy etc.” (Thomas Jefferson – Letter to William Short, October 31, 1819, *The Writings of Thomas Jefferson* (ed. A. A. Lipscome and A. E. Bergh) Volume XV (Washington DC: The Thomas Jefferson Memorial Association 1905 pp. 219-224).

James Madison, the 'Father of the Constitution' wrote: "During almost fifteen centuries has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the clergy; ignorance and servility in the laity; in both superstition, bigotry, and persecution. What influence in fact have ecclesiastical establishments had on civil society? In some places they have been seen to erect a spiritual tyranny on the ruins of the civil authority. In many instances they have been seen upholding the throne of political tyranny. In no instance have they been seen the guardians of the liberties of the people. Rulers who wished to subvert the public liberty have found an established clergy convenient auxiliaries." (James Madison*, Memorial & Remonstrance Against Religious Assessments,* 1785).[8]

John Adams, our second President who signed the Treaty of Tripoli into law, wrote: "Do you think that a Protestant Popedom is annihilated in America? Do you recollect, or have you ever attended to the ecclesiastical Strifes in Maryland, Pennsylvania, New York, and every part of New England? What a mercy it is that these people cannot whip and crop and pillory and roast, as yet in the United States! If they could they would." (Letter to Thomas Jefferson, May 18, 1817).

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[8] James Madison also wrote on two separate occasions that the legislative chaplaincy in Congress was a violation of the Establishment Clause (see Elizabeth Fleet, *Madison's Detached Memoranda* 3 Wm. & Mary Q 534, 536-59 (1946) & Letter from James Madison to Edward Livingston, July 10, 1822 in *The Founders Constitution*, Philip B. Kirkland & Ralph Lerner eds. , 1987). This clearly contradicts the analysis of *Town of Greece* where the Court noted: "That the First Congress provided for the appointment of chaplains only days after approving language for the First Amendment demonstrates that the Framers considered legislative prayer a benign acknowledgement of religion's role in society." *Town of Greece*, 134 S. Ct. at 1819. Objections to legislative prayer were successfully raised in Pennsylvania while ratification of the Constitution was debated, *Penn. Herald,* Nov. 24, 1787. As one commenter noted: "The chaplaincy established by the First Congress was a carry-over from the days of the Continental Congress, which . . . exercised plenary jurisdiction in matters of religion; and ceremonial practices such as [this] are not easily dislodged after becoming so firmly established." *See L. Pfeffer, Church, State, and Freedom* p. 170 (rev. ed.1967).

The actions of George Washington also merit the Court's attention. George Washington while serving as President attended Christ Church in Philadelphia. President Washington always politely left the service before communion was served, leaving his wife behind to receive it. Washington was a man of immense dignity and this was his polite and reserved way of expressing his disbelief in the divinity of Jesus and the Christian doctrine of transubstantiation. Bishop William White complained to the President of this behavior, so Washington simply stopped attending church on communion Sundays. In Bishop White's response letter of August 15, 1835 to Colonel Mercer of Fredericksburg, Virginia, White writes: "In regard to the subject of your inquiry, truth requires me to say that General Washington never received the communion in the churches of which I am the parochial minister. Mrs. Washington was an habitual communicant...I have been written to by many on that point, and have been obliged to answer them as I now do you." (*Memoir of Bishop White*, pp. 196, 197).

Benjamin Franklin wrote that he found "the Eternal decrees of God, Election, Reprobation" to be "unintelligible and doubtful." (Kenneth Silverman ed., *Benjamin Franklin: Autobiography and Other Writings* (New York, 1986), p. 89).

Our Founders debated and approved the Establishment Clause of the First Amendment which states: **"**Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;…" Thomas Jefferson explained the view of the Founders on the expected behavior of Federal officials in his letter to the Danbury Congregation of twenty six Baptist churches written while he was sitting President in 1802: "Believing with you that religion is a matter which lies solely between man and God(s), that he owes account to none other for his

faith or his worship, that the legislative powers of government reach actions only, and not opinions. I contemplate with sovereign reverence that act of the whole American people which declared that their (federal) legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and state." The passage of the Fourteenth Amendment extended this protection to the States and obviously State Legislators, County Commissioners, City Council Members and Township Supervisors are elements of State Government. Therefore they must abide by the wall of separation which the Founders established. The defendant's argument that elected government officials may offer Christian prayers during the course of their official government duties completely lacks any historical merit.

B. The District Court ruling establishes majority rule in religion.

The defendants have instituted majority rule in religion and are deliberately establishing the Christian religion as a preferred system of belief. Because each Commissioner is Christian (reflecting the religious demographics of Jackson County), every prayer offered has been Christian. The ruling of the District Court condones majority rule in religion, the very evil the Establishment Clause was designed to prohibit. Our Founders took matters of religion out of the hands of the government and secured them from the vagrancies of election results. Mr. JUSTICE JACKSON writing for the Court in *West Virginia Board of Education v. Barnette,* 319 U. S. 624, 319 U. S. 638 (1943) held:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts.

> One's right to . . . freedom of worship . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

In *Bacus v. Palo Verde Unified School District*, 52 Fed. Appx. 355 (9th Cir. 2002), a case involving teachers who sued their school board over the constitutionality of opening meetings with prayer, the Court stated:

> These prayers advanced one faith, Christianity, providing it with a special endorsed and privileged status in the school board….Solemnizing school board meetings 'in the Name of Jesus' displays 'the government's allegiance to a particular sect or creed.

There is no intrinsic difference between an elected school board member and a county commissioner. Both are elected governmental officials before whom the public come on official business. Having government officials solemnizing governmental meetings in the name of jesus christ displays the governments allegiance to a particular sect or creed and is a violation of the Establishment Clause. In *McGowan v. Maryland,* 366 U.S. 420 (1961) MR. JUSTICE FRANKFURTER wrote for the Court:

> The Establishment Clause withdrew from the sphere of legitimate legislative concern and competence a specific, but comprehensive, area of human conduct: man's belief or disbelief in the verity of some transcendental idea and man's expression in action of that belief or disbelief.

The District Court has tossed these venerable rulings into the waste basket along with the Establishment Clause and established majority rule in religion. Honourable Judge Marianne Battani held:

> The fact that all nine of the Commissioners are Christian is immaterial. As elected officials, they were chosen as representatives whose interests were most closely aligned with the public's, and their personal beliefs are therefore a reflection of the community's own overwhelmingly Christian demographic. Like the Town of Greece, Jackson was under no obligation to ensure representation by all religions. See Greece 134 S.Ct. at 1824. As argued by Jackson, the future may bring Commissioners of more diverse religious backgrounds who will deliver invocations in those traditions.
>
> (Dkt. 61, p. 7)

The danger of this ruling should be immediately apparent to this Court. It creates an electoral contest to establish religion, the precise evil that the Establishment Clause was construed to prevent. If Jackson County, like Town of Greece, was required to have a written policy and to invite guest clergy from the immediate area in accordance with the limited historical exception granted for legislative prayer, religious leaders (or even ordinary citizens) from among the minority population of Jews, Muslims, Hindus, Buddhists, Sikhs, Wiccans, Pagans, & Confucians, could attend meetings and lead respectful prayers. Invocation by guest speaker insures that minorities have a chance to offer invocations and allows some religious diversity to be maintained despite the 70% christian demographic of the community. In *Town of Greece N.Y. v. Galloway* 134 S. Ct. 1811 (2014) the Court ruled that prayers (by guest chaplains) did not have to be nonsectarian to comply with the Establishment Clause provided that: **"there is no indication that the prayer opportunity has been exploited to proselytize or advance any one,…faith or belief."** (quoting *Marsh* 463 U.S. at 794-795) (bold emphasis added). It is undeniable that the prayer opportunity in this case has been exploited to advance the christian faith and the District Court's ruling upholding such majority rule in religion violates the Establishment Clause and is just one more step along the road to a christian theocracy.

C. **These prayers are government speech, composed and offered by the Commissioners. The ruling in Town of Greece specifically held that the government should not dictate the content of prayers.**

Two other courts have considered this issue since the ruling in *Town of Greece* and both of them held that the identity of the speaker was significant and that prayers composed and offered by government officials were outside the ruling of *Town of Greece*. In a Memorandum Opinion in *Hudson v. Pittsylvania County, Va.,* Case No. 11-043 (W.D. Va. 2014), District Judge Michael Urbanski declined to dissolve his injunction in light of the Supreme Court ruling in *Town of Greece*. Considering similar facts to the instant case, the Court held:

> Central to the Court's decision in Town of Greece is the principal that the government, whether county officials or courts, ought not dictate the content of prayers offered at local government meetings…
>
> There are several critical points of distinction between the facts of Town of Greece and the prayer practice of the Board of Supervisors of Pittsylvania County. First and foremeost, unlike in Town of Greece, where invited clergy and laypersons offered the invocations, the Board members themselves led the prayers in Pittsylvania County. Thus, in contrast to Town of Greece, where the town government had no role in determining the content of opening invocations at its board meetings, the government of Pittsylvania County itself, embodied in its elected Board members, dictated the content of the prayers opening official Board meetings. Established as it was by the Pittsylvania County government, that content was consistently grounded in the tenets of one faith. Further, because the Pittsylvania County Board members themselves served as exclusive prayer providers, persons of other faith traditions had no opportunity to offer invocations. Put simply, the Pittsylvania County Board of Supervisors involved itself "in religious matters to a far greater degree" than was the case in Town of Greece. 134 S. Ct. at 1822. In doing so, the prayer practice in Pittsylvania County had the unconstitutional effect, over time, of officially advancing one faith or belief, violating the clearest command of the Establishment Clause…that one religious denomination cannot be officially preferred over another." Larson v. Valente, 456 U.S. 228, 224 (1982)….
>
> In sum, the active role of the Pittsylvania County Board of Supervisors in leading the prayers, and, importantly, dictating their content, is of constitutional dimension and falls outside of the prayer practices approved in Town of Greece…

Honorable Magistrate Judge Hluchaniuk extensively quoted this opinion, found the circumstances to be identical with the instant case, and correctly distinguished the instant case from *Town of Greece.* (Dkt. 50, p. 34, 35, 36).

In *Lund v. Rowan County, NC*, 13-207 (M.D. N.C. 2015) p. 17, when considering facts similar to the instant case, District Judge Beaty held:

> The crucial question in comparing the present case with Town of Greece is the significance of the identity of the prayer-giver, either as a member of the legislative body or a non-member of the legislative body. In the present matter, the Commissioners themselves-and only the Commissioners-delivered the prayers at the Board's meetings. In contrast, the Town of Greece invited volunteers from a variety of religious faiths to provide the prayers. After careful consideration, this Court concludes that this distinction matters under the Establishment Clause.

And on page 20 the Court holds:

> Under the Board's practice, the government is delivering prayers that were exclusively prepared and controlled by the government, constituting a much greater and more intimate government involvement in the prayer practice than that at issue in Town of Greece or Marsh. The Commissioners here cannot separate themselves from the government in this instance.
>
> Additionally, because of the prayer practice's exclusive nature, that is, being solely delivered by the Commissioners, the prayer practice cannot be said to be nondiscriminatory. The need for the prayer practice to be nondiscriminatory was one of the characteristics key to the constitutionality of the Town of Greece's practice. Town of Greece, 134 S. Ct. at 1824. Instead, the present case presents a closed-universe of prayer-givers, that being the Commissioners themselves, who favored religious beliefs believed to be common to the majority of voters in Rowan County…When all faiths but those of the five elected Commissioners are excluded, the policy inherently discriminates and disfavors religious minorities. That some day a believer in a minority faith could be elected does not remedy that until then, minority faiths have no means of being recognized. When only the faiths of the five commissioners are represented, the Board "reflect[s] an aversion or bias on the part of [county] leaders against minority faiths" namely, any faith not held by one of the Commissioners. See id. Such a system is in stark contrast with the policy

> at issue in Town of Greece where a follower of any faith, including members of the general public, were welcome to deliver the prayer at town council meetings.

While this Court is not bound by these two respective holdings, the Appellant believes their logic is irrefutable compared with the reasoning of Honorable Judge Battani who held:

> Further, in the opinion of this Court, the Commissioners' development of the prayers' content does not foster an entanglement with religion. Indeed, the hiring and payment of an official chaplain as upheld in Marsh may be regarded as a greater governmental entanglement with religion than the Commissioners' rather benign religious references at issue in the present case. That is, the presence of a religious figure could serve to strengthen perceived governmental ties to religion, not to distance them. (Dkt. 61, p. 16)

The impressionable young minds of children might be confused by the presence of a religious figure, but any competent adult can distinguish between a guest speaker and an elected governmental official. The Judge's argument ignores the specific history of legislative prayer. It ignores that legislators are elected decision makers who deliberate and vote within the legislative body, unlike an appointed or volunteer chaplain who possesses no such legislative, policy making power. (see *Lund v. Rowan County, NC*, 13-207 (M.D. N.C. 2015) p. 18, 19, footnote 5).

D. There is coercion in this case which was absent from Town of Greece

It is an elemental First Amendment principle that government may not coerce its citizens "to support or participate in any religion or its exercise." *County of Allegheny*, 492 U. S., at 659 (KENNEDY, J., concurring in judgment in part and dissenting in part); see also *Van Orden*, 545 U. S., at 683 (plurality opinion) (recognizing that our "institutions must not press religious observances upon their citizens"). *Town of Greece N.Y. v. Galloway*, 134 S. Ct. 1811, 1823 (2014). In allowing

the legislative prayers by guest chaplains, including requests to rise and bow heads, the majority opinion in *Town of Greece* specifically noted that:

> The analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity. No such thing occurred in the town of Greece. Although board members themselves stood, bowed their heads, or made the sign of the cross during the prayer, they at no point solicited similar gestures by the public. Respondents point to several occasions where audience members were asked to rise for the prayer. These requests, however, came not from town leaders but from the guest ministers, who presumably are accustomed to directing their congregations in this way and might have done so thinking the action was inclusive, not coercive.
>
> *Town of Greece N.Y. v. Galloway,* 134 S. Ct. 1811, 1823 (2014)

Obviously the facts in this case differ from *Greece.* The Court in *Greece* found the distinction between guest chaplains and the town council members themselves to be of significant importance. In the instant case the County Commissioners have directed the public to participate.[9] The factual record clearly indicates that the Jackson County Commissioners coerce

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[9] On January 3, 2011 after the gavel sounds opening the meeting, former Commissioner Cliff Herl approached the podium to give the invocation and demanded ***"All stand. I think everybody is."*** (January 3, 2011). Commissioner Phil Duckham requests ***"Everyone please stand. Please bow your heads."*** (March 15, 2011). Chairman Shotwell commands the audience to ***"All rise"*** before Commissioner Julie Alexander gives the invocation (April 19, 2011). Former Commissioner Jon Williams requests ***"Would you please rise?"*** (July 19, 2011). Before former Commissioner Cliff Herl leads the invocation, Jackson County Clerk Amanda Riska directs the audience to ***"Please rise."*** (January 3, 2012). Commissioner Phil Duckham instructs the audience to ***"Please bow your heads and let us pray."*** (March 20, 2012). Chairman Shotwell commands the audience to ***"All rise"*** before he leads the invocation. (June 19, 2012). Chairman Shotwell commands the audience to ***"All rise"*** before he again leads the invocation. (July 17, 2012). Chairman Shotwell commands the audience to ***"All rise and assume a reverent position"*** before Commissioner David Elwell leads the invocation. (October 23, 2012). Chairman Shotwell requests ***"If everyone could stand and please take a reverent stance"*** before Commissioner David Elwell leads the prayer. (November 20, 2012). Chairman Shotwell commands ***"Everyone rise and assume a reverent position"*** before Commissioner Carl Rice leads the prayer (January 15, 2013). Chairman Shotwell demands ***"All rise and assume a reverent position"*** before Commissioner Phil Duckham leads the prayer. (February 19, 2013). Chairman Shotwell commands the audience to ***"All rise and assume a reverent position"*** before Commissioner Julie Alexander leads the invocation (April 16, 2013). Chairman Shotwell commands ***"All rise"*** before Commissioner Mahoney leads the prayer. (May 15, 2013). Commissioner John Polaczyk demands ***"All rise. Please bow your head."*** (June 18, 2013). Chairman Shotwell commands ***"All rise"*** before Commissioner Gail Mahoney requests the audience to ***"Bow your heads with me***

citizens into standing, bowing their heads, and professing a belief in Jesus Christ when they come to participate in official governmental meetings. The "primary effect" of having an elected governmental official give the invocation while demanding that the audience participate is clearly religious. They are forcing citizens to pray to jesus christ. As the Supreme Court has said in the context of officially sponsored prayers in the public schools:

> “prescribing a particular form of religious worship," even if the individuals involved have the choice not to participate, places "indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion."
>
> *Engel v. Vitale*, 370 U.S. 421, 431 (1962)

Because the Invocations at Jackson County’s Commissioners meetings are given by elected governmental officials, they explicitly link religious belief and observance to the power and prestige of the State. This violates the constitutional prohibition on our government from offering prayers in order to promote a preferred system of belief or code of moral behavior. *Engel v. Vitale*, 370 U.S. 421, 430 (1962). The mere appearance of this joint exercise of legislative authority by Church and State provides a significant symbolic benefit to the christian religion by reason of the power conferred. See *Larkin v. Grendel's Den, Inc.,* 459 U.S. 116, 125-126 (1982); See also *Abington School Dist. v. Schempp,* 374 U.S. 203, 224 (1963). The government in this case is engaging in a religious exercise exclusively presenting the christian faith directly before making decisions on public matters. The government is commanding public participation in a prayer exercise, so that non-adherents in the majority faith must either acquiesce to the exercise or

please” (July 23, 2013). Commissioner David Elwell directs the audience to ***“Please rise*”** (August 20, 2013). Chairman Shotwell demands ***“All rise”*** before Commissioner David Lutchka leads the prayer (October 15, 2013). Commissioner Phil Duckham asks the audience to ***“Please bow your heads, please”*** (October 21, 2014).

brand themselves as outsiders by failing to stand and follow along. (See *Child Evangelism Fellowship of Maryland Inc v. Montgomery County Pub. Schs*., 373 F.3d 589 (4th Cir. 2004) at 599 (identifying situations in which the coerced activity constituted unconstitutional coercion because of its inherently religious nature, including “being bound to sit while other students of faculty pray,” and being “required, or even encouraged to…listen to a religious message”); see also *Peck v. Upshur Cnty. Bd. of Educ.*, 155 F.3d 274, 287 (4th Cir. 1998) (“the inquiry with respect to coercion must be whether the *government* imposes pressure…to participate in a religious activity.”) (quoting *Bd. of Educ v. Mergens*, 496 U.S. 226, 261 110 S. Ct. 2356, 2378, 110 L. Ed. 2d 191 (1990) Kennedy, J. concurring in part and concurring in the judgment)); see also *DeStefano v. Emergency Housing Group, Inc*., 247 F. 3d 397 (2nd Cir. 2001) (observing in the context of adults that “Government and those funded by the government ‘may no more use social pressure to enforce orthodoxy than [they] may use more direct means.’") (quoting *Lee*, 505 U.S. at 594, 112 S.Ct. 2649; *Santa Fe Indep. Sch. Dist*., 530 U.S. at 312, 120 S.Ct. 2266). Coercion is also impermissible when it takes the form of "subtle coercive pressure" that interferes with an individual's "real choice" about whether to participate in worship or prayer. *Lee,* 505 U.S. at 592, 595, 112 S.Ct. 2649. The facts of this case clearly establish that defendant’s prayer practice is unconstitutionally coercive and in violation of the Establishment Clause. The practice “sends the…message to members of the audience who are non-adherents ‘that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community’” *Sante Fe*, 530 U.S. at 309-310, 120 S. Ct. at 2279 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984) (O’Conner, J., concurring)).

In spite of the overwhelming command of all this case law, the District Court held:

> The Court is not persuaded that the legislative prayer at issue here is unduly coercive based on the identity of the prayer-giver. As a practical matter, nonadherants had several options available to them: leave the room for the duration of the prayer; remain for the prayer without rising; or remain for the prayer while rising…It is not clear that the direction to "Please rise" carries more coercive weight when voiced by the Commissioners themselves than by a guest chaplain selected by the Board of Commissioners.
>
> (Dkt. 61, p. 15)

The Appellant suggests this is faulty construction. A directive from a government official carries more weight and the expectation of compliance. For example, when Chairman Shotwell states: "The Jackson County Commissioners meeting is now in session. Please come to order" to start the meeting, or states "Your time is up, please sit down" to a citizen during public comment, no one in attendance regards that as a mere invitation which can be ignored. And if this Court is going to tell Plaintiff to leave the room because of his religion after the gavel sounds to open a governmental meeting, what does that say about this country?

E. The Plaintiff was singled out for disfavor and the Commissioners allocated benefits based on a standard of religious conformity or silence.

Assessing the factual record in *Town of Greece*, the Court found:

> Nothing in the record indicates that the town leaders allocated benefits and burdens based on participation in the prayer, or that citizens were received differently depending on whether they joined the invocation or quietly declined. In no instance did town leaders signal disfavor towards nonparticipants or suggest that their stature in the community was in any way diminished.

The facts in the instant case show that Commissioners singled out the Plaintiff for opprobrium on two separate occasions and denied the Plaintiff benefits based on his non-participation and his vocal opposition to the establishment of christian morality and religion. On August 20, 2013 during the public comment period while the Plaintiff was speaking on the issue of the Commissioner's prayer practice and quoting Thomas Jefferson, Commissioner David Lutchka made faces expressing his disgust and actually swiveled his chair and turned his back to the Plaintiff. (Dkt. 10, p. 9, ¶ 31). On Tuesday April 21, 2015, while the Plaintiff was speaking in a calm and rational manner during the (second) public comment period on the Earth Day topic of human population and abortion, Commissioner John Polaczyk first swiveled his chair and turned his back to the Plaintiff, then stood up and partially exited the chambers before returning to his seat. ((Dkt. 57, p. 2, ¶ 10; Affidavit 5 of Peter Bormuth, ¶ 12, 13, 14). In assessing these rude, demeaning, and deliberate actions, the District Court concluded:

> Bormuth's attestation that two Commissioners turned their backs to him during presentations, while evidence of disrespect, does not demonstrate that the Board was prejudiced against him because he declined to participate in the prayer – rather, their behavior is likely an unfortunate expression of their own personal sense of affront elicited by his sentiments.

The Court forgets that these individual Commissioners are not acting as private citizens, but as government officials. What these actions mean is that the Commissioners will not tolerate any expression opposed to their religious sentiments and morality.

Immediately after Commissioner Lutchka's showing of disfavor towards the Plaintiff, the Agencies and Affairs committee (on which Commissioner Lutchka was a member) met on September 9, 2013 and voted on a pool of applicants and nominated members for the County's

new Solid Waste Planning Committee. The Plaintiff, who had applied and who had been working on related issues for the last three years was not nominated, while two Christian "environmentalists" with limited activity were nominated. (Dkt. 10, p. 9, ¶ 33). On September 17, 2013 the Commissioners approved the nominations. (Dkt. 10, p.10, ¶ 34). The Plaintiff sought to take depositions of the Commissioners to prove that he was excluded because of his opposition to the Commissioner's prayer practice, but the District Court granted Defendant's motion to quash on erroneous factual grounds. Likewise, the District Court denied the Plaintiff's motion to supplement this action with evidence showing Commissioners Polaczyk, Alexander, and Lutchka denied the Plaintiff nomination to the Board of Public Works because of his religious sentiments on erroneous factual grounds. Even so, the record still establishes that the Commissioners discriminated against the Plaintiff and allocated benefits based on their standard of religious conformity or silence.

4. THE DISTRICT COURT ERRED BY FAILING TO APPLY ARTICLE 2, § 3 & ARTICLE VI, § 2 OF THE U.S. CONSTITUTION & THE TREATY OF TRIPOLI (ARTICLE 11) TO THIS CASE.

The District Court applied the historical practice standard and coercion standard utilized by the Supreme Court in *Town of Greece*. That ruling specifically noted that the Establishment Clause must be interpreted with reference to "historical practices and understandings." *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811 (2014) quoting *County of Allegheny v. ACLU Greater Pittsburg Chapter*, 492 U.S. 573 (1989). The Appellant claims that the Treaty of Tripoli clearly relates the historical understanding of our Founders with regard to governmental entanglements with the Christian religion.

This Court must uphold all treaties signed by the United States. Article 2, § 3 of the Constitution states that: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, **and Treaties made, or which shall be made, under their Authority…"** (bold emphasis added). Article 6, § 2 of the United States Constitution states: **"…all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land**, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." (bold emphasis added).

The treaty-making power of the United States is not limited by any express provision of the Constitution, and, though it does not extend "so far as to authorize what the Constitution forbids," it does extend to all proper subjects of negotiation between our government and other nations. *Geofroy v. Riggs*, 133 U.S. 258, 266, 267 (1890); *In re Ross*, 140 U.S. 453, 463 (1891); *Missouri v. Holland,* 252 U.S. 416 (1920). All treaties are binding. *Baldwin v. Frank*s, 120 U.S. 678, 682-683 (1887) ("The rule of equality established by a treaty cannot be rendered nugatory in any part of the United States by municipal ordinances or state laws (or common practice). It stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States. It operates of itself without the aid of any legislation, state or national; **and it will be applied and given authoritative effect by the courts")** (bold emphasis added); *Foster v. Neilson*, 27 U.S. 253, 314 (1829); *Head Money Cases*, 112 U.S. 580, 598 (1884); *Chew Heong v. United States*, 112 U.S. 536, 540 (1884); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *Maiorano v. Baltimore & Ohio R.R. Co*., 213 U.S. 268, 272 (1909); *Asakura v. City of Seattle*, 265 U.S. 332, 342 (1924). Treaties are to be liberally construed by the Courts and when interpreting the language

of a treaty words are to be taken in their ordinary meaning. *Hauenstein v. Lynham*, 100 U.S. 483, 487 (1879). *Geofroy v. Riggs*, 133 U.S. 258 (1890).

The Treaty of Tripoli, Article 11 (1797) gives concrete expression to the historical understanding which the Court must apply in this case: **"As the Government of the United States of America is not, in any sense, founded on the Christian religion;"** Thus no governmental official can offer Christian prayers during the course of their official duties. This treaty was debated and ratified by the full U.S. Senate and signed into law by President John Adams in 1797 without any objection being expressed to this specific language. His June 10th proclamation of the treaty stated: "Now be it known, That I John Adams, President of the United States of America, having seen and considered the said Treaty do, by and with the advice consent of the Senate, accept, ratify, and confirm the same, and every clause and article thereof. And to the End that the said Treaty may be observed and performed with good Faith on the part of the United States, I have ordered the premises to be made public; **And I do hereby enjoin and require all persons bearing office civil or military within the United States, and all others citizens or inhabitants thereof, faithfully to observe and fulfil the said Treaty and every clause and article thereof."** (bold emphasis added). The Treaty was published by the government in several newspapers, including the *Boston Price-Current and Marine Intelligence* and Philadelphia's *Porcupine Gazette*. The Barlow translation of the Treaty has been printed in all official and unofficial treaty collections since it appeared in the *Session Laws* of the Fifth Congress (1797) and in *The Laws of the United States,* edited by R. Folwell (1799).

Of the twenty-three Senators who approved the Treaty,[10] seventeen were delegates to the Continental Congress or the Congress of the Confederation. Three of them attended the Philadelphia Convention of which two signed the Constitution (Martin of NC left early). One signed the Declaration of Independence and most of them served in some important way in the Revolutionary War. Nearly all of them served in their state legislatures. Five of them helped frame their own state's Constitution and four were crucial in securing ratification of the Federal Constitution in their respective states. Most were attorneys educated at either Harvard, Yale, Princeton, University of Pennsylvania, Brown, or the College of William and Mary. All of these school were bastions of liberal thinking during the American Enlightenment. Six were judges of which five became the Chief Justices of their State Supreme Courts. Two of these judges also served as US District Court Judges. One was also a Probate Judge and another also a Naval Admiralty Judge. One of them (Paine-VT) served as Chief Justice of their state's highest court and then as Justice of the US Circuit Court. One was part of his state's War Council, one was Deputy Governor and six became Governors of their states. Never doubt the high standing, the intellectual achievement, and the unchallenged patriotism of the Fifth Congress. Their legal

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[10] Those who voted in the affirmative, were--Bingham, Bloodworth, Blount, Bradford (lawyer), Brown (lawyer), Cocke (lawyer & Justice of First Circuit Court), Foster (lawyer & Judge in Court of Admiralty), Goodhue, Hillhouse (lawyer), Howard, Langdon, Latimer, Laurance, Livermore (lawyer, New Hampshire Attorney General & Chief Justice of New Hampshire Superior Court), Martin (lawyer & Judge in Guilford County), Paine (lawyer & Chief Justice of Vermont Supreme Court), Read (lawyer), Rutherfurd (lawyer), Sedgwick (lawyer & Judge in the Supreme Judicial Court of Massachusetts), Stockton (lawyer), Tattnall, Tichenor (lawyer & Associate Justice of Vermont Supreme Court), and Tracy (lawyer). See, *The Journal of the Senate including the Journal of the Executive Proceedings of the Senate, John Adams Administration 1791-1801, Volume I: Fifth Congress, First Session; March-July, 1797*, Martin P. Claussen, General Editor. Michael Glazier, Inc. Wilmington, Delaware 19801, (1977) pp 156-57, 160. (I have identified the lawyers and added their future judicial positions to this roll call).

training and the historical necessity of their times, which obliged them to create constitutions and lay the foundations of American law, made these men were exquisitely sensitive to language. To pretend, as does the District Court, that they regarded Article 11 as a mere formality is absurd.

The District Court cites Frank Lambert, *The Founding Fathers and the Place of Religion in America,* Princeton (2006) in support of her position. The Appellant accepts Lambert's book as an authority, refers this Court to Chapter Nine for his conclusions,[11] and corrects the District Court's mangled quotation from his Introduction: **("By their actions, the Founding Fathers made clear that their primary concern was religious freedom, not the advancement of a state religion. Individuals, not the government, would define religious faith and practice in the United States. Thus the Founders insured that in no official sense would America be a Christian Republic. Ten years after the Constitutional Convention ended its work, the country assured the world that the United States was a secular state, and that its negotiations would adhere to the rule of law, not the dictates of the Christian faith. The assurances were contained in the Treaty of Tripoli of 1997…"** Frank Lambert, *The Founding Fathers and the Place of Religion in America,* Princeton

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[11] "Upon close analysis the Clause [Article 11] is entirely consistent with the Constitution. Ten years earlier, the delegates to the Constitutional Convention had crafted a secular state, one that established, supported, and defended no religion. Indeed, the end result of the Founding Fathers' deliberations was the acknowledgement that religion was not under governmental jurisdiction, remaining one of those natural rights that the people retained for themselves. Article 11 of the 1797 treaty affirmed that the "*government* (original emphasis) of the United States is not in any sense founded on the Christian Religion." Under the Constitution, church and state were separate." Frank Lambert, *The Founding Fathers and the Place of Religion in America,* Princeton (2006) p. 240.

"Throughout their deliberations, the Founders indicated that they were thinking about future generations. They acknowledged that their generation was a particularly liberal one, meaning that it was attuned to the dangers of any form of tyranny including that of a majority. But they knew that if proper constitutional safeguards were not in place, an imaginable political tyrant of the future could make a play for power by giving a popular religious group a position of favor in the eyes of the state. Frank Lambert, *The Founding Fathers and the Place of Religion in America,* Princeton (2006) p. 264.

(2006) (p. 11). Clearly the Senate's historical intention in ratifying that clause was to insure that no governmental official ever represented the United States as a christian nation, as the defendants have chosen to do. Our Constitution and our case law demand that this Court apply the Treaty of Tripoli to the defendant's practice in this case.

5. THE DISTRICT COURT ERRED BY NOT APPLYING THE 'LEMON TEST' TO THIS CASE.

The District Court found that the Defendant's practice fell within the legislative prayer exception as articulated by *Town of Greece.* (Dkt. 61, p. 11 ("Contrary to the district court's finding in Lund, the Court maintains that the present factual circumstances fall within the legislative prayer exception")). In *Lund v. Rowan County* the Court limited its analysis to the historical tradition and coercion tests solely because the parties did not raise *Lemon* as the proper standard if the defendant's practice fell outside the historical tradition test. See 2015 U.S. Dist. LEXIS 57840 at 33 (footnote 8 included).

> Insomuch as the Parties have limited their argument to coercion, and have not raised Lemon, the Court will limit its review to whether the practice is unconstitutionally coercive. Nonetheless, the Court notes that if the prayer practice is coercive, then it would necessarily advance religion in violation of the second Lemon prong.
>
> The Court also notes that there are serious questions of whether the practice might violate the other two Lemon prongs, particularly the third prong regarding excessive government entanglement with religion. Indeed, as is relevant here, the majority opinion in Town of Greece evoked this prong of Lemon in expressing concerns with government control over prayer content and prayer procedures. See Town of Greece, 134 S. CT. at 1822, 1824.

The instant case differs in that the Appellant has consistently argued that if the Court held the prayer practice outside the historical tradition test, *Lemon* must be applied. (See Dkt. 51,

Objection #2, p. 2-3; see also Dkt. 55, p. 14-15). The Appellant argues that the Sixth Circuit recently upheld such analysis in *Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, 788 F.3d 580 (6th Cir. 2015).[12] The 6th Circuit majority opinion specifically stated that "In cases like this one that cannot be resolved by resorting to historical practices, we do not believe that *Town of Greece* requires us to depart from our pre-existing jurisprudence." *Id.*

The Plaintiff contends that the invocation/prayers by Jackson County Commissioners: (1) are governmental speech lacking a secular legislative purpose (a moment of silence would prepare

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[12] To decide whether a governmental action violates the Establishment Clause, we must weave together three main jurisprudential threads. The first thread is the "Lemon test," named after the Supreme Court's decision in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971). Under that test, the action comports with the Establishment Clause only if it satisfies three distinct prongs. First, the activity must "have a secular legislative purpose." Id. at 612. Second, "its principal or primary effect must be one that neither advances nor inhibits religion." Id. Third, it "must not foster 'an excessive government entanglement with religion.'" Id. at 613 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970)).

The next thread is an "endorsement" analysis, first discussed by Justice O'Connor in *Lynch v. Donnelly*, 465 U.S. 668, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984). As Justice O'Connor intended, Lynch, 465 U.S. at 688 (O'Connor, J., concurring), the Sixth Circuit "has treated the endorsement test as a refinement or clarification of the Lemon test." *Granzeier v. Middleton*, 173 F.3d 568, 573 (6th Cir. 1999); see also, e.g., *Satawa v. McComb Cnty. Rd. Comm'n,* 689 F.3d 506, 526 (6th Cir. 2012) (explaining the Sixth Circuit's application of the Lemon test); *Am. Civil Liberties Union v. Grayson Cnty*., 591 F.3d 837, 844-45 (6th Cir. 2010) (using the Lynch discussion as guidance in applying the Lemon test). Justice O'Connor explained that Lemon's first prong, which focuses on the government's purpose, really asks "whether [the] government's actual purpose is to endorse or disapprove of religion." *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring). While the first Lemon prong is subjective, the second is objective. It asks "whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval." Id. If either the purpose or effect of the government activity is to endorse or disapprove of religion, the activity is unconstitutional. Id.

Excessive entanglement—Lemon's third prong—remains relevant. Under Justice O'Connor's test, such entanglement would still be grounds for striking down the activity, even if there is no hint of endorsement or disapproval. See id. at 689. Since then, however, the Court has "recast Lemon's entanglement inquiry [in the public school context] as simply one criterion relevant to determining a statute's effect." *Mitchell v. Helms,* 530 U.S. 793, 808, 120 S. Ct. 2530, 147 L. Ed. 2d 660 (2000) (plurality opinion) (citing *Agostini v. Felton,* 521 U.S. 203, 232-33, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997)).

minds for secular duties better than a prayer) while advancing the christian religion; (2) intrude on the right of conscience by forcing some citizens either to participate in an invocation/prayer with which they are in basic disagreement, or to make their disagreement a matter of public comment by declining to stand and participate; (3) force all residents of Jackson County to support a religious exercise that may be contrary to their own beliefs; (4) require the State to commit itself on fundamental theological issues such as the divinity of jesus christ; and (5) inject religion into the public sphere and excessively entangle the government with religion by having Commissioners compose, deliver, and endorse prayers. Clearly the practice of Jackson County fails all three prongs of the Lemon test and the case law of this Circuit dictates that Lemon be applied if the defendants practice is not exempted under the historical tradition test.

6. THE DISTRICT COURT ERRED BY DENYING THE PLAINTIFF STANDING TO BRING HIS ESTABLISHMENT CLAUSE CLAIM AGAINST THE DEFENDANTS FOR THEIR PLEDGE OF ALLEGIANCE PRACTICE.

The Supreme Court in Town of Greece considered the Plaintiff's claim that children were injured by the Town's prayer practice. The Court in *Greece* considered the issue even though Plaintiffs Galloway and Stephens made no attempt to show injury in fact. By considering the issue, the Court in effect found, that the constitutional provision in question implied a right of action in the plaintiffs.[13] The existence of Art. III injury "often turns on the nature and source of

[13] "The overarching problem is that a focus on demonstrating a particularized injury highlights only one aspect of the Clause's purpose – to prevent government coercion or favoritism with respect to matters of faith – to the detriment of an equally important value – that of reaffirming jurisdictional boundaries between the Church and the State. Several scholars have referred to this as the "structural" function of the Establishment Clause – to disable the government of all authority to act religiously. Unlike other potential constitutional violations, the injuries that flow from many Establishment Clause wrongs are

the claim asserted." *Warth v. Seldin,* 422 U.S. 490 (1975). The "case and controversy" limitation of Art. III overrides no other provision of the Constitution. To construe that Article to deny standing "'to the class for whose sake [a] constitutional protection is given,'" *Jones v. United States,* 362 U.S. 257, 261 (1960), quoting *New York ex rel. Hatch v. Reardon,* 204 U.S. 152, 160 (1907), simply turns the Constitution on its head. Standing may be based on an interest created by the Constitution or a statute. *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 162 (1961) (Frankfurter, concurring opinion); see also *See Linda R. S. v. Richard D., supra* at 410 U. S. 617 n. 3; *Sierra Club v. Morton,* 405 U. S. 727 (1972). The interest of the Plaintiff in this constitutional question, of course, extends to all religious minorities or non-believers. But as the Court said in *United States v. SCRAP,* 412 U. S. 669, 412, 687-688 (1973), "standing is not to be denied simply because many people suffer the same injury. . . . To deny standing to persons who are, in fact, injured simply because many others are also injured would mean that the most injurious and widespread Government actions could be questioned by nobody." This Court must reverse the District Court grant the Appellant standing to bring his Establishment Clause claim.

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inherently "generalized;" Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1 (1998) "The damage, broadly speaking, accrues to society as a whole rather than to individuals as such." *Nontaxpayer Standing, Religious Favoritism, and the Distribution of Government Benefits: The Outer Bounds of the Endorsement Test*, 123 HARV. L. REV. 1999, 1999 (2010).

"The Establishment Clause occupies a unique role within the Bill of Rights. As constructed over the past half-century, it frequently involves questions of government voice and structure, as well as more conventional constitutional concerns about individual coercion. Where the Clause is seen as a structural limitation on government, the question of what constitutes an "injury" takes on a different coloration than under other Bill of Rights provisions, where the relevant injury is individuated, material, and more visible. . . . The concerns at stake in most Establishment Clause cases are public, not private . . ." Ira C. Lupu & Robert W. Tuttle, *Ball on a Needle: Hein v. Freedom From Religion Foundation, Inc. and the Future of Establishment Clause Adjudication*, 2008 BYU L. REV. 115, 133-34 (2008).

Judge Alito's brief one-line mention in *Town of Greece* that "Nor is there anything unusual about the occasional attendance of students" 134 S. Ct. (Justice Alito concurring) does not legitimize Jackson County's practice of regularly inviting children to every single meeting to witness this ritual prayer before they are called upon to lead the audience in the Pledge of Allegiance. They are specifically invited for this purpose and the attempt by the Commissioners to associate the government of the United States with the Christian religion in these young impressionable minds is deliberate and coercive and completely unsanctioned by the ruling in *Town of Greece.* The Plaintiff asks this Court to apply the reasoning of *Lee* v. *Weisman,* 505 U.S. 577 (1992) and *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000) to this insidious practice. The Courts have ruled that prayer exercises involving elementary or secondary school children carry a particular risk of indirect coercion (see *Engel* v. *Vitale,* 370 U.S. 421 (1962) & *Abington School District* v. *Schempp,* 374 U.S. 203 (1963)) and the defendant's practice clearly violates that standard. The Appellant argues that the Defendants' practice violates the Establishment Clause, even if guest ministers were to give the invocations, and not the Commissioners themselves.

7. REQUEST FOR RELIEF

WHEREFORE, for the reasons stated in the foregoing brief, the Appellant respectfully requests that this Honorable Court grant him summary judgment, nominal damages, and a permanent injunction preventing the Commissioners from offering prayers and an permanent injunction preventing them from having children lead the Pledge of Allegiance directly after Christian prayers made in the name of Jesus Christ. The Appellant also requests that his basic right to take

depositions and to supplement the record with related claims which arose after the initial pleading was filed to be upheld by this Court.

CONCLUSION

Randall Terry, head of the anti-abortion group Operation Rescue, denounced those who celebrated the nation's religious pluralism. "I want you to just let a wave of intolerance wash over you," he told his followers in 1993. "I want you to let a wave of hatred wash over you. Yes, hate is good…Our goal is a Christian nation. We have a biblical duty, we are called by God, to conquer this county. We don't want equal time. We don't want pluralism." Frank Lambert, *The Founding Fathers and the Place of Religion in America,* Princeton (2006) p. 295. Each one of the Commissioners has taken an oath of office to uphold the Constitution. Instead, they have repeatedly violated it while following the dictates of their Christian faith. As Thomas Jefferson said: "the price of liberty is eternal vigilance." The Appellant requests this Honorable Court fulfill its duty to uphold our Constitution, the intent of our Founders, and all treaties entered into by the government of the United States, which is not in any sense founded on the Christian religion.

Respectfully submitted,

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Dated: September 8, 2015

CERTIFICATE OF COMPLIANCE

In accordance with F.R.A.P. 32(C)(i), Appellant Peter Bormuth, does hereby certify that his Appellant's Brief contains 1,299 lines of text according to the Microsoft Word program used to compose it.

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CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2015, I mailed a copy of my Appellant's Brief to Richard McNutty, 601 N. Capital Avenue, Lansing, MI 48933 by regular mail.

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