

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION**

**DARYL COBRANCHI, ERIC ENGLE,
and THE FREEDOM FROM RELIGION
FOUNDATION, INC.,**

Plaintiff,

v.

Civil Action No. 2:18-cv-01198

THE CITY OF PARKERSBURG,

Defendant.

**THE CITY OF PARKERSBURG'S RESPONSE TO PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

Defendant, The City of Parkersburg, submits this response to *Plaintiffs' Motion for Summary Judgment*. For the reasons set for the below, the Plaintiffs' Motion should be denied.

In the last forty years, the Supreme Court of the United States has heard two cases on legislative prayer, *Marsh v. Chambers*, and *Greece v. Galloway*. In each of these cases, the Supreme Court determined that legislative prayer holds a special place in establishment clause jurisprudence because of its long tradition and upheld the practice of legislative prayer in these two cases. The Plaintiffs ask this Court first to ignore this law and focus solely on a decision from the Fourth Circuit Court of Appeals, where the prayers specifically denigrated and proselytized those non-believers in the audience. While *Lund v. Rowan County* is controlling authority in the Fourth Circuit—where applicable— we cannot disregard Supreme Court case law, or case law from other jurisdictions, especially in light of the various distinctions between the facts at bar, and those in *Lund*.

The Plaintiffs spend their brief attempting to conflate the practices in *Lund* with those in the City of Parkersburg. Defendant recognizes that in *Lund* the prayers were offered by government representatives and were Christian prayers – both facts also present here. But, the content, setting, and other actions of the city representatives are distinct in these two cases, and the prayer practice of the City of Parkersburg is more similar to that in *Bormuth v. Cty. of Jackson*, where prayers offered by government representatives were constitutional. 870 F.3d 494, 498 (2017).

A. Lund Analysis

In support of their Motion, Plaintiffs essentially take the position that there is only one case which controls this Court: *Lund v. Rowan City, N.C.*, 863 F.3d 268 (2017). And, though the Plaintiffs spend the entirety of the motion relying on *Lund*, to support their contention that the prayers offered by the City of Parkersburg are unconstitutional, it contains little to no recitation of the facts of *Lund*, facts which stand in contrast to those in this case.

Rowan County, North Carolina is governed by an elected body known as the Rowan County Board of Commissioners. The five-member Board convenes twice a month. *Lund*, 863 F. 3d 268, 272. After calling bimonthly meetings to order, the chairperson asked everyone in attendance to stand up, and all five Board members rise and bow their heads, along with most of the attendees. A commissioner then asked the community to join him in worship, using phrases such as “Let us pray,” “Let’s pray together,” or “Please pray with me.” The invocations ended with a communal “Amen,” and the Pledge of Allegiance follows a moment later. *Id.* The prayers were “unmistakably Christian in content,” in various ways “implied that Christianity was superior to other faiths,” and “[o]n occasion, Board members appeared to implore attendees to accept Christianity.” *Id.* The County was notified by the American Civil Liberties Union of

Forth Caroling Legal Foundation that it viewed these prayers as unconstitutional. *Id.* In light of this notification, the commissioners publicly stated they would continue the prayers, and one even stated they “will always pray in the name of Jesus.” *Id.*

The Plaintiffs in this case were long-time residents of Rowan County. *Id.* After some initial filings, the District Court enjoined the County from reciting the prayers and eventually ruled for the Plaintiffs. *Id.* at 274. On appeal, a three-judge panel of the Fourth Circuit Court of appeals reversed the District Court and upheld the prayer practice in light of *Greece v. Galloway*. *Id.* The case eventually was heard by the Fourth Circuit Court of Appeals *en banc* where it ruled the prayers unconstitutional.

The Fourth Circuit Court of Appeals determined that the legislator-led prayer differed from the traditional historical context of chaplain-led prayer found in *Greece*, and then turned its attention to four topics: “commissioners as the sole prayer-givers; invocations that drew exclusively on Christianity and sometimes served to advance that faith; invitations to attendees to participate; and the local government setting.” *Id.* at 281. The Court was clear to emphasize that “it is the combination of these elements—not any particular feature alone—that threatens to blur the line between church and state to a degree unimaginable in *Town of Greece*.” *Id.* (internal citations and quotation marks omitted).

First, the Fourth Circuit determined that the prayer-givers in *Lund* were the State itself, and that it was a problem for the Commissioners to compose prayers and maintain complete control over the content thereof. *Id.* at 281.

Next, the Court determined that the prayers served to elevate the Christian faith while disparaging nonbelievers with prayers such as:

‘We have been blessed to be the recipients of your immeasurable grace. We can't be defeated, we can't be destroyed, and we can't be denied because we are going to live forever with you through the salvation of Jesus Christ. . . . And as we pick up the Cross, we will proclaim His name above all names, as the only way to eternal life’. S.A. 33 (prayer of March 5, 2012).

‘We can't be defeated, we can't be destroyed, and we won't be denied, because of our salvation through the Lord Jesus Christ.’ S.A. 19 (prayer of May 18, 2009).

‘You saved us and you call us with the holy calling. We are the recipients of your immeasurable grace and glory. We are the richest people in the world. . . . [W]e're going to live forever with Him.’ S.A. 15 (prayer of June 2, 2008).

Lund at 285. Other prayers preached conversion:

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

Id. The Fourth Circuit determined that “[b]y proclaiming the spiritual and moral supremacy of Christianity, characterizing the political community as a Christian one, and urging adherents of other religions to embrace Christianity as the sole path to salvation, the Board in its prayer practice stepped over the line.” *Id.* at 286.

Third, the Court found that the Commissioners “pressed religious observances upon their citizens” as the “commissioners told attendees to rise and often invited them to pray.” *Id.* at 286. The Court found it outside of the parameters established in *Greece* for the Commissioners to invite the attendees to participate. *Id.* at 287. It also noted that the *Town of Greece* involved similar requests, but the prayers in *Lund* had a higher degree of proselytization, and thus were more problematic. *Id.*

Finally, the Court considered the setting in which the prayers occurred. The Fourth Circuit found that as this setting was intimate, and involved attendees requesting the Board to exercise its “quasi-adjudicatory power over such granular issues as zoning petitions, permit applications, and contract awards,” that it presented “the opportunity for abuse” and that it may push attendees to participate. *Id.* at 288.

In *Lund* the Fourth Circuit took portions from the majority and plurality decisions in *Greece* and reasoned that “Courts adjudicating a challenge to legislative prayer inquire ‘into the prayer opportunity as a whole, rather than into the contents of a single prayer.’ *Town of Greece*, 134 S. Ct. at 1824. They must conduct a ‘fact-sensitive’ review of ‘the setting in which the prayer arises and the audience to whom it is directed,’ *id.* at 1825 (plurality opinion), as well as ‘the pattern of prayers over time,’ *id.* at 1827.” *Lund*, 863 F.3d 268, 280-281.

Thus, the stark differences between this matter and *Lund* must be given weight as to conduct a “fact-sensitive” review, and this case must be considered not only in comparison to *Lund* but to the Supreme Court’s analysis in *Marsh* and *Greece*.

In *Lund*, after determining that the legislator-led prayer differed from the traditional historical context of chaplain-led prayer, the Court turned their attention to four topics referenced above: “commissioners as the sole prayer-givers; invocations that drew exclusively on Christianity and sometimes served to advance that faith; invitations to attendees to participate; and the local government setting.” *Id.* at 281. The Court was clear to emphasize that “it is the combination of these elements – not any particular feature alone” which made the prayer in that case unconstitutional. *Id.* Thus, these four factors must be considered together in this case pursuant to *Lund*.

It is most important to clearly address what *Lund* does **not** say. The *Lund* Court did not say that legislatures or governmental representatives were not permitted to lead prayers. The *Lund* Court did not say that legislator-led prayers were not permitted to be sectarian. Because the Fourth Circuit did not place a complete prohibition on legislator-led sectarian prayer, this Court must conclude that these facts alone do not control the day, and it is the other differences between *Lund* and the prayers offered by the City of Parkersburg which must be the dispositive considerations. All of these other considerations either favor the City of Parkersburg, or there is no evidence of these issues.

1. The identity of the legislative prayer-giver is not dispositive under *Greece* or *Lund*

Though the Plaintiffs' place great weight in the identity of the prayer-givers in this case, neither *Greece* nor *Lund* state that if the legislator themselves are the prayer-givers, that the prayers are *per se* unconstitutional. Instead, *Lund* concluded that the identity of the prayer-giver is relevant to the constitutional inquiry. *Lund*, 863 F.3d 268, 280. It is true that *Lund* gave this consideration weight, and this factor weighed against the constitutionality of the Board's practices, but the *Lund* Court never stated it was dispositive, and continued to consider the prayers under the fact-sensitive analysis. The *Lund* Court was also focused on the problem that the commissioners were "composing" the prayers, the Councilmembers here were not "composing" a prayer, instead one was simply selected. *Id.* at 281.

In fact, *Lund* recognizes that member-led legislative prayer is far from unheard of, in considering certain *amicus* filings, the *Lund* Court wrote, "it is clear that lawmaker-led prayer is

far from rare.”¹ *Lund* at 279. Instead of a *carte-blanche* ruling prohibiting legislature-led-sectarian-prayer, the *Lund* Court wrote that though this case pushes past the boundaries of the facts in *Greece*, the Court must evaluate the prayer practice as a whole. *Id.* at 280.

2. Though the Lord’s Prayer is a Christian prayer, the content of the prayer does not proselytize or advance any one, or disparage any other, faith or belief.

The Lord’s Prayer was first spoken by Jesus Christ as recorded in the Gospel of Matthew. Though the Lord’s Prayer is a sectarian prayer under the Establishment Clause, nothing about the Lord’s Prayer runs afoul of *Marsh*, *Greece*, or even *Lund*. Legislative prayer is not required to be generic or non-sectarian. Instead, the Supreme Court made clear in its Syllabus that “[Plaintiff’s] insistence on nonsectarian prayer is not consistent with this [legislative prayer] tradition,” and “[a]bsent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a particular prayer will not likely establish a constitutional violation.” *Town of Greece*, 134 S. Ct. 1811, 1813-1814.

Plaintiffs’ entire argument on this point is based on their attempt to conflate the Lord’s Prayer with the disparaging prayers in *Lund*. Unlike the prayers in *Lund*, nothing in the Lord’s

¹ See also *Bormuth v. Cty. of Jackson*, 870 F.3d 494, 509–10 (6th Cir. 2017) (“Most significantly, history shows that legislator-led prayer is a long-standing tradition. Before the founding of our Republic, legislators offered prayers to commence legislative sessions. See, e.g., American Archives, Documents of the American Revolutionary Period, 1774–76, v1:1112 (documenting legislator-led prayer in South Carolina’s legislature in 1775); see also *Town of Greece*, 134 S.Ct. at 1833 (Alito, J., concurring); cf. S. Rep. No. 32–376, at 4S. Rep. No. 32–376, at 4 (1853) (“[The Founders] did not intend to prohibit a just expression of religious devotion by the legislators of the nation, even in their public character as legislators.”). Legislator-led prayer has persisted in various state capitals since at least 1849. See Brief of Amici Curiae State of Michigan and Twenty-One Other States, at 5–6; Brief of Amici Curiae Local and State Legislators and the Commonwealth of Kentucky, at 5–9; Brief of Amici Curiae Members of Congress, at 4. Indeed, the Michigan House of Representatives and Senate sit just north of Jackson County and have documented legislator-led prayer examples dating back at least to 1879 and 1898, respectively. See H.R. Journal, at 10, 82, 591, 956 (Mich. 1879) (prayers by representatives); S. Journal, Extra Sess., at 180 (Mich. 1898) (prayer by senator).

Prayer denigrates, proselytizes, or betrays an impermissible government purpose. This fact stands in stark contrast to *Lund* where the Fourth Circuit expressly found that the prayers composed and offered by the individual Commissioners were problematic because, “the prayer practice at times ‘promote[d]’ Christianity, the commissioners’ ‘preferred system of belief.’” *Lund*, 863 F.3d 268, 283 (citing, *Town of Greece*, 134 S. Ct. at 1822). The *Lund* Court was faced with prayers which focused on the communities’ spiritual shortcomings in the view of Christ, proclaimed Christianity as the one and only path to salvation, and denigrated non-believers. *Id.* at 284-285. No such prayers are at issue here.

This point is also supported by the Sixth Circuit Court of Appeals decision in *Bormuth v. County of Jackson*. In *Bormuth*, Christian County Commissioners led prayers at Commission meetings with public participation. *Bormuth v. Cty. of Jackson*, 870 F.3d 494, 498 (2017). The Sixth Circuit cited the following as generally illustrative of the prayers in the record:

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.

Id. at 498. The *Bormuth* Court – writing *en banc* – held that solemn, respectful-in-tone prayers led by Commissioners – even those which espouse the Christian faith – meet First Amendment scrutiny, even when on one occasion a Commissioner asked that God “Bless the Christians worldwide who seem to be targets of killers and extremists”.

The factual distinction between *Bormuth* and *Lund* is clear and telling of how the factor of proselytization drives the analysis. On this point more than any other, this case is distinguishable from *Lund*. The different outcomes in *Bormuth* and *Lund* illustrate why these courts reached different conclusions, both *en banc* – the *Lund* case involved proselytization and disparagement, and the *Bormuth* case did not.

3. The City Council rarely “invited” the attendees to pray since 2015.

In *Lund*, before delivering their invocations, “the commissioners told attendees to rise and often invited them to pray.” *Lund*, 863 F.3d 268, 286. Though the Plaintiffs’ claim that the City “often signal[ed] or motion[ed]” the public to pray, they were only able to point to four instances where they claim the public was invited to pray, and these instances only involved a brief and undirected gesture by the City Council’s presidents with his arms as he stands up to begin the prayer. *See* Plaintiffs’ Motion for Summary Judgment, p.18.

Thus, this case is distinct from *Lund*, which determined that the invitations to pray by the Board members set the case apart from *Greece*. *Lund* at 286-287. To the extent that Plaintiffs attempt to rest their case on these stray incidents, *Greece* requires the Court to consider the prayer opportunity as a whole, not a single prayer; thus, these few stray events should not control the day. *Greece* at 1824.

Even if this Court does find these few invitations play a role in this analysis, this matter is still distinguishable from *Lund*. In *Lund*, the Court did find it disfavored that the Board members themselves were inviting the attendees to pray, they also noted this was a problem because the prayers offered by the Board in *Lund* involved a greater “degree of proselytization” than the prayers in *Greece*. *Lund* at 287. As noted above, the Lord’s Prayer does not proselytize, thus taken as a whole, this case is further distinguishable from the analysis in *Lund*.

4. The setting in which the prayers in the City of Parkersburg take place is proper under *Greece* and different than *Lund*

The Supreme Court in *Greece* permitted chaplain-led legislative prayer at monthly town board meetings which were attended by the public. *Greece*, 124 S. Ct., at 1816. In *Lund* the Fourth Circuit found that the Rowan County Board's "intimate setting" cut against its constitutionality, even though the overall setting was similar to *Greece*. *Lund* 863 F.3d, at 287-288. *Lund* does not explain precisely where it strikes the difference from *Greece* on this issue, however, this factor was considered by the *Lund* Court.

In *Lund*, the Court placed significance on the fact that immediately after the prayer, the Board began to hold adjudicatory hearings, in which they exercised "quasi-adjudicatory power over such granular issues as zoning petitions, permit applications, and contract awards." *Lund* at 288. In other words, the Court was concerned that there would be coercion to participate in prayer since individuals would be appealing to the Board for not just legislation which they support or oppose, but adjudication on their personal issues. The Plaintiffs claims that setting here is "indistinguishable" from that in *Lund*. But, the Plaintiffs have presented no evidence that Parkersburg City Council performed such functions immediately after the prayer nor do they allege that their interest have been adversely impacted by this practice.

Another issue present in *Lund* seems to be that the attendees would feel pressured to stand and participate, one attendee was even booed and jeered by fellow citizens when she spoke out against the prayer. *Id.* at 288. There is no evidence of that here. Moreover, the *Greece* Court expressly held that offense does not equal coercion, and "[i]f circumstances arise in which the pattern and practice of ceremonial, legislative prayer is alleged to be a means to coerce or intimidate others, the objection can be addressed in the regular course." *Greece*, at 1826. While

the Plaintiffs allege in detail their internal feelings about the Council's practice, they have not alleged any facts that could plausibly demonstrate that the prayer is a "means to coerce or intimidate" a reasonable observer. The Plaintiffs were never booed or jeered, and they have presented no evidence that the City Council ever treated them different in their petitions and requests as public citizens.

In analyzing this factor in the context of *Greece* and *Lund*, it should weigh in favor of City Council as the Plaintiffs have not alleged the same set of facts in *Lund* which appear to differentiate that case from *Greece*.

CONCLUSION

It is well established that City Officials and Legislators are permitted to recite a legislative prayer without violating the Establishment Clause. It is also well established that sectarian prayer is not unconstitutional. The operative facts of this case stand in contrast to *Lund*, and instead fit within the long line of legislative prayer permitted in more similar cases.

For all the reasons stated above, this Court should deny the *Plaintiffs' Motion for Summary Judgment*.

CITY OF PARKERSBURG,

By Counsel,

/s/ Jordan V. Palmer, Esq.
Timothy L. Mayo (W.Va. Bar No. 5771)
Jeffrey A. Foster (W.Va. Bar No. 9410)
Jordan V. Palmer (W.Va. Bar No. 12899)
Flaherty Sensabaugh Bonasso PLLC
200 Capitol Street/Post Office Box 3843
Charleston, West Virginia 25338-3843
304-345-0200 Telephone/304-345-0260 Facsimile
tmayo@flahertylegal.com
jfoster@flahertylegal.com
jpalmer@flahertylegal.com

CERTIFICATE OF SERVICE

I, the undersigned counsel for Defendant City of Parkersburg, do hereby certify that on **May 15, 2020**, I electronically filed the foregoing ***The City of Parkersburg's Response to Plaintiffs' Motion for Summary Judgment*** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following counsel of record:

Marcus B. Schneider
STEELE SCHNEIDER
428 Forbes Avenue, Suite 700
Pittsburg, PA 12519

Kristina Thomas Whiteaker
The Grubb Law Group
1114 Kanawha Blvd. East
Charleston, WV 25301

Patrick C. Elliot
Christopher Line
Freedom From Religion
Foundation, Inc.
10 N. Henry Street
Madison, WI 53703

/s/ Jordan V. Palmer, Esq. _____

Timothy L. Mayo (W.Va. Bar No. 5771)
Jeffrey A. Foster (W.Va. Bar No. 9410)
Jordan V. Palmer (W.Va. Bar No. 12899)
Flaherty Sensabaugh Bonasso PLLC
200 Capitol Street
Post Office Box 3843
Charleston, West Virginia 25338-3843
304-345-0200 Telephone
304-345-0260 Facsimile
tmayo@flahertylegal.com
jfoster@flahertylegal.com
jpalmer@flahertylegal.com