2017 Sixth Circuit En Banc Opinions

By John A. Ferroli

The United States Circuit Court of Appeals for the Sixth Circuit issued the following notable en banc opinions in 2017.

Establishment clause: *Bormuth v County of Jackson*[1]

Sitting en banc, the Sixth Circuit held that the Jackson County Board of Commissioners' invocation practice is consistent with the Supreme Court's legislative prayer decisions in *Marsh v Chambers*[2] and *Town of Greece v Galloway*[3] and does not violate the Establishment Clause, which is applicable to the states by operation of the Due Process Clause of the Fourteenth Amendment.[4]

At its monthly meetings, the Jackson County Board's chairman typically requests that commissioners and the public bow their heads or take a reverent stance. One of the board's commissioners then offers a prayer, which is followed by the Pledge of Allegiance and county business. On a rotating basis, each commissioner, regardless of his or her religion (or lack thereof), is afforded an opportunity to open a session with a short invocation based on the dictates of his or her conscience. Prayers offered by the commissioners are generally Christian in tone and often ask "God" or "Lord" to guide them as they go about their business. Some prayers ask for blessings for others, such as Jackson County residents suffering particular hardships, military members, and first responders. The board does not review or approve the content of the invocations.[5]

The plaintiff, a "self-professed Pagan and Animist," admitted that he does not stand nor participate in the invocation portion of the monthly meetings, and he did not contend that he or others are discouraged from leaving the meeting during the prayer or arriving after the prayer concludes, or are prevented from objecting to the invocation practice. Nevertheless, the plaintiff argued that these invocations violate the Establishment Clause because the board's commissioners themselves offer the invocations. Furthermore, he alleged that the "prayers are unwelcome and severely offensive to [him] as a believer in the Pagan religion, which was destroyed by followers of Jesus Christ," and the prayers make him feel "like he [i]s in Church" and that "he [i]s being forced to worship Jesus Christ in order to participate in the business of County Government."[6]

The district court found the Jackson County Board's prayer practice to be consistent with the Supreme Court's holdings in *Marsh* and *Town of Greece*. On appeal, a three-judge panel ruled in Bormuth's favor on his Establishment Clause challenge.[7] Following rehearing en banc, the Sixth Circuit affirmed the district court's ruling:

> At the heart of this appeal is whether Jackson County's prayer practice falls outside our historically accepted traditions because the Commissioners themselves, not chaplains, or invited community members, lead the invocations. Bormuth contends legislator-led prayer is per se unconstitutional, and "[b]ecause each Commissioner is Christian…, every prayer offered has been Christian" and therefore the Jackson County Board of Commissioners is endorsing the Christian faith. We reject this narrow reading of the Supreme Court's legislative-prayer jurisprudence and our history.
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> There is no support for Bormuth's granular view of legislative prayer. In this regard, neither *Marsh* nor *Town of Greece* restricts who may give prayers in order to be consistent with historical practice. In *Marsh*, for example, the Supreme Court separately listed "paid legislative chaplains and opening prayers" as consistent with the Framers' understanding of the Establishment Clause…. And *Town of Greece* made clear that we are to focus upon "the prayer opportunity as a whole" in light of "historical practices and understandings."
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> Although the prayers offered before the Board generally espouse the Christian faith, this does not make the practice incompatible with the Establishment Clause. Quite the opposite, the content of the prayers at issue here falls within the religious idiom accepted by our Founders. Consistent with *Town of Greece*, the solemn and respectful-in-tone prayers demonstrate the Commissioners permissibly seek guidance to "make good decisions

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> that will be best for generations to come" and express well-wishes to military and community members. The prayers "vary in their degree of religiosity" and often "invoke the name of Jesus, the Heavenly Father, or the Holy Spirit," but *Town of Greece* makes clear the Founders embraced these universal and sectarian references as "particular means to universal ends."…It is clear from *Marsh* and *Town of Greece* that creed-specific prayers alone do not violate the First Amendment.[8] (Citations omitted.)

The court recognized that its en banc holding was in conflict with the Fourth Circuit's recent en banc decision in *Lund v Rowan County*,[9] but found the majority opinion in *Lund* to be "unpersuasive."[10]

Eighth Amendment: *In Re Ohio Execution Protocol (Fears v Morgan)*[11]

In *Fears*, the plaintiffs contended that Ohio's three-drug execution protocol violated their Eighth Amendment right to be free from cruel and unusual punishment. The district court found that "use of midazolam as the first drug" in Ohio's three-drug execution protocol would create a "substantial risk of serious harm" under *Baze v Rees* and *Glossip v Gross*.[12] The district court also held that Ohio was estopped from using the paralytic and heart-stopping drugs because of representations made by Ohio when it switched from its original three-drug protocol to a one-drug protocol in 2009.[13] Thus, the district court held that the plaintiffs had demonstrated a likelihood of success on their claims, and stayed their executions.[14]

After hearing en banc, the Sixth Circuit vacated the district court's preliminary injunction.

> In sum, we will grant that the plaintiffs have shown some risk that Ohio's execution protocol may cause some degree of pain, at least in some people. But some risk of pain "is inherent in any method of execution—no matter how humane[.]" And the Constitution does not guarantee "a pain-free execution[.]" Different people may have different moral intuitions as to whether—taking into account all the relevant circumstances—the potential risk of pain here is acceptable. But the relevant legal standard, as it comes to us, requires the plaintiffs to show that Ohio's protocol is "sure or very likely" to cause serious pain. The district court did not meaningfully apply that standard here. And the plaintiffs have fallen well short of meeting it.
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> That shortcoming by itself is sufficient to defeat the plaintiffs' claim under *Glossip*. But the district court also erred in its analysis of *Glossip*'s second prong—which requires the plaintiffs to prove that an alternative method of execution is "available," "feasible," and can be "readily implemented," among other things. The court found this requirement met as to one of the plaintiffs' proposed alternatives, namely a one-drug, barbiturate-only method using either sodium thiopental or pentobarbital. The court acknowledged, however, that Ohio no longer has any supplies [sic] of these drugs, that "Ohio's efforts to obtain the drug from other States and from non-State sources have not met with success[,]" and that Ohio is "not likely" to overcome these obstacles anytime soon. Yet the court concluded that barbiturates are "available" to Ohio because "there remains the possibility" that Ohio can obtain the active ingredient of pentobarbital and have it made into injectable form by a compounding pharmacy.
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> The district court was seriously mistaken as to what "available" and "readily implemented" mean….Granted, for the one-drug protocol to be "available" and "readily implemented," Ohio need not already have the drugs on hand. But for that standard to have practical meaning, the State should be able to obtain the drugs with ordinary transactional effort. Plainly it cannot. The reality is that the barbiturate-only method is no more available to Ohio than it was to Oklahoma two years ago in *Glossip*, for precisely the same reasons.[15] (Citations omitted.)

Finally, the en banc court rejected the district court's finding that Ohio was judicially estopped from returning to a three-drug protocol, holding that Ohio's change in policy in response to unforeseen circumstances like these "is hardly the kind of inconsistency that warrants estoppel."[16] It held that judicial estoppel prohibits "playing fast and loose with the courts—that is, abusing the judicial process through cynical gamesmanship by changing positions to suit an exigency of the moment."[17] The court held that "if any gamesmanship led us to this pass, it was not gamesmanship by the State."[18] ■

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ENDNOTES

1. *Bormuth v Co of Jackson*, 870 F3d 494 (CA 6, 2017).
2. *Marsh v Chambers*, 463 US 783; 103 S Ct 3330; 77 L Ed 2d 1019 (1983).
3. *Town of Greece v Galloway*, 134 S Ct 1811; 188 L Ed 2d 835 (2014).
4. *Bormuth*, 870 F3d at 497, n 1.
5. *Id.* at 498.
6. *Id.* at 498–499.
7. *Bormuth v Co of Jackson*, 849 F3d 266, 272, 291 (CA 6, 2017).
8. *Bormuth*, 870 F3d at 509, 513–514.
9. *Lund v Rowan Co*, 863 F3d 268 (CA 4, 2017).
10. *Bormuth*, 870 F3d at 509, n 5.
11. *In re Ohio Execution Protocol (Fears v Morgan)*, 860 F3d 881 (CA 6, 2017).
12. *In re Ohio Execution Protocol*, 235 F Supp 3d 892, 953 (SD Ohio, 2017), citing *Baze v Rees*, 553 US 35, 42–44; 128 S Ct 1520; 170 L Ed 2d 420 (2008) and *Glossip v Gross*, 135 S Ct 2726, 2732; 192 L Ed 2d 761 (2015).
13. *In re Ohio*, 235 F Supp 3d at 958.
14. *Id.* at 960.
15. *Fears*, 860 F3d at 890–891.
16. *Id.* at 892 (internal quotations and citations omitted).
17. *Id.*
18. *Id.*