

No. 15-1869

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETER CARL BORMUTH,

Appellant,

v.

COUNTY OF JACKSON,

Appellee.

On Appeal from the United States District Court
for the Eastern District of Michigan
2:13-CV-13726

BRIEF OF MICHIGAN, KENTUCKY, TENNESSEE, AND OHIO
LOCAL AND STATE LEGISLATORS, AND THE COMMONWEALTH OF
KENTUCKY BY AND THROUGH GOVERNOR MATTHEW G. BEVIN,
AS *AMICI CURIAE* SUPPORTING THE COUNTY OF JACKSON
AND AFFIRMANCE

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April 27, 2017

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LIST OF AMICI CURIAE

<u>Name</u>	<u>Position/District</u>
<i>Lead Amici</i>	
Sen. Mike Shirkey*	MI-16 ¹
Rep. Julie Alexander*	MI-64
Fmr. Rep. Claudia Badgett Riner*	KY-36 ²
Fmr. Rep. Thomas N. Riner, Jr.*	KY-41

Governors

The Commonwealth of Kentucky, by and through Governor Matthew G. Bevin
 Fmr. Gov. Brereton C. Jones 58th Governor of Kentucky
 Fmr. Gov. Julian Carroll* 54th Governor of Kentucky

Michigan Senators

Sen. Arlan Meekhof	Majority Leader/30
Sen. David Robertson	Majority Caucus Chair/14
Sen. Tom Casperson	38
Sen. Patrick Colbeck	7
Sen. Judy Emmons	33
Sen. Rick Jones	23
Sen. Peter MacGregor	28
Sen. Margaret O'Brien	20
Sen. Wayne Schmidt	37
Sen. Mike Shirkey*	16
Sen. Jim Stamas	36
Sen. Dale Zorn	17

* *Denotes individuals who appear under multiple headings.*

¹ Senator Mike Shirkey and Representative Julie Alexander are the representatives to the Michigan Legislature for Jackson County, Michigan, who is a party to this case. Representative Alexander is also formerly a member of the Jackson County Board of Commissioners whose practices are at issue in this case.

² Former Representatives Tom and Claudia Riner have volunteered to serve as lead *amici* for legislators from the Commonwealth of Kentucky in this case.

Michigan Representatives

Rep. Tom Leonard Speaker of the House/93
 Rep. Lee Chatfield Speaker Pro Tempore/107
 Rep. Chris Afendoulis.....73
 Rep. Julie Alexander*64
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Sen. Robert Stivers.....President of the Senate/25
 Sen. David Givens.....President Pro Tem/9
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 Sen. Ray S. Jones II Minority Floor Leader/31
 Sen. Dan “Malano” Seum Majority Caucus Chairman/38
 Sen. Dorsey Ridley Minority Caucus Chairman/4
 Sen. Jimmy Higdon.....Majority Whip/14
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Fmr. Sen. Landon Sexton	34
Fmr. Sen. Gary Tapp	20
Fmr. Sen. Jack Westwood	23

Kentucky Representatives

Rep. Jeff Hoover	House Speaker/83
Rep. David Osborne	Speaker Pro Tem/59
Rep. Jonathan Shell	Majority Floor Leader/71
Rep. Rocky Adkins	Minority Floor Leader/99
Rep. Dennis Keene	Minority Caucus Chairman/67
Rep. Kevin Bratcher	Majority Whip/29
Rep. Wilson Stone	Minority Whip/22
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Rep. Jerry T. Miller.....	36
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Rep. Phill Moffett	32
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Rep. Phillip Pratt.....	62
Rep. Melinda Gibbons Prunty.....	15
Rep. Marie Rader	89
Rep. Rick Rand	47
Rep. Brandon Reed	24
Rep. Jody Richards	20
Rep. Steve Riggs	31
Rep. Steve Riley.....	23
Rep. Rob Rothenburger	58
Rep. Bart Rowland.....	21
Rep. Steve Rudy.....	1

Rep. Sal Santoro.....	60
Rep. Dean Schamore.....	10
Rep. Arnold Simpson.....	65
Rep. John Sims, Jr.....	70
Rep. Kevin Sinnette.....	100
Rep. Diane St. Onge.....	63
Rep. Jim Stewart III.....	86
Rep. Walker Thomas.....	8
Rep. James Tipton.....	53
Rep. Tommy Turner.....	85
Rep. Ken Upchurch.....	52
Rep. Gerald Watkins.....	3
Rep. Russell Webber.....	26
Rep. Morgan C. Wesley.....	81
Rep. Susan Westrom.....	79
Rep. Addia Wuchner.....	66
Rep. Jill York.....	96
Fmr. Rep. Don Blandford.....	House Speaker/14
Fmr. Rep. Bobby Richardson.....	House Speaker/23
Fmr. Rep. Jon Ackerson.....	47
Fmr. Rep. Royce Adams.....	61
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Fmr. Rep. Vernon Jeffrey Buis.....	52
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Fmr. Rep. Ron Crimm.....	33
Fmr. Rep. Robert R. Damron.....	39
Fmr. Rep. Milward Dedman*.....	55
Fmr. Rep. Jon Draud.....	63
Fmr. Rep. Joel Ellington.....	4
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Fmr. Rep. Donald J. Gedling, Jr.....	18
Fmr. Rep. Gippy Graham.....	57
Fmr. Rep. J. R. Gray.....	6
Fmr. Rep. Charles M. "Hank" Hancock.....	57
Fmr. Rep. Mike Harmon.....	54
Fmr. Rep. Melvin B. Henley.....	5

Fmr. Rep. Kathy Hogancamp	4
Fmr. Rep. Charles Holbrook, III.....	100
Fmr. Rep. Edward Holloway	27
Fmr. Rep. E. Louis Johnson.....	13
Fmr. Rep. Ronnie Layman.....	19
Fmr. Rep. Henry Clay “Hank” List	79
Fmr. Rep. Jim Maggard	89
Fmr. Rep. Carl A. Nett.....	35
Fmr. Rep. Lewis “Lew” Nicholls	98
Fmr. Rep. Claudia Badgett Riner*	36
Fmr. Rep. Thomas N. Riner, Jr.*	41
Fmr. Rep. David Reinhardt	59
Fmr. Rep. Archie Romines, Sr.....	28
Fmr. Rep. Melvin Kent Stevens.....	55
Fmr. Rep. Jeff Taylor	8
Fmr. Rep. Tommy Thompson.....	14
Fmr. Rep. Thomas "Tommy" W. Todd	83
Fmr. Rep. Mark Treesh	14
Fmr. Rep. F. L. “Ben” Waide	10
Fmr. Rep. Jack Westwood	23

Tennessee Senators

Janice Bowling	16
Mark Green	22

Tennessee Representatives

Rep. Sheila Butt	64
Rep. David Byrd	71
Rep. Ron Gant.....	94
Rep. Mark Pody	46
Rep. Jay Reedy.....	74
Rep. Paul Sherrell	43
Rep. Terri Lynn Weaver	40

Ohio Representatives

Rep. Bill Patmon	10
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Kentucky County Commissioners

J.W. Bill Bartleman.....	McCracken County
Thomas Jackson	Boyd County
Mike Koger	Daviess County
Janet Mattern.....	Jefferson County
Joe McKay	Mason County
Beth Sewell	Kenton County
Melody Townsend.....	Montgomery County

Kentucky County Magistrates

Mark Bates	Carroll County
Brian Bayers.....	Spencer County
Floyd Bowling.....	Carroll County
Tom Boykin	Madison County
Tony Carriss.....	Shelby County
Robert Cummin.....	Lyon County
Larry Curling.....	Caldwell County
Tim Darland	Mercer County
Teresa Davis.....	Owen County
Carl Howard Dickerson	Barren County
Eli Dix	Meade County
Tony Felker	Webster County
Darryl Flatt.....	Adair County
Cecil Foley	Bourbon County
Gary Gardner.....	Hart County
Leslie Gedling.....	Breckinridge County
Darrell Glover	Rowan County
Kerry Graham	Carroll County
Thomas Goddard.....	Meade County
Hal Goode	Washington County
Kerry Graham	Carroll County
H. Jack Hendricks	Boyle County
Kenny Holbrook.....	Nicholas County
Matthews Hughes.....	Nicholas County
Wayne Thomas Jackson.....	Mercer County
George Jones	Fulton County
Hobert Judd	Spencer County
Joe Leavell	Garrard County

Robert Leslie	Oldham County
Brent Likens	Oldham County
Scotty Lippert.....	Bracken County
Anthony Lykins.....	Morgan County
Scotty Mosby	Metcalfe County
Roger Phillips.....	McCreary County
Joel Shinkle	Gallatin County
Todd Spurgeon.....	Owen County
Blake Tarpley	Simpson County
Vicki D. Thomison.....	Hopkins County
E. G. Thompson	Hardin County
Darrell Traughber.....	Warren County
Josephine Orange	Logan County
Woody Underwood	Lewis County
Gary Veirs	Pendleton County
Danny Walker	Lyon County
Steve Wardrip	Meade County
Douglas William Wells.....	Hardin County
Joe Wells	Union County
Ray White.....	Rowan County
Mark Young	Warren County

Kentucky County Judge Executives

Hollis L. Alexander.....	Trigg County
Walter “Doc” Blevins, DMD*	Rowan County
R. T. “Tucker” Daniel.....	Johnson County
Teresa Davis.....	Owen County
Milward Dedman*	Mercer County
Stanley Franklin	Morgan County
Cecil Foley	Bourbon County
Shane Gabbard	Jackson County
Michael Hale	Barren County
Charles Doc Hardin, Jr.....	Magoffin County
Jim Henderson.....	Simpson County
Steve Kelley	Pulaski County
Maurice D. Lucas.....	Breckinridge County
Gerry Lynn	Meade County
Gary W. Moore	Boone County
Dan Mosley	Harlan County

Melanie J. Roberts.....Bullitt County
Bobby C. Rogers Bath County
John Lester “JL” Smith.....Breathitt County
Kelly Thurman McLean County
Tommy Turner LaRue County
David Voegele..... Oldham County
Bobby Lee Westrick..... Carroll County

Kentucky City Council Members

Amy Engelman City of Independence
Bonnie J. Enlow City of Shepherdsville
Mike Hibbard, Sr..... City of Shepherdsville
Janet Mattern..... City of Rolling Hills
Judy C. Pfeffer City of Maysville

INTRODUCTION AND INTEREST OF AMICI CURIAE³

Amici curiae are a bipartisan group of legislators and governors from Michigan, Kentucky, Tennessee, and Ohio who believe that the constitutionally protected practice of opening “legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country,” *Marsh v. Chambers*, 463 U.S. 783, 786 (1983), and wish to ensure that this practice remains open to lawmakers at all levels of government. History, the Constitution, and Supreme Court jurisprudence affirm that a lawmaker may open a legislative session with prayer to “lend[] gravity to public business, remind[] lawmakers to transcend petty differences in pursuit of a higher purpose, and express[] a common aspiration to a just and peaceful society,” *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1818 (2014). Further, *amici* are concerned about the effects of re-embracing the repudiated distinction between sectarian and non-sectarian prayer – a distinction that “would force the legislatures that sponsor prayers . . . to act as supervisors and censors of religious speech.” *Town of Greece*, 134 S.Ct. at 1822. The Court should reject this distinction, and affirm the District Court.

³ In accordance with FED. R. APP. P. 29(a)(4)(E), *amici curiae* state that no party’s counsel authored this brief in whole or in part, no party or party’s counsel contributed money that was intended to fund preparing or submitting this brief, and no person other than *amici curiae* and their counsel contributed money that was intended to fund preparing or submitting this brief. Jackson County, Michigan has consented to *amici* filing this brief. Peter Bormuth has not consented.

ARGUMENT AND CITATION TO AUTHORITY

Under *Town of Greece v. Galloway*, 134 S.Ct. 1811, 1819 (2013), “the Establishment Clause must be interpreted by reference to historical practices and understandings.” The panel majority, however, – without citation or authority – found that “[l]egislator-led prayer at the local level falls far afield of the historical tradition upheld in *Marsh* and *Town of Greece*.” Doc. 29 at 20. This is incorrect.

The history of invocations is familiar to our courts. The Supreme Court has recognized, for instance, that “[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom.” *Marsh v. Chambers*, 463 U.S. 783, 786 (1983). The Continental Congress opened its sessions with prayer, as did the First Congress after drafting the First Amendment. *Id.* at 787-88; *Town of Greece*, 134 S.Ct. at 1818. Indeed, so deeply engrained is this tradition that “[i]t is presumed that the reasonable observer is acquainted with this tradition and understands that its purposes are to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens.” *Id.* at 1825.

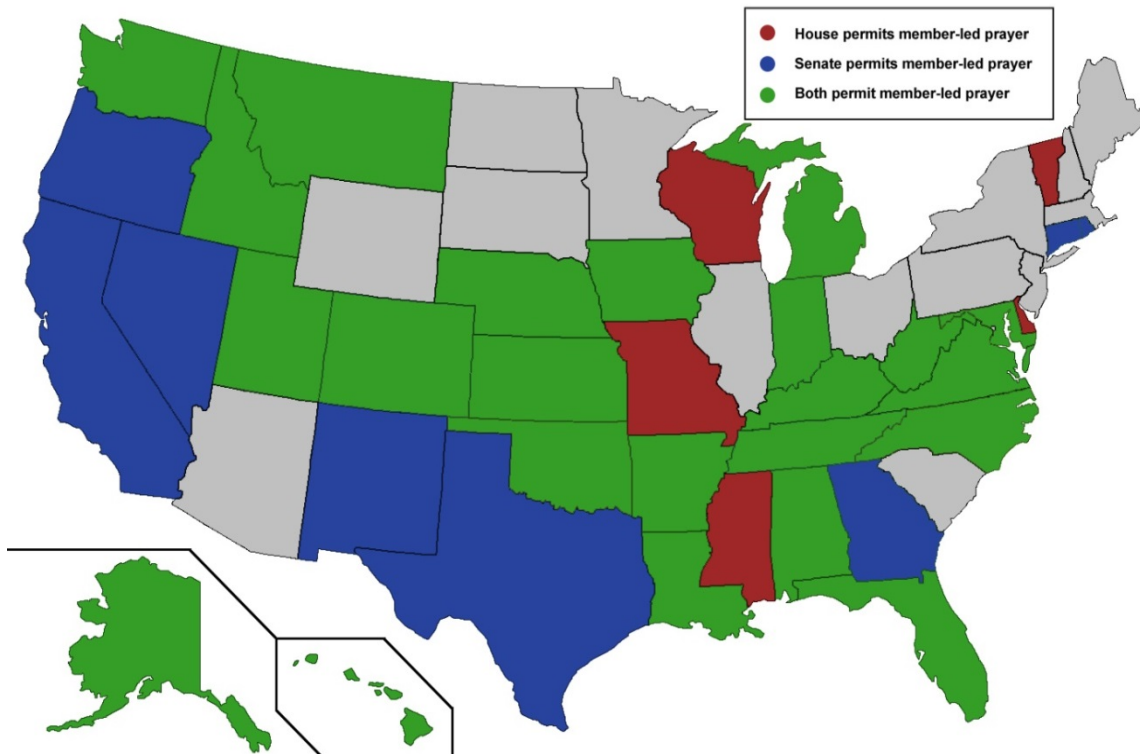
This practice is not limited to Congress. As the Supreme Court has clearly acknowledged in its two seminal cases on the issue, state and local governments

are key participants in this tradition. *See e.g., Marsh* (upholding Nebraska’s legislative chaplaincy) and *Town of Greece* (upholding a town board’s invocations). The Court explicitly noted, for instance, that “[w]hen *Marsh* was decided, in 1983, legislative prayer had persisted in the Nebraska Legislature **for more than a century**, and the majority of the other States also had the same, consistent practice.” *Id.* at 1819 (emphasis added).

I. INVOCATIONAL PRAYERS OFFERED BY LEGISLATORS ARE PART OF THIS COUNTRY’S HERITAGE AND HISTORY.

The panel majority has suggested, however, that lawmaker-led invocations fall **outside** this historic practice. *See* Doc. 29 at 20 (“The identity of the prayer giver distinguishes the Board of Commissioners’ practice from the practices upheld in *Marsh* and *Town of Greece*. . .”). Both *Marsh* and *Town of Greece* have made abundantly clear that “[a]ny test the Court adopts **must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change.**” *Town of Greece*, 134 S.Ct. at 1819 (emphasis added). Lawmaker-led invocation is a deep and vital part of the tradition upheld by *Marsh* and *Town of Greece*. *See e.g.,* II Byrd, Robert C., *The Senate (1789-1989): Addresses on the History of the United States Senate* 305 (1991) (“Senators have from time to time delivered the prayer.”). Consider, for instance, the survey conducted by the National Conference of State Legislatures in 2002.

Drawing from that and other data,⁴ the map below demonstrates that legislators may offer the invocation in at least one chamber of thirty-six states:



The history of legislator-led invocations within this Circuit is especially

striking. While all States within this Circuit use guest chaplains (and have for over

⁴ See NATIONAL CONFERENCE OF STATE LEGISLATURES, “Prayer Practices,” Table 02.5.52 at 5-151 (2002), available at: <http://www.ncsl.org/documents/legismgt/ilp/02tab5pt7.pdf>; but see also S. JOURNAL 99-26, at 290 (Mich. Mar. 14, 2017); H.R. JOURNAL 99-20, at 182 (Mich. Feb. 28, 2017); S. JOURNAL 223-1, at 263 (Ky. 2015); H.R. JOURNAL 218-5, at 4649 (Ky. 2010); S. JOURNAL 435-1, at 75 (Md. 2015); H.D. JOURNAL 433-1, at 1 (MD. 2013); S. JOURNAL 118-1, 1st Sess., at 24 (Ind. 2013); H.R. JOURNAL 118-1, 1st Sess., at 86 (Ind. 2013); S. JOURNAL 56-1, 1st Sess., at 607 (Okla. Mar. 21, 2017); S. JOURNAL 69-1, 2d Sess., at 741 (Col. Apr. 15, 2014); H. JOURNAL 69-1, 2d Sess., at 1069 (Colo. Apr. 17, 2014); S. JOURNAL 2, 1st Sess., at 906 (N.C. 2015); H.D. MINUTE BOOK (Va. Feb. 25, 2017), available at: <http://vacap.legis.virginia.gov/chamber.nsf/86d49cd44f9175d285256ca5006e80d4/75c2a6b311945967852580d20044cb11?OpenDocument>; S. MINUTE BOOK, Spec. Sess. I (Va. Sep. 18, 2014), available at: <https://lis.virginia.gov/cgi-bin/legp604.exe?142+min+SM0918>.

a century), each State also has a long practice of legislators offering invocations:

State	Chamber	Member-Led Prayer <i>at Least as Early as:</i>	Current Practice
Michigan	Senate	1898	Permitted
	House	1900	Permitted
Kentucky	Senate	1910	Permitted
	House	1904	Permitted
Tennessee	Senate	Unknown	Permitted
	House	1897	Permitted
Ohio	Senate	1898	Guest Chaplaincy
	House	1915	Guest Chaplaincy

a. Opening Invocations within the Michigan Legislature.

Both chambers of the Michigan legislature have permitted legislator-led invocations for well over 100 years. The Michigan Senate has allowed legislators to open its daily sessions with an invocation from *at least* 1898 up to the present. *See, e.g.*, S. JOURNAL, Extra Sess., at 180 (Mich. 1898) (“Lansing, Friday, April 8, 1898. . . . **Religious exercises were conducted by Senator Bostwick.**”) (emphases added);⁵ *cf.* S. JOURNAL 99-10, at 88 (Mich. Feb. 2, 2017) (“**Senator Goeffrey M. Hansen of the 34th District offered the following invocation . . .**”) (emphases added); *id.* at vol. 26, p. 290.

The Michigan House of Representatives has maintained a similar tradition since *at least* 1900. *See, e.g.*, H.R. JOURNAL, Extra Sess., at 34 (Mich. 1900)

⁵ Digital copies of all cited historical legislative journals are available online through the Hathi Trust Digital Library – a collaborative project of over 100 university libraries throughout the United States. *See* <https://www.hathitrust.org/>. Additionally, the undersigned maintain copies of all materials cited herein.

(“Friday, October 12, 1900. . . . **Prayer by Representative Nevins.**”) (emphases added); *cf.* H.R. JOURNAL 99-20, at 182 (Mich. Feb. 28, 2017) (“**Rep. Darrin Camilleri . . . offered the following invocation. . .**”) (emphases added).

b. Opening Invocations within the Kentucky Legislature.

In the same way, both chambers of the Kentucky Legislature have permitted lawmaker-led invocations since at least 1910. On January 25, 1910, for instance, the Kentucky Senate opened its daily business with an invocation from Lieutenant Governor W. H. Cox. *See* S. JOURNAL 118, at 242 (Ky. 1910) (“TUESDAY, JANUARY 25, 1910. **The Senate was opened with a Prayer by the Hon. W. H. Cox, Lieutenant Governor.**”) (Emphases added.) And likewise, Senator B. C. Lewis opened the Senate for session in 1917. *See* S. JOURNAL 125, Extra Sess., at 288 (Ky. 1917).⁶ The Kentucky Senate continued to permit Senators to give an invocation through the 20th Century,⁷ and the practice continues to this day. *See* S. JOURNAL 223-1, at 263 (Ky. 2015) (“Prayer was offered by Senator Wilson.”).

In the Kentucky House of Representatives, the practice of permitting member-led invocations dates to at least 1904. On January 6, 1904, for instance, representative J.W. Oliver opened the Kentucky House of Representatives with an invocation. *See* H.R. JOURNAL 112, at 41 (Ky. 1904) (“WEDNESDAY,

⁶ *See also* S. JOURNAL 124-1, at 499, 554, 574 (Ky. 1916).

⁷ *See, e.g.,* S. JOURNAL 158-1, at 69, 314 (Ky. 1950); *see also* S. JOURNAL 162-2, at 1767 (KY. 1954).

JANUARY 6, 1904. **The House was opened with prayer by Hon. J. W. Oliver.**”) (Emphases added.) Rep. Oliver would also be called upon to adjourn House. *See id.* at 1220 (“Be it resolved by the House . . . That this House on final adjournment be dismissed with prayer by the distinguished member of this House, and minister of the Gospel, the Rev. J. W. Oliver.”). The practice of legislator-led invocations continues to this day. *See, e.g.*, H.R. JOURNAL 218-1, at 525 (Ky. 2010) (“Prayer was offered by Representative Tom Riner.”); *see also id.* at 59.

c. Opening Invocations within the Tennessee Legislature.

Following the same tradition as Kentucky and Michigan, the Tennessee House of Representatives’ practice of opening its legislative sessions with prayers dates to at least 1849,⁸ and the practice of allowing legislator-led prayer can be traced to at least 1897. *See, e.g.*, H.R. JOURNAL 50, at 509 (Tenn. 1897) (“FRIDAY, FEBRUARY 12, 1897. . . . **Proceedings were opened with prayer by Representative Flaniken.**”) (Emphases added.) The practice continued into the 20th Century,⁹ and up to the present day. *See, e.g.*, H. JOURNAL 109, at 2286 (Tenn. Jan. 20, 2016) (“The proceedings were opened with prayer by Rep. Lollar.”).¹⁰ And although *amici* have been unable to determine when the Tennessee Senate began

⁸ *See* H.R. JOURNAL 28, at 262 (Tenn. 1849).

⁹ *See, e.g.*, H. JOURNAL 57, at 961 (Tenn. 1911); *see also* H. JOURNAL 62, at 12,788 (Tenn. 1921).

¹⁰ *See also id.* at 4217 (Apr. 22, 2016); *id.* 106, at 3131 (Tenn. Jan. 25, 2010).

the practice of allowing members to offer the Senate’s opening invocation, the Tennessee Senate has opened its sessions with an invocation since at least 1859,¹¹ and its current practice incorporates invocations by members. *See, e.g.*, S. JOURNAL 109, at 2178 (Tenn. Feb. 8, 2016) (“The proceedings were opened with prayer by Senator Green.”); *see id.* at 48 (Jan. 17, 2015).

d. Opening Invocations within the Ohio Legislature.

Finally, the practice of the Ohio Legislature closely mirrors those discussed above. The Ohio Senate has allowed legislators to offer the opening invocation since at least 1898. *See, e.g.* S. JOURNAL 73-93, at 3 (Ohio 1898) (“SENATE CHAMBER, COLUMBUS, OHIO, Monday, January 3, 1898, Ten o’clock, A.M. . . . **Prayer by Senator Adam Schafer.**”) (Emphases added.)¹² The delegates of the Ohio Constitutional Convention of 1912 offered invocations to open daily proceedings.¹³ And, similarly, the Ohio House of Representatives embraced this practice at least by 1915.¹⁴ Although *Amici* are unaware of whether legislators in Ohio are permitted by internal rules to offer invocations at the present time, they are aware that Ohio (like the other states in this Circuit) generally asks guest

¹¹ *See, e.g.*, S. JOURNAL 33, 1st Sess., at 171 (Tenn. 1859).

¹² *See also id.* at 17, 54, and 61; S. JOURNAL 75-95, at 45, 72, 244 (Ohio 1902).

¹³ *See* JOURNAL OF THE CONSTITUTIONAL CONVENTION OF OHIO, at 5, 45, 63 (1912).

¹⁴ *See, e.g.*, H.R. JOURNAL 81-106, at 215 (Ohio 1915) (“The House met pursuant to adjournment. Prayer was offered by the Reverend D. W. Besaw, **member from Portage County.**”) (emphases added); *id.* at 251 and 464.

chaplains to offer an invocation. *See, e.g.*, S. JOURNAL 132, at 209 (Ohio Mar. 8, 2017); H.R. JOURNAL 132, at 36 (Ohio Jan. 25, 2017).

In light of the “unambiguous and unbroken history of more than [100] years” of the States in this Circuit allowing lawmaker-led invocation, “there can be no doubt that the practice of opening legislative sessions with [member-led] prayer has become part of the fabric of our society.” *Marsh*, 463 U.S. at 792. “To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an ‘establishment’ of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country.” *Id.* This Court should affirm the District Court.

II. REINSTITUTING THE THOROUGHLY REJECTED DISTINCTION BETWEEN “SECTARIAN” AND “NON-SECTARIAN” PRAYERS WOULD BE AN IMPERMISSIBLE ESTABLISHMENT OF “CIVIC” RELIGION, AND WOULD VIOLATE THE RIGHTS OF INDIVIDUALS WHO OFFER INVOCATIONS.

Even more troubling than the panel majority’s failure to apply the “historical practice” test required by *Marsh* and *Town of Greece*, however, is the reinstatement of the “sectarian vs. non-sectarian” distinction so roundly rejected by the Supreme Court in *Town of Greece*. *See* 134 S. Ct. at 1821 (“The contention that legislative prayer must be generic or nonsectarian . . . **has been repudiated.** . . . [T]he constitutionality of legislative prayer [does not] turn[] on the neutrality of its content.”) (emphasis added). This is troubling for two closely related reasons.

First, as the Supreme Court has repeatedly recognized, attempts to draw distinctions between the “sectarian” and the “non-sectarian” almost universally run afoul of the very Establishment Clause that the distinction is trying to protect. Discussing precisely this issue, the Court held in *Town of Greece* that:

To hold that invocations must be nonsectarian would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech, a rule that would involve government in religious matters to a far greater degree than is the case under the town’s current practice of neither editing or approving prayers in advance nor criticizing their content after the fact. It would be but a few steps removed from that prohibition for legislatures to require chaplains to redact the religious content from their message in order to make it acceptable for the public sphere. **Government may not mandate a civic religion that stifles any but the most generic reference to the sacred any more than it may prescribe a religious orthodoxy. . . .** *School Dist. of Abingdon v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring) (arguing that “untutored devotion to the concept of neutrality” must not lead to “a brooding and pervasive devotion to the secular”).

134 S.Ct. at 1822 (emphases added). Indeed, the Court noted that it is unlikely any logical line “might be reached as to what qualifies as generic or nonsectarian,” and therefore rejected the invitation to line-drawing altogether. *Id.* **In an effort to act “neutrally,” courts cannot create a new god in the judicial image.** Contemplating this, Justice Souter observed in *Lee v. Weisman*, that he could “hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided” than “comparative theology.” 505 U.S. 577, 616-617 (1992) (Souter, J., concurring).

Perhaps even more importantly, however, in establishing a “non-sectarian” requirement, the panel majority invites legislatures to trample the free exercise rights of their members, ministers, and guests. As noted, requiring invocations to be nonsectarian “would force the legislatures that sponsor prayers and the courts . . . to act as supervisors and censors of religious speech,” and that would come at the direct expense of the legislators, chaplains, and guests who currently offer invocations. *Town of Greece*, 134 S.Ct. at 1822. This is wholly inappropriate, only serving to “tame[], cheapen[], and secularize[]” the faith of the prayer-giver. Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 127 (1992). “The law and the Court [can] not . . . require ministers to set aside their nuanced and deeply personal beliefs for vague and artificial ones,” which is precisely the effect of a “non-sectarian” requirement. *Town of Greece*, 134 S.Ct. at 1822. As the Court noted in *Weisman*, “[a] state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed.” 505 U.S. at 588 (citation omitted).

The proper mode of protecting pluralism is **not** by enforcing “non-sectarianism.” “The central meaning of the Religion Clauses of the First Amendment . . . is that all creeds must be tolerated and none favored. **The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds**

strikes us as a contradiction that cannot be accepted.” *Weisman*, 505 U.S. at 590 (emphases added). Instead, the proper protection for diverse beliefs is to welcome their expression. As the Supreme Court has held, “[o]nce [government] invites prayer into the public sphere, government must permit a prayer giver to address his or her own God or gods as conscience dictates, **unfettered by what an administrator or judge considers to be nonsectarian.**” *Town of Greece*, 134 S.Ct. at 1822-23 (emphases added). Thus, the Court has suggested that the proper expression of pluralism is to “acknowledge[] our growing diversity not by proscribing sectarian content but by welcoming ministers of many creeds,” in accordance with the make-up of the particular body at issue. *Id.* at 1820-21. This “does not require [a legislative body] to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing,”¹⁵ but only to “maintain[] a policy of nondiscrimination.” *Id.* at 1824.

CONCLUSION

Legislator-led invocations have deep roots in this Circuit, and drawing distinctions between “sectarian” and “non-sectarian” prayers is impermissible. For these reasons, this Court should affirm the District Court’s judgment.

¹⁵ Indeed, requiring such a policy would *itself* establish a type of civic religion that “would require the town to make wholly inappropriate judgments about the number of religions it should sponsor and the relative frequency with which it should sponsor each, a form of government entanglement with religion that is far more troublesome than the current approach.” *Town of Greece*, 134 S.Ct. at 1824.

Respectfully submitted on April 27, 2017.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), *amici curiae* hereby certify that this brief, in Times New Roman 14-point type face, contains 2,998 words and is 12 pages long, and therefore complies with the limitations of Fed. R. App. P. 29(a)(5) and this Court's briefing letter dated February 27, 2017. (*See* Doc. 31.)

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CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2017, a copy of the foregoing has been sent by e-mail to the Court's En Banc Coordinator, Ms. Beverly Harris, who will file it electronically in the Court's CM/ECF system. The following counsel of record will receive a copy of the brief through the Court's CM/ECF system, as well as being sent a copy by United States first class mail, properly addressed and postage prepaid:

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