No. 15-1869

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETER BORMUTH,
Plaintiff-Appellant,
v.
COUNTY OF JACKSON, MICHIGAN,
Defendant-Appellee.

Appeal from the United States District Court for the
Eastern District of Michigan, Case No. 2:13-cv-13726
Honorable Marianne O. Battani, Presiding

BRIEF OF *AMICUS CURIAE*, THE AMERICAN CENTER FOR LAW AND JUSTICE, SUPPORTING DEFENDANT-APPELLEE COUNTY OF JACKSON, MICHIGAN, AND URGING AFFIRMANCE

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May 1, 2017

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Sixth Circuit
Case Number: 15-1869 Case Name: Peter Bormuth v. County of Jackson

Name of counsel: Edward L. White III

Pursuant to 6th Cir. R. 26.1, the American Center for Law and Justice, *amicus curiae*, makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

   No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

   The American Center for Law and Justice is unaware of any.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus curiae, the American Center for Law and Justice ("ACLJ"), is an organization dedicated to defending constitutional liberties secured by law. It regularly litigates in the areas of free speech and religious liberty. ACLJ attorneys have argued before the Supreme Court of the United States, this Court, and other federal and state courts in numerous cases involving constitutional issues. *E.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013); *ACLU of Ky. v. Mercer County*, 432 F.3d 624 (6th Cir. 2005); *Summum v. Pleasant Grove City*, 345 P.3d 1188 (Utah 2015). The ACLJ has also participated as *amicus curiae* in numerous cases involving constitutional issues, including legislative prayer, before the Supreme Court, this Court, and other federal courts. *E.g.*, *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007); *Van Orden v. Perry*, 545 U.S. 677 (2005); *Little Sisters of the Poor v. Burwell*, 799 F.3d 1315 (10th Cir. 2015); *Autocam Corp. v. Sebelius*, 730 F.3d 618 (6th Cir. 2013).[1]/

[1]/ No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae* and its counsel made such a monetary contribution. Fed. R. App. P. 29(4)(E). A motion

(Text of footnote continues on next page.)

INTRODUCTION

This Court should affirm the district court's grant of summary judgment in favor of Jackson County, Michigan. The County's legislative prayer practice is constitutional under *Marsh v. Chambers*, 463 U.S. 783 (1983), and *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014).

FACTS

Jackson County allows each member of its Board of Commissioners, on a rotating basis, to give a brief invocation during the opening ceremonial portion of Board meetings. Rprt. & Recomm., R. 50, Page ID # 877-78.[2]/ Each Commissioner is allowed to offer an invocation as dictated by his or her conscience. *Id.* Neither the Board nor the County reviews, approves, or drafts the content of the invocations. *Id.* Each Commissioner is treated equally regardless of the Commissioner's beliefs, and no Commissioner has been prevented from giving an invocation based on that Commissioner's beliefs. *Id.*

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for leave to file accompanies this brief. Appellee Jackson County consented to the granting of the motion. Appellant Bormuth did not respond to requests for his position on the motion as of the time of its submission.

[2]/ In its summary judgment order, the district court adopted the facts as laid out in the magistrate judge's report and recommendation because the parties did not object to the report's recitation of the facts. Summ. Jmt. Order, R. 61, Page ID # 1052.

Those in attendance at the Board meetings are primarily adults; children sometimes attend to lead the Pledge of Allegiance after the invocation. *Id.* at # 878-79. The invocations are sometimes sectarian, and citizens in attendance have been asked to stand and bow their heads before the start of the invocations. *Id.* The record does not suggest that attendance at, or participation in, Board meetings is mandatory for citizens. Plaintiff Bormuth may be the only person in attendance to find the invocations "offensive."

ARGUMENT

In *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), the town selected clergy from local congregations to give the opening prayer at its monthly board meetings, where adults and children were present. *Id.* at 1816, 1831. The clergy were free to compose their own prayers. *Id.* at 1816. Nearly all of the prayer-givers were Christian. *Id.* A typical invocation "asked the divinity to abide at the meeting and bestow blessings on the community." *Id.* Some of the prayers were sectarian in nature, such as: "Lord we ask you to bless us all, that everything we do here tonight will move you to welcome us one day in your kingdom as good and faithful servants. We ask this in the name of our brother Jesus. Amen." *Id.* Before giving the invocations, clergy would sometimes ask those in attendance to stand and bow their heads. *Id.* at 1818. Objecting individuals sued, alleging a violation of the

Establishment Clause and claiming that the prayers should be "inclusive and ecumenical" and refer only to a "generic God." *Id.* at 1817.

The Supreme Court upheld the town's legislative prayer practice. *Id.* at 1815, 1818. The Court explained that, in *Marsh v. Chambers*, 463 U.S. 783 (1983), it stated that "legislative prayer, while religious in nature, has long been understood as compatible with the Establishment Clause." *Galloway*, 134 S. Ct. at 1818. The Court noted that legislative prayer has been a practice in this country since the framing of the Constitution. *Id.* It "lends gravity to public business, reminds lawmakers to transcend petty differences in pursuit of a higher purpose, and expresses a common aspiration to a just and peaceful society." *Id.* The Court went on to explain that *Marsh* carved out an exception to the Court's Establishment Clause jurisprudence because it upheld the legislative prayer practice based on a historical analysis without applying any formal tests, which were not needed because "history supported the conclusion that legislative invocations are compatible with the Establishment Clause." *Id.*

In ruling in favor of the Town of Greece's prayer practice, the Supreme Court rejected the plaintiffs' arguments (1) that *Marsh* did not approve sectarian legislative prayers and (2) that nonbelievers were coerced into tolerating such prayers at the town meetings. *Id.* at 1820. On the latter point, the Justices reached a

majority result but did not reach a majority rationale. Instead, there were two concurring opinions, which will be discussed *infra*.

A. Sectarian Prayer is Permissible Under *Marsh* and *Galloway*.

Regarding the *Galloway* plaintiffs' first argument, the Court emphasized that "[a]n insistence on nonsectarian or ecumenical prayer as a single, fixed standard is not consistent with the tradition of legislative prayer," *id.*, and noted that nowhere did *Marsh* suggest "that the constitutionality of legislative prayer turns on the neutrality of its content." *Id.* at 1821. Rather, in considering legislative prayer cases, the Court explained that the content of the prayer is of no concern to judges so long as there is no indication that the prayer is being given to proselytize or disparage another faith. *Id.* at 1821-22. The Court also stated 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.

Id. at 1822.

As in *Galloway*, the prayers offered at the Jackson County Board meetings fall within the type of legislative prayers that are permissible under *Marsh*. Board members are free to give the opening prayer of their choosing without edit or comment from either the County or the Board. *See id.* at 1822-23 ("Once it 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."). As in *Galloway*, none of the prayers said during the Board meetings "denigrate[d] nonbelievers or religious minorities, threaten[ed] damnation, or preach[ed] conversion," and the record does not indicate that "many present [at the Board meetings] consider[ed] the prayer[s] to fall short of the desire to elevate the purpose of the occasion and to unite lawmakers in their common effort." *See id.* at 1823.

A Commissioner giving an invocation during the ceremonial part of the meetings is no more a constitutional concern than if the County had rotating clergy give sectarian invocations (as is allowed under *Galloway*) or if the County had hired a *single clergyman* to handle *all* the invocations (as is permitted under *Marsh*). Indeed, if a government-paid chaplain of one religion praying for sixteen years was not an issue in *Marsh*, elected officials offering invocations on a rotating basis is not problematic; the permissible effect on the audience is the same. *See id.* ("Our tradition assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith.").

B. In Legislative Prayer Cases, Actual Legal Coercion Counts, Not Alleged Subtle Coercive Pressures.

In *Galloway*, two concurring opinions—one by Justice Kennedy and one by Justice Thomas—addressed the plaintiffs' argument that they had been improperly coerced by the prayer practice. Although each opinion added the concept of coercion to the *Marsh* historical analysis of legislative prayer, Justice Thomas's concurrence is the controlling opinion because it is narrower than, and is a logical subset of, Justice Kennedy's opinion. *See Marks v. United States*, 430 U.S. 188, 193 (1977) (explaining that when a fragmented Court decides a case, the holding of the Court is the "position taken by those Members who concurred in the judgment on the narrowest grounds"); *United States v. Cundiff*, 555 F.3d 200, 209 (6th Cir. 2009) ("'*Marks* is workable—one opinion can be meaningfully regarded as "narrower" than another—only when one opinion is a logical subset of other, broader opinions.'" (quoting *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (*en banc*))).

Justice Kennedy, joined by Chief Justice Roberts and Justice Alito, concluded that the Town of Greece did not coerce its citizens to engage in religious observation during the brief legislative prayers. *Galloway*, 134 S. Ct. at 1825. In reaching that determination, he broadened *Marsh*'s historical analysis by adding the coercion element and the fact-sensitive, reasonable observer analysis used when considering Establishment Clause challenges outside the realm of legislative

prayer, such as challenges to school prayer where subtle coercive pressures are considered. *E.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992).[3]/

Justice Kennedy explained that a reasonable observer would analyze coercion in legislative prayer cases by considering the "setting in which the prayer arises and the audience to whom it is directed." *Galloway*, 134 S. Ct. at 1825. He noted that a reasonable observer would understand that the main audience for invocations is the lawmakers themselves, not the public. *Id.* Additionally, legislative prayers, even if viewed as "offensive" by some, would not amount to unconstitutional coercion unless there were a pattern or practice of the prayers chastising or proselytizing dissenters and evidence that the public was dissuaded from leaving, arriving late, or protesting. *Id.* at 1826-27; *id.* at 1827 ("[I]n the general course legislative bodies do not engage in impermissible coercion merely

[3]/ In *Jones v. Hamilton Cnty. Gov't*, 530 Fed. Appx. 478, 487-88 (6th Cir. 2013) (unpublished), this Court determined that the three-pronged test announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), does not apply to legislative prayer cases, which are controlled by *Marsh*. The reasonable observer is part of the endorsement test, which is a reformulation of the second-prong of *Lemon*. *See ACLU of Ohio Found. v. Deweese*, 633 F.2d 424, 431 (6th Cir. 2011).

by exposing constituents to prayer they would rather not hear and in which they need not participate.").[4]/

In his concurring opinion, Justice Thomas, joined by the late-Justice Scalia, explained that, to the extent that coercion is relevant to Establishment Clause analysis, "it is actual legal coercion that counts—not the 'subtle coercive pressures' allegedly felt by respondents in this case." *Id.* at 1838 (Thomas, J., concurring). Historically speaking, examples of actual legal coercion include government-compelled religious orthodoxy, financial support of religion, and church attendance. *Id.* at 1837. Justice Thomas agreed with the majority that "offense" or "a sense of affront" from the expression of contrary religious views in a legislative forum is not legally cognizable "coercion" because adults often encounter disagreeable speech. *Id.* He added that "peer pressure" is not coercion either. *Id.*

Justice Thomas's more limited concept of coercion is historically based, which is consistent with *Marsh*'s historical analysis. In contrast, Justice Kennedy's

[4]/ Although Justice Kennedy's concurrence is not the controlling opinion, application of his broadened approach to legislative prayer analysis would still result in the conclusion that the Jackson County legislative prayer practice is constitutional. A reasonable observer would understand that the Commissioners, not the public, are the main audience of the invocations, that no one is forced to participate in the prayers or is punished for not participating, and that there is no pattern or practice of the prayers chastising or proselytizing dissenters. *See Galloway*, 134 S. Ct. at 1826-27 (Kennedy, J., concurring).

concept of coercion, based on what a reasonable observer would conclude, would incorporate the second-prong of the *Lemon* test into the *Marsh* analysis and runs contrary to *Marsh*'s rejection of formal tests. It marks a significantly greater departure from, and alteration of, *Marsh* than does Justice Thomas's concurrence. Because Justice Thomas's opinion is the one that concurred in the judgment on the narrowest grounds and is a logical subset of Justice Kennedy's broader view of coercion as it applies to legislative prayer, it is the controlling opinion. *See Marks*, 430 U.S. at 193; *Cundiff*, 555 F.3d at 210. *Cf. Staley v. Harris Cnty*., 485 F.3d 305, 308 n.1 (5th Cir. 2007) (*en banc*) (noting that Justice Breyer's concurrence in the judgment in *Van Orden* is the controlling opinion).

Under Justice Thomas's controlling opinion, Jackson County has not coerced Plaintiff Bormuth or anyone else with regard to its legislative prayers. Jackson County requires no citizen to listen to, or participate in, the brief invocations. Attendance at Board meetings is voluntary. Jackson County does not require citizens to listen to the invocations as a condition to receive government benefits. The invocations do not proselytize or disparage another faith (or non-faith), and there is no requirement that anyone show reverence during the prayers or agree with their content. *See Galloway*, 134 S.Ct. at 1837-38 (Thomas, J., concurring).

Although the record indicates that citizens who attend the meetings have been asked to stand and bow their heads by the Commissioner giving the invocation, those were *requests*, not *demands*. Such requests are common courtesies said before any form of prayer, whether sectarian or nonsectarian. They are along the lines of inviting citizens to recite the Pledge of Allegiance or asking for the removal of hats before the singing of our National Anthem—such requests may easily be refused (and often are by some individuals) without any form of penalty. Such requests are not coercive in the constitutional sense, especially when addressed to a group primarily made up of adults, including Plaintiff Bormuth, who are voluntarily in attendance.

A clergyman inviting people to rise or bow their heads, as occurred in *Galloway*, is similar to a Commissioner asking; neither situation creates a constitutional crisis. From a perspective of pure practicality, prayer givers often close their eyes, making them unaware of who is or is not joining the prayer. Bormuth's personal opposition to the invocations, however visceral or sincere, is not constitutionally distinct from the countless other times that a citizen may feel upset upon viewing (or hearing) something in day-to-day life that is personally objectionable. "People may take offense to all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation." *Lee*, 505 U.S. at 597. For coercion to amount to a constitutional violation, it must

be actual legal coercion, which is not present here. *Galloway*, 134 S. Ct. at 1837-38 (Thomas, J., concurring).[5]/

CONCLUSION

Amicus curiae respectfully requests that this Court affirm the district court's grant of summary judgment in favor of the County of Jackson, Michigan.

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May 1, 2017

[5]/ Although some children attend the Board meetings to lead the Pledge of Allegiance after the invocation, their presence does not make the legislative prayers unconstitutional. Children were also in attendance in the Town of Greece meetings during the sectarian invocations said by clergy. *Galloway*, 134 S. Ct. at 1816, 1818, 1831. The presence of children at the Board meetings does not change the analysis or result. *See Lee*, 505 U.S. at 597 (contrasting a practically mandatory school event with a government session "where adults are free to enter and leave with little comment and for any number of reasons").

CERTIFICATE OF COMPLIANCE

This *amicus curiae* brief is twelve pages long, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), and is no more than one-half the maximum length of the twenty-five pages allotted by this Court for each party's supplemental brief. CTA Order, Dkt. 31; *see* Fed. R. App. P. 29(a)(5). This brief also complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5)-(6) because it has been prepared in Times New Roman 14-point font, a proportionally spaced typeface.

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CERTIFICATE OF SERVICE

I certify that on May 1, 2017, I sent by electronic mail the foregoing *amicus curiae* brief to the Sixth Circuit's *en banc* coordinator, Beverly Harris, at Beverly_Harris@ca6.uscourts.gov; my understanding is that she will file the brief electronically via the Court's CM/ECF system, which will send notice of filing to all registered attorneys involved in this appeal. On the same day, I certify that I also sent two true and correct paper copies of the identical brief via United States Mail, first-class postage prepaid, to Appellant Peter Bormuth, 142 West Pearl Street, Jackson, Michigan 49201, and to Kenneth Klukowski, First Liberty Institute, 2001 West Plano Parkway, Suite 1600, Plano, Texas 75075, who is counsel for Appellee Jackson County, Michigan.

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ADDENDUM

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

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