No. 15-1869

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Peter Carl Bormuth,
Plaintiff-Appellant,

v.

County of Jackson, Michigan,
Defendant-Appellee.

On Appeal from the United States District Court for the
Eastern District of Michigan

EN BANC BRIEF FOR MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF JACKSON COUNTY AND AFFIRMANCE OF THE DISTRICT COURT

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

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

Name of counsel: Douglas R. Cox

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I certify that on May 3, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Douglas R. Cox

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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LIST OF *AMICI CURIAE*

Name	**State/District**
Sen. James Lankford	OK
Rep. Tim Walberg	MI-07
Sen. Tom Cotton	AR
Sen. Rand Paul	KY
Sen. Steve Daines	MT
Sen. James M. Inhofe	OK
Sen. Ted Cruz	TX
Sen. Mike Lee	UT
Rep. Robert Aderholt	AL-04
Rep. Trent Franks	AZ-08
Rep. Doug Lamborn	CO-05
Rep. Neal Dunn	FL-02
Rep. Jody Hice	GA-10
Rep. Barry Loudermilk	GA-11
Rep. Jim Banks	IN-03
Rep. Andy Harris, M.D.	MD-01
Rep. Bill Huizenga	MI-02
Rep. John Moolenaar	MI-04
Rep. Tom Emmer	MN-06
Rep. Vicky Hartzler	MO-04
Rep. Walter B. Jones	NC-03
Rep. Mark Walker	NC-06
Rep. Richard Hudson	NC-08
Rep. Robert Pittenger	NC-09
Rep. Bob Latta	OH-05
Rep. Keith Rothfus	PA-12
Rep. Phil Roe, M.D.	TN-01
Rep. Diane Black	TN-06
Rep. Brian Babin	TX-36
Rep. H. Morgan Griffith	VA-09

INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

Amici curiae are a group of 30 members of Congress who believe that legislative prayer is a vital, robust, and constitutionally protected practice firmly grounded in this Nation's history and tradition, as the Supreme Court affirmed in *Marsh v. Chambers*, 463 U.S. 783 (1983), and recently reaffirmed in *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811 (2014). And although *amici* represent diverse faith traditions, they are united in the understanding that legislative prayer, including prayer led by legislators themselves, is historically rooted and constitutionally permissible.

The panel majority's analysis represents a stark departure from the historical and objective examination of constitutional "tradition" and objective coercion analysis required by *Town of Greece*. If adopted by the en banc Court, this approach would eviscerate more than two hundred years of legislative practice and enmesh judges in precisely the types of subjective, theological questions that *Town of Greece* carefully avoids. As elected officials with broad legislative experience, *amici* respectfully urge the Court to hew to the historically based analysis in *Town of Greece*, respect our Nation's legislators as stewards of the centuries-old tradition

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[1] In accordance with Fed. R. App. P. 29(a)(4)(E), *amici curiae* state that no one other than *amici curiae* and their counsel authored the brief, in whole or in part, or contributed money intended to fund the preparation and submission of the same. The County of Jackson has consented to *amici* filing this brief. Mr. Bormuth has not consented. Fed. R. App. P. 29(a)(4)(D).

of legislative prayer, and affirm the district court.

ARGUMENT

I. The Panel Majority Disregards More Than Two Centuries Of Member-Led Legislative Prayer.

Town of Greece requires that when reviewing legislative-prayer practices, "the Establishment Clause must be interpreted 'by reference to historical practices and understandings.'" 134 S. Ct. at 1819 (citation omitted). Here, the panel majority singled out one factor as distinguishing this case from the historic practice affirmed in *Town of Greece*: the "Commissioners themselves" delivered the prayers. Op. 24; Op. 19 (arguing that "the identity of the prayer giver" "distinguishes this case"). According to the majority, "[l]egislator-led prayer at the local level falls far afield of the historical tradition upheld in *Marsh* and *Town of Greece*." Op. 20. That is demonstrably incorrect. The Court should steer clear of the panel majority's error, and hold Jackson County's prayer practice constitutional under *Town of Greece*.

The majority offered no historical analysis to support its conclusion. *See* Op. 20-24. Nor could it. Had the majority examined the historical record, it would have been compelled to reach the same conclusion that both the majority *and the dissent* reached in *Lund v. Rowan County*, 837 F.3d 407 (4th Cir. 2016): This Country has a "robust tradition," *id.* at 432-33 (Wilkinson, J., dissenting), and

"long-standing practice" of "lawmaker-led prayer," *id.* at 418-20 (majority op.).[2]

At the federal level, U.S. Senators and Representatives have long opened legislative sessions with member-led prayers. As the Senate Judiciary Committee explained in an 1853 report analyzing the history and constitutionality of its prayer practices, the Establishment Clause was not "intend[ed] to prohibit a just expression of religious devotion *by the legislators of the nation, even in their public character as legislators*." S. Rep. No. 32-376, at 4 (1853) (emphasis added). Thus, "Senators have, from time to time, delivered the prayer" that opens their legislative sessions. Sen. Robert C. Byrd, Senate Chaplain, *in* II *The Senate, 1789-1989: Addresses on the History of the United States Senate* 297, 305 (1982).[3] This historic practice continues unabated. *See*, *e.g.*, 159 Cong. Rec. S3915 (daily ed. June 4, 2013) (Sen. William M. Cowan); 155 Cong. Rec. 32,658 (2009) (Sen. John Barrasso); 119 Cong. Rec. 17,441 (1973) (Rep. William H. Hudnut III). Indeed, one of the *amici* participating in this brief has offered the prayer. *See*, *e.g.*, 161 Cong. Rec. S3313 (daily ed. May 23, 2015) (Sen. James Lankford). The majority's suggestion that member-led prayer is constitutionally suspect is irreconcilable with this unbroken practice; and that is sufficient under

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[2] The Fourth Circuit has vacated the *Lund* panel decision for en banc rehearing. *Lund v. Rowan Cty., N.C.*, 2016 WL 6441047, at *1 (4th Cir. Oct. 31, 2016).

[3] http://www.senate.gov/artandhistory/history/resources/pdf/Chaplain.pdf.

Town of Greece to reject the panel majority's analysis and affirm the district court.

At the state and local levels, member-led prayer is commonplace, and stretches back to the Founding. For instance, the South Carolina Provincial Congress—South Carolina's first independent legislature—welcomed member-led prayer from before the signing of the Declaration of Independence. It requested "[t]hat the Reverend Mr. Turquand, a Member, be desired to celebrate divine service in Provincial Congress." American Archives, *Documents of the American Revolutionary Period 1774-1776*, at 1112 (1776); *see also*, *e.g.*, *Journal of the Provincial Congress of South Carolina, 1776*, at 35, 52, 75 (1776) (examples of "Divine Service" led by Rev. Turquand). Similarly, the annals of state constitutional conventions abound with examples of *delegates* (not chaplains) offering a prayer to begin deliberations. *See*, *e.g.*, *Journal of the Constitutional Convention of the State of Ohio* 5, 45, 53, 63 (1912); 1 *Official Report of the Proceedings and Debates* [*Ohio*] 100, 345, 358 (1873); *Debates and Proceedings of the Convention* [*Arkansas*] 44, 57, 68, 75, 77 (1868); 1 *Debates and Proceedings of the Constitutional Convention* [*Illinois*] 166 (1870); 2 *Report of the Debates and Proceedings of the Convention* [*Indiana*] 1141, 1294, 1311, 1431 (1850); 1 *Official Report of the Proceedings and Debates* [*Utah*] 59, 975 (1898).

The Nebraska prayer practice at issue in (and approved by) *Marsh* encompassed member-led prayer. Although *Marsh* may have focused on prayers

"offered by a chaplain" selected by the legislators, Op. 19, a review of Nebraska's legislative journal shows that the Nebraska Unicameral also opened its sessions with member-led prayer.[4] And the *Marsh* Court was well aware that the tradition of legislative prayer it endorsed encompassed member-led prayer: The Court supported its claim that legislative prayer has been "followed consistently in most of the states" with a survey of state prayer practices acknowledging the widespread practice of member-led prayer. *See Marsh*, 463 U.S. at 788-89 & n.11 (citing Brief of National Conference of State Legislatures ("NCSL") as Amicus Curiae). The survey, produced by the NCSL, explained that the "opening legislative prayer" in various states may be given by various individuals, including "chaplains, guest clergymen, *legislators*, and legislative staff members." Brief of the NCSL as Amicus Curiae, *Marsh v. Chambers*, 463 U.S. 783 (No. 82-23), 1982 U.S. S. Ct. Briefs LEXIS 912, at *2 (emphasis added). Furthermore, the NCSL's brief explained that "*[a]ll bodies*, including those with regular chaplains, *honor requests from individual legislators either to give the opening prayer* or to invite a

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[4] *See*, *e.g.*, 1 *Legislative Journal of the State of Nebraska*, 85th Leg., 1st Sess. 2087 (May 17, 1977), http://nebraskalegislature.gov/FloorDocs/85/PDF/Journal/r1journal.pdf ("The prayer was offered by Mrs. Marsh."); *id.* at v (listing Shirley Marsh as a member); 1 *Legislative Journal of the State of Nebraska*, 85th Leg., 2d Sess. 640 (Feb. 13, 1978), http://nebraskalegislature.gov/FloorDocs/85/PDF/Journal/r2journal.pdf ("The prayer was offered by Senator Kremer.").

constituent minister to conduct the prayer." *Id.* at *3-4 (emphases added). The prayer practice of Greece, New York that the Supreme Court affirmed also involved town officials from time to time.[5]

A 2002 survey underscores that state legislative-prayer practices continue to include member-led prayer. According to the survey, legislators lead prayers in at least thirty-one states.[6] NCSL, Prayer Practices, in *Inside the Legislative Process*, at 5-151 to -152 (2002).[7] In fact, in the Rhode Island Senate, *only members* deliver the invocation. *Id.* And in the Hawaii House of Representatives, prayer-givers are apparently limited to members and their invitees. *Id.*

The prevalence of member-directed prayer practices is buttressed by express provisions in state statutes and the rules of state legislatures. The Michigan House of Representatives, for instance, requires the clerk to "arrange for a Member to

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[5] *See* Joint Appendix, *Town of Greece v. Galloway*, 2013 WL 3935056, at 66a (Aug. 20, 2002) (prayer by Councilman Helfer); *id.* at 26a (Jan. 5, 1999); *id.* (Jan. 19, 1999); *id.* (Feb. 16, 1999); *id.* at 29a (May 13, 1999); *id.* at 45a (Sept. 19, 2000); *id.* at 57a (Sept. 18, 2001) ("I would like to ask you to bow your heads in prayer ….").

[6] The true number may be higher, as a number of state legislative bodies did not respond to the survey. For instance, the Maryland House of Delegates, which did not respond to the survey, has exclusively relied on member-led prayer since around 2003. Kate Havard, *In Delegates They Trust*, Wash. Post (Mar. 9, 2013), http://www.washingtonpost.com/local/md-politics/in-delegates-they-trust-md-house-members-lead-secular-prayer/2013/03/09/571fef8e-810a-11e2-8074-b26a871b165a_story.html (last visited May 2, 2017).

[7] http://www.ncsl.org/documents/legismgt/ilp/02tab5pt7.pdf.

offer an invocation … at the opening of each session," which may be "delivered by the Member or a Member's guest." Mich. H.R. R. 16. And the South Carolina Code provides that local "deliberative public bod[ies]" can adopt ordinances establishing opening prayers led by "one of the public officials, elected or appointed to the deliberative public body." S.C. Code § 6-1-160(B)(1). A Virginia statute similarly protects members of governing bodies who deliver a sectarian prayer before deliberative sessions. *See* Va. Code § 15.2-1416.1.

Member-led invocations are, and always have been, part and parcel of the constitutional tradition approved in *Marsh* and *Town of Greece*. The panel majority improperly ignores these important elements of our national heritage.

II. The Panel Majority's Analysis Further Conflicts With *Town of Greece*.

Apart from the historical error discussed above, the panel's reasoning conflicts with Supreme Court precedent in at least two more respects.

A. The Panel Majority Applied The Wrong Test.

There is little question that the panel majority did not apply the appropriate analytic framework to this case. Fending off the historical test that Supreme Court precedent requires, *see* Op. 10 (opining that neither *Marsh* nor *Town of Greece* "provides much instruction"), the panel majority effectively resurrected the much-maligned test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *See, e.g.*, *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia,

J., concurring in the judgment) (comparing the *Lemon* test to a ghoul that "repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried"). To be sure, the panel majority claimed to reject the *Lemon* test. *See* Op. 33 n.10. But it also claimed that Jackson County's so-called "endorsement" of one religion over another essentially obviated the need to assess whether the prayer practice denigrated adherents to particular faiths. Op. 20 n.6, 21; Op. at 41, 45, 47 (Griffin, J., dissenting) (demonstrating that the panel majority's "endorsement" analysis and "purpose" and "entanglement" discussion effectively applied a *Lemon*-like test); *see also Smith v. Jefferson Cty. Bd. of Sch. Comm'rs*, 788 F.3d 580, 587 (6th Cir. 2015) (discussing endorsement as a key feature of *Lemon*).

This approach was improper. The relevant question under *Town of Greece* is not some subjective "endorsement" analysis, but simply whether the prayer practice "fits within the tradition long followed in Congress and the state legislatures." 134 S. Ct. at 1819; *see id.* at 1823 (accepting prayer practices that do not, over time, "denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion"). Indeed, the panel majority's *Lemon*-esque reasoning is directly foreclosed by *Town of Greece*. For instance, the panel concluded that Jackson County denigrated other faiths by "endors[ing] a specific religion." Op. 20 & n.6, 23. That is impossible to square with *Town of Greece*, where the plaintiffs' claim was based on the "distinctly Christian idiom" of the prayers at

issue, offered over the course of *eight years*. 134 S. Ct. at 1816. It also is irreconcilable with *Marsh*, which approved *16 years* of prayers from a single Presbyterian minister who served in an official governmental role as chaplain. 463 U.S. at 793.[8] The panel majority's endorsement analysis is thus inconsistent with *Town of Greece* and *Marsh*.

B. The Panel Majority Departed From *Town Of Greece*'s Coercion Analysis.

This Court should also reject the panel majority's distinct coercion analysis, which contradicts *Town of Greece* in at least three important respects.[9]

First, the panel majority's claim that beginning prayers with commonplace transition words like "rise," "assume a reverent position," or "bow [your] heads" somehow "coerce[s] the public to participate in the exercise of religion," Op. 25, is wrong on the facts and the law. The plaintiff "admits that he refused" to participate in the prayers at issue, which defeats any suggestion that he was, in fact,

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[8] Relatedly, and assuming it is in the record, a single commissioner's concern that a proposed new prayer-giver selection policy would allow "any Jackson County resident" to lead the prayer does not suggest, *contra* Op. 21, 27, that the Commissioners "affirmatively excluded non-Christian prayer givers." *See* Op. 51 n.6 (Griffin, J., dissenting). The Constitution permits a nondiscriminatory prayer-giver selection policy. *See Marsh*, 463 U.S. at 793 (approving selection of single chaplain for 16 years).

[9] The majority's reasoning on coercion would be faulty under either Justice Thomas's coercion analysis, *see* Op. 51 (Griffin, J., dissenting), or Justice Kennedy's, *see* Op. 17 (majority op.).

"coerced" by the prayers. Op. 58 (Griffin, J., dissenting); *see id.* at 4 (majority op.) (Bormuth "did not rise and bow his head"). And the Supreme Court has endorsed nearly identical language as being a common and acceptable way to begin prayer. *See Town of Greece*, 134 S. Ct. at 1826 (plurality op.); *id.* at 1832 (Alito, J., concurring). This inviting language can be considered "*inclusive*, not coercive," *id.* at 1826 (plurality op.) (emphasis added). Notably, this kind of language prefaced prayers at the last three presidential inaugurations. *See* 155 Cong. Rec. 1181 (2009); 159 Cong. Rec. S183, S186 (daily ed. Jan. 22, 2013); 163 Cong. Rec. S362, S363, S365 (daily ed. Jan. 20, 2017). The panel's decision's focus on prefatory language would thrust courts into "[d]eciding cases on the basis of … an unguided examination of marginalia," *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 675-76 (1989) (opinion of Kennedy, J.), while setting an impossible trap for legislators, who are left to divine how courts might react to their each and every word. "It is irresponsible to make the Nation's legislators walk [such a] minefield." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 768-69 n.3 (1995) (plurality op.).

Second, the panel majority's holding that the "coercion [in this case] is compounded" by the "small and intimate" setting of "[l]ocal government meetings," Op. 25, is directly contrary to *Town of Greece*. Justice Kennedy's plurality coercion analysis considered and rejected the *amici*'s argument in *Town*

of Greece on this exact point. 134 S. Ct. at 1824-25. Justice Alito's concurrence did the same. *Id.* at 1831-32. This "intimacy" theory of coercion was the theory of the principal *dissent* by Justice Kagan, and thus was expressly rejected by the majority. *See id.* at 1846-48, 1851-52. The Court has spoken on this precise issue; it has no proper place in the analysis of legislative prayer.

Finally, by holding that the plaintiff was "coerced," the panel majority erroneously adopted the position that feelings of "isolat[ion]" can constitute coercion. Op. 4 (majority op.). But unconstitutional coercion cannot rest on subjectively feeling "excluded," "disrespected," or otherwise. *Town of Greece*, 134 S. Ct. at 1826. "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." *Id.* at 1823 (majority op.). *Town of Greece* holds that the "choice" between "remain[ing]" in "quiet acquiescence" during a prayer and "exit[ing] the room" is not an "unconstitutional imposition" for "mature adults." *Id.* at 1827 (plurality op.).

The plaintiff's efforts to show that coercion occurred in other ways is unpersuasive. There is no evidence indicating "why Jackson County rejected Bormuth's application to fill a vacancy on the Solid Waste Planning Committee," Op. 58 (Griffin, J., dissenting), belying the panel majority's speculation that the County was "denying [Bormuth] benefits … based on [his] beliefs," *id.* at 27

(majority op.). And while the plaintiff and some commissioners may have had a few isolated, terse exchanges relating to the plaintiff's personal views on legislative prayer, *see* Op. 27, 30, those encounters occurred outside the context of prayers themselves, and in any event "do not despoil a practice that on the whole reflects and embraces our tradition." *Town of Greece*, 134 S. Ct. at 1824. Contrary to the panel majority's speculation about the "Commissioners' purpose in delivering the prayers," Op. 9, a prayer practice is problematic only if a "*course and practice over time* shows that *the invocations* denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion." 134 S. Ct. at 1823 (emphases added). Nothing of the kind has been shown here.

CONCLUSION

The Court should affirm the judgment of the district court.

Dated: May 3, 2017

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with Federal Rule of Appellate Procedure 29(a)(5) because it is 12 pages long and therefore no more than half the length authorized for the parties' briefs, *see* Dkt. 31 (Feb. 27, 2017), excluding the parts of the brief exempted by Rule 32(f).

2. This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

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I hereby certify that on May 3, 2017, a copy of the forgoing 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. Participants in the case who are registered CM/ECF users will be served electronically by the Notice of Docket Activity.

I further certify that on May 3, 2017, I sent the foregoing document by express mail for delivery within three calendar days to the following non-CM/ECF participant:

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IN THE UNITED STATES COURT OF APPEALS
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Peter Carl Bormuth, Plaintiff-Appellant, v. County of Jackson, Michigan, Defendant-Appellee.	No. 15-1869

NOTICE BY MEMBERS OF CONGRESS OF ADDITIONAL *AMICI CURIAE*

Members of Congress as *amici curiae* provide notice that Senator Rob Portman of Ohio and Senator Orrin Hatch of Utah hereby join the brief as additional *amici* in support of the County of Jackson, Michigan.

Dated: May 4, 2017

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Case: 15-1869 Document: 95-2 Filed: 05/08/2017 Page: 2

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