No. 15-1869

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETER CARL BORMUTH, *Plaintiff-Appellant,*

v.

COUNTY OF JACKSON, *Defendant-Appellee*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN
Case No. 2:13-CV-13726 (Hon. Marianne O. Battani)

BRIEF OF ALLIANCE DEFENDING FREEDOM AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE AND AFFIRMANCE OF THE DISTRICT COURT

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RULE 26.1 DISCLOSURE STATEMENT

Amicus curiae, Alliance Defending Freedom is a non-profit organization incorporated in the Commonwealth of Virginia and is recognized as tax-exempt under Section 501(c)(3) of the Internal Revenue Code. Alliance Defending Freedom has no parent corporation. Alliance Defending Freedom has no stock issued to the public, and accordingly, no publicly held corporation owns 10% or more of any stock of Alliance Defending Freedom.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Alliance Defending Freedom is a non-profit legal organization devoted to defending and advocating for religious freedom. Alliance Defending Freedom provides strategic training, funding, and direct litigation services and serves as counsel or *amicus curiae* in cases that raise issues of concern to the nation's religious community. Since its founding in 1994, Alliance Defending Freedom has played a role, either directly or indirectly, in dozens of cases before the United States Supreme Court, numerous cases before courts of appeals, and hundreds of cases before federal and state courts across the nation.[2] Alliance Defending Freedom was also merits co-counsel for Petitioners in the most recent case in which the Supreme Court upheld the constitutionality of legislative prayer, *Town of Greece v. Galloway*, 134

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[1] No party or party's counsel has authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. No person other than *amicus* and its counsel have contributed money that was intended to fund preparing or submitting the brief. A motion for leave to file accompanies this brief.

[2] *See, e.g., Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125 (2011); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).

S. Ct. 1811 (2014), and has played a role in many other cases throughout the country involving legislative prayer issues.

Alliance Defending Freedom frequently represents local governments facing Establishment Clause claims. It has a strong interest in ensuring that local governments are able to employ practices that recognize the longstanding religious traditions pervasive in public life throughout America's history, without being subject to limitations beyond what the Establishment Clause was intended to condemn.

INTRODUCTION AND SUMMARY OF ARGUMENT

The panel erred by finding the identity of the prayer giver to be a dispositive factor in this case. The panel distinguished this case from *Marsh*,[3] and *Town of Greece* by noting that here, the prayer is offered by a county commissioner, instead of a paid chaplain (as in *Marsh*) or a volunteer chaplain (as in *Town of Greece*). The panel expressed concern that prayers delivered by legislators offer "no distinction between the government and the prayer giver." *Bormuth v. Cnty. of Jackson*, 849 F.3d 266, 281 (6th Cir. 2017).

[3] *Marsh v. Chambers*, 463 U.S. 783 (1983)

But this is a distinction without a difference because legislative prayer in every context is simply government speech. One of the distinguishing characteristics of government speech is that the listening public routinely identifies the message delivered as the government's message *regardless* of the speaker's identity. The panel's concern over the identity of the prayer giver does not distinguish this case from *Marsh*, *Town of Greece*, or any other legislative prayer case, since the government is always considered to be the prayer giver. Whether the prayer giver is a volunteer chaplain, a paid chaplain, a member of Congress, or a councilmember, no court has treated the identity of the prayer giver as dispositive. To argue otherwise would require a judicially crafted exemption to the Supreme Court's government speech jurisprudence never before recognized. And it would lead to the odd result of disadvantaging an elected official by preventing his or her full participation in a prayer practice explicitly recognized as being targeted to, and for the benefit of, the members of an elected policymaking body.

Accordingly, the en banc court should affirm the decision of the district court below, finding that the County of Jackson's legislative prayer practice is squarely within the realm of *Town of Greece*.

ARGUMENT

I. The Identity of the Prayer Giver is Irrelevant in Determining Whether Legislative Prayer Violates the Establishment Clause.

A. Because Legislative Prayer is Government Speech, It Always is Closely Identified With the Government.

The panel majority's focus on the identity of the prayer giver is misplaced because legislative prayer is government speech, which always is closely identified with the government. Thus, the concern that the government and the prayer giver in this case are "one and the same" adds nothing new to the analysis. It is a feature inherent in all legislative prayer.

Courts addressing the issue have universally held that legislative prayer is government speech.[4] While *Town of Greece* did not explicitly invoke the term "government speech" to describe legislative prayer, courts interpreting it have certainly operated with that understanding.

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[4] *See, e.g.*, *Turner v. City Council*, 534 F.3d 352, 355 (4th Cir. 2008) (O'Connor, J., sitting by designation) (holding that legislative prayer is "government speech"); *Hinrichs v. Bosma*, 400 F. Supp. 2d 1103, 1104 (S.D. Ind. 2005) ("Such prayers are deemed government speech for purposes of applying the Establishment Clause."), *rev'd on other grounds*, 506 F.3d 584 (7th Cir. 2007); *Atheists of Fla., Inc. v. City of Lakeland*, 779 F. Supp. 2d 1330, 1342 (M.D. Fla. 2011) (referring to invocation delivered before city commission meeting as "government speech").

See, e.g., *Ctr. for Inquiry, Inc. v. Marion Circuit Court Clerk*, 758 F.3d 869, 874 (7th Cir. 2014) ("[*Marsh* and *Town of Greece*] concern what a chosen agent of the government says as part of the government's own operations."); *Lund v. Rowan Cnty.*, 837 F.3d 407, 413 (4th Cir. 2016) ("[L]egislative prayer is generally a type of government speech.").[5] Indeed, this must be so, since the Establishment Clause constrains government speech and not private speech.

Because legislative prayer is government speech, it must necessarily bear one of the important characteristics of government speech: listeners *identify* the message with the government. *See, e.g.*, *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2248 (2015) ("[L]icense plate designs 'are often closely identified in the public mind with the [State].'"); *Pleasant Grove City v. Summum*, 555 U.S. 460, 472 (2009) (holding privately donated monuments in public parks constitute government speech because "[p]ublic parks are often closely identified in the public mind with the government unit that

[5] On March 22, 2017, the Fourth Circuit reheard *Lund* en banc, but has not yet issued its ruling. Unlike here, the *Lund* panel decision was not vacated pending rehearing en banc. Nor has its decision been stayed.

owns the land").[6] This characteristic is present in *all* government speech, *regardless* of the speaker's identity. Moreover, government speech jurisprudence has never recognized varying degrees of government speech based on a speaker's identity. In other words, there are no "first tier" (e.g., a government official) or "second tier" (e.g., a paid spokesperson) government speakers. The analysis is simply limited to whether the speaker is acting under color of authority and/or whether the speaker is acting in a personal or official capacity. Once speech is determined to be government speech, it is government speech.

In the present case, that means the panel majority's focus on the identity of the prayer giver is misplaced. The panel majority's decision hinged on its concern that a Jackson County commissioner delivered the prayer. As the panel majority explained, "[w]hen the Board of Commissioners opens its monthly meetings with prayers, there is no distinction between the government and the prayer giver: they are one and the same. The prayers, in Bormuth's words, are literally 'governmental speech.'" *Bormuth*, 849 F.3d at 281–82. The panel

[6] The other two characteristics of government speech are that the speech conveys the government's message and the government maintains control over the message. *Walker*, 135 S. Ct. at 2248; *Summum*, 555 U.S. at 472.

majority reasoned that this close association between the government and the prayer giver "heightens the risks of coercion." *Id.* at 282.

But legislative prayer already is "closely identified in the public mind with the government," just as all government speech is. *Summum*, 555 U.S. at 472. That is part of what makes it "government speech." Therefore, stating that the "government and the prayer giver . . . are one and the same," adds nothing to the analysis. Rather, that characteristic is inherently present in legislative prayer.

The panel majority in *Lund* recognized this, stating, "[p]ractically speaking, the public seems unlikely to draw a meaningful distinction between a state-paid chaplain and the legislative body that appoints him. 'Such chaplains speak for the legislature.'" 837 F.3d at 425 (internal citation omitted). Even one of the dissents in *Town of Greece* recognized that by using volunteer outside chaplains, the prayer was still closely associated with the government. *Town of Greece*, 134 S. Ct. at 1850 (Kagan, J., dissenting) (referring to a "minister" offering a legislative prayer as being "deputized" by the town).

Critically, it does nothing to distinguish the case from *Marsh* or *Town of Greece*. In those cases, while the identity of the prayer giver

differed, the close association between the prayer and the government did not. The question of whether a prayer practice is coercive must therefore be separate from the question of who prays. Otherwise, all legislative prayer is unconstitutional. The panel majority erred by conflating these separate inquiries. Legislative prayer is often perfectly constitutional, as *Marsh* and *Town of Greece* attest.

To the extent there can be any risk of "coercion" in the present case, it is no different than the risk presented in any other legislative prayer context, regardless of the identity of the actual prayer giver. In fact, the legislative prayer practice upheld by the Supreme Court in *Marsh* would seem to carry an even greater risk of "coercion," since there the same paid Presbyterian minister consistently delivered Judeo-Christian prayers for 16 years before the Nebraska Legislature. 463 U.S. at 793. And yet the Supreme Court concluded that "[w]eighed against the historical background, these factors do not serve to invalidate Nebraska's practice." *Id.*

For these reasons, the prayer in the present case is squarely within the confines of *Town of Greece*. Both involved government speech given by prayer givers in a manner such that the message would

be closely associated with the government. The only distinction is the job title of the actual person delivering the prayer. But this is a distinction without a legal difference.

B. Legislative Prayer Cases Have Never Turned On the Identity of the Prayer Giver.

In the many cases to address legislative prayer after *Marsh*, through *Town of Greece*, and up until today, no court's analysis has ever turned on the identity of the prayer giver. Nothing in *Marsh* could be interpreted to have depended on the identity of the speaker. Rather, to the extent it referred to the identity of the prayer giver—the paid Presbyterian chaplain—it simply referred to the facts of the case before it. Indeed, of the nearly 20 legislative prayer cases subsequent to *Marsh* and prior to *Town of Greece*,[7] none treated the identity of the prayer giver to be relevant—much less dispositive. Moreover, the identity of the prayer giver has been explicitly rejected as outcome-

[7] *See* Robert Luther III, "*Disparate Impact" and the Establishment Clause*, 10 Geo. J.L. & Pub. Pol'y 529, 530 n.4 (2012) (collecting cases); *see also Atheists of Fla., Inc. v. City of Lakeland*, 713 F.3d 577 (11th Cir. 2013); *Rubin v. City of Lancaster*, 710 F.3d 1087 (9th Cir. 2013); *Snyder v. Murray City Corp.*, 159 F.3d 1227 (10th Cir. 1998); *Jones v. Hamilton Cnty.*, 891 F. Supp. 2d 870 (E.D. Tenn. 2012), *aff'd*, 530 F. App'x 478 (6th Cir. 2013); *Mullin v. Sussex Cnty.*, 861 F. Supp. 2d 411 (D. Del. 2012); *Doe v. Pittsylvania Cnty.*, 842 F. Supp. 2d 906 (W.D. Va. 2012).

determinative. *See Joyner v. Forsyth Cnty.*, 653 F.3d 341, 350 (4th Cir. 2011) ("It was the governmental setting . . . that courted constitutional difficulty, not those who actually gave the invocation.").

When the Supreme Court addressed legislative prayer once again in *Town of Greece*, nothing in its analysis could be interpreted as having turned on the identity of the prayer giver (in that case, volunteer prayer givers). And since *Town of Greece*, most courts to address the issue still have not found the identity of the prayer giver to be relevant. In *Lund*, the court explained that it had never "previously assigned weight to the identity of the prayer-giver." 837 F.3d at 418. "To the contrary, we have suggested this feature is irrelevant." *Id.*; *see also Coleman v. Hamilton Cnty.*, 104 F. Supp. 3d 877, 889 (E.D. Tenn. 2015) (finding prayer policy constitutional where policy restricted volunteer prayer givers to clergy members and not lay persons).[8]

[8] While *Hudson v. Pittsylvania County*, 107 F. Supp. 3d 524, 533 (W.D. Va. 2015), found the identity of the prayer giver to be relevant, that decision has limited value since it concerned a motion to modify an injunction in place prior to *Town of Greece*. Moreover, it would not likely stand in light of the Fourth Circuit's subsequent decision in *Lund*.

II. The Panel's Holding Would Lead to Incongruent Results.

The panel's decision leads to several negative consequences that contravene the very purpose of legislative prayer outlined in *Town of Greece*, produces illogical results, and imposes additional costs upon state and local governments.

In the opinion of the panel majority, a legislator would paradoxically be barred from participating in a practice that is designed specifically to aid him in his task of governing. As the Supreme Court explained, "[t]he principal audience" of the prayer is "lawmakers themselves, who may find that a moment of prayer or quiet reflection sets the mind to a higher purpose and thereby eases the task of governing." *Town of Greece*, 134 S. Ct. at 1825 (opinion of Kennedy, J.). Legislative prayer is employed "largely to accommodate the spiritual needs of lawmakers and connect them to a tradition dating to the time of the Framers." *Id.* at 1826. Yet under the panel's reasoning, individual legislators could not even offer the prayer themselves, in aid

of their fellow legislators. In every instance, they must outsource the prayers to others. This makes no sense.[9]

In *Town of Greece*, the Supreme Court also made clear that legislative prayer has an expressive component for as well. "For members of town boards and commissions, who often serve part-time and as volunteers, ceremonial prayer may also reflect the values they hold as private citizens." *Id.* Legislative prayer, then, "is an opportunity for them to show who and what they are without denying the right to dissent by those who disagree." *Id.* It would be nonsensical to nonetheless require that legislators do so only through the prayers of others. In fact, that passage could quite reasonably be interpreted to refer specifically to legislator-led prayer. It is difficult to imagine a more direct way for a legislator to show "who and what they are."

There are real costs too. State and local governments will be forced to spend the time and resources to administer volunteer programs, appoint (and perhaps pay for) a chaplain, or forego legislative

[9] *Cf. Am. Humanist Ass'n v. McCarty*, 851 F.3d 521, 529 (5th Cir. 2017) ("Legislative prayers are recited for the benefit of legislative officers. It would be nonsensical to permit legislative prayers but bar the legislative officers for whom they are being primarily recited from participating in the prayers in any way.") (addressing the propriety of school board members' bowing their heads during prayer).

prayer altogether. A local government may decide that volunteer prayer givers are too unreliable, since they may not show up. It may decide that finding clergy out of the phone book to solicit their help is too time consuming to administer. Or the council may not want to choose amongst the town's clergy so as to avoid the appearance of favoritism. Or it may not have the money to hire a paid chaplain. But under the majority's ruling, these are the only options. While the costs and resources involved may seem minor, that is up to the legislatures themselves—ultimately accountable to the electorate—to decide. The Establishment Clause and *Town of Greece* give them that option.

CONCLUSION

The judgment of the district court should be affirmed.

Dated: May 4, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the page-length limitation of this Court's briefing letter and Fed. R. App. P. 29(a)(5) because this brief is 12.5 pages, one-half the length allowed for the parties' 25-page supplemental briefs, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 6 Cir. R. 32(b)(1).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century Schoolbook font.

Dated: May 4, 2017

s/Benjamin L. Ellison
Benjamin L. Ellison

Counsel for Amicus Curiae
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CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2017, I electronically filed the foregoing via email with the En Banc Coordinator of the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit. All participants in the case, other than Appellant Peter Bormuth, are registered CM/ECF users and will be served electronically via that system.

I further certify that on May 4, 2017, I served Mr. Bormuth via email (to earthprayer@hotmail.com) and via U.S. mail to 142 West Pearl St., Jackson, MI 49201, in compliance with 6th Cir. Rule 25(f)(1)(B) and Fed. R. App. P. 25(c)(1)(D).

Dated: May 4, 2017

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