No. 15-1869

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETER BORMUTH,

Plaintiff-Appellant,

v.

COUNTY OF JACKSON,

Defendant-Appellee.

On Appeal from a Final Judgment of the United States District Court for the Eastern District of Michigan, Case No. 2:13-cv-13726

BRIEF OF THE MUNICIPAL ATTORNEYS ASSOCIATION OF KENTUCKY AS *AMICUS CURIAE* SUPPORTING APPELLEE AND AFFIRMANCE

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FRAP 29(c)(5) STATEMENT

No party's counsel authored this brief in whole or part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person other than the *amicus curiae* and its counsel contributed money that was intended to fund preparing or submitting this brief.

INTEREST OF *AMICUS CURIAE*

The Municipal Attorneys Association of Kentucky consists of individual lawyers who advise and defend towns, cities, and other local institutions across the Commonwealth. Its members serve municipal clients full-time, part-time, and in private practice. All are committed to ensuring governments serve Kentuckians consistent with the Constitution. As the preeminent association of attorneys representing Kentucky municipalities, MAAK offers an important perspective regarding the need for clarity in Establishment Clause jurisprudence.

This case affects municipal lawyers in two distinct ways. *First*, local meetings regularly begin with prayer that places local officials "in a solemn and deliberative frame of mind." *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014). The lawyers who advise governments on this practice have a distinct interest in clarifying its lawfulness and protecting their clients' longstanding practice and prerogative. As Justice Alito recognized in *Town of Greece*, local officials must confront the "often puzzling Establishment Clause jurisprudence" and may be "terrified of the legal fees that may result" unless "local government is [declared] a religion-free zone." 134 S. Ct. at 1831 (Alito, J., concurring).

Second, municipal lawyers are concerned with any attempt by lawyers or courts to conflate the prayers or remarks of individual legislators with the action of a multimember legislative body. The panel opinion focused on words uttered in legislative debates in deciding the constitutionality of the prayers that preceded those sessions. Municipalities and the lawyers who represent them, however, have long relied on the distinction between the speech of an individual legislator and the action—or opening prayer—of a legislative body.

SUMMARY OF ARGUMENT

The panel opinion and the appellant's brief make several errors in their treatment of the long-standing and constitutionally sound practice of opening legislative meetings with prayer. The Municipal Attorneys Association of Kentucky files this brief in support of the County to address two errors that threaten local governments in particular.

The panel opinion rests on the mistaken premise that the Establishment Clause applies more restrictively to local government prayer than to legislative prayer at the state and federal level. This approach demeans the municipalities and municipal officials who carry out countless essential government functions, often with less fanfare and funding

than their federal and state counterparts. It is also wrong as a matter of law: the Supreme Court's decision in *Town of Greece* squarely rejected the notion that municipal officials occupy a second-class status under the Establishment Clause. The tradition of legislative prayer is as much at home in town halls as it is in the halls of state.

The panel opinion also confuses and conflates the policy remarks of individual commissioners with the prayers offered to begin the Board's meetings. Individual legislators have no less prerogative to respectfully open a meeting with prayer than does a chaplain. And the lawfulness of a legislator's solemn invocation is not diminished by separate statements offered during open legislative debate. The panel majority's conflation of prayer and debate erodes the longstanding distinction between those distinct legislative functions. This threatens to stifle legislative debate by casting the shadow of the courts' notoriously opaque Establishment Clause jurisprudence over ordinary municipal policymaking.

ARGUMENT

I. THE ESTABLISHMENT CLAUSE DOES NOT DISFAVOR LOCAL LEGISLATIVE PRAYER.

"Legislator-led prayer at the local level," according to the panel majority, "falls far afield of the historical tradition upheld in *Marsh* and

Town of Greece." *Bormuth v. Cty. of Jackson*, No. 15-1869, slip op. at 20 (6th Cir. Feb. 15, 2017) (ECF No. 29) ("Panel Op."). To the panel majority, it was critical that the "setting of the prayer practice" at Jackson County—"a local governing body with constituent petitioners in the audience"—differed from "federal and state legislative sessions." Prayer before "local government meetings," the panel opinion asserted, "heighten[ed] the risks of coercion" compared to prayer before a session of the U.S. Congress or a state legislative chamber. *Id* at 20, 25.

The panel opinion's approach to the Establishment Clause has been squarely rejected by the Supreme Court. It is also wholly at odds with the reality of local governance in the United States. The First Amendment does not treat municipal meetings, and the citizens who lead and attend them, as second class.

The panel majority proceeded as if the Supreme Court had not considered prayer at the local level. That is of course incorrect: just three years ago, the Supreme Court addressed that very question and held that the prayers offered at town board meetings in Greece, New York, were consistent with the First Amendment. 134 S. Ct. at 1828.

The Supreme Court, moreover, specifically rejected the same "local is different" argument advanced unsuccessfully by the plaintiff and the dissent in *Town of Greece* and recycled by the panel majority in this case. In *Town of Greece*, the challengers claimed that "prayer conducted in the intimate setting of a town board meeting differs in fundamental ways from the invocations delivered in Congress and state legislatures, where the public remains segregated from legislative activity and may not address the body except by occasional invitation." *Town of Greece*, 134 S. Ct. at 1824–25.

The dissent agreed, contending that a "chasm" existed between prayer in "a legislative floor session involving only elected officials" and prayer in the "town hall revolving around ordinary citizens." *Id.* at 1852 (Kagan, J., dissenting). At great length, it attempted to distinguish local meetings from federal and state sessions. *Id.* at 1845–49 (contrasting "morning in Nebraska" with "evening in Greece"). Though the Board "has legislative functions, as Congress and state assemblies do," the dissent emphasized that "the Board's meetings are also occasions for ordinary citizens to engage with and petition their government." *Id.* at 1845.

Five members of the Court, however, expressly rejected the notion that the Establishment Clause imposes heightened scrutiny on prayers offered before local meetings. *See* Panel Op. at 56–57 (Griffin, J., dissenting). The Court disagreed "that prayer conducted in the intimate setting of a town board meeting differs in fundamental ways from the invocations delivered in Congress and state legislatures." *Town of Greece*, 134 S. Ct. at 1824–25 (majority opinion). Citizens at municipal meetings "speak on matters of local importance[,] and petition the board for action that may affect their economic interests, such as the granting of permits, business licenses, and zoning variances." *Id.* And the Court expressly recognized the "historical precedent" supporting the practice of "local legislative bodies open[ing] their meetings with prayer." *Id.* at 1819.

Given the sustained and recent attention this question received in the Supreme Court, the panel majority's position that "[l]egislator-led prayer at the local level falls far afield of the historical tradition upheld in *Marsh* and *Town of Greece*" is untenable. Panel Op. at 20 (majority opinion). *Town of Greece* forecloses any argument that municipal prayer receives greater scrutiny than invocations offered at "higher" levels of government.

In any event, there is no basis to view local government as lesser government under the Establishment Clause. By singling out local government for different treatment, the panel opinion necessarily implies that the local government officials are inferior claimants to the tradition of legislative prayer. As *amicus* can attest, these officials work tirelessly—often after their "day jobs" have ended—to ensure that their fellow citizens receive the schools, roads, parks, law enforcement, and other blessings of American life they deserve and expect. It demeans this work to imply that these officials are less entitled to "a moment of prayer or quiet reflection" so that they may set their "mind[s] to a higher purpose and thereby eas[e] the task of governing." *Town of Greece*, 134 S. Ct. at 1825. As the panel dissent recognized, "[t]his tradition extends not just to state and federal legislatures, but also to local legislative bodies." Panel Op. at 39 (Griffin, J., dissenting).

II. THE PRAYERS AND STATEMENTS OF INDIVIDUAL LEGISLATORS ARE DISTINCT FROM THE ACTIONS OF A MULTIMEMBER LEGISLATURE.

The panel majority also criticized Jackson County for allowing Commissioners, rather than chaplains or laypersons, to offer the Board's invocation. Based on the lack of any "distinction between the government

and the prayer giver," Panel Op. at 45 (Griffin, J., dissenting), the panel majority expanded its Establishment Clause analysis far beyond the words of prayer offered by the Commissioners. It also swept in legislators' statements and Board actions (some outside the District Court record) that could not have any bearing on whether the invocations had a solemnifying or coercive effect. *See* Supplemental Br. of Appellee County of Jackson ("County En Banc Br.") 10. Deepening this incursion on legislative debate, the majority also erred by ascribing to the Board as a whole the individual remarks of individual Commissioners. Panel Op. at 26–28 (majority opinion).

The panel majority's approach to legislator-led prayer erodes longstanding distinctions between prayer and policymaking, between private views and public debate, and between legislators and legislatures. If endorsed by the en banc Court, the panel's approach threatens to infect ordinary municipal governance with the courts' daunting Establishment Clause doctrine.

First, the panel opinion relied on a distinction between legislator-authorized and legislator-led speech that is absent from the Supreme

Court's decisions. Although both *Marsh* and *Town of Greece* involved invocations (usually) led by clergy, this country's long history of legislative prayer embraces prayer offered by legislators. Panel Op. at 41–44 (Griffin, J., dissenting). Indeed, prayers led by elected legislators of various denominations and beliefs may offer *greater* separation between church and state than officially sanctioned prayers by a minister ordained by a particular denomination. Nothing in the Supreme Court's precedents warrants extra scrutiny for municipalities that do not or cannot go to the trouble or expense of securing outside clergy, rather than lay legislators, to open meetings with prayer.

Second, the panel opinion reached far beyond the Commissioners' prayers to sweep their policy debates and actions into the Establishment Clause analysis. The opinion gave only cursory attention to the Commissioners' actual invocations, which were perfectly consistent with those approved in *Town of Greece*. Instead, it purported to connect those prayers with isolated Commissioner statements and a single Board decision (reasonably declining to appoint a citizen—who had sued the County—to a post representing the County). *Id.* at 26–30 (majority opinion); County En Banc Br. 21–22 n.11. The analysis in *Marsh* and *Town of Greece*, by

contrast, addressed whether the words and circumstances of the prayers departed from historical practice or coerced citizen participation. 134 S. Ct. at 1823 (asking whether "*invocations*," not legislative debate, impermissibly denigrate, threaten, or proselytize); *id.* at 1827 (asking whether the "pattern of *prayers* over time … comport with the tradition of solemn, respectful prayer") (emphases added).

No precedent authorizes litigants and judges to pore over legislative proceedings for blemishes that might retroactively transform an appropriately respectful invocation into unconstitutionally coercive proselytizing. Rather, the Court's decisions have treated legislative prayer as a prior "internal act" delivered during a "ceremonial" portion of a government meeting, distinct from the "fractious business of governing" that follows. *Id.* at 1823, 1825, 1827; *id.* at 1829 (Alito, J., concurring) (distinguishing prayer from the "separate" "legislative" portion of the agenda). Conflating legislative prayer and policymaking risks injecting Establishment Clause concerns into any number of policy debates, including about the role of religion in public life, that are wholly distinct from the session-opening prayer.

Third, the panel majority compounded its error by inappropriately ascribing statements by individual legislators to the Board as a whole. The panel majority concluded that the Board adopted its prayer policy to exercise "control over the content of the prayers" in order to "exclude other prayer givers," "prevent[] participation by religious minorities," and "endors[e] a specific religion." Panel Op. at 22–23; County En Banc Br. 17–18. But this broad assertion rested on the thinnest of support: a single statement by a single legislator. The opinion assigned to the Board a discriminatory motive and effect based on a brief, facially neutral statement that was not part of the prayers at issue—nor even part of the record on appeal. Without considering other Commissioners' reactions or positions (if any) regarding this opaque statement, the panel simply ascribed discrimination to the Board as a whole.

Even on topics less freighted than religion, courts have good reason to hesitate before inferring legislative intent based on an individual legislator's statements. "Individuals have intentions and purpose and motives; collections of individuals do not." Kenneth A. Shepsle, *Congress Is a They, Not an It: Legislative Intent as Oxymoron*, 12 Int'l Rev. L. & Econ.

239, 254 (1992). That is particularly true here, where an official's approach to legislative prayer necessarily—and appropriately—reflects the dictates of his or her own conscience. 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." *Town of Greece*, 134 S. Ct. at 1826. The County's facially neutral policy allowed a rotation of all elected Commissioners of any faith, or no faith at all, "to address his or her own God or gods as conscience dictates." *Id.* at 1822.

By conflating legislative debate with legislative prayer, and individual statements with collective action, the panel majority threatens to make the judiciary a "supervisor[] and censor[] of religious speech," just as *Town of Greece* warned. *Id.* at 1822. It also threatens to infect the ordinary work of local government with the vagaries of Establishment Clause doctrine. Kentucky's municipal attorneys can attest to the difficulty of applying the Supreme Court's "nebulous Establishment Clause analyses," which "ha[ve] confounded the lower courts." *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 12 (2011) (Thomas, J., dissenting from denial of certiorari). Before *Town of Greece*, this area of law was "undoubtedly in need of clarity." *Mt. Soledad Mem'l Ass'n v. Trunk*,

132 S. Ct. 2535, 2535 (2012) (Alito, J., concurring in denial of certiorari). The Supreme Court's decision, therefore, served as a welcome guide for those navigating this difficult terrain. This Court should not confound Establishment Clause jurisprudence further by embroidering the straightforward analysis of *Town of Greece*, or by subjecting the ordinary business of local government to searching review.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Dated: May 4, 2017

Respectfully submitted,

/s/ Benjamin Beaton

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

I hereby certify pursuant to Federal Rule of Appellate Procedure 32 that this brief:

(i) complies with the length limitation of Rule 29(a)(5) because it contains fewer than 12 ½ pages; and

(ii) 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 using Microsoft Word and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: May 4, 2017 /s/ Benjamin Beaton

CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2017, the foregoing brief was sent via email to the Court's En Banc Coordinator, who will file it electronically via the Court's electronic court filing system. All participants in the case, other than Appellant Peter Bormuth, are registered users of the ECF system and will be served electronically via that system.

I further certify that on May 4, 2017, I will serve Mr. Bormuth via email and U.S. Mail at the following address:

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Dated: May 4, 2017 /s/ Benjamin Beaton