
No. 15-1869

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETER CARL BORMUTH,

Plaintiff-Appellant,

v.

COUNTY OF JACKSON,

Defendant-Appellee.

Appeal from the United States District Court
Eastern District of Michigan, Eastern Division
Honorable Marianne O. Battani

**BRIEF OF AMICI CURIAE
STATE OF MICHIGAN AND TWENTY-ONE OTHER STATES
IN SUPPORT OF JACKSON COUNTY AND AFFIRMANCE**

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STATEMENT OF INTEREST OF AMICI CURIAE STATES

Legislative prayer “is deeply embedded in the history and tradition of this country.” *Marsh v. Chambers*, 463 U.S. 783, 786 (1983). The amici States—Michigan, Alabama, Arizona, Arkansas, Colorado, Georgia, Idaho, Indiana, Kansas, Louisiana, Mississippi, Missouri, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, and West Virginia—have long engaged in legislative prayer, a practice that predates the First Amendment’s ratification. *Id.* at 787–88. They have exercised that right by various mechanisms: by hiring chaplains, by inviting clergy and guests, and by allowing the lawmakers themselves to open meetings with prayer.

In fact, lawmakers lead prayer in one or both legislative chambers in 35 States. Local governments also widely rely on lawmaker-led prayer, a mechanism that avoids the expense of hiring a chaplain and the burden of recruiting volunteer clergy. The amici States have a strong interest in preserving that religious liberty, which is part of the traditional practice of legislative prayer in this country, at both the state and local level.

INTRODUCTION AND SUMMARY OF ARGUMENT

Lawmaker-led prayer is constitutionally permissible under *Marsh* and *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811 (2014), because it falls within the tradition of legislative prayer that has been practiced in our country since its founding. From the days when States had established religions, to the period both before and after the passage of the Fourteenth Amendment, to the present day, lawmakers have led prayers at the state and local levels, as the examples detailed in the brief and supporting appendices demonstrate. Because this specific practice has been acceptable throughout all of our country's history, under the Supreme Court's decisions the Establishment Clause cannot now be interpreted to ban lawmaker-led prayer.

Further, of the 143 counties in the Sixth Circuit that engage in some form of legislative prayer, 73% of those counties (i.e., 104 counties) include lawmaker-led prayer in their prayer practice. Thus, a reasonable observer, who is presumed to be acquainted with this tradition, would recognize that the practice is not coercive: it “does not suggest that those who disagree are compelled to join in the expression or approve its content.” *Greece*, 134 S. Ct. at 1825 (three justices).

ARGUMENT

I. The governing Establishment Clause test recognizes that prayer practices that have stood the test of time are constitutionally permissible.

The Supreme Court has consistently upheld legislative prayer against Establishment Clause challenges, recognizing that “it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted.” *Greece*, 134 S. Ct. 1811, 1819 (2014) (citing *Marsh*). This historical focus recognizes 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.” *Id.* The proper “inquiry, then, must be to determine whether the prayer practice” at issue “fits within the tradition long followed in Congress and the state legislatures.” *Id.*

II. Lawmaker-led prayer “has withstood the critical scrutiny of time and political change.”

A. Since the beginning of the republic, our tradition of legislative prayer has included lawmaker-led prayer.

As both *Marsh* and *Greece* acknowledge, the tradition of legislative prayer extends back to the Continental Congress (in 1774) and the First Congress (in 1789), which each opened meetings with prayer led by a

paid chaplain. *Marsh*, 463 U.S. at 787–88; *Greece*, 134 S. Ct. at 1818, 1823.

The tradition of legislative prayer was even more accepted at the state level, given that “[s]even of the fourteen states that comprised the Union in 1791 authorized establishments of religion by law,” Leonard W. Levy, *The Establishment Clause* xxii (2d ed., rev. 1994), and that it was settled that the Establishment Clause did not apply to the States. *Permoli v. Municipality No. 1 of City of New Orleans*, 44 U.S. 589 (3 How.) (1845) (“The Constitution of the United States makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws.”); Kurt T. Lash, *The Second Adoption of the Establishment Clause*, 27 Ariz. St. L.J. 1085, 1098–99 (1995) (“[S]tatements by those involved in the framing of the Establishment Clause, early constitutional treatise writers, numerous congressional leaders, and even the Supreme Court, are remarkably consistent in their interpretation of the Establishment Clause as representing no power to the federal government and reserving the same to the states.”). Lawmaker-led prayer at the state

and local level thus was “accepted by the Framers.” *Greece*, 134 S. Ct. at 1819.

Even after States ended their established religions, legislative prayer at the state level long included prayers by a variety of prayer givers. For example, even though many States followed Congress’s example by hiring a chaplain, individual lawmakers also led prayers across the States and across the centuries—that is, in the 1800s, 1900s, and 2000s. To pick just a few older examples, lawmakers led prayer in the Illinois Senate in 1849 (Senator Richmond), in the Iowa Senate in 1862 (Senators Watson and Teter), in the New Hampshire House in 1863 (Representatives Stewart and Lawrence), and in the Kansas Senate in 1867 (Senator Green and the President of the Senate). Appendices A–D (excerpts of the legislative journals of the relevant legislative chambers). Indeed, legislators from one chamber sometimes led prayer in their sister chamber, as in the Connecticut Senate in 1861 (Representatives Denison, Mitchell, and Parmelee). Appendix E (journal excerpts).

This tradition of lawmaker-led prayer at the state level continued after the ratification of the Fourteenth Amendment in 1868 (a date

relevant because of the incorporation doctrine). For example, lawmakers led prayer in the Alabama House in 1880 (Representative Calloway and Harris), in the Arkansas Senate in 1893 (Senator Allen), and in the Georgia Senate in 1898 (Senator McGehee). Appendices F–H (journal excerpts). To highlight a few examples from States in the Sixth Circuit, lawmakers led prayers in the Michigan House in 1879 (Representatives Sharts and Barnes), in the Kentucky House in 1910 (Representative Steers), in the Ohio House in 1921 (Speaker Beetham), and in the Tennessee House in 1923 (Representative Bratton). Appendices I–L (journal excerpts).

This is by no means a comprehensive list. See, e.g., Amicus Brief of Michigan & Kentucky State Legislators 5–8 (listing additional examples). Rather, it merely identifies a handful of examples where state lawmakers led prayers themselves, even though their legislative chambers at the time usually relied on clergy or chaplains to lead prayer. And while minutes at the local level are harder to research, it should not be surprising to learn that local legislators have also engaged in legislative prayer by leading prayers themselves. *E.g.*, Minutes of Weakly County, Tenn., <http://www.weakleycountyttn.gov/>

[commission_1940-49.html](#) (listing minutes that show lawmakers led prayer on July 5, 1943, and January 3, 1944); *see also id.* (confirming that the “quarterly court” is a lawmaking body by listing resolutions it adopted). In short, lawmakers leading prayers has long been part of the tradition of legislative prayer, both across the country and in this circuit, apparently without any Establishment Clause concerns arising.

This sort of historical evidence from across the country, spanning from 1849 through 1921 and (as shown in the next section) to this day, is the type of evidence that the Supreme Court examined in *Greece* and found sufficient to confirm that the prayer practice at issue in *Greece* fell within the traditional practices and understanding of legislative prayer. For example, *Greece* referred to a handful of examples from the 1830s through 1910. 134 S. Ct. at 1820 (discussing prayers by chaplains in 1830, 1839, and 1861); 1819–1820 (discussing the reevaluation of official chaplaincies in Congress in the 1850s); *id.* at 1819 (referring to 1883 and earlier: “When *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.* (discussing a prayer in the Boston City Council in 1910).

As the above examples show, not only has legislative prayer persisted across the country for more than a century, the practice of legislative prayer has persistently included lawmakers themselves exercising their own religious liberty by opening legislative meetings in prayer. *Greece*, 134 S. Ct. at 1825 (“The principal audience for these invocations is not, indeed, the public but 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.”).

B. The widespread use of lawmaker-led prayer to this day confirms that its practice has stood the test of time and political change.

The fact that lawmaker-led prayer is a type of legislative prayer that has “withstood the critical scrutiny of time and political change,” *Greece*, 134 S. Ct. at 1819, is confirmed by the frequency with which state and local governments use lawmaker-led prayer today.

1. Lawmaker-led prayer is common at the state level.

According to a 2002 survey conducted by the National Conference of State Legislatures, “[f]orty-seven chambers allow people other than

the designated legislative chaplain or a visiting chaplain to offer the opening prayer,” including “[l]egislators, chamber clerks, or other staff.” Nat’l Conf. of State Legs., *Inside the Legislative Process: Prayer Practices* 5-145 (2002), <http://www.ncsl.org/documents/legismgt/ILP/02Tab5Pt7.pdf>. That 2002 survey further details that lawmakers lead prayer themselves in one or both chambers in the following 31 States: Alabama, Alaska, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Iowa, Kansas, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, and Wisconsin. *Id.* at 5-151 to -152; *see also id.* at 5-152 (noting certain state chambers not return a survey). In fact, based on research West Virginia conducted and presented for itself and 12 other States in the Fourth Circuit in *Lund v. Rowan County*, No. 15-1591, as of 2015 the numbers were even higher: lawmakers were leading prayer in 35 States (adding Colorado, Indiana, Maryland, and Virginia to the count). Appendix M (table from brief).

Further, some state chambers (such as the Michigan House, the Rhode Island Senate, and the Maryland House) rely entirely on

lawmakers for their prayer. *Id.* at 5-151 to -152; Kate Havard, *In Delegates They Trust*, Wash. Post (Mar. 9, 2013), https://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?utm_term=.4647245830d8. Rule 16 of the Michigan House of Representatives states, for example, that “[t]he Clerk shall arrange for a Member to offer an invocation which will not exceed 2 minutes in length at the opening of each session of the House.”

2. Lawmaker-led prayer is common at the local level.

The practice of lawmaker-led prayer is also widespread at the local-government level, where chaplains are rarely, if ever, hired and where arranging for a volunteer clergy for each meeting imposes administrative costs. To aid the Court in this case, amici searched the minutes and recording of county commission meetings in Michigan, Tennessee, Kentucky, and Ohio that were publicly available online, looking for instances where local lawmakers led prayer within the last several years. That county-level research (to say nothing of other local entities, like city, village, or township councils) shows that lawmaker-led prayer is a common occurrence at the local level. Appendices N–Q

(by-state tables listing the prayer practices of those counties that engage in some form of legislative prayer).

For example, Michigan has 83 counties, and of the 79 counties for which information could be obtained, at least 39 engage in some form of legislative prayer. Significantly, lawmakers in 31 counties have led prayer recently at least some of the time. Appendix N. That means that 79% of Michigan counties that engage in legislative prayer (i.e., 31 out of 39) include lawmaker-led prayer as part of their prayer practice.

The percentages are similar for the other States in this circuit. Tennessee has 95 counties, and of the 58 counties for which information is available online, 54 counties engage in legislative prayer. Of those 54 counties, 78% (i.e., 42 counties) have included lawmaker-led prayer within their prayer practice in recent years. Appendix O. For Kentucky's 120 counties, 67 had information available online, with 37 counties engaging in some form of legislative prayer. Of those 37, 65% of the counties (i.e., 24 counties) have included lawmaker-led prayer. Appendix P. And while it appears that only 13 of Ohio's 88 counties engage in legislative prayer (out of the 62 counties for which information was obtainable), that still means 54% (7 of the 13 praying

county commissions) use lawmaker-led prayer as part of their legislative prayer. Appendix Q. Across the circuit then, of the 143 counties that engage in legislative prayer, 73% (104 counties) have recently had lawmakers lead prayer.

The fact that lawmaker-led prayer is so widespread today is significant not just because it shows that lawmaker-led prayer “has withstood the critical scrutiny of time and political change,” *Greece*, 134 S. Ct. at 1819 (opinion of Court). It is also significant to the coercion inquiry in *Greece* because it provides context to “the reasonable observer,” who is presumed to be “acquainted with this tradition” and to understand that the fact “[t]hat many appreciate these acknowledgements of the divine in our public institutions does not suggest that those who disagree are compelled to join the expression or approve its content,” *id.* at 1825 (three Justices).

CONCLUSION AND RELIEF REQUESTED

The amici States respectfully request that the Court affirm the decision of the district court.

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APPENDICES

A: Excerpt from Journal of the Senate of Illinois at 51 (Nov. 2, 1849)

B: Excerpt from Journal of the Senate of Iowa at 70 & 503 (Jan. 20 and Apr. 2, 1862)

C: Excerpt from Journal of the Senate of New Hampshire at 90, 169, 293, 312 (June 18, June 26, July 8, and July 8, 1863)

D: Excerpt from Journal of the Senate of Kansas at 119–20 & 316 (Jan. 17 and Feb. 7, 1867)

E: Excerpt from Journal of the Senate of Connecticut at 231, 258, & 406 (June 5, June 11, June 28, 1861)

F: Excerpt from Journal of the House of Representatives of Alabama at 6, 36 (Nov. 10 and Nov. 12, 1880)

G: Excerpt from Journal of the Senate of Arkansas at 3 & 7 (Jan. 9 and Jan. 10, 1893)

H: Excerpt from Journal of the Senate of Georgia at 584 (Dec. 17, 1898)

I: Excerpt from Journal of the House of Representative of Michigan at 10, 82, 594, 956 (Jan. 2, Jan. 11, Feb. 20, and Mar. 20, 1879)

J: Excerpt from Journal of the House of Representatives of Kentucky at 319 (Feb. 2, 1910)

K: Excerpt from Journal of the House of Representatives of Ohio at 84 (Jan. 21, 1921)

L: Excerpt from Journal of the House of Representatives of Tennessee at 623 (Mar. 15, 1923)

M: Prayer Practices of the State and Territorial Legislatures, from Brief of Amicus Curiae West Virginia and 12 Other States in *Lund v. Rowan County, North Carolina*, No. 15-1591 (4th Cir.), Table 1

N: Lawmaker-led Prayer Practices in Michigan Counties

O: Lawmaker-led Prayer Practices in Tennessee Counties

P: Lawmaker-led Prayer Practices in Kentucky Counties

Q: Lawmaker-led Prayer Practices in Ohio Counties

CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limit, Typeface Requirements, and Type Style Requirements

1. This amici brief complies with the page-length limitation of this Court's briefing letter, as this amici brief contains no more than 12 pages, which is less than half the length of the parties' 25-page supplemental brief.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Word 2013 in 14-point Century Schoolbook.

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CERTIFICATE OF SERVICE

I certify that on April 27, 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.

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