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.

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

Brief *Amicus Curiae* of The Becket Fund for Religious Liberty In Support of Defendant and Affirmance

Eric C. Rassbach
Daniel H. Blomberg
The Becket Fund for Religious Liberty
1200 New Hampshire Ave., N.W.
Suite 700
Washington, DC 20036
(202) 955-0095

Michael W. McConnell
559 Nathan Abbott Way
Stanford, CA 94305
(650) 736-1326

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and 29(a)(4)(A), *Amicus* states that it does not have a parent corporation, nor does it issue any stock.

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IDENTITY AND INTEREST OF THE *AMICUS*[1]

The Becket Fund for Religious Liberty is a non-profit, nonpartisan law firm dedicated to protecting religious liberty for all. It has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Native Americans, Santeros, Sikhs, and Zoroastrians, among others. It is often involved in cases seeking to preserve religious freedom by ensuring that the Establishment Clause is properly interpreted.

Becket believes the Court can best interpret the Establishment Clause by applying the historical approach outlined in *Town of Greece* and Judge Kelly's dissenting opinion in *Felix v. City of Bloomfield*, 847 F.3d 1214 (10th Cir. 2017).

ARGUMENT

I. Under *Town of Greece*, the Establishment Clause must be understood by its historical meaning.

A. *Town of Greece* ended *Lemon*-caused confusion over the role of history.

Among its many incongruities, the law of the Establishment Clause has long been ambivalent about the role historic practice should play in the analysis. There have been at least two competing strands of precedent.

One strand emphasized historical meaning. In the first case to incorporate the Clause against the States, the Supreme Court rooted its decision in a lengthy

[1] No party's counsel authored this brief in whole or in part, and no one other than the *amicus curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief. Plaintiff-Appellant has not consented to the filing of this brief. Defendant-Appellee has consented.

historical exposition. *See Everson v. Bd. of Educ.*, 330 U.S. 1, 7-16 (1947). And though the accuracy of *Everson*'s historical account has been the subject of vigorous debate for decades, it is undisputed that history was the primary justification for *Everson*'s interpretation of the Clause.[2] Subsequent Supreme Court decisions also self-consciously rooted themselves in historical accounts.[3]

But in *Lemon v. Kurtzman*, the Court took an entirely different tack regarding history, arguing that "we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law." *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). The *Lemon* Court then looked to only the preceding 24 years of Establishment Clause precedent to "glean[]" its now-familiar three-prong test, based on abstractions untethered to historical understanding. *Id.* Since then, *Lemon* and its corollary endorsement test have provided the governing test in most but not all Circuits. *See, e.g.*, *ACLU v. Mercer Cty.*, 432 F.3d 624, 636 (6th Cir. 2005) ("The recent decisions of this Court have routinely applied *Lemon*"); *but see ACLU v. City of Plattsmouth*, 419 F.3d 772, 778 n.8 (8th Cir. 2005) (en banc) (disclaiming *Lemon*).

The *Lemon*/endorsement test has been roundly criticized by Supreme Court

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[2] *See, e.g.*, Donald L. Drakeman, Everson v. Board of Education *and the Quest for the Historical Establishment Clause*, 49 Am. J. Legal Hist. 119 (2007).

[3] *See, e.g.*, *Torcaso v. Watkins*, 367 U.S. 488 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970); *Marsh v. Chambers*, 463 U.S. 783 (1983).

Justices, Courts of Appeals, and scholars alike. *See, e.g.*, *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 12-23 (2011) (Thomas, J., dissenting); *Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 869 (7th Cir. 2012) (Easterbrook, J., dissenting) (test "made up by the Justices" and lacked "any historical provenance."). The growing consensus was that *Lemon*'s analysis was inherently unstable, leaving courts "in Establishment Clause purgatory" and uncertain about what doctrine to apply. *Mercer*, 432 F.3d at 636; *see also Green v. Haskell Cty. Bd. of Comm'rs*, 574 F.3d 1235, 1245 (10th Cir. 2009) (Gorsuch, J., dissenting) (quoting *Mercer*). *See also* Eric Rassbach, Town of Greece v. Galloway: *The Establishment Clause and the Rediscovery of History*, 2014 Cato S. Ct. Rev. 71, 91 (2014) (collecting cases). Indeed, the Supreme Court has relegated the *Lemon* factors to "no more than helpful signposts," *Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (plurality op.), and has not applied them to the merits of an Establishment Clause claim since 2005.[4]

The Supreme Court addressed the conflict between these two lines of precedent in *Town of Greece v. Galloway*, putting the role of historical practice firmly at the center of Establishment Clause analysis: "[a]ny test the Court adopts must acknowledge a practice that was accepted by the Framers[.]" 134 S. Ct. 1811, 1819

[4] *See Mercer*, 432 F.3d at 635 (noting *Lemon*'s disuse); *see, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012) (ignoring *Lemon*); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (same); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (same).

(2014). This represents a "major doctrinal shift regarding the Establishment Clause" that completed the turn away from *Lemon* and toward the historical approach. *Smith v. Jefferson Cty. Bd. of Sch. Comm'rs*, 788 F.3d 580, 602 (6th Cir. 2015) (Batchelder, J., concurring) (recognizing *Town of Greece* as "a sea change in constitutional law"), *cert. denied*, 136 S. Ct. 1246 (2016). In 180-degree contrast to *Lemon*'s historical agnosticism and arbitrary line-drawing, *Town of Greece* commanded that "the Establishment Clause *must* be interpreted by reference to historical practices and understandings." *Town of Greece*, 134 S. Ct. at 1819 (emphasis added; quotation omitted); *see also id.* ("[T]he line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers") (quoting *Schempp*, 374 U.S. at 294 (Brennan, J., concurring)). Under this approach, "if there is any inconsistency between" a judicial test "and the historic practice," that "calls into question the validity of the test, not the historic practice." *Id.* at 1834 (Alito, J., concurring).

B. The Establishment Clause must now be interpreted like other constitutional provisions.

Town of Greece brought the Establishment Clause back into the analytical framework of other constitutional rights and provisions. This framework looks to the "historical background" of the provision "to understand its meaning." *Crawford v. Washington*, 541 U.S. 36, 43 (2004) (examining the Sixth Amendment's Confrontation Clause). Thus, for instance, in analyzing police searches under the

Fourth Amendment context, courts construe the text "in the light of what was deemed an unreasonable search . . . when it was adopted[.]" *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (quotation omitted). This approach examines what the Constitution *meant* to guide what it now *means*.

But while the core meaning of a constitutional provision is stable, grounded by historical understandings and practices, the application of that meaning is sensitive to changes in economic, social, and technological contexts. Thus, the First Amendment's right to free speech applies to the internet, *Reno v. ACLU*, 521 U.S. 844 (1997); the Second Amendment applies to modern handguns, *District of Columbia v. Heller*, 554 U.S. 570, 598 (2008); and the Fourth Amendment's right against unreasonable searches applies to thermal imaging, *Kyllo*, 533 U.S. at 40.[5]

In this case, the panel majority agreed that *Town of Greece* required it to consider history, but only insofar as the founding-era historical practice (or caselaw applying that practice) is on all fours with the current case. Op. 19-20. Hence the panel's mistake in thinking that variations from the circumstances of *Town of Greece*'s factual scenario—here, "the identity of the prayer giver," *id.*—justified omitting the historical analysis altogether.

[5] *See also Betterman v. Montana*, 136 S. Ct. 1609, 1614-15 (2016) (looking to "the Framers' comprehension of the right [to a speedy trial] as it existed at the founding" to ensure modern interpretation "comports with the historical understanding"); *accord Golan v. Holder*, 565 U.S. 302, 321 (2012) (Copyright Clause).

But *Town of Greece* never suggested that the municipal setting or religious content of a municipality's prayers need be identical to those of the founding era or those at issue in *Marsh*. Rather, as it does for its analysis of other constitutional provisions, the Court first looked to whether the broad category of legislative prayer would have been considered an establishment of religion as understood at the time of the founding. *See Town of Greece*, 134 S. Ct. at 1818. Only then did it apply that historical meaning to the facts of the Town's particular prayer practice.

II. The County's practice of municipal legislator-led prayer does not have any of the features of a religious establishment.

An opinion authored earlier this year by Judge Kelly of the Tenth Circuit, and joined by Chief Judge Tymkovich, shows how Establishment Clause historical analysis ought to work. Judge Kelly explains that following *Town of Greece*'s admonition to "make sense of the Establishment Clause" means that "one must understand . . . the Framers' use of the word 'establishment.'" *See Felix*, 847 F.3d at 1215 (Kelly, J., dissenting); *accord Town of Greece*, 134 S. Ct. at 1838 (Thomas, J., joined by Scalia, J., concurring) (stressing the importance of analyzing "*what constituted an establishment*" at the time of the founding (emphasis in original)). Judge Kelly's opinion identifies six "general features" of an historical establishment of religion: "'(1) [state] control over doctrine, governance, and personnel of the church; (2) compulsory church attendance; (3) financial support; (4) prohibitions on worship in dissenting churches; (5) use of church institutions for public functions;

and (6) restriction of political participation to members of the established church.'" *Felix*, 847 F.3d at 1216 (Kelly, J., dissenting) (quoting Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of a Religion*, 44 Wm. & Mary L. Rev. 2105, 2131 (2003)); *see also* Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 Notre Dame L. Rev. 1793, 1798 (2006) (concurring with the six categories). These historical practices fall into two categories: pre-disestablishment practices that were understood to be aspects of the establishment, and post-disestablishment practices that were understood not to transgress the principle of disestablishment.

Applying that approach here, it is apparent that legislative prayer practices do not normally involve the features of an historical establishment, but instead were seen as compatible with the new disestablishmentarian republic. *Marsh*, 463 U.S. at 788 n.10 (Founders never saw legislative prayer as "a step toward an established church"). The same is true of the County's specific prayer practices in this case.

1. Control over doctrine and governance of the church. One feature of an establishment is state control over the institutional church. At the time of the founding, this control manifested itself in two startling ways: the control of religious doctrine and the appointment and removal of religious officials. *Felix*, 847 F.3d at 1216 (Kelly, J., dissenting). For example, Anglican colonies like Virginia followed

the example of English rules providing that Parliament could determine the articles of faith for the Church of England and approve the text of the Book of Common Prayer, made it doctrine that the King must be Supreme Governor of the Church, and mandated that all ministers accept the Church of England's doctrines. *See* 1 William Blackstone, *Commentaries on the Laws of England* 364-83; *see also* Thomas Berg, *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 Nw. U. L. Rev. Colloquy 175, 180 (2011). In these colonies, the power of appointment and removal also ended up in government hands, and that power still rendered religious groups subservient to their state masters. *See Hosanna-Tabor*, 565 U.S at 182-83. This control over minister selection was an element of establishment the Founders sought to avoid. *See id.* at 183.

The County's practice of municipal legislator-led prayer does not require any interaction between government and a church, much less control of personnel or doctrine, so this characteristic of a historical establishment is not implicated here.

2. Compelled church attendance. Another characteristic of an historical establishment was compulsory church attendance. Before the founding, England fined those who failed to attend Church of England worship services. 4 Blackstone, Commentaries 51-52. The colonies followed suit. Virginia's earliest settlers attended twice-daily services on pain of losing daily rations, whipping, and six months of prison. *See* George Brydon, *Virginia's Mother Church and the Political Conditions*

Under Which It Grew 412 (1947). While Virginia eased those laws, versions of them remained in force until 1776. *See* Sanford Cobb, *The Rise of Religious Liberty in America: A History* 521 (Burt Franklin 1970) (1902). Connecticut and Massachusetts had similar laws in place until 1816 and 1833. *See id.* at 512-15.

The County's practice of municipal legislator-led prayer does not require attendance at any church. Bormuth alleges, however, that he suffered abuses of the prayer practice. Supp. Br. 7-8. Abuses of the prayer practice could call into question whether a particular practice comes close to compelling church attendance. That is what the Court was driving at in *Town of Greece* when it said that an entire legislative practice could constitute coercion—and thus be contrary to "historical practices and understandings"—due to a "pattern and practice" of using the prayer practice to "chastise[ ] dissenters" or by including a "lengthy disquisition on religious dogma." 134 S. Ct. at 1819, 1826-27 (quotation omitted).

But the County's practices come nowhere near to the kind of showing that would be required to show coercion. Coercion analysis does not occur on a blank slate, but instead "must be evaluated against the backdrop of historical practice." *Id.* at 1825. Here, that backdrop confirms that legislative prayer is broadly understood to be a non-coercive measure intended to "lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens." *Id.*

Bormuth's attempt to overcome that understanding confuses some

Commissioners' antagonism toward him as an individual with a "pattern and practice" of using the prayer opportunity to coerce him or others to join in a religious observance.[6] He has shown no evidence of any causal link between his objection to the legislators' prayers and their hostility towards him. The evidence Bormuth submitted instead shows, as Judge Battani found, that the legislators' "own personal sense of affront elicited by" Bormuth's aggressive behavior was the source of their hostility rather than anything related to the prayer practice. Op. 57. Therefore there

[6] The broader context for the individual Commissioners' actions is Bormuth's well-known role as a local gadfly. *See Bormuth v. City of Jackson*, 2013 WL 1944574, at *2 (E.D. Mich. 2013) (chronicling Bormuth's penchant for "inject[ing] into the record venomous, irrelevant, and gratuitous commentary"); *Bormuth v. City of Jackson*, 2012 WL 5493599, at *1-*2 (E.D. Mich. 2012) (denying Bormuth's claim that he suffered religious discrimination when, as "one of the best poets in Jackson County" and a "rare 'druidic bard,'" he was asked to stop attending community college's poetry readings); *Bormuth v. Dahlem Conservancy*, 837 F. Supp. 2d 667, 670 (E.D. Mich. 2011), (denying Bormuth's religious discrimination claim against private non-profit nature center that asked Bormuth to stop visiting after emailed threat: "tell your groundsman that the next time i see him driving that diesel cart just because he is too lasy [sic] to walk i will either have the spirits drop a widow maker on him putting him in a wheel chair the rest of his life . . . ."); *see also Bormuth v. Johnson*, 2017 WL 82977, at *3 (E.D. Mich. 2017) (denying claim that loss in Democratic primary was due to a "deliberate attempt by [a] Christian"—the Secretary of State—"to deny a Pagan candidate" a fair election); *In re: Peter Carl Bormuth*, No. 13-1194 (6th Cir. April 23, 2013) (denying mandamus action seeking recusal because the judge was a Christian); *Bormuth v. Grand River Envtl. Action Team*, 2015 WL 6439007 (Mich. Ct. App. Oct. 22, 2015) (denying lawsuit to allow him to conduct groundwater tests on nonprofit's property).

is no coercion and no implication of the compelled church attendance factor.[7]

3. Financial support of the church. A third characteristic of an historical establishment was public financial support of the church. At the founding, this support took several specific forms—namely, compulsory tithing, direct grants from the public treasury, specific taxes for the support of churches, and land grants. McConnell, 44 Wm. & Mary L. Rev. at 2147-48. Land grants, the most significant form of public support, provided not only land for churches and parsonages, but also income-producing land that ministers used to supplement their income. *Id.* at 2148. Here, although the County may spend a *de minimis* amount on legislator-led prayer, there is no flow of funds from the state to a church. This factor is not implicated.

4. Prohibition of dissenting worship. A fourth feature of an historical establishment of religion consisted of restricting dissenting churches. England

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[7] Bormuth also claims that the "intimacy of a local government setting" makes local-legislator-led prayer more coercive. Supp. Br. 11. But *Town of Greece* upheld municipal prayers as part of a long historical tradition. *See Town of Greece*, 134 S. Ct. at 1831 & n.4 (Alito, J., concurring) ("by no means unusual" that Michigan city and county have long-time tradition of legislator-led prayer). Nor does Bormuth appear particularly intimidated. *See* Peter Bormuth, Videos, http://peterbormuth.com/videos/ (last visited May 2, 2017) (post-lawsuit videos of comments to the Commission, including Solstice greetings and a warning to female Commissioners about the dangers of breast cancer). Moreover, a rigid municipal/state distinction would be arbitrary. New York City's 51-member municipal legislature is larger than the 49-member state legislature in *Marsh*, and represents four times as many people. *See also Am. Atheists, Inc. v. City of Detroit*, 567 F.3d 278, 286 (6th Cir. 2009) (32 cities "have populations larger than at least one State," and New York City has "population larger than those of 39 states").

restricted the practices of non-Anglicans, especially Catholics. Laycock, 81 Notre Dame L. Rev. at 1802. Massachusetts notoriously enacted similar provisions that it briefly used to banish, whip, and even hang some non-Puritans. *Id.* at 1805 n.54. Virginia imprisoned numerous Baptist preachers between 1768 and 1775 because of crimes such as "preaching the gospel contrary to law." Cobb at 112-14. Most states broadly disenfranchised Catholics. 1 Anson Phelps Stokes, *Church and State in the United States* 463 (1950). This characteristic of an establishment is not present here.

5. Using the church for state functions. A fifth feature of a religious establishment was government assignment of important civil functions to church authorities. At the founding, the colonies often used religious officials and entities for social welfare, elementary education, marriages, public records, and prosecution of some moral offenses. McConnell, 44 Wm. & Mary L. Rev. at 2169-76. Thus, for a time, New York recognized only those teachers licensed by a church, and South Carolina recognized only marriages performed in an Anglican church. *Id.* at 2173, 2127. Here, there is no such delegation of state authority to a church.

6. Restrictions on political participation. The final feature of an establishment was the restriction of political participation based on church affiliation or the lack thereof. At the time of the founding, eleven of the thirteen states had religious qualifications for holding government office, including bans on non-Christians or non-Protestants. Akhil Reed Amar, *Some Notes on the Establishment Clause*, 2

Roger Williams U. L. Rev. 1, 2 (1996). Although religious tests were prohibited at the federal level by the Religious Test Clause of Article IV, Maryland's version of religious disqualification lasted until 1961. *Torcaso*, 367 U.S. at 495.

Bormuth claims that he was "forced to worship jesus christ in order to participate in the business of County Government." Supp. Br. 5. As noted above, the record shows the opposite. Bormuth was not cowed into praying, but rather was able to fully engage in the political process. He just did not like how others chose to engage.

In sum, the Founders would never have understood the County's legislator-led prayer practice as an "establishment of religion." Nor should this Court.

CONCLUSION

The district court should be affirmed.

Respectfully submitted.

Date: May 3, 2017

/s/ Daniel H. Blomberg
Eric C. Rassbach
Daniel H. Blomberg
The Becket Fund for Religious Liberty
1200 New Hampshire Ave., N.W.
Suite 700
Washington, DC 20036
(202) 955-0095

Michael W. McConnell
559 Nathan Abbott Way
Stanford, CA 94305
(650) 736-1326

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

Type-Volume Limitation, Typeface Requirements,
and Type Style Requirements

1. 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(a)(7)(B)(iii) and 6 Cir. R. 32(b)(1).

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

Date: May 3, 2017

/s/ Daniel H. Blomberg
Daniel H. Blomberg

CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2017, I electronically filed the foregoing brief *amicus curiae* 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 3, 2017, I will serve Mr. Bormuth via email (to earthprayer@hotmail.com) and via U.S. mail to 142 West Pearl St., Jackson, MI 49201, in compliance with 6 Cir. R. 25(f)(1)(B) and Fed. R. App. P. 25(c)(1)(D).

Date: May 3, 2017

/s/ Daniel H. Blomberg
Daniel H. Blomberg