No. 17-565

In the Supreme Court of the United States

ROWAN COUNTY, NORTH CAROLINA,
Petitioner,

v.

NANCY LUND, LIESA MONTAG-SIEGEL,
AND ROBERT VOELKER,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

AMICI CURIAE BRIEF OF 103 STATE LEGISLATORS SUPPORTING PETITIONER ROWAN COUNTY, NORTH CAROLINA

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BRIEF OF 103 STATE LEGISLATORS AS *AMICI CURIAE* SUPPORTING PETITIONER ROWAN COUNTY, NORTH CAROLINA

Amici—the state legislators listed on the preceding pages—submit this brief supporting Petitioner Rowan County, North Carolina.[1]

STATEMENT OF INTEREST

Amici are state legislators from North Carolina, South Carolina, Virginia, and West Virginia. They have participated in countless legislative sessions that opened with a prayer—in many cases, a prayer similar to those that the Fourth Circuit condemned below. *Amici* have heard prayers from different belief systems and did not feel coerced in the hearing. Because the "principal audience for th[o]se invocations" is "not . . . the public" but the "lawmakers themselves" (*Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811, 1825 (2014) (Kennedy, J.)), *amici* will bear the brunt of the Fourth Circuit's decision circumscribing legislative prayer.

Among countries, the United States is unique in many ways but perhaps no more so than in its unflagging commitment to individual liberty and

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[1] In accordance with Supreme Court Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or in part and that no party or party's counsel helped fund the brief's preparation or submission. No person other than *amici curiae* or their counsel funded work on the brief.

In accordance with Supreme Court Rule 37.2, *amici* timely notified the parties of *amici*'s intent to file this brief. Respondents consented to the filing, and Rowan County has filed a blanket consent with the Court.

religious freedom. "We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). Such was the Founders' vision for our country, and in large part, we have lived up to their ideals.

The Founders also understood the value of religious expression in civic life. They did not banish religious values from the public square; on the contrary, many believed that religion contributes to the public virtue that sustains our Republic. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1441–44 (1990). It is no surprise, then, that "[o]ur history is replete with official references to the value and invocation of Divine guidance" in official proceedings. *Lynch v. Donnelly*, 465 U.S. 668, 675 (1984). During their years of public service, *amici* have offered or heard similar invocations; those invocations would have sounded a familiar ring to the Founders.

But the Founders wouldn't recognize the cramped view of the First Amendment that prevailed below. If you told them that the First Amendment would one day prohibit a local official from voluntarily offering a prayer of the official's choosing at the beginning of a county board meeting, they wouldn't have believed you. Neither would those who've read this Court's decisions in *Marsh* and *Town of Greece*.

The Fourth Circuit's break from history and precedent is no constitutional abstraction. The decision will be felt on the ground. It threatens to disrupt the prayer practices in hundreds (if not thousands) of legislative bodies (large and small) across North Carolina, South Carolina, Virginia, West Virginia, and

Maryland. Those prayer practices mean much to many. *Amici* agree with Justice Kennedy that legislative prayer "accommodate[s] the spiritual needs of lawmakers" and allows them to "reflect the values they hold as private citizens." *Town of Greece*, 134 S. Ct. at 1826 (Kennedy, J.). Those values often include religious devotion, to be sure, but they also include a commitment to individual liberty and mutual respect for differences of belief. An opening prayer—even when offered by a colleague or guest from a different faith—reminds us of those shared values.

This Court should grant Rowan County's petition and, having done that, should reverse the Fourth Circuit's decision condemning prayer practices that this Court has approved and that the First Congress would have approved.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Since the Founding, our country's leaders have made it a tradition to pray and reflect on religious matters:

> *Whereas it is the duty of all Nations to acknowledge the providence of Almighty God, to obey his will, to be grateful for his benefits, and humbly to implore his protection and favor.*

— George Washington, proclamation calling for National Day of Prayer (Oct. 3, 1789).

> *Fondly do we hope, fervently do we pray, that this mighty scourge of war may speedily pass away. Yet if God wills that it continue, until all the wealth piled by the bond-man's two hundred*

> *and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash, shall be paid by another drawn with the sword, as was said three thousand years ago, so still it must be said "the judgments of the Lord are true and righteous altogether*."

— Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865).

> *[I]f Easter means anything, it's that you don't have to be afraid. We drown out darkness with light, and we heal hatred with love, and we hold on to hope. And we think about all that Jesus suffered and sacrificed on our behalf—scorned, abandoned shunned, nail-scarred hands bearing the injustice of his death and carrying the sins of the world.*
>
> *And it's difficult to fathom the full meaning of that act. Scripture tells us, "For God so loved the world that He gave His only Son, that whoever believes in Him should not perish but have eternal life." Because of God's love, we can proclaim "Christ is risen!" Because of God's love, we have been given this gift of salvation. Because of Him, our hope is not misplaced, and we don't have to be afraid.*

— President Barack Obama, remarks at the White House's Easter Prayer Breakfast (Mar. 30, 2016).

> *The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States. Oyez! Oyez! Oyez! All persons having business before the Honorable, the Supreme Court of the United States, are*

> *admonished to draw near and give their attention, for the Court is now sitting. God save the United States and this Honorable Court!*

— spoken before each of this Court's sessions.

This case focuses on one facet of that tradition: legislative prayer.

Three days before Congress approved the First Amendment, it enacted a statute authorizing the Senate and House to pay chaplains who opened each legislative session with prayer. *Marsh v. Chambers*, 463 U.S. 783, 788 (1983). That practice "has continued without interruption ever since that early session of Congress." *Id.* The same has been true in thousands of state and local legislative bodies—where prayers led by chaplains, legislators, or laypeople have opened deliberative sessions for more than 200 years.

That tradition has never been reduced to a single approved formula or custom. As one would expect in a country as diverse as ours, prayer customs vary from statehouse to statehouse, county board to county board, city council to city council. In some cases, a salaried or visiting chaplain offers the prayer. In others, elected officials take turns volunteering to offer the opening prayer. In still others, a clerk, secretary, legislative aide, or layperson offers the prayer.

That diversity of practice has never bothered this Court. Twice, the Court has confirmed that opening a public proceeding in prayer does not violate the Establishment Clause—regardless of whether the prayer comes from a paid chaplain (*Marsh*) or a rotating cast of predominately Christian clergy (*Town of Greece*). "[N]either *Marsh* nor *Town of Greece*

restricts *who* may give prayers . . . to be consistent with historical practice." *Bormuth v. County of Jackson*, 870 F.3d 494, 509 (6th Cir. 2017) (en banc) (emphasis in original).

This Court's agnosticism about the prayer-giver makes sense in light of the prayer's intended audience. As Justice Kennedy explained in *Town of Greece*, the "principal audience" for legislative prayer is "not . . . the public" but the "lawmakers themselves." 134 S. Ct. at 1825. It allows lawmakers to "accommodate [their own] spiritual needs" and "reflect the values they hold as private citizens." *Id.* at 1826 (Kennedy, J.).

The Sixth Circuit understands those principles. Earlier this year, it held (sitting en banc) that "legislator-led prayer is a long-standing tradition" that comports with the First Amendment. *Bormuth*, 870 F.3d at 509.

The Fourth Circuit, by contrast, turned the historical record on its head. It held that legislative prayer violates the Establishment Clause when the legislator (rather than a paid chaplain or someone else) offers the invocation. Put another way, the Fourth Circuit held that a legislator may reflect their personal values only by borrowing another's words and voice. It reached that conclusion, not because it discovered new historical evidence about the First Amendment's meaning or the secret to understanding *Marsh* or *Town of Greece*, but because it abandoned the historical evidence and this Court's precedents.

ARGUMENT

I. THE FOURTH CIRCUIT'S DECISION STANDS AGAINST THE HISTORICAL RECORD.

This Court's "interpretation of the Establishment Clause has comported with what history reveals was the contemporaneous understanding of its guarantees." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). For certain practices, that contemporaneous understanding may be hard to discern. Legislative prayer is not one of them.

In 1774, the First Congress opened its session with a prayer asking "our Heavenly Father, high and mighty King of kings, and Lord of lords" to "crown [the representatives] with everlasting glory in the world to come . . . in the name and through the merits of Jesus Christ, Thy Son and our Savior." Office of the Chaplain of the United States House of Representatives, https://chaplain.house.gov/archive/continental.html. Over a decade later, on the same day that the House of Representatives voted to "make no law respecting an establishment of religion," it proposed a resolution that President Washington issue a proclamation asking the nation to set aside a "day of public humiliation and prayer." J. Clifford Wallace, *The Framers' Establishment Clause: How High the Wall?*, 2001 BYU L. Rev. 755, 764 (2001). Washington did so, and later presidents followed suit. John Adams and James

Madison issued multiple proclamations calling for prayer and thanksgiving.[2]

Similar examples abound. We've already recounted how, three days before approving the First Amendment, Congress enacted a statute authorizing compensation for legislative chaplains. But the historical record is not limited to chaplain-led invocations. Even indulging the Fourth Circuit's distinction between chaplain-led and legislator-led prayer, the historical record brims with examples of the latter. *See Bormuth*, 870 F.3d at 509 ("[H]istory shows that legislator-led prayer is a long-standing tradition . . . .").

We'll mention a few. Even before the Declaration of Independence, legislators in South Carolina opened deliberative sessions with personal prayers. *See* American Archives, *Documents of the American Revolutionary Period*, *1774–1776*, v1:1112 (documenting legislator-led prayer in South Carolina's legislature in 1775). In Pennsylvania, an elected delegate offered an opening prayer on sixteen separate days of the state's 1873 Convention to Amend its Constitution. *See* Debates of the Convention to Amend the Constitution of Pennsylvania, at 248, 263, 274, 304, 322, 335, 348, 362, 375, 409, 431, 456, 477, 566, 589, 637 (1873). Legislators in other States have offered similar prayers in deliberative sessions. *See Bormuth*,

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[2] On March 6, 1799, President Adams proclaimed a national day of humiliation, fasting, and prayer, quoting Proverbs 14:34: "[R]ighteousness exalteth a nation, but sin is a reproach to any people." John Adams, Proclamation for a National Fast (Mar. 6, 1799), reprinted in 9 The Works of John Adams, Second President of the United States 172, 173 (1850).

870 F.3d at 510 (describing the "historical breadth of legislator-led prayer in the state capitals for over one hundred fifty years"); *cf.* S. Rep. No. 32–376, at 4 (1853) ("[The Founders] did not intend to prohibit a just expression of religious devotion by the legislators of the nation, even in their public character as legislators."). Those practices continue today. *See* National Conference of State Legislatures, Prayer Practices, in *Inside the Legislative Process*, at 5-145 (2002), http://www.ncsl.org/documents/legismgt/ILP/02Tab5Pt7.pdf ("Many chambers vary on who delivers the prayer. Forty-seven chambers allow people other than the designated legislative chaplain or a visiting chaplain to offer the opening prayer. Legislators, chamber clerks and secretaries, or other staff may be called upon to perform this opening ceremony.").

"In light of th[at] unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with a prayer has become part of the fabric of our society." *Town of Greece*, 134 S. Ct. at 1819 (quoting *Marsh*, 436 U.S. at 792). It is "deeply embedded in the history and tradition of this country." *Marsh*, 463 U.S. at 786. And the tradition includes legislator-led prayer.

Which brings us to the nub of it: Either legislators for the last 200+ years have violated the Establishment Clause or the Fourth Circuit's decision below is wrong.

II. CONSISTENT WITH THE HISTORICAL RECORD, THIS COURT HAS NOT CONDITIONED PROTECTIONS FOR LEGISLATIVE PRAYER ON THE PRAYER-GIVER'S IDENTITY.

The historical record speaks for itself: Legislative prayer (whether chaplain-led or legislator-led) is as American as apple pie. Maybe more so. Twice, this Court has rejected attempts to "sweep away" legislative prayer—a practice that "has so long been settled." 134 S. Ct. at 1819. Indeed, after this Court's decision in *Town of Greece*, one would have thought the matter settled for good.

But instead of tacking to history or this Court's precedents, the Fourth Circuit strained out a distinction between Rowan County's prayer custom and those at issue in *Marsh* and *Town of Greece* and then imbued that contrived distinction with constitutional significance. According to the Fourth Circuit, *Marsh* and *Town of Greece* may have settled that prayer by a chaplain, minister, or invited guest does not violate the Establishment Clause, but those cases have little to say about prayer by a legislator. *See* App. 18 (claiming that the "crucial" difference between Rowan County's practice and those at issue *Marsh* and *Town of Greece* is that "legislators themselves gave the invocations in Rowan County").

Amici agree with Judge Niemeyer (one of the dissenting Fourth Circuit judges) that the Fourth Circuit majority's distinction between minister- and legislator-led prayer is nothing more than a "handle" (App. 68) for disregarding *Marsh* and *Town of Greece*. The en banc Sixth Circuit was right to conclude that

"neither *Marsh* nor *Town of Greece* restricts *who* may give prayers . . . to be consistent with historical practice." *Bormuth*, 870 F.3d at 509 (emphasis in original).

One can scarcely argue otherwise. In both *Marsh* and *Town of Greece*, this Court focused on the "practice" of legislative prayer, not on the prayer-giver's identity. *See Marsh*, 463 U.S. at 786 (explaining that "the *practice* of opening sessions with prayer" has been around since the Founding) (emphasis added); *Town of Greece*, 134 S. Ct. at 1819 (explaining that the "*practice* of opening legislative sessions with a prayer" is part of the "fabric of our society") (emphasis added). Indeed, in concluding in *Marsh* that "the practice of opening sessions with prayer . . . has also been followed consistently in most of the states" (463 U.S. at 788–89 & n.11), the Court relied on an *amicus* brief by the National Conference of State Legislatures that surveyed the landscape and explained that "the opening legislative prayer may be given by various classes of individuals . . . includ[ing] chaplains, guest clergymen, legislators, and legislative staff members." Brief of NCSL as Amicus Curiae, *Marsh v. Chambers*, 463 U.S. 783 (1983) (No. 82–83), 1982 WL 1034560. The Fourth Circuit majority elevated the prayer-giver's identity in the constitutional analysis without this Court's prompting.

Regardless, on its own terms, the Fourth Circuit's identity-focused analysis doesn't withstand scrutiny. The Fourth Circuit overlooked that, for many, the constitutional concerns "grow[], rather than diminish[], when the governmental body hires a faith leader (necessarily of one faith) to say the prayers." *Bormuth*,

870 F.3d at 523 (Sutton, J., concurring). If you asked 100 people on the street which seems more "religious"—paying a vocational minister from one faith to offer the opening prayer for 16 years straight (the facts in *Marsh*) or allowing legislators to rotate in voluntarily offering their own prayers—most would say the former. In any event, if you accept that reasonable people can disagree about the answer to that question, then history and this Court's decisions in *Marsh* and *Town of Greece* counsel against drawing the constitutional line to approve the one practice and condemn the other. In calibrating its constitutional analysis to do precisely that, the Fourth Circuit "swe[pt] away what has so long been settled" and "create[d] new controversy and beg[a]n anew the very divisions along religious lines that the Establishment Clause seeks to prevent." *Town of Greece*, 134 S. Ct. at 1819.

III. LEGISLATIVE PRAYER ALLOWS LEGISLATORS TO REFLECT THEIR PRIVATE VALUES AND SHARED COMMITMENT TO INDIVIDUAL LIBERTY.

"Prayers by their nature are personal, even when offered in a public setting." *Bormuth*, 870 F.3d at 523 (Sutton, J. concurring). That certainly is true of legislative prayer: Whether chaplain- or legislator-led, it "accommodate[s] the spiritual needs of lawmakers" and allows them to "reflect the values they hold as private citizens." *Town of Greece*, 134 S. Ct. at 1826 (Kennedy, J.).

For many lawmakers, the prayer that opens each new legislative session "lends gravity to public business, reminds lawmakers to transcend petty

differences in pursuit of a higher purpose, and expresses a common aspiration to a just and peaceful society." *Town of Greece*, 134 S. Ct. at 1818. The prayers are "solemn and respectful" and often "invite[] lawmakers to reflect upon shared ideals and common ends." *Id.* at 1823. Indeed, in many cases, they strengthen the bonds of friendship between lawmakers and encourage the sort of collaboration that aids legislative bodies in carrying out their constitutional duties.

Rowan County's prayer practices fit within that tradition. Almost without exception, Rowan County's commissioners use the opening prayer to request Divine guidance for the prayer-giver and their colleagues as they make decisions for the County. Consider the following prayers (one from each Commissioner on the Rowan County Board):

- "We thank you for the privilege of being able to represent the citizens. I pray you give us wisdom and guidance tonight as we deliberate. God help us to make the right decisions." App. 247 (Nov. 5, 2007 prayer by Commissioner Sides).

- "Heavenly Father, thank you for the opportunity that you've given us to come together to work on the business for the citizens of Rowan County. I ask your guiding hand in our deliberations and our decisions." App. 252–53 (May 5, 2008 prayer by Commissioner Mitchell).

- "Father, we thank you for this privilege again. . . . Help us to care for one another, be ladies and gentlemen, and do the business that's before us."

App. 253 (May 27, 2008 prayer by Chairman Chamberlain).

- "One of the greatest blessings that we have is to be of service and benefit to our fellow man. We ask that you guide and direct us in our efforts to do that, and help us to do so in a way that brings honor and glory to you." App. 260 (Jan. 20, 2009 prayer by Commissioner Coltrain).
- "Give those of us whom you have entrusted with the authority of government the spirit of wisdom." App. 260 (Feb. 2, 2009 prayer by Commissioner Hall).
- "We . . . pray that you'll guide and direct us in our discussions and our decisions tonight, Father." App. 264 (June 1, 2009 prayer by Chairman Ford).
- "Please be with us tonight as we conduct the business of Rowan County." App. 275 (May 17, 2010 prayer by Commissioner Barber).

Those prayers are no different in kind from the prayers approved in *Marsh* and *Town of Greece*. *Compare Town of Greece*, 134 S. Ct. at 1824 ("A number of the prayers did invoke the name of Jesus, the Heavenly Father, or the Holy Spirit, but they also invoked universal themes, as by celebrating the changing of the seasons or calling for a 'spirit of cooperation' among town leaders."); *Marsh*, 463 U.S. at

823 n.2 (Stevens, J., dissenting).[3] They are no different in kind from prayers that *amici* have offered or heard others offer. And from what we see in the historical record, they are no different in kind from the prayers that untold numbers of legislators and other leaders have offered throughout our Nation's history. Yet despite all that, the Fourth Circuit ruled that Rowan County's commissioners cannot offer their own prayers unless they choose less-sectarian language than a chaplain would.

In ruling that way, the Fourth Circuit essentially held that lawmakers must shield their private faith from public view. That type of judicial screening stands outside this Court's directives. "Once [the government] invites prayer into the public sphere," the Court has explained, it "must permit a prayer giver to address his or her own God or gods as conscience dictates unfettered by what an administrator or judge considers to be nonsectarian." *Town of Greece*, 134 S. Ct. at 1822–23. *Marsh* and *Town of Greece* did not enshrine

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[3] One of the prayers considered in *Marsh* included the following language:

> Father in heaven, the suffering and death of your son brought life to the whole world moving our hearts to praise your glory. The power of the cross reveals your concern for the world and the wonder of Christ crucified. The days of his life-giving death and glorious resurrection are approaching. This is the hour when he triumphed over Satan's pride; the time when we celebrate the great event of our redemption.

Marsh v. Chambers, 463 U.S. 783, 823 n.2 (1983) (Stevens, J., dissenting).

ceremonial deism as the only constitutional approach to prayer.

The Fourth Circuit nevertheless zeroed in on a handful of prayers that it said "crossed the line" by "confess[ing] spiritual shortcomings on the community's behalf" or exalting Christianity's virtues through references to doctrines like the "salvation of Jesus Christ." App. 35–36. But many of the prayers approved in *Marsh* and *Town of Greece* used similar Christian language and themes. At any rate, the Fourth Circuit majority's scouring of the record to cherry-pick examples of prayers that it does not like clashes with this Court's instruction that federal courts should not hover over legislators "act[ing] as supervisors and censors of religious speech." *Town of Greece*, 134 S. Ct. at 1822; *see also* App. 67 (Niemeyer, J., dissenting) ("The proper respect for a practice so venerated and important to our democratic order does not include the niggling of civil courts assessing whether the practice 'pointedly' invokes a particular name of the Divine to bless and solemnize the governmental proceeding."). And the Fourth Circuit's insistence that the prayers reflect a broader range of beliefs stands against this Court's teaching that "the Constitution does not require [legislators] to search beyond [their] borders for non-Christian prayer givers in an effort to achieve religious balancing." *Town of Greece*, 134 S. Ct. at 1824.

If left on the books, the Fourth Circuit's decision will also erode the diversity of belief that defines our Nation. Beyond accommodating lawmakers' spiritual needs, legislative prayer (whether chaplain- or legislator-led) reminds us of our shared commitment to

individual liberty. That is true both when a legislator offers a prayer in line with the dictates of their own conscience and when that same legislator hears another offer a prayer from a different faith tradition. *Amici* have listened to opening prayers from different belief systems and were not offended in the hearing. On the contrary, the prayers reminded *amici* that we are our freest when we are all free to express our beliefs.

The Founders understood as much. They were just as "divided in religious sentiments" as we are today, with many opposed to the early motions for legislative prayer at the First Continental Congress. Those who opposed legislative prayer argued that no single prayer could cover the full range of represented beliefs. *See* Letter to Abigail Adams (Sept. 16, 1774), in Charles F. Adams, Familiar Letters of John Adams and his Wife Abigail Adams, During the Revolution 37 (1875). But Samuel Adams—the Massachusetts delegate known for his "radical love" of liberty[4]—encouraged his colleagues to set aside their differences, insisting that "he could hear a prayer from a gentleman of piety and virtue, who was at the same time a friend to his country." *Id.* Adams, a Congregationalist, then moved to invite a local Anglican minister to deliver the opening prayer. *Town of Greece*, 134 S. Ct. at 1833 (Alito, J., concurring). The motion carried the day.

Legislative prayer has persisted ever since.

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[4] *See* 2 John Adams, The Works of John Adams, Second President of the United States: with A Life of the Author, Notes and Illustrations, by his Grandson Charles Francis Adams 163 (Boston: Charles C. Little & James Brown, 1850).

CONCLUSION

"Our history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders." *Lynch v. Donnelly*, 465 U.S. 668, 675 (1984). For *amici*, that tradition is not an anachronism or an artifact of a by-gone era. Far from it: The practice gives *amici* wisdom and comfort as they serve the citizens who have entrusted them with the responsibility to govern. And it reminds us all of our shared commitment to individual liberty and diversity of thought.

This Court should grant Rowan County's petition for a writ of certiorari and, having done that, should reverse the judgment below.

Respectfully submitted,

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