No. 17-565

IN THE

Supreme Court of the United States

ROWAN COUNTY, NORTH CAROLINA,

Petitioner,

—v.—

NANCY LUND, LIESA MONTAG-SIEGEL, ROBERT VOELKER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Fourth Circuit properly heeded this Court's instruction in *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), to examine the "prayer opportunity as a whole" in concluding that the unprecedented legislative prayer practice conducted by the Rowan County Board of Commissioners stood outside of our nation's historical traditions and was impermissibly coercive.

PARTIES TO THE PROCEEDING

The parties to the proceedings include those listed on the cover.

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INTRODUCTION

Petitioner's "question presented" is premised on a misstatement of the holding below. Petitioner urges this Court to consider "[w]hether legislative prayer delivered by legislators comports with this Court's decisions in *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), and *Marsh v. Chambers,* 463 U.S. 783 (1983), as the *en banc* Sixth Circuit has held, or does not, as the *en banc* Fourth Circuit has held." Pet. i. But the Fourth Circuit held no such thing. On the contrary, in the ruling below, the court of appeals stated just the opposite:

> In marshaling the historical and contemporaneous evidence of lawmaker-led prayer, Rowan County and its amici are waging war against a phantom. . . . Like the plaintiffs and the district court, we "would not for a moment cast all legislator-led prayer as constitutionally suspect." . . . *[T]he Establishment Clause indeed allows lawmakers to deliver invocations in appropriate circumstances. Legislator-led prayer is not inherently unconstitutional.*

Pet. App. 23 (emphasis added) (internal citations omitted).

Instead of imposing a categorical ban on legislator-led prayer, the Fourth Circuit heeded this Court's description in *Town of Greece* of "the proper inquiry as 'fact-sensitive' and the analysis as 'an inquiry into the prayer opportunity as a whole[.]'" *Id.* at 21 (discussing and quoting the *Town of Greece* standard). In conducting this totality-of-the-circumstances analysis, the Fourth Circuit faithfully

applied this Court's precedent, producing a careful opinion expressly limited to the particular practice before it.

The Sixth Circuit's approach in *Bormuth v. County of Jackson*, 870 F.3d 494 (6th Cir. 2017) (en banc) was not materially different, and it certainly did not give rise to an "intractable conflict" between the circuits. Pet. 25. The divergent outcomes are largely the result of different facts and contexts. Indeed, the Sixth Circuit explicitly pointed out that the two cases involve key factual distinctions, asserting that the record of prayers in *Bormuth* "pale[d] in comparison" to the record of prayers in this case. 870 F.3d at 512.

Petitioner might dislike the result produced by the Fourth Circuit's review of the prayer opportunity as a whole. No doubt Petitioner might have given some facts more weight and others less if it were judging the policy. But, as this Court's own rules provide, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

As with many context-based standards, the lower courts are still working through the application of *Town of Greece*, a ruling issued just three years ago, to a range of factual scenarios. To the extent that there is any tension between the circuits as to how the factual analysis should play out, the lower courts should be given space to continue that work. In the meantime, many constitutional options remain for those legislative bodies wishing to solemnize their proceedings. Pet. App. 45.

STATEMENT OF THE CASE

A. Factual Background

The Rowan County Board of Commissioners ("Board") generally meets twice a month with the Board Chairman or another Board member "open[ing] its meetings with a Call to Order, an Invocation, and the Pledge of Allegiance, in that order." Pet. App. 198-99. The opening prayers may be given only by Rowan County Commissioners themselves; no independent citizens or ministers are permitted to deliver the prayers. *See id.* at 7. The meeting is called to order as the members of the Board "sit at the front of the room facing their constituents[,]" *id.* at 6, and the Chairman directs the public to stand for the Invocation and the Pledge of Allegiance. *Id.* at 198-99. At that point, "either the Chairman or another member of the Board . . . deliver[s] the invocation or prayer." *Id.* at 199. The members of the Board select the content of the prayers themselves. *Id.* at 7. "Over a period of more than five years, ... 139 [of 143] prayers, or 97%, 'use[d] ideas or images identified with [Christianity][.]" *Id.* at 32 (quoting *Lee v. Weisman*, 505 U.S. 577, 588 (1992)). "No other religion was ever represented in the invocations." *Id.* at 32.[1]

Commissioners make clear that they intend for the audience to participate in and benefit from the prayers. In addition to directing the audience to stand for the prayers, the Commissioner delivering

[1] "Only four invocations, given by the same now-retired commissioner, were non-sectarian," Pet. App. 186 (Wilkinson, J., dissenting), two of which were moments of silence. Pet. App. 223 n.7.

the prayer typically begins by inviting all those attending to join in the prayer, "with some variant of 'let us pray' or 'please pray with me.'" Pet. App. 133. The Board members, as well as most of the public in attendance, then stand and bow their heads during the prayer. *Id.* The vast majority of those in attendance respond with "Amen" at the prayer's conclusion. *Id.* at 7; Suppl. App. 3 ¶ 12, *Lund v. Rowan County*, 863 F.3d 268 (4th Cir. 2017) (en banc); *id.* 5-6 ¶ 12; *id.* 9 ¶ 11. Furthermore, Rowan County Commissioners embrace—in even more explicit terms—the audience-focused, proselytizing nature of their prayers. *See, e.g.,* Pet. App. 303 (Commissioner Carl Ford: "I pray that the citizens of Rowan County will love you, Lord, and [that they will] put you first. In Jesus' name, Amen."); *id.* at 233 (Commissioner Jon Barber: prayer practice "has been a tradition for the board, *for our citizens* and for our country") (emphasis added); *id.* at 200 (Commissioner Ford: "I will continue to pray in Jesus' name. I am not perfect so I need all the help I can get, and *asking for guidance for my decisions from Jesus is the best I, and Rowan County, can ever hope for*.") (emphasis added). As these examples make plain, the prayers at times blend into the Commissioners' legislative role. *See, e.g.,* Pet. App. 256 (October 6, 2008 prayer: "Lord, we represent you and we represent the taxpayers of Rowan County."); *id.* at 289-90 (September 6, 2011 prayer: "And may what we say and do be that would honor and please you [Jesus Christ].").

Rowan County Commissioners "consider[] citizen petitions shortly after the invocation." *Id.* at 43. "[T]he Board exercises both legislative authority over questions of general public importance as well

as a quasi-adjudicatory power over such granular issues as zoning petitions, permit applications, and contract awards." *Id.* Rowan County intermingles these general and quite specific exercises of its authority. *Id.* "On numerous occasions," individualized adjudicative proceedings are "the first items up for consideration after the standard opening protocols." *Id.* At the November 5, 2007, meeting, for example, the "Quasi-Judicial Public Hearing for PCUR 02-07 for Request by Nelson Lingle" was first on the agenda after the Call to Order, Invocation, and the Pledge of Allegiance. *Id.* (citing Joint App. 27, *Lund*, 863 F.3d 268).

The Respondents are longtime residents of Rowan County and frequently attend its Board meetings. Pet. App. 198. Respondents, who are not Christian, are coerced into participating in the Board's prayers at its official meetings. *Id.* at 201-03. Respondent Lund feels "compelled to stand [for prayers] so that [she will] not stand out" at Board meetings. *Id.* at 201. Respondent Montag-Siegel feels "coerced into participating in the prayers which [are] not in adherence with her Jewish faith." *Id.* at 202. And Respondent Voelker feels pressured to stand and participate in the prayers because all Commissioners and most audience members stand during the Invocation, which "goes directly into the Pledge of Allegiance, for which [he] feel[s] strongly [he] need[s] to stand." *Id.* The Board amplifies the coercive pressure brought to bear on Respondents by signaling disfavor for religious minorities, including, but not limited to, Respondents. *See, e.g., id.* at 9 (Commissioner Barber on this litigation: "God will lead me through this persecution and I will be His instrument."); *id.* at 200-01 (Commissioner Jim Sides

regarding religious minorities in the community: "I am sick and tired of being told by the minority what's best for the majority. My friends, we've come a long way—the wrong way. We call evil good and good evil."). Commissioners' statements of disfavor include prayers suggesting that the County considers non-Christian religious beliefs to be inferior or wrong, effectively deriding the faith of many religious minorities in Rowan County. *See, e.g., id.* at 248 (Commissioner Barber: "Because we do believe that there is only one way to salvation, and that is Jesus Christ."); *id.* at 296 (Commissioner Barber: "And as we pick up the Cross, we will proclaim His name above all names, as the only way to eternal life."). Unfortunately, Rowan County's actions have created an atmosphere that has led to the harassment of religious minorities at Board meetings. Pet. App. 30 ("At one meeting, an individual who 'expressed opposition to the Board's prayer practice' was booed and jeered by the audience.") (quoting *id*. at 234).

B. Procedural History

Respondents filed this action in the U.S. District Court for the Middle District of North Carolina on March 12, 2013. Seeking declaratory and injunctive relief, Respondents alleged that Petitioner had violated the Establishment Clause of the First Amendment. Specifically pertinent to this appeal, Respondents objected to the fact that Petitioner impermissibly linked state officials with an exclusive practice of opening prayer and coerced public participation in its prayer practice. Compl. ¶¶ 28, 31, 35, 40, *Lund v. Rowan County*, 103 F. Supp. 3d 712 (M.D.N.C. 2015), 2013 WL 960466.

The district court granted summary judgment in favor of the Respondents on May 4, 2015, enjoining Rowan County's prayer practice. Pet. App. 197, 245-46. Undertaking a fact-sensitive analysis, the district court found that the County's "practice does not fit within the long history and tradition of legislative prayer condoned in *Marsh* and *Town of Greece*" and concluded that it is "unconstitutionally coercive." *Id.* at 244-45. Petitioner appealed this decision on June 1, 2015.

A panel of the U.S. Court of Appeals for the Fourth Circuit reversed the district court over the vigorous dissent of Judge Wilkinson. Pet. App. 132. Respondents filed a Petition for Panel Rehearing or Rehearing En Banc on October 3, 2016. The Fourth Circuit granted rehearing en banc and affirmed the district court by a vote of 10-5 on July 14, 2017. *Id.* at 1, 4, 12. In his opinion for the en banc court, Judge Wilkinson made clear that "[l]egislator-led prayer is not inherently unconstitutional[,]" and may be conducted consistent with the Establishment Clause "in appropriate circumstances." *Id.* at 23. But focusing on the totality of circumstances presented by the Rowan County practice, he explained:

> We examine each of these features in turn: commissioners as the sole prayer-givers; invocations that drew exclusively on Christianity and sometimes served to advance that faith; invitations to attendees to participate; and the local government setting. . . . We conclude that it is the combination of these elements—not any particular feature alone—that "threatens to blur the line

> between church and state to a degree unimaginable in *Town of Greece*."

Id. at 26-27 (quoting *id.* at 189 (Wilkinson, J., dissenting)). Rowan County filed a Petition for Writ of Certiorari on October 12, 2017.

REASONS FOR DENYING THE PETITION

Review by this Court is not warranted. Petitioner's arguments in support of the purported circuit split are based on the false premise that the Fourth Circuit held that all lawmaker-led legislative prayer is unconstitutional. It did not. The court below explicitly found that legislator-led prayer *could* comport with the Establishment Clause. Instead, examining the "prayer opportunity as a whole" and applying the "fact-sensitive" analysis set forth in *Town of Greece*, *id.* at 21 (discussing and quoting *Town of Greece* standard), the court of appeals limited its holding to this "one specific practice in one specific setting with one specific history and one specific confluence of circumstances." Pet. App. 49. "To extract global significance from such specificity is beyond a stretch." *Id.*

That the Sixth Circuit reached a different result on different facts in *Bormuth* is not surprising: As the Sixth Circuit acknowledged, even with the uncertain record before the court in that case, there were material factual differences from *Lund*. And whatever tension may exist in balancing the various factors in the legislative prayer analysis after *Town of Greece*, it is likely to dissipate as lower courts have further opportunities to interpret and apply the Court's recent ruling.

Review here is especially inappropriate because the Fourth Circuit has abided by this Court's legislative-prayer jurisprudence and reached the correct result in holding Rowan County's unprecedented prayer practice incompatible with tradition and case law.

I. THERE IS NO CIRCUIT SPLIT ON THE LEGAL QUESTION OF WHETHER, DEPENDING ON THE FACTUAL CIRCUMSTANCES, THE ESTABLISHMENT CLAUSE PERMITS LEGISLATOR-LED PRAYER.

Petitioner asserts that there is a "sharp[]" and "intractabl[e]" split between two courts of appeals, Pet. 15, because "those courts reached opposite conclusions on materially identical facts[.]" *Id.* at 36. Rowan County contends that "the Fourth [in its ruling in *Lund*] and Sixth [in its ruling in *Bormuth*] Circuits diverge on purely legal questions" pertaining to the constitutionality of the respective legislative prayer practices at issue. *Id.* at 37. According to Petitioner, this case presents the question "[w]hether legislative prayer delivered by legislators comports with this Court's decisions in *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), and *Marsh v. Chambers,* 463 U.S. 783 (1983), as the *en banc* Sixth Circuit has held, or does not, as the *en banc* Fourth Circuit has held." *Id. at* i. From these first two appellate court decisions interpreting *Town of Greece*, Petitioner divines that "[t]here is no possibility that the [alleged] conflict will resolve itself over time[.]" Pet. 37.

Petitioner is simply mistaken in asserting that the Fourth Circuit held that legislator-led prayer does not comport with this Court's precedent. On the contrary, the court of appeals took pains to note that it was *not* holding that legislator-led prayer is, in and of itself, unconstitutional, and affirmatively maintained that legislator-led prayers are, indeed, *permissible* under the Establishment Clause. The court explained, for example:

- "The plaintiffs have never contended that the Establishment Clause prohibits legislators from giving invocations, nor did the district court so conclude." Pet. App. 23.
- "Like the plaintiffs and the district court, we 'would not for a moment cast all legislator-led prayer as constitutionally suspect.'" *Id.* (quoting *id.* at 184 (Wilkinson, J., dissenting)).
- "[T]he Establishment Clause indeed allows lawmakers to deliver invocations in appropriate circumstances." Pet. App. 23.
- "Legislator-led prayer is not inherently unconstitutional." *Id.*
- "In concluding that Rowan County's prayer practice is constitutionally infirm, we reiterate that legislator-led prayer can operate meaningfully within constitutional bounds." *Id.* at 49.

It is difficult to imagine how the Fourth Circuit could have been any clearer on this point. And the Sixth Circuit also agreed in *Bormuth* that legislator-led prayer is not prohibited under the Establishment Clause. *See* 870 F.3d at 509. There is, thus, no conflict as to whether the Establishment

Clause permits legislator-led prayer: Both the Fourth Circuit and Sixth Circuit agree that it does.[2]

But that was not the question before the lower courts in these cases. Rather, the Fourth Circuit (like the Sixth Circuit in *Bormuth*) asked whether the particular prayer practice at issue—when subjected to a "fact-sensitive" inquiry that takes into account the "prayer opportunity as a whole"—was permissible under the Establishment Clause. Pet. App. 21 (discussing and quoting *Town of Greece* standard). The courts reached opposite conclusions as to each specific prayer practice because each practice presented different facts and contexts.

In answering the prescribed question, both courts applied the same Establishment Clause doctrine. Both cases recognized as touchstones this Court's two legislative-prayer precedents: *Marsh* and *Town of Greece*. Guided by that precedent, both appellate courts evinced respect for our country's tradition of legislative prayer. *See* Pet. App. 15-18 (chronicling how *Marsh* and *Town of Greece* were informed by historical tradition of legislative prayer); *Bormuth*, 870 F.3d at 503-06 (same). Both courts agreed that the analysis is fact-sensitive and must take account of the prayer opportunity as a whole and in light of historical practice. *See* Pet. App. 15-18, 21; *Bormuth*, 870 F.3d at 507, 509. Finally, both

[2] While the Sixth Circuit stated in a footnote that its view was "in conflict" with the Fourth Circuit's, 870 F.3d at 509 n.5, the court made the same mistake as Petitioner in failing to acknowledge that the Fourth Circuit explicitly and repeatedly stated that it was not imposing any categorical ban on legislator-led prayer. Moreover, as discussed below, the Sixth Circuit highlighted key factual distinctions between the two cases.

courts also acknowledged this Court's admonition in *Town of Greece* that "'[t]he analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity.'" Pet. App. 18 (quoting *Town of Greece*, 134 S. Ct. at 1826 (Kennedy, J., plurality opinion)); *Bormuth*, 870 F.3d at 507 (same).

The facts to which the circuit courts applied this governing precedent, however, were quite different. While both involved prayer led by legislators themselves, the records varied widely with respect to whether the legislators' prayers were "exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Marsh*, 463 U.S. at 794-95. The Sixth Circuit stated that the record before it "pale[d] in comparison to the litany of prayers the Fourth Circuit concluded impermissibly advanced Christianity in *Lund*." *Bormuth*, 870 F.3d at 512-13. It called attention to the distance between the "[o]ne stray [disparaging] remark" in the record in *Bormuth* and the practice of "characteriz[ing] Christianity as 'the one and only way to salvation,'" "proclaim[ing] that Christianity is exceptional and suggest[ing] that other faiths are inferior," "implicitly 'signal[ing] disfavor toward' non-Christians," and "urg[ing] attendees to embrace Christianity, thereby preaching conversion" in Rowan County. *Id.* (quoting Pet. App. 35-37). A similar gulf separated the records as to whether "[county] board members" impermissibly "singled out [religious] dissidents for opprobrium[.]" *Town of Greece*, 134 S. Ct. at 1826 (Kennedy, J., plurality opinion). Again, the Sixth Circuit spoke definitively:

> This point separates this case from *Lund*, where the Fourth Circuit found "[m]ultiple" examples of prayers portraying non-Christians as "spiritual-[ly] defect[ive]" and "suggesting other faiths are inferior." *No such practice of opprobrium has been alleged here*[.]

Bormuth, 870 F.3d at 518 (emphasis added) (internal citations omitted) (quoting Pet. App. 35-36); *see also* Pet. App. 30 ("At one meeting, an individual who 'expressed opposition to the Board's prayer practice' was booed and jeered by the audience.") (quoting *id.* at 234); *id.* at 9 (Commissioner Barber regarding Respondents' lawsuit: "God will lead me through this *persecution* and I will be His instrument.") (emphasis added); *id.* at 200-01 (Commissioner Sides regarding religious minorities in the community: "I am sick and tired of being told by the minority what's best for the majority. My friends, we've come a long way—the wrong way. We call evil good and good evil."). Where Petitioner sees "materially identical facts[,]" Pet. 36, the records in fact reflect (and the Sixth Circuit found) divergence pertaining to key guideposts laid out by this Court in *Marsh* and *Town of Greece*.[3]

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[3] While the *pro se* Plaintiff-Appellant in *Bormuth* sought to put forward instances of alleged opprobrium directed toward him by Jackson County officials for consideration by the Sixth Circuit, nearly all of these episodes were deemed outside of the record and, thus, were not considered by the majority en banc opinion. *See Bormuth*, 870 F.3d at 501, 512. Further, the *Bormuth* majority upheld the district court's denial of Bormuth's request to depose Jackson County's Administrator and three of its Commissioners about its prayer practice. *Id.* at 501-02. These discovery disputes deeply fractured the en banc court, with four of the five opinions touching on what evidence was properly before the court. *Id.*; *id.* at 524-525 (Sutton, J., concurring); *id.*

Petitioner also takes issue with the Fourth Circuit's even *considering*—as part of its fact-sensitive inquiry into the "prayer opportunity as a whole"—the fact that the prayer-givers were exclusively members of Rowan County's board, rather than the legislative chaplain in *Marsh* or the invited members of the public in *Town of Greece*. *See* Pet. 30-31 (arguing that the mere existence of some types of legislator-led prayer in our nation should end consideration of this factor). But nothing in *Marsh* or *Town of Greece* prohibits lower courts from weighing this factor when looking at the prayer opportunity in its entirety. In fact, in *Town of Greece*, this Court emphasized that the prayer-givers were members of the public, *not* legislators, 134 S. Ct. at 1826 (Kennedy, J., plurality opinion), that the legislators exercised no control over the content of their prayers, and that the legislators did not discriminate in selection of the ministers who independently wrote and delivered the prayers. *See id.* at 1816. Moreover, the Court in *Town of Greece* explicitly distinguished between directives to the public given by the guest invocation speakers and those that might be given by lawmakers themselves. *Id.* at 1826 (Kennedy, J., plurality opinion) (noting that requests to rise for prayer "came not from town leaders but from the guest ministers").

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at 528-36 (Moore, J., dissenting); *id.* at 545-46 (White, J., dissenting). Such divisions on discovery matters further muddle the purported circuit split identified by Petitioner, counseling against the need for this Court to grant review in *Lund* and providing further reasons why *Bormuth* is also an inappropriate vehicle for the resolution of any Establishment Clause questions of law, even if they did exist.

Petitioner does not like the outcome produced by the Fourth Circuit's fact-sensitive review of Rowan County's invocation practice and would prefer that the court had accorded different weight to the multiple factors in the court's analysis. No doubt, the plaintiff in *Bormuth* also believes that the Sixth Circuit's contextual analysis in *Bormuth* weighed the facts incorrectly and improperly excluded relevant and vital evidence. But a party's disappointment with how the courts below weighed differing facts, resulting in divergent outcomes, is generally not a reason to grant review, especially where, as here, most lower courts have not had an opportunity to interpret and apply relatively new guidance from this Court. *See, e.g.*, *Lackey v. Texas*, 115 S. Ct. 1421, 1422 (1995) (Stevens, J., respecting denial of certiorari) ("Often, a denial of certiorari on a novel issue will permit the state and federal courts to 'serve as laboratories in which the issue receives further study before it is addressed by this Court.'") (quoting *McCray v. New York*, 461 U.S. 961, 963 (1983)); *California v. Carney*, 471 U.S. 386, 400 n.11 (1985) (Stevens, J., dissenting) ("Disagreement in the lower courts facilitates percolation—the independent evaluation of a legal issue by different courts.") (internal quotation marks omitted); *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) ("We have in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court."). After additional lower courts have the chance to explore further how to weigh the various factors articulated by the controlling opinion in *Town of Greece*, the Court will have a better sense of

whether additional clarification is needed should (unlike here) a direct conflict in the legal standard arise.

II. THE FOURTH CIRCUIT'S DECISION FAITHFULLY APPLIED THIS COURT'S PRECEDENT.

Petitioner also inaccurately accuses the Fourth Circuit of indulging in "*ad hoc* analysis," Pet. 31, reverse engineered to "abandon[] *Town of Greece* altogether." *Id*. at 24. More specifically, Petitioner wrongly contends that the court of appeals "all but disregards the historical analysis held dispositive by this Court in *Town of Greece*, and it effectively nullifies that analysis by radically expanding the coercion inquiry." *Id*. at 25.

A review of the decision below, however, reveals these critiques as hyperbolic, and amply demonstrates the Fourth Circuit's fealty to controlling precedent. The decision reflected a full appreciation of the particular rules governing legislative prayer and, thus, emphasized historical tradition and coercion, as dictated by the controlling opinion in *Town of Greece*. The court of appeals' faithful application of this Court's precedent makes review unwarranted.

First, the Fourth Circuit gave due deference to the nation's historical tradition of legislative prayer. The substance of the majority opinion in *Lund*, in fact, began by canvassing how this Court has used history to aid its analysis. Citing *Marsh*, the court of appeals noted that this Court reasoned that "the Framers could not have viewed 'paid legislative chaplains and opening prayers'" as unconstitutional because "the First Congress 'authorized the

appointment of paid chaplains' shortly after finalizing language for the First Amendment." Pet. App. 15-16 (quoting *Marsh*, 463 U.S. at 788). The court of appeals concluded that "*Marsh*, then, stands for the principle that 'legislative prayer, while religious in nature, has long been understood as compatible with the Establishment Clause.'" Pet. App. 16 (quoting *Town of Greece*, 134 S. Ct. at 1818). The Fourth Circuit then detailed how, "[i]nvoking the historical tradition in *Marsh*," *Town of Greece* concluded that "a challenge based *solely* on the content of a prayer will not likely establish a constitutional violation." Pet. App. 16-17 (internal quotation marks omitted).

At the same time, the court also noted that "*Marsh* and *Town of Greece* . . . in no way sought to dictate the outcome of every subsequent case" by transforming general support for legislative prayer into a blanket endorsement of any such practice regardless of whether it squares with historical traditions. *Id.* at 14-15. And the court found, correctly, that the "historical 'practice of prayer,' at least as described by the Supreme Court"—namely of legislative prayer provided by chaplains and others *not* wielding any legislative authority—"is not entirely 'similar to that now challenged.'" *Id.* at 19 (quoting *Marsh*, 463 U.S. at 791); *see also Town of Greece*, 134 S. Ct. at 1819 (reiterating *Marsh*'s focus on the "specific [prayer] practice" in question). The decision below acknowledged "that lawmaker-led prayer is far from rare[,]" Pet. App. 22, expressly affirming that "the Establishment Clause indeed allows lawmakers to deliver invocations in appropriate circumstances." *Id.* at 23. But, mindful of the admonition to focus on the precise practice in

question, the court concluded that "[t]he evidence collected by Rowan County and amici . . . only reinforces our conclusion that the county's prayer practice [of exclusive legislator-led prayer] falls outside the tradition of legislative prayer elaborated in *Marsh* and *Town of Greece*." *Id.* at 22. The Fourth Circuit found that the historical evidence demonstrated that legislator-led invocations are "the exception to the rule" and, even more so here, where the prayer opportunity is exclusively available to and taken advantage of by officers of the state. *Id.* at 22-23. As Judge Motz noted, "Rowan County and its supporting amici do not cite a single authority suggesting that the First Congress engaged in a practice similar to the one at issue—that is, having one of its own members deliver the opening prayer." Pet. App. 58 (Motz, J., concurring). A search of the annals of the First Congress, Judge Motz reported, established that it relied exclusively on chaplains, not legislators, to deliver prayer. *Id.* Even Petitioner's "counsel conceded during oral argument that this case is without precedent." *Id.* at 181 (Wilkinson, J., dissenting). Thus, contrary to Petitioner's assertion, the decision below adhered to the historical analysis prescribed by this Court; in so doing, it simply arrived at a conclusion at odds with Rowan County's preferred result.[4]

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[4] Judge Motz's concurrence explained that Petitioner's only evidence of legislator-led prayer in Congress concerned isolated instances dating no earlier than 1973. Pet. App. 59 (Motz, J., concurring). She charged Petitioner with misusing isolated instances of historical precedent to fit its purposes: "One way to misuse [tradition's role in the case law] is to claim that a practice dating back to the First Congress justifies a significantly different modern practice." *Id.* at 58 (Motz, J., concurring). Petitioner sought to transform *Marsh*, *Greece*, and

Second, the Fourth Circuit faithfully applied the coercion standard embraced by the controlling opinion in *Town of Greece*. "[W]hen the historical principles articulated by the Supreme Court do not direct a particular result, a court must conduct a 'fact-sensitive' review of the prayer practice." *Id.* at 15 (quoting *Town of Greece*, 134 S. Ct. at 1825 (Kennedy, J., plurality opinion)). And, though that fact-sensitive inquiry did not show impermissible coercion in *Town of Greece*, the court of appeals was mindful that "'[t]he analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity.'" Pet App. 18 (quoting *Town of Greece*, 134 S. Ct. at 1826 (Kennedy, J., plurality opinion)).

Heeding this admonition, the Fourth Circuit assessed whether Rowan County's prayer practice was materially distinguishable from that in *Town of Greece*. County Commissioners—and *only* the County Commissioners—compose and lead prayers in Rowan County. Pet. App. 27-31. "Before delivering their invocations, the commissioners [tell] attendees to rise and often invite[] them to pray." *Id.* at 39. Finally, the prayers composed and delivered

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their focus on the Founders' understanding of how specific prayer practices comport (or not) with the Establishment Clause into a search for *modern* (and not necessarily frequent or similar) rather than historic comparators. *See id.* at 58-59 (Motz, J., concurring). "In the historical analysis" endorsed by precedent, Petitioner's evidence of "historical" practice was "very thin gruel[,]" both qualitatively and quantitatively. *Id.* at 59 (Motz, J., concurring).

by the Commissioners often "'signal[ed] disfavor toward' non-Christians." *Id.* at 36 (quoting *Town of Greece*, 134 S. Ct. at 1826 (Kennedy, J., plurality opinion)). The unfortunate end results of these distinguishing facts were "the very divisions along religious lines that the Establishment Clause seeks to prevent[,]" *Town of Greece*, 134 S. Ct. at 1819—here, community strife in the course of and beyond Board meetings. *See* Pet. App. 30. Based on these novel features, the court of appeals concluded that Rowan County's prayer practice was "a conceptual world apart" from previously approved practices, *id.* at 18 (internal quotation marks omitted), and therefore required a different analysis lest the Fourth Circuit "blind [itself] to the very fact[s] that the *Town of Greece* plurality regarded as relevant." *Id.* at 42.

Petitioner complains that the distinctions drawn by the Fourth Circuit each return to the fact that the Commissioners themselves compose and deliver the prayers. Pet. 24. But, while acknowledging that factor's importance given the intertwining of official state lawmaking power with the *content* and *delivery* of prayer, the decision stressed that this feature is not dispositive. Pet. App. 24 (noting "the constitutionality of a particular government's [legislator-led] approach ultimately will depend on other aspects of the prayer practice"). The Fourth Circuit then emphasized that it is reductive to conceive of legislator-led prayer as monolithic. "Within the universe of prayers delivered by legislators," *id.* at 24, it is not necessarily the case that "at every meeting of a local governing body for many years" the tongue of "one and only one religion[]" is heard, nor that legislators

seek to have "constituents join them in worship[,]" *id.* at 26, nor that the legislators prevent "anyone else from offering invocations." *Id.* at 25. Thus, though the court acknowledged that legislator-led prayer is not per se coercive, it also properly concluded that the power "the very embodiment of the state[,]" *id.* at 26, has over "'the setting in which the prayer arises'" cannot be ignored when combined with such factors. *See id.* (quoting *Town of Greece*, 134 S. Ct. at 1825 (Kennedy, J., plurality opinion)). Limiting consideration of who is drafting and leading prayers and how they are doing so to the simple question of whether there is an "act of the deliberative body writing or editing religious speech[,]" Pet. App. 155, would not only contravene *Town of Greece* but it would also place legislator-led prayer beyond judicial review "no matter how proselytizing, disparaging of other faiths, or coercive[.]" Pet. App. 47 (internal quotation marks omitted). Relatedly, the Fourth Circuit dismissed what Petitioner now characterizes as a "four-rights-make-a-wrong" critique, Pet. 24, as, at bottom, a complaint about the very "fact-sensitive" inquiry *Town of Greece* requires:

> [T]he citizens of Rowan County are not experiencing the prayer practice piece by piece by piece. It comes at them whole. It would seem elementary that a thing may be innocuous in isolation and impermissible in combination.

Pet. App. 46.

The appellate court's decision is governed by and reflects controlling precedent. Instead of abandoning, disregarding, or nullifying this Court's emphasis on tradition or its coercion analysis, the

Fourth Circuit applied the historical inquiry with the requisite precision, and based its coercion analysis on key factors identified by the controlling decision in *Town of Greece*. There is no need for further review.

III. THE FOURTH CIRCUIT REACHED THE CORRECT RESULT.

As demonstrated above, Petitioner's central concern is not adherence to precedent; it instead is the result that the Fourth Circuit reached in applying governing case law. Here, too, Rowan County's argument misses the mark as the decision below correctly concluded that the prayer practice in question is incompatible with the Establishment Clause, this Court's precedent, and our nation's history.

The Fourth Circuit rightly found that Petitioner's prayer practice is no mere "factual wrinkle" on our case law and history. Pet. App. 18 (internal quotation marks omitted); *see also* Pet. App. 181 (Wilkinson, J., dissenting) ("Rowan County's counsel conceded during oral argument that this case is without precedent."). On the contrary, it is the prayer practice that precedent and tradition have marked as beyond the pale. *Town of Greece* warned against legislators serving "'as supervisors and censors of religious speech[.]'" Pet. App. 54 (Motz, J., concurring) (quoting *Town of Greece*, 134 S. Ct. at 1822). Yet here, legislators supervise and censor to the extent "that Board members alone [can] give voice to their [exclusively Christian] religious convictions[.]" Pet. App. 31. As Judge Motz wrote:

> If members of a legislative body recited one religion's creed month after month, year after year, allowing no opportunity

> for members of any other religion to lead a prayer, a reasonable observer could only conclude that the legislative body preferred that religion over all others.

Pet. App. 55 (Motz, J., concurring). Moreover, "'[B]oard members . . . at no point solicited [religious] gestures [from] the public'" in *Town of Greece*. Pet. App. at 41 (quoting *Town of Greece*, 134 S. Ct. at 1826 (Kennedy, J., plurality opinion)). The Board in Rowan County directed the audience to stand for its lawmaker-led prayers, and the Commissioner delivering the prayer typically began "with some variant of 'let us pray' or 'please pray with me[,]'" Pet. App. 133, actions within the "realm of soliciting, asking, requesting, or directing . . . of concern to the *Town of Greece* plurality." *Id.* at 40 (internal quotation marks omitted). And, where Rowan County "characterized Christianity as 'the one and only way to salvation,'" "proclaim[ed] that Christianity is exceptional and suggest[ed] that other faiths are inferior," "implicitly 'signaled disfavor toward' non-Christians," and "urged attendees to embrace Christianity, thereby preaching conversion[,]" *Bormuth*, 870 F.3d at 513 (quoting Pet. App. 35-37), "[n]o such thing occurred in the town of Greece." *Town of Greece*, 134 S. Ct. at 1825 (Kennedy, J., plurality opinion); *see also Bormuth*, 870 F.3d at 518 ("No such practice of opprobrium has been alleged here[.]"). Searches through our nation's traditions for historical analogues turn up but "very thin gruel." Pet. App. 59 (Motz, J., concurring).

The Fourth Circuit, the Sixth Circuit, and even Petitioner's counsel recognized this as an exceptional set of circumstances. The court of

appeals was right to not welcome this ahistorical, coercive practice into the constitutional fold.

CONCLUSION

For the foregoing reasons, this Court should deny the petition.

Respectfully submitted,

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