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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The Fourth and Sixth Circuits have both considered *en banc* whether: (1) legislators may lead (2) faith-specific legislative prayers (3) beginning with introductions like "Let us pray" (4) in a local governmental setting. In *Town of Greece* v. *Galloway*, this Court upheld local prayer practices that, like Greece's, had the latter three features. 134 S. Ct. 1811, 1822-26 (2014). The *en banc* Fourth Circuit applied the *Greece* dissent's totality-of-the-circumstances approach, concluding that when added to the three features approved in *Greece*, legislator-led prayer violates the Establishment Clause. App. 46-47; *Greece*, 134 S. Ct. at 1847-49 (Kagan, J., dissenting). The *en banc* Sixth Circuit hewed to the *Greece* majority's approach, determining that legislator-led prayer falls within the Nation's long-standing prayer traditions, and thus comported with the Establishment Clause. *Bormuth* v. *Cty. of Jackson*, 870 F.3d 494, 509 (6th Cir. 2017) (*en banc*), *petition for cert. filed* (U.S. Dec. 21, 2017) (No. 17-___); *Greece*, 134 S. Ct. at 1819-20.

In reaching that conclusion, the Sixth Circuit forthrightly acknowledged it was creating a circuit split: "We recognize our view regarding Jackson County's invocation practice is in conflict with the Fourth Circuit's recent en banc decision." *Bormuth*, 870 F.3d at 509 n.5. And indeed it is. Pet. at 15-24. In the face of the Sixth Circuit's own recognition of the conflict, respondents' denials that it exists can safely be rejected. And respondents point to no other reason this Court's review is unwarranted—which is not

surprising, given the obvious, substantial importance of an issue addressed by two courts of appeals *en banc* (as respondents implicitly acknowledged in successfully seeking *en banc* review below). Nor do respondents meaningfully suggest that further percolation is desirable—and wisely so, in petitioner's view, given that as long as the Fourth Circuit's decision stands, it casts doubt on the historical practices of thousands of law-making bodies around the Nation. See, e.g., Br. of Int'l Municipal Lawyers Ass'n as *Amicus Curiae* in Support of Petitioner at 2-3; Br. of Members of Congress as *Amici Curiae* in Support of Petitioner at 17-23.

Thus respondents devote the bulk of their BIO (at 16-24) to arguing the correctness of the Fourth Circuit's decision on the merits. In this, respondents merely repeat the *en banc* Fourth Circuit's reasoning. See, e.g., BIO at 17-18 (quoting App. 14-17, 22-23); *id.* at 20-21 (quoting App. 24-25, 46-47). Respondents' extensive discussion of the merits only highlights the need for this Court's intervention—and confirms that the question is cleanly presented for the Court's resolution. This Court's review is needed to resolve the intolerable uncertainty created by this *en banc* circuit split on an issue of considerable constitutional and practical importance. The petition should be granted.

ARGUMENT

I. The Circuits Are Intractably Split Regarding The Constitutional Significance Of Legislators Offering Legislative Prayers.

Notwithstanding the Sixth Circuit's contrary view of its own *en banc* decision, respondents insist "there is no circuit split" for this Court to resolve. BIO at 9; Patrick L. Gregory, *Circuit Split on Legislator-Led Prayer Could Entice Supreme Court*, BLOOMBERG LAW (Sept. 13, 2017).[1] In support of that assertion, respondents cherry-pick statements from the Fourth Circuit's *en banc* majority opinion that "[l]egislator-led prayer is not inherently unconstitutional" and that "lawmakers [may] deliver invocations in appropriate circumstances." BIO at 10 (quoting App. 23). Respondents thus assure this Court (at 10-11) that "[b]oth the Fourth Circuit and Sixth Circuit agree" that "the Establishment Clause permits legislator-led prayer."

But this argument falls apart on the barest scrutiny. Relying on virtually the same historical materials, compare *Bormuth*, 870 F.3d at 509-11, with App. 22-23, 92-94, the *en banc* Fourth Circuit concluded that prayer by legislators falls outside the Nation's historical traditions; the *en banc* Sixth Circuit concluded just the opposite. And in the Fourth Circuit, a legislator delivering the very same prayers in the very same circumstances approved in *Greece* violates the Establishment Clause under a "totality of the circumstances"

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[1] Available at https://www.bna.com/circuit-split-legislatorled-n57982087849.

analysis, App. 46-47; in the Sixth Circuit, a legislator delivering the same prayers in the same circumstances would *not* violate the Establishment Clause given the long history and tradition of such prayers. *Bormuth*, 870 F.3d at 509. No verbal alchemy can transform that split into a mere factbound difference in applying this Court's cases.

A. The Circuits Are Split On Whether Faith-Specific Prayers By Legislators Fit Within The Nation's Traditions.

In *Greece*, this Court articulated a clear test for resolving Establishment Clause challenges to legislative-prayer practices: courts must "determine whether the * * * practice fits within the tradition long followed in Congress and the state legislatures." 134 S. Ct. at 1823. If the challenged practice does, it is constitutional. *Ibid.* The *en banc* Fourth and Sixth Circuits sharply disagree about whether the same practice—faith-specific prayers by legislators themselves—fits within this tradition.

As petitioner explained (at 21-23), the prayer practices considered by the *en banc* Fourth and Sixth Circuits are materially indistinguishable. Rowan and Jackson Counties each began meetings with a board member's voluntary invocation; prayers contained faith-specific language and often began with "let us pray" or a similar phrase; and the invocations all took place during local-government meetings just before official business began. See App. 6-8, 198-99; *Bormuth*, 870 F.3d at 497-98. Both practices were likewise

materially indistinguishable from that in *Greece*—save for the prayers being offered by the legislators themselves.[2] The historical analysis in both circuits therefore turned on that critical feature of both prayer practices.

Examining the same historical materials, the *en banc* Fourth and Sixth Circuits flatly disagreed on the historical significance of prayer by legislators (as opposed to paid chaplains or volunteers). The Fourth Circuit noted that prayer by legislators is "far from rare," but nonetheless described it as an "exception to the rule" of legislative prayer by chaplains—and thus, in the Fourth Circuit's view, outside the Nation's traditions as set forth in *Greece*. App. 18, 22. But the Sixth Circuit held that prayer by legislators "does not violate

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[2] Nor, despite respondents' repeated insistence otherwise (at 2, 12-13, 23), did the Sixth Circuit conclude that the prayers there differed materially from those in the Fourth Circuit. First, as the Sixth Circuit noted, the plaintiff there relied upon derogatory comments made *outside* the prayers to condemn Jackson County's prayer practice. *Bormuth*, 870 F.3d at 517-18. The Sixth Circuit observed that these comments arose as a response to the plaintiff's provocations, and not as a part of the prayer practice itself. *Id.* at 518. Thus the Sixth Circuit concluded that the plaintiff had not even "alleged" a "practice of opprobrium," "let alone shown" one, as the Fourth Circuit concluded respondents had below. *Ibid.* Second, the Sixth Circuit cited the Fourth Circuit *en banc* dissent and described it as "criticizing [the] majority for condemning prayers similar to those approved in *Marsh* and *Town of Greece*." *Id.* at 513. Just so. While the Fourth Circuit "found" examples of prayers it deemed defective, *id.* at 518 (quoting App. 35-36), the Sixth Circuit agreed with the Fourth Circuit *dissent* that these prayers were materially indistinguishable from those held permissible in *Marsh* v. *Chambers*, 463 U.S. 783 (1983), and *Greece*.

the Establishment Clause" precisely *because* the "history shows that legislator-led prayer is a long-standing tradition." *Bormuth*, 870 F.3d at 509, 519. The Sixth Circuit explicitly acknowledged that its historical analysis directly conflicts with that of the Fourth Circuit. *Id.* at 510.

As a result, in the Sixth Circuit, prayer by legislators falls within "American historical practices" by which courts "determine what the Establishment Clause allows." *Id.* at 521 (Sutton, J., concurring). In the Fourth Circuit, prayer by legislators is a "conceptual world apart" from prayer by chaplains or volunteer clergy. App. 18. The conflict could not be starker.

B. The Circuits Are Split On Whether Faith-Specific Prayer By Legislators Coerces Nonparticipants.

As petitioner explained (at 23), the Fourth Circuit listed four "features" of Rowan County's prayer practice that in "combination" rendered it coercive in the Fourth Circuit's view: (1) the exclusive delivery by legislators, (2) the faith-specific contents, (3) the openings, and (4) the local-government setting. See App. 26-27, 39-42. Again, the Sixth Circuit squarely disagreed, calling this approach "unpersuasive." *Bormuth*, 870 F.3d at 509 n.5. This, too, presents a clean split warranting this Court's resolution.

As petitioner explained (at 23-24), this Court approved the combination of the latter three factors in *Greece*. 134 S. Ct. at 1822-23, 1825-26. Contrary to

respondents' insistence, petitioner and the Sixth Circuit do not merely quarrel with the Fourth Circuit's observation that "a thing may be innocuous in isolation and impermissible in combination," BIO at 21; App. 46, but with the Fourth Circuit's conclusion that a prayer practice permissible under *Greece* becomes coercive when offered by a legislator.

Indeed, the Fourth Circuit found the features approved in *Greece* troubling precisely *because* legislators offered the prayers. App. 27, 32, 40-41. For example, when discussing commissioners' opening prayers with phrases like "[l]et us pray," App. 39-40, the Fourth Circuit recognized that "*Greece* involved similar requests." App. 41. Yet the Fourth Circuit held that once commissioners uttered those same words, they became impermissible requests "on behalf of the state." *Ibid.* Likewise, while the Fourth Circuit recognized that *Greece* expressly permitted faith-specific prayers, App. 34, the Fourth Circuit concluded that prayers by legislators must be "ecumenical"—i.e., *not* faith-specific, App. 37-38—notwithstanding *Greece*'s holding that prayer practices *need not* be "ecumenical," see 134 S. Ct. at 1820-21. Law-making bodies in the Fourth Circuit, then, may have faith-specific prayer or legislator-led prayer—but not both. See BIO at 22-23.

In contrast, the Sixth Circuit does not put legislatures to such an intolerable choice. That court recognized that *Greece* deemed faith-specific prayers, a local-government setting, and introductions like "let us pray" non-coercive. *Bormuth*, 870 F.3d at 515-16. The Sixth Circuit specifically rejected the Fourth Circuit's

contrary approach, instead following the *Greece* plurality's coercion analysis to determine whether, taken together and over time, Jackson County's prayer practice revealed official retaliation against nonparticipants or a pattern of denigrating nonbelievers. *Id.* at 516-17. Finding neither, the Sixth Circuit rejected the Fourth Circuit's conclusion that faith-specific prayers in a local-government setting that begin with "let us pray" coerce listeners when offered by legislators.[3] See Pet. at 23-25.

This disagreement, cleanly presented here, creates intolerable uncertainty for state and local governments that cannot be sure which historical prayer practices are protected and which will "blur the line between church and state." App. 189. Only this Court can resolve that uncertainty.

II. Respondents' Merits Arguments Only Confirm That This Court's Review Is Warranted.

Respondents' lengthy discussion of the merits (at 16-24) only underscores the need for this Court's review. Respondents claim that the Fourth Circuit reached the right result (at 22) after correctly applying

[3] Respondents selectively quote the Sixth Circuit's opinion to claim it recognized that *Rowan County* involved a "litany of [bad] prayers." BIO at 12-13. But the very next sentence in the Sixth Circuit's opinion noted the Fourth Circuit dissent's criticism of the "majority for condemning prayers similar to those approved in *Marsh* and *Town of Greece*." 870 F.3d at 513.

this Court's precedent (at 16-19), but simply repeat the Fourth Circuit's mistakes in making that argument.

Like the Fourth Circuit, respondents first miscast *Greece*'s dispositive historical inquiry as merely one consideration among many. This Court, however, held that a long historical tradition would satisfy *any* of the various Establishment Clause tests. *Greece*, 134 S. Ct. at 1819. Respondents misconstrue *Greece*—as the Fourth Circuit apparently did—as directing a historical inquiry only as an initial step in an open-ended "totality-of-the-circumstances" analysis. BIO at 1, 7; Pet. at 27-31.

But as petitioner explained (at 3, 27) and the Sixth Circuit observed, *Bormuth*, 870 F.3d at 516, the approach of respondents and the Fourth Circuit resembles the *Greece dissent*, which faulted the intimate local-government setting for legislative prayers, construing it as coercive, *Greece*, 134 S. Ct. at 1847 (Kagan, J., dissenting); BIO at 20; App. 42-45; construed introductions like "let us pray" as directing prayers "squarely at the citizens," *Greece*, 134 S. Ct. at 1847-48; BIO at 23; App. 39-42; criticized the prayers for being insufficiently "ecumenical," App. 37-38, or "inclusive," App. 23; *Greece*, 134 S. Ct. at 1848; BIO at 23; and considered the combination of these factors as coercive. *Greece*, 134 S. Ct. at 1849; BIO at 23; App. 26-27.

Respondents attempt to justify the Fourth Circuit's extensive reliance on the *Greece* dissent by emphasizing (at 8, 11, 14) the *Greece* majority's admonition that a prayer practice must be examined "as a

whole." *Greece*, 134 S. Ct. at 1824. But that admonition means the opposite of what respondents intend. The *Greece* majority cautioned courts *not* to focus on a small number of prayers that, taken in isolation, might fail to fit within the Nation's traditions. *Ibid*. Yet the Fourth Circuit did just that—singling out seven prayers (out of 143) that it characterized as espousing Christianity over other religions, App. 35-37, and asserting that those prayers condemned Rowan County's prayer practice. The Fourth Circuit thus did what *Greece* prohibits, 134 S. Ct. at 1824, and what the Sixth Circuit refused to do. *Bormuth*, 870 F.3d at 512-13. And in all events, even the prayers found objectionable by the Fourth Circuit are consistent with those upheld by this Court. See App. 104-10 (lead Fourth Circuit dissent noting the prayers objected to by the majority "contained the same sort of" religion-specific pleas, exhortations, and recognition of Christian tenets as the prayers in *Greece*).[4]

In the end, respondents cannot reconcile the Fourth Circuit's coercion analysis with *Greece* or *Marsh* (or the Sixth Circuit's). *Greece* firmly rejected

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[4] Respondents' emphasis (at 6, 13) on the fact that "[a]t one meeting, an individual who expressed opposition to the Board's prayer practice was booed and jeered by the audience," App. 30, is inapposite. As *Bormuth* noted, a poor reaction to a citizen's opposition to a prayer practice, while regrettable, is not the same as expressing "antagonism for his religious beliefs." 870 F.3d at 518. While the audience may have failed to "keep [its] cool," *ibid.*, this assuredly does not represent the board "singl[ing] out dissidents for opprobrium" based on their religious beliefs. *Greece*, 134 S. Ct. at 1826.

the idea that "the constitutionality of legislative prayer turns on the neutrality of its content," 134 S. Ct. at 1821, whether the audience is asked to join in prayer, *id.* at 1826 (plurality opinion), or whether the prayer takes place in a local-government setting. *Id.* at 1824-25 (majority opinion). Particularly given this Court's recognition that legislative prayer is meant to "reflect the values [legislators] hold as private citizens," and to provide an opportunity to show "who and what they are," *id.* at 1826 (plurality opinion), the Fourth Circuit's four-rights-make-a-wrong approach when it comes to legislative prayer by legislators is difficult to understand as anything other than an attempt to pare back *Greece*. This Court should not permit such *sub silentio* overruling of its precedents.

III. Resolving The Conflict Over The Constitutionality Of Legislative Prayer By Legislators Is Exceedingly Important.

As petitioner explained (at 35-37), and as respondents do not dispute, the question whether local legislators may offer faith-specific legislative prayers is exceedingly important. It implicates the participation by thousands of public servants in an "unambiguous and unbroken history of more than 200 years," *Marsh*, 463 U.S. at 972, of "lend[ing] gravity to public business," "transcend[ing] petty differences in pursuit of a higher purpose, and express[ing] a common aspiration to a just and peaceful society." *Greece*, 134 S. Ct. at 1818. Prayer by legislators themselves is perhaps the most natural expression of this tradition, given that

the "principal audience" for the prayers "is not, indeed, the public but lawmakers themselves." *Id*. at 1825 (plurality opinion). Whether local governments may continue to participate in this tradition, as many have for centuries, Br. of 103 State Legislators as *Amici Curiae* in Support of Petitioner at 15-17; Br. of Pittsylvania County, Virginia as *Amicus Curiae* in Support of Petitioner at 7, 10-12, is unquestionably an issue of substantial importance.

Across the Nation, local governments like Rowan County have for centuries begun legislative sessions with invocations by legislators. See *Bormuth*, 870 F.3d at 509-10. The *en banc* circuit-split between the Fourth and Sixth Circuits subjects local governments in the five states in the Fourth Circuit and four states in the Sixth Circuit to diametrically opposed legal regimes. See Pet. for a Writ of Certiorari at 16-18, *Bormuth*, No. 17-___ (U.S. Dec. 21, 2017) ("Additional delay will only make the confusion more widespread as other courts cite the conflicting decisions."). And lawmaking bodies elsewhere across the Nation must simply guess which approach to take, risking litigation and potentially hefty attorneys' fees awards whenever legislators pray. Br. of Int'l Municipal Lawyers at 7-13 (describing risks now inherent in various invocation practices). Given this uncertainty, some local governments may decide to forego prayer altogether. *Ibid.*

Only this Court's review can prevent that regrettable result. Legislative prayer by legislators is "an important and widely used method of legislative prayer"—particularly where the burdens of paying a

chaplain or administering a volunteer clergy program would be too great to bear. See Br. of States of West Virginia and 20 Other States and the Governor of Kentucky as *Amici Curiae* in Support of Petitioner at 4. This Court's review is needed to provide guidance to legislatures nationwide and reaffirm the fundamental protections guaranteed in *Greece*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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