No. 17-565

IN THE

Supreme Court of the United States

ROWAN COUNTY, NORTH CAROLINA,
Petitioner,

v.

NANCY LUND, *et al.,*
Respondents.

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

BRIEF OF INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the International Municipal Lawyers Association (IMLA) is a non-profit professional organization of more than 2,500 local government attorneys who advise towns, cities, and counties across the country. IMLA advises its members on legal challenges facing local governments and advocates for more just and effective municipal law.

This case is of particular concern to municipal attorneys. Across the country, local government meetings regularly begin with respectful prayer that places local officials "in a solemn and deliberative frame of mind." *Town of Greece* v. *Galloway*, 134 S. Ct. 1811, 1816 (2014). The lawyers who advise municipal governments on that longstanding practice have a distinct interest in clarifying its lawfulness and advising clients on their compliance with the Constitution. The clear and uniform articulation of federal law allows IMLA members to confidently advise their clients about the lawfulness of their traditional practices.

Local officials, as this Court has recognized, often serve on a part-time or volunteer basis. *Id.* at 1826. Absent this Court's confirmation of the rule recognized in *Marsh* v. *Chambers*, 463 U.S. 783 (1983), and *Town of Greece*, the simplest opening prayer could require those officials and their lawyers to wade

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and that no entity or person aside from counsel for *amicus curiae* made any monetary contribution toward the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2, *amicus curiae* states that counsel for all parties received notice and consented to the filing of this brief.

through the "puzzling Establishment Clause jurisprudence." *Town of Greece*, 134 S. Ct. at 1831 (Alito, J., concurring). IMLA members' clients are understandably concerned by the threat of "legal fees that may result" unless—contrary to judicial precedent and historical practice—they steer entirely clear of Establishment Clause litigation by making "local government … a religion-free zone." *Id.*

SUMMARY OF ARGUMENT

Local lawmakers, like their counterparts at the state and federal levels, have for centuries opened their meetings with prayer. For decades, they have done so with the understanding that this practice was consistent with the Establishment Clause. See *Marsh* v. *Chambers*, 463 U.S. 783 (1983). In 2014, this Court confirmed that local legislative prayer was not excluded from that constitutional tradition. The Court expressly rejected the contention that an invocation offered in a local setting was less worthy of respect than one offered in a statehouse or the U.S. Capitol. See *Town of Greece* v. *Galloway*, 134 S. Ct. 1811 (2014).

The Fourth Circuit's ruling invalidating a county invocation undermines the protection recognized in *Marsh* and *Town of Greece.* The reliance those precedents engendered in courthouses across the nation has been called into question by the conflict between the Fourth and Sixth Circuits on this important and recurring question of federal law. See *Bormuth* v. *City of Jackson*, 870 F.3d 494 (6th Cir. 2017) (en banc).

Only this Court can restore the law's clarity and ensure uniformity for countless city, county, and municipal bodies. As this Court recognized in *Town of Greece*, those public servants are not second-class cit-

izens under the First Amendment. By replacing this Court's historical rule with an amorphous and unworkable multifactor standard, moreover, the decision below would destabilize the law and hamstring the ability of municipal lawyers to advise local bodies and members of all religious, political, and demographic backgrounds. In light of the clear circuit split, which further exacerbates the lack of clarity for thousands of local governments outside the Fourth and Sixth Circuits, the petition should be granted.

ARGUMENT

I. THE ESTABLISHMENT CLAUSE DOES NOT EXCLUDE OR DISFAVOR LOCAL LEGISLATIVE PRAYER.

A. The Opinion Below Misperceives The Nature Of Local Public Service And Prayer.

The opinion below rests on the mistaken premise that the Establishment Clause applies differently to local government prayer than to legislative prayer at the state and federal level. "The prayers here," the Court of Appeals emphasized, "were delivered at the public meetings of a *local* government body, a fact that makes the other aspects of the county's prayer practice even more questionable." App. 42 (emphasis added). The opinion continued by surmising that "a municipal board meeting presents a heightened potential for coercion" due to its "intimacy." *Id.* A further purported flaw identified below was the County's altogether ordinary practice of addressing both "legislative and adjudicative business." *Id.* at 43.

That approach misunderstands the work of municipal officials and the logic of this Court's precedents. Municipal officials carry out countless essential pub-

lic functions—often with less fanfare and funding than their federal and state counterparts. Given that the "principal audience for these invocations is [the] lawmakers themselves," many of whom serve on a "part-time [or] voluntee[r]" basis, the intimate setting of a municipal proceeding provides less, not more, of a threat to Establishment Clause concerns. *Town of Greece*, 134 S. Ct. at 1825-26. The legislators who begin their after-hours public service with an invocation are quite obviously "set[ting] the mind to a higher purpose" of governing, rather than establishing or coercing any official religion for their particular sewer district or transit authority. *Id.* at 1825.

Indeed, the Fourth Circuit's approach to legislator-led prayer is difficult to reconcile with the diversity of local practices across the nation. Hamtramck, Michigan, for example, is represented by a majority-Muslim city council, as the Sixth Circuit observed. See *Bormuth*, 870 F.3d at 513. Those legislators are just as free as others, including the members of Congress, to open proceedings with prayer by a legislator. Different bodies in different parts of the country will undoubtedly adopt different approaches to legislative prayer. So long as those practices are nondiscriminatory and noncoercive, this localized approach deserves the same treatment as that afforded federal and state legislators.

B. The Opinion Below Conflicts With The Respect This Court Affords Local Officials.

The approach adopted below is also inconsistent with this Court's approach to local government practice. *Town of Greece* squarely rejected the notion that municipal officials occupy a second-class status under the Establishment Clause. As the Court made clear, the tradition of legislative prayer recognized in

Marsh is as much at home in town halls as it is in the halls of state.

In *Town of Greece*, the challengers claimed that "prayer conducted in the intimate setting of a town board meeting differs in fundamental ways from the invocations delivered in Congress and state legislatures, where the public remains segregated from legislative activity and may not address the body except by occasional invitation." 134 S. Ct. at 1824–25. The dissent agreed, contending that a "chasm" existed between prayer at a "legislative floor session involving only elected officials" and prayer in the "town hall revolving around ordinary citizens." *Id.* at 1852 (Kagan, J., dissenting). The dissent sought to distinguish local meetings from federal and state sessions. *Id.* at 1846–49 (contrasting "morning in Nebraska" from "evening in Greece"). It acknowledged that the Board "has legislative functions, as Congress and state assemblies do," but argued that "the Board's meetings are also occasions for ordinary citizens to engage with and petition their government." *Id.* at 1845.

A majority of this Court, however, expressly rejected the argument that the Establishment Clause imposes a higher burden on prayers offered before local as opposed to national or state meetings. Indeed, this Court rejected the assertion "that prayer conducted in the intimate setting of a town board meeting differs in fundamental ways from the invocations delivered in Congress and state legislatures." *Id.* at 1824–25. While acknowledging that local municipal meetings are attended by citizens who "speak on matters of local importance; and petition the board for action that may affect their economic interests, such as the granting of permits, business licenses, and zoning variances," the Court nevertheless dismissed the

challengers' argument that legislative prayer held ceremoniously at the beginning of every council meeting unconstitutionally coerced its citizens "to support or participate in any religion or its exercise." *Id.* at 1825. And the Court expressly recognized the "historical precedent" supporting the practice of "local legislative bodies open[ing] their meetings with prayer." *Id.* at 1819.

There is no basis, therefore, to view local government as a junior-varsity government under the Establishment Clause. As a historical matter, "[t]his tradition extends not just to state and federal legislatures, but also to local legislative bodies." *Bormuth*, 870 F.3d at 505. Even the court below acknowledged that "lawmaker-led prayer is far from rare" in this context. App. 22. Town councils, local school boards, and regional partnerships are assuredly among the "deliberative public bodies" whose opening "prayer is deeply embedded in the history and tradition of this country." *Marsh*, 463 U.S. at 786. Because in this context the Establishment Clause "must be interpreted by reference to historical practices and understandings," there should be no distinction between the standards applicable to localities, States, and Congress. Local legislative prayer comfortably "fits within the tradition long followed in Congress and the state legislatures." *Town of Greece*, 134 S. Ct. at 1819.

By treating local government differently from state or national governments, however, the decision below necessarily implies that the local government officials are inferior claimants to the tradition of legislative prayer. As *amicus* can attest, local officials work tirelessly—often after their "day jobs" have ended—to ensure that their fellow citizens receive the schools, roads, parks, law enforcement, and other blessings of

American life they deserve and expect. To imply that those officials are less entitled to "a moment of prayer or quiet reflection" so that they may set their "mind[s] to a higher purpose and thereby eas[e] the task of governing" is to demean the importance of their work. *Id.* at 1825. In light of the Fourth Circuit's departure from this tradition of equal treatment, this Court should grant the petition to clarify that local government officials enjoy the same respect as their state and federal counterparts.

II. THE DIVIDED DECISIONS BELOW LEAVE MUNICIPALITIES NO GOOD OPTIONS FOR COMPLYING WITH THE CONSTITUTION.

There can be no doubt about the longstanding history of legislative prayer in this country. Nor is there any doubt that municipal legislators have participated fully alongside federal and state legislators in that constitutional tradition. Under the Fourth Circuit's amorphous approach, however, municipalities and their lawyers cannot rely upon this long-standing historical practice or judicial precedent. Instead, the Establishment Clause may permit (or prohibit) *some* prayers, by *some* prayer-givers, with *some* degree of sectarian content.

As a result, municipalities and their lawyers face the very significant and difficult question of *how* to incorporate invocations consistent with the Establishment Clause as interpreted by the Fourth Circuit. Unfortunately, that question now has no good answer, particularly given the circuit split that has developed. If municipal lawyers outside the Sixth Circuit cannot rely on the Nation's history and this Court's precedent, as they could after *Marsh* and *Town of Greece*, it will be well nigh impossible to counsel local governments about the proper approach

to prayer. Whether to look to the Sixth Circuit's historical analysis or the Fourth Circuit's amorphous standard will vex lawyers across the nation absent this Court's involvement. In short, the divided courts of appeal leave municipalities and their lawyers with no clarity and only a series of bad options.

1. Chaplain: The municipal lawyer might, for example, urge clients to hire or appoint a chaplain to offer their opening invocations. That would fall within *Marsh*'s holding and protect localities from litigation over sectarian messages, so long as the prayers were not discriminatory or coercive. The problems with that approach, however, are easy to see. Few cities and counties have the time or money to satisfy that unfunded judicial mandate. It may be simple enough for Congress or large state capitals to hire or recruit a chaplain. It is another thing entirely for smaller and more remote local bodies, whose proceedings lack the same staffing, funding, and regularity.

In any event, hiring a local government chaplain would be a curious response to the concern that local government not "identify the government" with a particular faith. App. 5. Appointing a chaplain would likely be met with the argument that it ties the government more closely to the faith of the chaplain and raise many of the same concerns identified by the Fourth Circuit below. "A government-sponsored faith leader seems closer to an establishment than allowing each official to pray however they wish or to offer no prayer at all." *Bormuth*, 870 F.3d at 523 (Sutton, J., concurring). Appointing a single chaplain, moreover, would limit the opportunities to reflect religious plurality and heterogeneity in a multimember body. *Supra* at 4. And it would do little to alleviate concerns about the politicization of prayer. App. 29–30. If incumbent commissioners and their challengers

could make a campaign issue out of prayer practices, *id.*, there is no reason to believe that hiring a local chaplain to officially represent the government would draw any less scrutiny.

2. Chaplain-by-Committee: Alternatively, the diligent municipal lawyer could try to recruit different prayer-givers of different faiths to avoid charges of an impermissible association between the local government and a single religious sect. Counsel might advise that a town could seek to avoid liability by organizing the prayer givers and their offerings: ensuring the right mix of legislators and non-legislators, citizens and visitors, and sectarian and non-sectarian messages. The council in the Town of Greece took a similar approach (which, of course, led to protracted litigation of the sort the circuit split will revive). It is hardly clear that prayers delivered by rotating outsiders would ameliorate any concerns with prayers delivered by rotating legislators. Moreover, this Court has explained that such an approach also would entail entanglement risks:

> The quest to promote "a 'diversity' of religious views" would require the town "to make wholly inappropriate judgments about the number of religions it should sponsor and the relative frequency with which it should sponsor each," a form of government entanglement with religion that is far more troublesome than the current approach.

Town of Greece, 134 S. Ct. at 1824 (internal alterations omitted).

The "chaplain by committee" approach introduces additional practical hurdles as well. Some local governments preside over wide, sparsely-populated rural areas. Others represent narrow, homogeneous urban

or suburban constituencies. For either sort of jurisdiction, engaging a sufficiently diverse group of religious leaders may prove costly or impossible. There may simply not be enough religious institutions of enough different faiths to avoid the need for local leaders themselves to offer invocations. Likewise, there is no basis for assessing what level of religious diversity a reviewing court might deem sufficient "in proper context" to avoid a determination that the "prayer opportunity not get out of hand." App. 18.

3. Religious Balancing: The municipal lawyer also might advise policing the content of prayer to avoid "overly" sectarian invocations. That, however, would invite further challenges. As this Court has explained, the constitutional tradition of legislative prayer has never been so limited. "An insistence on nonsectarian or ecumenical prayer as a single, fixed standard is not consistent with the tradition of legislative prayer outlined in the Court's cases." *Town of Greece*, 134 S. Ct. at 1820–21 (rejecting a "neutrality of content" requirement). Yet by holding that local legislative "prayer has its [as-yet unidentified] limits," App. 24, and by parsing hundreds of prayers given over several years, the Fourth Circuit introduced just such a test into the Establishment Clause jurisprudence facing municipalities.

There is every reason to fear that policing the content of prayers in this way would subject municipalities to claims that they have impermissibly entangled government in religion. See *Bormuth*, 870 F.3d at 522 (Sutton, J., concurring). This Court has held, however, that the Establishment Clause does not require the type of supervision and "religious balancing" mandated by the Fourth Circuit's decision. *Town of Greece*, 134 S. Ct. at 1824. Municipalities are ill-equipped to continually assess and reassess

whether they are striking the right balance, in the eyes of a reviewing court, of different types of people offering different types of prayers to open different government meetings. "To hold that invocations must be nonsectarian would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech, a rule that would involve government in religious matters to a far greater degree." *Id.* at 1822; *see also Bormuth*, 870 F.3d at 522 ("Do we really want to go down the road of telling people how to pray?") (Sutton, J., concurring).

Nothing in the Constitution, the Nation's history, or the nature of local government, however, warrants this level of judicial micromanagement. To the contrary, the "terms of the Constitution and the words of our cases do not require, or even allow, [courts] to parse highly personal offerings on the basis of our intuitions or social conventions about how best to foster religious sensitivity in America." *Bormuth,* 870 F.3d at 523 (Sutton, J., concurring). Judge Sutton's concurrence powerfully illustrates the fine and unworkable distinctions that the Fourth Circuit decision would inject into everyday local activity.[2] The Constitution does not require "federal judges to hover over each town hall meeting in the country like a helicopter parent." *Id.* at 521. For the same reasons, the Constitution does not require municipalities to

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[2] The First Amendment, Judge Sutton explains, "does not preference any of" the semantic distinctions made relevant under the alternate approach: "Let us pray" or "Let *me* pray"; "Please join me in prayer" or "Please join me, *if you wish*, in prayer"; "Please stand reverently as we pray" or "Please stand reverently, *if you wish*, as we pray"; "Council member Smith will now offer a prayer" or "*Our chaplain* will now offer a prayer." 870 F.3d at 521 (emphases added).

preface prayer with "disclaimers," App. 56 (Motz, J., concurring), or a "Message of Religious Welcome," App. 179 (Wilkinson, J., panel dissent).[3] The First Amendment does not require this Court to preface its statement "God save the United States and this honorable Court" with a nonsectarian disclaimer. Nor does it require anything similar before a minister or legislator opens a session of Congress. *Marsh*, 463 U.S. at 793–94. Contrary to the decision below, App. 42, the same legal standard should apply to invocations made at the local level.

4. Silence: If the Court does not intervene to resolve the circuit split, the risk-averse municipal lawyer may well counsel avoidance of threatened Establishment Clause litigation under ambiguous legal standards. Rather than face the prospect of costly and uncertain litigation, at least some local governments undoubtedly would surrender—ending their tradition, in some instances centuries old, of opening prayers. Despite this Court's recognition of communal prayer's pedigree, see *Town of Greece*, 134 S. Ct. at 1824–27, the confusion and disagreement created by the Fourth Circuit's opinion may have set the bar

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[3] The author of the Fourth Circuit's en banc majority opinion began his panel dissent by describing such an express disclaimer, which the threat of Establishment Clause liability might foist on local governments. App. 179 (Wilkinson, J., dissenting) ("Welcome to the meeting of the Rowan County Board of Commissioners. As many of you are aware, we customarily begin these meetings with an invocation. Those who deliver the invocation may make reference to their own religious faith as you might refer to yours when offering a prayer. We wish to emphasize, however, that members of all religious faiths are welcome not only in these meetings, but in our community as well. The participation of all our citizens in the process of self-government will help our fine county best serve the good people who live here.").

too high; invocations would be shelved as constitutional in theory but unattainable in practice.

This Court's review is thus necessary to avoid chilling local government practice for fear of burdensome litigation and judicial micromanagement. It should revisit the issue from the historical perspective of *Marsh* and *Town of Greece*, with a view toward reinstituting a clear rule as set forth in those decisions. The Constitution forbids discrimination, but not individual expressions of individual faith. And "[o]nce it invites prayer into the public sphere, government 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." *Id.* at 1822–23. Before the circuit split developed, municipal lawyers could convey that relatively straightforward and uniform instruction to their local government clients. Only through this Court's intervention will they be able to do so again.

CONCLUSION

For these reasons, and those set forth in the Petition, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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