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 FOR PITTSYLVANIA COUNTY, VIRGINIA AS *AMICUS CURIAE* IN SUPPORT OF CERTIORARI

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QUESTION PRESENTED

Whether legislative prayer delivered by legislators complies with the Establishment Clause of the First Amendment, as the Sixth Circuit sitting *en banc* has held, or does not, as the Fourth Circuit sitting *en banc* has held.

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[*]

Amicus curiae Pittsylvania County, Virginia believes that legislative prayer is a vital and constitutionally protected part of its deliberative process. In particular, the County believes that its legislators—and other legislators across the Nation—must be free to pray in accordance with the language of their own faiths and the dictates of their own consciences.

America's tradition of solemnizing legislative sessions in that manner dates to the Founding. In keeping with this tradition, the Pittsylvania County Board of Supervisors has begun each meeting with prayer for more than 200 years. Although the particulars of the practice vary from place to place—with some inviting guests or chaplains to lead the prayer, others having legislators do so, and still others combining those approaches—this centuries-old and widespread tradition of legislators seeking divine guidance concerning the important work before them is shared by the federal Congress and many state and local legislatures.

Legislative work is often divisive. But for a few moments each meeting, politics is set aside. Instead of focusing on divisions, legislators reflect on their duty to represent every constituent, mindful of their shared duties and their need for divine assistance in carrying out their responsibilities.

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[*] Pursuant to Rule 37.2(a), *amicus* provided timely notice of its intention to file this brief. All parties consented. In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person or entity other than the *amicus* or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

Despite this Court's decisions in *Town of Greece* v. *Galloway*, 134 S. Ct. 1811 (2014), and *Marsh* v. *Chambers*, 463 U.S. 783 (1983), sanctioning opening legislative invocations, lower courts—including the *en banc* Fourth Circuit in petitioner's case, and a district court in a case involving *amicus* Pittsylvania County—have held that legislative prayer is unconstitutional when legislators themselves pray. And in the case of Pittsylvania County, a district court injunction has brought the County's centuries-old prayer practice to a halt. These decisions, which are contrary to the Framers' understanding of the Establishment Clause and this Court's precedents, should not be allowed to stand.

Legislative prayers are offered "principal[ly]" for "the lawmakers themselves," serve "largely to accommodate the spiritual needs of lawmakers," set lawmakers' "mind[s] to a higher purpose," and "thereby ease[] the task of governing." *Town of Greece*, 134 S. Ct. at 1825, 1826 (Kennedy, J., plurality). This Court has twice confirmed that the tradition of legislative prayer, unbroken since the Founding, poses "no real threat" of establishing religion. *Marsh*, 463 U.S. at 795. Indeed, all nine Justices in *Town of Greece* agreed that, when a legislative prayer practice "'fits within the tradition long followed in Congress and the state legislatures,'" it is constitutional. 134 S. Ct. at 1845 (Kagan, J., dissenting) (quoting *id.* at 1819). That a legislator, rather than a chaplain or guest minister, is delivering the prayer, does not compel a different result. Indeed, there is no small irony in the notion that those for whom legislative prayers are offered may listen to the prayers offered on their behalf by others, but may not themselves pray. Particularly given the widespread nature of the practice at issue, this Court's review is warranted.

STATEMENT

Rowan County, North Carolina is governed by a five-member board of commissioners, formally known as the Rowan County Board of Commissioners. Pet. 6a. The Board meets twice monthly. Pet. 7a, 10a.

Like countless other counties, state assemblies, and the U.S. Congress, the Board has traditionally begun its meetings with a moment of silence or a brief prayer, followed by the Pledge of Allegiance. Pet. 6a–7a, 198a–199a. By longstanding tradition, the opportunity to deliver the invocation was rotated among the five commissioners. Pet. 7a, 70a. Most often, Commissioners would begin with a prayer, but on several occasions Commissioners opened the meeting with a moment of silence or simply commenced the business portion of the meeting. *Ibid.* Whether the time was used for a prayer was therefore left to the discretion of the scheduled Commissioner, who could choose the form and content of each prayer without the other Commissioners' pre-approval. Pet. 10a. This practice was designed "for the edification and benefit of the commissioners and to solemnize the meeting." *Ibid.*

This was the Board's well-established practice until it was enjoined in this litigation. Pet. 10a. Although members of the public attending the meetings were often invited to join the Commissioners in prayer, they were not required to do so. *Ibid.* Any meeting attendee was free to leave the meeting when the invocation began or to come to the meeting after the invocation had taken place. *Ibid.* Some attendees prayed silently with the Commissioner; others did not. Pet. 198a–199a.

The prayers would generally refer to the Christian faith. Pet. 75a, 247a–306a. For example, the Commissioner leading the prayer often ended by referring to "Jesus," "Christ," or "Lord." *Ibid.* Some members of the community objected to this practice and filed a lawsuit in 2013, seeking to enjoin it under the then-applicable Fourth Circuit precedent. See, *e.g.*, *Joyner* v. *Forsyth County*, 653 F.3d 341, 348 (4th Cir. 2011); Pet. 201a.

Before the district court had the occasion to rule on respondents' motion for an injunction, this Court decided *Town of Greece*. The Court held that the tradition of local government legislative prayer is constitutional when the prayer is "solemn and respectful in tone" and "invites lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing." *Town of Greece*, 134 S. Ct. at 1823.

This Court concluded that the practice of opening town meetings with an invocation did not unconstitutionally coerce its listeners. *Town of Greece*, 134 S. Ct. at 1825 (Kennedy, J., plurality); *id.* at 1837 (Thomas, J., concurring). The plurality concluded "that the reasonable observer is acquainted with" the tradition of invocations before town meetings begin "and understands that its purposes are to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens." *Id.* at 1825. Justice Thomas, joined by Justice Scalia, wrote separately, expressing the view that, to the extent that the Establishment Clause governs state or municipal establishments, only "actual legal coercion," not "subtle coercive pressures," violates the Clause. *Id.* at 1835–1837.

The district court in this case nonetheless concluded that *Town of Greece* applied only to prayers delivered by chaplains or invited ministers, not to prayers delivered by legislators—here, the Commissioners. Pet. 217a–218a. According to the court, the "crucial question in comparing the present case with *Town of Greece* is the significance of the identity of the prayer-giver," as this Court "did not explicitly premise its decision on the fact that the Town Council members were not the ones giving the prayers." Pet. 217a. Based on this distinction, the district court permanently enjoined Rowan County's legislative prayer practice. Pet. 245a–246a.

A split panel of the Fourth Circuit reversed. The panel agreed that the crux of the dispute concerned "whether the Board's practice of the elected commissioners delivering such prayers makes a substantive constitutional difference." Pet. 147a. The majority concluded that it did not, explaining that if "legislative prayer is intended to allow lawmakers to 'show who and what they are' in a public forum, then it stands to reason that they should be able to lead such prayers for the intended audience: themselves." Pet. 153a (quoting *Town of Greece*, 134 S. Ct. at 1826 (Kennedy, J., plurality)). After reviewing the prayer record in accordance with the Court's instructions in *Town of Greece*, the majority concluded that Rowan County's practice "did not stray across this constitutional line of proselytization or disparagement." Pet. 157a.

The Fourth Circuit granted rehearing *en banc*, and a majority reversed the panel, thus affirming the district court. Pet. 12a. According to the *en banc* majority, the exclusively legislator-led practice, together with its failure to "embrac[e] religious pluralism and

the possibility of a correspondingly diverse invocation practice," an "unceasing[] and exclusive[]" invocation of "Christianity," introductions such as "Let us pray," in the "intimate setting of a municipal bard," violated the Establishment Clause. Pet. 18a, 29a, 31a, 42a.

Just two months later, the Sixth Circuit, sitting *en banc* in *Bormuth* v. *County of Jackson*, 870 F.3d 494 (6th Cir. 2017), addressed the same issue and reached the opposite conclusion. The majority there emphasized that, "[a]t the heart of this appeal is whether Jackson County's prayer practice falls outside our historically accepted traditions because the Commissioners themselves, not chaplains, or invited community members, lead the invocations." *Id.* at 509. The majority concluded that exclusively legislator-led prayer is constitutionally sound because, since "the founding of our Republic, legislators offered prayers to commence legislative sessions." *Id.* at 509, 515–519.

REASONS FOR GRANTING THE PETITION

I. Certiorari is warranted because legislator-led prayer is widely practiced across the nation.

This Court's review is needed to confirm that allowing legislative prayer to be led by those elected to office—a practice widely observed in cities, counties, and States across the Nation and dating to the practice of the first Congress—is consistent with the Establishment Clause as understood by the Founders and interpreted by this Court.

A. Like many local governments, Pittsylvania County has opened its meetings with legislator-led prayer for centuries.

This Nation has long observed "[a] custom of opening sessions of all deliberative bodies * * * with prayer." *Holy Trinity Church* v. *United States*, 143 U.S. 457, 471 (1892). Pittsylvania County's Board of Supervisors—like petitioner—is no different. Before it was enjoined, the Board had been opening its meetings with an invocation for well over two hundred years. It had been the Board's practice to allow its members to choose to deliver invocations before Board meetings. Reflecting the makeup of the community, these prayers often (but not always) invoked "Jesus" or "Christ" or referred to other Christian beliefs.

The Board members who prayed did so both in accordance with the dictates of their own consciences and in a manner respectful to all those present. The County never needed to establish written guidelines to dictate what content was appropriate, or to prevent those praying from making disparaging comments or exploiting the opportunity as a means of proselytizing. Nor did the Board or anyone else in the County ever review the wording of the prayers to ensure that they met a state-approved test. Common decency ensured that the prayers were both solemn and respectful.

This was the practice of Pittsylvania County until 2013, when a district court enjoined it. See *Hudson* v. *Pittsylvania County*, 2013 WL 1249091, *15 (W.D. Va. Mar. 27, 2013). Relying on Fourth Circuit precedent pre-dating *Town of Greece*, that court began from the premise that "a local government violates the Establishment Clause by opening its meeting with sectarian prayers." *Id.* at *7. The court thus "enjoined [the

Board] from repeatedly openings its meetings with prayers associated with any one religion, which practice has the unconstitutional 'effect of affiliating the government with any one specific faith or belief.'" *Id.* at *15 (quoting *County of Allegheny* v. *ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 603 (1989)). The district court determined that the Board could continue opening its meetings with prayer provided that it "'strive to be nondenominational so long as that is reasonably possible—it should send a signal of welcome rather than exclusion. It should not reject the tenets of other faiths in favor of just one.'" *Ibid.* This injunction addressed only content of the prayers, not the process by which those praying were selected.

Although the district court's order theoretically allowed for prayers not "associated with any one religion" to continue, the specter of judicial censorship and further litigation had the effect of silencing all Board-led prayer. Pittsylvania County's prayer practice was for the benefit of its elected Board members. It allowed the individual Board members to prepare themselves for their meetings. The legislative prayer practice of Pittsylvania County—like the practices of thousands of legislative bodies around the nation—"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 injunction frustrated that purpose.

Then, in *Town of Greece*, this Court "reject[ed] the suggestion that legislative prayer must be nonsectarian" and recognized that "a prayer giver [must be permitted] to address his or her own God or gods as

conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian." 134 S. Ct. at 1822–1823. Yet even then, Pittsylvania County fared no better. When it moved to modify the injunction, the district court modified it only "to eliminate any suggestion that legislative prayer must be nonsectarian"; it held that "the Board's exclusive practice of determining the content of and leading the citizens of Pittsylvania County in prayer associated with one faith tradition at the opening of Board meetings will remain enjoined." *Hudson* v. *Pittsylvania County*, 107 F. Supp. 3d 524, 541 (W.D. Va. 2015). The court acknowledged that "[the] inquiry * * * must be to determine whether the prayer practice * * * fits within the tradition long followed in Congress and the state legislatures." *Id.* at 528 (quoting *Town of Greece*, 134 S. Ct. at 1819). Ultimately, however, the court did not examine whether historical practice included prayer led by legislators praying in accordance with the dictates of their own consciences. See *id.* at 533–537.

This decision—and the Fourth Circuit decision of which petitioner seeks review—effectively silence the prayers of individual legislators. Legislatures across the Nation need this Court to confirm that the Establishment Clause does not countenance that result.

B. Across the country and at all levels of government, legislators open sessions by leading prayer.

The district court in Pittsylvania County's case distinguished *Town of Greece* on the grounds that it did not involve legislator-led prayer. See *Hudson*, 107 F. Supp. 3d at 533. The Fourth Circuit in this case employed similar reasoning to bar legislator-led prayer,

stating that this Court has "consistently discussed legislative prayer practices in terms of invited ministers, clergy, or volunteers providing the prayer," and has "not once described a situation in which the legislators themselves gave the invocation." Pet. 18a–19a (quotations omitted). The court read *Town of Greece* to "take[] for granted the use of outside clergy" and determined that while the historical evidence shows that "lawmakers may occasionally lead an invocation, this phenomenon appears to be the exception to the rule, at least at the state and federal levels." Pet 19a, 22a.

Not so. The Fourth Circuit's conclusion cannot be reconciled with the "unbroken history" of elected officials at all levels of government opening legislative sessions with prayer. *Marsh*, 463 U.S. at 792; see *Bormuth*, 870 F.3d at 511 (observing that "[t]he record in *Town of Greece* also shows that the long-standing practice of legislator-led prayer has continued to today"). As the Fourth Circuit panel in this case confirmed, there is a "long-standing national practice of legislative prayer generally and lawmaker-led prayer specifically. Opening invocations offered by elected legislators have long been accepted as both a mainstay of civic life and a permissible form of religious observance." Pet. 92a; see Pet. 89a ("the tradition and history of lawmaker-led prayer is as prevalent as that of other legislative prayer givers").

Since before the Founding, Congress has opened legislative sessions with prayer led by members. See, *e.g.*, *Bormuth*, 870 F.3d at 509; 2 Robert C. Byrd, *The Senate, 1789-1989: Addresses on the History of the United States Senate* 297, 305 (1982) ("Senators have,

from time to time, delivered the prayer.").[1] As an 1853 Senate Report addressing the constitutionality of the chaplaincy concluded after studying the historical record, the authors of the Establishment Clause "did not intend to prohibit a just expression of religious devotion by *the legislators of the nation, even in their public character as legislators*." S. Rep. No. 376, 32d Cong., at 4 (1853) (emphasis added)).

Both U.S. Senators and Representatives have delivered prayers to open legislative sessions. See Pet. 69a ("In the U.S. Congress, for example, prayers have been give not only by the hired Chaplain, but also by members of Congress."). The congressional record confirms the prevalence of the practice. It is "replete with examples of legislators commencing legislative business with a prayer." Pet. 94a–95a. And this "longstanding" and "uninterrupted" tradition is one that "continues in modern time." *Bormuth*, 870 F.3d at 509; see, *e.g.*, 161 Cong. Rec. S3313 (daily ed. May 23, 2015) (Sen. James Lankford); 159 Cong. Rec. S3915 (daily ed. June 4, 2013) (Sen. William M. Cowan); 155 Cong. Rec. 32,658 (2009) (Sen. John Barrasso); 119 Cong. Rec. 17,441 (1973) (Rep. William H. Hudnut III).

Legislator-led prayer is also commonplace at the state and local levels. "Almost all state legislatures still use an opening prayer as part of their tradition and procedure"; indeed, "opening prayer is standard practice." See National Conference of State Legislatures, Inside the Legislative Process 5-145 (2002).[2] In

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[1] Available at http://www.senate.gov/artandhistory/history/resources/pdf/Chaplain.pdf.

[2] Available at http://www.ncsl.org/documents/legismgt/ILP/02Tab5Pt7.pdf.

most states, legislators themselves at times lead the prayers. *Id.* at 5-152. This widespread practice is also longstanding. "[S]ince at least 1849," "[l]egislator-led prayer has persisted in various state capitals." *Bormuth*, 870 F.3d at 509–510 (commenting that "the historical breadth of legislator-led prayer in the state capitals for over one hundred fifty years more than confirms to us that our history embraces prayers by legislators"). South Carolina, for example, embraced member-led prayer from before the Founding and "routinely welcomed an elected member to deliver invocations." Pet. 93a. Indeed, South Carolina law expressly authorizes its elected officials to open meetings with prayer. S.C. Code Ann § 6-1-160(B)(1) (2016).

This practice has continued unbroken to this day, with a "majority of states and territories honor[ing] requests from individual legislators to give an opening invocation." Pet. 93a; see Pet. 69a (observing that "a majority of state and territorial legislators rely on *lawmaker-led* invocations"). At the time of *Marsh*, for example, the National Conference of State Legislatures (NCSL) surveyed the practices of state legislatures nationwide, finding that chaplain-only prayers are anything but standard practice: "The opening legislative prayer may be given by various classes of individuals. They include chaplains, guest clergymen, *legislators*, and legislative staff members." Brief of NCSL as Amicus Curiae, *Marsh* v. *Chambers*, 463 U.S. 783 (1983), 1982 WL 1034569, at *2, *3 (emphasis added). The NCSL further explained that "[a]ll bodies, including those with regular chaplains, *honor requests from individual legislators either to give the opening prayer* or to invite a constituent member to conduct the prayer." *Ibid.* (emphasis added). Similarly, a 2002 NCSL survey confirmed that a majority of state and territorial

assemblies honor requests from individual legislators to give the opening invocation. *Ibid.*; see also National Conference of State Legislatures, Inside the Legislative Process 5-151–152 (2002) (observing that legislators may offer an opening prayer in at least thirty-one States).[3]

In the Fourth Circuit alone, "seven of the ten legislative chambers utilize elected members for this purpose." Pet. 94a ("Several of these states have enacted legislation recognizing and protecting the historical practice of lawmaker-led prayer."). The "same is true for local governments, where the practice of government officials giving the invocations is widespread." *Ibid.* Pittsylvania County, where legislator-led prayer has been the norm for 200 years, is but one example.

This long tradition of legislator-led prayer is entitled to great weight in the constitutional analysis, as "[t]he Court's inquiry * * * must be to determine whether the prayer practice * * * fits within the tradition long followed in Congress and the state legislatures." See *Town of Greece*, 134 S. Ct. at 1819; *id*. at 1845 (Kagan, J., dissenting); cf. *Cooley* v. *Bd. of Wardens*, 53 U.S. 299, 315 (1851); accord *Printz* v. *United States*, 521 U.S. 898, 905 (1997); *McGrain* v. *Daugherty*, 273 U.S. 135, 156–157, 174 (1927). Yet the decision below gives this long tradition no weight at all, and in the process invalidated the practices of seven state legislative chambers and scores of county boards and city councils. This Court's review is needed.

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[3] Available at http://www.ncsl.org/documents/legismgt/ILP/02Tab5Pt7.pdf.

II. Certiorari is warranted because the decision below conflicts with the Court's holdings that the content of prayer is a matter of conscience and may not be regulated by the state.

As petitioners have shown (at 15–25, 35–37), the decision below directly conflicts with the decision of the Sixth Circuit in *Bormuth* v. *County of Jackson*, 870 F.3d 494 (6th Cir. 2017) (en banc). The decision also conflicts with this Court's precedents, which confirm both that legislative prayer practices observed since the Founding are constitutional and also that, where prayer is constitutionally permissible, the content of the prayer is a matter of conscience that may not be regulated by the courts.

A. In view of the long and widespread tradition of legislative prayer, this Court has repeatedly upheld the practice and affirmed that the content of prayers is a matter of conscience.

Marsh sustained legislative prayer on the ground that it was "deeply embedded in the history and tradition of this country," having been instituted by the authors of the Establishment Clause and "ever since * * * coexist[ing] with the principles of disestablishment and religious freedom." 463 U.S. at 786. Similarly, the Court in *Town of Greece* confirmed that "[the] inquiry * * * must be to determine whether the prayer practice * * * fits within the tradition long followed in Congress and the state legislatures." 134 S. Ct. at 1819.

Indeed, all nine members of the Court in *Town of Greece* agreed that, when legislative prayer is conducted in a manner consistent with the historical prac-

tices of Congress and state legislatures, it is constitutional. As Justice Kagan put it: "I agree with the majority that the issue here is 'whether the prayer practice in the Town of Greece fits within the tradition long followed in Congress and the state legislatures.'" 134 S. Ct. at 1845 (Kagan, J., dissenting).

Legislator-led prayer falls squarely within this tradition. See *supra* Part I.B. Yet the court below paid nothing more than lip service to the historical analysis compelled by *Marsh* and *Town of Greece*. Even as it conceded that "lawmaker-led prayer is far from rare," the court concluded that the "phenomenon appears to be the exception to the rule" and on that basis deemed it constitutionally suspect. Pet. 22a. The court did not explain how legislative prayer practices that date to the Founding become unconstitutional under *Marsh* and *Town of Greece* because those practices are but one of several ways in which legislative prayer has always been conducted. The court also ignored "the historical breadth of legislator-led prayer in the state capitals for over one hundred fifty years." *Bormuth*, 870 F.3d at 510. Not surprisingly, the Sixth Circuit "g[a]ve no credence" to a decision that "apparently did not consider the numerous examples of such [legislator-led] prayers" (*ibid.*)—the analysis compelled by this Court.

In ignoring "the historical breadth of legislator-led prayer" (*ibid.*), the court below equated "[p]rayers led by lawmakers [with] sectarian prayers" (Pet. 24a), but that reasoning too is foreclosed by this Court's decisions. *Marsh* taught that courts should not "embark on a sensitive evaluation or * * * parse the content of a particular prayer" (463 U.S. at 795), and *Town of Greece* taught that the government cannot dictate the

content of prayers or "insist[] on nonsectarian or ecumenical prayer" (134 S. Ct. at 1820). These admonitions, moreover, were grounded in several lines of this Court's precedents.

In *Presbyterian Church* v. *Hull Church*, 393 U.S. 440 (1969), for example, the Court held that "[i]f civil courts undertake" such matters as "the interpretation of particular church doctrines and the importance of those doctrines to the religion," "the hazards are ever present of inhibiting the free development of religious doctrine." *Id.* at 449. Thus, "the First Amendment forbids civil courts from playing such a role." *Ibid.*

Similarly, the Court in *Thomas* v. *Review Bd.*, 450 U.S. 707 (1981), observed that "[c]ourts are not arbiters of scriptural interpretation," and that "the judicial process is singularly ill equipped to resolve [intra-faith] differences." *Id.* at 715, 716. And in *Engel* v. *Vitale*, 370 U.S. 421 (1962), this Court explained that the Framers—who instituted legislative prayer and viewed it as constitutional—recognized that "one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer." *Id.* at 429.

As these decisions recognize, any line between "sectarian" and "nonsectarian" prayer is necessarily a *doctrinal* line. And policing that line requires courts both to interpret different faiths and to make subjective judgments about which aspects of those faiths are vital to their adherents. Thus, public officials (including judges) are "without power to prescribe by law any particular form of prayer." *Engel*, 370 U.S. at 430.

Without grappling with these decisions, however, the court below announced that a handful of the Rowan County prayers "hone too sharply in on doctrinal distinctions" rather than sticking to "the ecumenical dimensions of religious faith." Pet. 38a; accord Pet. 25a (criticizing "the elected members of Rowan County's Board of Commissioners" for "compos[ing] and deliver[ing] their own sectarian prayers featuring but a single faith"). According to the court below, "[t]he ultimate criterion" for determining whether a prayer is constitutional is whether, in the view of the court, the prayer "convey[s] a message of respect and welcome for persons of all beliefs." Pet. 45a.

In the experience of *amicus* Pittsylvania County, legislators pray in a manner that is both solemn and respectful to everyone present. But this Court's decisions foreclose the Fourth Circuit's view that it was constitutionally compelled to rein in prayers that it deemed too "sectarian." Prayer is "too precious to be either proscribed or prescribed by the State." See *Lee* v. *Weisman*, 505 U.S. 577, 589 (1992).

Notably, this aspect of the Fourth Circuit's analysis is likewise inconsistent with the historical analysis on which *Marsh* and *Town of Greece* rest. In *Marsh*, this Court relied on the prayers opening the Continental Congress to show "that the delegates did not consider opening prayers as a proselytizing activity or as symbolically placing the government's 'official seal of approval on one religious view.'" 463 U.S. at 792. The first of those prayers was addressed to the "Lord, our heavenly father, King of Kings and Lord of Lords," and concluded, "All this we ask in the name and through the merits of Jesus Christ thy son, Our Saviour,

Amen."[4] Likewise, in 1983, when *Marsh* was decided, more than 95 percent of invocations offered in the Senate used identifiably Christian language or references. See, *e.g.*, 129 Cong. Rec. 4055 (1983) ("In the name of the Father and the Son and the Holy Spirit."); 129 Cong. Rec. 2278 (1983) ("In the name of the God of Israel and His Son, our Savior."); 129 Cong. Rec. 260 (1983) (opening with a reading from *Jeremiah* and closing: "In the name of Him who loved us unconditionally and who prayed on the cross for the forgiveness of those who put him there. Amen."). Without examining this history in any detail, the court below complained that Rowan County's commissioners "exclusively invoked Christianity." Pet. 31a.

The court below also fretted that "several prayers purported to confess spiritual shortcomings on the community's behalf" or "proclaim[ed] that Christianity is exceptional." Pet. 35a–36a. But ever since the creation of the Senate chaplaincy in 1789, every chaplain has identified himself as Christian and has often led explicitly Christian prayers. Further, some Senate chaplains have regularly read the Lord's Prayer from the Book of Common Prayer, a prayer that includes a request to "forgive us our trespasses."[5]

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[4] 25 *Letters of Delegates to Congress* 1774-1789, at 551–552 (Paul Smith *et al.*, eds., 1976).

[5] *E.g.*, Bird Wilson, *Memoir of the Life of the Right Reverend William White, D.D., Bishop of the Protestant Episcopal Church of the State of Pennsylvania* 322 (1839) (Letter to Rev. Henry V. D. Johns, Dec. 29, 1830); American Book of Common Prayer (1790), A-2, http://www.justus.anglican.org/resources/bcp//1789/1790/mp.pdf.

Naturally, as our Nation's religious diversity has grown, the range of faiths represented has broadened to include Jewish, Muslim, and Hindu prayers, among others. See, *e.g.*, 103 Cong. Rec. 6651 (1957) (Rabbi Arthur Schneier); 138 Cong. Rec. 1718 (1992) (Imam Wallace Mohammed); 153 Cong. Rec. 18,657 (2007) (Rajan Zed). That is as it should be. Contrary to the Fourth Circuit's view, however, several lines of this Court's precedents confirm that it is not for a court to "placing its official stamp of approval upon one particular kind of prayer." *Engel*, 370 U.S. at 429.

Certiorari is needed.

B. The identity of the prayer giver is constitutionally irrelevant.

Even apart from the Nation's historical practice of prayer led by legislators—a "tradition long followed in Congress and the state legislatures" (*Town of Greece*, 134 S. Ct. at 1819)—this Court's legislative prayer decisions confirm that the identity of the person praying is not constitutionally dispositive.

For example, *Marsh* explained that "paid legislative chaplains" and "opening prayers" are *each* consistent with the Establishment Clause. 463 U.S. at 788. And the *Town of Greece* plurality indicated that legislator-led prayer could be a permissible expression of the beliefs of legislators as private citizens: "For members of town boards and commissions, who often serve part-time and as volunteers, ceremonial prayer may also reflect the values they hold as private citizens. The prayer is an opportunity for them to show who and what they are without denying the right to dissent by those who disagree." 134 S. Ct. at 1826.

The Fourth Circuit neglected this teaching in concluding that "[w]hen one of Rowan County's commissioners leads his constituents in prayer, he is not just another private citizen." Pet. 47a. Moreover, if the goal of legislative prayers is, as this Court has repeatedly said, "to accommodate the spiritual needs of lawmakers and connect them to a tradition dating to the time of the Framers" (*Town of Greece*, 134 S. Ct. at 1826), then it is "nonsensical to permit legislative prayers but bar the legislative officers for whom they are being primarily recited from participating in the prayers in any way." *Am. Humanist Ass'n* v. *McCarty*, 851 F.3d 521, 529 (5th Cir. 2017).

Further, if official chaplain-led prayer is constitutional, how would "a pattern of legislator-led prayer with respect to one faith coerce citizens to follow that faith in a way that chaplain-led prayer of a single faith does not?" *Bormuth*, 870 F.3d at 523 (Sutton, J., concurring). And why would "prayers by agents (like in *Marsh* and *Town of Greece*)" be "constitutionally different from prayers offered by principals"? *Id.* at 511–512 (majority op.). What if the principal adopts the prayer of the agent?[6] The decision below does not answer these questions, leaving legislatures to guess

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[6] For example, when the Senate convened in the wake of the September 11, 2001, terrorist attacks, the Chaplain appealed for divine help in gaining "victory over tyranny": "Almighty God, source of strength and hope in the darkest hours of our Nation's history * * * . Quiet our turbulent hearts. Remind us of how You have been with us in trouble and tragedies of the past and have given us victory over tyranny. * * * You are our Lord and Saviour. Amen." 147 Cong. Rec. 16,865 (2001). Then-Senate Majority Leader,

whether their centuries-old prayer practices are now unconstitutional.

According to the Fourth Circuit, the fact that town commissioners were "the sole" and "exclusive" "prayer-givers" had great constitutional significance, because "[b]y arrogating the prayer opportunity to itself, the Board * * * restricted the number of faiths that could be referenced" and was "elbow-deep in the activities banned by the Establishment Clause—selecting and prescribing sectarian prayers." Pet. 28a (quotations omitted). But insofar as there is a risk of a religious message being sent "with invocation prayers," it would seem to "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). The first two official Senate chaplains, Samuel Provoost and William White, were Episcopal bishops who followed *The Book of Common Prayer*.[7] And "[i]f the elected officials offer an invocation prayer in their own personal way, that coerces no one." *Ibid.* "If anything, risks of endorsement and any other risks at the outer edges of the Establishment Clause cases increase if the government must hire a chaplain to permit an opening prayer." *Ibid.*

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"As practiced by Congress since the framing of the Constitution, legislative prayer lends gravity to public business, reminds lawmakers to transcend petty differences in pursuit of a higher purpose, and expresses

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Tom Daschle, thanked the Chaplain, stating: "I know he speaks for us all." *Ibid.*

[7] See generally sources cited *supra* n.2.

a common aspiration to a just and peaceful society." *Town of Greece*, 134 S. Ct. at 1818. The decision below cannot be squared with this Court's precedents or the history that undergirds the long tradition of legislator-led prayer; it conflicts with Sixth Circuit precedent; and it impedes the very purposes of legislative prayer, which this Court has recognized and validated. This Court should grant review.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted.

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