No. 17-565

IN THE
Supreme Court of the United States

ROWAN COUNTY, NORTH CAROLINA,
Petitioner,

v.

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

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are a bipartisan group of 47 current and former Members of Congress who believe that legislative prayer is a typical, vital, robust, and constitutionally protected practice firmly grounded in this Nation's history and tradition—as this Court affirmed in *Marsh v. Chambers*, 463 U.S. 783 (1983), and recently reaffirmed in *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811 (2014). Although *amici* represent diverse faith traditions, they are united in the understanding that legislative prayer, including prayer led by legislators, is historically rooted and constitutionally permissible.

The decision below represents a stark departure from more than 200 years of historical precedent; it trammels on the rights of individual legislators to pray in accordance with their own consciences; and it openly invites the judiciary to parse each word uttered by a legislator who offers a prayer. In contrast to the observer-based effects test applied below, this Court has previously affirmed legislative prayer practices in *Marsh* and *Town of Greece* based on the traditions and

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[1] A list of *amici curiae* appears in Appendix A of this brief. Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part and no one other than the *amici* and their counsel made a monetary contribution to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, counsel for *amici curiae* states that counsel for Petitioner and Respondents received timely notice of intent to file this brief. Petitioner has entered consent on the docket to the filing of *amicus curiae* briefs and Respondents have consented in writing to the filing of this brief.

practices followed in Congress and the state legislatures.

Amici accordingly urge the Court to grant the petition in order to reverse the decision below and to protect the broad tradition of legislative prayer, which includes the historically rooted practice of legislators offering prayers that conform to their individually held beliefs.

SUMMARY OF ARGUMENT

1. There is an undeniable, and intractable, division among the lower courts on whether legislative prayer is constitutional when it is led by a *member* of a governing body, rather than by paid clergy or volunteers. On facts that are materially indistinguishable from each other, and from facts present in this Court's decisions in *Marsh v. Chambers* and *Town of Greece*, the Fourth Circuit below held that the identity of the prayer-giver rendered a prayer practice unconstitutional, while the Sixth Circuit recently held the exact opposite, considering and rejecting the views of the Fourth Circuit. Moreover, both decisions were made in an en banc posture. Absent intervention from this Court, division among the lower courts will only grow.

2. The Fourth Circuit's decision is also in direct conflict with this Court's decisions in *Town of Greece* and *Marsh*. This Court has applied a historical test to legislative prayer. The court of appeals had before it centuries of historical support for member-led prayer, at both the federal and state levels. Nevertheless, the decision below held that prayers indistinguishable in substance from the prayers in *Town of Greece* and *Marsh*, with the same invocatory language, were overly "sectarian" and coercive because they were uttered by a member of the county board rather than

an invited private citizen or taxpayer-funded chaplain.

3. The question presented is critically important to preserve our Nation's historical, widespread practice of member-led legislative prayer. Legislators across the country and at all levels participate in the opportunity to lead prayers that demonstrate gravity and solemnity in the proceedings and turn the legislators' minds to a higher cause. Should the Fourth Circuit's decision remain in place, public officials would be precluded from offering prayers according to their consciences, contrary to this Court's holdings. This implicates legislators' own free speech and free exercise rights, as they may be forced to choose between serving in a deliberative body and offering authentic prayers to open sessions. What is more, these unconstitutional limitations on prayer content or prayer-giver identity would compel courts to act as monitors over legislative sessions, dictating to legislative bodies how to conduct their meetings. And under the Fourth Circuit's observer-based effects test, lower courts are bound to generate inconsistent results on similar fact patterns.

ARGUMENT

This Court affirmed the constitutionality of legislative prayer in *Marsh v. Chambers*, 463 U.S. 783 (1983), holding that "[i]n light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society." *Id.* at 792. As this Court reaffirmed in *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), the proper constitutional inquiry focuses on whether a prayer practice "fits within the tradition long

followed in Congress and the state legislatures." *Id.* at 1819.

But the Fourth Circuit's en banc decision below struck down a non-discriminatory and non-proselytizing prayer practice because members of the county board delivered the prayers. That decision directly conflicts with this Court's precedent and will, barring review, upend our country's rich tradition of legislative prayer, which has for centuries permitted individual legislators to "solemnize" lawmaking by "ask[ing] their own God for blessings of peace, justice and freedom." *Town of Greece*, 134 S. Ct. at 1823. It also directly conflicts with the Sixth Circuit's en banc decision upholding a materially identical prayer practice.

This Court's review is necessary to resolve the intractable conflict among lower courts regarding member-led legislative prayer, faithfully apply this Court's decisions in *Marsh* and *Town of Greece*, clarify the proper standard for evaluating legislative prayer practices, and restore First Amendment rights to public officials.

I. THERE IS AN ACKNOWLEDGED AND INTRACTABLE CIRCUIT SPLIT REGARDING THE CONSTITUTIONALITY OF LEGISLATOR-LED PRAYER.

After the Fourth Circuit issued its en banc decision below, the Sixth Circuit, also sitting en banc, reached the opposite conclusion on materially identical facts. The Sixth Circuit "recognize[d] [that its] view regarding Jackson County's invocation practice is in conflict with the Fourth Circuit's recent en banc decision." *Bormuth v. Cty. of Jackson*, 870 F.3d 494, 509 n.5 (6th Cir. 2017) (en banc); *see* Pet. 17-25.

1. Rowan County's Board of Commissioners begins its meetings with a brief, respectful prayer, offered on a rotating basis by a commissioner and consistent with that individual commissioner's religious beliefs. Pet. 2-4. This practice is indistinguishable from the prayer practice at issue in *Bormuth*. As in *Bormuth*, the decision below considered (i) neutral prayer-giver selection policies, with commissioners rotating in offering an opening prayer, *compare* App. 7, *with Bormuth*, 870 F.3d at 498; (ii) prayers that were generally "Christian," ending "in the name of Jesus," *compare* App. 7-8, *with Bormuth*, 870 F.3d at 498; (iii) invocatory language, like "Please bow your heads" or "Let us pray," *compare* App. 7, *with Bormuth*, 870 F.3d at 498; and (iv) the same historical evidence of legislator-led prayer, provided by *amici*, including some of the *amici* that have signed this brief, *compare* App. 22, *with Bormuth*, 870 F.3d at 509.

2. Considering all of these circumstances, the decision below struck down Rowan County's practice as unconstitutional. It held that the facially neutral prayer-giver selection policy was constitutionally infirm because it meant "the prayer opportunity … was exclusively reserved for the commissioners," App. 18, whom it described as "the very embodiment of the state," *id.* at 26. Regarding prayer content, the court decried what it viewed as "unmistakably Christian" prayers, primarily because many of them "mentioned 'Jesus,' 'Christ,' or the 'Savior.'" App. 7. Such language was overly "sectarian" for the majority. *Id.* The court also found that invocatory language such as "Let's pray together" or "Please pray with me" was coercive and served to "proselytiz[e]" the members of the audience. *Id.* at 39-40. Admitting that all of these factors were also present in both *Town of Greece* and

Marsh, the court zeroed in on one fact that it believed made Rowan County's practice "unprecedented"—"legislators themselves gave the invocations" and did so "exclusively." App. 18. Rejecting the historical evidence of legislator-led prayer, *id.* at 22, the court concluded that "the Constitution does not allow what happened in Rowan County," *id.* at 5.

3. In direct conflict with the Fourth Circuit's decision, the Sixth Circuit upheld Jackson County Michigan's materially identical prayer practice. Pet. 13. Regarding prayer-giver selection, the Sixth Circuit held that the facially neutral policy of having commissioners offer the prayer was permissible. *Bormuth*, 870 F.3d at 513-14 (noting that legislators picked "the same Presbyterian clergyman for sixteen consecutive years" in *Marsh*). Regarding prayer content, the court recognized that the prayers were "generally Christian in tone" and used language like "'Heavenly Father'" and "'Lord'" and ended "'in Jesus's name,'" *id.* at 498, 512-13; *id*. at 521 (Sutton, J., concurring), but held that, under *Town of Greece*, "the Founders embraced these universal and sectarian references" as permissible, *id.* at 512 (majority op.). The Sixth Circuit found nothing remarkable, let alone coercive, in the invocatory language, such as "'let us pray'" or "'stand and please take a reverent stance.'" *Id.* at 498. After surveying the evidence, the Sixth Circuit found "[m]ost significant[]" that "history shows that legislator-led prayer is a long-standing tradition." *Id.* at 509.

* * *

These two cases are irreconcilable. The Sixth Circuit examined the Fourth Circuit's reasoning, *Bormuth*, 870 F.3d at 509 n.5, 510, 512-13, 514, 516 n.11, and found it "unpersuasive," *id.* at 509 n.5. Both

cases were decided initially by divided panels, and then ultimately in an en banc posture. This division will persist and grow until and unless this Court steps in. That alone warrants certiorari. S. Ct. R. 10(a).

II. THE DECISION BELOW CONTRAVENES THIS COURT'S DECISIONS IN *MARSH* AND *TOWN OF GREECE*, AND MORE THAN 200 YEARS OF LEGISLATIVE PRAYER TRADITION.

The Fourth Circuit's decision disregards the historical approach to analyzing legislative prayer practices that this Court has required in *Marsh* and *Town of Greece*. In the process, the decision below upended more than two centuries of accepted prayer practice at the federal and state levels. Instead, the court below concocted a coercion analysis based on the effects a prayer would have on an unreasonable "reasonable observer"—a test wholly irreconcilable with *Town of Greece* and the basic assumptions underlying the historical approach to legislative prayer questions. These important errors warrant review. S. Ct. R. 10(c).

A. The Decision Below Rejects This Court's Historical Approach To Legislative Prayer.

This Court's decisions in *Town of Greece* and *Marsh* require courts to analyze legislative prayer practices through a historical lens, asking whether a given practice "fits within the tradition long followed in Congress and the state legislatures." *Town of Greece*, 134 S. Ct. at 1819; *see also Marsh*, 463 U.S. at 792; *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part). The decision below disregarded that necessary analysis.

1. Lawmaking sessions opened with prayer have been an integral part of America's legislative fabric since the dawn of the Republic. The First Continental Congress famously opened with a prayer rich in faith-specific language and offered by Anglican minister Jacob Duché at the behest of Samuel Adams. *Town of Greece*, 134 S. Ct. at 1833 (Alito, J., concurring).

Legislator-led prayer fits comfortably within this time-honored tradition alongside prayers offered by paid clergy or volunteers. Indeed, there is no question "that legislator-led prayer is a long-standing tradition," *Bormuth*, 870 F.3d at 509, and is part of the broader tradition of legislative prayer approved by this Court in *Marsh* and *Town of Greece*.

As a Senate committee concluded more than 160 years ago: "[The Founders] did not intend to prohibit a just expression of religious devotion by the legislators of the nation, *even in their public character as legislators*." S. Rep. No. 32–376, at 4 (1853) (emphasis added). Accordingly, Members of Congress have, for well over a century (at least) offered prayers to open legislative sessions. *E.g.*, 58 Cong. Rec. 7841 (1919) (Speaker Gillett, "request[ing]" members "join[] in the Lord's prayer"); 27 Cong. Rec. 1584 (1895) (Rep. Everett); 27 Cong. Rec. 1629 (1895) (Rep. Everett); 26 Cong. Rec. 5878 (1894) (Rep. Everett); 23 Cong. Rec. 5571 (1892) (Rep. McKinney); *see also* Sen. Robert C. Byrd, Senate Chaplain, *in* II *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.").[2]

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[2] The *Congressional Record* did not consistently include the full text of the prayer that opened each Senate session until

This "unambiguous and unbroken history," *Marsh*, 463 U.S. at 792, continues to this day. *E.g.*, 161 Cong. Rec. S3313 (daily ed. May 23, 2015) (Sen. Lankford); 159 Cong. Rec. S3915 (daily ed. June 4, 2013) (Sen. Cowan); 155 Cong. Rec. 32,658 (2009) (Sen. Barrasso); 151 Cong. Rec. 5444 (2005) (Sen. Santorum); 142 Cong. Rec. 488 (1996) (Sen. Warner); 129 Cong. Rec. S4165 (1983) (Sen. Baker) (noting that it was "the seventh prayer Senator Danforth has given in the Senate"); 125 Cong. Rec. 2828 (1979) (Sen. Danforth); *id*. at 2805 (1979) (Sen. Heflin); 124 Cong. Rec. 22,983 (1978) (Sen. Danforth); 123 Cong. Rec. 30,728 (1977) (Sen. Danforth); 123 Cong. Rec. 4364 (1977) (Sen. Danforth); 119 Cong. Rec. 39,076 (1973) (Sen. Bennett); 119 Cong. Rec. 17,441 (1973) (Rep. Hudnut); 114 Cong. Rec. 16,043 (1968) (Rep. Albert); 111 Cong. Rec. 12,588 (1965) (Sen. Bennett); 102 Cong. Rec. 1935 (1956) (Sen. Carlson); 100 Cong. Rec. 11,505 (1954) (Sen. Bennett). Relatedly, legislators' assistants have also offered the prayer. *E.g.*, 137 Cong. Rec. 11,365 (1991) (prayer offered by Rev. Hampton Joel Rector); 111 Cong. Rec. 15,561 (1965) (prayer offered by Rev. Clair M. Cook, Th. D.); 111 Cong. Rec. 3304 (1965) (same); 110 Cong. Rec. 6861 (1964) (same).

2. A similar historical practice exists at the state level, including within the states comprising the Fourth Circuit. South Carolina's Provincial Congress welcomed member-led prayer from before the signing of the Declaration of Independence, asking "[t]hat the Reverend Mr. Turquand, a Member, be desired to celebrate divine service in Provincial Congress."

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approximately 1914. *See* Chaplain's Prayer, Senate.gov, https://www.senate.gov/reference/Sessions/Traditions/Chaplains_Prayer.htm (last visited Nov. 13, 2017).

American Archives, *Documents of the American Revolutionary Period 1774-1776*, at 1112 (1776) (South Carolina); *see also Journal of the Provincial Congress of South Carolina, 1776*, at 35, 52, 75 (1776) (examples of "Divine Service" led by Rev. Turquand).

Of the fifty-seven active days of West Virginia's first constitutional convention of 1861, thirty-seven (or 65%) were opened with prayers *by members of the convention* and not chaplains.[3] A similar record exists across the country. *See*, *e.g.*, *Debates and Proceedings of the Convention* [*Arkansas*] 44, 57, 68, 75, 77 (1868) (members of the convention opening proceedings with prayer); 1 *Debates and Proceedings of the Constitutional Convention* [*Illinois*] 166 (1870) (same); 2 *Report of the Debates and Proceedings of the Convention* [*Indiana*] 1141, 1294, 1311, 1431 (1850) (same); *Journal of the Constitutional Convention of the State of North Carolina* 7, 9, 18, 249 (1868) (same); *Journal of the Constitutional Convention of the State of Ohio* 5, 45, 53, 63 (1912) (same); 1 *Official Report of the Proceedings and Debates* [*Ohio*] 100, 345, 358 (1873) (same); 1 *Official Report of the Proceedings and Debates* [*Utah*] 59, 975 (1898) (same); 2 *Report of the Proceedings and Debates of the Constitutional Convention of the State of Virginia* 1721, 1728, 1780, 1871, 2228, 2404, 2512, 2672, 3154 (1906) (same).

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[3] *Debates and Proceedings of the First Constitutional Convention of West Virginia* (1861-1863), http://www.wvculture.org/history/statehood/cctoc.html (last visited Nov. 14, 2017). Prayers were offered by members of the convention on November 30, December 2, 11, 14, 16, 18-20 of 1861, and January 7-10, 13-16, 20, 24-25, 27-30, February 1, 3-8, 10, 12-14, 17-18 of 1862. *See id.*

3. Strikingly, the records in both *Marsh* and *Town of Greece* also encompassed legislator-led prayer. The legislative journals of Nebraska's Unicameral show members offering prayers in the lead-up to *Marsh*.[4] And the survey from the National Conference of State Legislatures ("NCSL") that this Court relied on in *Marsh* confirmed that numerous states had "legislators, and legislative staff members" offering prayers. Br. of the NCSL as *Amicus Curiae*, *Marsh v. Chambers*, 463 U.S. 783 (1983) (No. 82-23), 1982 U.S. S. Ct. Briefs LEXIS 912, at *2. The record in *Town of Greece* similarly showed town officials offering the invocation, or opening with silent prayer. *See* Joint Appendix, *Town of Greece v. Galloway*, 134 S. Ct. 1871 (2014) (No. 12-696), 2013 WL 3935056, at 66a (Aug. 20, 2002); *id.* at 26a (Jan. 5, 1999); *id.* (Jan. 19, 1999); *id.* (Feb. 16, 1999); *id.* at 29a (May 13, 1999); *id.* at 45a (Sept. 19, 2000); *id.* at 57a (Sept. 18, 2001).

4. But the Fourth Circuit paid little heed to this Court's directive that legislative prayer practices should be judged by whether they fit "within the tradition long followed in Congress and the state legislatures." *Town of Greece*, 134 S. Ct. at 1819; *id.* at 1825 (plurality op.) ("It is presumed that the reasonable observer is acquainted with this tradition and understands that its purposes are to lend gravity

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[4] *See*, *e.g.*, 1 *Legislative Journal of the State of Nebraska*, 85th Leg., 1st Sess. 2087 (May 17, 1977), http://nebraskalegislature.gov/FloorDocs/85/PDF/Journal/r1journal.pdf ("The prayer was offered by Mrs. Marsh."); *id.* at v (listing Shirley Marsh as a member); 1 *Legislative Journal of the State of Nebraska*, 85th Leg., 2d Sess. 640 (Feb. 13, 1978), http://nebraskalegislature.gov/FloorDocs/85/PDF/Journal/r2journal.pdf ("The prayer was offered by Senator Kremer.").

to public proceedings and to acknowledge the place religion holds in the lives of many private citizens ….”). It instead determined that it should follow “general principles animating the Establishment Clause,” jettisoned any meaningful historical analysis, and concluded that, at most, legislator-led prayer was an “exception to the rule.” App. 13, 22.[5]

A wealth of historical evidence contradicts the Fourth Circuit’s conclusion. Legislator-led prayer is a historically accepted and widely practiced aspect of the broad tradition of legislative prayer approved by this Court. The Fourth Circuit’s analysis is irreconcilable with our Nation’s history and traditions, as well as this Court’s approach to legislative prayer. Review is warranted to protect this country’s “unambiguous and unbroken history” of legislative prayer, *Marsh*, 463 U.S. at 792, and to resolve the conflict between this Court’s precedents and the decision below.

B. The Decision Below Otherwise Squarely Contradicts *Town Of Greece* And *Marsh*.

The Fourth Circuit functionally, and erroneously, treated the identity of the prayer-giver as the determinative factor in the constitutionality of legislative prayer. This Court has held that the relevant consideration in deciding who gives the prayer was whether there was an “impermissible motive” behind it. *See Marsh*, 463 U.S. at 793-94. It is clear that no such motive is present here. *See* App. 7. The Fourth Circuit disregarded the long history of legislator-led prayer and labeled Rowan County’s practice “unprecedented.” App. 18. It then took

[5] Oddly, the en banc majority’s author recognized at the panel stage that there is a “robust tradition” of legislator-led prayer. App. 183 (Wilkinson, J., dissenting).

factors this Court has expressly *approved*, and concluded through some unclear constitutional synergy that Rowan County's prayer practice violates the Establishment Clause. *See* App. 46. This analysis cannot be reconciled with *Town of Greece* and *Marsh*.

1. This Court explicitly approved the use of faith-specific language in both *Marsh* and *Town of Greece*. The prayers in *Marsh* included "pointed Christian themes," for instance mentioning "'the suffering and death'" of "'Christ crucified,'" the "'power of the cross,'" the "'glorious resurrection,'" and man's "'redemption.'" App. 109 (Agee, J., dissenting) (quoting *Marsh*, 463 U.S. at 823 n.2 (Stevens, J., dissenting)). Similarly, the prayers in *Town of Greece* gave "'[p]raise and glory'" to God "'Our Father'" and to "'the Holy Spirit,'" quoted in full the Lord's Prayer, mentioned "'the saving sacrifice of Jesus Christ on the cross,'" declared that God the Father, "'Jesus Christ … and the Holy Spirit [are] one God,'" and more often than not ended "'in the name of … Jesus Christ.'" *Id.* at 106-09 (quoting Joint Appendix from *Town of Greece*). This Court acknowledged the right of the individual who offers a legislative prayer to "ask *their own God* for blessings of peace, justice, and freedom." *Town of Greece*, 134 S. Ct. at 1823 (emphasis added); *id.* at 1822 ("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 ….").

Consistent with that ideal, legislators have offered faith-specific prayers throughout our Nation's history. For instance, the Acting President *pro tempore* of the Senate has led the entire Senate in reciting the Lord's Prayer (indeed, the King James version, which includes the ending doxology "For

Thine is the kingdom and the power and the glory, forever"). *See*, *e.g.*, 110 Cong. Rec. 21,213 (1964). And other Senators have offered prayers addressed to "Our Father in Heaven" and ending "in the name of Thy Son, Jesus Christ. Amen." 119 Cong. Rec. 39,076 (1973) (Sen. Bennett); *see also* 161 Cong. Rec. S3313 (Sen. Lankford) ("In the Name of Jesus, I pray. Amen.").

Nonetheless, the Fourth Circuit erroneously condemned what it saw as "unmistakably Christian" prayers in Rowan County, App. 7, holding that its conception of a "reasonable observer," including an "exceptionally well-informed citizen steeped in the Court's legislative prayer jurisprudence," would "be surprised to find" such "sectarian invocations" being delivered by legislators, App. 33. That ruling is contrary to this Court's express injunction against "sifting sectarian from nonsectarian speech," *Town of Greece*, 134 S. Ct. at 1822, and the Fourth Circuit's analysis throws courts into theological thickets. The Fourth Circuit labeled, with numerical certainty, the number of "sectarian" prayers versus "non-sectarian" prayers at issue: by the majority's theology and arithmetic, 143 to 4. App. 32. A majority of the Fourth Circuit has concluded that United Methodists, Independent Baptists, and Southern Baptists (the convictions of the commissioners at issue) are all "one faith." *Id.* Presumably, the court would also view "Roman Catholics, Southern Baptists, Mormons, Quakers, Episcopalians, Lutherans, [and] Methodists," *Bormuth*, 870 F.3d at 513, in the same way. There is hardly a task "less amenable to the competence of the federal judiciary, or more deliberatively to be avoided where possible," than distinguishing "'sectarian' religious practices" from "ecumenical" ones. *Lee v. Weisman*, 505 U.S. 577, 616-

17 (1992) (Souter, J., concurring). The Fourth Circuit's inappropriate religious musings permeate its approach, and cannot be reconciled with this Court's precedent.

2. This Court has also expressly approved of prayer-givers beginning their prayers with invocatory language. The prayers in *Town of Greece* began, "'Let us pray,'" "'[W]e acknowledge,'" "'Would you bow your heads with me,'" and "'Join me in prayer.'" App. 105-09 (Agee, J., dissenting) (quoting Joint Appendix from *Town of Greece*). This invocatory language is as common for the laity as it is for the clergy. *See Town of Greece*, 134 S. Ct. at 1832 (Alito, J., concurring) (noting that "Let us pray" is an "almost reflexive" way to begin prayer). Numerous Members of Congress have begun prayers with this language, *e.g.*, 161 Cong. Rec. S3313; 125 Cong. Rec. 2828; *id.* at 2805, which is "*inclusive*, not coercive," *Town of Greece*, 134 S. Ct. at 1826 (plurality op.) (emphasis added).

Notwithstanding this Court's contrary ruling, the Fourth Circuit determined that innocuous prefatory language, such as "Let us pray," was coercive and "proselytizing." App. 40. The court's hypothetical "reasonable observer" could not abide such language, so the court declared it state-sponsored coercion. *Id.* at 41. Much like the plaintiffs, who subjectively "felt" coerced even though numerous others around them did not participate in the prayers, App. 7, 10, 44, 118, 176, the Fourth Circuit's hypothetical observer demands prayers begin without this customary language.

This "reasonable observer" is worlds apart from the premise underlying this Nation's longstanding constitutional tradition of legislative prayer: "that adult citizens, firm in their own beliefs, can tolerate

and perhaps appreciate a ceremonial prayer delivered by a person of a different faith." *Town of Greece*, 134 S. Ct. at 1823. Legislators do not engage in impermissible coercion merely by exposing constituents to prayers they would rather not hear and in which they need not participate. Indeed, the Fourth Circuit's application of its "reasonable observer" standard bears an uncanny resemblance to the *Lemon* test, which this Court has pointedly declined to apply in this context. *See Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); *see also* App. 33-34 (holding that a "reasonable observer" would take "sectarian invocations being delivered exclusively by the commissioners" to be an endorsement of "one faith and one faith only"); *Bormuth*, 870 F.3d at 515 (criticizing the initial Sixth Circuit panel's similar approach as effectively applying "the *Lemon* test").

Under this Court's precedent, what matters is this Nation's well-established tradition of legislative prayer. *Town of Greece*, 134 S. Ct. at 1826 (plurality op.) ("[T]hat the prayers gave [the plaintiffs] offense and made them feel excluded … does not equate to coercion."). At any point, respondents were free to "exit the room during a prayer they find distasteful" and even their "quiet acquiescence will not, in light of our traditions, be interpreted" as coerced participation. *Id.* at 1827. Thus, in addition to the Fourth Circuit's departure from a historical analysis, review is warranted to correct the Fourth Circuit's skewed understanding of this Court's coercion framework.

III. THE QUESTION PRESENTED IS IMPORTANT, WITH FAR-RANGING IMPACT FOR CONGRESS AND ALL OTHER LEGISLATIVE BODIES IN THE UNITED STATES.

The practice of legislative prayer is deeply rooted in our Nation's history, and it continues to hold significant meaning for legislative bodies across the country. These bodies engage in legislative prayer to set the legislators' minds on a higher purpose and to lend gravity to the important tasks before them. The decision below, left unreviewed, eliminates the opportunity for public officials to offer these prayers—which are given for the legislators' benefit—in accordance with their consciences. The decision further compels courts to meddle in the internal affairs of coordinate branches of government, dictating to them how to conduct their meetings—all to enforce an ahistorical, incoherent, observer-based effects test that will generate conflicting results. S. Ct. R. 10(c).

A. Legislative Prayer, Including Member-Led Prayer, Is A Common And Meaningful Practice At The Federal, State, And Local Levels.

Legislative prayer has been practiced by deliberative public bodies at all levels of government since the Founding, and even earlier. It is "part of the fabric of our society," *Marsh*, 463 U.S. at 792, and is a deeply significant and meaningful practice for many legislators. Congress from its earliest days has opened with a prayer—a practice that is also widespread at the state and local levels. *See* Part II.A.

The virtual ubiquity of this practice is in part owing to the vital role legislative prayer plays in aiding public servants. After all, "[t]he principal

audience for these invocations is not, indeed, the public but lawmakers themselves." *Town of Greece*, 134 S. Ct. at 1825 (plurality op.). Legislative prayer's purpose is to "accommodate the spiritual needs of lawmakers." *Id*. at 1826. It "sets the mind to a higher purpose and thereby eases the task of governing," *id*. at 1825, and "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," *id*. at 1818 (majority op.).

Member-led prayer may be particularly well suited to achieve these aims. Because the prayer presents "an opportunity for [lawmakers] to show who and what they are," *Town of Greece*, 134 S. Ct. at 1826 (plurality op.), legislators are a natural choice to lead a prayer consistent with their own consciences. Indeed, "[f]or 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." *Id*.

The pages of the Congressional Record repeatedly reflect the unifying effects of member-led legislative prayer. Following the attempted assassination of President Reagan, Senator John Danforth of Missouri led the Senate in three prayers—"one for the President, one for [those] … who were also injured in the shooting, and one for the country." *See* 129 Cong. Rec. 7630 (1983) (remarks of Sen. Baker). In the midst of another moment of national crisis, and recalling Benjamin Franklin's call for divine guidance during the Constitutional Convention, Senator Byrd stated that Senator Akaka's prayer at an all-Senators meeting in the Old Senate Chamber "set just the right tone and the right spirit" for tense deliberations about

how the impeachment trial of President Clinton should proceed. 145 Cong. Rec. 1408 (1999). The Senators emerged two hours later with a bipartisan agreement that passed 100-0 on the Senate floor.[6] This is consistent with the way legislative prayer has always been practiced. *See Town of Greece*, 134 S. Ct. at 1823 (referencing Rev. Duché's prayer delivered to the Continental Congress in 1774 and citing John Adams's letter approving the practice); *see also* Part II.A.

State legislative bodies also frequently open sessions with member-led legislative prayer. According to a survey conducted by the NCSL, 47 chambers allow people other than appointed or visiting chaplains to offer the opening prayer. And in 34 jurisdictions, opening prayers are offered by a member, clerk, or legislative staff person.[7]

This brief sketch of the vast practice and salutary effects of member-led legislative prayer demonstrates that the practice is by no means "unprecedented"—as the Fourth Circuit asserted, App. 18—but is a meaningful and foundational practice of legislative bodies across our Nation.

B. The Decision Below Violates The First Amendment Rights Of Legislators.

Like all private citizens, legislators and public officials are entitled to the full protection the Constitution, including free exercise and free speech

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[6] *A Behind-The-Scenes Look At The Senators' Meeting*, CNN (Jan. 8, 1999), http://www.cnn.com/ALLPOLITICS/stories/1999/01/08/senate.color/.

[7] NCSL, Prayer Practices, in *Inside the Legislative Process*, at 5-145, -151 to -152 (2002) ("NCSL Survey"), *available at* http://www.ncsl.org/documents/legismgt/ilp/02tab5pt7.pdf.

rights. But the Fourth Circuit's decision, left unreviewed, imperils these cherished constitutional rights.

Legislators in the Fourth Circuit are now subject to judicial censorship of religious expressions upon assuming public office. A private citizen in Rowan County, if invited by the Board to offer a prayer to open a session, must be left free to pray in accordance with his or her own conscience. *Town of Greece*, 134 S. Ct. at 1822-23 ("Once 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."). But, under the Fourth Circuit's decision, that same person would be precluded from offering the exact same prayer in the exact same setting if he or she were elected to the Board. This is especially troubling because, as the petition notes, the prayers at issue here "necessarily reflected the Commissioner's personal beliefs, values, and contemporary concerns about the community or world at large." Pet. 4.

The Free Exercise Clause prohibits the government from conditioning the availability of a state-law right on surrendering religious commitments. *See McDaniel v. Paty*, 435 U.S. 618, 626 (1978). But that is precisely what the Fourth Circuit's decision does. Citizens in the Fourth Circuit must surrender their ability to offer legislative prayer as their consciences dictate should they choose to join a legislative body—something all citizens have a right to pursue. *See id.*; *see also Torcaso v. Watkins*, 367 U.S. 488, 495-96 (1961). By declaring Rowan County's legislative prayer practice unconstitutional based on the prayer-givers' status as commissioners, the

decision below impermissibly forces citizens to choose between these two rights. It should not be permissible for a legislative body to force a member to pray publicly, and it should not be permissible to prohibit a member of a legislative body from praying.

The decision below is similarly antithetical to free speech principles. An individual invited to pray must be allowed to pray as his or her conscience dictates, but the Fourth Circuit's rule regulates the content of the prayer when the prayer-giver is a public official. It restricts legislators from praying from their own religious perspective—a First Amendment violation. *See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993). Restricting a class of speakers from offering a prayer from their religious perspective while ensuring others receive that right is incompatible with that class of speakers' free speech protections. Limiting an elected official's speech based on its content is inconsistent with First Amendment protections for all Americans.

Given the wide range of legislative bodies that employ member-led legislative prayer, the Fourth Circuit's decision impacts a vast cross-section of individuals and governing bodies. Under the rule applied by the decision below, members of city councils, county boards, and state legislatures around the country, as well as Members of Congress, stand to lose these fundamental First Amendment freedoms—simply because of their position as public servants.

C. The Decision Below Threatens To Entwine Judges Into The Internal Affairs Of Legislative Bodies.

Review is also warranted because courts applying the Fourth Circuit's observer-based effects test would be forced to pore over records and transcripts with

watchful eye, and make determinations that should be left to deliberative bodies. For example, courts cannot assess the Fourth Circuit's factor of "close proximity" between the legislative prayer and the consideration of individual petitions, App. 44 (internal quotation marks omitted), without determining precisely when the body is conducting official business—a determination best left for the bodies themselves.

This Court, in contrast, rightly has hesitated to interfere with the internal workings of a coordinate branch of government, especially in the First Amendment context. *See Town of Greece*, 134 S. Ct. at 1822 (citing *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 705-06 (2012)). In *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), this Court unanimously held that "the Senate is in session when it says it is" because the Constitution delegates broad authority to the Senate "to determine how and when to conduct its business." *Id*. at 2574. The Senate has extensive control over its schedule, including "how to conduct the session." *Id*.

This case allows the Court to address the extent to which legislative prayer practices also fall within legislative bodies' discretion. So long as a legislative prayer practice is within the confines of the Establishment Clause as outlined in *Marsh* and *Town of Greece*, courts should not dictate to legislative bodies how to conduct prayers.

The panel dissent below demonstrated the type of intrusive analysis lower courts could engage in when it suggested that Rowan County's prayer practice would have passed muster if the County had only begun its meetings by reading a judicially crafted "Message of Religious Welcome" included in the

dissent. App. 179 (Wilkinson, J., dissenting). These types of ad hoc, fine-grained directives to deliberative bodies on how to conduct their meetings displace the discretion these bodies are constitutionally owed.

Not only will courts be forced to meddle in the internal affairs of legislative bodies, they must do so without adequate guidance. Because the Fourth Circuit's approach requires applying fact-sensitive analysis to an observer-based effects test, similar prayer practices could be upheld by one court and struck down by another.

A clear, uniform standard from the Court is necessary to restore the proper boundaries between courts and deliberative bodies.

* * *

The Fourth Circuit's decision, if left unreviewed, threatens a centuries-long practice that has served to uplift and ennoble the legislative process. Legislators at all levels of government will feel the effects of this erroneous decision. This Court's review is warranted to speak directly and clearly to the recurring and important question dividing the lower courts, and to ensure that legislators at all levels of government may continue to participate in the solemn, profound, and centuries-old constitutional tradition of legislative prayer.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 15, 2017

APPENDIX A

APPENDIX A

TABLE OF CONTENTS

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List of Amici Curiae

Name	**State/District**
Sen. James Lankford	OK
Rep. Richard Hudson	NC-08
Sen. Roy Blunt	MO
Sen. John Boozman	AR
Sen. Richard Burr	NC
Sen. Ted Cruz	TX
Sen. Steve Daines	MT
Sen. Lindsey Graham	SC
Sen. James M. Inhofe	OK
Sen. James E. Risch	ID
Sen. Thom Tillis	NC
Rep. Robert B. Aderholt	AL-04
Rep. Rick Allen	GA-12
Rep. Brian Babin	TX-36
Rep. Ted Budd	NC-13
Rep. Jeff Duncan	SC-03
Rep. Blake Farenthold	TX-27
Rep. Bill Flores	TX-17
Rep. Virginia Foxx	NC-05
Rep. Trent Franks	AZ-08
Rep. Bob Goodlatte	VA-06

List of Amici Curiae (continued)

Name	**State/District**
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Rep. Andy Harris, M.D.	MD-01
Rep. Vicky Hartzler	MO-04
Rep. Jody Hice	GA-10
Rep. George Holding	NC-02
Rep. Bill Huizenga	MI-02
Rep. Randy Hultgren	IL-14
Rep. Mike Johnson	LA-04
Rep. Walter Jones	NC-03
Rep. Doug Lamborn	CO-05
Rep. Barry Loudermilk	GA-11
Rep. Patrick McHenry	NC-10
Fmr. Rep. Mike McIntyre	NC-07
Rep. Mark Meadows	NC-11
Rep. Pete Olson	TX-22
Rep. Steven Palazzo	MS-04
Rep. Steve Pearce	NM-02
Rep. Robert Pittenger	NC-09
Rep. Phil Roe, M.D.	TN-01
Rep. Todd Rokita	IN-04
Rep. David Rouzer	NC-07
Rep. Adrian Smith	NE-03
Rep. Tim Walberg	MI-07

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Rep. Randy Weber	TX-14
Rep. Brad Wenstrup	OH-02