No. 15-1591

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

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Nancy Lund, Liesa Montag-Siegel, and Robert Voelker,
*Plaintiffs-Appellees*,

*v.*

Rowan County, North Carolina,
*Defendant-Appellant*.

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On Appeal from the United States District Court for the
Middle District of North Carolina

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# BRIEF FOR MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF ROWAN COUNTY, NORTH CAROLINA

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| **Name** | **State/District** |
|---|---|
| Rep. Andy Harris | MD-01 |
| Sen. Thom Tillis | NC |
| Rep. Walter Jones | NC-03 |
| Rep. Virginia Foxx | NC-05 |
| Rep. Mark Walker | NC-06 |
| Rep. David Rouzer | NC-07 |
| Fmr. Rep. Mike McIntyre | NC-07 |
| Rep. Richard Hudson | NC-08 |
| Rep. Robert Pittenger | NC-09 |
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| Rep. George Holding | NC-13 |
| Sen. James Lankford | OK |
| Rep. Jeff Duncan | SC-03 |
| Rep. Trey Gowdy | SC-04 |
| Rep. J. Randy Forbes | VA-04 |
| Rep. Bob Goodlatte | VA-06 |

## INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

*Amici curiae* are a bipartisan group of eighteen members of Congress who regard legislative prayer as a vital, robust, and constitutionally protected practice firmly grounded in this Nation's history and tradition. The Constitution and this Court's jurisprudence make no distinction in the identity of the prayer-giver—whether clergy, legislator, or lay citizen—who delivers a respectful prayer in our Nation's legislatures in accordance with the individual's own religious tradition.

The district court's prohibition of prayer by members of a legislative body rests on an analysis of the Establishment Clause that has not been applied by the Supreme Court and is inconsistent with historical tradition and practices. The identities of the prayer-givers did not factor into the Supreme Court's analysis in *Marsh v. Chambers*, 463 U.S. 783 (1983), or *Town of Greece v. Galloway*, 134 S. Ct. 1811

[1] In accordance with Rule 29(c)(5) of the Federal Rules of Appellate Procedure, *amici curiae* state that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person other than *amici curiae* and their counsel contributed money that was intended to fund preparing or submitting this brief. All parties have consented to the filing of this brief. Fed. R. App. P. 29(c)(4).

(2014). And had the Court focused on these facts it would have found that legislator-led prayer is part and parcel of that constitutional tradition.

Reversal is warranted for this reason alone. But the district court went further, latching onto this baseless distinction to effectively resurrect the repudiated view that the Establishment Clause forbids faith-specific prayers, thereby running roughshod over legislators' First Amendment rights, and improperly expanding the concept of coercion under the Establishment Clause to confer a heckler's veto that can effectively censor a wide swath of religious speech in public life.

Given the far-reaching implications for public officials at all levels of government who strive to serve the public in a manner consistent with their deeply held religious beliefs, *amici* request that this Court reverse the district court and vacate the injunction.

## ARGUMENT

"[L]egislative prayer, while religious in nature, has long been understood as compatible with the Establishment Clause." *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1818 (2014). "'In light of the unambiguous and unbroken history of more than 200 years,'" the

Supreme Court reaffirmed in *Town of Greece* that "'there can be no doubt that the practice of opening legislative sessions with a prayer has become part of the fabric of our society'" and is consistent with the Constitution. *Id.* at 1819 (quoting *Marsh v. Chambers*, 463 U.S. 783, 792 (1983)). The prayer practice of Rowan County is consistent with these traditions and historical practices and is therefore permissible under the Establishment Clause.

The faulty lynchpin of the district court's attempt to distinguish the prayer practice in Rowan County from practices in Nebraska (*Marsh*) and the Town of Greece is the fact that the prayers in Rowan County are offered, on a rotating basis, by one of the Board's five Commissioners. But this fact is of no constitutional significance. Legislators have been leading prayer in deliberative bodies from the Founding until today. This, in and of itself, is enough for the practice to pass muster under *Town of Greece* and *Marsh*.

The district court, however, claims that member-led prayer creates a host of other constitutional infirmities. These attempts to extinguish Rowan County's prayer practice fail.

For one, the district court tried to resurrect the distinction between sectarian and nonsectarian prayers rejected in *Town of Greece*. The district court concluded that because the Commissioners "provide prayers according to their personal faiths," which happen to be Christian, the County's practice "tends to advance the Christian faith of the elected Commissioners." JA 344. *Town of Greece*, however, squarely "reject[ed] the suggestion that legislative prayer must be nonsectarian," given our Nation's unbroken history of sincere, faith-specific legislative prayer and the dictates of the Establishment Clause. 134 S. Ct. at 1823.

Absent evidence that the Board exploited the prayer practice to proselytize or disparage another faith—and neither Plaintiffs nor the district court offer any—Rowan County's prayer practice falls comfortably within the tradition identified in *Marsh* and *Town of Greece*. Moreover, the district court's contrary conclusion and departure from historical precedent impermissibly tramples the First Amendment rights of the Rowan County Commissioners, and calls into question the rights of elected officials across our Nation.

The district court's claim that member-led prayer leads to constitutionally cognizable coercion cannot withstand serious scrutiny. *Town of Greece* confirms that legislators may take public, religious actions and invite others to participate in legislative prayer without giving rise to impermissible coercion. The district court's attempts to downplay this case's similarity to *Marsh* and *Town of Greece* cannot alter the fact that member-led invocations remain within the "unbroken history" of legislative prayer. *Marsh*, 463 U.S. at 792.

## I. Member-Led Legislative Prayer Is Plainly Constitutional As A Matter Of History And Precedent

Eschewing a straightforward application of *Town of Greece* and *Marsh* to Rowan County's prayer practice, the district focused its analysis on "the identity of the prayer-giver . . . as a member of the legislative body." JA 339. The court determined that the fact that the prayers in Rowan County were delivered by members of the Board of Commissioners rendered them unconstitutional. This focus on the identity of the prayer-giver contravenes both history and Fourth Circuit precedent.

### A. Elected Officials Have Led Legislative Prayers Since The Founding

The Supreme Court has made clear that "the Establishment Clause must be interpreted by reference to historical practices and understandings." *Town of Greece*, 134 S. Ct. at 1819 (internal quotation marks omitted). Critical, then, is the history—totally ignored by the district court—of elected officials at all levels of government opening legislative sessions with prayer.

**1.** U.S. Senators and Representatives have long opened legislative sessions with member-led prayers. As the Senate Judiciary Committee explained in an 1853 report analyzing the history and constitutionality of its prayer practices, the Founding Fathers adopted the Establishment Clause to prevent an establishment of religion akin to the English church; they "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). Indeed, "Senators have, from time to time, delivered the prayer." Sen. Robert C. Byrd, Senate Chaplain, *in* II *The Senate, 1789-1989: Addresses on the History of the United States Senate* 297, 305

(1982), *available at* http://www.senate.gov/artandhistory/history/resources/pdf/Chaplain.pdf.

This practice has continued unabated. As recently as this May, Senator Lankford opened the Senate in a prayer "[i]n the Name of Jesus." 161 Cong. Rec. S3313 (daily ed. May 23, 2015). And he is not alone; the Congressional Record includes many other member-led prayers. *See*, *e.g.*, 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).

Notably, even when not directly offered by members of Congress, members have the opportunity to invite guest chaplains of their choosing to offer the opening prayer. Members routinely invite guest ministers from their constituencies to offer this prayer, and often give floor speeches accompanying these prayers. *See*, *e.g.*, 146 Cong. Rec. 3222 (2000) (Rep. Larry Combest); 146 Cong. Rec. 3005 (2000) (Sen. Peter Fitzgerald). Seventy guest chaplains were sponsored by House members in the 113th Congress alone. *See* U.S. House of Representatives, Office of the Chaplain, Guest Chaplains,

http://chaplain.house.gov/chaplaincy/guest_chaplains.html (last visited July 31, 2015).

**2.** At the state and local levels, member-led prayer is commonplace, with the practice stretching back to the Founding. As one example, the South Carolina Provincial Congress—South Carolina's first independent legislature—welcomed member-led prayer from before the signing of the Declaration of Independence. It requested "[t]hat the Reverend Mr. Turquand, a Member, be desired to celebrate divine service in Provincial Congress." American Archives, *Documents of the American Revolutionary Period 1774-1776*, at 1112 (1776); *see also*, *e.g.*, 1 *Journal of the Provincial Congress of South Carolina, 1776*, at 35, 52, 75 (1776) (examples of "Divine Service" led by Rev. Turquand).

Members also led prayers in the Nebraska legislature under scrutiny in *Marsh*. Although *Marsh* focused on prayer by a chaplain selected by the legislators, a review of Nebraska's legislative journal in the years before the *Marsh* complaint was filed shows that Nebraska's legislature also opened legislative sessions with member-led prayer.[2]

[2] *See*, *e.g.*, 1 *Legislative Journal of the State of Nebraska*, 85th Leg., 1st Sess. 2087 (May 17, 1977) ("The prayer was offered by Mrs. Marsh."),
*(Cont'd on next page)*

Indeed, the *Marsh* Court was well aware that the tradition of legislative prayer it endorsed encompassed member-led prayer. The Court supported its claim that legislative prayer has been "followed consistently in most of the states" with a survey of state prayer practices acknowledging the widespread practice of member-led prayer. *See Marsh*, 463 U.S. at 788-89 & n.11 (citing Brief of National Conference of State Legislatures ("NCSL") as Amicus Curiae). The survey, produced by the NCSL, explained that the "opening legislative prayer" in various states may be given by various individuals, including "chaplains, guest clergymen, *legislators*, and legislative staff members." Brief of NCSL as Amicus Curiae, *Marsh v. Chambers*, 463 U.S. 783 (No.

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*(Cont'd from previous page)*

*available at* http://nebraskalegislature.gov/FloorDocs/85/PDF/Journal/r1journal.pdf; *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) ("The prayer was offered by Senator Kremer"), *available at* http://nebraskalegislature.gov/FloorDocs/85/PDF/Journal/r2journal.pdf.

Likewise, the record in *Town of Greece* establishes that Councilman Helfer opened a meeting with an invocation, and Town Supervisor Auberger invited members to engage in silent prayer on particular topics on six separate occasions. *See* Joint Appendix, *Town of Greece v. Galloway*, 2013 WL 3935056, at 66a (U.S. 2013) (Aug. 20, 2002) (prayer by Councilman Helfer); *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).

82-23), 1982 U.S. S. Ct. Briefs LEXIS 912, at *2 (emphasis added). Furthermore, the NCSL's brief 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 minister to conduct the prayer." *Id.* at *3-4 (emphases added).

A 2002 NCSL survey provides more recent detail on state legislative-prayer practices, which continue to include member-led prayer. According to the 2002 survey, legislators lead prayers in at least thirty-one states.[3] NCSL, Prayer Practices, *in Inside the Legislative Process*, at 5-151 to -152 (2002), *available at* http://www.ncsl.org/documents/legismgt/ilp/02tab5pt7.pdf. Indeed, the survey indicates that in the Rhode Island Senate, *only members* deliver

[3] The true number may be higher, as a number of state legislative bodies did not respond to the survey. For instance, the Maryland House of Delegates, which did not respond to the survey, has exclusively relied on member-led prayer since around 2003. Kate Harvard, *In Delegates They Trust*, Wash. Post (Mar. 9, 2013), http://www.washingtonpost.com/local/md-politics/in-delegates-they-trust-md-house-members-lead-secular-prayer/2013/03/09/571fef8e-810a-11e2-8074-b26a871b165a_story.html (last visited July 31, 2015).

the invocation. *Id.*[4]

The prevalence of member-directed prayer practices also manifests itself in state statutes and the rules of state legislatures. The Michigan House of Representatives, for instance, requires the clerk to "arrange for a Member to offer an invocation . . . at the opening of each session," which may be "delivered by the Member or a Member's guest." Mich. H.R. R. 16. And the South Carolina Code provides that local "deliberative public bod[ies]" can adopt ordinances establishing opening prayers led by "one of the public officials, elected or appointed to the deliberative public body," so long as the opportunity is (as in Rowan County) "regularly and objectively rotated among all of that deliberative public body's public officials." S.C. Code § 6-1-160(B)(1).

Member-led invocations are thus part and parcel of the tradition approved in *Marsh* and *Town of Greece*. The district court's decision would cast aside these important aspects of our national heritage.

[4] In the Hawaii House of Representatives, prayer-givers are apparently limited to members and "someone invited by a House member." Prayer Practices, *supra*, at 5-151 to -152.

### B. The Identity Of Prayer-Givers Is Unimportant Under Supreme Court And This Court's Precedents

In keeping with this tradition of elected and public officials engaging in religious speech and exercise—which extends back to the Founding—this Court has continually refused to assign controlling weight to the identity of the prayer-giver.

Contrary to the district court's analysis of the "identity of the prayer-giver" as the "crucial question" to determine the application of *Marsh* and *Town of Greece*, JA 339, this Court has made clear in a series of decisions that whether "prayers were delivered by members . . . was not dispositive." *Joyner v. Forsyth Cnty.*, 653 F.3d 341, 350 (4th Cir. 2011). This Court's legislative-prayer case-law stands for the proposition that the identity of the prayer-giver is not an important constitutional consideration, and nothing in *Town of Greece* undercuts the validity of that principle, which is controlling here.

In *Wynne v. Town of Great Falls*, this Court considered a prayer practice by members of a town council that involved faith-specific language. 376 F.3d 292, 294 (4th Cir. 2004). The Court struck down the practice on grounds that are irrelevant after *Town of Greece*—the faith-specific content of the prayers. *See id.* at 302; *see also* JA 334

(district court opinion) (recognizing that *Town of Greece* abrogates that aspect of the ruling). But in doing so, the Court made no distinction between prayers led by appointed chaplains and elected government officials. It noted instead that "[p]ublic officials' brief invocations of the Almighty before engaging in public business have always, as the *Marsh* Court so carefully explained, been part of our Nation's history," and that the "Town Council of Great Falls *remains free to engage in such invocations* prior to Council meetings." *Wynne*, 376 F.3d at 302 (emphasis added); *see also Turner v. City Council of Fredericksburg*, 534 F.3d 352, 353 (4th Cir. 2008) (affirming nondenominational local prayer practice led "by one of the Council's elected members followed by the Pledge of Allegiance").

This Court's decision in *Joyner* is to the same effect. 653 F.3d 341. In *Joyner* the county board tried to distinguish *Wynne* on the ground that "the prayers there were delivered by members of the town council." *Id.* at 350. This Court rejected that argument as "miss[ing] the forest for the trees" and observed that the identity of the prayer-givers "was not dispositive" in *Wynne*. *Id.* *But see* JA 344 (district court opinion) (holding that "determinative differences" include member-led prayer).

Instead, this Court indicated that *Wynne* turned on the (now-rejected) position that "sectarian" content of the prayers at issue was the constitutionally fatal consideration. *Joyner*, 653 F.3d at 350.

The sectarian/nonsectarian analysis underlying these cases was firmly rejected in *Town of Greece*, but the Supreme Court left undisturbed lower courts' holdings that the identity of a particular prayer-giver is not dispositive in the constitutional analysis. *See Snyder v. Murray City Corp.*, 159 F.3d 1227, 1233 (10th Cir. 1998) (en banc) (holding that under *Marsh* "a legislative body does not violate the Establishment Clause when it chooses a particular person to give its invocational prayers"); *cf. McCreary County v. ACLU*, 545 U.S. 844, 877 n.24 (2005) (providing examples of religious acknowledgements used for constitutional purposes, including "[c]rèches placed with holiday symbols and *prayers by legislators*" (emphasis added)). The decision below cannot be reconciled with these precedents, and must therefore be reversed.

## II. The District Court's Ruling Tramples Legislators' Free Speech And Free Exercise Rights

Despite our country's long and varied tradition of permitting legislative prayer by legislators, the district court held that the

Establishment Clause prohibits Rowan County Commissioners from offering sincere, faith-specific invocations to open legislative sessions—even as the court recognized that those same members may constitutionally invite (or even pay) third parties to deliver those *same* prayers in the *same* setting. *See* JA 334, 339, 344.

The implications of the district court's departure from historic practice are troubling. *Town of Greece* specifically held that faith-specific legislative prayers are constitutionally permissible, and never suggested that a prayer-giver's occupation would change that analysis. In the wake of the decision below, however, Rowan County Commissioners are improperly forced to choose between two alternative options: (a) They may scrub their prayers of faith-specific references; or (b) they may pay or solicit a third party to deliver prayers. They may not offer faith-specific prayers of their own.

The district court's flawed interpretation of the Establishment Clause would swallow legislators' First Amendment rights whole. That result is untenable.

### A. The First Amendment Prohibits Courts From Imposing Court-Determined Standards Of Ecumenicity On Legislative Prayers

Rowan County Commissioners could apparently satisfy the district court's reading of the Establishment Clause by ceasing to pray "according to their personal faiths." JA 344; *see* JA 339-40 n.4 (noting that "[u]nder a different, inclusive prayer practice, [the] Commissioners might be able to provide prayers"). Despite *Town of Greece*'s abrogation of Fourth Circuit law to the contrary, the district court was preoccupied with prayer content, explaining that most prayers included "references to Jesus, the Savior, and other tenets of the Christian faith." JA 324.[5] This "overwhelming pattern" of "sectarian prayers" was among the reasons cited by the district court for distinguishing the Board's prayer practice from "the constitutional, historically-rooted legislative prayer" affirmed in *Town of Greece* and *Marsh*. JA 343-44 & n.7.

The problem with the district court's rationale is that—as acknowledged elsewhere in its opinion—"sectarian legislative prayer

[5] The district court believed that a prayer was sectarian if the prayer-giver concluded "in Jesus's name." *See* JA 324 (asserting that "139 of 143 Board meetings" involved a "sectarian prayer invoking Christianity").

does not violate the Establishment Clause." JA 334 (citing *Town of Greece*, 134 S. Ct. at 1823-24). There is no basis for a court to require that prayers be nonsectarian; to the contrary, "[t]he law and the Court could not draw this line for each specific prayer or seek to require [prayer-givers] to set aside their nuanced and deeply personal beliefs for vague and artificial ones." *Town of Greece*, 134 S. Ct. at 1822. The federal courts are without power to reduce lawmakers' prayers to an empty formality addressed to no deity in particular. Indeed, any attempt to establish "supervisors and censors of religious speech" would "involve government in religious matters to a far greater degree than" simply permitting public prayers to be faith-specific. *Id.* "A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed." *Lee v. Weisman*, 505 U.S. 577, 592 (1992).

The district court's decision has the undeniable effect of imposing a court-defined code of acceptable religious speech on elected officials—a prospect that has dangerous implications for current and aspiring public officials of all religious convictions. Under this rationale, members of legislative bodies (and by extension, other public officials)

would become subject to judicial censorship of religious expressions upon assuming public office. Thus, if a minister from Greece, New York were elected to the town board, the district court's decision would strip that minister of the ability to offer the very same prayers, in the very same context, that the Supreme Court held constitutional in *Town of Greece*. *Cf. Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring) (cautioning that "untutored devotion to the concept of neutrality" can lead to "approval of results" that partake of "a brooding and pervasive devotion to the secular").

Insofar as the district court's decision permits elected officials to offer only generic prayers, it deprives them of the First Amendment's guarantees of the free exercise of religion and the freedom of speech—rights that they would enjoy as private citizens delivering a public invocation. *See*, *e.g.*, *Town of Greece*, 134 S. Ct. at 1822 (holding that government "must permit a prayer giver" to deliver ceremonial prayers "as conscience dictates," and rejecting a rule that would "force legislatures" or "courts" to "act as supervisors and censors of religious speech").

But the Free Exercise Clause prohibits the government from conditioning the availability of a state-law right—such as the Rowan County Board's practice of opening legislative sessions with prayer—on surrendering religious commitments. *See McDaniel v. Paty*, 435 U.S. 618 (1978) (striking down a statute enacted per a provision of the Tennessee Constitution that barred ministers from serving as delegates to the State's constitutional conventions). In the words of James Madison, "the leading architect of the religion clauses of the First Amendment," *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 703 (2012) (internal quotation marks omitted), "'punishing a religious profession with the privation of a civil right'" would "'violate a fundamental principle of liberty.'" *McDaniel*, 435 U.S. at 624 (plurality opinion) (quoting 5 *Writings of James Madison* 288 (Gaillard Hunt ed., 1904)). The district court's decision impermissibly accomplishes such a privation by barring elected officials from exercising their state-law right to deliver the invocation unless they forfeit their First Amendment right to do so in their own religious idiom.

*Town of Greece* confirms that these principles apply in the specific context of delivering legislative prayers. As explained in Justice Kennedy's plurality opinion, legislative prayers are intended "to accommodate the spiritual needs of lawmakers," and as such, the invocations may permissibly "reflect the values [the lawmakers] hold as private citizens" and can be used as "an opportunity for them to show who and what they are without denying the right to dissent by those who disagree." *Town of Greece*, 134 S. Ct. at 1826 (plurality opinion).[6] "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." *Id.* at 1822-23 (majority opinion). The First Amendment does not permit the government to "mandate a civic religion that stifles

[6] Justice Kennedy's plurality opinion is controlling on this point, as Justices Scalia and Thomas would go further and hold that the Establishment Clause is violated only by "coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*." *Town of Greece*, 134 S. Ct. at 1837 (Thomas, J., concurring in part and concurring in the judgment, joined in relevant part by Scalia, J.) (internal quotation marks omitted). The narrowest rationale that would command the support of five Justices is binding, even if some Justices would reach the result under a different test. *Marks v. United States*, 430 U.S. 188, 193-94 (1977).

any but the most generic reference to the sacred any more than it may prescribe a religious orthodoxy." *Id.* at 1822; *see Walz v. Tax Comm'n of City of N.Y.*, 397 U.S. 664, 669 (1970) ("[T]here is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.").

Any contrary holdings from this Circuit have been abrogated by *Town of Greece*. *Compare Turner*, 534 F.3d at 356 (holding that government could "regulate the content of what is or is not expressed" without violating a legislator's "Free Exercise and First Amendment rights" (citation omitted)), *with Town of Greece*, 134 S. Ct. at 1822-23 (legislatures and courts may not "act as supervisors and censors of religious speech"; prayer-givers "must" instead be permitted to pray "as conscience dictates" absent proselytizing or denigration of other faiths); *id.* at 1826 (plurality opinion) (ceremonial prayer provides "an opportunity for [lawmakers] to show who and what they are").

### B. Barring Lawmakers From Offering Invocations Is Inconsistent With The Purpose Of Legislative Prayer

A second possible response to the district court's opinion would be to expend time and taxpayer money on either instituting a formal

chaplaincy (as in *Marsh*) or soliciting local ministers to deliver the prayers (as in *Town of Greece*).

But forcing Rowan County Commissioners to outsource the invocation would abandon the tradition of opening legislative sessions with a member-led invocation and improperly divest the members of their right to offer faith-specific invocations on their own behalf in accordance with their consciences—thereby implicating the same First Amendment problems as mandating generic prayers, *see supra* Section II.A. Moreover, as the *Town of Greece* plurality emphasized, a major purpose of the opening prayer is to "accommodate the spiritual needs *of lawmakers* and connect them to a tradition dating to the time of the Framers." 134 S. Ct. at 1826 (plurality opinion) (emphasis added). The constitutional legitimacy of this purpose precludes the district court's view that lawmakers should be barred from participating in this exercise designed for their benefit.

In that regard, the record confirms that lawmakers themselves are perhaps uniquely qualified to offer uplifting, heartfelt prayers on matters that concern their constituents. *See*, *e.g.*, Transcription of Invocations, Dist. Ct. Dkt. 6-4, at 4 (Case No. 1:13-cv-00207) (invocation

for Mar. 17, 2008) ("And also, a special prayer for Deputy Sheriff Janet Wietbrock, who has been severely injured in the line of duty. Please be with her and her family."); *id.* at 19 (invocation for Apr. 18, 2011) (praying for "those who suffered damage" and "lost family members" "the other day in the storm," and "for our servicemen overseas; we had a big deployment recently—local people that went over to Iraq, we pray for them"). Nothing in the text, history, structure, or purpose of the Establishment Clause bars members of deliberative public bodies from beginning their sessions by petitioning for guidance on matters of local concern.

Moreover, there is no constitutionally meaningful distinction between a prayer offered by a board member and a prayer offered by a third party invited by one or more board members. Both prayers arise in the same context and serve the same purpose. If anything, Rowan County's practice is less discriminatory than the practices approved in *Town of Greece* and *Marsh*: By rotating the prayer among members of the Board, Rowan County was not involved in selecting prayer-givers. By comparison, it would be inherently more "discriminatory" to force Rowan County to select a *single* chaplain from a *single* faith tradition—

the practice explicitly affirmed in *Marsh*. The same is true of requiring the county to compile a list of local ministers willing to deliver the prayer, and then to solicit their services. *See Town of Greece*, 134 S. Ct. 1811. And neither of these more "discriminatory" alternatives would necessarily result in prayers that "referenc[e] a deity specific to one faith other than Christianity" (JA 18 ¶ 29) or otherwise reflect a broader religious diversity than rotating prayer duties among the Commissioners elected by the citizens of Rowan County. *See Town of Greece*, 134 S. Ct. at 1816 ("[N]early all of the congregations in town were Christian; and from 1999 to 2007, all of the participating ministers were too."). There is thus no basis for precluding Rowan County Commissioners from delivering the invocation.

* * *

There is, of course, a third way in which the Rowan County Board could respond to the district court's decision. Despite the Board's desire to "connect . . . to a tradition dating back to the time of the Framers," *Town of Greece*, 134 S. Ct. at 1826 (plurality opinion), the Board could "forswear altogether the practice of having a prayer before meetings," "terrified of the legal fees that may result from a[nother] lawsuit

claiming a constitutional violation." *Id.* at 1831 (Alito, J., concurring). This repressive result is apparently the one that plaintiffs and their attorneys hope to achieve. *Cf.* Montag-Siegel Aff. ¶ 13, Dist. Ct. Dkt. 6-2 ("I have no problem whatsoever with them praying according to their religious beliefs *in their private lives*, but when they are acting as elected officials, they need to represent us all." (emphasis added)).

This Court should not aid the plaintiffs in robbing Rowan County of its prayer tradition and the Commissioners of their constitutional rights. As this Court has recognized, the Establishment Clause "does not create a 'heckler's veto'" that litigious adults can use to eradicate religious expressions they disagree with. *Lambeth v. Bd. of Comm'rs of Davidson Cnty.*, 407 F.3d 266, 272 (4th Cir. 2005) (citation omitted). Rather, "[o]ur tradition assumes 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 (plurality opinion).

## III. Opening Legislative Sessions With Member-Led Prayer Is Not Coercive

The district court's decision also rests on the flawed premise that member-led prayer should be viewed differently under the

Establishment Clause than the prayers of paid chaplains or invited ministers because individuals may feel coerced to participate in the prayer for fear of incurring retaliation from the legislative body. JA 349-50. Yet as with the rest of the district court's Establishment Clause analysis, its "coercion" conclusion buckles under the weight of controlling precedent. *Town of Greece* confirms that legislators may take public, religious actions and invite others to participate. The district court attempts to muddy the facts and operative evidentiary burdens, but the reality remains that legislator-led prayer is constitutionally protected.

### A. "Fact-Sensitive" Analysis Confirms That Rowan County's Prayer Practice Is Not Coercive

Purportedly applying the *Town of Greece* plurality's analysis of what constitutes a coercive religious practice,[7] the district court

[7] Without question, Rowan County's prayer practice would raise no coercion concerns for two members of the *Town of Greece* majority. *See* 134 S. Ct. at 1838 (Thomas, J., concurring in part and concurring in the judgment, joined in relevant part by Scalia, J.) ("to the extent that coercion is relevant to the Establishment Clause analysis, it is actual legal coercion that counts—not the 'subtle coercive pressures' allegedly felt by respondents in this case" (citation omitted)); *id.* (agreeing with plurality that offense "'does not equate to coercion'").

concluded that Commissioner-led prayer is "unconstitutional coercion" because the prayers almost always sound in Christian tones, are led exclusively by the Commissioners, and often begin with "such phrases as 'let us pray,' or 'please pray with me.'" JA 349-50. But most of these factors were present in *Town of Greece* and *Marsh*, and none warrant a different outcome here.

*First*, it is entirely irrelevant that, in practice, the Commissioners' prayers reflect only a subset of Rowan County citizens' religious beliefs. In *Town of Greece*, *every* prayer-giver for *nine years* had represented a "Christian" congregation, 134 S. Ct. at 1816, and in *Marsh*, a single Presbyterian minister offered prayers for *16 years*, 463 U.S. at 793. While lack of religious diversity is plainly not dispositive, prayers from five democratically elected representatives are, or have the potential to be, more diverse than those offered in either of those contexts. *See supra* 23-24.

*Second*, the district court's reliance on the identity of the speaker fares no better. Neither the Supreme Court nor this Court has taken issue with the identity of the prayer-giver when considering whether legislative prayer is coercive. *See supra* Section I.B.

Indeed, although the plurality in *Town of Greece* emphasized that determining whether a practice is coercive is "fact-sensitive," it notably explained that the inquiry turns on "both the setting in which the prayer arises and the audience to whom it is directed," 134 S. Ct. at 1825 (plurality opinion)—not, as the district court would have it, the identity of the speaker. And for good reason: It is hard to divine how a Commissioner's personal prayer could smack of coercion more than if a Commissioner "invite[d] a local clergyman to the front of the room to deliver an invocation," *id.* at 1816 (majority opinion). If anything, prayers from a paid chaplain selected by the legislative body as a whole, as in *Marsh*, would seem to place a *greater* legislative imprimatur on such prayers. So too for the practice approved in *Town of Greece*, where the Town Supervisor "would invite a local clergyman to the front of the room to deliver an invocation," then "thank the minister for serving as the board's 'chaplain for the month' and present him with a commemorative plaque." *Id.* Both practices involved deliberate efforts from the legislative body to honor the prayer-giver; both were held not coercive despite this special treatment.

If anything, affirming the district court's conclusion that legislators are barred from offering the same prayers that they may invite constituents to give would bring coercion analysis into tension with one of the key historical justifications for legislative prayer: 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 (plurality opinion) (emphasis added). Part of the historical context against which Establishment Clause concerns are measured is the fact that the "principal audience for these invocations" is not the public, "but lawmakers themselves, who may find that a moment of prayer or quiet reflection sets the mind to a higher purpose and thereby eases the task of governing." *Id.* at 1825; *see also id.* at 1825-26 (citing examples of legislative prayer serving this purpose).

That dynamic is at work in Rowan County. Then-Commissioner Carl Ford, for instance, stated that he "will continue to pray in Jesus' name" because "I am not perfect so I need all the help I can get, and asking for guidance for my decisions from Jesus is the best I, and Rowan County, can ever hope for." JA 18-19 ¶ 31. The district court faults the Commissioners (and apparently the Rowan County public) for

not viewing legislative prayer as *exclusively* for the benefit of individual Commissioners. JA 351-53. But the Supreme Court has never required such single-minded purpose. *See Town of Greece*, 134 S. Ct. at 1823 (legislative prayer "meant to lend gravity to the occasion and reflect values long part of the Nation's heritage"). The historical backdrop of legislative prayer for the primary benefit of members *lessens* the potential for coercion when members themselves pray, not increases it.

*Third*, the district court was wrong that expressions such as, "let us pray," have constitutional significance when uttered by a legislator. No reasonable person would interpret that commonplace invitation as a government "directiv[e]." JA 350 (district court opinion). In *Town of Greece*, prayer-givers frequently invited the public to participate in strikingly similar terms. *See* 134 S. Ct. at 1826 (plurality opinion) ("'Let us join our hearts and minds together in prayer' . . . 'Would you join me in a moment of prayer?'" (citations omitted)); *id.* at 1832 (Alito, J., concurring) (noting that "let us pray" is a "commonplace" and "almost reflexive" invitation to open a prayer). Similar expressions resound in the halls of Congress as well. *See*, *e.g.*, 119 Cong. Rec. 17,441 (Rep. William H. Hudnut III) ("Let us pray."); 146 Cong. Rec.

3005 (2000) (guest chaplain Roger Kaffer) ("Let us pray . . . [i]n the name of the Father and of the Son and of the Holy Spirit."); 155 Cong. Rec. 32,658 (Sen. John Barrasso) ("Please join me in prayer."); 159 Cong. Rec. S3915 (Sen. William M. Cowan) ("Let us pray."); 161 Cong. Rec. S3313 (Sen. James Lankford) (same).

There is no logical basis to infer that these words exert any greater pressure when spoken by a single legislator than by an appointed chaplain or guest invited by the legislature. At a minimum, watching legislators conspicuously participating in a prayer offered by another person, such as by "bow[ing] their heads, or ma[king] the sign of the cross during the prayer," *Town of Greece*, 134 S. Ct. at 1826 (plurality opinion), would raise the same purported concerns the district court fears here—namely, that failure to do likewise could "irritat[e] the officials who would be ruling on their petitions." *Id.* But *Town of Greece* expressly rejected such arguments. *Id.* The mere *possibility* of irritation does not create coercion.

In short, opening a prayer with a brief invitation to join hardly amounts to "orchestrat[ing] 'the performance of a formal religious exercise' in a fashion that *practically obliges* the involvement of non-

participants." *Myers v. Loudoun Cnty. Pub. Schs.*, 418 F.3d 395, 406 (4th Cir. 2005) (emphasis added; citation omitted). The district court speculated that the public might not be able to distinguish a legislators' statement to "[p]lease be quiet" when calling a meeting to order from a ceremonial invitation to join the legislator in prayer, JA 351, but the Supreme Court presumes that mature adults can follow contextual cues, as they are not "readily susceptible to 'religious indoctrination' or peer pressure." *Marsh*, 463 U.S. at 792 (citations omitted).

### B. The District Court's View Of "Coercion" Would Upend Settled Evidentiary Burdens For Establishment Clause Challenges

Bereft of support for its misapplication of the *Town of Greece* plurality's "fact-sensitive" analysis, the district court attempts to alter the evidentiary burdens to prove coercion in two ways. Neither comports with precedent, and endorsing these innovations would work an unjustified shift in the manner in which "coercion" is analyzed in future Establishment Clause challenges.

*First*, the district court chastens Rowan County for not affirmatively informing citizens that they were not required to stand, bow their heads, remain in the room, or participate in any fashion in

Commissioner-led prayers (and would suffer no adverse consequences if they did not). JA 351. Yet *Town of Greece* found no coercion under identical circumstances. *See* 134 S. Ct. at 1847 (Kagan, J., dissenting) (emphasizing that the minster "does not suggest that anyone should feel free not to participate," but instead "asks them all to stand" and pray). Instead, the plurality emphasized that courts can "*presum[e]* that the reasonable observer is acquainted with [the legislative-prayer] tradition 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 (plurality opinion) (emphasis added). Where the public is not "dissuaded from leaving the meeting room during the prayer, arriving late, or even . . . making a later protest," *id.* at 1827, affirmative disclaimers are simply not necessary. The Supreme Court affirms the public's common sense and ability to distinguish a brief invocation at a public meeting from an altar call.

*Second*, the district court wrongly credited plaintiffs' allegations of perceived exclusion and a possibility of retribution from Commissioners if they did not participate in the prayers—despite *no* allegations that *any* citizen of Rowan County suffered retaliation or denigration for

declining to participate in a prayer. Properly understood, the law puts the onus on challengers to adduce evidence of discrimination, not on Rowan County to disprove that any individual was offended or subjected to attempted retribution.

Below, plaintiffs alleged that Rowan County's prayer practice made them feel "excluded at meetings, excluded from the community, and coerced into participating in the prayers which were not in adherence" with their faith, and that the Board's "'clear disagreement with [their] public opposition to sectarian prayer could make [them] a less effective advocate on other issues.'" JA 326-27 (district court opinion) (citation omitted). *Town of Greece*, however, held that markedly similar allegations were constitutionally insufficient. *See* 134 S. Ct. at 1826 (plurality opinion) ("respondents stated that the prayers gave them offense and made them feel excluded and disrespected"; "[o]ffense, however, does not equate to coercion"). The Court brushed this evidence aside because—as here—there was nothing concrete to show coercion beyond plaintiffs' personal impressions: There was no evidence that the content of the prayers "chastised dissenters [or] attempted lengthy disquisition on religious dogma," nor that officials

"indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity." *Id.* at 1826.

To be sure, legislative prayer may stray across the constitutionally permitted line if the record shows that "town leaders allocat[e] benefits and burdens based on participation in the prayer, or that citizens were received differently depending on whether they joined the invocation or quietly declined." 134 S. Ct. at 1826 (plurality opinion). But there must be evidence "in the record" to buttress allegations along these lines, not mere perceptions belied by the facts. *Id.*

Importantly, a *majority* in *Town of Greece* rejected the idea that perceived "subtle pressure to participate in prayers that violate [citizens'] beliefs in order to please the board members from whom they are about to seek a favorable ruling" can constitute coercion. 134 S. Ct. at 1825 (plurality opinion); *id.* at 1838 (Thomas, J., concurring in part and concurring in the judgment, joined in relevant part by Scalia, J.). This is true even where board members may "know many of their constituents by name," making anonymity less likely for those citizens who decline to rise or otherwise participate in an opening prayer. *Id.* at 1825 (plurality opinion). In short, "merely exposing constituents to

prayer they would rather not hear and in which they need not participate" is not coercion. *Id.* at 1827.

Finally, the plurality's insistence in *Town of Greece* that showing coercion requires more than allegations that individual citizens were offended by the prayers or feared retribution is important: It ensures that a "heckler's veto," *Lambeth*, 407 F.3d at 272 (internal quotation marks omitted), cannot quash an entire historical tradition of legislative prayer without actual evidence that "the pattern of prayers over time" establishes that a particular legislative-prayer practice has strayed from its constitutional boundaries. *Town of Greece*, 134 S. Ct. at 1827 (plurality opinion). Indeed, the *Town of Greece* majority affirmed that "[f]rom the earliest days of the Nation," ceremonial prayers "have been addressed to assemblies comprising many different creeds," yet are fully consistent with the Establishment Clause. *Id.* at 1823. The district court's attempts to place new evidentiary burdens on government bodies attempting to engage in this historical practice cannot be squared with either precedent or common sense.

## CONCLUSION

For the foregoing reasons, the Court should vacate the injunction and reverse the judgment of the district court.

Dated: August 3, 2015

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## CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with Fed. R. App. P. 32(a)(7)(B)(i) because it contains 6,996 words, as determined by the word-count function for Microsoft Word 2010, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point New Century Schoolbook font.

Dated: August 3, 2015

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## CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2015, I caused the foregoing Brief for Members of Congress as *Amici Curiae* In Support of Rowan County, North Carolina to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system.

I further certify that on August 3, 2015, an electronic copy of the foregoing Brief for Members of Congress as *Amici Curiae* In Support of Rowan County, North Carolina was served electronically by the Notice of Docket Activity on counsel for all parties.

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