No. 17-565

In the Supreme Court of the United States

ROWAN COUNTY, NORTH CAROLINA,
Petitioner,

v.

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

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

BRIEF OF *AMICUS CURIAE* AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law.[1] ACLJ attorneys often appear before this Court and other federal courts as counsel either for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993), or as *amicus curiae* in numerous cases involving constitutional issues, including legislative prayer. *E.g.*, *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014); *Freedom From Religion Found. v. Chino Valley Unified Sch. Dist.*, No. 16-55425 (9th Cir. 2017); *Bormuth v. Cty. of Jackson*, 870 F.3d 494 (6th Cir. 2017) (en banc). The ACLJ is dedicated, *inter alia*, to defending religious liberty and freedom of speech, and this brief is supported by members of the ACLJ's Committee to Defend Legislative Prayer. The ACLJ files this brief in support of the petition for writ of certiorari.

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[1] No counsel for a party authored this brief in whole or in part. No person or entity aside from *amicus curiae*, its members, and its counsel made a monetary contribution to the preparation or submission of this brief. *Amicus curiae* has no parent corporation and does not issue stock. Counsel of record for the parties received timely notice of the intent to file this brief and counsel for Petitioner has filed notice with this Court consenting to the filing of *amicus curiae* briefs. Counsel for Respondent has provided *amicus curiae* written consent to the filing of this brief.

SUMMARY OF THE ARGUMENT

Amicus curiae urges this Court to grant a writ of certiorari in this case. There is a split among the circuit courts of appeal regarding the constitutionality of sectarian, legislator-led invocations given before meetings of local governmental bodies in light of this Court's ruling in *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014).

In the *en banc* decision below, the Fourth Circuit wrongly held that the legislator-led prayer practice in Rowan County, North Carolina, violated the United States Constitution. In stark contrast, the Sixth Circuit, also *en banc*, recently held that a similar legislator-led prayer practice was constitutional, expressly disagreeing with the Fourth Circuit's decision. *Bormuth*, 870 F.3d at 510.

This Court should resolve the conflict on this important matter of national, historical, and religious significance. *Amicus curiae* also urges this Court to provide additional guidance as to the coercion standard for deliberative-body prayer practices and to consider the far-reaching ramifications within the federal judiciary if the Court delays the resolution of this matter.

ARGUMENT

I. Contrary to the Fourth Circuit's Decision, Invocations of Deliberative Bodies May Be Sectarian and Legislator-Led.

Legislative prayer has been a practice "deeply embedded in the history and tradition of this country" since the framing of the Constitution. *Marsh v. Chambers*, 463 U.S. 783, 786, 792 (1983). It "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 Fourth Circuit's decision conflicts with this Court's decisions in *Marsh* and *Town of Greece* and creates an irreconcilable conflict with a decision of the Sixth Circuit on the very same constitutional issues. The Fourth Circuit held that while legislator-led prayer *may* be constitutional, the practice in Rowan County nonetheless "cross[ed] the line," finding, *inter alia*, that in various prayers commissioners "confess[ed] spiritual shortcomings on the community's behalf," raised "spiritual defects," and "impl[ied] that adherents of other faiths were in some ways condemned." Pet. App. at 35-36.

In so doing, the Fourth Circuit introduced a new analysis not followed by this Court in *Town of Greece.* The Fourth Circuit stated that the prayer practice itself must be scrutinized, and individual prayers parsed, to determine whether constitutional limits were breached—something this Court in *Town of Greece* did not do. Pet. App. at 25 ("To see just how far

outside those boundaries the prayer practice was, we must turn to the operation of the practice itself. Because *Town of Greece* does not resolve this challenge, we must decide whether the county's prayer practice, taken as a whole, exceeded constitutional limits on legislative prayer."). Left undisturbed, the Fourth Circuit's approach threatens to "sweep away what has so long been settled [and] would create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent." *Town of Greece*, 134 S. Ct. at 1819 (citing *Van Orden v. Perry*, 545 U.S. 677 (2005)).

Notably, this Court determined in *Town of Greece* that, while governmental coercion would violate the Establishment Clause, so would government over-involvement in parsing prayers for the sake of ensuring government neutrality:

> The First Amendment is not a majority rule, and government may not seek to define permissible categories of religious speech. 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. While the Fourth Circuit conceded that legislator-led prayer may be constitutional, its holding goes beyond what this Court—and the Constitution—require.

In sharp contrast, the Sixth Circuit adhered to this Court's decision in *Town of Greece* and held that legislator-led prayer—like chaplain-led prayer—fits

within our nation's "historically accepted traditions" and does not violate the Constitution. *Bormuth*, 870 F.3d at 509. The Sixth Circuit dismissed the Fourth Circuit's *en banc* decision as having no credibility, stating that the Fourth Circuit ignored numerous examples of historical legislator-led prayer practices held across the nation. *Id*. at 509-10; *contra* Pet. App. at 21-22.

Because of the clear circuit split on this matter, the conflict with this Court's precedent, and the evident confusion by the circuits as to the full effect of the Court's decision in *Town of Greece*, *amicus curiae* urges this Court to grant the Petition to resolve these conflicts.

II. This Court Should Provide Additional Guidance as to the Coercion Standard for Deliberative Body Prayer Practices.

This Court has ruled that a deliberative public body may open its proceedings with a sectarian prayer so long as there is not an ongoing practice of denigration of minority beliefs or non-belief, or government coercion to participate. *Town of Greece*, 134 S. Ct. at 1814-15, 1818, 1821. This Court recognized that ceremonial prayers may "reflect the values [board members] hold as private citizens," and that an invitation for participation from the audience might simply be "inclusive, not coercive." *Id*. at 1826. Fundamentally, the Constitution does not protect individuals from hearing speech–even religious speech–with which they disagree, but from being compelled to participate in a religious exercise or to conform one's speech to another's religion. *Id*. at 1827.

In *Town of Greece*, Justice Thomas set forth in his concurrence a standard for coercion that helps to illuminate the question presented in the Petition. "[T]o the extent coercion is relevant to the Establishment Clause analysis, it is actual legal coercion that counts—not [] 'subtle coercive pressures.' . . ." *Id.* at 1838 (Thomas, J., concurring in part and concurring in the judgment). Mere offense and peer pressure do not meet this standard. *Id*.

Nonetheless, there is confusion within the federal courts as to whether certain aspects of a deliberative body prayer practice are unconstitutionally coercive. The Fourth Circuit held here that the Board of Commissioners' invocations were unconstitutional because they were exclusively given by the commissioners and Christianity was the predominant religion represented. *See* Pet. App. at 39. The Fourth Circuit failed to acknowledge, however, that it is not the sectarian nature of the prayers that might make the practice coercive; indeed, this Court held as much in *Town of Greece*. As stated in the dissent from the Fourth Circuit's *en banc* decision, the majority seeks to have only "generic prayer[s given] to a generic god" under constraints not required by *Town of Greece*. Pet. App. at 125 (Agee, J., dissenting).

Contrary to the Fourth Circuit's decision, the Sixth Circuit held that inviting attendees to stand during legislator-led prayers is not unconstitutionally coercive, acknowledging these types of requests as "polite," "commonplace," and "reflexive." *Bormuth*, 870 F.3d at 511, 517 (quoting *Am. Humanist Ass'n v. McCarty*, 851 F.3d 521, 526 (5th Cir. 2017)); *Town of Greece*, 134 S. Ct. at 1932 (Alito, J., concurring)). Further, the Sixth

Circuit expressed that it is not the responsibility of the judiciary to examine the contents of invocations so long as the prayers offered are not offensive to the Court's holdings in *Marsh* or *Town of Greece*. *Bormuth*, 870 F.3d at 511-12 ("*Town of Greece* instructs that 'government must permit a prayer giver to address his or her own God or gods as conscience dictates,' and that it is not the role of the judiciary to act 'as [a] supervisor[] and censor[] of religious speech.' We heed this advice . . . .") (citations omitted).

Clarification by this Court, *at this time*, is necessary. Cases examining prayers before deliberative bodies continue to rise through the federal courts with wide-ranging outcomes.[2] The confusion among the lower courts is apparent and has been plainly established by two directly conflicting *en banc* decisions. Without additional guidance from this Court, similar cases will continue to have incongruous outcomes throughout the country. This Court should take this opportunity to provide clarity in this area and resolve the question presented by the Petition.

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[2] *See, e.g., Hudson v. Pittsylvania Cty.*, 107 F. Supp. 3d 524 (W.D. Va. 2015); *Hake v. Carroll Cty.*, 2014 U.S. Dist. LEXIS 40476 (D. Md. 2014); *Coleman v. Hamilton Cty.*, 104 F. Supp. 3d 877 (E.D. Tenn. 2015).

CONCLUSION

Amicus curiae respectfully requests that this Court grant the Petition.

Respectfully submitted,

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