

No. 17-565

In the Supreme Court of the United States

ROWAN COUNTY, NORTH CAROLINA,

Petitioner,

v.

NANCY LUND, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

**BRIEF OF *AMICI CURIAE* STATES OF WEST
VIRGINIA AND 20 OTHER STATES AND THE
GOVERNOR OF KENTUCKY IN SUPPORT OF
PETITIONER**

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QUESTION PRESENTED

Whether legislative prayer delivered by legislators comports with this Court's decisions in *Town of Greece*, 134 S. Ct. 1811 (2014), and *Marsh v. Chambers*, 463 U.S. 783 (1983), as the *en banc* Sixth Circuit has held, or does not, as the *en banc* Fourth Circuit has held.

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**INTEREST OF *AMICI CURIAE* AND
SUMMARY OF ARGUMENT¹**

Certiorari is warranted to resolve the disagreement between the Fourth and Sixth Circuits about the role of lawmaker-led prayer in our constitutional system—a tradition dating back to the Framing and still practiced in many state and local legislative bodies today. *Amici curiae*—the States of West Virginia, Alabama, Arizona, Arkansas, Colorado, Georgia, Indiana, Kansas, Louisiana, Michigan, Missouri, Montana, Nebraska, Nevada, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, and Wisconsin and the Governor of Kentucky—have a significant interest in ensuring that lawmakers themselves have the option to lead ceremonial invocations, within both state legislatures and local deliberative bodies. The time-honored “practice of opening legislative sessions with prayer,” *Marsh v. Chambers*, 463 U.S. 783, 792 (1983), dates to before the adoption of the Federal Constitution, and has become “deeply embedded” in our nation’s history and tradition, *id.* at 786. As this Court has recognized, legislative prayer “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 v. Galloway*, 134 S. Ct. 1811, 1818 (2014).

In two pathmarking decisions, this Court set forth certain principles and documented the long-standing

¹ Pursuant to Supreme Court Rule 37.2(a), *amici* have timely notified counsel of record of their intent to file an *amicus* brief in support of Petitioner.

tradition of legislative prayer more generally against which challenges to such practices must be measured. In *Marsh v. Chambers*, 463 U.S. 783 (1983), “the unambiguous and unbroken history of more than 200 years” of public prayer led the Court to reject an Establishment Clause challenge to the Nebraska legislature’s century-old practice of paying a chaplain to open its proceedings with prayer. *Id.* at 791–92, 794–95. In *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), this Court upheld a town board’s practice of opening its meetings with prayers led by local ministers—concluding that the practice satisfied the test of “whether the prayer practice . . . fits within the tradition long followed in Congress and the state legislatures.” *Id.* at 1819.

The Sixth Circuit recently held that *Marsh* and *Town of Greece* dictate the same result where prayer is offered by the lawmakers themselves, rather than chaplains or volunteer clergy. *Bormuth v. Cnty. of Jackson*, 870 F.3d 494 (6th Cir. 2017) (en banc). Here, however, the *en banc* Fourth Circuit parted ways with this precedent. Finding the identity of the prayer-giver to be dispositive, the court below deemed unconstitutional the practice of a North Carolina county board of commissioners to allow its members to give brief invocations to open the board’s public sessions.

Lawmaker-led prayer is no less part of our constitutional tradition than chaplain- or minister-led prayer. Nothing in *Marsh* or *Town of Greece* supports the Fourth Circuit’s contrary conclusion. This Court’s review is necessary to resolve the disagreement in the

courts below regarding the permissibility of a practice that a majority of States and hundreds or thousands of local deliberative bodies have long allowed.

Indeed, lawmaker-led prayer is a widespread, deeply historic tradition. State legislatures across the country have allowed legislator-led prayer for over a century. Today, more than thirty-five States permit lawmakers to offer prayers in at least one chamber of their state legislature. Often, legislator-led prayer is practiced in tandem with minister-led prayer (similar to the practices in *Marsh* and *Town of Greece*), but in at least three States, lawmaker-led prayer is the *only* type of legislative prayer.

Lawmaker-led prayer is even more prevalent in local deliberative bodies, which frequently rely on the option of lawmaker-led prayer to connect them to the tradition of legislative prayer dating to the country's founding. Hiring a chaplain may be outside the budget for many of these entities, and in some rural areas, recruiting volunteer clergy may prove unreliable. As a result, hundreds of local deliberative bodies use lawmaker-led prayer on some occasions—many with legislative prayer practices almost identical to that of the Rowan County Board of Commissioners.

The storied history of lawmaker-led prayer on the state and local levels underscores the error of the decision below—and the need for this Court to set it right. The Fourth Circuit's departure from this Court's precedent threatens lawmaker-led prayer throughout the country. For the States and local

governing bodies within the Fourth Circuit—as well as in other circuits that have yet to decide this issue—the decision below eliminates an important and widely used method of legislative prayer. This Court should act to protect the ability of state and local lawmakers to participate in our country’s long-established tradition of public ceremonial prayer.

REASONS FOR GRANTING THE PETITION

I. Lawmaker-Led Prayer Falls Within The Tradition Of Legislative Prayer Recognized In *Marsh* And *Town Of Greece*.

Twice in the past thirty-five years, this Court has affirmed that “the unambiguous and unbroken history of more than 200 years” of invocations before deliberative bodies shows “that legislative prayer presents no . . . potential for establishment.” *Marsh v. Chambers*, 463 U.S. 783, 791–92 (1983). This historical tradition is critical when evaluating legislative prayer against constitutional challenge: “[T]he Establishment Clause must be interpreted by reference to historical practices and understandings.” *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014) (citation omitted).

Both *Marsh* and *Town of Greece* make clear that legislative prayer is a time-honored part of our national tradition—and thus fully consistent with the First Amendment. In *Marsh*, this Court explained that “[t]he opening of sessions of legislative and other deliberative bodies with prayer is deeply embedded in

the history and tradition of this country.” 463 U.S. at 186. Indeed, “the same week Members of the First Congress voted to appoint and to pay a Chaplain for each House,” they “also voted to approve the draft of the First Amendment for submission to the States.” *Id.* at 790. Because the practice of legislative prayer “was accepted by the Framers and has withstood the critical scrutiny of time and political change,” “there can be no doubt” that it is “compatible with the Establishment Clause.” *Town of Greece*, 134 S. Ct. at 1818–19 (citation omitted).

While neither *Marsh* nor *Town of Greece* specifically involved lawmaker-led prayer, a fair reading of both decisions shows that this mode of legislative prayer falls comfortably within the robust tradition of prayer this Court has approved. Both *Marsh* and *Town of Greece* teach that the purpose of legislative prayer “is largely to accommodate the spiritual needs of lawmakers.” *Town of Greece*, 134 S. Ct. at 1826 (plurality op.). “The principal audience for these invocations is not, indeed, 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 (emphasis added). Thus, members of the First Congress “join[ed] in the same act of worship” when a chaplain led them in prayer, *Marsh*, 463 U.S. at 791 (citations omitted), and the board members in *Town of Greece* “bowed their heads[] or made the sign of the

cross” together under the leadership of a guest chaplain, 134 S. Ct. at 1818 (majority op.).

These cases therefore instruct that legislative prayer allows legislators *themselves* to make a public and “brief acknowledgment of their belief in a higher power.” *Town of Greece*, 134 S. Ct. at 1827–28 (plurality op.). This Court specifically singled out “members of town boards and commissions, who often serve part-time and as volunteers,” as the lawmakers for whom “ceremonial prayer may . . . reflect the values they hold as private citizens.” *Id.* at 1826. For those individuals—the very type of lawmakers that the court below held could not open deliberative sessions in prayer—“the prayer is an opportunity for them to show who and what they are.” *Id.*

As such, and as Petitioners have shown, Pet. 25–35, and the Sixth Circuit recently agreed, *Bormuth v. Cnty. of Jackson*, 870 F.3d 494, 519 (6th Cir. 2017) (en banc), there “can be no doubt” that lawmaker-led prayer is “compatible with the Establishment Clause,” *Town of Greece*, 134 S. Ct. at 1818-19 (majority op.) (citation omitted). It stands to reason that where legislative prayer is intended to allow lawmakers to “reflect the values they hold as private citizens,” then the fact that they offer invocations themselves should not change the constitutional analysis. If anything, under the rationale this Court applied in *Marsh* and *Town of Greece*, the fact that legislators themselves may offer brief invocations to begin a body’s deliberate sessions sets the constitutionality of the practice on

more solid ground—not less—than when a paid chaplain or other individual offers the prayer.

The court below erred by allowing the identity of the prayer-giver to lead it to the opposite conclusion that this Court reached in *both* of its pathmarking decisions concerning legislative prayer. This Court should grant the petition to provide certainty about the validity of legislator-led prayer to the numerous state and local bodies with longstanding traditions of lawmaker-led prayer. Otherwise, state and local deliberative bodies in the Fourth Circuit—or in circuits yet to consider the issue—may forego legislative prayer altogether out of fear of the legal fees that may result from a lawsuit. Pet. 36; see also *Town of Greece*, 134 S. Ct. at 1831 (Alito, J., concurring). This Court’s review is essential to avoid the dismantling of one of this country’s oldest and most valued traditions.

II. The Decision Below Threatens A Widespread Prayer Practice That Has Been Part Of This Country’s Tradition Since The Founding.

The Fourth Circuit’s conclusion that lawmaker-led invocations fall outside the constitutionally protected tradition of prayer at legislative sessions and public proceedings of other deliberative bodies is entirely unmoored from this Court’s precedent. Giving near-determinative effect to the identity of the prayer-giver, the lower court discounted the robust tradition of legislative prayer generally, as well as the specific tradition of legislator-led prayers, on the basis that legislator-led prayer is not the most *common* type of

legislative prayer. App. 22–23. The correct question, however, is whether the “history shows that the specific prayer practice is permitted” under the Establishment Clause and has “withstood the critical scrutiny of time and political change”—not whether other (also permissible) prayer practices are more prevalent still. See *Town of Greece*, 134 S. Ct. at 1819.

Weighed against this correct standard, the lower court’s reasoning fails. Lawmakers have overwhelmingly been permitted throughout our nation’s history to lead prayer before deliberative bodies at the state and local levels. Lawmaker-led prayer is a common and important form of legislative prayer, which “connect[s] [lawmakers] to a tradition dating to the time of the Framers” and allows part-time and volunteer lawmakers to “reflect the values they hold as private citizens.” See *id.* at 1826 (plurality op.). This Court’s review is necessary to undo the Fourth Circuit’s erroneous decision, which would “sweep away what has so long been settled,” and threaten to “create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent.” *Id.* at 1819 (majority op.).

A. State legislatures have opened public sessions with lawmaker-led prayer throughout this country’s history.

Within state legislative chambers, the practice of lawmaker-led prayer can be traced back at least 150 years—with the tradition dating over a century in many States. And the practice is still robust today:

many States permit legislator-led prayer, legislative chambers in three States rely on it exclusively, and three States expressly protect the practice in state law. The decision below wrongly calls into question this well-established and continuing tradition. This Court's review would provide certainty of the constitutional grounding of legislator-led prayer for the many States in which these invocations form an important part of their historical tradition and the fabric of contemporary public life.

1. In one of the earliest examples of state legislator-led prayer, on January 11, 1775, the South Carolina Provincial Congress appointed one of its members, "Reverend Mr. Turquand . . . to celebrate divine service in [the] Provincial Congress." American Archives, Documents of the American Revolutionary Period, 1774–76, v1:1112. Lawmaker-led prayer continued well after the States disestablished religion, persisting "in various state capitals since at least 1849." *Bormuth*, 870 F.3d at 509. The Illinois General Assembly, for example, opened its proceedings with a prayer led by Senator Richmond in 1849.² The Tennessee Senate has opened its proceedings with an invocation since at least 1859, S. Journal 33, 1st Sess., at 171 (Tenn. 1859)—and

² Journal of the Senate of the Sixteenth General Assembly of the State of Illinois at its Second Session 51 (1849), <https://books.google.com/books?id=pLIHAQAAMAAJ&pg=PA1&dq=journal+of+the+senate+of+the+sixteenth+general+assembly+of+the+state+of+illinois+at+its+second+session+commencing+october+22,+1849&hl=en&sa=X&ved=0ahUKEwjohrGz3P3WAhXH5CYKHeXSBQoQ6AEIKDAA#v=onepage&q=richmond&f=false>.

continues to do so today, S. Journal 109, at 2178 (Tenn. Feb. 8, 2016). For its part, the Tennessee House of Representatives has opened legislative sessions with prayers since at least 1849,³ allowed lawmakers to lead those prayers since at least 1897,⁴ and continued this practice through the 20th century and up to the present.⁵

At least fourteen States—Alabama, Arkansas, Connecticut, Georgia, Iowa, Kansas, Maryland, Michigan, Mississippi, North Carolina, Tennessee, Utah, Vermont, and West Virginia—have allowed lawmaker-led prayer “for well over a century,” *Marsh*, 463 U.S. at 794; see *supra* nn.2–5; *infra*. nn.7–38. The examples below from several of the many States that have long allowed lawmaker-led prayer illustrate the prevalence of the practice, as well as its important role as one of this nation’s oldest and most well-established traditions.

Alabama. Both of Alabama’s legislative chambers have allowed members to offer prayers for more than one hundred years. A member of the House of Representatives, for instance, gave the invocation in

³ See H.R. Journal 28, at 262 (Tenn. 1849).

⁴ See, *e.g.*, H.R. Journal 50, at 509 (Tenn. 1897) (“Friday, February 12, 1897. . . . Proceedings were opened with prayer by Representative Flaniken.”).

⁵ See, *e.g.*, H. Journal 57, at 961 (Tenn. 1911); H. Journal 62, at 12, 788 (Tenn. 1921); H. Journal 86, at 811 (Tenn. 1969); H. Journal 109, at 2286 (Tenn. 2016).

the state Senate in 1873.⁶ And during the 1875 legislative session, Mr. Nelson and Mr. Wilson, members of the House of Representatives, opened House sessions with prayers.⁷

Connecticut. Members of the Connecticut House of Representatives offered prayer in the Connecticut Senate as early as 1861. To take a few examples from that year, on June 5, “[p]rayer was offered by Rev. William Denison, a member of the House of Representatives from the town of Saybrook.”⁸ On June 11, “[p]rayer was offered by Rev. John Mitchell, a member of the House of Representatives from the

⁶ Journal of the Session of 1872–73 of the Senate of Alabama, p. 561, <https://books.google.com/books?id=jSFKAAAAMAAJ&printsec=frontcover&dq=editions:D1IDkQLiElsC&hl=en&sa=X&ved=0ahUKEwicoLay6I3UAhUi3YMKHZC5BKIQ6AEIKDAB#v=onepage&q&f=false>.

⁷ Journal of the House of Representatives of the State of Alabama, Session of 1875–76, pp. 113, 121, 130, 138, 172, 230, 252, 270, 280, 291, 310, 320, 449, 525, 587, 677, <https://books.google.com/books?id=ANEIAQAAIAAJ&printsec=frontcover&dq=editions:KZgKbZSwXCMC&hl=en&sa=X&ved=0ahUKEwi1nte75Y3UAhVI7IMKHTdVAAIQ6AEIjAA#v=onepage&q&f=false>.

⁸ Journal of the Senate of the State of Connecticut, May Session 1861 231 (1861), <https://books.google.com/books?id=pjUtAQAAAMAAJ&pg=PA4&dq=Journal+of+the+Senate+of+the+State+of+Connecticut,+May+Session+1861&hl=en&sa=X&ved=0ahUKEwj85vCf6YfXAhWJWCYKHbmbB38Q6AEIKDAA#v=onepage&q=Journal%20of%20the%20Senate%20of%20the%20State%20of%20Connecticut%2C%20May%20Session%201861&f=false>.

town of Stratford.”⁹ And on June 28, “Rev. E. H. Parmelee, a member of the House of Representatives, from the town of Killingworth,” offered the prayer.¹⁰ State records show other, early examples of legislator-led prayer in the state Senate as well: during the 1868 legislative session, for example, Rev. Mr. Churchill, Rev. Mr. Fassendon, and Rev. Mr. Rockwell— all members of the Connecticut House of Representatives— opened the Senate’s proceedings with prayer.¹¹

Kansas. The Kansas House of Representatives allowed legislators to offer prayer from at least 1877, with Rev. Mr. Dixon, a member of the House, offering the prayer on February 19, 1877.¹² Similar examples date to 1887. See H.R. Journal 5, at 634 (Kan. 1887) (“Prayer by Hon. Mr. Bottorff, member of the House

⁹ *Id.* at 258.

¹⁰ *Id.* at 406.

¹¹ Journal of the Senate of the State of Connecticut 118, 263, 415, 582, 628 (1868), <https://books.google.com/books?id=qiUwAQAA MAAJ&printsec=frontcover&dq=editions:E7hMbKXXg9gC&hl=en&sa=X&ved=0ahUKEwjW4Za04o3UAhVE9IMKHZRSC6c4FBDoAQg0MAQ#v=onepage&q&f=false>.

¹² House Journal Proceedings of the House of Representatives of the State of Kansas 640 (1877), <https://babel.hathitrust.org/cgi/p t?id=mdp.39015068096745;view=1up;seq=9>.

from Sumner county.”); see also *id.* at 667 (“Prayer by Mr. Morton, a member of the House.”).¹³

Michigan. Both the Michigan House of Representatives and the Michigan Senate have a long history of opening proceedings with lawmaker-led prayer. Representatives Sharts and Barnes led prayer in the Michigan House of Representatives in 1879,¹⁴ as did Representative H.W. Thompson at the beginning of the chamber’s session on January 11, 1887.¹⁵ In the Michigan Senate, lawmaker-led prayer dates back to at least 1883.¹⁶ Other instances include

¹³ <https://babel.hathitrust.org/cgi/pt?id=chi.095659234;view=1up;seq=675>.

¹⁴ Journal of the House of Representatives of the State of Michigan, 1879, p. 10, https://books.google.com/books?id=2UdOAAAAMAAJ&printsec=frontcover&dq=journal+of+the+house+of+representatives+of+the+state+of+michigan+1879&hl=en&sa=X&ved=0ahUKEwjw_4XM3_WAhXD5CYKHcbJBDkQ6AEINDAC#v=onepage&q&f=false.

¹⁵ 1 Journal of the House of Representatives of the State of Michigan, 1887, p. 57, <https://babel.hathitrust.org/cgi/pt?id=uc1.b2883706;view=1up;seq=61;size=150>.

¹⁶ 1 Journal of the Senate of the State of Michigan, 1883, pp. 228, 303, <https://babel.hathitrust.org/cgi/pt?id=mdp.39015071347051;view=1up;seq=234>.

prayers from Senators Westgate and Deyo in 1887,¹⁷ and from Senator Campbell in 1897.¹⁸

Mississippi. The Mississippi House of Representatives' legislator-led prayer practice dates back to the early twentieth century, at least. In 1902, the House began its deliberations nearly every day with prayer led by a member.¹⁹ The House Journal records, for example, note that the seventh day of the legislative session commenced with a “[p]rayer by Representative Ferguson” followed by the calling of the roll.²⁰ The ninth day similarly commenced with “[p]rayer by Representative Langston,” also followed by the roll call.²¹ The pattern continued throughout that legislative session. The House Journal records

¹⁷ 1 Journal of the Senate of the State of Michigan, 1887, p. 12, <https://babel.hathitrust.org/cgi/pt?id=mdp.39015071347051;view=1up;seq=234>.

¹⁸ 1 Journal of the Senate of the State of Michigan, 1897, p. 94, <https://babel.hathitrust.org/cgi/pt?id=mdp.39015071347184;view=1up;seq=100>.

¹⁹ Journal of the House of Representatives of the State of Mississippi (1902), <https://books.google.com/books?id=8IJKAAAAMAAJ&printsec=frontcover&dq=journal+of+mississippi+legislature+1865&hl=en&sa=X&ved=0ahUKEwieks2hgZbWAhVp0YMKHbYPAjkQ6AEINDAC#v=onepage&q=prayer&f=false>.

²⁰ *Id.* at 83.

²¹ *Id.* at 102.

similar prayers in at least the 1904 and 1914 sessions, as well.²²

New Hampshire. The New Hampshire House of Representatives allowed its members to lead prayer from at least 1863. In that year, “Mr. Stewart, member from New Hampton” and “Mr. Lawrence, member from Claremont” each offered prayer to commence the legislative proceedings.²³ In 1865, “Mr. Cutting, member of the House” and “Rev. Mr.

²² Journal of the House of Representatives of the State of Mississippi (1904), <https://books.google.com/books?id=A5g6AQAAMAAJ&pg=PA900&dq=journal+of+the+house+of+representatives+state+of+mississippi+1878&hl=en&sa=X&ved=0ahUKEwj6mKqiyp3WAhWq7oMKHU2kAioQ6AEIMzAC#v=onepage&q=journal%20of%20the%20house%20of%20representatives%20state%20of%20mississippi%201878&f=false>; Journal of the House of Representatives of the State of Mississippi (1914), <https://books.google.com/books?id=5TktAQAAMAAJ&printsec=frontcover&dq=inauthor:%22Mississippi.+Legislature.+House+of+Representatives%22&hl=en&sa=X&ved=0ahUKEwiCxpeiy53WAhUh34MKHV5hCKEQ6AEIKDAA#v=onepage&q=prayer&f=false>.

²³ Journal of the House of Representatives of the State of New Hampshire 90, 169, 293, 312 (1863), <https://books.google.com/books?id=d8dHAQAAMAAJ&pg=PA25&dq=journal+of+the+house+of+representatives+of+new+hampshire+1863&hl=en&sa=X&ved=0ahUKEwiGw5D37tzWAhVq7YMKHc3JBqoQ6AEINDAC#v=onepage&q=journal%20of%20the%20house%20of%20representatives%20of%20new%20hampshire%201863&f=false>.

Humphrey, member from Winchester” also led prayers.²⁴

North Carolina. Members of the Senate and the House of Representatives offered prayers in the North Carolina Senate on at least ten occasions in 1870.²⁵ For example, “Rev. James Grayson, Representative from McDowell county,” opened Senate proceedings with prayer on November 29, 1870.²⁶ The following day, “Rev. R. M. Norment, Senator from Robeson county,” led the opening prayer.²⁷

Vermont. Lawmakers led prayer in the Vermont legislature as early as 1866. In that year, several members of the House of Representatives commenced the chamber’s proceedings with prayer, including Revs. Mr. Cushing, Mr. Dunn, Mr. Pease, Mr.

²⁴ Journal of the House of Representatives, June Session 51, 58 (1865), <https://books.google.com/books?id=zkatQAAMAAJ&pg=RA1-PA58&dq=%22Prayer+by+Mr.+Cutting,+member+of+the+House%22&hl=en&sa=X&ved=0ahUKEwiShvmjinWAhULyYMKHQjhDWcQ6AEILTAB#v=onepage&q=%22Prayer%20by%20Mr.%20Cutting%2C%20member%20of%20the%20House%22&f=false>.

²⁵ Journal of the Senate of the General Assembly of the State of North Carolina, 1870, <https://books.google.com/books?id=9UobAQAAIAAJ&printsec=frontcover&dq=editions:3Y1AsvgXnCUC&hl=en&sa=X&ved=0ahUKEwjN7OnIkJjUAhXDz4MKHcwxC4oQ6wEITTAH#v=onepage&q&f=false>.

²⁶ *Id.* at 52.

²⁷ *Id.* at 57.

Stevens, Mr. Walker, and Mr. Woodman.²⁸ And in the Vermont Senate, “Rev. S.K.B. Perkins, a member of the House of Representatives from Glover” offered a prayer in 1871.²⁹

West Virginia. In West Virginia, the practice of lawmaker-led prayer has been part of the State’s tradition for almost its entire existence. In 1867, just four years after West Virginia was granted statehood, several state Senators opened the Senate proceedings with invocations.³⁰ And in the West Virginia House of Delegates, delegates led prayers as early as 1871.³¹

²⁸ Journal of the House of Representatives of the State of Vermont (1866) <https://books.google.com/books?id=AJtMAAAAMAAJ&printsec=frontcover&dq=editions:r0WLCHH6H2gC&hl=en&sa=X&ved=0ahUKEwiT7YO-uJjUAhVlzIMKH73B-IQ6AEIOjAE#v=onepage&q&f=false>.

²⁹ Journal of the Senate of the State of Vermont 143 (1871), https://books.google.com/books?id=nTNFAAAAYAAJ&printsec=frontcover&dq=editions:r5HOFKBX7gMC&hl=en&sa=X&ved=0ahUKEwjnnJaRu5jUAhUF_4MKHYOVCTU4HhDoAQhEMAc#v=onepage&q&f=false; *see also id.* at 38.

³⁰ Journal of the Senate of the State of West Virginia 37, 72, 92, 118, 147, 179, & 196 (1867), <https://books.google.com/books?id=ZTwtAQAAMAAJ&printsec=frontcover&dq=editions:bnN4Ua7lkC&hl=en&sa=X&ved=0ahUKEwjuyZmowZjUAhUCxoMKHYaoBbsQ6AEISTA#v=onepage&q&f=false>.

³¹ Journal of the House of Delegates of the State of West Virginia 94, 102, 120, 165, 213, 310, 341, 381, & 398 (1871), <https://books.google.com/books?id=8TctAQAAMAAJ&printsec=frontcover&dq=editions:rzxpRTsT3wC&hl=en&sa=X&ved=0ahUKEwiO1t7pv5jUAhVj6YMKHQH8B2QQ6AEIPzAF#v=onepage&q&f=false>.

Legislators have led prayer in the House of Delegates on multiple occasions since.³²

Other States. The examples recounted above reflect a common trend from the early history of our country. The experience of other States further underscores the widespread, long-established nature of legislator-led prayer: In Iowa, records show that a state Senator led prayer in the Iowa Senate in 1862,³³ and a state Senator similarly led prayer in 1927.³⁴

³² See, e.g., Journal of the House of Delegates of the State of West Virginia for the Twenty-Sixth Regular Session 560, 632, 651, 675 (1903) (“Prayer by Rev. G. A. Burdett, delegate from the county of Wirt.”); Journal of the House of Delegates of the Legislature of West Virginia 308 (1968) (noting that “the Honorable Russell L. Davisson, a Delegate from the County of Kanawha,” offered a prayer); Nat’l Conf. of State Leg., Inside the Legislative Process, Prayer Practices 5-152, <http://tinyurl.com/ncslprayer>.

³³ Journal of the Senate of the Ninth General Assembly of the State of Iowa 70 (1862), https://books.google.com/books?id=-xItAQAAAMAAJ&pg=PA494&dq=journal+of+the+senate+of+the+ninth+general+assembly+of+the+state+of+iowa+1862+prayer+by+senator+watson&hl=en&sa=X&ved=0ahUKEwjZns6l3_3WAhUI1CYKHbSxA10Q6AEIKDAA#v=onepage&q=journal%20of%20the%20senate%20of%20the%20ninth%20general%20assembly%20of%20the%20state%20of%20iowa%201862%20prayer%20by%20senator%20watson&f=false.

³⁴ Journal of the House of the Forty-Second General Assembly 729 (1927), https://books.google.com/books?id=d70lAQAAIAAJ&pg=PA152&dq=journal+of+the+house+of+representatives+of+the+state+of+oklahoma+1920&hl=en&sa=X&ved=0ahUKEwjfn4Df_OjWAhVq44MKHVbtDDEQ6AEIODAD#v=onepage&q=lloyd%20ellis&f=false.

Both chambers of the Arkansas legislature have allowed lawmaker-led prayer since at least 1873.³⁵ A member of the Georgia Senate commenced the Senate's proceedings with prayer in 1898.³⁶ In 1917, a Maryland Senator offered a prayer in the state Senate.³⁷ And in the Utah House of Representatives, a member offered prayer in 1913.³⁸

2. These records of early practices of legislator-led prayer are not mere historical curiosities: Prayer by

³⁵ Journal of the Senate of Arkansas, Nineteenth Session 88 (1874), <https://books.google.com/books?id=yc1MAQAAMAAJ&pg=PA729&dq=journal+arkansas+senate+1864&hl=en&sa=X&ved=0ahUKEwi74uv8853WAhUi5YMKHVB8DB8Q6AEIKDAA#v=onepage&q=prayer&f=false>; Journal of the Senate of Arkansas Twenty-Ninth Session 3 & 7 (1893), <https://books.google.com/books?id=J8ZMAQAAMAAJ&pg=PA3&dq=senator+allen+senate+journal+of+the+state+of+arkansas+twenty-ninth+session&hl=en&sa=X&ved=0ahUKEwie8LqQh4DXAhUGyoMKHasyAKsQ6AEIKDAA#v=snippet&q=Hon.%20Hogan%20Allen&f=false>.

³⁶ Journal of the Senate of the State of Georgia at Regular Session of the General Assembly at Atlanta, Wednesday, October 26, 1898, p. 584, https://books.google.com/books?id=_CRFAAAA YAAJ&printsec=frontcover&dq=editions:ROo8Ma1XiikC&hl=en&sa=X&ved=0ahUKEwi_oai--I3UAhVG7IMKHfKMDhsQ6AEIjAA#v=onepage&q&f=false.

³⁷ Journal of the Proceedings of the Senate of the State of Maryland, Special Session June 127 (1917), <https://books.google.com/booksid=ujEtAQAAMAAJ&pg=PA128&dq=journal+of+the+senate+of+the+state+of+maryland+1904&hl=en&sa=X&ved=0ahUKEwiF0-rSgOnWAhUF24MKHSFgDgoQ6AEIKDAA#v=onepage&q=journal%20of%20the%20senate%20of%20the%20state%20of%20maryland%201904&f=false>.

³⁸ H. Journal 10, at 22 (Utah 1913).

lawmakers in state legislatures remains a widespread practice down to today. Indeed, a *majority* of States and territories permit their state legislators to pray in one or both of their legislative chambers.³⁹

Admittedly, most of these state legislative bodies use invocations offered by a chaplain in addition to permitting lawmaker-led prayer. Nevertheless, chambers in three States—the Michigan House, the Rhode Island Senate, and the Maryland House—rely exclusively on lawmakers to offer opening invocations.⁴⁰ For example, Michigan House of Representatives standing rule 16 provides that “[t]he

³⁹ Br. of *Amici Curiae* State of West Virginia et al., *Lund v. Rowan Cnty.*, No. 15-1591, at *44 (4th Cir. filed Aug. 3, 2015) (supplementing a national survey conducted by the National Conference of State Legislatures conducted in 2002, finding examples of current legislator-led prayer in Alabama, Alaska, American Samoa, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Louisiana, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, Northern Mariana Islands, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin).

⁴⁰ Nat’l Conf. of State Leg., *Inside the Legislative Process, Prayer Practices* 5-151 to -152, <http://tinyurl.com/ncslprayer>; Kate Howard, *In Delegates They Trust*, Wash. Post (Mar. 9, 2013), https://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?utm_term=.86314b58a8a5; Michigan Legislature, Standing Rules of the House of Representatives, Rule 16 (Jan. 12, 2017), http://www.legislature.mi.gov/publications/rules/house_rules.pdf.

Clerk shall arrange for a Member to offer an invocation which will not exceed 2 minutes in length at the opening of each session of the House.” The member may deliver the invocation himself or herself or invite a guest to deliver the invocation.⁴¹

At least three other States have affirmed the importance of legislator-led prayer by expressly protecting the practice in their state constitutions or in state law. The Missouri Constitution provides that “citizens *as well as elected officials and employees of the state of Missouri and its political subdivisions* shall have the right to pray on government premises and public property,” and that “the General Assembly and the governing bodies of political subdivisions may extend to ministers, clergypersons, and other individuals the privilege to offer invocations.” Mo. Const. art I, § 5 (emphasis added). Similarly, Virginia law provides that “[d]uring the time prior to the governing body’s actual call to order or convening of business, any expressions *by members of the governing body* or members of the public shall be held consistent with the individual’s First Amendment right of freedom of speech.” Va. Code § 15.2-1416.1 (emphasis added). And South Carolina law expressly

⁴¹ Michigan Legislature, Standing Rules of the House of Representatives, Rule 16 (Jan. 12, 2017), http://www.legislature.mi.gov/publications/rules/house_rules.pdf; see also Nat’l Conf. of State Leg., *Inside the Legislative Process, Prayer Practices* 5-151 to -152, <http://tinyurl.com/ncslprayer>; Kate Howard, *In Delegates They Trust*, Wash. Post (Mar. 9, 2013), https://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?utm_term=.86314b58a8a5.

authorizes local deliberative bodies to “allow for a public invocation to be offered . . . by . . . *one of the public officials, elected or appointed to the deliberative public body.*” S.C. Code § 6-1-160(B)(1) (emphasis added).

B. Lawmaker-led prayer is a common practice in local deliberative bodies.

Beyond state legislative halls, lawmaker-led prayer has for years played an important role for local deliberative bodies as well. Legislative prayer connects lawmakers to a tradition dating back to the nation’s founding and lends gravity to public proceedings. *Town of Greece*, 134 S. Ct. at 1818. It likewise serves an important role for part-time and volunteer lawmakers specifically, who can use legislative prayer to demonstrate the values they hold in their private lives, *id.* at 1826 (plurality op.). Perhaps unsurprisingly in light of these historical purposes, lawmaker-led prayer is enshrined in the practices of local deliberative bodies no less than in state legislatures.

Amici States conducted surveys of local deliberative bodies in the Fourth and Sixth Circuits, as well as research into the practices of local bodies in States in other circuits. This information shows that lawmaker-led prayer is—and has long been—commonplace on the local level. In fact, available

information shows that in many areas it may be the most common form of legislative prayer.⁴²

Of the counties in States within the Fourth Circuit for which *amici* were able to obtain information,⁴³ 60% open their meetings with lawmaker-led prayer. And nearly 87% of those counties, 144 counties, limit the prayer opportunity to lawmakers, rather than permitting chaplains or other individuals to offer an invocation. Those 144 counties that rely exclusively on lawmaker-led prayer represent more than half of the 276 counties for which *amici* were able to obtain information.⁴⁴

A similar trend is apparent on the municipal level. Of the 52 most populous cities in States in the Fourth Circuit, 49 had data available regarding the prayer practices of their municipal governmental bodies. Of those city councils, 21 made use of lawmaker-led prayer in at least some instances, with 19 of those

⁴² To compile this information, *amici* reviewed meeting minutes, agendas, video recordings, and audio recordings of meetings of local deliberative bodies. In most instances, *amici* inferred that a deliberative body relies exclusively on lawmaker-led prayer if only lawmakers offered prayer in recent meetings.

⁴³ *Amici* were able to obtain information for 276 of the 319 counties in the Fourth Circuit.

⁴⁴ Br. of Amici Curiae State of West Virginia et al., *Lund v. Rowan County*, No. 15-1591, at *21–25, 30 (filed Aug. 3, 2015).

bodies relying *exclusively* on lawmakers to lead prayer.⁴⁵

With respect to the practice of local deliberative bodies in States in the Sixth Circuit, many of the *amici* represented here presented similar research to the *en banc* Sixth Circuit in *Bormuth*. This group of *amici* were able to obtain information for 266 of the 386 counties in the Sixth Circuit, and found that 143 of those counties open their meetings with prayer. Further, in fully 72% of those counties—or 104 counties—lawmakers themselves lead the prayer.⁴⁶

Although *amici*'s information regarding legislator-led prayer on the local level is less robust outside the Fourth and Sixth Circuits, information about county practices from *amici* outside these circuits is strikingly consistent. For example, lawmaker-led prayer is by far the most common form of legislative prayer in Louisiana's parish governments (called police juries), with more than 87% of parishes that allow for prayer at all permitting lawmakers to pray. And half of those parishes (14 of 28) appear to rely exclusively on lawmakers to give invocations.⁴⁷

Finally, although historical information is more difficult to find for local deliberative bodies, a few

⁴⁵ *Ibid.*

⁴⁶ Br. of *Amici Curiae* State of Michigan et al., *Bormuth v. Cnty. of Jackson*, No. 15-1869, at *13–15 (6th Cir. filed May 1, 2017).

⁴⁷ *Amici* States reviewed minutes, video recordings, and audio recordings of meetings available on the websites of each parish

examples illustrate that the widespread contemporaneous practice of lawmaker-led prayer is part of an established tradition. Commissioners have offered invocations at Weakley County, Tennessee commission meetings since at least 1943, the first year for which meeting minutes are available online.⁴⁸ Commissioners in Glynn County, Georgia opened their meetings with an invocation between at least 1960 and 1990.⁴⁹ And in Okeechobee County,

police jury. Information was available for 40 of the 64 police juries in Louisiana. *Amici* inferred that a deliberative body relies exclusively on lawmaker-led prayer if only lawmakers offered prayer in recent meetings. See, e.g., Washington Parish, Meeting Agenda & Minutes, Minutes Oct. 9, 2017; Minutes Aug. 28, 2017; Minutes Aug. 14, 2017, <http://www.washingtonparishalerts.org/meeting-agenda---minutes.html>; Union Parish Police Jury, Minutes Oct. 3, 2017, http://uppj.org/application/files/2215/0772/2871/10-3-17_Regular_Meeting.pdf; Union Parish Police Jury, Minutes Sept. 26, 2017, http://uppj.org/application/files/8915/0668/4843/9-26-17_Special_Meeting.pdf; Union Parish Police Jury, Minutes Sept. 5, 2017, http://uppj.org/application/files/4815/0533/0802/9-5-17_Regular_Meeting.pdf; Sabine Parish Police Jury, Minutes Oct. 18, 2017, <https://sabineparishpolicejury.com/Documents/Minutes/Police-Jury/Police-Jury-Meeting-2017-10-18.pdf>; Sabine Parish Police Jury, Minutes Oct. 18, 2017, <https://ishpolicejury.com/Documents/Minutes/Police-Jury/Police-Jury-Meeting-2017-09-27.pdf>; Sabine Parish Police Jury, Minutes Aug. 16, 2017, <https://sabineparishpolicejury.com/Documents/Minutes/Police-Jury/Police-Jury-Meeting-2017-08-16.pdf>.

⁴⁸ The county's meeting minutes are available at http://www.weakleycountyttn.gov/commission_1940-49.html.

⁴⁹ The county's meeting minutes are available at <https://www.glynncounty.org/1356/Commission-Minutes>.

Florida, Commissioners delivered invocations throughout 1984 and 1985.⁵⁰

III. The History And Prevalence of Legislator-Led Prayer Underscores The Error Of The Lower Court's Analysis And Need For This Court's Review.

The court below based its decision in large part on the erroneous premise that a widespread tradition of *lawmaker-led* legislative prayer—as distinct from a practice of legislative prayer more generally—was necessary for the practice to survive constitutional scrutiny, then deemed that historical record lacking. Yet not only is there no basis in *Marsh* or *Town of Greece* for the identity of the prayer-giver to dictate the constitutional result, see *supra* Part I, but the lower court turned a blind eye to the fact that legislator-led prayer is itself an established part of our national tradition, see *supra* Part II.

The prevalence and long practice of lawmaker-led prayer in both state legislatures and local deliberative bodies underscores the need for this Court's review. Unlike the Sixth Circuit, see *Bormuth*, 870 F.3d at 509 (concluding that “history shows that legislator-led prayer is a long-standing tradition”), the Fourth Circuit turned this Court's precedent on its head by discounting evidence of long-standing historical

⁵⁰ The county's meeting minutes are available at <http://okeechobeecounty.fl.iqm2.com/Citizens/Calendar.aspx?From=1/1/1985&To=12/31/1985>.

tradition on the basis that *other* types of legislative prayer are more common. But that is not the test this Court established: the proper inquiry is whether the practice falls within the country's history and tradition. *Town of Greece*, 134 S. Ct. at 1819. State and local legislative bodies do not run afoul of the Establishment Clause by choosing one form of expression over another, when both are part of a well-trod historical tradition.

Further, the historical record of lawmaker-led prayer at the state and local level undercuts the lower court's conclusion that the Rowan County prayer practice is unconstitutionally coercive. After affirming the robust tradition of legislative prayer in *Town of Greece*, a plurality of this Court found that the prayer practice at issue was not coercive based on a "fact-sensitive" inquiry that "considers both the setting in which the prayer arises and the audience to whom it is directed"—all "against the backdrop of a historical practice." 134 S. Ct. at 1825 (plurality op.). Importantly, the plurality applied a presumption that "the reasonable observer is acquainted with this 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, not to afford government an opportunity to proselytize or force truant constituents into the pews." *Ibid.* Absent evidence that lawmakers "singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity," historical tradition is an important touchstone in the coercion analysis. *Id.* at 1826. For his part, Justice Thomas

explained that the Establishment Clause is concerned with “coercion of religious orthodoxy and of financial support by force of law and threat of penalty.” *Id.* at 1837 (Thomas, J., concurring in part and concurring in the judgment) (citation omitted). With no allegation of coercive threat or penalties, he concluded that “[o]ffense” does “not equate to coercion.” *Id.* at 1838 (citation omitted).

As Petitioner has explained, the lower court’s coercion analysis—which deemed individual aspects of prayer practices held unproblematic in *Town of Greece* to be coercive when considered in tandem—conflicts with *Town of Greece* under either the plurality’s or concurrence’s approach. Pet. 32–35. The historical account set forth above strengthens this conclusion. The history of lawmaker-led prayer in state legislative halls and city councils dating from the early days of the Republic demonstrates that the “reasonable observer’s” familiarity with the tradition of legislative prayer extends to prayers offered by legislators no less than chaplains. Particularly at the local level, where lawmaker-led prayer is often the only or most common form of legislative prayer, a reasonable observer who sees a lawmaker offering prayer during the ceremonial portion of a hearing or legislative session would recognize that the prayer is intended to “accommodate the spiritual needs of lawmakers and connect them to a tradition dating to the time of the Framers”—not to proselytize or coerce

participation from the observer. *Town of Greece*, 134 S. Ct. at 1825–26 (plurality op.).

This Court’s review is necessary to resolve the split between the Fourth and Sixth Circuits on the constitutionality of the longstanding, widespread practice of lawmaker-led prayer. Indeed, the same concerns that animated this Court’s decision in *Town of Greece* support granting certiorari review here: state and local legislatures—especially part-time and volunteer “members of town boards and commissions”—have a right to “reflect the values they hold as private citizens” by participating in a tradition of ceremonial prayer. 134 S. Ct. at 1827–28. Local deliberative bodies, however, are the entities *most likely* to feel the sting of the lower court’s decision if left uncorrected, because, in practice, geographic constraints or funding limits may make the prospect of hiring a chaplain or recruiting volunteer clergy untenable solutions. In other words, in rural counties or where money is tight, legislative bodies may forego the right to participate in the historical tradition of legislative prayer altogether rather than risk a lawsuit in the Fourth Circuit—or another court that may adopt its strained reading of *Marsh* and *Town of Greece*.

Intervention is critical to resolve the disagreement in the lower courts and to preserve the ability of state and local legislative bodies to “accommodate the spiritual needs of lawmakers.” *Town of Greece*, 134 S. Ct. at 1825. This Court should grant review to provide certainty for the thousands of state and local governments that have long allowed lawmaker-led

prayer in their proceedings—and thereby continue a tradition that “has become part of the fabric of our society.” *Marsh*, 463 U.S. at 792.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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