No. 15-1591

In The United States Court Of Appeals For The Fourth Circuit

NANCY LUND; LIESA MONTAG-SIEGAL; ROBERT VOELKER,
Plaintiff - Appellee,

v.

ROWAN COUNTY, NORTH CAROLINA,
Defendant - Appellant.

On Appeal from the United States District Court
for the Middle District of North Carolina at Greensboro
No. 1:13-CV-207

REPLY BRIEF OF DEFENDANT-APPELLANT ROWAN COUNTY

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

INTRODUCTION

This case began as a challenge to the sectarian content of the County's legislative prayer practice. Once the Supreme Court in *Greece* eliminated the basis for that challenge by recognizing that sectarian prayers are part of the historical tradition previously upheld by the Supreme Court in *Marsh*, plaintiffs switched gears—contending that the County's legislative prayer practice is unconstitutional because legislators (and not chaplains or clergy) offer the prayers. With the shortcomings of that theory now evident, plaintiffs' theory has shifted once more to the "context" and "facts" that allegedly make the County's legislative prayer practice "coercive"—a strategy made doubly treacherous by misstatements of the record and the law. And at bottom, the new theory relies—as it must—on the same *Lemon*/endorsement test rejected by the Supreme Court in *Greece*.

Greece controls and requires judgment in the County's favor for two primary reasons. First, the County's prayer practice fits comfortably within the historical tradition recognized in *Marsh* and *Greece*, and the fact that legislators rather than chaplains or clergy offer the prayers is a distinction without a constitutional difference. Second, and related, the narrow exception recognized in *Greece* for a practice over time of truly "coercive" prayers that would *not* come within the historical tradition of solemnizing prayers has no application here. If anything, it is plaintiffs' visions of censorship—both inside and outside the

legislative hall—that would run afoul of the Establishment and Free Speech Clauses, not the County's prayer practice.

ARGUMENT

I. The Supreme Court's Decision In *Greece* Is Controlling And Requires Judgment For The County.

A. There Is No Constitutional Basis For Distinguishing Legislative Prayers Offered By Legislators From Those Offered By Chaplains or Clergy.

As the County demonstrated in its opening brief (at 19-21), the district court reversibly erred in misreading *Greece*—which is controlling here and requires judgment in the County's favor—to hold that the Constitution bars the County commissioners, simply because they are commissioners (and not chaplains), from offering prayers to solemnize their meetings unless they censor those prayers to remove any "overwhelmingly Christian" content. *See* JA 344; DE 62 at 22. Plaintiffs' primary argument (at 5, 10, 17, 24-26, 30-31) is that legislative prayers somehow lose their constitutional protection when legislators (rather than chaplains) offer the prayers. But as the County has already demonstrated (at 19-23), that is a distinction without a legal, logical, or practical difference.

Plaintiffs' only meaningful response (at 30) is that "the [Supreme] Court's analysis [in *Greece*] repeatedly references who led the prayers." But the Supreme Court gave no indication—and plaintiffs do not point to one—that its decisions in *Greece* and *Marsh* hinged on the fact that chaplains delivered the prayers in those

cases. *See Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014); *Marsh v. Chambers*, 463 U.S. 783 (1983). Whether it is a chaplain or a legislator, the government is speaking. If anything, as the County argued in its opening brief (at 26), an argument could be made that prayers offered by legislators present *fewer* Establishment Clause concerns than prayers by chaplains—*i.e.*, that it is arguably *more* problematic to allow a simple majority to elect a chaplain (and pay him or her from the public fisc) to deliver purely sectarian prayers (as was the case in *Marsh*)—than it is to allow various members of the legislative body to offer (or decline to offer) the legislative prayers. Plaintiffs have no response to this argument, because there is none.[1]

Plaintiffs attempt (at 25-26) but fail to explain away this Court's recognition in previous cases (cited in the County's opening brief at 23-25) that legislators may offer legislative prayers. Plaintiffs insist (at 25) that this Court's cases "were decided with the understanding that elected officials could not engage in sectarian legislative prayer." The argument seems to be that this Court would have prohibited legislators *qua* legislators from offering legislative prayers if it had only realized that the Supreme Court would deem sectarian prayers acceptable.

[1] Plaintiffs counter (at 30 n.10) is that this argument would allow sectarian prayers in courts. So too, however, would plaintiffs' own argument—the prayers would simply need to be delivered by a chaplain appointed by the chief judge. That, in turn, only highlights that the distinction plaintiffs rely upon makes no difference to the legal analysis under *Marsh* and *Greece*.

Understanding that this is a false assumption, plaintiffs go on to argue the "more important" points that those cases did not involve "elected officials directing the public to participate in its prayers and singling out for reproach those who object." *Id.* Because neither of those things happened in this case either, the argument simply begs the question.

Plaintiffs similarly beg the question (at 23-26) by virtually framing it in terms of whether there is a "longstanding historical tradition of an unconstitutional legislative prayer practice."[2] That is like asking whether a punishment that is cruel and unusual violates the Eighth Amendment's prohibition on cruel and unusual punishment. It is only by *assuming* a constitutional violation—which is the very thing at issue—that plaintiffs can argue it makes a constitutional difference whether a legislator or a chaplain offers the prayer. It is difficult to imagine a more persuasive argument *against* plaintiffs' position than the one they themselves offer

[2] Plaintiffs rely (at 24) on three epithets to *assume* that the County's prayer practice is not in line with the tradition recognized in *Marsh* and *Greece*—that it involves "externally focused, directed, and divisive prayers." Yet each of these labels misstates either the law or the facts. Because legislative prayers that mention nonlegislators (like soldiers or citizens of the County) may still have legislators as their "principal audience," plaintiffs' "external focus" argument misreads *Greece*. *See infra* Part II.A. Because the prayers were not "directed," there is no legal difference between the ones offered here and those offered in *Greece* and *Marsh*. *See infra* Part II.B. And because "divisive" can only mean "sectarian," an argument rejected by *Greece*, the correct inquiry is whether the prayers single out individuals for opprobrium, which they do not. *See infra* Part II.C.

in support of it. Thus plaintiffs implicitly recognize that there is no difference between legislators and chaplains when it comes to speaking for the government.[3]

B. The County's Practice Fits Comfortably Within The Historical Tradition Recognized By The Supreme Court In *Marsh* And *Greece*.

In this case, the only question is "whether the prayer practice . . . fits within the tradition long followed in Congress ***and the state legislatures***." *Greece*, 134 S. Ct. at 1819 (emphasis added). After *Greece*, there is no longer any question that sectarian prayer "fits within" that tradition, or that prayer by local government entities does too. Plaintiffs are left to argue that prayer by legislators (as opposed to chaplains or clergy) is somehow outside that tradition, but that argument is even weaker than the ones rejected in *Greece*. *See* Br. of *Amici Curiae* States at 12-26; Br. of Members of Congress as *Amici Curiae* at 1.

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[3] The Supreme Court has noted on more than one occasion that government speech is government speech, no matter which actor is doing the "talking." *See, e.g.*, *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2251 (2015) ("The fact that private parties take part in the design and propagation of a message does not extinguish the governmental nature of the message or transform the government's role into that of a mere forum-provider."). This is consistent, of course, with the Supreme Court's consideration of whether volunteer chaplains offering prayers at a legislative session offends the Establishment Clause. If the speech were not "government" speech, there could be no violation. But if the government-paid chaplain in *Marsh* was free to offer a sectarian prayer, there is no bar to a legislator offering the same prayer. Both are government speakers. *See also Pleasant Grove City v. Summum*, 555 U.S. 460, 464 (2009) (monuments donated by private citizens but displayed on government land were government "speech").

Indeed, if accepted, plaintiffs' argument would effectively overrule *Greece* by throwing into question the "tradition long followed by . . . the state legislatures"—outlined extensively by *amici*—of legislators leading legislative prayer (even exclusively leading the prayers, as here). *See* Br. of *Amici Curiae* States at 20-26. As *amici* demonstrate, at least 163 lawmaking bodies in this Circuit alone rely exclusively on "lawmaker-led prayers." *Id.* at 24. And that number does not even account for the lawmaking bodies (like the U.S. Congress) in which legislators occasionally offer the prayers. The tide of litigation against state and local governments stemmed by the *Greece* decision would no doubt rise again under plaintiffs' argument—in contravention of the Supreme Court's instruction that it would be wrong to "create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent." *Greece*, 134 S. Ct. at 1819.

Plaintiffs' silence on the scope and history of the prayer practice at issue here is telling. Evidently they believe it was constitutionally suspect for *amicus* U.S. Senator James Lankford to personally deliver the Senate's prayer during this past year as a sitting U.S. Senator. 161 CONG. REC. S3313 (daily ed. May 23, 2015) (offering just one recent example of a longstanding practice). Yet congressional history refutes that view and confirms that the practice has existed

throughout American history, and thus is part of the tradition upheld in *Marsh* and *Greece*. Br. of Members of Congress as *Amici Curiae* at 6-11.

II. The Narrow Exception In *Greece* For Unconstitutionally Coercive Prayers Has No Application Here (And Neither Does The *Lemon* Test).

Perhaps recognizing the weakness of their argument that prayers by legislators are somehow outside the tradition of solemnizing prayers recognized by the Supreme Court in *Marsh* and *Greece*, plaintiffs devote much of their brief to attempting to expand the narrow exception recognized in *Greece* for truly coercive prayers. *See Greece*, 134 S. Ct. at 1824 ("Absent a ***pattern*** of prayers that ***over time denigrate, proselytize, or betray an impermissible government purpose***, a challenge based solely on the content of a prayer will not likely establish a constitutional violation. *Marsh*, indeed, requires an inquiry into the prayer opportunity as a whole, rather than into the contents of a single prayer." (emphases added) (citing 463 U.S. at 794-95)).[4] But plaintiffs' attempt to expand that narrow exception only confirms that they cannot come within it. Indeed, were plaintiffs' view accepted, the narrow exception for coercive prayers would swallow the rule

[4] Justice Thomas, joined by Justice Scalia, would go even further to hold that an Establishment Clause violation only takes place when there is legal coercion. *See Greece*, 134 S. Ct. at 1838 (Thomas, J., concurring in part and concurring in the judgment).

and *sub silentio* overrule *Greece* itself by inviting courts to undertake an endorsement analysis in every case. That cannot be right.[5]

Though plaintiffs misrepresent (at 27) the County's position as seeking "blanket approval for all legislative prayer policies," that has never been the County's position. To the contrary, the County's view (at 29-35) is simply that the criteria set out in *Greece* for identifying unconstitutional legislative prayer practices are not close to being met in the instant case.

A. *Greece* Protects Legislative Prayers From Censorship By Either Legislatures Or Courts.

First, plaintiffs seize (at 8-14) on language in *Greece*, 134 S. Ct. at 1825 (opinion of Kennedy, J.), recognizing that legislators are the "principal"—but not exclusive—"audience" for legislative prayers, to argue that the prayers at issue are unconstitutionally coercive because they are "an external act focused on the broader public." But *Greece* itself refutes that argument, which the record would not support in any event. In *Greece*, the Supreme Court made clear that legislative prayers can "reflect the values [lawmakers] hold as private citizens" because "[t]he prayer is an opportunity for them to show who and what they are." *Id.* at 1826. The record here reflects just such prayers. Plaintiffs complain (at 10) that the

[5] If plaintiffs' "facts-sensitive" analysis proves anything, it is that summary judgment was improper and the County is entitled at the very least to a trial.

prayers were not "solely for [the commissioners'] benefit" but do so by stretching the words of the prayers beyond their meaning.

For example, contrary to plaintiffs' assertions, a commissioner's prayer expressing his own belief that divine guidance for him is the best the county can hope for (JA 325; DE 62 at 3) "sets [his] mind to a higher purpose" and thus bears all the hallmarks of legislative prayer. *See Greece*, 134 S. Ct. at 1825 (opinion of Kennedy, J.). So too with plaintiffs' complaints about prayers by commissioners that mentioned a deputy sheriff who had been seriously wounded in the line of duty (JA 14; DE 1 at 6) and county residents deployed to Iraq and other warzones in service to the Nation (SA 29; DE 6-4 at 19). Such prayers are common in Congress. *See, e.g.*, 153 CONG. REC. H1567 (daily ed. Feb. 14, 2007) (remarks of Rev. Toti) ("We pray this Nation will return to the faith exhibited by men and women who trusted God, forged a Nation out of wilderness, raised families guided by standards from Your Word . . . . Father, shield our military troops protecting our freedoms around the world.").

Legislative prayers do not somehow lose their constitutionally protected status because they invoke persons other than those serving in office—and certainly not prayers invoking those who serve and sacrifice for the good of their community and the Nation. Perhaps the most troubling aspect of plaintiffs' argument, though, is the degree to which, if accepted, it would "force the

legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech, a rule that would involve government in religious matters to a far greater degree than is [currently] the case." *Greece*, 134 S. Ct. at 1822.

Given the number of times plaintiffs have misconstrued the commissioners' words in this case alone, it is not hard to see why the Supreme Court has prohibited courts from engaging in such an exercise across the board. So not only would plaintiffs' reading of *Greece* and *Marsh* prohibit legislative prayers on behalf of soldiers, first responders, the needy, and victims of tragedy, it would also violate *Marsh* by requiring the very same judicial parsing of prayers that led the Supreme Court in *Marsh* to uphold legislative prayer in the first place. *See Marsh*, 463 U.S. at 795 ("[I]t is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer."). That is reason enough to reject it. More broadly, and contrary to plaintiffs' assertion (at 11), the "internal or external nature of a prayer practice" is not, and never was, a "key consideration" under *Greece*. Instead, the Court distinguished situations where "the course and practice ***over time*** shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion." *Greece*, 134 S. Ct. at 1823 (emphasis added).[6]

[6] Plaintiffs' argument to the contrary relies on Justice Kagan's *Greece* dissent, which noted that "[t]he practice here at issue differs from the one sustained in

B. The County's Legislative Prayer Practice Is Not "Coercive" Under *Greece* Because The Public Is Not "Directed" Or "Solicited" To Participate.

Second, plaintiffs argue (at 14-18) that the prayers at issue are unconstitutionally coercive because the commissioners occasionally invited others to join them in prayer by saying "let us pray" or "please pray with me." *See Greece*, 134 S. Ct. at 1826 (opinion of Kennedy, J.) (noting that the "analysis would be different if town board members ***directed the public to participate in the prayers***, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity." (emphasis added)). That argument, too, is both legally and factually wrong. When the Supreme Court expressed concern about prayer-givers "direct[ing] the public to participate in the prayers," the Court was concerned about orders, not requests. *See id.* at 1832 (Alito, J., concurring) (referring to the invitation as not just "commonplace" but an "almost reflexive" request that opens any public prayer).

As the County pointed out in its opening brief (at 31), and as plaintiffs' own record citations (at 15) confirm, an invitation to stand is not a "direction" to do so. And even plaintiffs admit (at 2), not everyone stood or bowed their heads for the

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Marsh because Greece's town meetings involve participation by ordinary citizens, and the invocations given—directly to those citizens—were predominantly sectarian in content." *Greece*, 134 S. Ct. at 1842 (Kagan, J., dissenting). This approach was rejected by the majority, and therefore provides plaintiffs no support.

prayer. Plaintiffs further admit (at 15) that when these complained-of instances occurred, citizens were asked to "please stand [for] the invocation ***and*** the [P]ledge." (quoting JA 14; DE 1 at 6) (emphasis added). Government officials cannot direct citizens to stand to recite the Pledge of Allegiance, *see Myers v. Loudoun Cnty. Pub. Schs.*, 418 F.3d 395, 403-08 (4th Cir. 2005) (repeatedly recognizing that the recitation must be voluntary), any more than they could direct them to salute the American flag, *see W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638-42 (1943). So the words from the presiding commissioner are simply an *invitation* for citizens to participate voluntarily in the prayer or the Pledge only if they freely choose to do so—not a *command* that could reasonably be construed as "directing citizens" to participate in either activity.[7]

Neither can "let us pray" be an unconstitutional "solicitation" under *Greece*. That is because there is no evidence that those who chose not to pray were chastised or treated differently as a result—there is no *quid pro quo* one would see with solicitation. *See Greece*, 134 S. Ct. at 1826 (opinion of Kennedy, J.). And there is no evidence that plaintiffs could not have left the room during that time or arrived late to the meeting if it offended them. *See id.* at 1827. Further, an

[7] Plaintiffs' reliance on *Simpson v. Chesterfield County Board of Supervisors*, 404 F.3d 276 (4th Cir. 2005), is misplaced. That case predates *Greece* and therefore has nothing to say about whether the commissioners here impermissibly "directed the public to participate in the prayers," *Greece*, 134 S. Ct. at 1826 (opinion of Kennedy, J.), which they did not.

invitation to "[p]ray with me" or to "let us pray"—when made by the prayer-giver—is commonly (and reasonably) understood in the context of public prayer as an invitation to those who wish to join in the prayer—not as soliciting, much less directing, religious behavior. *See id.* at 1832 (Alito, J., concurring). As plaintiffs evidence in their affidavits, they obviously did not feel that they had to participate in the prayers because they did not. SA 3, 5-6, 9; DE 6-1 at 3; DE 6-2 at 2-3; DE 6-3 at 3. And as plaintiffs admit in their complaint, the only harm suffered were feelings of exclusion. JA 11-12; DE 1 at 3-4.

C. No One Was Singled Out For Opprobrium By The County's Legislative Prayer Practice.

Third, plaintiffs argue (at 18-23) that they were singled out for opprobrium. This argument—based on hearsay from newspaper articles and the actions of other citizens, not the commissioners—not only misrepresents the record, but also relies on improper and irrelevant evidence. Plaintiffs point to Commissioner Sides' statement—made *after* this lawsuit was filed—that people "call evil good and good evil." JA 325 (citation omitted); DE 62 at 3. Tellingly, this quote—the one most emphasized by plaintiffs—had nothing to do with any objections to legislative prayer and, contrary to plaintiffs' misrepresentation (at 20), the commissioner was not calling "religious minorities in the County 'evil.'" As plaintiffs recognize (at 4), he was referring to the issue of Bible instruction in County schools, and

commenting on what he views as societal decline in general. This type of statement is irrelevant to coercion analysis under *Greece*.

Plaintiffs also point (at 20-21) to Commissioner Barber's statements that "God will lead me through this persecution" and that "we do believe that there is only one way to salvation and that is Jesus Christ," along with a meeting at which members of the audience—not the commissioners—jeered a resident who expressed opposition to the County's legislative prayer, to argue (at 21) that "the Board's leadership engendered and then inflamed 'the very divisions along religious lines that the Establishment Clause seeks to prevent.'" (quoting *Greece*, 134 S. Ct. at 1819). That argument fails for several reasons.

All of this happened after the instant lawsuit was filed. If anything, it was plaintiffs' efforts to censor the content of the legislative prayers that "engendered and then inflamed" the division that evidently (and regrettably) took place at a later meeting. None of this is evidence that the County "allocated benefits and burdens based on participation in the prayer, or that citizens were received differently [by the commissioners] depending on whether they joined the invocation or quietly declined"—which is the test under *Greece*. *See Greece*, 134 S. Ct. at 1826 (opinion of Kennedy, J.). And these isolated incidents do not come close to showing, as *Greece* requires, a "course and practice ***over time*** . . . that the

invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion." *Id.* at 1823 (majority opinion) (emphasis added).

It would trench upon legislative immunity to say that a lawmaker could not express his personal views arising from being a defendant in litigation, and it would trench upon free-speech rights to say that a lawmaker could not express those views outside a legislative session. And if expressing one's own religious views is the equivalent of disparaging the faith of others, then *no* prayer could withstand constitutional scrutiny under *Greece*. *See id.* at 1822 ("[I]t is unlikely that prayer will be inclusive beyond dispute . . . ."). Thus it is not surprising that the record in *Greece* included similar prayers offered in the town board meetings referring to the "saving sacrifice of Jesus Christ on the cross." *Id.* at 1820 (citation omitted).

While it is regrettable that private citizens may have jeered another fellow citizen who criticized the practice of offering prayers, those discourteous words were uttered by private citizens, and are not attributable to the County. In all events, the incident is not materially different from one that occurred in *Greece* when a prayer-giver rudely referred to legislative-prayer opponents as "ignorant." *Id.* at 1824 (holding that stray remarks "do not despoil a practice that on the whole reflects and embraces our tradition"). Because isolated incidents of this type were

not enough to render the legislative prayer practice in *Greece* unconstitutionally coercive, they cannot be enough to do so here, either.

D. The *Lemon* Test In Any Form Is Inappropriate Here.

As a last-ditch stand, plaintiffs rely (as the district court did) on the *Lemon* test, but that test has no application here. To be sure, this Court previously applied a variation of the *Lemon* test in its legislative prayer cases beginning with *Wynne v. Town of Great Falls*, 376 F.3d 292 (4th Cir. 2004), and reaching its zenith in *Joyner v. Forsyth County*, 653 F.3d 341 (4th Cir. 2011). That was the same test the Second Circuit applied in *Galloway v. Town of Greece*, 681 F.3d 20, 30 (2d Cir. 2012), before being reversed by the Supreme Court. The Supreme Court did not just disagree with the result reached by the Second Circuit, but with its reasoning, too—and held that *Marsh* supplies the proper legal framework and analysis. *See Greece*, 134 S. Ct. at 1815, 1821.

Plaintiffs impermissibly attempt to smuggle the *Lemon*/endorsement test back into the analysis by arguing (at 31-32) that there is evidence the commissioners prefer Christianity (and thus impermissibly send a message of "endorsement" to outsiders). But the same thing was true in *Greece*, where the overwhelming majority of prayers offered at the town meetings were explicitly Christian. *See Greece*, 681 F.3d at 30-31 (invalidating the town's practice because the vast majority of prayers included references to Christian beliefs). The Supreme

Court held those facts not to amount to an Establishment Clause violation as a matter of law, either as a historical violation or as a legally cognizable form of coercion. That holding requires this Court to reach the same conclusion in this case.

Put simply, the Supreme Court in *Greece* decided that if an Establishment Clause test would invalidate a longstanding historical practice, the problem is with the test—not the practice. *See* 134 S. Ct. at 1819 (The Establishment Clause allows legislative prayer practices "where history shows that the specific practice is permitted. Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change."). Prayer practices that are "coercive"—as the Supreme Court carefully explained the term—are simply not part of that historical pedigree. But as already demonstrated, the prayer practice at issue in this case does not cross that constitutional line. It is well within the historical tradition recognized by the Supreme Court in *Marsh* and *Greece*.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and judgment rendered in the County's favor.

Dated: October 14, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 14, 2015, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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