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

BRIEF OF DEFENDANT-APPELLANT ROWAN COUNTY

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Defendant-Appellant Rowan County makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity?

No.

2. Does party/amicus have any parent corporations? If yes, identify all parent corporations, including grandparent and great-grandparent corporations.

No.

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? If yes, identify all such owners.

No.

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? If yes, identify entity and nature of interest.

No.

5. Is party a trade association? (*amici curiae* do not complete this question) If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member.

No.

6. Does this case arise out of a bankruptcy proceeding? If yes, identify any trustee and the members of any creditors' committee.

No.

Date: July 27, 2015

/s/ Allyson N. Ho
Attorney for Defendant-Appellant Rowan County

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JURISDICTIONAL STATEMENT

This case arises under the Establishment Clause of the First Amendment to the United States Constitution, U.S. CONST. amend. 1, and 42 U.S.C. § 1983. The district court had subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1343. On May 4, 2015, that court granted summary judgment for plaintiffs on all claims. JA 363; DE 62 at 41. On June 2, 2015, Rowan County, North Carolina timely appealed. JA 365; DE 64 at 1. This Court's jurisdiction rests on 28 U.S.C. § 1291.

STATEMENT OF ISSUE

In *Marsh v. Chambers*, 463 U.S. 783 (1983), the Supreme Court held that the Nebraska legislature's practice of opening sessions with a prayer by a chaplain paid by the State did not violate the Establishment Clause of the First Amendment. In *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), the Court extended *Marsh*'s core holding on the propriety of legislative prayer to a local government's practice of opening meetings with invocations delivered by local, volunteer clergy even though many, if not most, of the prayers were sectarian. In this case, Rowan County opened its commissioners' sessions by permitting each commissioner, on a rotating basis, to offer an invocation (or not to do so) as part of an opening ceremony that includes a call to order and the Pledge of Allegiance. The issue presented is:

Whether the legislative prayers offered by the county commissioners offend the Establishment Clause of the First Amendment under *Marsh* and *Greece*.

STATEMENT OF CASE

I. Plaintiffs Challenge The Sectarian Nature Of Rowan County's Legislative Prayers Under This Court's Then-Controlling Precedent.

This Establishment Clause case involves a challenge to a local government's legislative prayers. JA 9-10; DE 1 at 1-2. Before it was enjoined by the district court, Rowan County permitted each commissioner, on a rotating basis, to offer a prayer or have a moment of silence as part of an opening ceremony that included a call to order and the Pledge of Allegiance. JA 275, 279, 283, 287, 291; DE 23-1 at 1; DE 23-2 at 1; DE 23-3 at 1; DE 23-4 at 1; DE 23-5 at 1. The content of any prayer (as well as the decision whether to pray or have a moment of silence) was determined solely by the individual commissioners. JA 275-76, 279-80, 283-84, 287-88, 291-92; DE 23-1 at 1-2; DE 23-2 at 1-2; DE 23-3 at 1-2; DE 23-4 at 1-2; DE 23-5 at 1-2.[1]

Once called to order, the board chair typically asked attendees to join the commissioners in standing for the opening ceremony, including the invocation and Pledge of Allegiance, at which point either the chairman or another board member

[1] Rowan County is a political subdivision of the State of North Carolina governed by a Commission. JA 13; DE 1 at 5. The Commission, in turn, is a duly elected and deliberative body. *Id.*

would deliver the invocation (or announce a moment of silence). JA 324; DE 62 at 2. The majority of attendees (but not all) would join the board in standing and bowing their heads during the invocation. *Id.* The majority of invocations delivered by individual commissioners included sectarian (Christian) references. *Id.* Individual commissioners "frequently" began their prayers with some variant of "let us pray" or "please pray with me." *Id.*

No one was required to participate in the invocation. JA 277, 281, 285, 289, 293, 324; DE 23-1 at 3; DE 23-2 at 3; DE 23-3 at 3; DE 23-4 at 3; DE 23-5 at 4; DE 62 at 2. Attendees could remain seated, leave the room, or arrive after the invocation to participate only in the Pledge of Allegiance and the business portion of the meeting. *Id.*

The American Civil Liberties Union of North Carolina Legal Foundation sent the board a letter asserting that the sectarian nature of the invocations violated the Establishment Clause based on then-controlling precedent of this Court holding that sectarian legislative prayer is prohibited. JA 18, 272-74, 325; DE 1 at 10; DE 1-4 at 1-3; DE 62 at 3. The Board did not respond to the letter, but two then-commissioners did make statements, publicized by a local television station, indicating their resistance to the attempted censorship of their legislative prayers.[2]

[2] JA 18-19; DE 1 at 10-11 ("I will continue to pray in Jesus' name. I am not perfect so I need all the help I can get, and asking for guidance for my decisions

Plaintiffs-Appellees Nancy Lund, Liesa Montag-Siegel, and Robert Voelker are residents of Rowan County who have attended meetings of the Commission. JA 10-12; DE 1 at 2-4. In March 2013, they filed this suit alleging that the County's practice of legislative prayer offended the Establishment Clause of the First Amendment to the United States Constitution and Article I, Paragraphs 13 and 19 of the North Carolina Constitution. JA 9-22; DE 1 at 1-14. Specifically, plaintiffs objected to the content of the prayers, which often included Christian references. JA 11-12, 15-19; DE 1 at 3-4, 7-11. Plaintiffs further complained that the faith-specific content of the prayers led to feelings of exclusion because their religious perspectives differ from those expressed in the prayers they heard. JA 11-12; DE 1 at 3-4.

Plaintiffs did not complain about legislative prayer generally. Nor did they object to the County's practice of elected officials delivering the prayers. *See* JA 9-21; DE 1 at 1-13. Instead, relying heavily on this Court's then-controlling precedent holding that any sectarian prayer violates the Establishment Clause, *see, e.g.*, *Joyner v. Forsyth Cty.*, 653 F.3d 341 (4th Cir. 2011), plaintiffs filed a motion

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from Jesus is the best I, and Rowan County, can ever hope for." (citation omitted)); ("[I will] continue to pray in JESUS name . . . I volunteer to be the first to go to jail for this cause . . . and if you [another commissioner] will [get] my bail in time for the next meeting, I will go again!" (citation omitted)). As later confirmed by the Supreme Court in *Greece*, the commissioners were correct to believe that the content of their prayers was constitutional. 134 S. Ct. at 1823-24.

for a preliminary injunction seeking to restrict the content of the prayers. JA 317; DE 36 at 23 (referencing DE 5). The County moved to dismiss the complaint in its entirety. JA 295; DE 36 at 1 (referencing DE 22).

While the motions were pending, the Supreme Court granted *certiorari* in *Town of Greece v. Galloway* to review the Second Circuit's judgment that a town's legislative prayer practice violated the Establishment Clause because (in part) of the sectarian nature of the prayers. 133 S. Ct. 2388 (2013). The County filed a motion to stay the case until the Supreme Court could issue its opinion in *Greece*. *See* JA 295; DE 36 at 1 (referencing DE 30). Rather than granting a stay, the district court enjoined the County "from knowingly and/or intentionally delivering or allowing to be delivered sectarian prayers at meetings of the Rowan County Board of Commissioners during the pendency of this suit." JA 322; DE 36 at 28.

II. The Supreme Court's Intervening Decision In *Greece* Effectively Overrules This Court's Precedents Holding That Sectarian Legislative Prayer Violates The Establishment Clause.

With dispositive motions in this case pending, the Supreme Court issued its decision in *Greece* holding that sectarian legislative prayers do not, without more, run afoul of the Establishment Clause—effectively overruling this Court's precedent that the district court relied upon in enjoining the County from engaging in sectarian legislative prayer. JA 334; DE 62 at 12; *Greece*, 134 S. Ct. at 1823-24.

In a context strikingly similar to this case, the Supreme Court reaffirmed that opening public meetings in prayer does not violate the Establishment Clause. "'In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with a prayer has become part of the fabric of our society.'" *Id.* at 1819 (quoting *Marsh*, 463 U.S. at 792). In his opinion for the Court, Justice Kennedy rejected plaintiffs' argument that sectarian prayers are not part of that "fabric," holding that "[a]n insistence on nonsectarian or ecumenical prayer as a single, fixed standard is not consistent with the tradition of legislative prayer outlined in the Court's cases." *Id.* at 1820.

Indeed, the Supreme Court expressly rejected the "proposition" that only nonsectarian legislative prayer can pass constitutional muster because it is "irreconcilable with the facts of *Marsh* and with its holding and reasoning." *Id.* at 1821. The Supreme Court also pointed out that, though the chaplain in *Marsh* "modulated the 'explicitly Christian' nature of his prayer and 'removed all references to Christ' after a Jewish lawmaker complained . . . *Marsh* did not suggest that Nebraska's prayer practice would have failed had the chaplain not acceded to the legislator's request." *Id.* (quoting *Marsh*, 463 U.S. at 793 n.14) (citation omitted).

In *Greece*, the legislative prayer process involved a rotating group of volunteer clergy from the surrounding community—and the Supreme Court

emphasized that even though "nearly all of the congregations in town turned out to be Christian" that did "not reflect an aversion or bias on the part of town leaders against minority faiths." *Id.* at 1824. Rather, "[s]o long as the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing." *Id.*

Any other rule, the Supreme Court reasoned, "would require the town 'to make wholly inappropriate judgments about the number of religions [it] should sponsor and the relative frequency with which it should sponsor each,' a form of government entanglement with religion that is far more troublesome than the current approach.'" *Id.* (quoting *Lee v. Weisman*, 505 U.S. 577, 617 (1992) (Souter, J., concurring)).

Having rejected the argument that the town's legislative prayers violated the Establishment Clause because they were sectarian, the Court next rejected the argument that the prayers violated the Establishment Clause because they were impermissibly "coercive." In a key passage, Justice Kennedy made clear that mere exposure to a prayer (even sectarian prayer) in a public meeting does not constitute unconstitutional coercion:

> As a practice that has long endured, legislative prayer has become part of our heritage and tradition, part of our expressive idiom, similar to the Pledge of Allegiance, inaugural prayer, or the recitation of "God save the

> United States and this honorable Court" at the opening of this Court's sessions. It is presumed 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. That many appreciate these acknowledgments of the divine in our public institutions does not suggest that those who disagree are compelled to join the expression or approve its content.

Id. at 1825 (opinion of Kennedy, J.) (citations omitted).[3]

The Supreme Court acknowledged the argument that some of the invocations at issue "disparaged those who did not accept the town's prayer practice," including "[o]ne guest minister [who] characterized objectors as a 'minority' who are 'ignorant of the history of our country,'" and "another [who] lamented that other towns did not have 'God-fearing' leaders." *Id.* at 1824.

[3] While that part of Justice Kennedy's opinion commanded only three votes, two other Justices—Justices Thomas and Scalia—would have gone even further in rejecting the notion of any coercion because "the municipal prayers at issue in this case bear no resemblance to the coercive state establishments that existed at the founding." *Greece*, at 134 S. Ct. at 1837 (Thomas, J., concurring in part and concurring in the judgment). Justice Thomas went on to clarify that "to the extent 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." *Id.* at 1838. Because Justice Kennedy's plurality opinion is the narrowest rationale supporting the judgment, it is controlling on the coercion analysis. *See Marks v. United States*, 430 U.S. 188, 193-94 (1977) (citing *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).

Nonetheless, the Court reasoned, "[a]though these two remarks strayed from the rationale set out in *Marsh*, they do not despoil a practice that on the whole reflects and embraces our tradition." *Id.* "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." *Id.* (emphasis added). That is because, the Court explained, "*Marsh* . . . requires an inquiry into the prayer opportunity *as a whole*, rather than into the contents of a single prayer." *Id.* (citing *Marsh*, 463 U.S. at 794-95).

The Court next rejected the argument that *Marsh* was distinguishable because "prayer conducted in the intimate setting of a town board meeting differs in fundamental ways from the invocations delivered in Congress and state legislatures, where the public remains segregated from legislative activity and may not address the body except by occasional invitation." *Id.* at 1824-25 (opinion of Kennedy, J.). More specifically, the plaintiffs argued in *Greece* that "the public may feel subtle pressure to participate in prayers that violate their beliefs in order to please the board members from whom they are about to seek a favorable ruling" and that "the fact that board members in small towns know many of their constituents by name only increases the pressure to conform." *Id.* at 1825.

The Supreme Court rejected all of these arguments. Of particular relevance to this case—where individual commission members deliver the prayers on a voluntary, rotating basis—the Court noted that "[t]he 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.* (emphasis added). The Court highlighted that "[t]he [d]istrict [c]ourt in *Marsh* described the prayer exercise as 'an internal act' directed at the Nebraska Legislature's 'own members,'" *id.* (quoting *Chambers v. Marsh*, 504 F. Supp. 585, 588 (D. Neb. 1980)), "rather than an effort to promote religious observance among the public," *id.* (citing *Lee*, 505 U.S. at 630 n.8 (Souter, J., concurring) (describing *Marsh* as a case "in which government officials invoke[d] spiritual inspiration entirely for their own benefit")).

The Supreme Court went on to explain that while "many members of the public find these prayers meaningful and wish to join them . . . their purpose is largely to accommodate the spiritual needs of lawmakers and connect them to a tradition dating to the time of the Framers." *Id.* at 1826. Crucially for this case, the Court observed that "[f]or members of town boards and commissions, who often serve part-time and as volunteers, ceremonial prayer may also reflect the values they hold as private citizens. ***The prayer is an opportunity for them to***

show who and what they are without denying the right to dissent by those who disagree." *Id.* (emphasis added).

At the same time, the Supreme Court noted that "[t]he 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." *Id.* But the Court made clear that "offense" and feeling "disrespected" "do[ ] not equate to coercion." *Id.* (agreeing with Justice Thomas's concurrence at 1838). Where, as in *Greece*, "the prayers neither chastised dissenters nor attempted lengthy disquisition on religious dogma," they do not amount to unlawful coercion. *Id.*

Thus, "[a]bsent 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." *Id.* at 1824 (majority opinion). And prayers are considered "denigrating" and "proselytizing" "if the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion." *Id.* at 1823. But "[p]rayer that is solemn and respectful in tone, that invites lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing, serves th[e] legitimate function" approved in

Marsh of "elevat[ing] the purpose of the occasion and . . . unit[ing] lawmakers in their common effort." *Id.*

III. The District Court Acknowledges That *Greece* Permits Sectarian Legislative Prayer But Nonetheless Grants Plaintiffs Summary Judgment And Enjoins The Commission's Legislative Prayers.

After the Supreme Court handed down its decision in *Greece*, the parties filed cross motions for summary judgment. JA 323; DE 62 at 1. In granting plaintiffs' motion and denying the County's, the district court held that (i) the legislative prayers here do not come within *Marsh* and *Greece* because they were delivered by legislators and not clergy; and that (ii) the prayers were unconstitutionally coercive. JA 339, 361-62; DE 62 at 17, 39-40.

The district court began by acknowledging that this Court's precedent holding that sectarian legislative prayer violated the Establishment Clause "was repudiated by the Supreme Court in . . . *Greece*." JA 334; DE 62 at 12. The court concluded, however, that "[n]otable [d]ifferences" between *Greece* and this case take it outside of the *Marsh*/*Greece* framework and render the County's legislative prayers unconstitutional as a matter of law. JA 338; DE 62 at 16.

A. The District Court Limits The Scope Of Legislative Prayer.

According to the district court, the dispositive difference between this case and *Greece* is the "significance of the identity of the prayer-giver, either as a member of the legislative body or a non-member of the legislative body." JA 339;

DE 62 at 17. The district court highlighted the Supreme Court's discussion of "invited ministers, clergy, or volunteers providing the prayer" and emphasized that the Supreme Court had not mentioned legislators doing so. On that basis, the district court concluded that "*Greece* and *Marsh* . . . do not squarely approve of the practice at issue here, which deviates from the long-standing history and tradition of a chaplain, separate from the legislative body, delivering the prayer." JA 340-41; DE 62 at 18-19.

The court further opined that allowing legislators to offer legislative prayers would run into *Greece*'s prohibition against legislators "editing or approving prayers." JA 341; DE 62 at 19 (citing *Greece*, 134 S. Ct. at 1821). Relatedly, the district court reasoned that "because of the prayer practice's exclusive nature, that is, being delivered solely by the [c]ommissioners, the prayer practice cannot be said to be nondiscriminatory." JA 342; DE 62 at 20. Since the commissioners themselves offer the prayers, the district court concluded that "the present case presents a closed-universe of prayer givers" and opined that "the policy inherently discriminates and disfavors religious minorities" because they will not be recognized until some future time when a believer in a minority faith is elected. *Id.*

The district court emphasized that the prayers were "effectively being delivered by the government itself" and that the "overwhelmingly" Christian

nature of the prayers evidenced a discriminatory practice that entangled the government with religion. JA 344; DE 62 at 22.[4]

B. The District Court Applies The *Lemon* Test.

After deciding that the County's legislative prayers do "not fit[ ] within the legislative prayer exception," the district court then considered an argument not raised or briefed by either party—whether the County's legislative prayer practice "constitutes an unconstitutional establishment of religion" by having an impermissibly "coercive" effect under the *Lemon* test, thereby entangling the government with religion. JA 344; DE 62 at 22 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)).

Although the district court had already ruled that, in its view, the County's legislative prayer practice did not come within the tradition recognized in *Marsh* and *Greece*, the district court first applied *Marsh* and *Greece* as informing its *Lemon* analysis of "coercion." JA 346; DE 62 at 24.[5] Though the record

[4] The district court noted multiple times its belief that the sectarian nature of the prayers created the coercive atmosphere of the legislative prayer at issue here. *See* JA 324-25, 339-40, 344, 350; DE 62 at 2-3, 17-18, 22, 28. The court went so far as to say that "[u]nder a different, inclusive [(*i.e.*, nonsectarian)] prayer practice, Commissioners might be able to provide prayers." JA 339-40 n.4; DE 62 at 17-18 n.4.

[5] After its examination of coercion in *Greece*, the district court explicitly stated that the coercion analysis in *Greece* was not definitive for examining the prayers at issue here, JA 353; DE 62 at 31, and thus the court felt compelled to analyze

established—without contradiction—the County's position that individuals could leave the room or remain seated without consequence, the district court nonetheless questioned whether that information had been adequately conveyed to the general public, and opined that the County's position did not change "the atmosphere and context in which the prayers were given and received by the public." JA 351-52; DE 62 at 29-30. The court next relied upon cases predating *Greece* that held prayers at other types of public events unconstitutional—primarily *Lee*, 505 U.S. at 587, and *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 312 (2000). JA 354-56; DE 62 at 32-34.

The district court permanently enjoined Rowan County from continuing its legislative prayer practice as it had been implemented. JA 363; DE 62 at 41. The court further awarded plaintiffs nominal damages and attorneys' fees in an amount to be determined should plaintiffs pursue them. *Id.*

SUMMARY OF ARGUMENT

Greece and *Marsh* resolve this case and require reversal. From the outset, plaintiffs litigated this case as a challenge to the content of the prayers that opened and solemnized the county commission's meetings—but the Supreme Court entirely foreclosed that challenge in *Greece*, holding that opening town meetings

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coercion under Establishment Clause cases pre-dating *Greece*. JA 353-54; DE 62 at 31-32.

with faith-specific prayers does not violate the Establishment Clause. Once the Supreme Court decided *Greece*, this should have been an easy case to resolve in the County's favor. Yet the district court's contrary decision—which effectively holds that the Constitution bars the commissioners, simply because they are commissioners, from offering prayers to solemnize their meetings unless they censor those prayers to remove any "overwhelmingly Christian" content—does not merely misread *Greece*, but overrules it *sub silentio*.

Greece holds that sectarian prayer—as government speech—lies squarely within the historical tradition of legislative prayer. The government does not get credit for hired chaplains under *Marsh* or religious leaders under *Greece* acting as private actors—instead, the Supreme Court deemed these speakers as speaking on behalf of the government. After all, if the speakers in *Marsh* and *Greece* had not been government speakers, there would have been no Establishment Clause issue at all. Government speech is government speech; the identity of the speaker is only important if there is a claim, unlike in this case, that the speaker is engaging in private rather than public speech. There is thus no principled basis for excluding the commissioners from the long tradition of government speech invocations affirmed in *Marsh* and *Greece*.

Nor is there sufficient legal or factual basis for the district court's conclusion that the prayers were unconstitutionally "coercive." Although it purports to be

"fact-intensive," in reality the district court's coercion analysis uncovers only the inherent "coerciveness" of all faith-specific legislative prayer—a battle already lost by the dissenters in *Greece*. The district court's invocation of the *Lemon* test—which neither party briefed or argued—exemplifies the error of its legal reasoning. The Supreme Court could not have been clearer in *Greece* that if an Establishment Clause test invalidates a tradition deeply enmeshed in the fabric of our Nation's history, the problem is the test—not the tradition.

The county commissioners' opening prayers are part of the tradition of legislative prayer affirmed in *Marsh* and *Greece*, and the district court's contrary judgment should be reversed. Any other result requires the banning of prayer proclamations by all elected officials, including mayors, governors, and the President of the United States.

STANDARD OF REVIEW

This Court reviews the grant of summary judgment *de novo*, applying the same familiar standards as the district court. *E.J. Sebastian Assocs. v. Resolution Trust Corp.*, 43 F.3d 106, 108 (4th Cir. 1994). Where, as here, both sides moved for summary judgment, this Court can not only reverse but also render judgment. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam). "On summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *Id.*

This Court reviews an award of injunctive relief for abuse of discretion. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048, 1054 (4th Cir. 1985). A district court abuses its discretion when it relies on an erroneous legal premise, *PBM Products, LLC v. Mead Johnson & Co.*, 639 F.3d 111, 125 (4th Cir. 2011), or misapprehends the applicable legal issues, *Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105, 112 (4th Cir. 2013).

ARGUMENT

I. The District Court Reversibly Erred In Concluding That The County's Legislative Prayer Practice Falls Outside *Marsh* and *Greece* Merely Because Legislators Deliver The Prayers.

Until the district court enjoined it from doing so, the county commission began its meetings with an opening ceremony that included "a Call to Order, an Invocation, and the Pledge of Allegiance, in that order." JA 323-24; DE 62 at 1-2. Like the state legislature in *Marsh* and the town council in *Greece*, the county commission is the "[t]he principal audience" of the invocation, as "lawmakers . . . 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." *Greece*, 134 S. Ct. at 1825 (opinion of Kennedy, J.); *see also* JA 276; DE 23-1 at 2 ("The invocation is given in a manner consistent with each commissioner's personal understanding of the nature of an Invocation and what the commissioner determines is appropriate to solemnize the meeting."). And like the state legislature in *Marsh* and the town

council in *Greece*, the county commission includes an invocation in its opening ceremony "largely to accommodate the spiritual needs of [the] *lawmakers* and connect them to a tradition dating to the time of the Framers." *Greece*, 134 S. Ct. at 1826 (opinion of Kennedy, J.) (emphasis added).

Indeed, as the Supreme Court explained in *Greece*, "[f]or members of town boards and commissions, who often serve part-time and as volunteers, *ceremonial prayer may also reflect the values they hold as private citizens*." *Id.* (emphasis added). Legislative prayer, then, "is an opportunity for them to show who and what they are without denying the right to dissent by those who disagree." *Id.* Thus the district court's conclusion that the speaker's identity matters to the Establishment Clause analysis fails to conform to the principles set forth in *Greece*—as well as this Court's precedent—and the decision should be reversed for that reason.

A. *Marsh* And *Greece* Provide No Basis For Treating Legislative Prayers By Legislators Differently Than Legislative Prayers By Clergy.

In light of the historical analysis in *Greece*, the district court's conclusion that legislative prayer by legislators somehow falls outside the tradition recognized in *Marsh* and *Greece* is untenable. If, as the Supreme Court explained in *Greece*, it is perfectly permissible for legislative prayer to "reflect the values [legislators] hold as private citizens," and "an opportunity for them to show who and what they

are," it is difficult to understand how prayers by legislators themselves could somehow fall outside the historical tradition described by the Supreme Court in *Greece*. *See Greece*, 134 S. Ct. at 1826 (opinion of Kennedy, J.).

Indeed, the district court's emphasis that the prayers were by "government" speakers and were "overwhelmingly" Christian reflects a serious misreading of *Marsh* and *Greece*. In both cases, the chaplains, whether paid by the government or not, were "government" speakers. Otherwise there could have been no Establishment Clause claim *at all*. *Cf. Pleasant Grove City. v. Summum*, 555 U.S. 460, 468 (2009) ("*[G]overnment* speech must comport with the Establishment Clause.") (emphasis added). Because the chaplains were just as much "government" speakers as the commissioners in this case, it makes no sense to distinguish the cases on that basis. As for the district court's view that the sectarian nature of the prayers is somehow relevant to the analysis, that view is fundamentally inconsistent with *Greece* itself.

If anything, ceremonial prayers by legislators would seem even more in keeping with a historical tradition that "accommodate[s] the spiritual needs of *lawmakers* and connect[s] them to a tradition dating to the time of the Framers," *Greece*, 134 S. Ct. at 1826 (opinion of Kennedy, J.) (emphasis added)—and if anything, raise less constitutional concern than the single clergyman—paid by the state legislature—delivering invocations for more than sixteen years as approved

by the Supreme Court in *Marsh*. Any other conclusion would throw into doubt the constitutionality of numerous practices that have long been part of our Nation's history.[6]

[6] For example, every President from George Washington to Barack Obama has, "upon assuming his office," invoked "the protection and help of God." *Engel v. Vitale*, 370 U.S. 421, 446 & ann. (1962); *Chronology of Inaugural Addresses*, Joint Congressional Committee on Inaugural Ceremonies, http://inaugural.senate.gov/swearing-in/addresses (last visited July 27, 2015). President George Washington wrote a letter to the governors that included "my earnest prayer that God would have you, and the State over which you preside, in his holy protection [and] that he would most graciously be pleased to dispose us all to do justice, to love mercy, and to demean ourselves with that charity, humility, and pacific temper of mind, which were the characteristics of the Divine Author of our blessed religion, and without an humble imitation of whose example in these things, we can never hope to be a happy nation." THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 217 (1986). President John Adams issued a proclamation praying that God, in "His infinite grace, through the Redeemer of the World, freely [would] remit all our offenses, and . . . incline us by His Holy Spirit to that sincere repentance and reformation which may afford us reason to hope for his inestimable favor." H.R. MISC. DOC. NO. 210, 269 (1896). President George W. Bush solemnized the National Day of Prayer and Remembrance Service three days after 9/11 by "ask[ing] Almighty God to watch over our Nation and grant us patience and resolve in all that is to come." *Bush Remarks at Prayer Service*, The Washington Post (Sept. 14, 2001), http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushtext_091401.html. And President Obama concluded his remarks at the 50th Anniversary of the Selma to Montgomery Marches by affirming that "we believe in the power of an awesome God, and we believe in this country's sacred promise. May He bless those warriors of justice no longer with us, and bless the United States of America." *Remarks by the President at the 50th Anniversary of the Selma to Montgomery Marches*, The White House (Mar. 7, 2015), https://www.whitehouse.gov/the-press-office/2015/03/07/remarks-president-50th-anniversary-selma-montgomery-marches.

These prayers and other public calls to prayer, offered by elected officials, have never been understood to run afoul of the Establishment Clause. That is true even though the speaker represents the government, is paid by the government, and could be considered to be offering the prayer on behalf of the government. This is because, as *Greece* made clear, ceremonial prayers are allowed to "reflect the values [the elected officials] hold as private citizens." *Id.* Elected leaders can offer a prayer—*especially* on their own behalf to solemnize certain occasions and actions—and then govern without bias against those who might not agree with them. Under the district court's interpretation of the Establishment Clause, however, none of those prayers would come within the historical tradition of ceremonial, solemnizing prayer recognized in *Marsh* and *Greece* because they were delivered by government officials, not clergy. There is no basis for any such distinction in the text, history, structure, or interpretation of the Establishment Clause.

That the Supreme Court focused on the history of legislative prayers by chaplains in *Marsh* and *Greece* is hardly surprising, given that clergy primarily—but not exclusively—delivered the prayers in those cases. But the Supreme Court said nothing that could reasonably be construed as imposing some sort of requirement that *clergy* must deliver legislative prayers for them to come within the longstanding tradition recognized in *Marsh* and *Greece*. It may have been the

First Congress that "provided for the appointment of *chaplains*," *Greece*, 134 S. Ct. at 1819 (emphasis added), but this distinction seems unlikely to matter since the First Congress considered having a *delegate* lead the initial prayer to unite the legislators but only rejected the idea because of sectarian division, not because it was the "government" praying, *id.* at 1833 (Alito, J., concurring). If anything, as already demonstrated above, the Supreme Court's explication in *Greece* about the purpose and role of legislative prayer generally would seem to directly refute any notion that the identity of the prayer-giver causes an invocation to cease to be constitutionally protected legislative prayer.

B. This Court's Precedent Offers No Basis For Excluding Legislators From Legislative Prayer.

Not surprisingly, this Court has never suggested that only clergy may perform legislative prayers without violating the Establishment Clause. To the contrary, in *Wynne v. Town of Great Falls*, 376 F.3d 292 (4th Cir. 2004), this Court observed 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." *Id.* at 302 (emphasis added).

Similarly, in *Joyner v. Forsyth County*, even though this Court invalidated a legislative prayer practice because the content of the prayers was sectarian, this Court nonetheless explained that "[i]t was the governmental setting . . . that courted constitutional difficulty, *not those who actually gave the invocation*."

653 F.3d at 350 (emphasis added). And in *Simpson v. Chesterfield County Board of Supervisors*, 404 F.3d 276 (4th Cir. 2005), this Court stressed that the Supreme Court, "neither in *Marsh* nor in *Allegheny*, held that the identity of the prayer-giver, rather than the content of the prayer, was what would 'affiliat[e] the government with any one specific faith or belief.'" *Id.* at 286 (quoting *Cty. of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 603 (1989)).

Perhaps most instructive, in *Turner v. City Council of the City of Fredericksburg*, 534 F.3d 352 (4th Cir. 2008), in an opinion authored by retired Justice Sandra Day O'Connor, sitting by designation, this Court rejected a free-exercise challenge brought by a government official to a town's legislative prayer practice. As in this case, the "Council of the City of Fredericksburg, Virginia . . . [began] every meeting with a Call to Order, which consist[ed] of an opening prayer offered by one of the Council's elected members followed by the Pledge of Allegiance. Only Council members [we]re allowed to offer the opening prayer, and the Council members rotate[d] the Call to Order duty." *Id.* at 353. Justice O'Connor had little difficulty concluding that the "Council's decision to open its legislative meetings with nondenominational prayers does not violate the Establishment Clause" under *Marsh*, with no suggestion that it somehow mattered that council members (and not clergy) delivered the opening prayers. *Id.* at 356.

Thus even this Court's own pre-*Greece* legislative prayer cases—although they are no longer good law in holding that sectarian prayers are not encompassed by *Marsh*—are best read to stand for the proposition that whether the prayer-giver is a single clergyman chosen and paid by the state (as in *Marsh*), a rotating roster of volunteer clergy open to all comers (as in *Greece*), or council members themselves on a rotating basis (as in *Wynne* and *Turner*), *who* delivers a legislative prayer is immaterial. This Court has already rejected the notion that *Marsh*, which involved the "select[ion] [of] only one minister from only one faith[,] . . . intended to mandate such exclusivity." *Simpson*, 404 F.2d at 287. To the contrary, "nothing in *Marsh* says that legislative or local governmental bodies must have a single minister or chaplain drawn from only one denomination." *Id.* Nor does anything in *Marsh* or *Greece* "fasten on local governments a limitation to a prayer-giver" that would exclude local government officials themselves. *Cf. id.* If anything, the rationale of those decisions *precludes* any such limitation.[7]

C. Rowan County's Non-Discriminatory Policy Keeps It Squarely Within The Bounds Of Legislative Prayer Set Forth In *Greece*.

The district court thought that the practice of elected officials delivering the opening prayers impermissibly created a "closed-universe" of prayer givers that

[7] Contrary to the implications of the district court's opinion, all legislative prayer is government speech—*see Turner*, 534 F.3d at 353; *Simpson*, 404 F.2d at 287—whether delivered by elected officials (this case), government employees (*Marsh*), or invited guests (*Greece*).

"inherently" discriminates against minority faiths. JA 342; DE 62 at 20. But that determination cannot be squared with *Marsh*, which upheld legislative prayers delivered by an even more tightly "closed universe" of one speaker for over 16 years. *Marsh*, 463 U.S. at 793. The touchstone is a policy of nondiscrimination. "That nearly all of the congregations in [*Greece*] turned out to be Christian does not reflect an aversion or bias on the part of town leaders against minority faiths." *Greece*, 134 S. Ct. at 1824. So too here, it is undisputed that the County selected prayer givers solely on the basis of status as a commission member, irrespective of professing faith (or lack thereof).

Moreover, the record is devoid of any allegation or evidence that the County impermissibly chose commissioners to deliver the prayers on a rotating basis for discriminatory purposes. People of all faiths or no faith at all may be elected to the county commission, thereby inherently permitting invocations of any faith or no faith to be offered at commission meetings. If anything, this selection process is far more inclusive and democratic than allowing the legislative body to select—presumably by simple majority—a single chaplain to give one type of prayer on a consistent basis for 16 years. *Cf. Marsh*, 463 U.S. at 793.

The district court believed that the county's selection policy was somehow tainted with 'inherent" discrimination because, in the district court's view, the faith perspective of elected officials necessarily aligns with that of the majority of voters

who elect them. JA 342; DE 62 at 20. Setting aside that the district court's view is easily disproved as a factual matter, it is also irrelevant as a legal matter.[8]

Even if in recent years nearly all of the elected officials in Rowan County delivered Christian prayers (or were Christians themselves), that does not, as a matter of law under *Greece*, reflect any aversion to or bias against minority faiths. *See Greece*, 134 S. Ct. at 1824. And while the district court tried to downplay the ability of Rowan County's citizens to elect commissioners of different faiths, this ability seriously undermines the court's conclusion that the Establishment Clause was violated.

If permitted to stand, the district court's ruling that the practice of rotating an opportunity to deliver opening prayers among elected officials is inherently discriminatory—and thus falls outside *Marsh* and *Greece*—will have serious, wide-ranging implications. Although precise statistics are unavailable, it cannot reasonably be questioned that many state and local governments have chosen this practice of engaging in legislative prayer—indeed, of the four legislative prayer cases this Court alone has decided since *Marsh*, two of them (*Wynne* and *Turner*) involved that practice.

[8] For example, Representative Keith Ellison, the first Muslim elected to Congress, won his seat by 70 percent of the vote in a majority Christian district. *See, e.g.*, Selman Hague, *Interview: Rep. Keith Ellison*, Harvard Political Review (June 15, 2014, 12:47 PM), http://harvardpolitics.com/interviews/interview-rep-keith-ellison/.

Thus it is not surprising that neither this Court nor any other of which we are aware ever questioned the propriety of legislators as prayer givers until *Greece* foreclosed challenges to sectarian prayers.[9] Under the district court's decision, state and local governments will be forced to go to the time and expense to administer volunteer programs, appoint (and perhaps pay for) a chaplain, or forego legislative prayer altogether. Because nothing in the Constitution, *Marsh*, *Greece*, or this Court's cases supports, much less requires, that state and local governments be put to such a choice, the decision of the district court should be reversed.

II. The District Court Reversibly Erred In Concluding That The County's Legislative Prayers Are Unconstitutionally "Coercive."

After determining that legislative prayers by legislators fall outside *Marsh* and *Greece*, the district court went on to conclude that the legislative prayers at issue here were unconstitutionally coercive. That, too, was error for two primary reasons. First, the district court's analysis of coercion under *Marsh* and *Greece*—which the district court mistakenly believed were not "definitive"—misunderstands and misapplies the legal analysis set forth in those cases. Second, the district court's analysis under *Lemon*—which no party invoked—and its

[9] The district court supplemented its conclusion that the identity of the prayer giver is constitutionally relevant with an unpublished opinion addressing a Rule 60(b) motion. *Hudson v. Pittsylvania Cty.*, No. 4:11cv043, 2014 U.S. Dist. LEXIS 106401 (W.D. Va. Aug. 4, 2014). This Court was unable to reach the merits of the Establishment Clause argument in that case because the notice of appeal was untimely. 774 F.3d 231 (4th Cir. 2014).

progeny is flawed because *Lemon* has no application here, and the cases relied upon by the district court in applying it are distinguishable even on their own terms. It is *Greece* that serves as the lodestar for evaluating the constitutionality of legislative prayers, not cases that pre-date it and address other contexts and scenarios. The district court's decision should be reversed for that reason, too.

A. The District Court Was Mistaken In Concluding That The County's Legislative Prayers Fall Outside *Marsh* And *Greece* Because They Are "Coercive."

The Supreme Court held in *Greece* that "[a]bsent 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." 134 S. Ct. at 1824. Elsewhere in its opinion, the Court clarified that legislative prayers are constitutional so long as they do not "over time" show that the invocations "denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion." *Id.* at 1823. The Supreme Court thus identified a narrow range of extreme circumstances that would take certain prayers outside the category of "legislative prayer" altogether. The district court seriously misread *Greece* in concluding that this was such a case.

Most important, the district court did not identify a single prayer—let alone a *pattern* of prayers *over time*—that "denigrate[d] nonbelievers or religious minorities, threaten[ed] damnation, or preach[ed] conversion." Participation is not

coerced, nor is the selection process discriminatory, when the practice is viewed (as it must be) within the proper legal framework of *Marsh* and *Greece*. The district court's contrary conclusion thus cannot stand. At a minimum, summary judgment for plaintiffs should be reversed and the case remanded for trial under the proper legal framework.

In *Greece*, the Supreme Court identified several "red flags" that signal a practice is coercive and thus not within the historical tradition of legislative prayer. None of those red flags are present here. Specifically, the Court explained that coercion may exist "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." *Greece*, 134 S. Ct. at 1826 (opinion of Kennedy, J.). The Court also identified "practice[s] that classified citizens based on their religious views" or resulted in a pattern of prayers used to "intimidate" or "chastise dissenters" or that devolves into "lengthy disquisition on religious dogma." *Id*. at 1826-27. Plaintiffs do not allege that any of these extreme circumstances are present in the instant case—nor could they. Plaintiffs were simply asked to stand for the opening ceremony—including the invocation and Pledge of Allegiance—and, as Justice Kennedy anticipated in *Greece* and the record establishes here, plaintiffs were not required to participate in the invocation.

Although the Supreme Court instructed in *Greece* that the public could not be forced to "participate in the prayers," *id.* at 1826, subtle things such as peer pressure do not qualify as coercion, *id.* at 1827; *id.* at 1838 (Thomas, J., concurring in part and concurring in the judgment). The district court, however, concluded that inviting attendees to stand as part of the opening ceremony was "significant" evidence of direction (and thus coercion). JA 350; DE 62 at 28. It is difficult to imagine how a polite invitation, intended to smooth the transition into the opening, could be "significant" evidence of coercion when no reasonable adult would understand such a courtesy as coercive or feel pressured into compliance. Nevertheless, as the district court correctly recognized, the commission requested attendees to stand for the opening ceremony generally—including for the Pledge of Allegiance—not for the invocation specifically. *Id.* ("The Board Chair here would regularly ask that everyone stand for the prayer *and* the Pledge of Allegiance." (emphasis added)).

The County's practice is no different than that of courts when they instruct attendees to stand when judges approach the bench and the bailiff prays "God save the United States and this honorable court." The response of the audience to stand is a show of respect and traditional decorum, not participation in the bailiff's invocation. *See Marsh*, 463 U.S. at 786 (recognizing the bailiff's recitation as an invocation); *Greece*, 134 S. Ct. at 1825 ("It is presumed that the reasonable

observer is acquainted with this tradition [ceremonial prayers, the Pledge of Allegiance, and the bailiff's prayer] and understands that its purposes are to lend gravity to public proceedings . . . not to afford government an opportunity to proselytize or force truant constituents into the pews.").

The Supreme Court in *Greece* further explained that "[n]othing in the record" in that case "suggest[ed] that members of the public [we]re dissuaded from leaving the meeting room during the prayer, arriving late, or even, as happened here, making a later protest." *Greece*, 134 S. Ct. at 1827 (opinion of Kennedy, J.). Justice Kennedy went on to note:

> In this case as in *Marsh*, board members and constituents are "free to enter and leave with little comment and for any number of reasons." Should nonbelievers choose to exit the room during a prayer they find distasteful, their absence will not stand out as disrespectful or even noteworthy. And should they remain, their quiet acquiescence will not, in light of our traditions, be interpreted as an agreement with the words or ideas expressed. Neither choice represents an unconstitutional imposition as to mature adults, who "presumably" are "not readily susceptible to religious indoctrination or peer pressure."

Id. (quoting *Lee*, 505 U.S. at 597 and *Marsh*, 463 U.S. at 792). The same thing is true here.

As in *Greece*, the record establishes without contradiction that "[t]he Commission respects the right of any citizen to remain seated or otherwise disregard the Invocation in a manner that is not disruptive of the proceedings" and

that "[a]ny citizen is free to step outside during the Invocation or to arrive after the Invocation is given, and such decision has no impact on his or her right to fully participate in the public meeting, including addressing the commission and participating in the agenda items in the same matter as permitted any citizen of Rowan County." JA 277, 281, 285, 289, 293; DE 23-1 at 3; DE 23-2 at 3; DE 23-3 at 3; DE 23-4 at 3; DE 23-5 at 3. Plaintiffs indicated in their pleadings below that they and other members of the audience also chose not to participate. JA 10-15; DE 1 at 2-7; *see also* JA 324; DE 62 at 2 (noting only "the majority of the audience members would join the Board in standing"); JA 327; DE 62 at 5 (noting only "most" of the audience stood). And the record contains no evidence that anyone who chose not to participate suffered any adverse consequences at the hands of Rowan County beyond plaintiffs' claim to being offended. But offense "does not equate to coercion." *Greece*, 134 S. Ct. at 1826 (opinion of Kennedy, J.); *id.* at 1838 (Thomas, J. concurring in part and concurring in the judgment).

As in *Greece*, there is no evidence plaintiffs were not free to leave the meeting room during prayer, or that staying in the room during prayer would have implied their agreement with the prayers being offered. Nonetheless, the district court found constitutional fault with the commission's practice because there was no evidence "to demonstrate that the attending public [wa]s ever made aware" that no one was obligated to participate in the prayer. JA 351; DE 62 at 29. Setting

aside that it can hardly be the County's obligation to prove a negative where plaintiffs bear the burden of proof, the district court's conclusion ignores the absence of any support in *Greece* or *Marsh* for imposing the equivalent of a "disclosure" requirement on the County. This absence is particularly meaningful given that in *Greece*, the Supreme Court reversed the Second Circuit's decision—which, like the district court's decision here, ruled that the prayers there were unconstitutionally coercive "absent any effort on the part of the town to explain the nature of its prayer program to attendees," *Galloway v. Town of Greece*, 681 F.3d 20, 32 (2d Cir. 2012)—without imposing any such obligation upon the town. *See Greece*, 134 S. Ct. 1811.

The district court further erred in relying on media publications that, in the district court's view, "enhanc[ed] the coercive setting" of the prayers. JA 352; DE 62 at 30.[10] Setting aside the district court's error in even considering these hearsay statements when granting plaintiffs summary judgment, *see Md. Highways*

[10] One article, misconstrued by the district court, was entirely unrelated to the legislative prayers, addressing instead a former commissioner's response to questions about school curriculum. JA 352; DE 62 at 30. That statement—"I am sick and tired of being told by the minority what's best for the majority. My friends, we've come a long way—the wrong way. We call evil good and good evil."—to the extent it is relevant at all, is not fairly considered as evidence of the *Commission's* "views on religious minorities" but rather as an expression of frustration with a small number of people who were overreading the Establishment Clause. *See* JA 325, 352; DE 62 at 3, 30. And to the extent there was any doubt on that score, the district court was obliged to construe all inferences in the *County's* favor in granting plaintiffs summary judgment.

Contractors Ass'n v. Maryland, 933 F.2d 1246, 1251 (4th Cir. 1991), they fail to demonstrate coercion under the legal standard set out by the Supreme Court. The subjective thoughts and motivations of legislators are irrelevant to the coercion analysis under Justice Kennedy's plurality opinion on the point, *Greece*, 134 S. Ct. at 1826, and such statements are similarly irrelevant under the concurrence's legal coercion test, *id.* at 1838 (Thomas, J., concurring in part and concurring in the judgment). If there is no singling out of dissidents for opprobrium or indication that the legislator will rule based on discriminatory factors, there is no basis for limiting the legislator's prayer. Beyond that, we allow elected officials to hold controversial views and to express them freely without fear of losing their other rights.

B. The *Lemon* Test Has No Application Here.

Further evidencing its apparent confusion about the proper legal standard, the district court *sua sponte* applied *Lemon* even though neither party invoked that case, and for good reason—it does not apply here, and only led the district court into further error. *See, e.g.*, *Simpson*, 404 F.3d at 281 (*Lemon* does not extend to legislative prayer); *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984) (noting that in *Marsh* the Court "did not even apply the *Lemon* 'test'").

Relying primarily on inapposite cases applying *Lemon* in the school setting, the district court purported to identify "indirect coercion" and "subtle coercive

pressure" in the setting of the prayers here. JA 354-56; DE 62 at 32-34. But as the majority made clear in *Greece*, these are not the types of coercion that matter for an analysis of legislative prayer. *Greece*, 134 S. Ct. at 1827 (opinion of Kennedy, J.); *id.* at 1838 (Thomas, J., concurring in part and concurring in the judgment). There is a stark difference between the school setting and a legislative session where adults are free to enter and leave with little comment for any number of reasons. *Id.* at 1827 (opinion of Kennedy, J.).

The district court next relied on cases applying *Lemon* in similarly disparate contexts of military schools and prisons. JA 357-58; DE 62 at 35-36 (discussing *Mellen v. Bunting*, 327 F.3d 355, 371 (4th Cir. 2003); *Kerr v. Farrey*, 95 F.3d 472, 476-80 (7th Cir. 1996); *Gray v. Johnson*, 436 F. Supp. 2d 795, 799-800 & n.4 (W.D. Va. 2006)). None of these contexts are remotely analogous to a county commissioners meeting. That is why this Court already rejected some of the authority relied upon by the district court in the context of legislative prayer. *Compare* JA 357; DE 62 at 35 (citing *Mellen*, 327 F.3d 355), *with Simpson*, 404 F.3d at 281-82 (rejecting *Mellen* in the legislative prayer context).

All of this led the district court to erroneously conclude that the County's prayer practice was unconstitutional because (1) the government engages in a religious exercise prior to making decisions on public matters, and (2) the government asks for public participation in the exercise, thereby making people

feel like political outsiders. JA 358-59; DE 62 at 36-37. But that cannot be right, because it would lead to the conclusion that *all* legislative prayer is unconstitutionally coercive—an absurd result that cannot be squared with *Marsh* and *Greece*.

For one thing, all legislative prayer, by definition, involves a religious exercise before making decisions on public matters. The Supreme Court and this Court have both acknowledged this and, yet, have repeatedly recognized that legislative prayer is not only constitutional, but also "part of the fabric of our society." *Greece*, 134 S. Ct. at 1819 (quoting *Marsh*, 463 U.S. at 792); *Marsh*, 463 U.S. at 793 (holding that "[t]o invoke Divine guidance on a public body entrusted with making laws is not, in these circumstances, an 'establishment' of religion"); *Wynne*, 376 F.3d at 298 (noting that "a legislative body generally may, without violating the Establishment Clause, invoke Divine guidance for itself before engaging in its public business"). A legal framework that would necessarily result in striking down legislative prayer practices that both the Supreme Court and this Court have already approved cannot be correct.

For another thing, the district court's conclusion that asking attendees to stand constitutes "coercion" because it makes them feel like "outsiders" cannot be reconciled with *Marsh* or *Greece*, either. That is the endorsement test, which this Court has already held does not apply in the context of legislative prayer.

Simpson, 404 F.3d at 281. Not only did *Marsh* refuse to apply *Lemon*, but the Supreme Court in *Greece* also rejected the endorsement test as a surrogate for *Lemon* or as justifying a broad understanding of coercion. *See Greece*, 134 S. Ct. 1811.

In rejecting the endorsement test, the Supreme Court rejected the same proposition advanced here in labeling the County's prayer practice unconstitutionally coercive: "Respondents argue that the public may feel subtle pressure to participate in prayers that violate their beliefs in order to please the board members from whom they are about to seek a favorable ruling" but "the Court is not persuaded." *Id.* at 1825. Yet the district court relied on that (unsuccessful) argument to label the pressure "to conform so as to not diminish their political clout or social standing" as unconstitutional "coercion." JA 361; DE 62 at 39.

In sum, the district court's conclusion that the County's prayer practice was "coercive" is rooted in an erroneous application of the *Lemon* test. Both the Supreme Court and this Court have rejected that test in this context—perhaps because applying that test to legislative prayer would inevitably result in it being struck down as unconstitutional across the board. Such a result would be fundamentally at odds with the traditional role of such prayers in our Nation's history. *See, e.g.*, *Greece*, 134 S. Ct. at 1825 (opinion of Kennedy, J.) ("As a

practice that has long endured, legislative prayer has become part of our heritage and tradition, part of our expressive idiom, similar to the Pledge of Allegiance, inaugural prayer, or the recitation of 'God save the United States and this honorable Court' at the opening of this Court's sessions.").[11]

In the instant case, participation in the opening ceremony, including the invocation and the Pledge, is voluntary. JA 275-294; DE 23-1 at 1-4; DE 23-2 at 1-4; DE 23-3 at 1-4; DE 23-4 at 1-4; DE 23-5 at 1-4. Yet the district court concluded that plaintiffs are subject to unconstitutional coercion because they claim to feel "compelled and coerced" based on their belief about how their non-participation in the prayers will be received. JA 360; DE 62 at 38. That conclusion cannot be reconciled with the Supreme Court's rejection of the notion that "peer pressure" amounts to coercion of adults in these circumstances. *Greece*, 134 S. Ct. at 1827 (reasoning that mature adults "'presumably' are 'not readily susceptible to religious indoctrination or peer pressure'" (quoting *Marsh*, 463 U.S.

[11] The Court noted in *Greece* that "[a]ny 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." 134 S. Ct. at 1819; *see also id.* at 1834 (Alito, J., concurring) ("The Court of Appeals appeared to base its decision on one of the Establishment Clause 'tests' set out in the opinions of this Court, but if there is any inconsistency between any of those tests and the historic practice of legislative prayer, the inconsistency calls into question the validity of the test, not the historic practice.").

at 792)). Neither can that conclusion be squared with the record facts indicating that the plaintiffs (and others) were not coerced into participating in the prayer.

What is more, under the district court's interpretation of the Establishment Clause, the purported "coerciveness" of the prayers here could be remedied if the prayers were less sectarian or delivered by a wider range of prayer givers. *See* JA 339-40 & n.4; DE 62 at 17-18 & n.4 ("Under a different, inclusive prayer practice, Commissioners might be able to provide prayers . . . ."). This refrain is familiar, however, as it is the same position taken by the *dissenters* in *Greece*. *Greece*, 134 S. Ct. at 1851 (Kagan, J., dissenting). Justice Alito highlighted "the principle dissent's objection [which], in the end, is really quite niggling." *Id.* at 1829 (Alito, J., concurring). That is because while the dissent's two suggestions would have been acceptable avenues for the town to take, neither is constitutionally mandated. *Id.* at 1829-31.

As Justice Alito pointed out in his *Greece* opinion, "[a]ccording to the principal dissent, the town could have avoided any constitutional problem in either of two ways." *Id.* at 1829. First, the chaplains could have been asked to pray in nonsectarian terms. *Id.* at 1851 (Kagan, J., dissenting). As in Justice O'Connor's opinion for this Court in *Turner*, that clearly would pose no Establishment Clause violation. 534 F.3d 352. Second, the town's policy could have included a wider range of prayer givers. *Greece*, 134 S. Ct. at 1851 (Kagan, J., dissenting). Again,

as Justice Alito pointed out, the town *could* have adopted a policy of looking for prayer givers from other faiths but, as long as there was no discrimination, the Constitution did not require it to do so. *Id.* at 1830-31 (Alito, J., concurring).

In this case, either scenario would suffice under the district court's coercion analysis to prevent a constitutional violation. Yet these scenarios are the very ones that the Supreme Court held in *Greece* to be unnecessary. Ultimately, the district court's approach in the instant case must be rejected as an impermissible (if inadvertent) attempt to enshrine the anti-sectarian views of the dissent in *Greece*. The district court's judgment should be reversed for that reason, too.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and the case remanded with instructions to enter judgment in the County's favor.

REQUEST FOR ORAL ARGUMENT

The County respectfully requests oral argument because, in the County's view, oral argument would be helpful to the Court in resolving the important constitutional issues raised in this appeal that have serious implications far beyond the parties themselves.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,179 words, 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14-point Times New Roman typeface.

Date: July 27, 2015

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CERTIFICATE OF SERVICE

I certify that on July 27, 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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