NO. 15-1591

UNITED STATES COURT OF APPEALS

FOR THE

FOURTH CIRCUIT

NANCY LUND; LIESA MONTAG-SIEGEL; ROBERT VOELKER

Plaintiffs-Appellees

v.

ROWAN COUNTY, NORTH CAROLINA

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA AT GREENSBORO AT CASE NO. 1:13-CV-00207-JAB-JLW

BRIEF FOR PLAINTIFFS-APPELLEES

CHRISTOPHER BROOK
AMERICAN CIVIL LIBERTIES UNION
OF NORTH CAROLINA LEGAL FOUNDATION
PO Box 28004
Raleigh, North Carolina 27611
[redacted]

DANIEL MACH
HEATHER L. WEAVER
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, N.W., Suite 600
Washington, DC 20005
[redacted]

Attorneys for Plaintiffs-Appellees

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES……iv

STATEMENT OF THE ISSUE……1

STATEMENT OF THE CASE……1

SUMMARY OF ARGUMENT……5

ARGUMENT……7

I. Rowan County's Prayer Practice Pressed Religious Observances on Residents in a Fashion Not Found in *Town of Greece* or Longstanding Legislative Prayer Traditions……7

A. The Prayers Delivered by the Rowan County Commissioners Are an External Act Focused on the Broader Public……8

B. Rowan Improperly Solicited and Directed Public Participation in Official Prayers……14

C. The Commissioners' Practice of Directing the Public to Participate in Prayer and Singling Out Dissidents for Opprobrium Created a Hostile Atmosphere for Prayer Nonparticipants at Rowan County Board Meetings……18

D. There is No Longstanding Historical Tradition of Externally Focused Prayers Delivered by Governmental Officials in a Hostile Environment……23

II. By Focusing on the Setting in Which the Prayers Arose and the Audience to Whom the Prayers Were Delivered, the District Court Properly Applied the Fact-Sensitive Inquiry Mandated by *Town of Greece* and the Establishment Clause……26

A. The District Court Appropriately Focused on the Plurality Opinion in *Town of Greece*, Particularly in Assessing Whether Rowan County's Prayer Practice Impermissibly Coerced Citizens……...28

B. The District Court Properly Interpreted *Town of Greece* in Light of Establishment Clause Case Law Elucidating What Constitutes Impermissible Coercion……...32

CONCLUSION……..……35

REQUEST FOR ORAL ARGUMENT……...35

CERTIFICATE OF COMPLIANCE……...37

CERTIFICATE OF SERVICE……38

TABLE OF AUTHORITIES

Page(s)

Cases

Chambers v. Marsh, 504 F.Supp. 585 (D. Neb. 1980)……8

Child Evangelism Fellowship of Md., Inc. v. Montgomery Cty. Pub. Schs., 373 F.3d 589 (4th Cir. 2004)……..34

Exxon Corp. v. Amoco Oil Co., 875 F.2d 1085 (4th Cir. 1989)…….....13

Green v. Haskell Cty. Bd. of Comm'rs, 568 F.3d 784 (10th Cir. 2009)……..13

Coleman v. Hamilton County, No. 1:12cv190, 2015 WL 1815617 (E.D. Tenn. April 22, 2015)……19, 33

Jordan v. Gardner, 986 F.2d 1521 (9th Cir. 1993)……28

Hudson v. Pittsylvania County, No. 4:11cv043, 2015 WL 3447776 (W.D. Va. May 28, 2015)……...*passim*

Ind. Civil Liberties Union v. O'Bannon, 259 F.3d 766 (7th Cir. 2001)…….....13

Inouye v. Kemna, 504 F.3d 705 (9th Cir. 2007)……..34

Jackson v. Nixon, 747 F.3d 537 (8th Cir. 2014)……..34

Joyner v. Forsyth County, 653 F.3d 341 (4th Cir. 2011)……31

Kerr v. Farrey, 95 F.3d 472 (7th Cir. 1996)……..…34

Lee v. Weisman, 505 U.S. 577 (1992)……..8

Lemon v. Kurtzman, 403 U.S. 602 (1971)……32, 33

Marrero-Méndez v. Pesquera, Civil No. 13-1203 (JAG), 2014 WL 4109518 (D.P.R. Aug. 19, 2014)……...34, 35

Marsh v. Chambers, 463 U.S. 783 (1983)……*passim*

McCreary County v. Amer. Civil Liberties Union of Ky.,
545 U.S. 844 (2005)……13

Mem'l Hosp. v. Maricopa Cty., 415 U.S. 250 (1974)……...27, 28

N.C. Civil Liberties Union Legal Found. v. Constangy,
947 F.2d 1145 (4th Cir. 1991)…….……9, 11, 18, 30

Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000)…….……14

Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963)……..……...7

Simpson v. Chesterfield Cty. Bd. of Sup'rs, 404 F.3d 276 (4th Cir. 2005)…..*passim*

Town of Greece v. Galloway, 134 S. Ct. 1811 (2014)……..*passim*

Turner v. City Council of Fredericksburg,
534 F.3d 352 (4th Cir. 2008)……...25

United States v. Garrett, No. 94-5510,
1995 WL 255942 (4th Cir. May 3, 1995) (unpublished decision)……..…13

United States v. Wilson, 966 F.2d 243 (7th Cir. 1992)……13

Wynne v. Town of Great Falls, 376 F.3d 292 (4th Cir. 2004)……..…9, 12, 14, 26

Other Authorities

The Supreme Court, 2013 Term -- Leading Cases,
128 HARV. L. REV. 191 (2014)……17

STATEMENT OF THE ISSUE

Did the District Court properly conclude, after conducting a fact-sensitive analysis under the Establishment Clause of the First Amendment, that Rowan County engaged in impermissible religious coercion where County Commissioners directed residents and citizens attending Board meetings to participate in prayers exclusively led by the Commissioners themselves and singled out dissenters for opprobrium?

STATEMENT OF THE CASE

The Rowan County Board of Commissioners ("the Board") generally meets twice a month. JA 323. The Board Chairman or another Board member "regularly open[s] its meetings with a Call to Order, an Invocation, and the Pledge of Allegiance, in that order." *Id.* at 323-24. The Board Chairman directs the public to stand for the Invocation and the Pledge of Allegiance after the meeting is called to order, "at which point either the Chairman or another member of the Board . . . deliver[s] the invocation or prayer." *Id.* at 324. The vast majority (97%) of invocations are explicitly Christian prayers. *Id.*[1] In fact, "no invocation delivered

[1] Below are four representative prayers delivered by Rowan County Commissioners:

a. May 18, 2009: Our Heavenly Father, we will never, ever forget that we are not alive unless your life is in us. We are the recipients of your immeasurable grace. We can't be defeated, we can't be destroyed, and we won't be denied, because of our salvation through the Lord Jesus Christ. I ask you to be with us as we conduct the business of Rowan County this evening, and continue to bless everyone in this

since November 5, 2007, referenced a deity specific to a faith other than Christianity." *Id.* at 325.

Commissioners make clear that they intend for the audience to participate in and benefit from the prayers. In addition to directing the audience to stand for the prayers, "[f]requently, the prayer-giver . . . begin[s] the prayer with a phrase such as 'let us pray' or 'please pray with me.'" *Id.* at 324. The Board members, as well as most of the public in attendance, then stand and bow their heads during the prayer. *Id.* Furthermore, Rowan County Commissioners have embraced – in even more

---

room, our families, our friends, and our homes. I ask all these things in the name of Jesus, Amen. JA 16.

b. March 7, 2011: Let us pray. Holy Spirit, open our hearts to Christ's teachings, and enable us to spread His message amongst the people we know and love through the applying of the sacred words in everyday lives. In Jesus' name I pray. Amen. *Id.* at 17.

c. October 3, 2011: Let us pray. Merciful God, although you made all people in your image, we confess that we live with deep division. Although you sent Jesus to be Savior of the world, we confess that we treat Him as our own personal God. Although you are one, and the body of Christ is one, we fail to display that unity in our worship, our mission, and our fellowship. Forgive our pride and arrogance, heal our souls, and renew our vision. For the sake of your Son, our Savior, the Lord Jesus Christ, Amen. *Id.* at 17.

d. December 3, 2012: Let us pray. Father God, we thank you for this day. Thank you for grace and mercy and love. I thank you so much, Lord, for sending your Son; this is the reason for the season, Jesus Christ. We thank you for all you've done for us these last four year[s]. We pray that you will bless these men and women. God, I pray to you today, that these new commissioners will seek your guidance. I pray that the citizens of Rowan County will love you Lord, and that they will put you first. In Jesus' name, Amen. *Id.* at 18.

explicit terms – the audience-focused, proselytizing nature of their prayers. *See, e.g.*, *id.* at JA 18 (Commissioner Carl Ford: "I pray that the citizens of Rowan County will love you Lord, and that they will put you first. In Jesus' name, Amen."), *id.* at 352 (Commissioner Jon Barber: prayer practice "has been a tradition for the board, *for our citizens* and for our country.") (emphasis added), *id.* at 325 (Commissioner Ford: "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 from Jesus is the best I, and Rowan County, can ever hope for*.") (emphasis added).

The Plaintiffs-Appellees are long-time residents of Rowan County and frequently attend its Board meetings. *Id.* at 323. Plaintiffs-Appellees, who are not Christian, feel coerced to participate in the Board's prayers at its official meetings. *Id.* at 326. Plaintiff-Appellee Lund feels "compelled to stand [for prayers] so that [she] would not stand out" at Board meetings. *Id.* Plaintiff-Appellee Montag-Siegel feels "coerced into participating in the prayers which [are] not in adherence with her Jewish faith." *Id.* And Plaintiff-Appellee Voelker feels pressured to stand and participate in the prayers because all Commissioners and most audience members stand during the Invocation, which "goes directly into the Pledge of Allegiance, for which [he] feel[s] strongly [he] need[s] to stand." SA 8 at ¶ 7. The Board has amplified the coercive pressure brought to bear on Plaintiffs-Appellees by signaling disfavor for religious minorities such as them. *See, e.g.*, JA 325 (then-Board Chair

Jim Sides addressing the issue of Bible instruction in Rowan County schools: "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."); Pls.' Mem. Supp. Mot. Summ. J. [Doc. #53], at 9 (Commissioner Barber on Plaintiffs' lawsuit: "God will lead me through this persecution and I will be His instrument."). Commissioners' statements of disfavor have included prayers suggesting that the County views non-Christian religious beliefs are inferior or wrong, effectively deriding the faith of many religious minorities in Rowan County. JA 16 (Commissioner Barber: "Because we do believe that there is only one way to salvation and that is Jesus Christ."). Rowan County's actions, in turn, have created an atmosphere that has led to the harassment of religious minorities at Board meetings. JA 19 at ¶ 32 ("Rowan County resident, Shakeisha Gray, was jeered by audience members for expressing opposition to" the Board's prayer practice).

Based on the above facts, the District Court granted summary judgment in favor of Plaintiffs-Appellees on May 4, 2015, enjoining Rowan County's prayer practice. *Id.* at 363. Undertaking a fact-sensitive analysis, the District Court reviewed the case law on point and concluded

> Defendant's practice does not fit with the long history and tradition of legislative prayer condoned in *Marsh* [*v. Chambers*, 463 U.S. 783 (1983)] and *Town of Greece* [*v. Galloway*, 134 S. Ct. 1811 (2014)]. . . . [K]ey distinctions, including that Commissioners themselves are the sole prayer-writers and prayer-givers, distinguish Defendant's

> practice from that at issue in *Town of Greece*. In turn, considering the persuasive weight of the *Town of Greece*'s plurality opinion and the general principles of past coercion cases, Defendant's practice is unconstitutionally coercive in violation of the Establishment Clause of the United States Constitution.

Id. at 362. Rowan County appealed this decision on June 2, 2015. JA 365.

SUMMARY OF ARGUMENT

The District Court correctly held that Rowan County coerces its citizens to participate in prayer in violation of the First Amendment's Establishment Clause. Although Appellants rely heavily on the Supreme Court's decision in *Town of Greece*, the legislative prayer practice upheld there differs starkly from Rowan County's practice. In Rowan County, the prayer-givers are Board members themselves; in *Town of Greece*, the prayer-givers were not government officials elected to represent all residents and were comprised of volunteers of a variety of faiths. Rowan County Commissioners focus their prayers on the broader public, and Commissioners routinely direct Rowan County citizens such as Ms. Lund, Mrs. Montag-Siegel, and Mr. Voelker, to participate in prayers these government officials compose and deliver. Officials in *Town of Greece* never did so, and the prayers there were, as a result, internally focused and for the benefit of the board, not town residents. And Rowan County Commissioners have turned their Board meetings into a hostile environment for prayer nonparticipants by deriding those who question their prayer practice and suggesting that non-Christian beliefs are inferior; nothing

of the sort took place in Greece. These features are a far cry from historically accepted prayer practices; Rowan County, unlike the defendants in *Town of Greece* and *Marsh*, cannot support its practice by pointing to deep-rooted traditions.

While Rowan County and its *amici* argue for a coercion standard identical to the one articulated by Justice Thomas in *Town of Greece*, that standard would place even egregious prayer practices beyond judicial review and, understandably, has never commanded a majority of the Supreme Court. Instead, in arriving at its conclusion that the County's prayer practice is unconstitutionally coercive, the District Court applied the appropriate fact-sensitive inquiry mandated by Establishment Clause jurisprudence. First, and foremost, the District Court focused its review on the plurality opinion in *Town of Greece*. The District Court's analysis was further informed by case law turning on whether the government had engaged in impermissible coercion; the consideration of this additional precedent elucidated the key principles courts must apply in assessing whether a practice transgresses the bounds of the Establishment Clause. Reflecting both *Town of Greece* and the broader prayer jurisprudence, the District Court eschewed grand pronouncements in favor of fact-driven assessments.

Accordingly, the Court neither adopted a categorical rule against legislator-led prayer, as Rowan County and its *amici* argue, nor adopted their position that no constraints remain on prayer practices. Recognizing that the Supreme Court's

opinion in *Town of Greece* is not a blank check giving constitutional approval to any and all legislative prayer practices, the District Court merely concluded that Rowan County's invocation practice differed markedly from the prayers in *Town of Greece* and that, in light of that case and the broader jurisprudence, the governmental prayers violated the Establishment Clause.

ARGUMENT

I. Rowan County's Prayer Practice Pressed Religious Observances on Residents in a Fashion Not Found in *Town of Greece* or Longstanding Legislative Prayer Traditions.

The District Court's decision below simply reaffirms the "elemental First Amendment principle that government may not coerce its citizens 'to support or participate in any religion or its exercise." *Town of Greece*, 134 S. Ct. at 1825 (plurality opinion) (citation omitted). "[C]ontext is key in [assessing alleged] Establishment Clause violations involving coercive practices." JA 360. The Supreme Court found no impermissible coercion in *Town of Greece* because the prayers were delivered by volunteers for the benefit of town board members, who, in turn, never directed the public to participate in the prayers or signaled disfavor toward nonparticipants. 134 S. Ct. at 1825-26 (plurality opinion). The Town of Greece's prayer practice thus "'accord[ed] with history and faithfully reflect[ed] the understanding of the Founding Fathers.'" *Id.* at 1819 (quoting *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring)). The prayers

in the current controversy, by contrast, were externally focused, with Board members directing public participation and labeling as persecutors those who dared question their practice. While the Supreme Court has recognized that certain legislative prayer practices dating back to our nation's founding are constitutionally permissible, the Court has remained steadfast in enforcing the Establishment Clause prohibition on religious coercion, and, as the District Court correctly recognized, Rowan County's prayer practice violates that cardinal rule.

A. The Prayers Delivered by the Rowan County Commissioners Are an External Act Focused on the Broader Public.

Central to the finding that the prayers in *Town of Greece* were constitutional was the fact that they were "an internal act" for the benefit of the town board. *Id.* at 1825 (quoting *Chambers v. Marsh*, 504 F. Supp. 585, 588 (D. Neb. 1980)); *see also Lee v. Weisman*, 505 U.S. 577, 630 n.8 (1992) (Souter, J., concurring) (describing *Marsh* as a case "in which government officials invoke[d] spiritual inspiration *entirely* for their own benefit") (emphasis added); *Hudson v. Pittsylvania County*, No. 4:11cv043, 2015 WL 3447776 at *13 (W.D. Va. May 28, 2015) (denying defendant's motion to dissolve injunction against legislative prayer practice post-*Town of Greece* decision, explaining that, "[w]hile the majority and principal dissenting opinions in *Town of Greece* disagreed on the proper interpretation of the facts of that case, both Justices Kennedy and Kagan deemed the intended audience of the prayers to be significant . . . In each of their minds, there is a more significant

Establishment Clause concern where, as here, the prayers are delivered to the public by the governing body, as opposed to prayers directed to the governing body." (internal citations omitted)). Any concerns that Greece pressed religious observances upon its citizens were allayed, in large part, by this internal, solemnizing focus: "The principal audience for these invocations is not, indeed, the public but lawmakers themselves, who may find that a moment of prayer or quiet reflection sets the mind to a higher purpose[.]" *Town of Greece*, 134 S. Ct. at 1825 (plurality opinion); *see also Simpson v. Chesterfield Cty. Bd. of Sup'rs*, 404 F.3d 276, 284 (4th Cir. 2005) ("Board members made clear . . . that the invocation 'is a blessing . . . for the benefit of the board,' rather than . . . for those who might also be present."); *Wynne v. Town of Great Falls*, 376 F.3d 292, 301 n.7 (4th Cir. 2004) (dismissing Town Council contention that prayers were "'only . . . for the benefit of Council members'" based on evidence the prayers were directed at "the citizens in attendance at its meetings and the citizenry at large") (internal citation omitted); *N.C. Civil Liberties Union Legal Found. v. Constangy*, 947 F.2d 1145, 1149 (4th Cir. 1991) (deeming judicial prayer impermissible, in part, because "judge's prayer in the courtroom is not to fellow consenting judges but to the litigants and their attorneys"); *Hudson*, 2015 WL 3447776, at *14 ("[W]hen a governmental body engages in prayer for itself and does not impose that prayer on the people, the governmental body is given greater latitude than when the government imposes

prayer on the people.") (quoting *Simpson*, 404 F.3d at 289 (Niemeyer, J., concurring)).

The District Court duly noted that this is not the case here. In place of "guest ministers" praying for the town board in *Town of Greece*, 134 S. Ct. at 1826 (plurality opinion), "the Commissioners themselves—and only the Commissioners—delivered the prayers at the Board's meetings." JA 339; *see also Town of Greece*, 134 S. Ct. at 1822 (criticizing practices that "would involve government in religious matters" by "editing or approving the prayers in advance"); *Hudson*, 2015 WL 3447776, at *12 ("In Pittsylvania County, the Supervisors led the prayers and asked the audience to stand while doing so, rendering the prayer practice far less of 'an internal act' directed at the Board than was the case in both *Marsh* and *Town of Greece*.") (citation omitted). And the Rowan County Commissioners have pointedly and repeatedly disavowed the notion that these prayers are solely for their benefit. *See, e.g.,* JA 18 ¶ 27(m) (Commissioner Ford: "I pray that the citizens of Rowan County will love you Lord, and that they will put you first. In Jesus' name, Amen."); *id.* at 352 (then-Board Chair Chad Mitchell: expressing willingness to spend public funds on litigation "because *it's not just fighting for these five* [County Commissioners'] rights but for all the citizens of Rowan County.") (emphasis added). The structure of the prayer practice as well as the Commissioners' statements in support of it "demonstrate that Commissioners do

not consider the prayer practice an internal act directed at one another, but rather, that it is also directed toward citizens and for the benefit of all Rowan County." JA 352. The external focus of Rowan County's prayer practice has a type of coercive power that the internally directed practice in *Town of Greece* could not have. *See Town of Greece*, 134 S. Ct. at 1825-26 (plurality opinion).

Even though the internal or external nature of a prayer practice is a key consideration in determining whether impermissible coercion has occurred, Rowan County essentially ignores this factor, merely declaring – contrary to the evidence – that "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.'" Br. of Def.-Appellant at 19 (internal citation omitted). But this conclusory assertion does not square with the County's frank acknowledgement that "[i]ndividual commissioners 'frequently' began their prayers with some variant of 'let us pray' or 'please pray with me'" — plain evidence of the prayer's external focus. Br. of Def.-Appellant at 3 (citation omitted); *see also* JA 350 ("Although Defendant argues that the prayers are offered solely for the benefit of the Board, that the Board signaled for the public to join in the prayers undercuts such an argument."); *Constangy*, 947 F.2d at 1147, 1149 (holding that judge engaged in externally focused prayer by opening court each morning with "[l]et us pause for a moment of prayer"); *accord infra* pp. 14-18. Nor does it square

with the Commissioners pre-litigation admissions that their prayers were for public consumption, *see, e.g.*, JA 352 (Commissioner Barber: prayer practice "has been a tradition for the board, *for our citizens* and for our country.") (emphasis added), to say nothing of the externally focused content of the invocations themselves. *See, e.g.*, JA 17 (Commissioner Barber: "Holy Spirit, open our hearts to Christ's teachings, and enable us to spread His message amongst the people we know and love through the applying of the sacred words in everyday lives."); *compare id.* at 325 (Commissioner Ford: "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 from Jesus is the best I, and Rowan County, can ever hope for*.") (emphasis added) *with Wynne*, 376 F.3d at 301 n.7 (finding prayer practice was externally focused and violated the Establishment Clause, in part, based on Town Council statement that "invocation may request *divine guidance* for Town of Great Falls and its . . . citizens") (emphasis added).

Defendant-Appellant argues that such evidence is "irrelevant to the coercion analysis under Justice Kennedy's plurality opinion," but does not explain why. Br. of Def.-Appellant at 35.[2] In fact, the Commissioners' statements bear directly on

[2] Rowan County alleges that public statements made by Commissioners and reported by the media constitute hearsay, Br. of Def.-Appellant at 34, but failed to raise a hearsay objection to the introduction of these statements in the District Court. *See, e.g.* JA 18-19 ¶ 31 (Complaint); Answer [Doc. #37] at ¶ 31; Def.'s Resp. to Pls.' Cross Mot. Summ. J. [Doc. #53], at 4 (asserting only that news reports "are irrelevant

the coercion analysis because they are part of the context in which the Plaintiffs-Appellees and other residents perceive the prayers and are compelled to participate in them. *See Town of Greece*, 134 S.Ct. at 1825-26 (plurality opinion) (considering "the setting in which the prayer arises" and, in turn, whether this setting featured town leaders signaling disfavor towards prayer nonparticipants).[3] This Court cannot "turn a blind eye to the context in which [the prayer practice] arose." *McCreary County v. Amer. Civil Liberties Union of Ky.*, 545 U.S. 844, 866 (2005) (quoting

---

to the question of whether the content and setting of the Board's legislative invocations is constitutional"). The objection, therefore, has been waived. *See, e.g.*, *United States v. Garrett*, No. 94-5510, 1995 WL 255942, at *1 (4th Cir. May 3, 1995) (holding issue not preserved for appeal when defendant's counsel raised no hearsay objection at district court level); *Exxon Corp. v. Amoco Oil Co.*, 875 F.2d 1085, 1090 (4th Cir. 1989) ("[A] party may not state one ground for objection and attempt to rely on a different ground on appeal."); *United States v. Wilson*, 966 F.2d 243, 246 (7th Cir. 1992) (holding that an objection on relevance grounds did not preserve objection that evidence is unduly prejudicial under Rule 403). In any event, the District Court's consideration of these comments was appropriate under the contextual analysis required by the Establishment Clause. *See infra* note 3.

[3] Courts have repeatedly considered lawmakers' and other media statements as evidence in Establishment Clause cases, especially when assessing how a challenged act may be perceived. *See, e.g.*, JA 352 ("To the extent that '[i]t is presumed that the reasonable observer is acquainted with this tradition' of legislative prayer, a reasonable observer would likewise be aware of such public statements made by Commissioners outside of meetings.") (quoting *Town of Greece*, 134 S. Ct. at 1825 (plurality opinion)); *Green v. Haskell Cty. Bd. of Comm'rs*, 568 F.3d 784, 801-802 (10th Cir. 2009) ("Numerous quotes from these commissioners appear in news reports, ranging from statements reflecting their determination to keep the Monument . . . to statements of religious belief [testified to the religious purpose of their action]."); *Ind. Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 771 (7th Cir. 2001) (considering press release from defendant, Governor Frank O'Bannon, in weighing governmental purpose of religious display).

Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 315 (2000)); *see also Town of Greece*, 134 S. Ct. at 1825 (plurality opinion) ("The [coercion] inquiry remains a fact-sensitive one[.]"). As the Supreme Court made clear in *Town of Greece*, where the facts indicate that a prayer practice is externally focused, the analysis is different. 134 S. Ct. at 1825-26 (plurality opinion).

B. Rowan County Commissioners Improperly Solicited and Directed Public Participation in Official Prayers.

Consistent with its internal focus, the prayer practice in *Town of Greece* did not involve town board members directing and soliciting public participation in the prayers. "[B]oard members themselves stood, bowed their heads, or made the sign of the cross during the prayer[.]" *Town of Greece*, 134 S. Ct. at 1826 (plurality opinion). But, crucially, these elected officials "*at no point* solicited similar gestures by the public." *Id.* (emphasis added). "The [coercion] analysis would [have] be[en] different if town board members directed the public to participate in the prayers[.]" *Id.*; *see also Simpson*, 404 F.3d at 284 ("Moreover, Chesterfield, unlike Great Falls, did not invite the citizenry at large to participate during its invocations. . . . In other words, Chesterfield's invocations are 'directed only at the legislators themselves,' as the court in *Wynne* explained that they should be.") (quoting *Wynne*, 376 F.3d at 302); *Hudson*, 2015 WL 3447776, at *14 (quoting *Simpson* and *Wynne* for proposition that elected officials directing audience prayer participation impacts Establishment Clause analysis); Br. of Def.-Appellant at 30 (admitting that, when

elected officials direct the public to participate in prayers, it is a "red flag[]" signaling that the "practice is coercive").

The District Court noted that the Rowan County Commissioners, on the other hand, time and again directed public participation in the prayers they delivered. "The Board Chair here would regularly ask that everyone stand for the prayer and the Pledge of Allegiance." JA 350. This often came in the form of a call to action at the outset of Board meetings along the lines of, "If you will stand for the invocation and pledge, I will lead us tonight[,]" and "[a]t this time, if you would, please stand. We'll ask [Board member] Mike Caskey to give us the invocation and the pledge." JA 14 ¶ 21. Thereafter, "the designated prayer-giving Commissioners . . . often open[ed] the prayer by saying such phrases as 'let us pray,' or 'please pray with me'" JA 350; Rowan County does not deny this. *See id*. at 351, n.9 ("Defendant does not contend or provide evidence that the Board did not actually solicit the public to stand and join in prayer on those occasions discussed by Plaintiffs in their Verified Complaint and Affidavits. To the extent the online, public videos of the Board meetings . . . are considered . . . such videos would foreclose any such refutation by Defendant."), *id*. at 361 ("[T]he Commissioners ask everyone—including the audience—to stand and join in what almost always is a Christian prayer.").[4] The Board's impermissible

[4] Rowan County argues that the commissioners merely "requested attendees to stand for the opening ceremony generally—including for the Pledge of Allegiance—not for the invocation specifically." Br. of Def.-Appellant at 31. This assertion elides the

"solicit[ation of] similar gestures [of religious expression] by the public," *Greece*, 134 S.Ct. at 1826 (plurality opinion), has predictably coerced Rowan citizens to participate in its prayers. JA 326 ("Plaintiffs, none of whom are Christian, each attested to feeling coercion by Defendant's prayer practice.").

Rowan County argues that the Court should, as Justice Thomas contends in his *Town of Greece* concurrence, require proof that the Commissioners visited "adverse consequences" upon religious minorities to find a violation of the Establishment Clause. Br. of Def.-Appellant at 33. But the plurality opinion mandates no such showing to prove coercion. *Compare Town of Greece*, 134 S. Ct. at 1837 (Thomas, J., concurring in part and concurring in the judgment) ("The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*.") (citations omitted) *with id.* at 1825 (plurality opinion) ("The [coercion] inquiry

---

District Court's finding that there are generally two requests to participate, one of which is specific to the Commissioner-composed and delivered prayer. JA 350; *see also* Br. of Def.-Appellant at 3 ("Individual commissioners 'frequently' began their prayers with some variant of 'let us pray' or 'please pray with me.'") (citation omitted). Rowan County further asserts 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[.]" *Id.* at 33. But this argument conveniently ignores that this is simply not possible as a practical matter under the Board's current practice. *See* JA 327 ("Plaintiff Voelker further stated that he felt pressured to stand and participate in the prayers because at each meeting he had attended, Commissioners and most audience members stood during the invocation, and he 'stood because *the Invocation goes directly into the Pledge* for which I feel strongly I need to stand.'") (emphasis added) (citation omitted).

remains a fact-sensitive one that considers both the setting in which the prayer arises and the audience to whom it is directed."); *see also The Supreme Court, 2013 Term -- Leading Cases*, 128 HARV. L. REV. 191, 195 (2014) ("[W]riting for himself and Justice Scalia, [Justice Thomas] recited a narrower understanding of the coercion test that prohibits only 'actual legal coercion', not merely psychological coercion.") (citation omitted).

At the same time that it urges this Court to adopt Justice Thomas's coercion standard, Rowan County seeks to recast its Commissioners' prayer solicitations as nothing more than benign, "polite invitation, intended to smooth the transition into the [meeting] opening[.]" Br. of Def.-Appellant at 31. However, the plurality opinion paid far more attention to who asked the audience to participate in the prayer than tonal vagaries such as the force or cordiality of the request. *Greece*, 134 S. Ct. at 1826 (plurality opinion) ("Respondents point to several occasions where audience members were *asked* to rise for the prayers. *These requests, however, came not from town leaders but from the guest ministers*[.]") (emphasis added); *see also Hudson*, 2015 WL 3447776, at *16 ("[B]y delivering the prayers to the assembled public and asking them to stand for the prayers, the Board members 'directed the public to participate in the prayers.'") (citation omitted); *cf. Simpson*, 404 F.3d at 284 (finding no Establishment Clause violation, in part, due to fact that "Chesterfield, unlike

Great Falls, did not *invite* the citizenry at large to participate during its invocations.") (emphasis added).

Defendant-Appellant also seeks to minimize the coercive nature of its prayer practice — which involves government officials writing, delivering, and directing the public to participate in overwhelmingly sectarian prayers — by comparing it to a bailiff opening a session of court with "God save the United States and this honorable court." Br. of Def.-Appellant at 39. This Court, however, has firmly rejected this comparison as inapt, highlighting the marked distinction between, on one hand, prayers delivered by government officials that involve the audience or are intended for the audience's benefit, and, on the other hand, purely ceremonial, "brief references to God." *See Constangy*, 947 F.2d at 1151 (observing that "God save the United States and this Honorable Court" and similar phrases used to open court sessions "have been repeated so often that their religious meaning has diminished so that they are merely examples of 'ceremonial deism[]'" and concluding that they are, therefore, distinguishable from judicial prayer) (internal citation omitted). Rowan County's attempted re-imagining of the controlling law and relevant facts cannot change the reality that its Commissioners coercively directed the public to participate in religious practices again and again.

C. The Commissioners' Practice of Directing the Public to Participate in Prayer and Singling Out Dissidents for Opprobrium Created a Hostile Atmosphere for Prayer Nonparticipants at Rowan County Board Meetings.

The internal nature of the prayer practice, coupled with the fact that town board members did not invite or direct the public to participate, ameliorated any coercion in *Town of Greece*. The external focus predicted the atmosphere: There was a limited opportunity to "signal disfavor toward nonparticipants or suggest that their stature in the community was in any way diminished"[5] because there was limited interaction between town leaders and board meeting attendees during the legislative prayers. *Town of Greece*, 134 S. Ct. at 1826 (plurality opinion); *see also id* at 1829 (Alito, J., concurring) ("town had 'no religious animus'") (citation omitted).

In contrast, the District Court rightly observed that the Rowan Commissioners' actions "enhance[d] the coercive setting" of its Board meetings. JA 352. As noted above, the fact that the Board directed public participation in the

[5] Instead of diminishing religious minorities, Greece "maintained that a minister or layperson of any persuasion, including an atheist, could give the invocation" and, subsequently, made good on this assertion when it "invited a Jewish layman and the chairman of the local Baha'i temple to deliver prayers." *Town of Greece*, 134 S. Ct. at 1816-17 (noting also that a "Wiccan priestess *who had read press reports about the prayer controversy* requested, and was granted, an opportunity to give the invocation.") (emphasis added); *see also Simpson*, 404 F.3d at 279 (noting, among others, imams, rabbis, Jehovah's Witnesses, and Mormons were on congregation prayer list); *Coleman v. Hamilton Cty., Tenn.*, No. 1:12cv190, 2015 WL 1815617, at *9 (E.D. Tenn. April 22, 2015) (noting county "has allowed speakers from assemblies representing a variety of faith traditions" in upholding prayer practice). "Because no one other than the [Rowan] Commissioners provided the prayers, the prayers repeatedly and exclusively advanced only the faiths of the five Commissioners," JA 350, Christianity. *Id.* at 325.

prayers "in addition to dictating their content" not only set this case apart from *Town of Greece* but also "tend[ed] to create a coercive atmosphere." *Hudson*, 2015 WL 3447776 at *10; *see also* JA 351-53 (same). Rowan County's external focus and direction resulted in interactions between the Commissioners delivering the prayers and those coerced into participating in the prayers. These interactions, in turn, problematically led to Board members signaling their disfavor of those who did not fall in line, a "red flag[]" indicating an impermissibly coercive practice. Br. of Def.-Appellant at 30; *see also Town of Greece*, 134 S. Ct. at 1826 (plurality opinion). Specifically, County Commissioners have labeled religious minorities in Rowan County "evil," JA 325 (then-Board Chair Jim Sides: "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."), and charged those who object to the prayer practice with the "persecution" of Board members. Pls.' Mem. Supp. Mot. Summ. J. [Doc. #53], at 9 (Commissioner Barber on Plaintiffs' lawsuit: "God will lead me through this persecution and I will be His instrument."); *see also* Br. of Members of Congress at 25 (demeaning Plaintiffs as "litigious adults" seeking to "eradicate religious expressions they disagree with" as well as repress the Commissioners' speech). At least one Commissioner has suggested in the prayer he delivered that the County views the religious beliefs of non-Christians as inferior or wrong. *See* JA 16 ¶ 27(a) (Commissioner Barber: "Because we do believe that there

is only one way to salvation and that is Jesus Christ."). These comments fostered the environment in which the audience at a Board meeting "boo[ed] and jeer[ed]" a Rowan County resident "who expressed opposition to the Board's prayer practice," further deepening the coercive atmosphere. JA 353; *see also id.* at 19 ¶ 32 ("Rowan County resident, Shakeisha Gray, was jeered by audience members for expressing opposition to" the Board's prayer practice). In short, the Board's leadership engendered and then inflamed "the very divisions along religious lines that the Establishment Clause seeks to prevent." *Town of Greece*, 134 S. Ct. at 1819.

Rowan County fails to seriously grapple with the toxic and coercive atmosphere created by its Board members. Indeed, for the most part, the County does not attempt to justify the numerous divisive, proselytizing prayers by Commissioners or other remarks, such as Commissioner Barber's assertion that he has suffered "persecution" at the hands of Plaintiffs. The County does defend Chair Sides's "sick and tired" rant "as an expression of frustration with a small number of people who were overreading the Establishment Clause" rather than a reflection of animus towards religious minorities. *See* Br. of Def.-Appellant at 34 n.10. But whatever the motivation behind the comment, the result is the same and one that Rowan County cannot deny: Sides, the Board Chair, "singled out dissidents for opprobrium." *Town of Greece*, 134 S. Ct. at 1826 (plurality opinion). This plainly runs afoul of the Supreme Court's caution in *Town of Greece*, where "[i]n no

instance did town leaders signal disfavor toward nonparticipants or suggest that their stature in the community was in any way diminished." *Id.*

As the District Court noted, the "reasonable observer" referred to in *Town of Greece* would be "aware of such [disfavoring] public statements made by Commissioners outside of meetings," and prior to litigation, as well as the broader hostile environment.[6] *See* JA 352 (citing *Town of Greece*, 134 S. Ct. at 1826 (plurality opinion)); *see also* SA 2-3 ¶¶ 9-13, SA 5-6 ¶¶ 9-12, SA 8-9 ¶¶ 9-11, 13 (Plaintiffs' affidavits testifying to divisive Board meeting atmosphere). And while the "reasonable observer" invoked by the plurality would also be "acquainted with . . . [our legislative prayer] tradition," *Town of Greece*, 134 S. Ct. at 1825, she would also know that the *accepted* historical practice of legislative prayer has never looked like it does here: It has never countenanced the type of opprobrium expressed by the Rowan County Commissioners toward religious minorities or required religious minorities to submit to official prayer in such a hostile and coercive setting. *See id.*

[6] Defendant-Appellant and *amici* suggest that considering Commissioners' comments disparaging prayer nonparticipants and religious minorities would undermine the Commissioners' free-speech rights. *See, e.g.*, Br. of Def.-Appellant at 35; Br. for Members of Congress at 4 (accusing District Court of "impermissibly trampl[ing] the First Amendment rights of the Rowan County Commissioners"); Br. of State *Amici* at 15 (arguing that legislators delivering invocations are exercising an "individual First Amendment right of freedom of speech") (citation omitted). As the District court held, however, Defendant-Appellant's prayers are not private speech. JA 331-32. And, as discussed above, *supra* note 3, courts have considered lawmakers' statements as evidence in Establishment Clause cases.

at 1826 (plurality opinion) ("The analysis would be different if [the Greece] town board members . . . singled out dissidents for opprobrium.").

D. There is No Longstanding Historical Tradition of Externally Focused Prayers Delivered by Governmental Officials in a Hostile Environment.

The opinion in *Town of Greece* documented the historical pedigree of congressional and legislative prayer delivered by religious figures for the benefit of elected officials. Rev. Jacob Duché first delivered a prayer to the Continental Congress on September 7, 1774. *Town of Greece*, 134 S. Ct. at 1823. And "[t]he First Congress made it an early item of business to appoint and pay official chaplains, and both the House and Senate have maintained the office virtually uninterrupted since that time." *Id.* at 1818. Similarly, Nebraska could point to more than a century of precedent when its practice of paying a chaplain to open legislative session was challenged in *Marsh*. 463 U.S. at 789-90. The tradition of religious figures delivering legislative prayers continues through to the present day; Congress in recent years has welcomed "ministers of many creeds" including Judaism, Islam, Hinduism, and Buddhism. *Town of Greece*, 134 S. Ct. at 1821.

The Court in *Town of Greece* was quick to note, however, that — while instructive — the history of legislative prayers in general does not speak to the constitutionality of all legislative prayer practices. Judicial review must focus on whether "the specific [prayer] practice is permitted." *Id.* at 1819; *see also* JA 340

("[T]hroughout its *Town of Greece* opinion and the opinion in *Marsh*, the Supreme Court consistently discussed legislative prayer practices in terms of invited ministers, clergy, or volunteers providing the prayer, and not once described a situation in which the legislators themselves gave the invocation."). Yet, Rowan County essentially argues that, after *Town of Greece*, no further inquiry into the details of a legislative prayer practice is necessary, no matter how markedly distinct the challenged practices are from those in *Town of Greece* and others that have stood the test of time. This is not so.

As the District Court noted, Defendant-Appellant cannot highlight a legislative prayer tradition along the lines of its practice. JA 343 ("The prayer practice of Defendant likewise fails to comport with the tradition and purposes embodied in the *Town of Greece* decision. Several significant differences distinguish the constitutional, historically-rooted legislative prayer of *Town of Greece* and *Marsh*."). Although Rowan County argues that its externally focused, directed, and divisive prayers are analogous to Presidents invoking "the protection and help of God," *see* Br. of Def.-Appellant at 21 n.6, the presidential letter, proclamation, and two speeches cited lend no guidance as to whether "the specific practice [at issue here] is permitted," *see Town of Greece*, 134 S. Ct. at 1819, as "[n]one of these contexts are remotely analogous to a county commissioners

meeting." Br. of Def.-Appellant at 36.[7] The factors contributing to the coercive atmosphere here are not repeated in these examples.

Rowan County also claims that its practice fits with the tradition of prayers sanctioned by this Court's jurisprudence. It must admit, however, that each of the cases it cites in support of this proposition were decided with the understanding that elected officials could not engage in sectarian legislative prayer. *Id.* at 25; *see also* JA 339 n.4. Even more importantly, none of the cases Defendant-Appellant cites endorse elected officials directing the public to participate in its prayers and singling out for reproach those who object. *See Turner v. City Council of Fredericksburg*, 534 F.3d 352, 355-56 (4th Cir. 2008) (holding that prayers delivered by members of

[7] Arguing in support of Rowan County, some *amici* contend that the County's prayer practice is enmeshed in our nation's history. Like Defendant-Appellant, however, they fail to produce evidence bearing out this contention. Reviewing more than two centuries of history, congressional *amici* identify only four instances of Members of Congress opening a legislative session with prayer. Br. for Members of Congress at 7; *see also* Br. of Def.-Appellant at 21 n.6 (noting the First Congress considered and *rejected* having a delegate lead a prayer). Three of those four occurred in the last six years. *Compare* Br. for Members of Congress at 7 with *Town of Greece*, 134 S. Ct. at 1818 (noting Congress has provided for chaplains for well over 200 years). State *amici* similarly claim that "lawmakers lead the invocation *on at least some occasions* in 29 of 53 senate chambers and 26 of 51 house chambers" across the nation. Br. of West Virginia and 12 Other States at 13 (hereinafter "State *Amici*") (emphasis added). They further contend that "[o]f 319 counties in the Fourth Circuit . . . lawmaker-led prayer *is permitted on at least some occasions* in 166." *Id.* at 15 (emphasis added). However, State *amici* offer only "a rough estimate at best" regarding the prevalence of exclusively lawmaker-led prayer practices, *id.* at 23, *see also* Br. of Def.-Appellant 27 (noting "precise statistics are unavailable" on point), and do not cite even one county invocation policy featuring the lawmaker-led, externally focused, directed, and divisive prayer practice adopted by Rowan County.

City Council were government speech and that Establishment Clause permitted City to require prayers be non-sectarian); *Simpson*, 404 F.3d at 284 (finding no Establishment Clause violation, in part, due to fact that "Chesterfield, unlike Great Falls, did not *invite* the citizenry at large to participate during its invocations"); *Wynne*, 376 F.3d at 301 n.7 (finding Establishment Clause violation, in part, based on evidence Council members prayers were directed at "the citizens in attendance at its meetings and the citizenry at large"); *cf. Hudson*, 2015 WL 3447776 at *12 ("The Court, therefore, finds that Defendant's prayer practice, in directing the public to stand and pray violates the bedrock principle of the Establishment Clause in that it serves as an unconstitutionally coercive practice.") Again, Rowan County's proposed comparators only serve to highlight that its practice does not "fit[] within the tradition long followed in Congress and the state legislatures" and carried forward in *Town of Greece.* JA 338 (quoting *Town of Greece*, 134 S. Ct. at 1820).

II. By Focusing on the Setting in Which the Prayers Arose and the Audience to Whom the Prayers Were Delivered, the District Court Properly Applied the Fact-Sensitive Inquiry Mandated by *Town of Greece* and the Establishment Clause.

In concluding that Rowan County has impermissibly coerced participation in its prayer practice, the District Court thoroughly canvassed and objectively applied the governing case law. The jurisprudential lodestar of the District Court's analysis was the Supreme Court's opinion in *Town of Greece*. The District Court focused, in particular, on the Supreme Court's guidance regarding what did and did not

constitute impermissible coercion. JA 334-44, 346-53. Recognizing, however, that "*Town of Greece* simply gives one situation that does not constitute coercion, but does not conclusively declare when legislative prayer might constitute coercion," JA 348-49 (internal citation omitted), the District Court appropriately turned to other religious coercion cases to further inform its analysis and elucidate the coercion standard applicable here. JA 353-62.

Rowan County protests that the District Court's ruling would bring about sweeping changes in the law by, for example, endangering presidential prayer proclamations. *See, e.g.,* Br. of Def.-Appellants at 21 n.6. But Defendant-Appellant's comparison to presidential prayer proclamations is as inapt as was its analogy to a bailiff's opening of a court session with "God save this honorable court." *See supra* pp. 18. Both examples involve contexts and facts that are far different than the ones before this Court here, and the District Court's decision jeopardizes neither.

Rowan County's critique makes plain its real objection: The District Court did not construe *Town of Greece* as conveying blanket approval for all legislative prayer policies, regardless of context.[8] Defendant-Appellant's preferred

[8] For the first time on appeal, Rowan County also argues that the Court's decision raises the administrative burden and cost of complying with the Establishment Clause. Br. of Def.-Appellant at 28; *see also* Br. of State *Amici* at 1-2, 10. Even were that so, administrative inconvenience cannot justify allowing the County to continue violating the constitutional rights of Plaintiffs-Appellees. *See, e.g., Mem'l*

interpretation of the law, however, is not only directly at odds with the Supreme Court's reasoning in *Town of Greece*, it is also incompatible with the Establishment Clause's fundamental protection against religious coercion. The District Court's opinion reflects the contextual inquiry compelled by *Town of Greece* and the broader principles at work in Establishment Clause case law, and it should be upheld by this Court.

A. The District Court Appropriately Focused on the Plurality Opinion in *Town of Greece*, Particularly in Assessing Whether Rowan County's Prayer Practice Impermissibly Coerced Citizens.

The District Court's opinion was rightly animated first and foremost by the plurality opinion in *Town of Greece*. Noting that "the facts before the Supreme Court in *Town of Greece* are particularly relevant to this Court's analysis," JA 335, the District Court's Establishment Clause analysis began with a summary of the case and its facts as well as how they compared with the current controversy. *Id.* at 334-44. This assessment forthrightly noted that *Town of Greece* "dismantl[ed] the Fourth

---

Hosp. v. Maricopa Cty., 415 U.S. 250, 263 (1974) (holding that the "conservation of the taxpayer's purse is simply not a sufficient state interest" to override constitutional rights); *see also, e.g., Jordan v. Gardner*, 986 F.2d 1521, 1537 (9th Cir. 1993) ("Almost any accommodation of constitutional rights will result in some 'administrative burden'; most accommodations are not 'cost-free.' The minor adjustments in the practices of the . . . [Defendant] that would [be] require[d] are relatively insignificant, both in themselves and when weighed against the constitutional interests at stake.") (internal citation omitted). In any event, local governments across the country are in the same position as Rowan County and have managed, without great difficulty, to comply with Supreme Court decisions on point. There is no evidence that Rowan County would be incapable of doing so as well.

Circuit's legislative prayer doctrine which developed around the core understanding that the sectarian nature of legislative prayers was largely dispositive of the question of whether there was a constitutional violation." *Id.* at 334. Accordingly, the District Court predicated its analysis on "Justice Kennedy's general rules for evaluating potential coercion in the legislative prayer context[.]" *Id.* at 353. The District Court first acknowledged that, standing alone, offense or a sense of affront due to exposure to 'contrary religious views in a legislative forum' does not constitute coercion." *Id.* at 348 (quoting *Town of Greece*, 134 S. Ct. at 1826 (plurality opinion)) (citation omitted); *see also* JA 360 (noting Rowan County's dismissive argument that Plaintiffs' "hurt feelings" did not constitute undue coercion). But the District Court was also appropriately mindful that *Town of Greece* mandated "a fact-sensitive inquiry that 'considers both the setting in which the prayer arises and the audience to whom it is directed.'" JA 347 (quoting *Town of Greece*, 134 S. Ct. at 1825 (plurality opinion)). Ultimately, the District Court's assessment of the prayer setting and audience in Rowan County compelled a different result than in *Town of Greece*. JA 362 ("The practice of the Board is much more similar to the prohibited activity [articulated by the *Town of Greece* plurality] than it is to the inclusive, non-

discriminatory, and non-coercive practice of the *Town of Greece* in inviting volunteers to deliver legislative prayers.").[9]

Nonetheless, Rowan County argues the Supreme Court's rulings in *Marsh* and *Town of Greece* have rendered the identity of the prayer-giver and composer, as well as the content of the prayers, irrelevant to the coercion inquiry. *Id.* at 16, 20.[10] But an examination of the reasoning set forth in *Town of Greece* shows this is simply not the case. First, the Court's analysis repeatedly references *who* led the prayers. *See* 134 S. Ct. at 1816, 1817, 1818, 1820, 1822, 1824 (noting repeatedly that prayers were led by guest ministers and prayer-givers); *see also id.* at 1826 (plurality

[9] Defendant-Appellant argues the District Court does not give sufficient deference to the plurality's coercion analysis in *Town of Greece*. Br. of Def.-Appellant at 14 n.5, 28. But as discussed above, the plurality's coercion discussion was the foremost guide of the District Court's analysis, as the court made plain throughout its analysis and by returning to and focusing on the plurality opinion in its conclusion. *See* JA 362.

[10] Rowan County asserts that "[g]overnment 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." Br. of Def.-Appellant at 16. Thus, according to Defendant-Appellant, prayers from a chaplain, a guest minister, and an elected official are indistinguishable since all constitute government speech. *Id.* The Supreme Court did not hold this in *Town of Greece*, however. Indeed, if taken to its logical conclusion, the County's proposed interpretation would permit North Carolina's elected judiciary to open court every day with sectarian prayers. *But see Constangy*, 947 F.2d at 1149 ("For a judge to engage in prayer in court entangles governmental and religious functions to a much greater degree than a chaplain praying before the legislature."). The potential for coercion from each of these prayer-givers is not the same. *See Town of Greece*, 134 S. Ct. at 1825-27 (plurality opinion) (noting coercion analysis turns, in part, on identity of prayer-giver).

opinion) ("Although board members themselves stood, bowed their heads, or made the sign of the cross during the prayer, they at no point solicited similar gestures by the public. Respondents point to several occasions where audience members were asked to rise for the prayer. These requests, however, came not from town leaders but from the guest ministers[.]"); *see also Hudson*, 2015 WL 3447776 at *10 ("As the majority opinion in *Town of Greece* noted, such a request [for prayer participation] from the government [referring to elected officials] makes a difference."); *id. at* *16 ("Like Justice Kennedy in *Town of Greece*, Judge Niemeyer's dissent in *Joyner* [*v. Forsyth County*, 653 F.3d 341 (4th Cir. 2011)] focuses on the lack of government [referring to elected official] control over the content of the prayer in Forsyth County and the inclusive nature of its prayer policy.").

Second, under *Town of Greece* "[c]ourts remain free to review the pattern of prayers over time to determine whether they comport with the tradition of solemn, respectful prayers approved in *Marsh*[.]" 134 S. Ct. at 1826-27 (plurality opinion)). Though not determinative in and of itself, *id.* at 1821, judicial review can include whether a prayer practice features sectarian references to the extent it tended to advance a particular faith. *Id.* at 1826 (noting potential relevance of whether prayers "attempted a lengthy disquisition on religious dogma"). The District Court's limited consideration of the overwhelmingly sectarian content of Rowan County's pattern

of prayers over time, JA 344-45, in concert with other evidence including "public statements . . . indicat[ing] that at least some of the Commissioners have a preference for Christianity," JA 352,[11] fit well within the boundaries set by *Town of Greece*.

B. The District Court Properly Interpreted *Town of Greece* in Light of Establishment Clause Case Law Elucidating What Constitutes Impermissible Coercion.

Pointing to the District Court's discussion of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and case law involving coercion, Rowan County contends that the District Court improperly strayed from *Town of Greece* in its analysis. This argument mischaracterizes the inquiry undertaken by the court.

Although the District Court briefly discussed the historical importance of the Establishment Clause test articulated in *Lemon*, JA 344-46, it "limit[ed] its review to whether the [prayer] practice [in question was] unconstitutionally coercive." *Id.* at 346. Contrary to the contention of Defendant-Appellant, Br. of Def.-Appellant at 38, the District Court did not base its ruling on the *Lemon* test. *See id.* at 14 (noting

[11] The District Court's limited consideration of the overwhelmingly sectarian nature of Rowan County's pattern of prayers over time was in the broader context of other key elements of the prayer practice. *See, e.g.,* JA 339-40 n.4. Defendant-Appellant, however, claims "[t]he 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." Br. of Def.-Appellant at 14 n.4 (misquoting JA 339-40 n.4) (emphasis added). This distorts the quotation in question. The District Court actually stated, "The prayer-givers' identities are significant here in relation to the surrounding circumstances. Under a different, inclusive prayer practice, Commissioners might be able to provide prayers, but that is not the case before the Court." JA 339-40 n.4.

the District Court "first applied *Marsh* and *Greece*" in its coercion analysis). For example, Rowan County argues that the District Court applied the *Lemon* test to conclude that the Board's prayer practice had the effect of "entangling the government with religion." *Id.* at 14. This claim is inaccurate. The Court's discussion of entanglement was based not on *Lemon*, but on the Supreme Court's opinion in *Town of Greece*. JA 341 ("*Town of Greece* reasoned that requiring prayers to be nonsectarian would 'force the legislatures that sponsor prayers . . . 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 the case under the town's current practice of neither editing or approving prayers in advance nor criticizing their content after the fact.'") (quoting 134 S. Ct. at 1821);[12] *see also Coleman*, 2015 WL 1815617, at *9 (post-*Greece* decision finding no Establishment Clause violation, in part, because "[t]he County does not involve itself in the content of the prayers offered").

In addition to its exhaustive consideration of *Town of Greece*'s view of coercion, JA 346-53, the District Court did survey other case law that discussed *Lemon* but only because those cases *also* analyzed the challenged practices under

[12] The District Court also noted that, "[i]f Defendant's prayer practice unconstitutionally coerce[d] Plaintiffs into religious exercises, then the practice would almost certainly have the effect of advancing religion," but this was at most dicta and the *Lemon* test was not the basis for the court's findings. JA 346 n.8

the coercion test. JA 353-62. Moreover, noting that coercion case law "has developed largely in several cases involving school children," and that there are differences between the two contexts, as well as differences between the contexts in cases addressing coercion in the prison and military settings, the District Court did not present these cases as determinative of outcome in the current controversy. *Id.* ("The bulk of the coercion cases—in the Fourth Circuit and beyond—demonstrate that context is key."); *see also Hudson*, 2015 WL 3447776 at *11 (same). It did recognize, though, that this jurisprudence was persuasive and useful here to the extent it helped inform the Court's analysis under *Town of Greece* by identifying the means used by other courts to judge whether particular circumstances were impermissibly coercive. *See* JA 358 ("These tests are particularly useful given the *fact-specific nature* of Establishment Clause cases[.]") (emphasis added). Factors derived from this precedent included "the context in which the assertedly coerced activity occurs," "the character of the activity itself," *id.* (quoting *Child Evangelism Fellowship of Md., Inc. v. Montgomery Cty. Pub. Schs.*, 373 F.3d 589, 598 (4th Cir. 2004)), as well as, relatedly, "whether the state acted, whether the action was coercive, and whether the coercion was religious in nature." *Id.* (citing *Kerr v. Farrey*, 95 F.3d 472, 479 (7th Cir. 1996); *Jackson v. Nixon*, 747 F.3d 537, 542 (8th Cir. 2014); *Inouye v. Kemna*, 504 F.3d 705, 713 (9th Cir. 2007); *Marrero-Méndez v. Pesquera*, Civil No. 13-1203 (JAG), 2014 WL 4109518, at *4 (D.P.R. Aug. 19,

2014)). These factors were echoed in the *Town of Greece* plurality, which "identif[ied] the [coercion] inquiry as fact-sensitive and focused on . . . 'both the setting in which the prayer arises and the audience to whom it is directed.'" JA 358 (quoting *Town of Greece*, 134 S. Ct. at 1825 (plurality opinion)). Ultimately, the District Court's thoroughness reinforced its reliance on the plurality opinion in *Town of Greece*.

CONCLUSION

For the reasons set forth above, Plaintiffs-Appellees respectfully request that this Court affirm the decision of the District Court.

REQUEST FOR ORAL ARGUMENT

Plaintiffs-Appellees respectfully request an opportunity for oral argument in this case. Because this case involves a significant dispute regarding the interpretation of the First Amendment to the United States Constitution, Plaintiffs-Appellees believe that oral argument would be beneficial to the Court.

Respectfully submitted,

/s/ Christopher A. Brook
Christopher A. Brook
AMERICAN CIVIL LIBERTIES UNION
OF NORTH CAROLINA LEGAL FOUNDATION
P.O. Box 28004
Raleigh, North Carolina 27611
[redacted]

Daniel Mach
Heather L. Weaver
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, N.W., Suite 600
Washington, DC 20005
[redacted]

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P 21(a)(7)(B) because this brief contains 9,340 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 Word 2013 in Times New Roman 14-point font.

/s/ Christopher A. Brook
Christopher A. Brook

CERTIFICATE OF SERVICE

I certify that on September 30, 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 address listed below:

N/A

/s/ Christopher A. Brook
Christopher A. Brook
ACLU of North Carolina
Legal Foundation, Inc.
PO Box 28004
Raleigh, NC 27611
[redacted]

Attorney for Plaintiffs-Appellees

Unless otherwise noted, 8 paper copies have been filed with the Court on the Same date via Federal Express Mail.

/s/ Christopher A. Brook
Christopher A. Brook

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. *15-1591* Caption: *Nancy Lund, et al vs. Rowan County, North Carolina*

Pursuant to FRAP 26.1 and Local Rule 26.1,

Nancy Lund
(name of party/amicus)

who is *appellee*, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

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))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
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:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: */s/ Christopher A. Brook* Date: *June 5, 2015*

Counsel for: *Appellee*

CERTIFICATE OF SERVICE

****

I certify that on *June 5, 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:

/s/ Christopher A. Brook (signature)

June 5, 2015 (date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 15-1591 Caption: *Nancy Lund, et al vs. Rowan County, North Carolina*

Pursuant to FRAP 26.1 and Local Rule 26.1,

Liesa Montag-Siegal
(name of party/amicus)

who is *appellee*, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

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))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
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:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: */s/ Christopher A. Brook* Date: *June 5, 2015*

Counsel for: *Appellee*

CERTIFICATE OF SERVICE

****

I certify that on *June 5, 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:

/s/ Christopher A. Brook (signature)

June 5, 2015 (date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 15-1591 Caption: *Nancy Lund, et al vs. Rowan County, North Carolina*

Pursuant to FRAP 26.1 and Local Rule 26.1,

Robert Voelker
(name of party/amicus)

who is *appellee*, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

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))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
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:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: */s/ Christopher A. Brook* Date: *June 5, 2015*

Counsel for: *Appellee*

CERTIFICATE OF SERVICE

****

I certify that on *June 5, 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:

/s/ Christopher A. Brook (signature)

June 5, 2015 (date)