No. 15-1591

In the
United States Court of Appeals for the Fourth Circuit

NANCY LUND, *ET AL.*,
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

Brief *Amicus Curiae* of United States Justice Foundation, Conservative Legal Defense and Education Fund, Citizens United, and Citizens United Foundation in Support of Defendant-Appellant

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ William J. Olson Date: December 22, 2016

Counsel for: U.S. Justice Foundation, et al.

CERTIFICATE OF SERVICE

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I certify that on December 22, 2016 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/ William J. Olson (signature) December 22, 2016 (date)

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INTEREST OF *AMICI CURIAE*

United States Justice Foundation, Conservative Legal Defense and Education Fund, Citizens United, and Citizens United Foundation are nonprofit organizations, exempt from federal income taxation under sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code. Each is dedicated, *inter alia*, to the correct construction, interpretation, and application of the law.[1]

ARGUMENT

I. THE ROWAN COUNTY PRAYER PRACTICE IS NOT A FORBIDDEN ESTABLISHMENT OF RELIGION.

In Town of Greece v. Galloway, 572 U.S. ___, 134 S.Ct. 1811 (2014), Justice Kennedy stated that the inquiry into whether an official government prayer practice is an unconstitutional establishment of religion is "a fact-sensitive one." *Id.* at 1825. He cautioned, however, that the establishment question was **not** resolved by examining solely the facts, such as whether the content of the prayers was "generic" or "sectarian" (*id.* at 1820), whether the prayers had the "effect" of endorsing a particular religious faith (*id.* at 1821), or even whether the prayers

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[1] *Amici* requested and received the consent of the parties to the filing of this brief *amicus curiae*, pursuant to Rule 29(a), Federal Rules of Appellate Procedure. No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than these *amici curiae*, their members or their counsel contributed money that was intended to fund preparing or submitting this brief.

"gave [persons of another faith] offense and made them feel excluded and disrespected." *Id.* at 1826. Instead, Justice Kennedy ruled, the constitutionality of legislative prayer under the Establishment Clause is determined by two factors. First, the court examines the overall "purpose" of the prayer practice — whether "a pattern of prayers ... over time denigrate[d], proselytize[d], or betraye[d] an impermissible government purpose" (*id.* at 1824). And second, the court focuses on whether, overall, anyone was "coerced" by government directives "to participate in the prayers" by something more than social "pressure," like "indicat[ions] that [official decisions] might be influenced by a person's acquiescence in the prayer opportunity." *Id.* at 1826.

In this case, the panel followed Justice Kennedy's lead, painstakingly examining the facts, including the content of the prayers, the persons saying the prayers, the role of the Board of Commissioners, and the pressures to conform, coming to the same conclusion that the Rowan County's prayer practice does not violate the Establishment Clause. *See generally* Lund v. Rowan County, 837 F.3d 407, 417-31 (4th Cir. 2016). Not surprisingly in a case requiring a weighing of the facts, guided solely by the history of legislative prayer, the panel split two to one, just as the Supreme Court split five to four in Town of Greece. And now that this case is before this circuit sitting *en banc*, the controversy over the Rowan County

legislative prayer has again devolved into a dispute solely over facts. On the one hand, the ACLU welcomed this descent into religious factualism, contending that "Rowan County's exclusionary and coercive prayer practice would transform *Town of Greece* from a particularized, fact-sensitive inquiry into a grand pronouncement countenancing virtually every legislative prayer practice, regardless of its contours or implementation." Supplemental *En Banc* Rehearing Brief for Plaintiffs-Appellees ("ACLU Br.") at 2; *see also id.* at 6. On the other hand, Rowan County urges this Court to examine its overall prayer practice through the lens of "tradition long followed," invoking Town of Greece as having sanctioned a broad swath of prayer practices in a variety of governmental settings. *See* Supplemental Brief of Appellant Rowan County ("Rowan Br.") at 1-5.

Both parties, however, eschew an analysis of the Rowan County prayer practice based upon the governing constitutional text that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." To be sure, the ACLU purports to rely on "the principles animating the Establishment Clause," but it simply assumes that its position is consonant with one of those principles: "our enduring regard for religious pluralism and the inclusion of all faiths in civic activities." ACLU Br. at 2. And Rowan County appears content to rely solely on Supreme Court precedent, maintaining that the

Rowan County prayer practice is "materially indistinguishable" from Town of Greece, and therefore does "not offend the Establishment Clause." *See* Rowan Br. at 2.

The purpose of this *amicus curiae* brief is to offer a third approach — one based upon a textual analysis of the First Amendment religion guarantees as applied to the Rowan County prayer practice. It is the thesis of these *amici* that the key to the constitutionality of both the content and purpose of the prayer cannot be determined without first defining "religion" as it appears in the First Amendment and, in light of that definition, determining whether the prayer practice would constitute a prohibited establishment of religion.

A. Religion is a Jurisdictional Term Separating the Ministry of the Church from the Ministry of the State, but United Under the Oversight of the Creator.

Future students of the legal archives of the American republic undoubtedly will come away amazed when they discover that thousands of cases were decided by applying the First Amendment establishment and free exercise of religion guarantees without the courts' having first adopted a governing definition of "religion." *See, e.g.,* G. Stone, L. Seidman, C. Sunstein & M. Tushnet, Constitutional Law 1463-1466 (Little, Brown, 2d ed.: 1991). Indeed, some commentators have given up the search for any such meaning, calling it

misguided. *See* G.C. Freeman III, "The Misguided Search for a Constitutional Definition of 'Religion,'" 71 GEO. L.J. 1519 (1983). Yet, the "Fixed Meaning Canon" of construction, not only for statutes but also the Constitution, establishes the duty to give words "the meaning they had when the text was adopted." *See* A. Scalia & B. Garner, Reading Law at 78 (West: 2012). As an unanimous Supreme Court once explained, "[i]n expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added." Holmes v. Jennison, 39 U.S. 540, 570-71 (1840). And, as Justice Frankfurter put it: "Words must be read with the gloss of the experience of those who framed them." United States v. Rabinowitz, 339 U.S. 56, 70 (1950) (Frankfurter, J., dissenting).

Notoriously, Establishment Clause cases are decided without regard for the text, despite the counsel of Socrates, who stated: "The beginning of wisdom is a definition of terms."[2] For example, in the case of Glassroth v. Moore, which challenged the constitutionality of Alabama Chief Justice Roy S. Moore's installation of a Ten Commandments monument in the State Judicial Building, the district judge insisted on resolving the case solely on the basis of precedent,

[2] As quoted in Gowder v. City of Chicago, 923 F. Supp. 2d 1110, 1115, n.1 (N.D. Ill. 2012).

rejecting Chief Justice Moore's effort to persuade the court to define religion as it appears in the original First Amendment text. *See id.,* 229 F. Supp. 2d 1290, 1313 (M.D. Ala. 2002). The district judge refused, confessing:

> the court lacks the expertise to formulate its own definition of religion for First Amendment purposes. Therefore, because the court cannot agree with the Chief Justice's definition of religion and cannot formulate its own, it must refuse the Chief Justice's invitation to define "religion." [*Id.* at 1314.]

However, the district judge's inability to define religion did not deter the court from concluding as a matter of law that the Chief Justice's monument constituted an unconstitutional establishment of "religion"! *Id.* at 1319.

Yet a court that is willing to engage in a quest for the true meaning of religion would be able to find it, informed by the Supreme Court's decision in Reynolds v. United States, 98 U.S. 145 (1878), upholding the constitutionality of a federal statute outlawing polygamy in United States territories. In Reynolds, the Court — after acknowledging that the First Amendment does not, itself, define religion[3] — launched an historical inquiry of the meaning of religion, tracing the religion guarantees back to their "culminat[ion]" in Virginia, specifically the legacy of Thomas Jefferson and James Madison. *Id.* at 162-63. In particular, the Reynolds

[3] Nor does the Amendment define "speech" or "press," but that has not deterred the judiciary from seeking to discover the historic definition of the two freedoms. *See, e.g.,* First Bational Bank of Boston v. Bellotti, 435 U.S. 765, 797-801 (1978) (Burger, C.J., concurring).

Court embraced Madison's statement that religion was a jurisdictional term, excluding certain duties that "we owe the Creator" that are outside the "cognizance of civil government." *Id.* at 163. Madison, in turn, rested this jurisdictional principle on the language in Article 16 of the 1776 Virginia Declaration of Rights,[4] which defines "[r]eligion" as "the duty which we owe to our Creator and the manner of discharging it, [which] can be directed **only** by reason and conviction, not by force or violence." *See* J. Madison, Memorial and Remonstrance, reprinted in P. Kurland & R. Lerner, eds., The Founders' Constitution, Vol. Five, p. 82, item 43 (Univ. Chi. Press: 1987) (emphasis added).

Religion, then, as it appears in the First Amendment, secures to the people the "right" to be governed only by individual "conscience" — reason and conviction — when it comes to those objectively defined duties that the Creator has exclusively reserved to Himself. If, however, the duty is one subject to enforcement by "force or violence" — within the jurisdiction of the State — then it falls outside the protection of either the Establishment or Free Exercise guarantees, as the Supreme Court ruled in Reynolds. *See id.* at 165-67.[5]

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[4] Reprinted in R. Perry & J. Cooper, eds., Sources of Our Liberties Rev. Ed. at 312 (ABA Foundation: 1978).

[5] *See also* H. Titus, "The Free Exercise Clause: Past Present And Future," 6 REGENT L. REV. 7, 10-13 (1995).

As summarized by James Madison in his Memorial and Remonstrance:

> [W]hat is ... a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the General Authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no mans right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance. [*Id.* at 82.]

As to those duties owed exclusively to God — such as "proselytizing" — they are enforceable only by "reason and conviction," belonging, entirely outside the jurisdiction or "cognizance" of civil government which rules by "force or violence." In contrast, duties owed to the State — such as following speed limits in residential neighborhoods — are legitimately enforceable by the use of "force or violence" by the civil rulers. Accordingly, the State is barred from compelling adherence to a particular faith, or proselytizing a particular doctrine, to protect the conscience of each individual, but this jurisdictional rule certainly does not bar civil government from invoking the Creator's aid in public prayer, in a pattern exemplified by Benjamin Franklin's call to prayer of the Constitutional Convention in 1787.

B. The Rowan County Prayer Practice Does Not Encroach upon the Ministry of the Church.

In its Supplemental Brief, the ACLU is rightfully concerned that Rowan County's practice of invocatory prayer not cross the Constitution's jurisdictional line separating the church's "proselytiz[ing]" role from the county board's civic functions. *See, e.g.,* ACLU Br. at 10. To be sure, some of the invocations offered through the years by some board members touched on the redemptive work of Christ, rather than invoking the aid of the Creator, who still oversees the civic affairs of Rowan County. But such statements by a few do not detract from the panel's finding of fact that "[t]he record in this case reflects that the board's prayer practice did not stray across th[e] constitutional line of proselytization or disparagement" (837 F.3d at 421):

> The content of the commissioners' prayers largely encompassed universal themes, such as giving thanks and requesting divine guidance in deliberations.... There is no prayer in the record asking those who may hear it to convert to the prayer-giver's faith or belittling those who believe differently. And even if there were, it is the practice as a whole — not a few isolated incidents — which controls. [*Id.* at 422.]

Faithfully applying Town of Greece, the panel opined 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.'" *Id.*

The ACLU attempts to differentiate Town of Greece from Rowan County, noting that, unlike the Greece city council, where persons who were not members of the council delivered the invocation, Rowan County Commissioners themselves delivered the invocations. ACLU Br. at 6-7. Thus, the ACLU claimed that the prayer practice in Town of Greece was "for the benefit of the board, not the town residents," *id*., while the target of the Rowan County invocations was the audience, not the board. But the purpose of the legislative prayer in both cases was really the same – to "lend[] gravity to public business, ... transcend petty differences in pursuit of a higher purpose and express[] a common aspiration to a just and peaceful society." Town of Greece, 134 S.Ct. at 1818. Anyone who has attended a meeting of a town council or county board can attest that the residents in attendance are in as much need of such invocatory prayer as are the council members or the commissioners, in hope that the civic business at hand will be transacted in a civil and cooperative manner (*see* Lund, 837 F.3d at 420). Regardless of who is praying, the residents are only asked to stand silently without being proselytized or denigrated, as the ACLU falsely has claimed. *See* ACLU Br. at 3-4, 10-11; Section I.C., *infra*.

Additionally, in its supplemental brief, the ACLU has contended that the rule in Town of Greece, embraces "prayers led by outside clergy," but not by "elected

officials." *See* ACLU Br. at 13-15. As the Rowan County supplemental brief demonstrates, there is no constitutional prohibition against elected officials to call upon God for direction, both for themselves as servants of the people, as well as for the people. *See* Rowan Br. at 3-4. Indeed, the panel majority chronicled America's rich history, from colonial to modern times, of "lawmaker-led prayer." Lund, 837 F.3d at 418-19. It should surprise or offend no one that the overwhelming theme of these prayers is Christian in content, reflecting the Biblical foundation upon which the freedom of religion legacy of the nation rests.[6]

Indeed, as Jefferson has attested, both the free exercise and no establishment guarantees are founded upon the law of the Creator as affirmed in his 1785 Act for Establishing Religious Freedom in a preamble that remains part of the Virginia Code even today:

> Whereas **Almighty God** hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the **Holy** author of our religion, who being **Lord** both of body and mind, yet chose not to propagate it by **coercions** on either, as was in his Almighty power to do....

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[6] Indeed, Christian principles pervaded the legal landscape in the nation's early history. As Joseph Story proclaimed in his inaugural lecture upon his appointment of Dane Professor of Law in the Harvard Law School in 1829:

> There never has been a period, in which the Common Law did not recognize Christianity as lying at its foundations. [P. Miller, ed., The Legal Mind in America at 178 (Cornell: 1962).]

[Virginia, Act for Establishing Religious Freedom, reprinted in The Founders' Constitution, Vol. Five, item 44, at 84 (emphasis added).]

No doubt, Jefferson believed in the separation of church and state but, as evidenced by this preamble, Jefferson was not animated by some notion of religious pluralism to support the disestablishment of religion so as to exclude God from the civil affairs of man. To the contrary, he rested his case for religious freedom directly upon the example of God, who, having every right to propagate the gospel by coercion, forewent doing so. Thus, Jefferson's preamble appealed to his fellow legislators in the name of "Almighty God" to disestablish the church to bring the new Commonwealth of Virginia into compliance with the law of the Creator.[7] In like manner, the Rowan County Commissioners invite each other and members of the community in attendance to acknowledge God in their invocatory prayers, "set[ting] the mind to a higher purpose and thereby ease[] the task of governing." *See* Lund at 420 (quoting Town of Greece at 1825). In so appealing, they, like Jefferson before them, invoke the Lord to remind themselves of their duty to their Creator in conducting the business of statecraft. *See id.*

C. The Board's Prayer Practice Is Not Unconstitutionally Coercive.

[7] *See* J. Story, Dane inaugural lecture, *supra* ("The error of the common law was ... calling ... the secular power to enforce that conformity of belief, whose rewards and punishments belong exclusively to God.").

At the heart of the plaintiffs' complaint that the Rowan County Board's prayer policy and practice is unconstitutionally coercive is the claim that members of the audience are "directed" by the prayer-giver to "participate" by standing, bowing, or otherwise identifying themselves to be in concert with the prayer. *See* ACLU Br. at 11-12. In sum, the ACLU claims that the County Board created a "coercive environment" that put unconstitutional "pressures" upon the audience to conform. *Id.* at 14-19. However, after reviewing the record, the panel concluded that the proof of "coercion" fell short, either under the test of the Town of Grace three-person plurality or the "force of law" test of the other two justices composing the majority. 837 F.3d at 425-27.

According to the plurality test, the panel concluded that the social pressure of which the plaintiffs complained was not enough: "adults are not presumed susceptible to religious indoctrination or pressure simply from speech they would rather not hear." *Id.* at 427. Instead, there had to be more — such as "chastise[ment]" or "lengthy disquisition on religious dogma." *Id.* In its supplemental brief, the ACLU attempts to fill in this evidentiary gap with allegations of a "divisive atmosphere" based on remarks of Board members defending their prayer policy and practice. *See* ACLU Br. at 18-19. But the Board's defensive remarks appear to have been triggered by the legal conflict over

the policy and practice, and are not a feature of the policy and practice itself, such as, "singl[ing] out dissidents for opprobrium." *See* Town of Greece at 1826. And the Town of Greece plurality ruled that someone taking "offense ... does not equate to coercion." *Id.*

Alternatively, had the panel adopted the views of concurring Justices Thomas and Scalia expressed in Town of Greece, all of these inquiries would have been unnecessary. The only question would be whether there is "actual legal coercion," such as the "exercise[] [of] government power in order to exact financial support of the church, compel religious observances, or control religious doctrine." Town of Greece at 1837. As Justice Thomas has observed about the original meaning of an "establishment" of religion:

> At a minimum, there is no support for the proposition that the framers ... embraced wholly modern notions that the Establishment Clause is violated whenever the "reasonable observer" feels "subtle pressure" ... or perceives governmental "endors[ement]." [*Id*. at 1838.]

In contrast, there is incontestable support for a return to the original meaning of "religion," dividing the law into the two distinct and categorical jurisdictions discussed *supra*, protecting the conscience of the individual from true coercion in proselytizing or doctrine — but certainly not from an extreme from of "political correctness" which would protect the ears of the ACLU from hearing the name of God uttered in the public arena.

D. This Court Should Reject the Atextual Approach to the Religion Guarantees.

The ACLU views "Establishment Clause questions [to be] by their nature 'matter[s] of degree,'" "[e]schewing jurisprudence by categorization." ACLU Br. at 6 (citing dissenting Judge Wilkinson). Just the opposite is the case. By employing the word "religion," the First Amendment divides one's duties owed to the Creator into two mutually exclusive categories: those duties that are, by nature, subject to enforcement only by "reason and conviction" and those that may be imposed by "force or violence." As applied to legislative prayer, the purpose of such prayer must be directed at those matters that properly belong to the State, to the exclusion of those matters that rightfully belong to the Church. As the Lord has put it in the Holy Scriptures: "Render ... unto Caesar the things which be Caesar's and, unto God the things which be God's." Luke 20:25. Certainly, participation in legislative prayer may not be coerced to protect one's conscience, but acknowledging the Creator's rule over affairs of State, is not only permissible, it has been recognized in these United States to be of great value and importance, from the Declaration of Independence's appeal to the Supreme Judge of the World in 1776, to the prayers offered in Rowan County, North Carolina today.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

/s/ *William J. Olson*

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of United States Justice Foundation, *et al.*, in Support of Defendant-Appellant, was made, this 22nd day of December, 2016, by the Court's Case Management/ Electronic Case Files system upon the attorneys for the parties.

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