Nos. 17-15769, 18-10109

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

DAVID WILLIAMSON, *et al.*,

Plaintiffs / Appellees / Cross-Appellants,

v.

BREVARD COUNTY,

Defendant / Appellant / Cross-Appellee.

On Appeal from a Final Judgment of the
United States District Court for the Middle District of Florida
Case No. 6:15-cv-01098-JA-DCI, Hon. John Antoon II

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**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

Plaintiffs / Appellees / Cross-Appellants certify that all persons who have an interest in the outcome of this appeal are listed in the Certificates of Interested Persons included in their opening brief or the Brief of Amici Curiae Anti-Defamation League, et al. Plaintiffs further certify that, to their knowledge, no publicly traded company or corporation has an interest in the outcome of this case or appeal.

By: /s/ Alex J. Luchenitser Date: June 26, 2018
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SUMMARY OF ARGUMENT

All the arguments that Brevard County presents in defense of its Commissioners' directives to rise for opening prayers are meritless.

Justice Kennedy's plurality opinion, not Justice Thomas's concurrence, is the controlling opinion in *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014). When the Justices supporting a judgment split into a plurality and a concurrence (and there is no majority opinion), the plurality opinion is controlling if it supports the judgment on the narrowest ground—in other words, as this Court has explained, the middle ground between the concurrence and the position rejected by the judgment. In *Greece*, Justice Kennedy's position that legislative-prayer practices are coercive when governmental officials solicit audience participation is the middle ground between Justice Thomas's position that coercion requires legal compulsion and the position rejected by the judgment that legislative prayer is inherently coercive in the municipal context.

Justice Kennedy's controlling opinion forecloses the County's other arguments. For example, the County contends that attendees at County Board meetings are not required to say the prayers, are not forced to obey directives to stand, need not remain in the room for the prayers,

and are not coerced merely by virtue of being offended by the prayers. But even though all those things were also true in *Greece*, Justice Kennedy's controlling opinion made clear that the town's practice would not have been upheld if town-board members had requested meeting attendees to rise for prayers.

The Court should hold that the Commissioners' directives to stand for prayers violate the Establishment Clauses of the U.S. and Florida Constitutions.

ARGUMENT

The Commissioners' directives to rise for prayers are unconstitutional.

A. Justice Kennedy's opinion in *Greece* is controlling.

The County's argument that Justice Thomas's plurality opinion in *Greece* is controlling (Cty. Resp. Br. 23–24) appears to be based on a misunderstanding of how to apply *Marks v. United States*, which held that "[w]hen a fragmented [Supreme] Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (plurality opinion)). This Court has explained

that when the Justices supporting a judgment split into a plurality and a concurrence (and there is no majority opinion), the controlling opinion under *Marks* is the one that represents a "'middle ground'" between the other opinion in favor of the judgment and the position rejected by the judgment. *See United States v. Hughes*, 849 F.3d 1008, 1013, 1015 (11th Cir. 2017) (quoting *United States v. Graham*, 704 F.3d 1275, 1277–78 (10th Cir. 2013); *United States v. Duvall*, 740 F.3d 604, 612 (D.C. Cir. 2013) (Kavanaugh, J., concurring in denial of rehearing en banc)), *rev'd on other grounds*, No. 17-155, __ S. Ct. __, 2018 WL 2465187 (U.S. June 4, 2018).

For example, in *Glossip v. Gross*, 135 S. Ct. 2726, 2737–38 & n.2 (2015), the Supreme Court concluded that the controlling opinion in *Baze v. Rees*, 553 U.S. 35 (2008), was a plurality opinion that held that a method of execution is unconstitutional only if there is a demonstrated risk of severe pain that is substantial compared to known and available alternatives—a middle ground between (a) the concurrence's position that only methods of execution deliberately designed to inflict pain are unconstitutional and (b) the position, rejected by the judgment, that pointing to a marginally safer alternative is sufficient to render a method of execution

unconstitutional. In *Panetti v. Quarterman*, 551 U.S. 930, 948–49 (2007), the Court ruled that the controlling opinion in *Ford v. Wainwright*, 477 U.S. 399 (1986), was a concurrence holding that a death-row inmate alleging that he is insane cannot be executed unless his sanity is demonstrated through a hearing offering certain due-process protections—an intermediate position between (a) the plurality's position that the inmate is entitled to more stringent due-process protections and (b) the position, rejected by the judgment, that it is constitutional to execute an insane person. In *Marks* itself, the Court concluded (430 U.S. at 191–94) that the controlling opinion in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), was a plurality opinion reversing an obscenity conviction on the ground that allegedly obscene material is constitutionally protected unless it is utterly without redeeming social value, where (a) concurring opinions took the position that obscene material has absolute First Amendment protection, and (b) the judgment rejected the position that the material at issue did not have First Amendment protection.

Similarly, this Court has repeatedly held that the controlling opinion in *Elrod v. Burns*, 427 U.S. 347 (1976), is a concurring opinion concluding that non-policymaking, non-confidential governmental

employees cannot be fired solely because of their political beliefs—a middle ground between (a) broader restrictions on political-patronage practices advocated by the plurality and (b) the position, rejected by the judgment, that the patronage practices at issue were constitutional. *See Ezell v. Wynn*, 802 F.3d 1217, 1223 (11th Cir. 2015); *Underwood v. Harkins*, 698 F.3d 1335, 1338–39 (11th Cir. 2012); *Stegmaier v. Trammell*, 597 F.2d 1027, 1032–34 (5th Cir. 1979). In *Citizens for Police Accountability Political Committee v. Browning*, 572 F.3d 1213, 1217–18 & n.9 (11th Cir. 2009), this Court ruled that the controlling opinion in *Burson v. Freeman*, 504 U.S. 191 (1992), was a plurality opinion holding that a statute proscribing campaigning within one hundred feet of a polling place satisfied strict scrutiny—an intermediate position between (a) a concurrence's view that the statute did not even need to meet strict scrutiny, and (b) the position, rejected by the judgment, that the statute was unconstitutional. And in *United States v. Farley*, 607 F.3d 1294, 1339–40 & n.30 (11th Cir. 2010), this Court ruled that the controlling opinion in *Harmelin v. Michigan*, 501 U.S. 957 (1991), was a concurrence by Justice Kennedy upholding a criminal sentence on the ground that it met Eighth Amendment requirements that non-capital sentences be proportional in some respects to the underlying crimes,

where (a) the judgment rejected the position that the Eighth Amendment has stricter proportionality requirements, and (b) the plurality took the position that there is no Eighth Amendment proportionality requirement at all in non-capital cases.

In *Greece*, Justice Kennedy's plurality opinion represents the middle ground between the position taken by the concurrence and the position rejected by the judgment. The *Greece* Court rejected the proposition that opening prayers are inherently coercive in the municipal context. *See* 134 S. Ct. at 1824–25 (plurality opinion); *id.* at 1828 (majority opinion). Justice Thomas advocated the polar opposite of that proposition: that coercion under the Establishment Clause can occur only "'*by force of law and threat of penalty*'" and that "'coercive pressures'" falling short of "actual legal coercion" are insufficient to violate the Clause. *See id.* at 1837–38 (Thomas, J., concurring in part and concurring in the judgment) (quoting *Lee v. Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting); *Greece*, 134 S. Ct. at 1820 (majority opinion)). Justice Kennedy took the intermediate position that although the Town of Greece's specific practice was not coercive, "[t]he analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or

indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity." *Id.* at 1826 (plurality opinion).

Indeed, it would be bizarre to treat Justice Thomas's opinion as controlling, because his position on coercion has been rejected by a majority of the Supreme Court. *Compare Lee*, 505 U.S. at 592 (Establishment Clause protects against "subtle coercive pressure" and "indirect coercion" by government), *with id.* at 642–43 (Scalia, J., dissenting) (no coercion under Establishment Clause without "threat of penalty" and "*legal compulsion*"). The cases that the County paints (Cty. Resp. Br. 24–25) as supporting Justice Thomas's preferred standard do not do so: *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449–51 (1988), interpreted the Free Exercise Clause, not the Establishment Clause. *Zorach v. Clauson* warned that it would be coercive under the Establishment Clause for public-school teachers to "us[e] their office to *persuade* or force students to take . . . religious instruction." 343 U.S. 306, 311 (1952) (emphasis added). And *Croft v. Perry*, 624 F.3d 157, 162, 169–70 (5th Cir. 2010), held only that the practice of teachers leading students (who could be excused from participation by their parents) in a state pledge that contained a reference to God was not religiously coercive because the pledge was

patriotic, not religious. In addition, the test used by the Fifth Circuit in *Croft*—" '[U]nconstitutional coercion occurs when: (1) the government directs (2) a formal religious exercise (3) in such a way as to oblige the participation of objectors.' " (*id.* at 169 (alteration in original) (quoting *Doe ex rel. Doe v. Beaumont Indep. Sch. Dist.*, 173 F.3d 274, 285 (5th Cir. 1999), *vacated on reh'g en banc*, 240 F.3d 462 (5th Cir. 2001)))—appears to be inconsistent with the decisions of the Supreme Court and this Court. *See Lee*, 505 U.S. at 599 ("No holding by this Court suggests that a school can *persuade* or compel a student to participate in a religious exercise." (emphasis added)); *Bown v. Gwinnett Cty. Sch. Dist.*, 112 F.3d 1464, 1472–73 (11th Cir. 1997) (holding that moment of silence in public schools was not coercive because "students were [not] exhorted to pray" and "state ha[d] [not] created a situation in which students are faced with public pressure or peer pressure to participate in religious activity").

As a Pennsylvania federal district court recently put it, "Justice Kennedy's plurality opinion" in *Greece* represents "the narrowest grounds on coercion" because "while the plurality rejected the particular coercion claim before it as factually deficient, Justice Thomas would reject nearly *all* coercion claims as *legally* deficient." *Fields v. Speaker*

of the Pa. House of Representatives, 251 F. Supp. 3d 772, 790 (M.D. Pa. 2017). Consistent with this reasoning, an overwhelming majority of Fourth and Sixth Circuit judges have agreed that Justice Kennedy's opinion is controlling. In *Lund v. Rowan County*, a ten-judge majority opinion for the en banc court treated Justice Kennedy's opinion as controlling (*see* 863 F.3d 268, 286–87 (4th Cir. 2017), *petition for cert. docketed*, No. 17-565 (Oct. 16, 2017)), and none of the five dissenting judges took issue with that (*see id.* at 305 (Agee, J., dissenting)). In *Bormuth v. County of Jackson*, nine of the fifteen judges hearing the case en banc concluded that Justice Kennedy's opinion is controlling (*see* 870 F.3d 494, 519–21 (6th Cir. 2017) (Rogers, J., concurring, joined by two other judges), *petition for cert docketed*, No. 17-7220 (Dec. 29, 2017); *id.* at 533 n.6, 540 (Moore, J., dissenting, joined by four other judges in full and by White, J., in part); *id.* at 545 (White, J., dissenting)); three argued that Justice Thomas's opinion is controlling (*see id.* at 515 n.10 (footnote in opinion of Griffin, J., joined by only two other judges)); and the other three did not address the issue.

B. The Commissioners' practice of directing Board-meeting attendees to rise for prayers is contrary to Justice Kennedy's controlling opinion.

As detailed in Plaintiffs' opening brief (at 75), Justice Kennedy's controlling opinion in *Greece* makes clear that municipal officials must not instruct audience members at legislative meetings to rise for opening prayers. In explaining why the invocation practice of the Town of Greece was not coercive, the controlling opinion emphasized that "[a]lthough [town] 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." 134 S. Ct. at 1826. And while "audience members were asked to rise for the prayer" on a few occasions, "[t]hese requests . . . came not from town leaders but from the guest ministers . . . accustomed to directing their congregations in this way." *Id.* "[T]he analysis would be different," the controlling opinion warned, "if town board members directed the public to participate in the prayers." *Id.*

1. The County argues that Commissioners issued "request[s]," not "directions," to rise for opening prayers. (Cty. Resp. Br. 26.) The Commissioners' pre-prayer statements most commonly were in the form

of "please stand,"[1] "please rise,"[2] and "all rise,"[3] though they sometimes took other forms,[4] such as "stand up for prayer,"[5] "all stand,"[6] "everybody rise,"[7] "everybody, please stand,"[8] "please stand, everybody,"[9] "if the audience would stand,"[10] "let's all stand,"[11] "we'll stand for prayer,"[12] "if everyone would please rise,"[13] and "[W]e'll stand for you also, sir. Might get a couple of them to bow their heads."[14] As these statements were delivered in imperative form and issued by authority figures, they are properly viewed as directives. But characterizing the statements as "requests" would not save them, for

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[1] R. 55-4 at A334, A338, A347, A349, A352, A355, A368, A372–73, A381, A383, A388, A431, A460, A473, A481, A497–501, A508, A515, A517, A521–22, A525–26, A528.

[2] *Id.* at A333, A348, A375, A377, A415, A430, A433, A439, A441, A450, A454–55.

[3] *Id.* at A343, A374, A396, A413, A418, A423, A458, A466.

[4] *See generally id.* at A330–536.

[5] *Id.* at A445.

[6] *Id.* at A376, A444.

[7] *Id.* at A438.

[8] *Id.* at A382, A502, A513, A520.

[9] *Id.* at A504, A510, A519.

[10] *Id.* at A463.

[11] *Id.* at A511.

[12] *Id.* at A469.

[13] *Id.* at A399–400, A403, A405, A414, A419, A442, A447.

[14] *Id.* at A524.

the controlling opinion in *Greece* disapproves of governmental officials "solicit[ing]," "request[ing]," or "ask[ing]" members of the public to rise for prayer. *See* 134 S. Ct. at 1826; *accord Lund*, 863 F.3d at 286–87. Regardless of whether the Commissioners' statements are viewed as "directions" or "requests," they run afoul of the principle "that our 'institutions must not press religious observances upon their citizens.' " *See Greece*, 134 S. Ct. at 1825 (controlling plurality opinion) (quoting *Van Orden v. Perry*, 545 U.S. 677, 683 (2005) (plurality opinion)).

2. The County contends that although Board-meeting attendees are "requested to stand," they are not "requested to actually participate in the invocation itself" because they are "not required to recite or repeat the invocation or otherwise involve themselves in the invocation." (Cty. Resp. Br. 26.) "Given our social conventions," however, "[t]here can be no doubt that for many, if not most . . . the act of standing . . . *is* an expression of participation in . . . prayer." *Lee*, 505 U.S. at 593 (emphasis added). Indeed, the controlling opinion in *Greece* points to town-board members who "stood, bowed their heads, or made the sign of the cross" as examples of people "participat[ing] in . . . prayers." *See* 134 S. Ct. at 1826.

3. The County notes that meeting attendees are not required to be in the boardroom during the invocation. (Cty. Resp. Br. 26–27.) But as explained in Plaintiffs' opening brief (at 79), the Supreme Court and this Court have repeatedly rejected arguments that an option to let objectors leave the room can save governmental directives to take part in prayer. *See Lee*, 505 U.S. at 596; *Sch. Dist. v. Schempp*, 374 U.S. 203, 224–25 (1963); *Engel v. Vitale*, 370 U.S. 421, 430 (1962); *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1287–88 (11th Cir. 2004); *Karen B. v. Treen*, 653 F.2d 897, 899, 902 (5th Cir. Unit A Aug. 1981), *aff'd mem*, 455 U.S. 913 (1982). Such an option "serve[s] only to marginalize." *See Lund*, 863 F.3d at 288. And despite the availability of the option to leave the room before prayer at Greece town-board meetings, the controlling opinion in *Greece* warned that municipal officials must not call on remaining audience members to rise for prayer. *See* 134 S. Ct. at 1826–27.

4. The County (Cty. Resp. Br. 27), like the district court (R. 105 at 54–55), points to the fact that the plaintiffs who attended Board meetings did not rise when Commissioners instructed attendees to do so. But as noted in Plaintiffs' first brief (at 78), "the Establishment Clause focuses on the constitutionality of the state action, not on the

choices made by the complaining individual." *Jager v. Douglas Cty. Sch. Dist.*, 862 F.2d 824, 832 (11th Cir. 1989). And the controlling opinion in *Greece* makes clear that governmental requests to rise for prayer are unconstitutional. *See* 134 S. Ct. at 1826. Moreover, just as an option to leave the room cannot legitimize governmental directives to take part in prayer, neither can an option to remain but not participate. *See Engel*, 370 U.S. at 430; *Holloman*, 370 F.3d at 1287; *Karen B.*, 653 F.2d at 899, 902. The Commissioners' directives to rise presented the plaintiffs who attended Board meetings with an unconstitutional choice between "participating" in the prayers on the one hand, "or protesting" (*see Lee*, 505 U.S. at 593) and "stand[ing] out" as religious dissenters (*see Lund*, 863 F.3d at 288) on the other. That the plaintiffs did not comply and suffered the latter harm (*see* R. 55-2 at A120 ¶ 32, A155 ¶ 33) does not somehow render the directives to rise constitutional.

5. The County relies (Cty. Resp. Br. 27) on the statement in *Greece*'s controlling opinion that "[o]ffense . . . does not equate to coercion" (134 S. Ct. at 1826). That statement appears in a paragraph explaining that legislative prayers are not coercive merely because listeners may be offended by their content, however. *See* 134 S. Ct. at 1826–27. The controlling opinion nevertheless disapproves of official

requests to rise for prayers. *See id.* Here, Plaintiffs are complaining of pressure to rise for prayers, not of offense to the content of the prayers. (*See* R. 55-2 at A120 ¶ 32, A155 ¶ 33.) In any event, after stating that "an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum," *Greece*'s controlling opinion adds the qualifier that this is "especially [so] where . . . any member of the public is welcome in turn to offer an invocation reflecting his or her convictions." 134 S. Ct. at 1826. Here, of course, Plaintiffs are not permitted to open Board meetings with invocations reflecting their beliefs. (R. 83 ¶¶ 112–40.)

6. The County asserts that this Court should not consider the presence of children or County employees at Board meetings because Plaintiffs are neither. (Cty. Resp. Br. 28–29 n.11.) But in *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 294, 311 (2000), the Supreme Court gave weight to the coercive effect of a school district's football-game prayer practice on football-team members, band members, and cheerleaders, even though there was no evidence that the plaintiffs in the case—who were anonymous—belonged to any of those groups. To be sure, the County is correct (Cty. Resp. Br. 28) that the

presence of children at its Board meetings does not render *having* opening prayers at the meetings unconstitutional, for the meetings are a less coercive environment than public-school events. *See Greece*, 134 S. Ct. at 1827 (controlling plurality opinion); *Lee*, 505 U.S. at 596–97. Still, the impressionable and vulnerable nature of children (*see Lee*, 505 U.S. at 593; *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987)), and the fact that children and County employees are often present during the invocation to receive honors (or support an honoree) at a segment of the meetings that occurs shortly after the invocation (R. 83 ¶¶ 35–42), together compound the coercive effect of the Commissioners' directives to rise.

7. Finally, the County accuses Plaintiffs of improperly relying on school-prayer cases. (Cty. Resp. Br. 27 n.10.) But the same principle applies inside and outside the public-school context: "government may not coerce its citizens 'to support or participate in any religion or its exercise.'" *Greece*, 134 S. Ct. at 1825 (controlling plurality opinion) (quoting *County of Allegheny v. ACLU*, 492 U.S. 573, 659 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part)); *accord Lee*, 505 U.S. at 587; *see also Zorach*, 343 U.S. at 314 ("Government may not . . . coerce *anyone* to attend church, to observe a

religious holiday, or to take religious instruction." (emphasis added)). Application of this principle, as *Greece*'s controlling opinion explains, requires "a fact-sensitive [inquiry] that considers both the setting in which the prayer arises and the audience to whom it is directed." 134 S. Ct. at 1825. Thus, in the public-school context, government cannot sponsor prayer at all, because of the inherently coercive environment and the vulnerability of young people. *See, e.g.*, *Santa Fe*, 530 U.S. at 311–13; *Lee*, 505 U.S. at 593, 597. In the legislative context, the environment is typically less coercive and audience members are usually adults, so government can sponsor prayer but cannot go so far as to request participation in it. *See Greece*, 134 S. Ct. at 1826–27 (controlling plurality opinion). The support that passages from the school-prayer cases provide for this result only confirms that the Supreme Court's Establishment Clause coercion jurisprudence follows consistent general standards.

Historical analysis, as explained in Plaintiffs' opening brief (at 79–80), likewise supports this result. Historical research indicates that no oral directive to rise to members or guests preceded Congressional opening prayers in the Founding Era. *See* Joseph H. Jones, *The Life of Ashbel Green, V.D.M.* 261 (1849), http://bit.ly/2elRIA8. And as the

County itself points out, "[l]egislative prayer is an internal act directed at a legislature's own members" (Cty. Resp. Br. 18; *accord id.* at 37); its historical "purpose is largely to accommodate the spiritual needs of lawmakers," not to "promote religious observance among the public," "afford government an opportunity to proselytize[,] or force truant constituents into the pews" (*Greece*, 134 S. Ct. at 1825–26 (controlling plurality opinion)). There is, therefore, no constitutional justification for the Commissioners' practice of calling on members of the public to rise for opening prayers.

CONCLUSION

For the foregoing reasons, in addition to affirming the district court's grant of summary judgment to Plaintiffs on the issue of discrimination in the selection of invocation-speakers, this Court should reverse the district court's grant of summary judgment to the County on the issue of the Commissioners' directives to rise for prayer and instruct the district court to enter summary judgment in Plaintiffs' favor on this issue.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Federal Rule of Appellate Procedure 28.1(e)(2)(C) because, excluding the parts of the brief exempted by Rule 32(f) and Eleventh Circuit Rule 32-4, it contains 3,749 words.

This brief complies with the typeface requirements of Federal Appellate Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Word 2013 in 14-point Century Schoolbook font.

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CERTIFICATE OF SERVICE

I certify that on June 26, 2018, I filed this brief through the Court's CM/ECF system, which caused the brief to be electronically served on the opposing party, through the following counsel:

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On the same date, I caused seven paper copies of this brief to be dispatched to a third-party commercial carrier for delivery to the Clerk of Court within three days.

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