

No. \_\_\_\_\_

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**In The  
Supreme Court of the United States**

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JOSIAH BUNTING, III, Superintendent Emeritus, and  
J. H. BINFORD PEAY, III, General, USA (Retired),

*Petitioners,*

v.

NEIL J. MELLEN and PAUL S. KNICK,

*Respondents.*

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**On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Fourth Circuit**

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**PETITION FOR A WRIT OF CERTIORARI**

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JERRY W. KILGORE  
Attorney General of Virginia

WILLIAM H. HURD  
State Solicitor  
*Counsel of Record*

MAUREEN RILEY MATSEN  
WILLIAM E. THRO  
Deputy State Solicitors

ALISON P. LANDRY  
Senior Assistant Attorney General

A. CAMERON O'BRION  
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL  
900 East Main Street  
Richmond, Virginia 23219  
(804) 786-2436 (voice)  
(804) 371-0200 (fax)

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**QUESTION PRESENTED**

May a public institution of higher education include a brief, non-denominational prayer as part of an official event involving an audience of adults, especially where the prayer serves legitimate secular purposes?

**LIST OF PARTIES**

There are two petitioners. The first is Josiah Bunting, III, who was Superintendent of the Virginia Military Institute (“VMI”) when this lawsuit began, and who was sued in both his official and individual capacities. He remains a party in his individual capacity. The second petitioner is J. H. Binford Peay, III, General, USA (Retired), who has succeeded Bunting as Superintendent of VMI, and who is substituted as a party in his official capacity pursuant to S. Ct. R. 35.3. The respondents are Neil J. Mellen and Paul S. Knick, who filed this case as cadets at VMI.

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## PETITION FOR WRIT OF CERTIORARI

The petitioners – former and current Superintendents of the Virginia Military Institute – respectfully petition the Court for a writ of certiorari to review the judgment of the court of appeals, which ruled that the Establishment Clause prevents the reading of a brief, non-denominational prayer as part of VMI’s Supper Roll Call ceremony.

## OPINIONS BELOW

The decision of the Fourth Circuit, denying rehearing *en banc* on a tie vote, is published as *Mellen v. Bunting*, 341 F.3d 312 (4th Cir. 2003). It is reprinted in the Appendix at App. 1. There were three written dissents from the denial of rehearing *en banc*: (1) the opinion of Judge Widener (“Widener, J., dissenting”) is reported at 341 F.3d at 313 and reprinted at App. 8; (2) the opinion of Judge Wilkinson (“Wilkinson, J., dissenting”) is reported at 341 F.3d at 319 and reprinted at App. 13; and (3) the opinion of Judge Niemeyer (“Niemeyer, J., dissenting”) is reported at 341 F.3d at 325 and reprinted at App. 27.

The panel decision of the court of appeals is reported as *Mellen v. Bunting*, 327 F.3d 355 (4th Cir. 2003). It is reprinted at App. 39. The decision of the district court is reported as *Mellen v. Bunting*, 181 F. Supp. 2d 619 (W.D. Va. 2002), and was amended at 202 F. Supp. 2d 511. It is reprinted at App. 76 and 115.

## JURISDICTION

The panel decision of the court of appeals was entered on April 28, 2003. The decision of the court of appeals denying VMI’s petition for rehearing *en banc* was entered on August 13, 2003. On November 4, 2003, the Chief Justice granted petitioners’ motion for an extension of time and set December 11, 2003 as the deadline for filing this petition. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

## CONSTITUTIONAL PROVISIONS INVOLVED

1. The First Amendment provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech. . . .”

2. The Fourteenth Amendment provides that “. . . nor shall any State deprive any person of life, liberty, or property without due process of law. . . .”

## STATEMENT OF THE CASE

The Fourth Circuit is evenly divided. Six judges voted to rehear this case *en banc*, and six voted against it. Thus, the panel decision stands. That decision not only strikes down VMI’s practice of reading a brief prayer before supper, it does so with a rationale calculated to eradicate formal prayer from *all* government settings, even where such prayer is an incidental part of a secular, adult function and even where it is non-denominational and participation is entirely voluntary. This far-reaching decision disregards any distinction between adults and children, or between higher education and grades K-12. It disregards the fact that prayer before meals – and prayer in military ceremonies – are part of the fabric of our society, as respondents candidly admitted. It ventures far beyond any precedent of this Court and creates a split in the circuits, as the panel expressly acknowledged. Such a decision calls for review by the Nation’s highest tribunal.

### The Institute

The Virginia Military Institute is known nationally as “an incomparable military college.” *United States v. Virginia*, 518 U.S. 515, 519 (1996). As such, it has a two-fold mission. It strives to prepare young men and women for military service and leadership, making them

“ready as citizen-soldiers to defend their country in time of peril.” JA-194.<sup>1</sup> At the same time, VMI seeks to impart a classic, liberal education. The Institute employs an adversative method of training,<sup>2</sup> which is “more restrictive and more austere than the regular military.” JA-113. VMI makes no attempt to inculcate religious belief. JA-111, 190, 215. On the contrary, in keeping with the broad traditions of higher education, a VMI education teaches cadets “to think creatively, liberally and skeptically.” JA-215.

### **The Ceremony**

At issue in this case is VMI’s tradition of reading a brief prayer as part of its Supper Roll Call ceremony. Held each evening except Saturday, the ceremony begins with a bugle call summoning the Corps of Cadets into formation in front of the Barracks. There is an accountability report. The colors are struck. The Corps then marches in review past the officer-in-charge (a faculty member) and down the street to the mess hall for the first seating of supper. First classmen (seniors) are allowed to fall out of formation as the march begins. Any other cadet may fall out of formation

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<sup>1</sup> All cadets must participate in one of the four ROTC programs for their entire four years at the Institute. When this case was filed, a substantial number of VMI cadets – approximately 40 percent – were commissioned upon graduation as officers in the United States armed forces. JA-65. Future years are likely to see a “massive” increase in commissions. *See* Matt Chittum, “New VMI Superintendent is Schooled in Tradition,” *Roanoke Times*, Nov. 28, 2003, A1 (quoting General Peay). Since VMI was founded, more than 10,000 of its graduates have served as commissioned officers during wartime, including 128 generals and admirals. JA-195. (Note: “JA” refers to the Joint Appendix in the court of appeals.)

<sup>2</sup> “The adversative method features physical rigor, mental stress, equality of treatment, little privacy, minute regulation of personal behavior and inculcation of certain values.” App. 42. Those values include “[m]oral courage . . . , integrity, generosity of temper, great-heartedness [and] magnanimity.” JA-111.

outside the mess hall and need not enter.<sup>3</sup> As the court of appeals acknowledged, “[a]t all relevant times, VMI’s upper-class cadets could avoid the mess hall” and, thereby, avoid hearing the prayer. App. 65.

Once inside, cadets who choose to enter the mess hall – and most cadets do – are called to attention by the senior cadet officer, and the formation is presented to the officer-in-charge. Salutes are exchanged and the Corps is given the command, “Rest!” At “rest,” cadets must remain standing – keeping their right feet in place – but they are otherwise free to relax, drink and even *talk*. Announcements are made and a brief prayer is read aloud by a cadet. As the panel recognized, “cadets are *not* obliged to recite the prayer, close their eyes, or bow their heads.” App. 46 (emphasis added). Indeed, they need not pay any attention whatsoever. The prayer lasts less than half a minute. When it is finished, the ceremony is ended with the command, “Seats!” The Corps is then seated and supper proceeds.

After the ceremony, any cadet who opted to fall out of formation may enter the mess hall and eat supper, an option that continues throughout the first seating. Cadets also have other options. Supper is available to any cadet (other than “rats”) during the half hour before supper roll call. Cadets having a “permit” to miss the ceremony (*e.g.*, athletes at practice) may eat during a second seating. Cadets who exercise any of these options do not hear the prayer. No stigma attaches to cadets because of their choice. On the contrary, many cadets eat supper before the ceremony in order to be free to do other things afterwards. JA-199.

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<sup>3</sup> Not quite full cadets, recent arrivals at VMI are known as “rats.” To the extent they may be present in formation, they would not be entitled to fall out. Subject to separate regulations, “rats” are sometimes scheduled to eat supper apart from the rest of the Corps. Respondents have not asserted any claim on behalf of “rats” and have no standing to do so.

## The Prayer

Written by the VMI chaplain,<sup>4</sup> the prayers at Supper Roll Call mirror those heard during ceremonies in the United States armed services. As such, they are non-denominational and non-proselytizing. Seven in number, the texts are found at App. 117. The prayer serves an array of secular purposes, “none of which appear to be in dispute.” App. 19 (Wilkinson, J., dissenting).<sup>5</sup> These purposes fall into three categories: academic, expressive and accommodationist. They were summarized by Judge Wilkinson:

1. *Academic Purposes*: “First, the prayer has a clear academic purpose: it furthers VMI’s stated mission to develop cadets into civilian and military leaders. Specifically, it familiarizes cadets with religious practices, it encourages religious tolerance, and it aids students in reflecting upon their own beliefs.” App. 19 (Wilkinson, J., dissenting) (citations omitted).<sup>6</sup>
2. *Expressive Purposes*: “The prayer also serves an important expressive function: it allows cadets to celebrate the American tradition of ‘expressing thanksgiving and requesting divine guidance and support’ for the challenges that lie ahead. Just as religious invocations solemnize events like legislative sessions, the VMI prayer

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<sup>4</sup> The VMI Chaplain is Colonel James S. Park, a graduate of West Point and the U.S. Army War College.

<sup>5</sup> See App. 69 (panel decision) (crediting General Bunting’s explanation of the prayers’ secular purposes).

<sup>6</sup> Unrebutted testimony showed that VMI’s practice is “reasonably calculated” to achieve its academic objectives. App. 120. This evaluation is found in the Expert Report of Colonel John W. Brinsfield, Ph.D., a career chaplain in the U.S. Army with teaching experience at West Point and the U.S. Army War College. He is an expert on the role of faith in military leadership. His report is reprinted at App. 119.

solemnizes the supper roll call ceremony, an occasion in which the cadets come together to share an important part of their day.” *Id.* (citations omitted).<sup>7</sup>

3. *Accommodationist Purposes*: “Finally, the VMI prayer performs an accommodationist function: it facilitates the cadets’ exercise of their spiritual needs and free exercise rights. Given the rigors of life in military school and the limited time that cadets have for themselves, this brief period for personal reflection and, if they so choose, spiritual meditation, is significant.” *Id.* (citations omitted).<sup>8</sup>

Among the prayer’s academic purposes, the lesson of tolerance merits particular attention. It is taught not merely in the abstract, but by exposing cadets to the real similarities and differences among them.<sup>9</sup> As General Bunting explained to the Corps:

[A] critical component of leadership is the ability to appreciate and respect men and women under your charge whose views on subjects of common interest may differ from those of their peers . . . [J]ust as we expect all cadets to respect the

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<sup>7</sup> These expressive purposes are closely analogous to those already recognized as legitimate by members of this Court. They “solemniz[e]” the communal meal, “express[] confidence in the future” and “encourag[e] appreciation of what is worthy in our society.” See *County of Allegheny v. ACLU*, 492 U.S. 573, 625 (1989) (O’Connor, J., concurring); *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984) (O’Connor, J., concurring). This conclusion is supported by the text of the prayers and the topics on which they focus: the Nation, the Institute, the Corps, the Body, Strength, Success, as well as Friends and Family. App. 117.

<sup>8</sup> VMI regulations direct how cadets spend most hours of the day, and cadets are only allowed to leave the Post during specific hours on specific days. JA-24 and JA-189.

<sup>9</sup> Respondents conceded that “VMI rules and regulations expressly prohibit harrassment or discrimination among or by cadets on the basis of religion.” JA-190.

rights of those who wish to offer thanks before a meal, we also expect all cadets to respect the rights of those who decline to participate in the practice.

JA-20. In other words, though some may welcome the prayers and others may decline to participate, all are members of the Corps, united in their shared purpose. All are being acclimated to a military environment and the demands of military leadership. Indeed, as Judge Wilkinson explained, it is the Fourth Circuit’s decision, not the prayer, that threatens to be divisive.<sup>10</sup>

### **The Litigation**

Not everyone was willing to tolerate the lessons VMI seeks to impart. Respondents – two VMI cadets – brought this lawsuit near the end of their third year at the Institute. They “conceded that they faced *no* adverse consequences for any failure to take part in the prayer.” App. 16 (Wilkinson, J, dissenting) (emphasis in original) (citations omitted). “[T]hey did not even claim that they felt pressure to attend or participate in the observance, apart from the basic requirement to stand.” *Id.* Respondents also conceded that “prayers [in] the military or at meals are part of the fabric of our society.” JA-340. Even so, they claimed that including prayer in the Supper Roll Call ceremony violated the Constitution. They brought suit under 42 U.S.C. § 1983 after the Superintendent of VMI, General Josiah Bunting, III, declined their request that the ceremony be changed.

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<sup>10</sup> “The panel adduces not the slightest evidence that officials at VMI have introduced religious division in the ranks.” App. 21 (Wilkinson, J., dissenting). On the other hand, “[t]here is a danger that in overturning long and widely accepted accommodations, courts will divide a community, rather than unite it.” *Id.* at 23.

Suing the Superintendent in both his official and individual capacities, the two cadets sought an injunction as well as nominal damages and attorneys' fees. On cross-motions for summary judgment, the district court ruled in favor of the two cadets, declaring that the supper prayer violated their rights under the Establishment Clause, and entered a permanent injunction requiring the Superintendent to cease the practice. App. 113.<sup>11</sup> On the question of nominal damages, the district court recognized that the law was not clearly established and denied the claim, ruling that General Bunting was entitled to qualified immunity.

The Superintendent appealed the award of summary judgment against him. He also appealed the decision denying his motion for summary judgment and, alternatively, sought remand for trial on the merits. The two cadets cross-appealed on the question of qualified immunity. Relying on this Court's decisions involving children in grades K-12, they contended that well-established law clearly prohibited the prayers at VMI, and that, therefore, General Bunting was not entitled to qualified immunity.

By the time the case reached the court of appeals, the two cadets had graduated. Thus, the panel properly determined that their claims for declaratory and injunctive relief were moot, and it vacated the district court's judgment insofar as it awarded such relief. App. 50. Even so, the damages claim presented a live controversy requiring the court of appeals to answer "basically the same

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<sup>11</sup> In addition to their federal Establishment Clause claim, the two cadets sued under Virginia law. These state law claims were dismissed without prejudice. App. 114. The district court also denied an injunction against prayer at any other mandatory event, *id.*, relief the two cadets initially sought but then abandoned. However, the court of appeals made no distinction between Supper Roll Call and any other event and, instead, adopted a rationale that reaches *all* public university functions.

question” confronted by the district court. App. 50, n.6. In order to decide whether or not qualified immunity foreclosed an award of damages, the panel was first required to decide whether there was a constitutional violation. App. 51.<sup>12</sup> Although the panel ultimately awarded General Bunting qualified immunity, it did so only after ruling that the challenged prayers offend the Establishment Clause, thus binding VMI officials in the future, albeit without a formal injunction.

The panel based its ruling on two separate theories. Using the test found in *Lemon v. Kurtzman*, 403 U.S. 602 (1971),<sup>13</sup> the panel concluded that VMI’s practice violated the “primary effect” and “excessive entanglement” prongs. The panel also concluded – apparently as a matter of law – that VMI “coerced” these two cadets to participate in the prayer.<sup>14</sup>

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<sup>12</sup> Some federal courts once avoided the issue of whether there was a constitutional violation by “skip[ping] ahead to the question [of] whether the law [was] clearly established.” *Saucier v. Katz*, 533 U.S. 194, 201 (2001). However, it is now clear that “[t]he threshold inquiry a court must undertake in a qualified immunity analysis is whether plaintiff’s allegations, if true, establish a constitutional violation.” *Hope v. Pelzer*, 536 U.S. 730, 736 (2002) (citing *Saucier*, 533 U.S. at 201). This Court has determined that such an approach “promotes clarity in the legal standards for official conduct . . .” *Wilson v. Layne*, 526 U.S. 603, 609 (1999). In the case at bar, however, the resulting split in the circuits frustrates the goal of clarity, thereby underscoring the need for certiorari.

<sup>13</sup> The *Lemon* test has three prongs:

First, the statute [or practice] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute [or practice] must not foster an excessive government entanglement with religion.

403 U.S. at 612-13 (internal quotation marks and citations omitted).

<sup>14</sup> The panel rejected the argument that any advancement of religion was incidental and secondary, and it ignored the fact that inclusion of the prayer implicated no involvement with any religious institution. In reliance on *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.

(Continued on following page)

Although the panel concluded that the Constitution was violated, it also found that “General Bunting could reasonably have believed that the supper prayer was constitutional.” App. 74-75. Thus, it affirmed the district court’s decision to grant him qualified immunity. In so doing, the court recognized the split with other circuits and the absence of guiding precedent from this Court. It said:

Although the Establishment Clause plainly forbids public schools from sponsoring an official prayer for young children, the Supreme Court has *never* addressed the constitutionality of state-sponsored prayer in any *university* setting, much less in a *military college*. Indeed, some of our sister circuits have approved prayer at certain university functions. . . . In addition, the Court has not had the occasion to consider whether, or to what extent, the military may incorporate religious practices in its ceremonies.

App. 74 (emphasis added).

In response to the panel ruling, the Superintendent petitioned for rehearing *en banc* by the full Fourth Circuit. Put before the twelve active judges, the petition was denied by a tie vote. *See* 4th Cir. R. 35. Thus, the panel ruling stands. It operates as a binding adjudication upon General Bunting – and upon his successors in office, including General Peay – precluding them from returning

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1996), the panel also rejected the proposition that “academic freedom” may effect the constitutional obligations of public colleges. The court remained unmoved when VMI pointed out that this Court’s decision in *Grutter v. Bollinger*, 123 S.Ct. 2325 (2003), supports its view. Finally, the panel found no value in *Marsh v. Chambers*, 463 U.S. 783 (1983), or in the fact that prayer before meals and prayer in military ceremonies are part of the fabric of our society and consistent with original intent.

prayer to Supper Roll Call without incurring constitutional liability.<sup>15</sup>

### The Results

It is not only VMI that is implicated here. The decision has consequences that reach beyond the Institute, as recognized by the judges dissenting from denial of *en banc* review. The United States Naval Academy, located within the Fourth Circuit, arranges for prayer at its midday meal. While the panel disclaimed any intent to reach the Naval Academy (App. 73, n.13), its decision clearly jeopardizes that practice. *See* App. 25 (Wilkinson, J., dissenting) (noting the decision “fails to provide a meaningful basis for preserving the mealtime prayer at Annapolis”). Indeed, the threats of lawsuits against Annapolis have already begun. *See* “ACLU Letter Asks Academy to Review

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<sup>15</sup> Thus, petitioners may seek review of the decision on the constitutional issue, even though they ultimately obtained a favorable judgment because of qualified immunity. “In an appropriate case, appeal may be permitted from an adverse ruling collateral to the judgment on the merits at the behest of the party who has prevailed on the merits, so long as that party retains a stake in the appeal satisfying the requirements of Art. III.” *Deposit Guaranty Nat’l Bank v. Roper*, 445 U.S. 326, 334 (1980). Petitioners retain a stake in the outcome of the constitutional question because the decision below is binding precedent controlling their future conduct. If VMI’s Superintendent were to reinstitute supper prayers and the practice were challenged, a court would be obligated to follow the decision below and declare the practice unconstitutional. Moreover, in such a suit, the defense of qualified immunity would be unavailable. Thus, petitioners have “a concern that their success in some unspecified future litigation would be impaired by *stare decisis* or collateral-estoppel application.” *Deposit Guaranty*, 445 U.S. at 337. “This concern supplie[s] the personal stake in the appeal required by Art. III.” *Id.* *See also* *Electrical Fittings v. Thomas & Betts Co.*, 307 U.S. 241 (1939) (allowing defendant who prevailed in patent infringement lawsuit to appeal the conclusion that the patent was valid).

Prayer,” *The Baltimore Sun*, May 2, 2003, 3B (demanding end to lunchtime prayer based on VMI decision).<sup>16</sup>

It is not only the military colleges that will be affected. Other military interests are also implicated. Many units and major installations are located in the Fourth Circuit,<sup>17</sup> and prayer is frequently included in their ceremonies. *See* App. 23 (Wilkinson, J., dissenting) (noting that prayer is “part of military life in general”).<sup>18</sup> Comparable ceremonies can be found in college ROTC units located throughout the Fourth Circuit. The decision below – especially its coercion analysis – establishes the precedent necessary to declare all these practices unconstitutional.

Other higher education interests are implicated as well. Rejecting the distinction made by other circuits, the

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<sup>16</sup> Another military college, The Citadel in South Carolina, has already abandoned its mealtime prayer in response to the Fourth Circuit’s ruling. *See* Schuyler Kropf, “Citadel Gives Up Mealtime Prayers; Decision Follows VMI Court Ruling,” *The Post and Courier* (Charleston, S.C.) Aug. 16, 2003, 1A.

<sup>17</sup> Examples include the Pentagon, Langley Air Force Base (headquarters of Air Force Combat Command), Norfolk Naval Station (headquarters of Atlantic Fleet), Fort Bragg (headquarters of 82nd Airborne), Quantico (headquarters of Marine Combat Development Command and Systems Command); and Camp Lejeune (headquarters of Fleet Marine Force, Atlantic, and Second Marine Expeditionary Force). *See* John W. Wright (ed.), *The New York Times Almanac*, 146-47 (2003 ed).<sup>18</sup> Military regulations distinguish between (i) worship and (ii) secular ceremonies with a prayer component. *See, e.g.*, Army Regulation 165-1 (Chaplain Activities in the United States Army), Section III, Chapter 4, Paragraph 4(h) (“Military and patriotic ceremonies may require a chaplain to provide an invocation, reading, prayer or benediction. Such occasions are not considered to be religious services.”). In keeping with this distinction, military commanders frequently include prayer in ceremonies for a variety of reasons, such as contributing to the spiritual fitness of soldiers, preparing them to face combat, and promoting unit cohesion as well as individual reflection, training and sensitivity. *See* App. 119 (Expert Report of Colonel John W. Brinsfield, Ph.D.); *see* App. 123-24 (same, listing examples).

decision equates institutions of higher education with grades K-12. Thus, it jeopardizes the ability of *any* public university within the circuit to include an invocation or benediction at *any* graduation, convocation, memorial service, banquet or other official event.

The implications of the decision reach even further. “VMI’s observance is part of a larger and broader social practice.” App. 23 (Wilkinson, J., dissenting). It is a social practice by which groups ranging from legislative bodies to civic clubs “begin their meals or public meetings with a brief, non-sectarian prayer.” *Id.* Much of this practice occurs in government-sponsored settings,<sup>19</sup> and in the Fourth Circuit, much of it now stands in jeopardy. Indeed, the decision below “is a new extension of the Establishment Clause moving in the alarming direction of purging *all* public places of religion.” App. 34 (Niemeyer, J., dissenting) (emphasis added). “[T]he effect [of the panel opinion] is to ‘read into the Bill of Rights . . . a philosophy of hostility to religion’” against which this Court has warned. App. 5 (Widener, J., dissenting) (quoting *Zorach v. Clauson*, 343 U.S. 306, 315 (1952)).

In short, the decision below establishes as the law of the Fourth Circuit the most extreme Establishment Clause doctrine of any circuit in the Nation. So bold an extension of constitutional principles warrants review by this Court.

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<sup>19</sup> Judge Widener noted “the frequent and implicitly approved use of prayer . . . by branches of the United States government in situations and ceremonies similar to the VMI supper prayer.” App. 5 (Widener, J., dissenting). Among the examples he cited are: (i) prayer at a naturalization ceremony presided over by federal district judges; (ii) prayer at an investiture ceremony for a new court of appeals judge; and (iii) prayer at a Supreme Court dinner held to honor new members of United States Senate. *Id.* at 6.

## REASONS WHY THE WRIT SHOULD BE GRANTED

The Establishment Clause is an important pillar of American constitutional jurisprudence. Yet, it does not prohibit all religious expression in government settings.<sup>20</sup> Indeed, this Court has never held that the Establishment Clause prohibits prayer as part of any secular *adult* assembly, much less one convened in an academic setting. On this, the Fourth Circuit stands alone, splitting from the two other circuits that have decided the question. *See Chaudhuri v. Tennessee*, 130 F.3d 232 (6th Cir. 1997) (upholding prayer at state university functions); *Tanford v. Brand*, 104 F.3d 982 (7th Cir. 1997) (same).

The split is exacerbated by the important distinctions that the court of appeals ignored or cast aside in reaching its conclusion. Most obviously, the Fourth Circuit disregarded the well-established distinction between a college and a public primary or secondary school, rejecting out of hand the possibility that academic freedom could affect a college's constitutional obligations. It failed to acknowledge any difference between compulsory education in grades K-12 and the voluntary preparation of men and women for military service. Instead, it evaluated a military ceremony – and organizational meal – using the same analysis that this Court applied to a high school football game. It ignored the obvious secular effects of prayer in this special setting, seeing only advancement of religion, and it found “excessive entanglement” even in the absence of any religious institution.

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<sup>20</sup> *See, e.g., Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding practice of prayer before legislative assemblies); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 212 (“We are a religious people whose institutions presuppose a Supreme Being.”) (quoting *Zorach*, 343 U.S. at 313); *Engel v. Vitale*, 370 U.S. 421, 429 n.21 (1962) (“[T]here are many manifestations in our public life of belief in God.”).

Most striking, however, is the Fourth Circuit's disregard of the profound difference between impressionable children and the mature adults who choose to attend VMI. In *Lee v. Weisman*, 505 U.S. 577 (1992), this Court expressly left open the question of whether the Establishment Clause analysis used for children also applies to adults. With little or no analysis, the Fourth Circuit answered this question in a way sharply different from the Sixth and Seventh Circuits. By treating adult cadets as if they were children, the Fourth Circuit found that they were "coerced" into entering the mess hall, even though it acknowledged they were not required to be present; and it equated the hearing of a prayer with "participation" in it, even though there was no requirement that anyone bow his head, close her eyes, or assume any other posture of reverence or assent.

In short, this is a case where the array of factual nuances called for the deftness of a surgeon's scalpel, not the bluntness of the meat ax wielded by the court of appeals. It is a case where the Court has an opportunity to resolve a serious conflict among the circuits, to bring moderation to Establishment Clause doctrines that the court of appeals carried to an extreme, and to provide needed guidance on the application of the Establishment Clause to public assemblies of adults. Certiorari should be granted.

**I. THE DECISION BELOW CREATES A SPLIT IN THE CIRCUITS ON THE CONSTITUTIONALITY OF PRAYER AT ADULT GATHERINGS IN STATE-SPONSORED SETTINGS.**

"[T]he panel decision, . . . creates a deep conflict with two other circuits." App. 31 (Niemeyer, J., dissenting). On this there is no disagreement. Indeed, the panel candidly acknowledged that "some of our sister circuits have approved prayer at certain university functions." App. 74. Both the Sixth Circuit and the Seventh Circuit have approved the inclusion of prayer as an official part of

programs sponsored by public universities, thereby reaching conclusions wholly at odds with that of the court below.

In *Chaudhuri v. Tennessee*, 130 F.3d 232 (6th Cir. 1997), the Sixth Circuit ruled that the Establishment Clause does not forbid the University of Tennessee from arranging for clergy to deliver nonsectarian invocations and benedictions at “university functions such as graduation exercises, faculty meetings, dedication ceremonies, and guest lectures.” *Id.* at 234. Similarly, in *Tanford v. Brand*, 104 F.3d 982 (7th Cir. 1997), the Seventh Circuit ruled that the Establishment Clause does not forbid Indiana University from arranging for clergy to deliver invocations and benedictions at commencement ceremonies. *Chaudhuri* and *Tanford* each held that prayers at university events satisfied all three prongs of the *Lemon* test. In contrast, the decision below found that a prayer at VMI’s supper roll call ceremony violates *Lemon*’s second and third prongs.

#### **A. There Is a Split in the Circuits on *Lemon*’s “Primary Effect” Prong.**

Under the second prong of *Lemon*, it is not fatal that a challenged practice may result in some incidental advancement of religion. Instead, advancement must be the “principal or primary effect.” *Lemon*, 403 U.S. at 612. At issue here is whether there is a *per se* violation of the second prong whenever an agency of government – including a public university – includes a prayer in the program of an otherwise secular adult gathering. The practice is well-established in our society. Yet, in the Fourth Circuit, the practice is in jeopardy because of two sweeping – and novel – legal assumptions implicitly adopted by the court of appeals. The first assumption is that the factual context in which the prayer takes place is irrelevant. The second is that there is no meaningful distinction between children and adults for purposes of assessing a prayer’s effects.

1. The court assumed that, when “government” arranges for a meeting to include a prayer, it not only

“endorses” religion, but religious advancement is necessarily the “primary effect.” App. 68. Applying this *per se* approach, the court found a violation of the Establishment Clause without examining the specific factual context in which the VMI prayer takes place. If it had considered the context, it would have understood that any “endorsement” is *de minimis* and that the secular effects predominate over any religious ones.<sup>21</sup> The Fourth Circuit’s *per se* approach disregards this Court’s teaching that Establishment Clause jurisprudence is “delicate and fact-sensitive,” *Lee*, 505 U.S. at 597, and that “[e]very government practice must be judged in its unique circumstances. . . .” *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O’Connor, J., concurring).

Rather than use a *per se* analysis, the Sixth and Seventh Circuits each focused on the specific circumstances confronting them. *Chaudhuri* and *Tanford* each involved a public university’s practice of including prayer in secular adult gatherings. In both cases, the court found that the practice satisfied the “primary effect” prong of the *Lemon* test. As the Sixth Circuit explained:

It would not be reasonable to suppose that an audience of college-educated adults could be influenced unduly by prayers of the sort in question here. If these prayers “endorsed” religion,

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<sup>21</sup> As Judge Wilkinson explained:

[T]he primary effects of VMI’s prayer are permissible ones: within this context, the prayer principally solemnizes the occasion, encourages reflection, and promotes VMI’s core training mission.

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The observance undoubtedly has a religious effect as well. However, the *Lemon* test makes a practice unconstitutional only if its “principal or primary effect” is a religious one. *Lemon*, 403 U.S. at 612. Here, within the context of the supper roll call ceremony, the secular effects of the prayer are in my view the “principal” ones.

App. 22 and 22 n.5 (Wilkinson, J., dissenting).

the endorsement was indirect, remote and incidental, and a *de minimis* gesture does not, by itself, create an Establishment Clause problem.

*Chaudhuri*, 130 F.3d at 237.

Similarly, in *Tanford*, the Seventh Circuit rejected an Establishment Clause challenge, ruling that Indiana University’s “brief non-sectarian invocation and benediction does not have a primary effect of endorsing or disapproving religion.” 104 F.3d at 986. Instead of finding an impermissible “primary effect,” *Chaudhuri* and *Tanford* agree that the challenged prayers were merely “tolerable acknowledgement[s] of beliefs widely held among the people of this country.” *Chaudhuri*, 130 F.3d at 237 (quoting *Marsh v. Chambers*, 463 U.S. 783, 792 (1983)); *Tanford*, 104 F.3d at 986 (same).

Like the prayers at issue in *Chaudhuri* and *Tanford*, the prayers at VMI are voluntary, and they form an incidental part of an otherwise secular adult function. Moreover, the prayers at issue here reflect additional secular interests not found in those two cases. For example, these prayers serve pedagogical functions, they occur before an organizational meal, and they are part of a military ceremony. These factors provide secular effects in addition to those relied upon in *Chaudhuri* and *Tanford*. By finding that VMI’s practice violates *Lemon’s* second prong despite these factors, the Fourth Circuit compounded the conflict with the Sixth and Seventh Circuits.

2. The Fourth Circuit based its *per se* approach on the implicit assumption that – for purposes of evaluating a prayer’s effects – cases dealing with children control cases concerning adults. In explaining its decision, the court cited what it termed “numerous other cases” where courts invalidated “similar practices” under *Lemon’s* second prong. App. 71. Yet, an examination of those cases reveals that they *all* involved school children and that they are

“similar” to the case at bar only at the most general level.<sup>22</sup> To blur so casually the lines naturally drawn by maturity is especially troublesome because this Court has expressly left open the question of whether children and adults are to be treated alike for purposes of the Establishment Clause. *Lee*, 505 U.S. at 593, 598-99.

It is on this very issue – whether adults must be treated as if they were children – that the conflict between the circuits is the most pronounced and calls most urgently for guidance from this Court. In another First Amendment context – non-obscene yet indecent speech – this Court has repeatedly drawn a distinction between adults and children. *See, e.g., Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 252 (2002) (reiterating “the important First Amendment principle” that government may not “reduce the adult population . . . to reading only what is fit for children.”) (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)). It would be ironic if the distinction in age that is so critical in dealing with pornography counted for naught in dealing with prayer.

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<sup>22</sup> The cases cited by the Fourth Circuit are: *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 341, 346-47 (5th Cir. 1999) (striking down policy requiring *elementary* and *high school* teachers to read disclaimer before teaching evolution); *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 383-85 (6th Cir. 1999) (striking down practice of opening school board meetings with prayer, based largely on presence of *elementary* and *secondary school children* at such meetings); *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 279-80 (5th Cir. 1996) (striking down statute authorizing students to initiate prayer at public school functions and noting that affected students are required by law to attend school – a requirement not applicable to adults); *ACLU v. Black Horse Pike Regional Bd. of Educ.*, 84 F.3d 1471, 1487 (3rd Cir. 1992) (striking down policy authorizing student vote on whether to incorporate prayer in *high school* graduation ceremony); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 406 (5th Cir. 1995) (enjoining coaches from participating in prayers initiated by students on *high school* basketball teams). *See App.* 71.

**B. There Is a Split in the Circuits on *Lemon*'s "Excessive Entanglement" Prong.**

The circuits also are split on application of *Lemon*'s third prong, which provides that the challenged practice "must not foster an excessive government entanglement with religion." *Lemon*, 403 U.S. at 613. This Court's jurisprudence does not forbid *all* interaction between government and religion. It forbids "entanglement" and the "entanglement must be 'excessive' before it runs afoul of the Establishment Clause." *Agostini v. Felton*, 521 U.S. 203, 233 (1997). Moreover, while there has not yet been a majority opinion expressly on point, "[t]he entanglement prong of the *Lemon* test is properly limited to *institutional* entanglement." *Lynch v. Donnelly*, 465 U.S. 668, 689 (1984) (O'Connor, J., concurring) (emphasis added). The same view is reflected in *Lee*, where three Justices explained *Lemon*'s third prong by recognizing the institutional component lying at its roots:

The final prong, excessive entanglement . . . harkens back to the final example in *Everson*: "Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious *organizations or groups* and *vice versa*."

*Lee*, 505 U.S. at 602, n.3 (Blackmun, J., joined by Stevens and O'Connor, J.J., concurring) (emphasis added) (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947)).<sup>23</sup> Given this institutional focus, it is not surprising that *Lee* – a case

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<sup>23</sup> The presence or absence of an institutional component was also significant in *Aguilar v. Felton*, 473 U.S. 402, 413 (1985) ("[P]ervasive monitoring by public authorities in the sectarian schools infringes precisely those Establishment Clause values at the root of the prohibition of excessive entanglement."); and *Mueller v. Allen*, 463 U.S. 388, 403 (1983) ("comprehensive, discriminating, and continuing state surveillance [is] necessary to run afoul of this [excessive entanglement] standard . . .") (internal quotation marks and citations omitted).

involving public school prayers by invited clergy, but no institutional component – turned on the age of the audience, not entanglement. Indeed, *none* of this Court’s “school prayer” cases has turned on excessive entanglement.<sup>24</sup>

By finding excessive entanglement even though no religious institution is present, the decision below stepped beyond the precedents of this Court and, in so doing, widened the split with *Chaudhuri* and *Tanford*.<sup>25</sup> Neither the Sixth Circuit nor the Seventh Circuit found a third prong violation when the organizers of a university function selected clergy to deliver opening and closing prayers. The Sixth Circuit said, “[i]t does not seem to us that the practice of including nonsectarian prayers . . . at [state university] events creates any church-state entanglement

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<sup>24</sup> There have been five such cases, all involving children in grades K-12: *Engel* (invalidating practice of prayer composed by state agency and recited by children in public school classrooms); *Schempp* (striking down practice of beginning each school day by reading from Bible and reciting Lord’s Prayer); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (striking down “moment of silence” because, under unique facts of the case, Alabama did not present evidence of *any* secular purpose”); *Lee* (striking down practice of inviting clergy to deliver invocations and benedictions at middle school and high school graduations); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (striking down practice of school-sponsored prayer before high school football games, based on principles endorsed in *Lee* noting the effect on “school age children”).

<sup>25</sup> Among the judges voting for rehearing *en banc*, there was an understanding that this Court – and, once, the Fourth Circuit – looked for *institutional* entanglement under the third prong: “[T]here is no ‘excessive’ entanglement between government and religion here, since there is no public monitoring of the uses of financial aid by *religious entities* and there is no need for VMI to interact with any *religious organizations*.” App. 23 (Wilkinson, J., dissenting) (emphasis added) (citing *Koenick v. Felton*, 190 F.3d 259, 268 (4th Cir. 1999)). Indeed, respondents made no third prong argument to the court of appeals.

at all, let alone ‘excessive’ entanglement.” *Chaudhuri*, 130 F.3d at 238. In *Tanford*, the Seventh Circuit reached a similar result, saying “there is no excessive entanglement of church and state by virtue of the University’s selection of a cleric or its instruction . . . that his or her remarks should be unifying and uplifting.” *Tanford*, 104 F.3d at 986.

Even if the third prong did not require an institutional component, the result reached below would still be problematic. The Fourth Circuit based its entanglement analysis on *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369 (6th Cir. 1999), where the court found excessive entanglement even though no religious institution was involved. App. 72. In *Coles*, the court based its decision on the fact that “[t]he school board decided to include prayer in its public meetings, chose which member from the local religious community would give those prayers, and . . . has more recently had the school board president himself compose and deliver prayers. . . .” 171 F.3d at 385.

*Coles* found “excessive entanglement” on the theory that these facts were “indistinguishable” from *Lee*. *Id.* Yet, *Lee* did not use the entanglement prong – nor any other part of the *Lemon* test.<sup>26</sup> Thus, *Coles* – and the decision below – are based on a fundamental misunderstanding of *Lee*. Under their approach, no public official may *invite* someone to say a prayer at a public assembly, nor may the official select *himself* to say a prayer. No options remain; prayer is wholly eliminated. Such an extreme result – rooted in a growing misperception of this Court’s jurisprudence – presents an issue calling for certiorari.

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<sup>26</sup> See *Santa Fe*, 530 U.S. at 320 (Rehnquist, C.J., joined by Scalia and Thomas, J.J., dissenting) (“In *Lee* . . . we mentioned but did not feel compelled to apply the *Lemon* test.”).

## II. THE DECISION BELOW PRESENTS IMPORTANT, UNSETTLED QUESTIONS ABOUT COERCION IN ADULT SETTINGS, AND FURTHER DIVIDES THE CIRCUITS.

“It is beyond dispute that . . . government may not *coerce* anyone to support or *participate* in religion or its exercise. . . .” *Lee*, 505 U.S. at 587. In applying this prohibition, it is important that care be taken in handling the operative phrase, “coerce . . . to participate.” Otherwise, the prohibition will sweep too broadly. The court of appeals took no such care. Instead, it adopted an expansive and novel theory of what it means to “coerce” an adult to “participate” in prayer.

The court below recognized that, “[a]t all relevant times, VMI’s upper-class cadets could avoid the mess hall in order to shield themselves from the prayer.” App. 64-65. Even so, the court held that respondents were “coerced” into being present in the mess hall when the prayers were read. Having thus found that respondents were required to be present, the court then tacitly equated presence with participation and arrived at the conclusion that they were coerced to participate in the prayer. Each leap in the court’s analysis carries it well beyond this Court’s jurisprudence, and each creates a conflict among the circuits.

### A. The Decision Below Treats Children and Adults as Equally Vulnerable to Coercion.

After recognizing that cadets were not required to enter the mess hall, the court of appeals treated that fact as essentially irrelevant, stating: “Nevertheless, the communal dining experience, like other official activities, is undoubtedly *experienced* as obligatory.” App. 65 (emphasis added). This was so, the court said, because of VMI’s “coercive atmosphere” and “social pressure.” App. 64-65.

Such an analysis is perplexing because respondents did not allege any such experience, atmosphere or pressure. See App. 16 (Wilkinson, J., dissenting).<sup>27</sup> Indeed, the evidence affirmatively precludes any such result as a *factual* conclusion. See *supra* at 4. Thus, the court’s conclusion – albeit erroneous – is best viewed as a *legal* one.<sup>28</sup>

In effect, the Fourth Circuit has decided that, as a *matter of law*, adults who choose to undertake VMI’s vigorous and demanding program must be treated as if they were school children while they are there. Such a conclusion is not supported by this Court’s precedents. See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 584 n.5 (1987) (“The potential for undue influence is far less significant with regard to college students who voluntarily enroll in courses. ‘This distinction warrants a difference in constitutional results.’”) (quoting *Schempp*, 374 U.S. at 253 (Brennan, J., concurring)); *Marsh*, 463 U.S. at 792 (“[T]he individual claiming injury by the [prayer] practice is an adult, presumably not readily susceptible to ‘religious indoctrination’ or peer pressure.”) (internal citations omitted). Nor can the decision be explained by the decisions of other

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<sup>27</sup> The only “requirement to participate” identified by respondents was the requirement that they stand. See App. 16 (Wilkinson, J., dissenting). At VMI – as in other military settings – personnel are required to stand on all manner of occasions, and such standing cannot reasonably be understood to convey assent to what is being said. Indeed, the court of appeals did not base its ruling against VMI on the fact that cadets stand. See App. 63-65. Obviously, if the requirement to stand were a problem, it could be cured by a remedy far less radical than the complete elimination of prayer effected by the decision below.

<sup>28</sup> Alternatively, to the extent that the court’s conclusion could be viewed as a finding of fact, such finding would be wholly unwarranted speculation. App. 16 (Wilkinson, J., dissenting). It would also be a serious breach of the rule that, on summary judgment, all facts and inferences must favor the non-moving party. *Hunt v. Cromartie*, 526 U.S. 541, 550-55 (1999). In either case, the court of appeals “has so far departed from the accepted and usual course of judicial proceedings . . . as to call for the exercise of this Court’s supervisory power.” S. Ct. R. 10(a).

circuits, which have drawn a sharp distinction between children and adults in terms of their susceptibility to coercion. See *Chaudhuri*, 130 F.3d at 238 (distinguishing university setting from “risk of peer pressure and ‘indirect coercion’ in the primary and secondary school context.”) (citing *Lee*, 505 U.S. at 592); *Tanford*, 104 F.3d at 985 (same).

Indeed, concerns about coercion are especially misplaced in dealing with VMI cadets. By volunteering to forego a typical college lifestyle in exchange for the rigors of the Institute, the men and women who attend VMI have distinguished themselves as more mature – and more tough-minded – than the mass of their contemporaries. They are “a self-selecting group of men and women who voluntarily expose themselves to a rigorous training environment, the purpose of which is to develop strong leaders.” App. 33 (Niemeyer, J., dissenting). It is “doubt[ful] that cadets who are deemed ready to vote, to fight for our country, and to die for our freedoms, are so impressionable that they will be coerced by a brief, non-sectarian supper prayer.” App. 14 (Wilkinson, J., dissenting).

### **B. The Decision Below Equates Presence in the Room with Participation in the Prayer.**

Even if cadets were required to be *present* in the mess hall, it would not necessarily follow that they were “coerced” to *participate* in the prayer. Yet, after deciding that cadets were forced to enter the mess hall, the court of appeals engaged in no further analysis.<sup>29</sup> Instead, it

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<sup>29</sup> Such an analysis was provided by Judge Wilkinson, who observed that, while the prayer is being read, cadets have “freedom to move, drink or even talk, so long as they keep their right feet in place. . . . [A] cadet must stand, but he or she can engage in a variety of other conduct.” App. 17 (Wilkinson, J., dissenting). Thus, “even if . . . attendance at the suppertime observance is required – either directly

(Continued on following page)

implicitly equated a requirement to be present with a requirement to participate in the prayer. Such a result is both far-reaching and unprecedented.

There are a variety of occasions when adults may be obligated to be present where they will hear a prayer. Litigants and lawyers who must attend the opening of court will hear the bailiff's invocation. Staff employed by a legislature may be required by their jobs to be on hand when the morning prayer is said. Soldiers on duty at a military ceremony will hear any prayer offered by the unit chaplain. Yet, in none of these cases is anyone required to bow his head, close her eyes or assume any other posture of reverence or assent. None of this has been regarded as coerced participation in a religious exercise. "[M]erely being present in a room where prayer occurs, or hearing a prayer that might offend one's sensibilities, has not been enough to constitute an Establishment Clause violation." App. 17-18 (Wilkinson, J., dissenting).

As this Court observed in *Lee*:

We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation.

*Lee*, 505 U.S. at 597. Respondents may find the VMI prayer offensive; however, it is merely an incidental part of an obviously secular ceremony. By equating a requirement that cadets attend the ceremony with coercion to participate in the prayer, the decision below breaks with the moderate approach reflected in this Court's jurisprudence and experiments with the extreme.

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... or indirectly ... – it is implausible to suggest that cadets are coerced to *participate* in the prayer." *Id.* at 17 (emphasis in original).

It is an experiment that other circuits have been unwilling to undertake. In *Chaudhuri*, the Sixth Circuit explained that, even if the plaintiffs were required to attend the university functions where prayers were said, there still would be no Establishment Clause violation:

Even if Dr. Chaudhuri had been obliged to attend these events, moreover, he would not have had to participate in the prayers or pay any attention to them. There was absolutely no risk that Dr. Chaudhuri – or any other unwilling adult listener – would be indoctrinated by exposure to the prayers. The peer pressure and “subtle coercive pressure” that concerned the Court in *Lee* were simply not present here.

*We cannot accept the notion that Dr. Chaudhuri was “coerced” into participating in the prayers merely because he was present.* He may have found the prayers offensive, but that reaction, in and of itself, does not make them unconstitutional.

*Chaudhuri*, 130 F.3d at 239 (emphasis added) (citing *Tanford*, 104 F.3d at 985 and *Lee*, 505 U.S. at 597). *See also Coles*, 171 F.3d at 383 (finding prayer at school board meeting was coercive for elementary and secondary students required to attend, but making no similar finding for adults).

In sum, the view of coercion adopted below is not only in conflict with other circuits, it is a precarious leap beyond this Court’s precedents on an important issue of constitutional law. For this reason, too, certiorari is warranted.

### **III. THIS PETITION PRESENTS AN IDEAL VEHICLE FOR DECIDING HOW THE ESTABLISHMENT CLAUSE APPLIES TO PRAYER AT ADULT GATHERINGS.**

The court of appeals candidly recognized the unsettled nature of the question presented by this petition. *See App. 74.* Indeed, other than *Marsh*, where legislative prayers were upheld as constitutional, this Court has never

addressed the constitutionality of state-sponsored prayer in *any* adult setting.

In *Lee*, this Court ruled that the Establishment Clause was violated when public middle schools and high schools included prayer by clergy as part of an official graduation program. Critical to this holding was the age of the audience. As the Court noted, “there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.” *Id.* at 592. At the same time, it disclaimed any suggestion that the same result would be reached in an audience of adults:

Finding no violation under these circumstances would place objectors in the dilemma of participating, with all that implies, or protesting. *We do not address whether that choice is acceptable if the affected citizens are mature adults*, but we think the State may not, consistent with the Establishment Clause, place primary and secondary school *children* in this position.

*Id.* at 593 (emphasis added).

This petition provides the Court an opportunity to answer the question left undecided in *Lee*: whether the Establishment Clause analysis used for children also applies to adults. The case was decided below by application of two standards, the *Lemon* test and coercion. It thus enables this Court to address two important Establishment Clause doctrines as they may apply to adults. Moreover, the case presents several factors that distinguish it from *Lee*, thereby providing the Court a range of options for careful line-drawing.

The prayer at issue here is an incidental part of an otherwise secular gathering of adults, and it is voluntary. VMI contends – and the Court could decide – that this is all that is needed to avoid violating the Establishment Clause, thereby vindicating public prayer in a wide array of circumstances. But, the Court need not decide this case

on such broad terms in order to rule for VMI. The gathering here is both an organizational meal and a military ceremony. In each of these contexts, prayer is part the fabric of our society. Each of these factors would allow the Court to narrow the scope of its decision. Additionally, the prayers are brief, non-denominational and non-proselytizing, factors closely related to their secular purposes. Moreover, the prayers occur at an institution of higher education where cadets attend by choice, and where the prayers serve academic purposes and implicate academic freedom. These, too, are factors that would allow the Court to craft as narrow or as broad a decision as necessary.<sup>30</sup> In short, this case not only allows the Court to establish a jurisprudential “bookend” for its decisions involving school children, it allows that bookend to be located at several possible points along a continuum. Thus, it is an ideal vehicle for providing needed guidance on proper application of the Establishment Clause in public assemblies of adults.

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<sup>30</sup> “Academic freedom” is a concept that “long has been viewed as a special concern of the First Amendment.” *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 312 (1978), (Powell, J., announcing judgment of the Court). See also *Grutter v. Bollinger*, 123 S.Ct. 2325, 2339 (2003) (endorsing Justice Powell’s view in *Bakke* and affirming “our tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits.”). Here the prayers are “reasonably calculated” to advance VMI’s academic purposes. App. 120 (Expert Report of Col. John W. Brinsfield, Ph.D.) While public universities do not have *carte blanche*, their academic decision-making must be a significant factor in the constitutional analysis. Moreover, any connection between a public college’s *academic* speech and a state’s *political* institutions is either non-existent or too attenuated to constitute “government” endorsement of any views expressed. Thus, concerns noted in *Lynch* about membership in the “political community” are less likely to be implicated. See *Lynch*, 456 U.S. at 688 (O’Connor, J., concurring).

**CONCLUSION**

The petition for writ of certiorari should be granted.

Respectfully submitted,

JOSIAH BUNTING, III,  
Superintendent Emeritus

J. H. BINFORD PEAY, III, General,  
USA (Retired)

JERRY W. KILGORE  
Attorney General of Virginia

WILLIAM H. HURD  
State Solicitor  
*Counsel of Record*

MAUREEN RILEY MATSEN  
WILLIAM E. THRO  
Deputy State Solicitors

ALISON P. LANDRY  
Senior Assistant Attorney General

A. CAMERON O'BRION  
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL  
900 East Main Street  
Richmond, Virginia 23219  
(804) 786-2436 (voice)  
(804) 371-0200 (fax)

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