Team 2501

No. 17–1891

In the Supreme Court of the United States

October Term, 2018

HENDERSONVILLE PARKS AND RECREATION BOARD, PETITIONER,

v.

BARBARA PINTOK, RESPONDENT.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

BRIEF FOR THE PETITIONER

QUESTIONS PRESENTED

I: Whether the Hendersonville Board's practice of having members offer solemn prayers before governance comports with the longstanding history and tradition of sectarian legislative prayer approved of by this Court in *Marsh v. Chambers* and *Town of Greece v. Galloway*.

II: Whether the Hendersonville Board's short and solemnizing opening prayers coerced an adult Respondent where the prayers were based on members' personal religious beliefs and contained no legal threats.

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STATEMENT OF JURISDICTION

A Formal Statement of Jurisdiction has been omitted in accordance with the Rules of the Washington College of Law's Burton D. Wechsler First Amendment Moot Court Competition.

STATEMENT OF THE CASE

Summary of the Facts

The Hendersonville Parks and Recreation Board ("the Board") is a local government body that oversees a wide variety of issues. J.A. at 8, 18. The Board meets once a month and has five members, each from a different sect of Christianity. J.A. at 8, 18. The meetings begin with a short ceremony where one member politely invites the public to stand and recite the Pledge of Allegiance. J.A. at 8. A Board member then delivers a short, solemn prayer in preparation for governance. J.A. at 8.

The Board offers these prayers to solemnize public business, lend gravity to its proceedings, and encourage quiet reflection. J.A. at 2, 4–5. For example, one prayer asked for guidance "to preside fairly and impartially over all petitions." J.A. at 9, 18. Other prayers are directed at fellow Board members, asking for assistance "as we conduct the public's business and serve all people," and for God's "spirit [to] watch[] over us as we conduct the public's work." J.A. at 18–19. The Board does not intend the prayers to coerce individuals, promote Christianity, or convert the audience. J.A. at 2–3, 5. Rather, the prayers ask for guidance in supporting Hendersonville citizens, "no matter what religion, faith, or lack thereof." J.A. at 9.

Chairman Wyatt J. Koch affirmed that the Board represents "all citizens from the religiously devote to the fiercely atheistic." J.A. at 2. Although the Board's prayers tend to be in the Judeo-Christian tradition, the prayers ultimately reference each member's specific faith. J.A. at 8. For example, Board member Alvania Lee stated "[m]y prayers have referenced my specific faith, which is Methodist." J.A. at 3. The prayers sometimes contain references to the Christian deity, invoking the "Almighty God," "Heavenly Father," and "his son Jesus Christ." J.A. at 9.

In large part, however, the prayers contain universal themes such as peace and togetherness, calling for a "spirit of unity despite whatever differences we have." J.A. at 9. One prayer asked the audience to "reflect on the awful violence and mass shootings in this country." J.A. at 9. Another prayer invited audience members to bow their heads before encouraging peace in the community and support for the military. J.A. at 9.

Barbara Pintok ("Respondent") is an adult resident of Hendersonville and a follower of Wicca, a pagan religion. J.A. at 8. She has attended numerous Board meetings. J.A. at 8. She has also presented a permit appeal for her paddleboard company to the Board, which was denied. J.A. at 18. However, the Thirteenth Circuit noted that the appeal's denial is unrelated to this case. J.A. at 18 n.2.

Respondent is familiar with Christianity and asserts that Hendersonville residents lack tolerance for non-Christian religions. J.A. at 1. Respondent stated that she had negative childhood experiences with Christianity and thus felt uncomfortable hearing the Board's opening prayers. J.A. at 1. Specifically, she stated, "I felt very intimidated by these prayers, which are all Christian in nature. I felt like I was back at Christian church in my youth." J.A. at 1. Respondent complained about this prayer practice to Board member James Lawley who allegedly responded, "[t]his is a Christian country, get over it." J.A. at 1. Member Lawley, however, swore under oath that he did not recall saying this to Respondent. J.A. at 6. Further, member Lawley attested that he never judged Respondent on the basis of her religion. J.A. at 6. To that end, Board members submitted affidavits affirming that the Board does not consider the faith of any citizen when making administrative decisions. J.A. at 4, 6.

Summary of the Proceedings

Respondent brought an action against the Board, alleging that the Board's opening prayer practice violated the Establishment Clause of the First Amendment. J.A. at 10. After both parties cross-moved for summary judgment, the United States District Court for the District of Caldon correctly upheld the Board's prayer practice as constitutional. J.A. at 7. The District Court held that the prayers comported with the time-honored tradition of solemnizing public business and did not coerce Respondent. J.A. at 7, 14–15. Respondent appealed this decision to the United States Court of Appeals for the Thirteenth Circuit. J.A. at 16.

The Thirteenth Circuit incorrectly analyzed this case under the *Lemon v. Kurtzman* test to hold that the Board's practice violated the Establishment Clause. J.A. at 20–21. In concurrence, Justice Rodriguez correctly opposed the *Lemon* test and stated that the proper inquiry is a coercion analysis. J.A. at 25. The Board appealed, and this Court granted certiorari to consider the issues on record. J.A. at 26.

SUMMARY OF THE ARGUMENT

I.

The Board's member-led prayer practice does not violate the Establishment Clause because it fits comfortably within this nation's historical tradition as required by *Marsh v. Chambers* and *Town of Greece v. Galloway*. Religious observance is baked into the history of this country, and asking courts to remove this part of America's identity is like asking a baker to remove the flour from a loaf of bread.

In *Marsh* and *Town of Greece*, this Court made clear that prayer practices must be viewed in accordance with history and tradition. It was thus improper to invoke the *Lemon* test because the Board's lawmaker-led practice aligns with this Country's long-settled legislative tradition.

First, the Board's lawmaker-led practice comports with the historical analysis required by *Marsh* and *Town of Greece* because lawmakers have been leading prayer at all levels of government for nearly 200 years. Second, this Court has expressly approved all other salient features of the Board's practice and thus the practice as a whole is constitutional.

The Thirteenth Circuit improperly relied on the holding in *Lund v. Rowan County* to find the Board's prayer practice unconstitutional because *Lund* supports a finding that the Board's practice remained within the bounds of the Establishment Clause. As *Lund* considers the totality of the prayer practice rather than focusing on any single feature, the Thirteenth Circuit erred by fixating on the identity of the prayer-giver. Under the full *Lund* analysis, the totality of the Board's solemn and respectful practice comports with the Establishment Clause. What's more, *Lund* actually stands for the notion that lawmakers are in a better position to effectively lead legislative prayer. Ultimately, *Lund* neither supports the Thirteenth Circuit's holding nor is it a proper vehicle to reach the much-maligned *Lemon* test.

II.

The Board's prayer practice does not violate the First Amendment because it did not coerce Respondent to engage in religious worship or impermissibly endorse religion. To find the Board's practice coercive would be a severe misunderstanding of this country's religious history, and would open the floodgates to claims of coercion at the whisper of God's name.

The Thirteenth Circuit erred in relying on the *Lemon* test to analyze the Board's prayer practice, undermining nearly thirty years of Supreme Court jurisprudence. Instead, the proper approach for evaluating lawmaker-led prayer is a coercion analysis, as established by this Court in *Town of Greece*.

The Board's prayer practice is constitutional under both of the coercion tests from *Town of Greece*. This Court should adopt Justice Thomas's "actual legal coercion" test because it is more faithful to the Constitution, easier to apply, and the narrowest holding. The Board's practice passes this test because the Board did not coerce Respondent by force of law or threat of penalty. Moreover, even if this Court adopts Justice Kennedy's "indirect social coercion" test, the Board's practice is still constitutional because neither the local government setting nor the makeup of the audience rendered the practice coercive. Thus, under either coercion analysis, the Board's practice does not violate the Establishment Clause.

Finally, even if this Court chooses to apply *Lemon*, the Board's prayer practice remains constitutional. The Thirteenth Circuit misapplied *Lemon*'s three-part test by failing to account for the controlling reasonable person standard from *Town of Greece.* Under the appropriate standard, reasonable Americans would view the Board's prayers as serving a legitimate secular purpose, not endorsing religion.

ARGUMENT

I. THE BOARD'S MEMBER-LED PRAYER PRACTICE DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE BECAUSE IT FITS COMFORTABLY WITHIN THIS NATION'S HISTORICAL TRADITION AS REQUIRED BY *MARSH* AND *TOWN OF GREECE*

From the dollar bill to the Pledge of Allegiance, explicitly religious messages permeate American life on a daily basis. This Court has consistently accepted that religious traditions are embedded in the history of this country as both a government and a people. *See Marsh v. Chambers*, 463 U.S. 783, 792 (1983) (quoting *Zorach v. Clauson*, 343 U.S. 306, 313 (1952)) ("[W]e are a religious people whose institutions presuppose a Supreme Being."). The Supreme Court, however, is not the only body that approves of this tradition: all three branches of government have expressly acknowledged this nation's religious identity since the drafting of the

First Amendment. *See Lynch v. Donnelly*, 465 U.S. 668, 674 (1984). Accordingly, the First Amendment does not require complete separation of church and state, but rather, accommodates religious practices rooted in this history. *See, e.g.*, *Zorach*, 343 U.S. at 312–14 (noting that government respects this country's tradition when it "respects the religious nature of our people and accommodates the public service to their spiritual needs").

This Court's jurisprudence reflects a growing acknowledgment of the nation's religious identity. Twice in the past thirty-five years, this Court has affirmed that legislative prayer is a practice "deeply embedded in the history and tradition of this country." *Marsh*, 463 U.S. at 786. In *Marsh v. Chambers*, this Court affirmed a legislature's practice of hiring a clergyman to deliver exclusively Christian prayers for over sixteen years. *See generally id.* Then, in *Town of Greece v. Galloway*, this Court reaffirmed the longstanding tradition of legislative prayer by approving a legislature's practice of rotating predominately Christian clergy to deliver explicitly sectarian prayer. *See generally Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014). Although this Court has not yet ruled on the constitutionality of lawmaker-led prayer, it has provided a framework to find the answer: legislative prayer practices that "fit[] within the tradition long followed" in the federal and state legislatures necessarily comport with the Establishment Clause. *Id.* at 1819. Therefore, to find lawmaker-led prayer unconstitutional would undermine nearly 200 years of legislative history and stunt the religious tolerance this Court has encouraged time and time again.

The Thirteenth Circuit erred by relying on the *Lemon* test to dismiss the Board's lawmaker-led prayer practice as unconstitutional. First, the *Lemon* test does not apply to the Board because lawmakers leading prayer fits within *Marsh* and *Town of Greece*'s historical analysis. Second, within this historical analysis, the Board's entire prayer practice aligns with

this country's tradition of legislative prayer. Finally, the Thirteenth Circuit should not have used *Lund v. Rowan County* as a vehicle to reach *Lemon*, when *Lund* itself avoids the much-maligned *Lemon* test. *See Lund v. Rowan Cty.*, 863 F.3d 268 (4th Cir. 2017).

A. The Board's Lawmaker-Led Prayer Practice Fits within the Protected Tradition of Legislative Prayer Recognized by This Court

By turning to *Lemon*, the Thirteenth Circuit impermissibly deviated from this Court's required historical analysis established in *Marsh* and *Town of Greece*. First, the Board's practice fits comfortably within this nation's history and tradition because lawmakers have led prayer for nearly 200 years. Second, this Court has expressly approved all other salient features of the prayer practice. Therefore, the Board's lawmaker-led practice is constitutional and remains within the historical framework set out by this Court.

1. The Thirteenth Circuit Should Have Looked to History and Tradition Rather Than Applying the *Lemon* Test

The Thirteenth Circuit improperly relied on the fact that a lawmaker led the prayer to justify its departure from the historical analysis required by both *Marsh* and *Town of Greece*. The relevant inquiry for evaluating the constitutionality of a prayer practice is not a subjective *Lemon* analysis, but rather whether the practice comports with this nation's history and tradition. *See Town of Greece*, 134 S. Ct. at 1819. As lawmakers have led sectarian prayers for nearly two centuries, the Board's lawmaker-led practice fits within history and tradition. Therefore, because there was nothing to warrant the Thirteenth Circuit's decision to apply the *Lemon* test, this Court should return to the *Marsh* and *Town of Greece* historical analysis when evaluating the constitutionality of the Board's prayer practice.

2. The Board's Member-Led Practice Aligns with Nearly Two Centuries of Lawmaker-Led Prayer

The Board's practice of lawmaker-led prayer aligns with this Court's historical interpretation of the Establishment Clause. Dating back as early as 1849, lawmakers have opened legislative sessions with member-led prayers. *See Bormuth v. County of Jackson*, 870 F.3d 494, 509 (6th Cir. 2017). As the Senate explained in its report analyzing the history and constitutionality of its prayer practices, the Founding Fathers "did not intend to prohibit a just expression of religious devotion by the legislators of the nation, *even in their public character as legislators*." S. Rep. No. 32-376, at 4 (1853) (emphasis added) (explaining that the Founders drafted the Establishment Clause to prevent an establishment of religion that resembled the Church of England); *see also* Sen. Robert C. Byrd, Senate Chaplain, *in 2 The Senate, 1789-1989: Addresses on the History of the United States Senate* 297, 305 (1982), *available at* http://www.senate.gov/artandhistory/history/resources/pdf/Chaplain.pdf (noting that senators have delivered the legislative prayer). Therefore, the Board's practice of having its members lead legislative prayer reflects the Founders' intent that lawmakers can and should lead prayer.

Lawmaker-led prayer is not only embedded in this nation's history, but it remains prominent in legislative practice today. To analyze whether a lawmaker-led prayer practice comports with the Establishment Clause, the Court must "determine whether [the] legislative prayer fits within the tradition long followed in Congress and state legislatures." *Town of Greece*, 134 S. Ct. at 1819. The Congressional Record includes numerous examples of lawmaker-led prayers. *See, e.g.*, 161 Cong. Rec. S3313 (daily ed. May 23, 2015) (noting that in 2009, Senator Lankford opened the Senate with a prayer "[i]n the Name of Jesus, I pray"); *see also* 159 Cong. Rec. S3915 (daily ed. June 4, 2013) (Sen. William M. Cowan); 155 Cong. Rec. 32,658 (2009) (Sen. John Barrasso); 119 Cong. Rec. 17,441 (1973) (Rep. William H. Hudnut III). Lawmaker-

led prayer is also commonplace at the state level; at least thirty-one state legislatures invoke this practice. *See* National Conference of State Legislatures, Prayer Practices, *in Inside the Legislative Process*, at 5-151–5-152 (2002), *available at* http://www.ncls.org/documents/legismgt/ilp/02tab5pt7.pdf. Respondent's position calls on this Court to unravel centuries of legislative tradition by invalidating a majority of states' current prayer practices. The continued prevalence of these lawmaker-led prayers at all levels of government, however, confirms that the Board's practice is not only commonplace but widely accepted.

Further, this Court has expressly cited lawmaker-led prayer as an acceptable practice. In *Marsh*, when the Court identified permissible state prayer practices, it cited to a survey of all fifty states explaining that legislative prayers may be led by various individuals, including lawmakers. *See Marsh*, 463 U.S. at 789 n.11. The survey specifically identified "chaplains, guest clergymen, *legislators*, and legislative staff members" as examples of prayer-givers. *See Brief of National Conference of State Legislatures as Amicus Curiae*, Marsh, 463 U.S. at 789 n.11 (emphasis added) ("All bodies . . . honor requests from individual legislators either to give the opening prayer or to invite a constituent minister to conduct the prayer."). This explicit reference to lawmaker-led prayer as an example of a permissible prayer practice highlights this Court's understanding that lawmaker-led prayer is a part of this nation's history.

Moreover, the Board's prayer practice serves the legitimate purpose of allowing lawmakers to express their personal values through prayer. In *Town of Greece*, this Court specifically noted that legislative prayer reflects the values town board members hold as private citizens. 134 S. Ct. at 1826. Prayer is an opportunity for lawmakers—the exact type of prayer-giver at issue in this case—to show "who and what they are." *Id.* (finding that prayers serve "largely to accommodate the spiritual needs of lawmakers and connect them to a tradition dating

to the time of the Framers"). Regardless of whether prayers are delivered by lawmakers or by hired third parties such as chaplains, the prayers serve the same purpose of accommodating the needs of lawmakers by expressing their personal values. In fact, when the lawmakers lead prayers themselves, they are in the best position to show "who and what they are." Because legislative prayer is principally for the benefit of legislators themselves, it stands that members of the Board in their capacity as lawmakers should be able to lead prayers.

3. This Court Approved the Other Pertinent Aspects of the Board's Practice

Not only are the Board members permissible prayer-givers, but all other relevant features of the prayer practice fit within the historical framework of *Marsh* and *Town of Greece*. First, the Board's practice had a proper theme and purpose. Second, the Board's prayers contained permissible sectarian references. Finally, the Board maintained a non-discriminatory practice. Therefore, the prayer practice in its entirety did not violate the Establishment Clause.

a. The Board's Prayers Had a Proper Theme and Purpose

The language of the Board's prayer practice as a whole comports with the constitutional requirements of the Establishment Clause. Legislative prayer need not be devoid of sectarian content to remain constitutionally sound. *Id.* at 1820–24. When prayers involve universal themes, such as a "spirit of cooperation," the prayers fall within the tradition this Court has long recognized. *See id.* at 1824 (cautioning only against prayer practices which, over time, clearly demonstrate that the invocations "denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion"). The prayers here, as in *Town of Greece*, involved universal themes such as peace and togetherness, calling for a "spirit of unity despite whatever differences we have." J.A. at 9. Further, a majority of the invocations explicitly preached inclusivity and unity, "no matter what religion, faith, or lack thereof." J.A. at 9. The Board's prayer practice in

its entirety thus falls within the bounds of the Establishment Clause because its content is compatible with the themes that this Court expressly affirmed in *Town of Greece*.

Further, the prayers' language also reflects the legitimate purpose of solemnizing public business. Sectarian prayer is constitutional when it eases the task of governing by setting lawmakers' minds to a higher purpose. *See Town of Greece*, 134 S. Ct. at 1818 (noting prayer in a public business setting "reminds lawmakers to transcend petty differences in pursuit of a higher purpose and expresses a common aspiration to a just and peaceful society"); *see also Lynch*, 465 U.S. at 693 (finding government acknowledgments of religion are permissible when they serve to solemnize public business, express confidence in the future, and encourage the recognition of what is worthy of appreciation in society). In an intimate local setting comprised of townspeople whose families have likely grown up together, prayers that set lawmakers' minds to a higher purpose are especially important because they remind people of their shared experiences, thereby encouraging effective and unified governance. As confirmed by Chairman Koch, the Board designed the prayer to encourage quiet reflection and unity as a public body. *See* J.A. at 2. Further, the prayers explicitly asked for guidance in conducting business fairly and impartially to ease the task of governing. J.A. at 19. The language of the Board's prayers lent gravity to public business and expressed shared goals of a peaceful society, embodying and advancing the very purpose of prayer this Court has now affirmed twice in a local setting.

b. The Prayers Contained Permissible Sectarian References

The Board's references to Jesus and other Christian deities does not place the practice outside of history and tradition. Because this Court requires an inquiry into the language of the prayer as a whole, rather than into the subject of any single prayer, prayers with explicitly Christian phrases are permissible. *Town of Greece*, 134 S. Ct. at 1824; *see also Van Orden v.*

Perry, 545 U.S. 677, 688 n.8 (2005) (recognizing that the prayers in *Marsh* were "often explicitly Christian" and rejecting the view that this gave rise to an Establishment Clause violation). For example, this Court has accepted prayers which included overwhelmingly Christian themes, mentioning "the suffering and death . . . [of] Christ crucified," the "power of the cross," the "glorious resurrection," and a man's "redemption." *Marsh*, 463 U.S. at 823 n.2 (Stevens, J., dissenting). This Court has similarly accepted prayers which gave praised the "Lord, God of all creation," and "the saving sacrifice of Jesus Christ on the cross." *Town of Greece*, 134 S. Ct. at 1816. Therefore, despite the Board's references to the "Almighty God," "Heavenly Father," and "his son Jesus Christ," the Board's prayer practice as a whole fits within the nation's tradition of legislative prayer. J.A. at 9, 18–19.

Furthermore, requiring legislatures to regulate prayer would entwine the government even further with religion, exactly what the Establishment Clause sought to prevent. If a legislature meticulously examines every prayer to mandate its neutrality, there would be greater government entanglement with religion than simply reciting a sectarian prayer. *See Town of Greece*, 134 S. Ct. at 1814 (noting that regulating prayer would force legislatures and courts to "act as supervisors and censors of religious speech, thus involving government in religious matters to a far greater degree than the town's current practice"). To hold that this particular prayer practice violates the First Amendment because of its "direct references to the Christian Deity," J.A. at 23, would force future legislatures seeking prayer-givers, as well as courts deciding cases about those prayers, to impermissibly comb through every word of a potential prayer. Requiring such censorship would have dangerous and far-reaching implications on public officials of all religious convictions, blurring the boundary even further between church and state.

c. The Board Maintained a Non-Discriminatory Practice

The Board's prayer practice conforms with the constitutional requirement that members must be free to pray as their conscience dictates. Once the government invites prayer into the public sphere, it must permit prayer-givers to address their own God or gods as their "conscience dictates." *Town of Greece*, 134 S. Ct. at 1822; *see also Lee v. Weisman*, 505 U.S. 577, 580, 588 (1992) (invalidating a prayer practice where the government curated the religious message by advising a Rabbi on acceptable content and providing him with a pamphlet of guidelines before his invocation). Board member Alvania Lee stated that "[her] prayers have referenced [her] specific religious faith, which is Methodist," highlighting that prayer-givers may pray to their own God in any manner they choose. J.A at 3. The Board thus properly removed itself from the prayer-selection process by allowing each of its members to pray according to their own conscience.

Further, the fact that the Board is composed of all Christian members is not dispositive in an Establishment Clause analysis. A policy that inadvertently results in only one represented religion does not violate the Establishment Clause as long as there is no discriminatory intent in selecting the prayer-giver. *See Town of Greece*, 134 S. Ct. at 1831 (upholding a prayer practice where the prayer-givers were overwhelmingly Christian because there was no discriminatory intent); *Marsh*, 463 U.S. at 793–94 (finding that the consistent reappointment of a chaplain from one faith did not violate the Establishment Clause because there was no impermissible motive behind his appointment). The Board members, each from a different sect of Christianity, pray according to their own religious affiliation. *See* J.A. at 3. The Board's policy of allowing any of its members to lead prayer according to their own faiths is neutral and non-discriminatory. Therefore, this practice remains within the constitutional bounds of the Establishment Clause.

B. The Thirteenth Circuit Misapplied *Lund v. Rowan County*

The Thirteenth Circuit misapplied the Fourth Circuit's holding in *Lund v. Rowan County* to find that lawmaker-led prayer is unconstitutional. *Lund* requires an examination into the prayer practice as a whole rather than focusing on any single feature. The Thirteenth Circuit thus improperly cut its analysis short by fixating solely on the prayer-giver's identity. Examining the totality of the Board's practice under the full *Lund* analysis, the Board's peaceful and respectful lawmaker-led prayers are constitutional. Moreover, the Thirteenth Circuit ignored that *Lund* actually supports the proposition that lawmakers better serve the purpose of lending gravity to public business when they lead prayer themselves. Finally, the Thirteenth Circuit erred by using *Lund* as a vehicle to reach *Lemon* because *Lund* itself avoids the much-maligned *Lemon* test.

1. The Thirteenth Circuit Failed to Consider the Totality of the Board's Prayer Practice and Ignored the Fourth Circuit's Finding that Lawmakers Are Better Suited to Lead Legislative Prayer

The Thirteenth Circuit erred by narrowly interpreting *Lund* to support its contention that the legislature was "inextricably intertwine[d]" with religion simply because the Board members led the prayer. J.A. at 21. The *Lund* court specifically noted, "[w]e would not for a moment cast all legislator-led prayer as constitutionally suspect," rather, "the constitutionality of a particular government's [lawmaker-led prayer] approach ultimately will depend on other aspects of the prayer practice." *Lund*, 863 F.3d at 279–80. The Thirteenth Circuit thus improperly relied on *Lund* to support its blanket conclusion that lawmaker-led prayer is inherently problematic. J.A. at 20–21. To the contrary, *Lund* explicitly rejected an analysis that focuses solely on the identity of the prayer-giver and fails to consider all aspects of the prayer practice. *See Lund*, 863 F.3d at 279–80. Therefore, if this Court decides to follow the framework set out in *Lund*, the Court must

consider the totality of the Board's prayer practice and reject the Thirteenth Circuit's limited analysis.

Under the proper *Lund* analysis, the totality of the Board's solemn and respectful prayer practice is constitutional. The practice in *Lund* violated the Establishment Clause, not because the prayer was lawmaker-led, but because the totality of those prayers improperly advanced and promoted religion. In *Lund*, the prayers improperly advanced religion by advocating for the public body to believe in Jesus. *See id.* at 273 ("Father I pray that . . . *the world may believe* that you sent Jesus to save us from our sins." (quoting prayer of Oct. 5, 2009) (emphasis added)). The prayers also included proselytizing statements that explicitly placed Christianity above other faiths. *See id.* ("[A]s we pick up the Cross, we will proclaim His name *above all names*, as the only way to eternal life." (quoting prayer of Mar. 5, 2012) (emphasis added)). The Board's prayers here made no such efforts to place Christianity above other faiths or pressure the audience to convert to their faith. Unlike the deliberately proselytizing prayers in *Lund*, the language of the Board's prayers was solemn and respectful. *See supra* Part I.A.2.a–b. Further, the prayers effectuated the Board's intent of lending gravity to public business and promoting inclusiveness and unity. *See id*. Therefore, viewing the prayer-giver's identity as a Board member within the context of the entire practice as required by *Lund*, the Board's practice does not run afoul of the Establishment Clause.

The Thirteenth Circuit further overlooked the Fourth Circuit's contention that lawmakers are in a better position to advance the purpose of legislative prayer than other religious figures. *Lund* acknowledged that not only does the Establishment Clause "allow[] lawmakers to deliver invocations in appropriate circumstances," but in fact, the solemnizing effect of prayer is "heightened when [lawmakers] personally utter the prayer." *Lund*, 863 F.3d at 279–80. As

discussed, the Board's lawmaker-led prayer practice has the appropriate purpose and themes set out by this Court: lending gravity to public business and promoting inclusiveness and unity. *See supra* Part I.A.2.a. The Thirteenth Circuit's blatant misinterpretation is apparent from a review of *Lund* and the Fourth Circuit's express recognition of the benefits of lawmaker-led prayer.

2. *Lund* Is Not a Vehicle to Reach the Disfavored *Lemon* Test

The Thirteenth Circuit should never have used the holding in *Lund* as a vehicle to reach the *Lemon* test because *Lund* ignores the *Lemon* test altogether. In fact, in its fifty-five-page opinion, the court does not even reference the *Lemon* test once, instead choosing to focus on the totality of the prayer practice. *Lund*, 863 F.3d at 268–323. By citing to *Lund* at all, the Thirteenth Circuit exploited the Fourth Circuit's holding to push its own *Lemon* agenda.

This Court disfavors any test that undermines longstanding tradition and "begin[s] anew the very divisions along religious lines that the Establishment Clause seeks to prevent." *Town of Greece*, 134 S. Ct. at 1819. The *Lemon* test does just that: it disregards the settled tradition of lawmaker-led prayer and ignores clear developments in the law for Establishment Clause cases. Moreover, this Court has consistently dismissed the "much-maligned" *Lemon* test as ineffective. *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *see, e.g.*, *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring) (comparing the *Lemon* test to a ghoul that "repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried"). By applying the *Lemon* test and ignoring this country's tradition of lawmaker-led prayer, the Thirteenth Circuit resurrected a settled Establishment Clause debate that this Court put to bed in *Marsh* and *Town of Greece*.

II. THE BOARD'S PRACTICE DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE BECAUSE THE PRAYERS HAD A SECULAR PURPOSE AND DID NOT COERCE RELIGIOUS MINORITIES

This Court opens its proceedings with the proclamation "God save the United States and this honorable Court." Reasonable observers understand that the purpose of this invocation is to lend gravity to this Court's proceedings, not to coerce parties to join Christianity under threat of law. Similarly, many local town boards choose to begin their proceedings with short prayers. Reasonable townspeople understand that these prayers mention Christian themes because America is traditionally a Christian country, not because the town board seeks to convert its citizens. Of course, legislative prayers must not proselytize because the First Amendment prohibits the government from coercing citizens to exercise or join a particular faith. *See Town of Greece*, 134 S. Ct. at 1825. But when invocations are short, respectful, and designed to lend gravity to a governing mission, as the Board's prayers were here, those practices are non-coercive and thus constitutionally sound. The Board's prayers are part of the rich American tradition of beginning public proceedings with references to religion. They exerted no coercive pressure on Respondent who already possessed strong opinions about Christianity. J.A. at 1.

The Board's prayer practice does not violate the First Amendment because it did not impermissibly endorse religion or coerce Respondent to engage in religious worship. First, the proper approach for evaluating lawmaker-led prayer is a coercion analysis. Second, the Board's prayer practice is constitutional under both coercion tests in *Town of Greece* because Respondent was neither threatened with legal sanctions for nonparticipation, nor subjected to coercive social pressure. Third, even if this Court chooses to apply *Lemon*, the Board's prayer practice did not improperly endorse religion. Thus, the Board's prayer practice does not run afoul of the Establishment Clause.

A. The Proper Approach for Evaluating Lawmaker-Led Prayer is a Coercion Analysis, Not the *Lemon* Test

This Court should focus on coercion and abandon the *Lemon* test because *Lemon* presents an unworkable framework that leads to inconsistent results. *See, e.g.*, *Lamb's Chapel*, 508 U.S. at 399 (Scalia, J., concurring) ("I agree with the long list of constitutional scholars who have criticized *Lemon* and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced."); *Wallace v. Jaffree*, 472 U.S. 38, 110 (1985) (Rehnquist, J., dissenting) ("[T]he *Lemon* test has caused this Court to fracture into unworkable . . . opinions."). Accordingly, this Court should heed decades of warnings and finally recognize *Lemon* as the lemon it is.

The *Lemon* test is particularly inappropriate in legislative prayer cases where this Court has already decidedly abandoned it. *See* Karthik Ravishankar, The Establishment Clause's Hydra: The Lemon Test in the Circuit Courts, 41 DAYTON L. REV. 261, 266 (2016). Even Chief Justice Burger, who authored *Lemon*, decided to forego his own *Lemon* analysis in the legislative prayer context. *See Marsh*, 463 U.S. at 785–97. This Court reaffirmed *Marsh*'s approach in *Town of Greece* and once again deliberately did not apply *Lemon*. *See generally*, *Town of Greece*, 134 S. Ct. 1811. Further, in two recent *en banc* circuit cases featuring lawmaker-led prayer, neither the Fourth nor the Sixth Circuits applied *Lemon*. *See Lund*, 863 F.3d at 275–76; *Bormuth*, 870 F.3d at 514–15 (contemplating a *Lemon* analysis similar to the Thirteenth Circuit's, but rejecting the approach as contrary to thirty years of Supreme Court precedent). Justice Rodriguez's concurrence also correctly acknowledged that coercion, not *Lemon*, was the proper analysis. J.A. at 24. Thus, this Court should not sour at tossing a rotten *Lemon*; instead, it

should conduct a *Town of Greece* coercion analysis[1] to evaluate the Board's prayer practice.

B. The Board's Prayer Practice Does Not Violate the Establishment Clause under Either Coercion Analysis

The Board's prayer practice did not coerce Respondent through legal compulsion or unreasonable social pressures. In *Town of Greece*, there was no controlling opinion on the issue of coercion. Rather, Justice Kennedy and Justice Thomas introduced two distinct tests for evaluating coercion in Establishment Clause cases. This Court should adopt Justice Thomas's "actual legal coercion" test because it is more faithful to the Constitution, easier to apply, and the narrowest holding. The Board's practice easily passes this test because the Board did not coerce Respondent by force of law or threat of penalty. Further, the Board's practice is also constitutional under Justice Kennedy's "indirect social coercion" test because neither the local government setting nor the makeup of the audience rendered the practice coercive. Thus, under either coercion analysis, the Board's practice does not violate the First Amendment.

1. The Board's Practice Is Constitutional under the Controlling "Actual Legal Coercion" Test

This Court should adopt the test from Justice Thomas's concurring opinion in *Town of Greece*. Under this standard, the Board's prayer practice is constitutional because Respondent was not forced to participate in the prayers by force of law or threat of legal penalty.

[1] Justice Kennedy first articulated a coercion analysis in his concurrence in *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 659–60 (1989). In that same case, Justice Kennedy warns of the dangers that a vague *Lemon* analysis poses. *See id.* Only three years later, this Court agreed and adopted a coercion analysis, finding that coercion is the touchstone of an Establishment Clause violation. *See generally Lee*, 505 U.S. 577. The coercion analysis has since been used for Establishment Clause cases in the legislative prayer context. *See Town of Greece*, 134 S. Ct. 1811; *see also* Ravishankar, *supra* at 266.

a. The "Actual Legal Coercion" Test Is More Faithful to the Constitution, Easier to Apply, and the Narrowest Holding

Justice Thomas's "actual legal coercion" test from *Town of Greece* controls on the issue of coercion because it is the most faithful to the Constitution. The framers of the Fourteenth Amendment did not equate coercion with social peer pressure; rather, they understood coercion as legal compulsion. *See Town of Greece*, 134 S. Ct. at 1838 ("The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy . . . *by force of law and threat of penalty*.") (emphasis in original) (citation omitted). Mandatory attendance at state-established churches and taxes used to fund church projects are examples of coercion that amount to historical government establishments. *Id.* at 1837. Justice Thomas's test formalizes this understanding and makes "force of law and threat of penalty" the basis for Establishment Clause violations. As such, the "actual legal coercion" test is most faithful to the Constitution, and this Court should adopt it as the proper coercion analysis.

The "actual legal coercion" test is also easier for courts to apply in practice. A coercion test delineated by "force of law and threat of penalty" is easier for lower courts to implement because it provides a clear standard that avoids judicial bias. *Lee*, 505 U.S. at 640–42 (Scalia, J., dissenting). An ambiguous test that relies on "psychology practiced by amateurs," like Justice Kennedy's, is inherently problematic because it inevitably leads judges to impart their biases. *Id.* at 636, 640. To avoid this infinitely squishy standard, this Court should adopt the "actual legal coercion" test. It provides concrete guidance for an Establishment Clause violation, avoiding judicial biases and inconsistent results.

Moreover, when no single rationale of a decision garners majority support, the controlling holding is the position taken by the justices who concurred on the narrowest grounds. *See Marks v. United States*, 430 U.S. 188, 193 (1977). Courts interpret "narrowest

grounds" as the "least common denominator" upon which a majority of justices can agree. *See United States v. Eckford*, 910 F.2d 216, 219 n.8 (5th Cir. 1990). Justice Kennedy applies a broader and more discretionary coercion test that focuses on social factors like peer pressure. *Town of Greece*, 134 S. Ct. at 1825. On the contrary, Justice Thomas uses a narrower coercion analysis that considers only whether the government uses "force of law and threat of penalty" to compel religious exercises. *Id.* at 1837–38 (Thomas, J., concurring). Because Justice Thomas's standard is narrower, his opinion should control on the issue of coercion.

b. The Board's Practice Is Not Coercive under the "Actual Legal Coercion" Test Because Respondent Was Not Compelled by Force of Law

There is no legal coercion under Justice Thomas's test. Respondent was not compelled by law to participate in the prayers, nor was she threatened with penalties for noncompliance. To violate the Establishment Clause, the compulsion must be legal rather than psychological. *Id.* The record, however, contains no evidence that Board members threatened Respondent with legal sanctions if she failed to participate in the opening prayer. Similarly, nothing in the record suggests that the Board used, attempted to use, or threatened to use force to proselytize Respondent. Therefore, under the test most faithful to the framers of the Fourteenth Amendment, the Board did not violate the Establishment Clause.

2. The Board's Practice Does Not Violate the Establishment Clause Even If This Court Adopts the "Indirect Social Coercion" Test

The "indirect social coercion" test looks to both the setting in which the prayer arises and the audience to whom the prayer is read to determine whether a practice violates the Establishment Clause. *See id.* at 1825. Here, the local setting of the Board's prayers was not coercive and the makeup of the audience did not create undue coercive pressure. Thus, there is no Establishment Clause violation under Justice Kennedy's coercion analysis.

a. The Setting of the Board's Prayer Was Not Coercive

The Board's local government setting is distinguishable from settings that involve a heightened risk of coercion. For example, the custodial nature of a school setting renders it inherently coercive. *See Lee*, 505 U.S. at 592–93. By contrast, local government meetings are not automatically coercive. *See Town of Greece*, 134 S. Ct. at 1825–27. Recognizing this distinction, the "indirect social coercion" test requires a fact-intensive analysis to determine whether other indicia of coercion are present. *Id.* at 1825. Here, the setting of the Board meeting was not inherently coercive and did not feature other indicia of coercion.

i. The Board's Local Government Setting Was Not Inherently Coercive

The Board meetings were free from the inherently coercive custodial aspects of school settings. The custodial nature of the school setting increases the risk of indirect coercion. *See Lee*, 505 U.S. at 592, 597. School administrators exert substantial control over movements, dress, and decorum at school events. *Id*. at 596–97; s*ee Santa Fe Independent Sch. Dist. v. Doe*, 530 U.S. 290, 311–12 (2000) (finding opening prayer at high school football games violated the Establishment Clause because coaches and school officials control all students' decorum). The Board meeting was not held in a school setting. Further, there is no indication that any Board member could have prevented Respondent from entering the meeting late or leaving the room during the prayer. J.A. at 1–6. Therefore, the Board's setting lacked the custodial aspects that distinguish school prayer cases like *Lee* and *Santa Fe*.

Moreover, local government settings are not inherently more coercive than other legislative sessions. This Court in *Town of Greece* established that coercive impact is not automatically heightened at board meetings where members and attendees know each other personally. *See Town of Greece*, 134 S. Ct. at 1824–25; *see also Bormuth*, 870 F.3d at 516

(applying *Town of Greece* to find that prayers at local meetings are no more coercive than at other legislative sessions). There is no indication that the local setting of the Board's meeting heightened any potential coercive impact on Respondent. Accordingly, there is no basis for viewing the Board's local government setting as inherently coercive.

ii. The Setting of the Board Meeting Did Not Feature Any Other Indicia of Coercion

Applying the fact-intensive analysis to the setting here, nearly all of the factors weigh against coercion. Indicia of coercion include whether: (1) citizens are free to skip the prayer or otherwise protest, (2) dissidents are singled out and excluded, and (3) board decisions appear influenced by a citizen's acquiescence in the opening prayer. *See Town of Greece*, 134 S. Ct. at 1824–26. First, the record contains no instances of protest; rather, it appears that protest would be tolerated because the Board "represent[s] all citizens from the religiously devout to the fiercely atheistic." J.A. at 2. Second, the Board members never singled out Respondent or criticized her religious beliefs during the prayer. Third, Board members submitted affidavits affirming that the Board does not consider the religious faith of any citizen when making decisions. J.A. at 4, 6. Analyzing these facts under Justice Kennedy's approach in *Town of Greece*, the setting of the Board's prayers is not coercive.

b. Respondent Did Not Experience Undue Coercive Pressure as a Member of the Audience

Respondent did not experience undue coercive pressure while attending Board meetings under a fact-intensive analysis for audience. First, Respondent is an adult, and adults are presumably not susceptible to coercion. Second, Respondent's feelings of distress do not indicate coercion. Third, the Board's prayers were addressed to the Board members themselves and not intended to induce religious conversion. Fourth, the Board members' polite invitations

for the audience to participate in prayers did not coerce Respondent. Finally, neither the permit denial nor member Lawley's alleged comment coerced Respondent into religious exercises.

i. Respondent Is an Adult and Not Susceptible to Coercion

The legislative prayer at issue here is further distinguishable from the unique nature of the school prayer cases because adolescents are much more susceptible to social pressures. There is a heightened risk of coercion when impressionable children are present because they may perceive prayers as an attempt to enforce religious orthodoxy. *See Lee*, 505 U.S. at 592–93. It is presumed, however, that mature adults are safe from religious indoctrination or peer pressure to participate in prayer. *Town of Greece*, 134 S. Ct. at 1827; *see also Marsh*, 463 U.S. at 783, 792. Respondent is an adult and claims to be "familiar with Christianity and the lack of tolerance of many Christians in [her] community for outside religions." J.A. at 1. Because Respondent is an adult, it is unlikely that she is susceptible to religious coercive pressure at the Board meetings. Respondent knows exactly what Christianity is and she is deliberately not a believer.

ii. Respondent's Feelings of Distress Are Not Evidence of Coercion

Respondent's feelings of distress at hearing the opening prayers are not evidence of coercion. Even if an individual finds speech offensive or antithetical to her worldview, that does not mean the speech was coercive. *See Town of Greece*, 134 S. Ct. at 1826–27 (finding that legislative bodies merely exposing adults to invocations they would rather not hear does not amount to coercion). Because Respondent associated the opening prayers with her negative childhood experiences with Christianity, she felt discomfort when she heard the prayers at the Board meeting. J.A. at 1. Nevertheless, Respondent's discomfort is not evidence of coercion because personal feelings have no bearing on this constitutional analysis.

iii. The Prayers Were an Internal Act and Thus Did Not Induce Religious Conversion

The Board's prayers were directed at the other Board members and were not meant to induce religious conversion. When lawmakers lead opening prayers, it is done as an "internal act;" prayers are addressed to other lawmakers to ease the task of governing, not to convert the public to a state-endorsed religion. *See Town of Greece*, 134 S. Ct. at 1825–26 (finding that part-time local lawmakers, in particular, benefit from internal prayers). Here, the language of the prayers confirms that the members sought help in the task of governing—for example, "we ask for your guidance as we conduct the public's business and serve all people," "we need your spirit watching over us as we conduct the public's work," and "help us to make good decisions." J.A. at 18–19. This language indicates that the practice is not coercive because the prayers are directed at the Board's other part-time members and not at the public.

iv. The Board's Invitation to Pray Was Not Coercive

Board members inviting citizens to participate in the prayers was not coercive. When a prayer-giver requests audience participation before reciting the prayer, courts interpret this as a polite invitation rather than a formal mandate. *See Town of Greece*, 134 S. Ct. at 1826 (finding no coercion in the practice of guest ministers asking audience members to rise or bow their heads in prayer); *see also Bormuth*, 870 F.3d at 498, 517 (finding no coercion where public officials make polite requests to "please bow your heads" at the beginning of prayers). Here, only one prayer began by inviting attendees to "[p]lease bow your heads." J.A. at 9. Another began with a secular request: "[m]ay we reflect on the awful violence and mass shootings in this country." J.A. at 9. Thus, the Board did not coerce citizens by beginning prayers with polite invitations to participate.

v. Neither Member Lawley's Comment nor Respondent's Rejected Permit Indicate a Pattern of Coercion

Member Lawley's allegedly hostile comment to Respondent was an isolated incident, not part of a pattern of coercion. Isolated personal confrontations do not amount to government-sponsored coercion. *See Bormuth*, 970 F.3d at 517–18 (declining to find a coercive effect where two Board members turned their backs on Appellant, a Wiccan practitioner, while he protested a local board's prayer practice). When Respondent complained about the prayers, member Lawley allegedly responded that "this is a Christian country, get over it." J.A. at 6. Regardless of whether member Lawley made this comment, it should be viewed as a Board member expressing his personal beliefs rather than as part of a pattern of government coercion.

Moreover, there is no evidence that Respondent's complaint about the prayer disadvantaged her permit appeal to the Board. Courts do not find prejudice in local government decisions when there is no evidentiary support for discrimination. *See Town of Greece*, 134 S. Ct. at 1826; *Bormuth*, 870 F.3d at 518–19 (rejecting a discrimination claim where Appellant offered no evidence that the adverse judgment was motivated by religious bias). Here, member Lawley affirmed that he never judged Respondent on the basis of her religious affiliation. J.A. at 6. Further, the Thirteenth Circuit explicitly noted that Respondent's religion had no bearing on the denial of her permit appeal. J.A. at 18 n.2. This Court need not engage in a discrimination analysis because there is no evidence of prejudice against Respondent.

C. The Board's Prayer Practice Does Not Violate the Establishment Clause Even If This Court Applies the *Lemon* Test

Although the *Lemon* test should be abandoned, the Board's prayer practice does not violate any of its three prongs. The *Lemon* test requires that the government action: (1) have a secular purpose, (2) not endorse religion, and (3) not create excessive government entanglement

with religion. *See Lemon*, 403 U.S. at 612; *see also Lynch*, 465 U.S. at 688 (O'Connor, J., concurring) (refining *Lemon*'s second prong as an endorsement test). First, the Thirteenth Circuit properly found that the Board's prayers had the secular purpose of solemnizing public business. Second, the Thirteenth Circuit erred in finding endorsement because the Board's sectarian prayers do not endorse religion under the appropriate reasonable person standard as articulated in *Town of Greece*. Third, the Board's practice did not excessively entangle government with religion because the prayers derived from the Board members' personal beliefs, rather than from a state-sponsored message. Thus, the Board's practice is constitutional under a correct *Lemon* analysis.

1. The Board's Practice Had a Secular Purpose of Solemnizing Public Business

The Thirteenth Circuit properly found that the Board's prayer practice did not violate *Lemon*'s first prong. J.A. at 22. Secular purposes offered by government officials are entitled to deference unless the proffered purpose is clearly a sham. *Santa Fe Independent Sch. Dist.*, 530 U.S. at 308. Chairman Koch offered a secular purpose, stating the intent of the prayers was to solemnize public business. J.A. at 2. Member John Riley echoed this purpose, stating the prayers were an attempt to lend gravity to the proceedings. J.A. at 4. Even Respondent did not assert that solemnizing public business was a sham purpose. J.A. at 1. As the Thirteenth Circuit correctly established, the practice had a secular purpose and thus survives *Lemon*'s first prong.

2. The Board's Practice Did Not Endorse Religion

The Thirteenth Circuit applied the wrong reasonable person standard in conducting their endorsement analysis. This Court has established that the reasonable person presumes the purpose of legislative prayer is to solemnize public business, not to promote religion. *See Town of Greece*, 134 S. Ct. at 1814 ("[T]he reasonable observer . . . understands that [the purpose of

prayer is] to lend gravity to public proceedings . . . not to afford government an opportunity to proselytize or force truant constituents into the pews."). In stark contrast, the Thirteenth Circuit assumed that a reasonable person would interpret sectarian prayers as government endorsements of religion. *See* J.A. at 23 ("It would be hard given the exclusively Christian nature of the prayers for a reasonable person not to believe that the government was advancing religion."). However, this Court has already established that sectarian prayers are permissible. *See Town of Greece*, 134 S. Ct. at 1820. Therefore, this Court should disregard the Thirteenth Circuit's reasonable person standard because it improperly assumes that sectarian references automatically amount to endorsements of religion.

Moreover, the Board's prayer practice did not endorse religion because the prayers were short, solemn, and respectful. The presumption that a prayer's purpose is to solemnize public business can be rebutted, but only if the "pattern of prayers over time" chastises nonbelievers or subjects them to long recitations of religious dogmas. *See Town of Greece*, 134 S. Ct. at 1821–22 (finding endorsement only when prayers are used to preach conversion, threaten damnation, proselytize, advance, or disparage any faith or belief). In this case, the Board's prayers were short and never singled out nonbelievers. J.A. at 9. They contained solemnizing messages like "[w]e pray that we can all come together in a spirit of unity," and "[m]ay you guide us to preside fairly and impartially." J.A. at 9. In fact, one prayer explicitly affirmed the Board's commitment to "serve all people—no matter what religion, faith, or lack thereof." J.A. at 9. Thus, the Board's prayer practice did not endorse religion in the eyes of a reasonable person because the "pattern of prayers over time" was both solemn and respectful.

3. The Board's Practice Did Not Excessively Entangle Church and State

Although the Thirteen Circuit's analysis did not reach *Lemon*'s third prong, there is no excessive entanglement because the Board members' prayers are derived from their personal views rather than a curated state message. The logic of entanglement does not hinge on who the speaker is, but rather on the nature and degree of the government involvement with the religious activity. *See, e.g.*, *Bogen v. Doty*, 598 F.2d 1110, 1111 (8th Cir. 1979) (noting that the entanglement test is necessarily a question of degree); *see also Lee*, 505 U.S. at 587–88 (finding an unconstitutional degree of government involvement where a state actor personally chose the speaker and controlled the religious message). The Board members here offered prayers reflecting their individual faiths, and there is no evidence that the Board curated their members' prayers to present a state-sponsored religious message. J.A. at 1–6; *cf. Engle v. Vital*, 370 U.S. 421 (1962) (finding excessive entanglement where the State of New York drafted a prayer and required it to be read at public schools). Accordingly, the Board's lawmaker-led prayer practice did not excessively entangle the state with religion because the prayer-givers independently structured their invocations without any government influence.

This Court has squeezed *Lemon* for all it is worth. But ultimately, under any test, the Board's prayer practice remains as constitutional today as lawmaker-led prayer was on the day the Founders ratified the First Amendment.

CONCLUSION

For the foregoing reasons, the judgment of the Thirteenth Circuit should be reversed.

Respectfully submitted,

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