Docket 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 RESPONDENT**

**Team 2502**
Counsel for Respondent

## QUESTIONS PRESENTED

I. Does the Hendersonville Board comport with what this Court has authorized as constitutionally permissible legislative prayer when the invocations are given by a board member instead of a chaplain, represent only a single faith, and when the government itself is responsible for the prayers' content?

II. Does the Board's practice of government-led prayer violate the Establishment Clause when analyzed under *Lemon*, where the invocations are non-secular, clearly promote the Christian religion as the preferred faith, thereby excluding and coercing non-adherents, all while simultaneously entangling the state with religion?

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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

Frequently, Barbara Pintok ("Ms. Pintok") enters her local community center nestled in the heart of her hometown, Hendersonville, Caldon, for the monthly meeting of the Hendersonville Parks and Recreation Board ("the Board"). J.A. at 1. At the direction of the Board, Ms. Pintok, sitting amongst the crowd of her fellow community members, rises and recites the Pledge of Allegiance, then bows her head and listens to a prayer led by one of the Board's five Christian members. J.A. at 18. While short, the invocation directly references the Christian Deity and reminds the community members to strive to conduct their business in a manner "consistent with the careful hand of the Father and his son Jesus Christ." J.A. at 18-19. Although this routine has become familiar to those in attendance, Ms. Pintok, a devout follower of the pagan religion known as Wicca, feels only isolation, humiliation, intimidation, and excruciating distress. J.A. at 1, 19.

The Board's work delves into nearly every aspect of the local government and community. J.A. at 18. This includes hearing matters involving cultural arts, greenways, golf courses, historic sites, permit rentals and reservations, and outdoor recreation. *Id*. Once a month, the Board meets to lead a public hearing regarding these various issues, including conducting a review of permit denials. *Id*.

Indeed, this was the sole purpose of Ms. Pintok's appearances at these meetings: She wanted to operate a paddleboat company on a local lake. *Id*. However, Ms. Pintok's permit was denied, so she sought to appear in front of the Board to appeal. *Id*. Due to the strong feeling of intimidation stemming from the clearly Christian nature of the Board, Ms. Pintok was so distraught and nervous that she was unable to enunciate her words properly during this very important appeal

process. J.A. at 1. In fact, hearing these pointed prayers brought back traumatic memories of when Ms. Pintok had to attend Christian church during her youth. *Id*.

Acting as an extension of the local government, The Board consists of five members. J.A. at 18. Every single one openly practices and believes in the Christian faith. *Id*. At each monthly meeting, it is one of these five members of the government Board who delivers the contentious prayers in question. *Id*. These invocations always reference the Christian Deity in one of several ways: "Almighty God," "Heavenly Father," "Lord," or "Jesus Christ." J.A. at 18-19. More troubling, while the Board contends via sworn affidavit they are not attempting to "endorse the Christian faith" or "coerce religious conformity," they nonetheless preach that:

> We are all sinful but as the book of Isaiah reads, though our sins are like scarlet, they shall be as white as snow. We all fall short of the glory of God. We must strive to conduct our business in a way consistent with the careful hand of the Father and His son Jesus Christ.

J.A. at 5-6, 19.

While presented as a chance for the government to reflect and solemnize its business, this purportedly time-honored tradition does nothing but remind non-Christian community members that the Board does not share their beliefs. J.A. at 19. Despite the Board openly recognizing that Hendersonville is a community with a broad spectrum of "citizens from the religiously devout to the fiercely atheistic," its prayers are not reflective of this diverse continuum. J.A. at 2. Moreover, when Ms. Pintok bravely confronted one of the Board's members about her distaste and discomfort caused by the purely Christian nature of the prayers, she was abruptly told "this is a Christian country, get over it." J.A. at 1. Receiving no support and only unprofessional backlash from the members of the Board, Ms. Pintok felt trapped and like a complete outsider in the town she has always known to be home. J.A. at 19.

**Summary of the Proceedings**

Seeing that the Board would not change its unconstitutional practice on its own, Ms. Pintok filed suit seeking declaratory and injunctive relief, as well as a preliminary injunction against the Board's use of sectarian prayer at its meetings. J.A. at 10. The Board submitted affidavits from Board its members and Ms. Pintok submitted an affidavit as well. *Id*. Both parties then filed cross-motions for summary judgment. *Id*.

On September 15, 2017, the United States District Court for the District of Caldon denied Ms. Pintok's motion and granted summary judgment in favor of the Board. J.A. at 15. The District Court found that the Board's use of sectarian prayer before its meetings comported with the longstanding history and tradition of legislative prayer that exists in this country. J.A. at 7. Ms. Pintok appealed, and on January 4, 2018, the United Stated Court of Appeals for the Thirteenth Circuit reversed the grant of summary judgment in favor of the Board and remanded the case to the District Court with instruction to enter summary judgment for Ms. Pintok. J.A. at 24. The Circuit Court found that the Board's practice did not comport with the history and tradition of legislative prayer upheld in *Town of Greece* and *Marsh* because the benedictions endorsed Christianity and the practice violated the Establishment Clause. J.A. at 17, 24.

**Standard of Review**

*De novo* is the standard of review for conclusions of law or mixed fact and law. *United States v. Moore*, 968 F.2d 216, 221 (2d Cir. 1992). This Court may therefore review the present issues of constitutional law using a *de novo* standard of review. *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 599, 134 S. Ct. 1744, 1748 (2014) (questions of law receive *de novo* review); *see also Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1029 (10th Cir. 2008).

## SUMMARY OF THE ARGUMENT

The practice of having a sitting member of a government board deliver a prayer before public meetings does not comport with the history and tradition of legislative invocations recognized by this Court. In both *Marsh* and *Town of Greece*, this Court found that there exists throughout the history of this country, a tradition of prayer in government bodies. These prayers have historically been given by a member of the clergy, invited or hired by the government body that wishes to hear a prayer, and are delivered to the government at the opening of its meetings. By having a member of the government body deliver the prayer, the Hendersonville Board moves outside of the realm of legislative prayer accepted by this Court and into a territory of religious entwinement that the Establishment Clause necessarily protects against. Furthermore, when the Board limits the legislative prayer opportunity to its own members, minority faiths are effectively excluded from sharing in this tradition. Likewise, when the Board itself delivers these invocations, it tightens a knot of government entanglement with religion that the Establishment Clause strictly forbids.

Because the Board's prayers do not properly conform to an analysis under the history and traditions perspective as defined by *Marsh* and *Town of Greece*, the appropriate constitutional assessment for this Establishment Clause issue is the *Lemon* test. The *Lemon* test mandates that the government's conduct: (1) has a secular purpose; (2) has a primary effect that neither advances nor inhibits religion; and (3) does not promote excessive government entanglement with religion.

In this case, the Board fails to meet its burden in regard to all three prongs of the *Lemon* test. First, the Board's prayers unmistakably do not have a secular purpose as they are all Christian in nature and solely seek to advance the practice of this particular faith. Next, these clearly religious invocations have the effect of exclusively promoting the Christian faith above all others since

every Board member is Christian and every prayer directly references the Christian Deity. Taken as a whole, these circumstances have the effect of producing a strong sense of government coercion and makes believers of all other religions feel like outsiders within the Hendersonville community. Finally, since the Board is unequivocally conveying a Christian message, it is violating the timeless sanctity of the Constitution by entangling government with religion.

## ARGUMENT

The Establishment Clause of the First Amendment states, "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. Determining the constitutionality of legislative prayer requires a "fact-sensitive" inquiry that considers "both the setting in which the prayer arises and the audience to whom it is directed." *Town of Greece v. Galloway*, 572 U.S. 565, 134 S. Ct. 1811, 1825 (2014). Legislative prayer that comports with history and tradition is not subjected to standard Establishment Clause tests. *Id*. at 1818. Without such history and tradition, the proper test to determine whether a government action is constitutional under the Establishment Clause is the *Lemon* test. *Lynch v. Donnelly,* 465 U.S. 668, 679 (1984).

This case presents a legislative prayer practice unlike any this Court has addressed before. Here, the government itself delivers sectarian prayers exclusive to the Christian faith. Because this Court is addressing a wholly distinct form of legislative prayer, the proper analysis asks: (1) whether the Board has a legitimate secular purpose behind its practice; (2) whether the invocations have the primary effect of neither advancing nor inhibiting religion, and; (3) whether the practice promotes excessive government entanglement with religion.

## I. THE HENDERSONVILLE BOARD'S PRACTICE OF OPENING ITS MEETINGS WITH A BOARD MEMBER-LED PRAYER DOES NOT COMPORT WITH THE HISTORY AND TRADITION OF LEGISLATIVE PRAYER RECOGNIZED BY THIS COURT IN *MARSH* AND *TOWN OF GREECE*.

Governmental bodies of all sizes and functions bear the burden of carrying out their work in the public's best interest, while acting in accordance with the Constitution. This Court has observed that this obligation has historically been solemnized by a prayer, delivered by an independent chaplain, and directed at government officials, rather than citizens. *Town of Greece*, 134 S. Ct. at 1818 ("[L]egislative prayer lends gravity to public business, reminds lawmakers to transcend petty differences in pursuit of a higher purpose, and expresses a common aspiration to a just and peaceful society."). History makes clear that legislative prayer has been a tradition within the United States government and all of its branches since before the founding of the republic. *Marsh v. Chambers*, 463 U.S. 783, 787 (1983). When these invocations are delivered by members of the clergy, they need not be void of all religious references to be constitutionally permissible. *Town of Greece*, 134 S. Ct. at 1821.

What history does not show, and what cannot possibly pass constitutional muster, is legislative prayer that is carried out by members of a government board, speaking in their official capacities, and directing citizens to participate in exclusively Christian invocations. Such a program was not implemented by the First Congress of the United States, and was not in contemplation of this Court when ruling on legislative prayer; thus, it cannot be said to be within the realm of acceptable legislative prayer. Further differentiating acceptable legislative prayer from government-led prayer is that the latter does not allow for the representation of minority faiths. When government board members themselves lead prayers, and maintain exclusive control over the content of the prayers, the professed religion is established as the preferred faith of the government. This is the exact discriminatory effect that the Establishment Clause was enacted to

protect against. On the other hand, legislative prayer that comports with the history and tradition of hiring or inviting clergy members of various faiths does not overstep these constitutional boundaries. Unfortunately, the government-led prayer practice carried out by the Hendersonville Board is not traditional legislative prayer and violates the Constitution. Therefore, the United States Court of Appeals for the Thirteenth Circuit correctly decided that the Board must be enjoined from continuing the practice of government-led prayer.

### A. This Court Has Not Recognized the Practice of Allowing Government Board Members Themselves to Deliver Prayers Before Public Meetings as Being Part of the History and Tradition of Legislative Prayer That Can Exist in Lawful Harmony with the Constitution.

The two most substantial sources of legislative prayer jurisprudence come from this Court's decisions in *Marsh* and *Town of Greece.* These two cases stand for the notion that the tradition of chaplain-led legislative prayer is so deeply entrenched in the history of this country, that formal tests for its compliance with the Establishment Clause are not needed. *Town of Greece*, 134 S. Ct. at 1818 ("The Court in *Marsh* found those tests unnecessary because history supported the conclusion that legislative invocations are compatible with the Establishment Clause."). These chaplain-led invocations do not violate the Constitution even when sectarian in content. *Id*. at 1817.

In *Marsh*, this Court upheld the Nebraska state legislature's practice of opening its sessions with a prayer offered by a chaplain. 463 U.S. at 795. The chaplain in this case was a Presbyterian minister paid from public funds for his service. *Id*. at 784-85. Feeling that the practice violated the protections of the Establishment Clause, Ernest Chambers, a member of the Nebraska legislature, brought suit under 42 U.S.C. § 1983. *Id*. at 785. Finding that "the opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country," this Court held that the Nebraska legislature's prayer program did not violate the Constitution. *Id*. at 786. This Court looked as far back as the First United States Congress to find

that the practice of hiring a minister was among the preliminary orders of business for the founding members. *Id*. at 787. Under the rationale that the First Congress would not adopt a custom that it considered to be in violation of the Establishment Clause, which it drafted the language to in the same week, this Court upheld the Nebraska state legislature's virtually identical practice of paying a guest chaplain to lead members in prayer before the start of its sessions. *Id*. at 790.

Thirty-one years later, this Court reexamined the lawful extent of legislative prayer in *Town of Greece*, where the sectarian content of the town's chaplain-led legislative prayer practice was challenged. 134 S. Ct. at 1820. This Court began its analysis by reiterating the central holding of *Marsh*: Legislative prayer finds itself deeply rooted in the history and tradition of this country and need not be subjected to formal Establishment Clause tests to determine its constitutionality. *Id*. at 1818. In response to an attack on the sectarian content of the chaplains' invocations, this Court, in a plurality opinion written by Justice Kennedy, stated that "*Marsh* nowhere suggested that the constitutionality of legislative prayer turns on the neutrality of its content." *Id*. at 1821. To hold that the chaplains' "invocations must be nonsectarian would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech." *Id*. at 1822. Delving further into the content of prayer, therefore, was not something this Court found would comport with *Marsh*, save one circumstance: when there is an "indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Id*. at 1821 (quoting *Marsh*, 463 U.S. at 794-95). This Court found no indication of such exploitation, since the town was inviting volunteer guest ministers of multiple faiths to deliver prayers before its board meetings and, accordingly, held that the practice was constitutional. *Id*. at 1824.

Unlike both the Nebraska state legislature in *Marsh*, and the Board of Commissioners in *Town of Greece*, the Hendersonville Board opens its meetings with a prayer led by one of its own members. J.A. at 18. Justice Kennedy himself recognized this as an important distinction while delivering the majority opinion in *Town of Greece*, stating that his "analysis would [have been] different if town board members directed the public to participate in the prayers," however, the requests "came not from town leaders but from the guest ministers . . . thinking the action was inclusive, not coercive." 134 S. Ct. at 1826. Contrarily, every month, members of the Hendersonville community are asked by their own government to stand and bow their heads before listening to their government tell them that they "are all God's people," and that they "all fall short of the glory of God." J.A. at 19. In *Town of Greece*, members of the Greece community might be greeted by a Jewish prayer one month and a Wiccan invocation the next, depending on which denomination's chaplain was volunteering that week. *See* 134 S. Ct. at 1817. This is in stark contrast to the citizens of the Hendersonville community, who will hear only their government's exclusively Christian prayers at each month's meeting. J.A. at 18.

In the present case, this Court is asked to determine whether the practice of government-led prayer comports with the history and tradition of chaplain-led legislative prayer recognized in both *Marsh* and *Town of Greece*. This Court has not yet spoken on this matter. However, this question has been addressed by the Fourth and Sixth Circuits in *Lund v. Rowan Cty.*, 863 F.3d 268 (4th Cir. 2017), and in *Bormuth v. Cty. of Jackson*, 870 F.3d 494 (6th Cir. 2017), respectively, with conflicting holdings emerging.

In *Lund*, the Fourth Circuit considered the Rowan County Board of Commissioners' custom of beginning its meetings with a sectarian invocation led by one of the board members. 863 F.3d at 271-72. After analyzing the holdings of *Marsh* and *Town of Greece*, the court correctly

held that the practice did not comport with the established tradition of legislative prayer. *Id*. at 279. The court in *Lund* found that *Marsh* and *Town of Greece* were too factually distinct from the Rowan County Board's regime of government-led prayer to be applied as guiding precedent. *Lund*, 863 F.3d at 278 ("As *Town of Greece* makes plain, the Court has never approved anything like what has transpired here."). The important factual distinction being that the "members of Rowan County's Board of Commissioners composed and delivered their own sectarian prayers featuring but a single faith." *Id*. at 280.

Conflictingly, the Sixth Circuit approached similar facts in *Bormuth*, and arrived at the opposite conclusion. In *Bormuth*, the court considered the Jackson County Board of Commissioners' practice of opening its meetings with commissioner-led prayer. 870 F.3d at 498. *Marsh* and *Town of Greece* were also discussed by the court and it opined that "neither [case] restricts who may give prayers in order to be consistent with historical practice." *Id*. at 509. Accordingly, the Sixth Circuit court applied the same history and tradition test proffered by those cases in its analysis of the contested government-led prayer regime and held that the Jackson County prayer practice did not violate the Constitution. *Id*. at 519.

What the Sixth Circuit in *Bormuth* failed to appreciate, and what the Fourth Circuit in *Lund* correctly understood, is that this Court was not ruling on *government-led* prayer in either *Marsh* or *Town of Greece*. The two cases "simply [do] not address the constitutionality of lawmaker-led prayer." *Lund*, 863 F.3d at 277. *Town of Greece* and *Marsh*, thus, do not "squarely approve of the practice at issue here, which deviates from the long-standing history and tradition of a chaplain, separate from the legislative body, delivering the prayer." *Lund v. Rowan Cty.*, 103 F. Supp. 3d 712, 722–23 (M.D.N.C. 2015). As identified by the Fourth Circuit in *Lund*, "[t]he conspicuous absence of case law on lawmaker-led prayer is likely no accident . . . this type of prayer both

identifies the government with religion more strongly than ordinary invocations and heightens the constitutional risks posed by requests to participate and by sectarian prayers." 863 F.3d at 278.

This Court's initial analysis of legislative prayer "would have been different" if it had been considering a situation in which a member of the government had directed the public to stand and bow their heads before hearing the government pray. *See Town of Greece*, 134 S. Ct. at 1826. However, in both *Marsh* and *Town of Greece*, this was simply not the case. To the extent that either case "touches on the constitutional relevance of the prayer-giver's identity, the decision[s] [take] for granted the use of outside clergy." *Lund*, 863 F.3d at 278. Accordingly, this Court did not apply the typical Establishment Clause tests to determine the constitutionality of these chaplain-led prayer practices "because *history* supported the conclusion that legislative invocations are compatible with the Establishment Clause." *Town of Greece*, 134 S. Ct. at 1818 (emphasis added). Contrastingly, the Hendersonville Board begins its sessions with a government-led prayer, which is unlike anything this Court has addressed before. J.A. at 18. Therefore, without precedential guidance for analyzing *government-led* prayer, this Court must apply the customary three-pronged analysis known as the *Lemon* test when determining whether the Board's actions comport with the Establishment Clause. *Lemon v. Kurtzman,* 403 U.S. 602 (1971).

### B. The Board's Current Practice of Having its Exclusively Christian Members Deliver Exclusively Christian Prayers Does Not Comport with the More Inclusive Chaplain-Led Prayers Authorized by This Court and Public Policy Demands a More Open Avenue for Minority Faith Representation Within the Practice.

A legislative prayer practice that is conscientious about including minority faiths is more in line with the commands of the Constitution than a prayer regime that represents only one religion. When "considering whether [the] government has aligned itself with a particular religion, a tapestry of many faiths lessens th[e] risk whereas invoking only one exacerbates it." *Lund*, 863

F.3d at 284. Therefore, although the "Constitution does not require [the government] to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing," the fact that it does so serves to illustrate a separation between the state and a single faith. *Town of Greece*, 134 S. Ct. at 1824.

In *Town of Greece*, after the respondents complained that the Christian focus of the board's invocations excluded other denominations, "the town invited a Jewish layman and the chairman of the local Baha'i temple to deliver prayers, [and a] Wiccan priestess . . . was granted an opportunity to give the invocation." *Id*. at 1817. When examining the totality of the circumstances in *Town of Greece*, this Court did not find a constitutional violation since the Board of Commissioners extended its legislative prayer practice to represent faiths beyond those of the individual board members. *Id*. at 1824. The practice upheld in *Marsh* also demonstrated a legislative prayer opportunity more inclusive than government-led prayer. 463 U.S. at 793. In *Marsh*, the Presbyterian chaplain "was not the only clergyman heard by the Legislature; guest chaplains have officiated at the request of various legislators and as substitutes during [his] absences." *Id*.

Directly at odds with the inclusive practice upheld in *Town of Greece* and *Marsh*, government-led prayer virtually eradicates the opportunity for members of minority faiths to be represented by legislative invocations. This is distinguishable from *Town of Greece* because there, the chaplain-led prayer practice was exemplary due to its inclusion of multiple faiths. *See* 134 S. Ct. at 1817. Such representation is only possible where guest religious leaders from many differing faiths can be invited to administer the prayers. *Id*. Likewise, in *Marsh*, the Nebraska legislature welcomed new prayer-givers on multiple occasions. 463 U.S. at 793. Contrastingly, the Hendersonville Board does not represent minority faiths or any faith other than Christianity. J.A.

at 18. Due to the Board being made up of exclusively Christian members, the prayers they deliver are all Christian in nature. J.A. at 18. Such has been the case for at least thirteen years. J.A. at 6. This Court was by no means incorrect in reaching its decisions in *Town of Greece* or *Marsh,* but these cases simply are not analogous to the facts at hand. Neither case can provide a sound basis for upholding the Board's present practice, which is far less inclusive than the chaplain-led prayer upheld in either *Marsh* or *Town of Greece*.

The Fourth Circuit in *Lund* correctly identified the legal discrepancy between government-led prayer and the chaplain-led prayer upheld in *Marsh* and *Town of Greece*. Here, the constitutional taint was found in the fact that the "openness evinced by these other elected bodies contrasts starkly with Rowan County's policy of restricting the prayer opportunity to the commissioners alone." *Lund*, 863 F.3d at 278. As described in *Lund*, allowing the government "to restrict to one the number of faiths represented at Board meetings would warp our inclusive tradition of legislative prayer into a zero-sum game of competing religious factions." *Id*. at 282. A rule that would encourage members of the public to vote or otherwise participate in government according to the religion that they wish to see their government profess goes against public policy. *Id*. ("For any Buddhists, Hindus, Jews, Muslims, Sikhs, or others who sought some modest place for their own faith or at least some less insistent invocation of the majority faith, the only recourse available was to elect a commissioner with similar religious views. We find this point troubling."). The court also addressed the equally troubling prospect that members of majority faiths might be concerned about "what kind of prayer a candidate of a minority religious persuasion would select if elected." *Id*.

The Hendersonville Board's practice of government-led prayer limits the representation of religions only to that of its board members and serves to alienate members of minority faiths, like

Ms. Pintok. The only faith represented by the Board is Christianity. J.A. at 18. This has led to the consistent exhibition of exclusively Christian invocations, which has caused members of minority faiths, like Ms. Pintok, to feel like outsiders in their own community. J.A. at 1. Because the opportunity to offer a prayer is limited to the Board members themselves, individuals of minority faiths have no fair chance to share their own religions with their community through this practice. J.A. at 18. Thus, without a genuine opportunity for minority faiths to be represented in the Board's legislative prayer practice, the program does not comport with the chaplain-led prayer that this Court has recognized as constitutional. Additionally, the Board's practice violates public policy by promoting religious line-drawing in government participation.

### C. The Board's Practice of Delivering Government-Drafted Prayers Does Not Comport with *Town of Greece* Where the Government Played No Part in Writing or Editing the Content of the Legislative Prayers.

The Constitution makes clear that the Establishment Clause "was intended to erect a wall of separation between Church and State." *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947). When a member of a government board is praying, he or she is speaking as the government. *See Turner v. City Council of Fredericksburg*, 534 F.3d 352, 355 (4th Cir. 2008). Allowing the government itself to compose the words to sectarian prayers is "precisely the type of activity that the Establishment Clause prohibits." J.A. at 21. The closeness that this effectuates between church and state "can create an environment in which the government prefers—or appears to prefer—particular sects or creeds at the expense of others." *Joyner v. Forsyth Cty.*, 653 F.3d 341, 347 (4th Cir. 2011). This close relationship "violate[s] '[t]he clearest command of the Establishment Clause' that 'one religious denomination cannot be officially preferred over another.'" *Id*. (quoting *Larson v. Valente*, 456 U.S. 228, 244 (1982)).

The Fourth Circuit correctly differentiated traditional legislative prayer from the contested prayer practice before the court in *Lund*, where the Rowan County Board of Commissioners "composed and delivered their own sectarian prayers featuring but a single faith." 863 F.3d at 280. As opposed to the hands-off approach taken by the board in *Town of Greece*, where this Court pointed to the fact that the town "neither reviewed the prayers in advance of the meetings nor provided guidance as to their tone or content," 134 S. Ct. at 1816, the Rowan County Board violated the Constitution in *Lund,* "by so clearly identifying the government with a particular faith." 863 F.3d at 280. Contrastingly, the Sixth Circuit found that the government-led prayer in *Bormuth* did comport with *Town of Greece* because "[n]either other Commissioners, nor the Board as a whole, review[ed] or approve[ed] the content of the invocations." 870 F.3d at 498.

*Lund* correctly found that the government itself has composed and delivered prayers when its "representatives—the very embodiment of the state—delivered sectarian invocations referencing one and only one religion." 863 F.3d at 281. Thus, legislative prayer drafted and delivered by the representative members of the government is correspondingly drafted and delivered by the government itself. Conversely, the Sixth Circuit in *Bormuth* erred in its consideration of the Jackson County Board of Commissioners' review and approval of its members' prayers. 870 F.3d at 498. The Sixth Circuit failed to realize the important point that when any individual member of a government board writes, reviews, and delivers a sectarian invocation in the setting of legislative prayer, it is the government itself who has written, reviewed, and delivered that prayer. *See id*.; *see also Turner*, 534 F.3d at 355.

Unlike the chaplain-led prayer authorized by this Court in *Town of Greece*, government-led prayer necessarily establishes an impermissible connection between the government and religion. In the instant case, members of the Board deliver their own prayers before public

meetings. J.A. at 18. Therefore, it is the Hendersonville government that wrote the words to prayers such as: "We all fall short of the glory of God. We must strive to conduct our business in a way consistent with the careful hand of the Father and His son Jesus Christ." J.A. at 19. The language of the invocations heard by those in attendance at the meetings was written, edited, and delivered by the Board, thereby directly conveying government support for specific religious beliefs. J.A. at 18-19. Thus, the practice cannot be said to comport with the acceptable standards in *Town of Greece* and the Court of Appeals for the Thirteenth Circuit correctly held that the Board's practice violated the Constitution.

## II. THE BOARD'S PRACTICE OF BEGINNING EACH PUBLIC MEETING WITH A GOVERNMENT-LED PRAYER IS CLEARLY PROHIBITED BY THE CONSTITUTION, AS THE NON-SECULAR PURPOSE IS TO ENDORSE CHRISTIANITY AS THE PREFERRED FAITH, WHICH PLACES COERCIVE PRESSURE ON NON-BELIEVERS, WHILE IMPERMISSIBLY ENTANGLING THE GOVERNMENT WITH RELIGION.

Seeing as this Court has never gone so far as to extend the history and tradition analysis from *Marsh* and *Town of Greece* to government-led prayer, when considering the constitutionality of the Board-led invocations in juxtaposition with the Establishment Clause, the proper analysis is the *Lemon* test. *See Freedom from Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ.*, 896 F.3d 1132, 1149 (9th Cir. 2018). Under the *Lemon* test, a government practice is only constitutional when (1) it has a secular purpose; (2) it has a primary effect that neither advances nor inhibits religion; and (3) does not promote excessive government entanglement with religion. 403 U.S. at 612-13 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)). The *Lemon* inquiry is sequential, meaning if the action fails the first prong, the second and third prongs need not be explored. *Edwards v. Aguillard*, 482 U.S. 578, 583-85 (1987). If any of the three principles of *Lemon* are not met, the government's practice must be enjoined in light of the Establishment Clause. *Stone v. Graham*, 449 U.S. 39, 41 (1980).

The case at hand fails to surpass any of the three aforementioned *Lemon* prongs. First, the Board's prayers are undeniably non-secular in purpose as they convey a strong Christian theme and the government's purported purpose of religious inclusion is a sham. Next, by solely promoting the Christian faith through these invocations, all non-believers are isolated and effectively made to feel like outsiders within their own community. These actions have the clear, unambiguous, and utterly impermissible effect of sending the message that the Board endorses one faith and religious belief over all others. Finally, the Board's practice of having its own members lead prayer is irreconcilable with required constitutional imperatives: It dangerously crosses the religious lines that the Framers firmly drew by mandating that religion and government are never to be entangled.

### A. It is Clear from the Exclusively Christian Nature of the Board's Prayers That the Government is Advancing This Sole Religion and That the Invocations Do Not Have a Neutral, Secular Purpose.

The first prong of the *Lemon* test requires a government practice to have a true secular purpose. 403 U.S. at 612. In applying this prong, the appropriate question is whether the government's actual purpose is to either support or criticize a religion. *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985). If the government's intent is to endorse or disapprove of a particular religion, the secular purpose requirement has been violated. *See Aguillard*, 482 U.S. at 585. The state's practice must have a genuine purpose and cannot be a sham. *McCreary Cty. v. ACLU*, 545 U.S. 844, 864 (2005). A government's actions best convey its true purpose and have a more significant impact than any decree or word. *See id.* at 859-61; *see also, e.g., McGowan v. Maryland*, 366 U.S. 420, 449-51 (1961). For this inquiry, this Court should look through the eyes of an objective and reasonable observer. *McCreary Cty.*, 545 U.S. at 862.

When a government body's intention is to unequivocally support or endorse a single denomination, the purpose for leading prayer is not secular. This finding is similar to the one

articulated in *Wallace*, where this Court held that an Alabama statute authorizing "a period of silence for meditation or voluntary prayer," in public schools was unconstitutional. 472 U.S. at 41. More specifically, this Court invalidated the statute because it failed the first prong of the *Lemon* test: An examination of legislative history revealed that this law was enacted for the primary purpose of returning voluntary prayer to schools. *Id.* at 57-60. The Fourth Circuit in *Joyner* was also careful to point out that citizens attending Board meetings only hear the words of the prayers themselves and are not privy to the purpose behind these messages. 653 F.3d at 354. Thus, while a government board's internal discussions may allude to the fact that the benediction is not intended to express a preference for a particular faith, but rather is only meant to provide a moment of solemnization, the prayer nonetheless sends an entirely different message to the community at large. *Id*.

Alternatively, in *Bown v. Gwinnett Cty. Sch. Dist.*, 112 F.3d 1464, 1469 (11th Cir. 1997), the Eleventh Circuit held that a "Moment of Quiet Reflection" statute, which was enacted to allow students "an opportunity for a brief period of quiet reflection" each morning before the school day officially began, was constitutional. Here, in the preamble to the contentious statute, the state legislature made clear that the government was "not advocating the moment of quiet reflection as a time for religious activity." *Id.* at 1470.

Because the Board solely seeks to advance Christianity in the case at hand, a reasonable observer would conclude that there is no secular purpose at play here. Much like the moment of silence given in *Wallace*, 472 U.S. at 41, which actually had the misleading and unconstitutional purpose of reinstating voluntary prayer in public schools, the Board in this case uses an opening prayer to advance its inherent Christian agenda. All five members of the Board are Christian. J.A. at 18. Moreover, each of the invocations proffered by the Board members are Christian in nature

and frequently reference the Christian Deity directly by name. J.A. at 18-19. Some prayers even go so far as to decree, "[w]e all fall short in the glory of God" or proclaim, "[w]e know that we need your spirit watching over us as we conduct the public's work." *Id.* The Board's members are steadfast in their assertions that the intent or purpose of the prayers is not to convey personal religious beliefs or to coerce anyone into converting to the Christian practice. J.A. at 2-6. However, as the court so wisely pointed out in *Joyner*, 353 F.3d at 354, citizens attending the Hendersonville Board meeting only hear the non-secular words and content of the prayers and have no way of knowing that their government could possibly have any purpose other than furthering the practice of Christianity. Therefore, while the Hendersonville government may attempt to paint an idealistic picture of religious neutrality, the stark reality is the Board's avowed secular purpose is a sham.

The Board's position can be contrasted from that of *Bown*, 112 F.3d at 1470, in which a moment of silence was deemed constitutional where the intent of the statute was not to advocate for religious activity, because the clear purpose of the prayers offered by the Hendersonville Board was to encourage the Christian faith. *Bown* can also be distinguished in the sense that quiet reflection is not comparable to prayer: Quiet reflection simply offers a moment to ponder individual thoughts, whereas delivering a Christian prayer aloud clearly promotes a religious affinity. The Board's non-secular purpose is further evidenced by a Board member flatly telling Ms. Pintok, "this is a Christian country, get over it," when she publicly made note of the discriminatory nature of the benedictions. J.A. at 19. Undoubtedly, this distasteful statement is strong evidence that the Board's non-secular purpose for leading these prayers is to further the Christian faith within the Hendersonville community.

### B. The Board-Led Prayers Have a Clear Christian Focus and Directly Reference the Christian Deity, Which When Taken in Totality, Creates the Effect of the Government Favoring One Religion Above All Others and, Through This Endorsement, Makes All Non-Christians Feel Like Outsiders Within Their Own Community.

Under the second prong of the *Lemon* test, the primary effect of the government's practice "must be one that neither advances nor inhibits religion." 403 U.S. at 612. This Court has also adopted the "endorsement test" for analyzing the government's primary effects. *Skoros v. City of New York*, 437 F.3d 1, 29-30 (2d Cir. 2006). The endorsement test and the second prong of the *Lemon* analysis are essentially the same, as the leading purpose is to evaluate the neutrality of the government's actions. *ACLU v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1486 (3d Cir. 1996).

#### 1. When the Board's Prayers are Scrutinized Under the Second Prong of the *Lemon* Inquiry, it is Evident That the Invocations Have the Blatant Effect of Attempting to Advance the Christian Religion.

To survive the second prong of *Lemon*, the primary effect of the state's action has to be neutral, meaning it cannot progress or impede one religion. 403 U.S. at 612. Regardless of the intended purpose, the government's practice "cannot symbolically endorse or disapprove of religion." *Busch v. Maple Newtown Sch. Dist.*, 567 F.3d 89, 100 (3d Cir. 2003). Thus, it is the responsibility of this Court to "determine, whether under the totality of the circumstances, the challenged practice conveys a message favoring or disfavoring religion." *Black Horse*, 84 F.3d at 1486. The effect is evaluated from the standpoint of a reasonable observer. *McCreary Cty.*, 545 U.S. at 862.

When a government entity wholly consists of members from one faith and exclusively preaches messages from that sole denomination, any reasonable person would find the effects of those practices to be biased, coercive, and reminiscent of endorsing that particular religion. For

example, in *Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 285 (3d Cir. 2011), the Third Circuit invalidated a local school board's practice of opening a public meeting with prayer because the primary effect was a conveyance that the Christian religion was favored by this administrative body. The court opined that the nearly exclusive Christian nature of the prayers, including references directly to "God" or "Jesus Christ" or "Lord," made it impossible "to accept the proposition that a 'reasonable person' would not find that the primary effect of the Prayer Policy was to advance religion." *Id.* With such a blatant endorsement of Christianity, it was clear that the government's practice was by no means neutral. *Id*. Comparably, in *Lund*, the Fourth Circuit arrived at a similar conclusion when it held that the Rowan County Board's practice of starting its meetings with a prayer led by one of the commissioners was unconstitutional. 863 F.3d at 278. The court opined that while prayer led by outside clergy members may be within constitutionally acceptable bounds, when government officials themselves are the ones giving the invocations, there is a heightened constitutional risk as "this type of prayer [ ] identifies the government with religion." *Id*.

On the other hand, in *Pelphrey v. Cobb Cty.*, 547 F.3d 1263, 1278 (11th Cir. 2008), the Eleventh Circuit held that invocations given before city board meetings did not have the effect of advancing a particular religion. In this case, the county board invited religious leaders from differing faiths to offer prayer on a rotating basis at their monthly meetings. *Id*. at 1266. The speakers represented a variety of beliefs, including Christianity, Islam, Unitarian Universalism, and Judaism. *Id*. The prayers often included references to "Jesus," "Allah," "God of Abraham, Isaac, and Jacob," "Mohammed," and "Heavenly Father." *Id*. The diversity of religious expression offered by the county board allowed the court to conclude that the prayers, when taken as a whole, "did not advance any particular faith." *Id*. at 1278.

Given the lack of religious diversity from the Hendersonville Board's members and the exclusive Christian content of prayers proffered, in totality, the circumstances produce the impermissible effect of the government promoting one particular religion. Here, like the benediction offered in *Indian River*, 653 F.3d at 285, that had the effect of conveying a message that sought to advance Christianity, all of the prayers offered by the Board in this case are invariably and unquestionably Christian. J.A. at 18-19. Of the prayers submitted into the record, every single one mentioned "God," "Father," "Lord," or "Jesus Christ." *Id*. No other religion besides Christianity was represented. *Id.* Further, all five of the Board's members share in the Christian faith. J.A. at 18. Several of the prayers even went so far as to confess sin and ask for forgiveness of behalf of the entire Hendersonville community. J.A. at 19. ("We are all sinful but as the book of Isaiah reads, though our sins are like scarlet, they shall be as white as snow."). The prayers also gave the clear implication that Christianity was the superior faith. *Id*. ("We must strive to conduct our business in a way consistent with the careful hand of the Father and his son Jesus Christ."). Often, the prayers appeared to encourage those in attendance to accept Christianity. J.A. at 18. ("We know that we need your spirit watching over us as we conduct the public's work."). Here, Ms. Pintok, a believer of the Wiccan faith, experienced intimidation, humiliation, and severe distress due to the Board's undeniable support of the Christian religion. J.A. at 19. While *Lund*, 863 F.3d at 278, establishes that a rational person may be tolerant of hearing a prayer when it is led by a chaplain, a reasonable person, like Ms. Pintok, cannot endure hearing the Board's members lead this same prayer, as it would mean the government was promoting a single faith.

While the invocations given in *Pelphrey*, 547 F.3d at 1266, provided a diverse religious prospective and did not support a single faith, here there is an evident contrast where the Hendersonville Board is undeniably only promoting one denomination. J.A. at 18-19. The practice

in *Pelphrey* was constitutional because, while some of the prayers made direct Christian references, the practices of Islam, Unitarian Universalism, and Judaism were also incorporated. 547 F.3d at 1266. Comparatively, here, all of the Board's prayers reference the Christian Deity, while no other faiths are either explored or entertained. J.A. at 18-19. Any rational person would find this exclusive practice to be interpreted as the Board endorsing the practice of Christianity above all other beliefs.

**2. When the Government's Prayers are Examined Under the Endorsement Test, it is Apparent That the Practice Makes Non-Believers Feel Like Outsiders Who are on Unequal Footing with Those Who Believe in the Christian Faith.**

This Court has also occasionally elected to adopt the "endorsement test" in place of the second prong of the *Lemon* test for scrutinizing the primary effects of the government's practice. *Skoros*, 437 F.3d at 29-30. An action can be construed as endorsing a single religion when it makes non-believers feel like "outsiders" within their community. *Lynch*, 465 U.S. at 694 (O'Connor, J., concurring). Whether a government practice rises to the level of endorsement is based on a reasonable observer's perception of the action. *Elewski v. City of Syracuse*, 123 F.3d 51, 53 (2d Cir. 1997).

The endorsement test examination was first crafted by Justice O'Connor in her concurring opinion for *Lynch*, where she agreed with the majority that the inclusion of a nativity scene in a public Christmas display did not violate the Constitution. 465 U.S. at 694 (O'Connor, J., concurring). However, Justice O'Connor's concurrence was ridden with a cautionary tale, as she stated that "[e]very government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion." *Id*. Extra care must be taken to uphold the delicate balance of promoting religious freedom, while maintaining the integrity of the Establishment Clause, as endorsement of a singular religion "sends a message to nonadherents that

they are outsiders, not full members of the political community," while simultaneously sending "an accompanying message to adherents that they are insiders, favored members of the political community." *Id*. at 688. Further, Justice O'Connor stressed that in making this determination, "courts must keep in mind both the fundamental place held by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which Establishment Clause values can be eroded." *Id*.

In *Lynch*, 465 U.S. at 694 (O'Conner, J., concurring), while Justice O'Connor agreed with the majority that the inclusion of a nativity scene in a public Christmas display did not violate the Constitution, her reasoning grew out of a novel interpretation to the Establishment Clause: When there is government endorsement of a single religion, there is irrefutably a constitutional violation. In the present case, Ms. Pintok admitted that the Board's exclusively Christian prayers made her feel "like an outsider" within her own Hendersonville community. J.A. at 19. This is the exact harm Justice O'Connor cautioned against in *Lynch*. 465 U.S. at 694 (O'Conner, J., concurring). Worse yet, the injustice at hand goes farther than the damage Justice O'Connor warned against, as a member of the Board solidified the entities obvious endorsement when he openly stated, "this is a Christian country, get over it" in response to Ms. Pintok's protests over the solely Christian prayers. J.A. at 1.

### C. Given That the Board is Plainly Promoting Christianity, it is by Extension Disrupting the Enduring Sanctity of the Constitution by Grossly Entangling Government with Religion.

The third and final prong of the *Lemon* analysis states that a government's actions "must not foster 'an excessive government entanglement with religion.'" 403 U.S. at 613 (quoting *Walz*, 397 U.S. at 674). To properly assess entanglement, this Court must look to "the resulting relationship between the government and religious authority." *Agostini v. Felton*, 521 U.S. 203,

233 (1997) (quoting *Lemon*, 403 U.S. at 615). "The Constitution decrees that religion must be a private matter . . . and while some involvement and entanglement are inevitable, lines must be drawn." *Lemon*, 403 U.S. at 625. This is because the Constitution makes clear that the Establishment Clause "was intended to erect a wall of separation between Church and State." *Everson*, 330 U.S. at 16.

The Constitution requires an unwavering divide between church and state; however, this divide is clearly broken when religion becomes entwined with the government's official dealings. This was the holding in *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 306, 309 (2000), where this Court found that an invocation was not necessary to provide a moment for serious reflection, as other alternatives would suffice without impinging on constitutional freedoms. The same decision was handed down by the Ninth Circuit in its holding for *Freedom from Religion*, where it found clear government comingling with religion when a school board opened its public meetings with a prayer. 896 F.3d at 1132. In this case, the board's opening benediction typically included Bible reading and Christian preaching. *Id*. at 1140. The prayer was given either by a board member or a board-selected member of the clergy. *Id*. at 1138. Ultimately, the court held that since a government member was the often the one conducting the prayer, there was automatically entanglement. *Id*. at 1144. While the court acknowledged the history and tradition of an independent clergy member leading prayer to open a legislative session, it distinguished this practice from the board's meetings because this was "not solely a venue for policymaking," but instead was a place where "extracurricular activity" occurred including "student discipline." *Id*. Additionally, the court found evidence of "excessive government entanglement with religion" and noted there were several other ways the board could have chosen to solemnize the meetings. *Id*. at 1151.

Since the government members are delivering the prayers themselves in the present case, the Board is automatically violating the Establishment Clause by impermissibly entangling government with religion. As this Court correctly pointed out in *Santa Fe*, 530 U.S. at 309, there are many ways besides prayer that would respect the community's religious diversity while adequately solemnizing the Board's meetings. The Board could instead read a passage noting the importance of religious variety or it could bring in outside religious leaders from differing faiths. Simply stated, government-led prayer is not necessary to accomplish this supposed purpose and to sufficiently commence the Board's meetings. Most importantly, offering solely Christian prayer is not a constitutional way to succeed in formalizing meetings. There are other alternatives available that do not infringe upon the personal liberties guaranteed by the Constitution. Additionally, as the Ninth Circuit alluded to in *Freedom from Religion*, 896 F.3d at 1151, there cannot be government-led prayer without a constitutional violation due to the entanglement of the state with religion. The Board's meetings are not solely a place of policymaking, but rather a venue where many aspects of the community are deliberated and discussed.

Although *Marsh* and *Town of Greece* stand for the proposition that legislative sessions or other government meetings may be commenced with a prayer from an *independent member of the clergy*, these cases do not, and cannot, go so far as to validate the practice of government-led invocation. While the precise question of where to draw the line between the government and religion is uncertain, it is clear that some boundaries exist. For instance, neither of these cases suggest that a legislative body could begin each meeting by always reciting a single religion's creed. *See Marsh*, 463 U.S. 783; *see also Town of Greece*, 134 S. Ct. 1811. Likewise, neither case speaks specifically to a government member leading the prayer. *Id*. To extend such a holding would be a gross overstep of judicial power. To interpret the holdings of *Marsh* and *Town of*

*Greece* to this degree would contravene the protections set forth by the Establishment Clause of the Constitution by endorsing, and essentially promoting, the entanglement of church and state.

### D. In the Alternative, the Board's Practice Also Fails the Coercion Test, Which This Court Has Occasionally Opted to use in Place of the *Lemon* Analysis to Streamline the Inquiry in Examining Whether a Government Practice is Constitutional.

In some instances, this Court has elected to forgo a detailed *Lemon* analysis, instead choosing to implement a more simplified process by way of the "coercion test." *Lee v. Weisman*, 505 U.S. 577, 587 (1992). This coercion standard was first proposed by Justice Kennedy in *Lee*. *Id.* The essence of this standard was that the government's attempts to accommodate freedom of religion may not supersede the limitations imposed by the Establishment Clause. *Id*. At the very minimum, "the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercises." *Id*.

When a government body promotes or gives the illusion of endorsing a single faith, impermissible coercion and, consequently, government entanglement exist. This principle was articulated in *Lee*, where this Court held that a Rhode Island public school's policy of permitting principals to choose clergymen to give nonsectarian prayers at its graduation ceremonies was unconstitutional. 505 U.S. at 598-99. Although students had the choice to stand silently during the benediction or refuse to attend the graduation altogether, the pressure to "stand as a group" during the invocation, while admittedly "subtle and indirect," was nonetheless "as real as any overt compulsion." *Id*. at 593. Giving students the option to leave during the recitation of a prayer was "not a cure for a constitutional violation." *Id*. at 596.

In Justice Scalia's dissent to *Lee*, he opined that there were no coercive pressures placed upon the students when a prayer was read at their graduation ceremony. *Id*. at 640 (Scalia, J.,

dissenting). Rather, Justice Scalia opined that coercion could only be felt by "force of law and threat of penalty." *Id*. He saw no evidence of either in this case. *Id*.

Just like the coercive practice in *Lee*, 505 U.S. at 593, where the school attempted to circumvent the requirements of the Constitution when it gave students the opportunity to stand silently or to refuse to attend graduation whatsoever in lieu of participating in prayer, the Hendersonville Board-led invocation in this case also creates unlawful compulsive pressures. Although the Board may argue that Ms. Pintok is free to remain seated or arrive to the meeting after the prayer has been given, this is not a tolerable cure for such a blatant constitutional violation. Simply put, the role of the Board is not to mitigate or diffuse the unconstitutional effects of its act, but to stop the unlawful practice altogether. Thus, merely assuaging the situation by alleviating the constitutional violation is not enough; the unconstitutional practice cannot be glossed over and must cease immediately. This is what our Constitution demands and nothing less can be tolerated.

Justice Scalia was correct to assert that the school in *Lee* did not force law or the threat of penalty nor did they even require students to attend the graduation ceremony; however, this is not the required threshold for determining whether government coercion exists. No matter how minimal, coercion was present in *Lee* and, as the majority pointed out, this automatically leads to a constitutional violation. 505 U.S. at 596. This is the true threshold. Taking this standard and applying it to the facts of the present case, the potential for social ostracism for Ms. Pintok was both foreseeable and substantial since the Board meetings involved potentially great influences of social pressure to stand and join in the Christian prayer, regardless of personal beliefs. No matter how small, this is a coercive pressure. Simply put, if you turn a blind eye to a constitutional violation, there nonetheless remains a constitutional violation. This far exceeds the tolerable

threshold and traverses into the unacceptable realm of coercive government pressure, regardless of whether or not there was the threat of law or penalty.

## CONCLUSION

The Board's practice of opening its sessions with a prayer led by one of its members is too distinct from *Marsh* and *Town of Greece* for this Court to apply the analysis used by those cases. Therefore, the correct assessment for constitutionality is the *Lemon* test, under which the Board's practice fails all three prongs as the prayers are non-secular in purpose, promote a single faith, and impermissibly entangle the government with religion. Accordingly, Ms. Pintok asks this Court to AFFIRM the decision of the United States Court of Appeals for the Thirteenth Circuit.

Dated: September 30, 2018

Respectfully submitted,

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