No. 17-1891

IN THE
SUPREME COURT OF THE UNITED STATES

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 PETITIONER

TEAM # 2503
Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether the Hendersonville Parks and Recreation Board's practice of having members offer prayer before public meetings comports with the history and tradition of legislative prayer authorized by *Marsh v. Chambers*, 463 U.S. 783 (1983), and *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014).
2. Whether the Hendersonville Parks and Recreation Board's practice of beginning public meetings with prayer supports the secular purpose of solemnizing public business, or whether legislator-led prayer has a clearly religious purpose and places coercive pressures on religious minorities.

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JURISDICTION STATEMENT

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

I. Summary of the Facts

Respondent Barbara Pintok seeks to prevent members of the Hendersonville Parks and Recreation Board ("Board") from offering solemnization prayers prior to each monthly Board meeting. Before each meeting, a member the Board offers an opening prayer, lending gravity to the proceedings. J.A. at 2. Board Chairman Wyatt J. Koch, and Board members Alvania Lee, John Riley, Monique Johnson, and James Lawley never intend to coerce or offend any meeting attendee with their prayers. J.A. at 2–6. Rather, Board members find their prayers more secular in nature than religious, like reciting the Pledge of Allegiance. *Id.* The Board uses these moments of prayer to quietly reflect on the matters before them. *Id.* The prayers are not an opportunity to coerce or convert an individual into any specific belief system. *Id.*

While Board members sometimes draw from their individual faiths to construct a prayer, they do not all belong to the same religious denomination. For instance, Board member Lee describes herself as Methodist, Board member Johnson identifies as Lutheran, Board member Riley is Catholic, and Board member Lawley is Presbyterian. J.A. at 8. These traditions are not identical, as the members belong to different religious groups, which coincidently fall under the broad umbrella of Christianity. Whichever Board member delivers the prayer intends to solemnize the proceedings by reflecting on a personal experience within their respective tradition. J.A. at 3.

Under Board Chairman Koch's leadership, there has never been any effort to coerce, proselytize, or engage in any form of religious harassment. J.A. at 2. However, Respondent contends that at one of the Board meetings—meetings that she frequently attended—the legislative prayer prevented her from properly enunciating her words. J.A. at 1. During this

specific meeting, Respondent stood up in front of the assembly to appeal a permit application denial. J.A. at 1. The Board denied Respondent's appeal. J.A. at 18. After this meeting, Respondent confronted Board member Lawley, and believes that Lawley told her, "This is a Christian country, get over it" J.A. at 1. Board member Lawley simply recalls telling Respondent that her complaint was "frivolous." J.A. at 6. Respondent now complains about the Christian connotations within a legislative prayer. J.A. at 1. The Record contains no additional evidence to support Respondent's allegation and every Board member indicates the prayers' purposes are non-coercive and secular in nature. J.A. at 2–6.

II. Summary of the Proceedings

Respondent filed suit with the United States District Court for the District of Caldon, claiming that the Board's solemnization prayers violated the Establishment Clause of the First Amendment. J.A. at 10. Both parties cross-filed motions for summary judgment, in which the District Court ruled in the Board's favor, finding no constitutional violation because "such prayers comport with the time-honored tradition of solemnizing public business." J.A. at 7, 10. Respondent then appealed to the United States Court of Appeals for the Thirteenth District. J.A. at 16. The Thirteenth Circuit reversed the District Court's decision, and remanded with instructions to enter summary judgment for Respondent. J.A. at 17. The Board filed a timely appeal, and this Court granted certiorari to be heard during the October term of 2018. J.A. at 26.

III. Standard of Review

The Standard of Review for this Court on a question of law is *de novo*. *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231 (1991). The obligation of a responsible federal appellate jurisdiction implies the requisite authority to review independently a lower court's determinations of federal constitutional law. *Id.*

SUMMARY OF THE ARGUMENT

The Board's legislator-led prayers are consistent with this Court's legislative prayer exception to the Establishment Clause. The Thirteenth Circuit erred when it did not consider this country's extensive history and tradition of legislator-led prayer, and misapplied this Court's other tests for evaluating religious expression. The Board asks this Court to reverse the Thirteenth Circuit's grant of summary judgment to Respondent and remand to the District Court with instruction to enter summary judgment in favor of Board.

The Thirteenth Circuit should have evaluated the Board's practice under this Court's legislative prayer exception guidelines set in *Marsh v. Chambers* and *Town of Greece v. Galloway*. Since the birth of this nation, legislative bodies have used legislator-led prayer to solemnize their proceedings. Indeed, this practice remains prevalent, ranging from small-town councils, to large state legislatures.

Conversely, the Thirteenth Circuit erred when it found this Court's legislative prayer exception inapplicable to the Board's prayer practice. The Thirteenth Circuit chose to narrowly focus on the identity of the prayer-giver, rather than the message of the prayer. However, the prayer-giver's identity does not matter so long as the prayers do not denigrate or threaten others, and are offered for solemnization purposes to lend gravity to a legislative body's proceedings. By failing to examine the Board's legislative prayers under this Court's applicable exception, the Thirteenth Circuit erred and summary judgment was improper.

Even if this Court determines that the Thirteenth Circuit should not have applied *Marsh* and *Town of Greece*, the Board's legislative prayer practice is still constitutionally valid under this Court's other tests used to evaluate religious expression in government settings. Under a hybrid analysis applying the tripartite *Lemon* test, supplemented with the endorsement test

from *Lynch v. Donnelly*, and the coercion test from *Lee v. Weisman*, this Court will still find the Board's legislative prayer practice passes Constitutional muster.

Under this analysis, a legislative act or action must meet four objectives. First, the act must have a secular purpose. Second, the act must not advance, inhibit, or endorse religion. Third, the act may not excessively entangle government with religion. Finally, the act must not be coercive. In applying a four-prong, in-depth test, the Board's prayers still pass constitutional muster.

First, the Board's legislative prayers have a secular purpose, as they are used by the Board to focus their meetings, and solemnize the proceedings, in order to purposefully accomplish the business before them. Second, the Board's legislative prayers do not endorse any religion, or advance such religion over others as the Board members are from various faiths, and do not attribute their work to any religious figure. Third, the Board's legislative prayers do not entangle the government with religion because a prayer-giver may draw from his or her own faith without violating the Establishment Clause. Fourth, the Board's legislative prayers do not directly or indirectly coerce the community to adopt a religion, as the community is not required to participate in—nor be present at—the opening of Board meetings.

Because the Board's prayer practice does not violate the First Amendment's Establishment Clause, this Court should reverse the Thirteenth Circuit's grant of summary judgment to Respondent, and remand to the District Court with instruction to enter summary judgment in favor of Board.

ARGUMENT

This Court views "[l]egislative prayer, while religious in nature, . . . as compatible with the Establishment Clause." *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1813 (2014) (quoting *Marsh v. Chambers*, 463 U.S. 783, 792 (1983)). While the First Amendment's Establishment Clause provides that, "Congress shall make no law respecting an establishment of religion, . . ." this Court followed history and the Founding Father's tradition in *Marsh* and *Town of Greece*, by protecting religious invocations before legislative sessions because. U.S. Const. amend. IV; *see Town of Greece*, 134 S. Ct. at 1814; *see Marsh*, 463 U.S. at 786. This Court understood that legislative prayer, in a limited context, can coexist with both "the principles of disestablishment and religious freedom." *Town of Greece*, 134 S. Ct. at 1814; *Marsh*, 463 U.S. at 786.

Like the Nebraska State Legislature in *Marsh*, and the town council in *Town of Greece*, the Board in Hendersonville, Canton, traditionally allows a Board member to deliver an opening prayer before meetings, which differs from this Court's prior legislative prayer cases only regarding the prayer-giver, not the purpose or the message. J.A. at 2. Given that the Board's practice does not purposefully advance or disparage any specific faith, the religious message is of no concern to judges, and thus conforms to the legislative prayer exception to the Establishment Clause. *Marsh*, 463 U.S. at 794–95.

The Board's legislator-led prayer practice is constitutional because the Establishment Clause does not absolutely dictate permissible methods of legislative prayer. *Turner v. City Council*, 534 F.3d 352, 356 (4th Cir. 2008). Indeed, each lawmaking body is best suited to determine which prayer-giver will bring gravity to its proceedings, ranging from the United States Senate's invitations to the world's most renowned clergymen as guest chaplains, to small-town lawmakers who deliver a short prayer at local council meetings. *Town of Greece*, 134 S. Ct.

at 1821; *Lee v. Weisman*, 505 U.S. 577, 630 n.8 (1992); *Bormuth v. County of Jackson*, 870 F.3d 494, 498 (6th Cir. 2017). In this regard, the Board's purpose is the same—to provide lawmakers a moment to reflect upon shared ideals and common ends. *Town of Greece*, 134 S. Ct. at 1818.

To use the courts as legislative prayer-regulators, would excessively entangle government with religion. *See id.* Thus, *Town of Greece* emphasizes that once a legislative body invites prayer prior to proceedings, "government must permit a prayer-giver to address his or her own God or gods as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian." *Id.* at 1822–23.

Even if this Court declines to apply the *Marsh* and *Town of Greece* legislative prayer exception to the Board's practice, the practice still passes constitutional muster under a more restrictive and intrusive analysis which hybrids the three commonly applied Establishment Clause tests: the three-prong test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the endorsement test from *Lynch v. Donnelly*, 465 U.S. 668 (1984), and the *Lee v. Weisman,* 505 U.S. 577 (1992), coercion test.

While a legislative action's purpose cannot not be entirely religious, the purpose need not be completely secular. *Lynch*, 465 U.S. at 678. Here, the Board's legislative prayers are a conduit for the secular purpose of solemnizing public meetings. Invoking guidance from a higher power is not an "establishment" of religion, nor a step toward establishment, but rather a tolerable, non-coercive acknowledgment of beliefs widely held among the people of this country. *See Marsh*, 463 U.S. at 792. These prayers neither advance, inhibit, nor endorse religion, as it is permissible for a prayer-giver to acknowledge his or her God or gods during a prayer. *Town of Greece*, 134 S. Ct. at 1822.

The Board's practice also does not excessively entangle government and religion, as it actions do not extend the government's reach in an impermissible manner which would require oversight to ensure public policies are not being used for religious purposes. *See Lemon*, 403 U.S. at 614. Further, the Board's practice is not coercive as attendance for the entirety of the Board's meetings is not mandatory and the community members are all adults. *See Lee*, 505 U.S. at 596. Such practice is distinguishable from this Court's previous religious-expression cases.

Thus, this Court should reverse the Thirteen Circuit and remand to the District Court with instructions to enter summary judgment for the Board because the Board's practice of legislator-led prayer is consistent with this country's history and tradition, and the Board's prayers support a secular purpose of solemnization of business consistent with the Establishment Clause of the First Amendment.

I. THE BOARD'S PRAYER PRACTICE COMPORTS WITH THIS COURT'S LEGISTLATIVE PRAYER EXCEPTION TO THE ESTABLISHMENT CLAUSE BECAUSE LEGISLATOR-LED PRAYERS ARE CONSISTENT WITH HISTORY AND TRADITION, AND THE PRAYERS DO NOT DENGRATE, THREATEN DAMNATION, OR PREACH CONVERSION.

This Court appropriately considered this nation's history and tradition when evaluating sectarian, legislative prayer in both *Marsh* and *Town of Greece*, and need only apply the same reasoning to the Board's prayer practice. *Marsh* and *Town of Greece* dictate that the history and tradition of opening legislative sessions with prayer has become part of the "fabric of our society," and does not violate the First Amendment's Establishment Clause. *Town of Greece*, 134 S. Ct. at 1819; *Marsh*, 463 U.S. at 792. Further, "absent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose," solely challenging the Board's legislative practice for the content of the prayers is insufficient establish a constitutional violation. *Town of Greece*, 134 S. Ct. at 1824.

Accordingly, the Board's legislator-led prayer practice is constitutional because it complies with this Court's two overarching legislative-prayer guidelines established in *Marsh* and *Town of Greece*. First, the Board's prayers follow historical and traditional practice because each prayer's purpose is to allow the Board a moment of solemn reflection and unification by asking for peaceful blessings and divine guidance. *See id.* at 1833 (Alito, J., concurring). Second, the Board's current practice does not proselytize or advance any one, or disparage any other, faith or belief, meaning the occasional sectarian nature of the Board's prayers is not of concern to this Court. *Id.* at 1823; *Marsh*, 463 U.S. at 794–95. Therefore, this Court should find that the legislative prayer exception includes legislator-led prayer, and that the Board's practice conforms with this Court's standards under *Marsh* and *Town of Greece*.

A. The Board's Practice is Constitutionally Indistinguishable from *Marsh* and *Town of Greece* because Legislator-Led Prayer is Part of This Country's History and Tradition, and a Prayer-Giver's Title Does Not Affect a Sectarian Prayer's Constitutionally-Protected Message.

The Board's practice aligns with *Marsh* and *Town of Greece* because "[f]rom colonial times through the founding of the Republic and ever since, . . . legislative prayer has coexisted with the principles of disestablishment and religious freedom." *Marsh*, 463 U.S. at 786. Legislator-led prayer is no exception. *See Bormuth*, 870 F.3d at 509. Accordingly, the Thirteenth Circuit erred when it failed to even consider legislator-led prayer's extensive history and tradition on the ground that *Marsh* and *Town of Greece* do not explicitly address such practice. J.A. at 20–21. Instead, the Thirteenth Circuit narrowly focused on the prayer-giver's identity as a primary reason for finding the Board's practice unconstitutional. J.A. at 21. Consequently, the Thirteenth Circuit's analysis is contrary to the First Amendment's main goal of preventing the excessive entanglement between the judiciary and religious expression. *Freedom from Religion Found., Inc. v. Concord Cmty. Schs*, 885 F.3d 1038, 1053–54 (7th Cir. 2018).

This Court should find that while it has not explicitly addressed legislator-led prayer under the legislative prayer exception to the Establishment Clause, the practice not only co-existed with the historical prayers evaluated under *Marsh* and *Town of Greece*, but also remains a purposeful practice among many legislative bodies today. *See Bormuth*, 870 F.3d at 509-10. While no one necessarily acquires rights in violation of the Constitution by long use, "an unbroken practice . . . is not something to be lightly cast aside." *Marsh*, 463 U.S. at 790 (quoting *Walz v. Walz v. Tax Com. of N.Y.*, 397 U.S. 664, 678 (1970)). Further, the only real distinction between the Board's practice and the practices in *Marsh* and *Town of Greece* is the person leading the prayer, which does not affect the risk of prejudice, nor the applicability of this Court's legislative prayer exception. *Rowan County v. Lund*, 138 S. Ct. 2564, 2566 (2018) (Thomas, J., dissenting) (cert. denied); *Bormuth*, 870 F.3d at 517.

1. The Board's Practice Falls Within the Legislative Prayer Exception Because Legislator-Led Prayers are Equally Part of This Country's History and Tradition as the Clergy-Led Prayers Evaluated in *Marsh* and *Town of Greece*.

Marsh and *Town of Greece* encompass legislator-led prayer as an exception to the Establishment Clause because the practice is a traditional, historically prevalent way to solemnize legislative business. In fact, at least thirty-one state legislative bodies allow legislator-led prayer. *See* Nat'l Conference of State Legislatures, *Inside the Legislative Process* 5-151 to -152 (2002), http://www.ncsl.org/documents/legismgt/ilp/02tab5pt7.pdf. While some legislatures do not provide legislator-led prayer, the practice is still traditional because *Marsh* and *Town of Greece* allow each legislative body the flexibility to follow its respective legislative traditions. *See Bormuth*, 870 F.3d at 509. A legislature may then select the prayer-givers it believes are most necessary and appropriate to lend gravity to the proceedings, including the legislators themselves. *See id.*

The legislative prayer exception to the Establishment Clause under *Marsh* and *Town of Greece* requires that a prayer practice be "part of the fabric of our society" for this Court to consider the practice consistent with the First Amendment. *Town of Greece*, 134 S. Ct. at 1819 (quoting *Marsh*, 463 U.S. at 792). This means this Court evaluates legislative prayer by reference to historical practices and understandings. *Id.* Thus, if a legislative prayer practice "accords with history and faithfully reflects the understanding of the Founding Fathers," it is a permissible religious expression under the Establishment Clause. *Id.* at 1823; *Marsh*, 463 U.S. at 786; *see Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 294 (1963).

Marsh and *Town of Greece* rely on Samuel Adams' proclamation to the First Continental Congress in 1774 as evidence the Founding Fathers' understood that legislative prayer is not an establishment of religion. *Town of Greece*, 134 S. Ct. at 1833 (Alito, J., concurring); *Marsh*, 463 U.S. at 791–92. Adams declared, "he was no bigot, and could hear a prayer from a gentleman of piety and virtue, who was at the same time a friend to his country." *Town of Greece*, 134 S. Ct. at 1833 (Alito, J., concurring); *Marsh*, 463 U.S. at 791–92. Although some legislators initially opposed allowing prayer from an Anglican priest during a legislative session, the prayer "filled the bosom of every man" in attendance, and this Court determined the Founding Fathers understood legislative prayer as consistent with the Establishment Clause. *Town of Greece*, 134 S. Ct. at 1833 (Alito, J., concurring); *Marsh*, 463 U.S. at 791–92.

Following this Court's *Marsh* and *Town of Greece* analysis, the Sixth Circuit in *Bormuth* analyzed legislator-led prayer's history and traditions. *Bormuth*, 870 F.3d at 509. The court found legislator-led prayer was equally prevalent throughout this country's history, and therefore not constitutionally distinguishable. *Id.* For example, just one year after Samuel Adams first invited a priest to deliver a prayer for the Continental Congress, the South Carolina state

legislature instead allowed legislators to individually offer prayers to commence sessions. *Id.* The court also found that legislator-led prayer expanded throughout state capitols following the American Revolution and after the incorporation of the First Amendment, further indicating legislator-led prayer was understood to be compatible with the Establishment Clause. *Id.* The Sixth Circuit even pointed out that just north of Jackson County, Michigan, where Bormuth alleged legislator-led prayer violated the Establishment Clause, both the Michigan House of Representatives and State Senate allowed legislator-led prayer, which demonstrated the practice was a long-standing tradition. *Id.* at 510.

Despite the extensive history and tradition of legislator-led prayer, some courts have also incorrectly determined the practice does not fall under the *Marsh* and *Town of Greece* legislative prayer exception. Most notably, the Fourth Circuit, in an *en banc* rehearing, determined "the identity of the prayer-giver is relevant to the constitutional inquiry." *Lund v. Rowan County*, 863 F.3d 268, 280 (4th Cir. 2017). However, *Lund* also ignored several important inquiries from *Marsh* and *Town of Greece*. For instance, as noted in one of the dissenting opinions in *Lund*, "both *Marsh* and *Town of Greece* teach that the purpose of legislative prayer is largely to accommodate the spiritual needs of lawmakers, and long-standing tradition of prayer practice at governmental assemblies show that prayer-givers can include governmental officials or members of the assembly, such as numerous examples of members of the United States Congress delivering prayers." *Lund*, 863 F.3d at 298 (Niemeyer, J., dissenting). While standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress. *Marsh*, 463 U.S. at 790. Thus, since 1789 this Court has maintained an unbroken history of

official acknowledgment of religion in American life. *Lynch*, 465 U.S. 668, 674 (1984). Such an historical analysis is more appropriate in light of *Marsh* and *Town of Greece*.

History further provides that legislator-led prayer is, and has always been, a traditional ceremony for many legislative bodies. For example, when this Court approved Greece, New York's legislative prayer practices in *Town of Greece*, the Town's prayer transcripts showed that alongside prayers from the community's religious leaders, occasionally the council-members would instead open meetings with legislator-led prayer. *Bormuth*, 870 F.3d at 511. Similarly, when the Indiana House of Representatives does not designate a visiting clergy member to give the prayer for a legislative session, a state representative instead gives the invocation. *Hinrichs v. Speaker of the House of Representatives*, 506 F.3d 584, 586 (7th Cir. 2007). The Pennsylvania House of Representatives also allows a member of its legislature to open legislative sessions with sectarian prayer. *Fields v. Speaker of the Pa. House of Representatives*, No. 1:16-CV-1764, 2018 U.S. Dist. LEXIS 146938, at *2 (M.D. Pa. Aug. 29, 2018). These are only a few of the numerous examples through this country.

The prayers at issue are government speech, meaning the Establishment Clause does not absolutely dictate the form of legislative prayer. *Turner*, 534 F.3d at 355-56. As such, "it would be nonsensical to permit legislative prayers but bar the legislative officers for whom they are being primarily recited from participating in the prayers in any way." *Am. Humanist Ass'n v. McCarty*, 851 F.3d 521, 529 (5th Cir. 2017). If the Thirteenth Circuit properly conducted an historical analysis of legislator-led prayer, it would have found that opening legislative business with a legislator-led prayer is just another traditional opportunity for public officials to reflect upon the values they hold as private citizens in a manner they see fit. *See Bormuth*, 870 F.3d at 511. For example, while the Dalai Lama's blessing to the United States Senate might best help

Senators reflect upon their larger purpose, a small-town councilmember-led prayer in Greece, New York might be just as effective with a unique, relevant, and localized message. *See Id.* (citing Greece, New York councilmember's opening prayer); *See* 160 Cong. Rec. S1329 (Mar. 6, 2014) (Dalai Lama's opening invocation to the United States Senate).

Thus, this Court should continue protecting legislators' right to conduct a moment of quiet reflection and contemplation of the importance of their duty as representatives of their constituents, by upholding the Board's legislator-led prayer practice. The Founding Fathers understood history and tradition provide that even those who disagree as to religious doctrine, may find common ground in the desire to show respect for the divine in all aspects of their lives. *Town of Greece*, 134 S. Ct. at 1823. This Court need not go beyond a history and tradition analysis where, as here, "there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Marsh*, 463 U.S. at 794–95.

2. A Prayer-Giver's Identity is Irrelevant to the *Marsh* and *Town of Greece* Legislative Prayer Exception, because a Speaker's Title or Position Does Not Affect a Prayer's Message.

A prayer's message, purpose, and intent do not differ constitutionally when delivered by a priest as opposed to a legislator, meaning a prayer-giver's title or position is not relevant when evaluating a prayer under *Marsh* and *Town of Greece*. In fact, this nation's history is full of official government references to the value of divine guidance in deliberations. *Lynch*, 465 U.S. at 675. This Court should find that the Thirteenth Circuit erred in its determination that the prayer-giver's identity is relevant to constitutional inquiry because "the risk of potential religious prejudice when a Board member delivers a prayer is no greater than when a prayer is delivered by a guest chaplain." *Bormuth*, 870 F.3d at 517. Instead, legislative prayer exists "largely to

accommodate the spiritual needs of lawmakers and connect them to a tradition dating to the time of the Framers." *Id.* at 511 (citing *Town of Greece*, 134 S. Ct. at 1826).

This Court's holdings in *Marsh* and *Town of Greece* do not require prayer opportunities for persons of other faiths to offer invocations. *Id.* 870 F.3d. at 514. Historical practices further confirm that the Establishment Clause does not prevent the government or individual legislators from recognizing this country's religious heritage, meaning the Board's practice limiting prayer opportunities to its Board members does not alter the practice's constitutionality under *Marsh* and *Town of Greece*. *See Doe v. United States*, No. 16-4440, 2018 U.S. App. LEXIS 24387, at *9 (8th Cir. Aug. 28, 2018). Further, the religious faiths of elected officials are "dynamic, not static," so while the Board is currently composed of only Christians, it does not mean a future Board member of non-Christian faith will not ultimately have the opportunity to provide a moment of solemn reflection from their respective tradition. *Bormuth*, 870 F.3d at 513. Presumably, this even includes Respondent.

The Sixth Circuit correctly concludes that *Marsh* and *Town of Greece* do not support negating a prayer practice based on a pray-givers identity, and this Court should adopt *Bormuth*'s reasoning. A different standard would create a trivial result where an invocation delivered in one legislature by a guest minister would be upheld under *Marsh* and *Town of Greece*, while the identical invocation delivered in another legislature by one of the legislators would be struck down. *Id.* at 512. Instead, *Marsh* and *Town of Greece* support the history and tradition of legislative prayer practices that are purposeful and promote unity and acceptance, regardless of the prayer-giver's title, or their sectarian message based on personal religious belief. Therefore, this Court should uphold the Board's prayer practice because it comports with legislative prayer's history and tradition.

B. The Board's Prayers Do Not Denigrate Non-Believers or Religious Minorities, Threaten Damnation, or Preach Conversion, and Thus Conform to the Standards Under *Marsh* and *Town of Greece*.

Although the Board's prayers sometimes contain recognizably Christian references, this Court's legislative prayer exception allows the Board's prayer-giver to address his or her own God (or gods), "unfettered by what an administrator or judge considers to be nonsectarian." *Town of Greece*, 134 S. Ct. at 1822–23. Yet the Thirteenth Circuit erred when it failed to apply this Court's exception, which requires "inquiry into the prayer opportunity as a whole" and instead, relied solely on the contents of a single prayer. *Id.* at 1824; *Marsh*, 463 U.S. at 794–95; J.A. at 18–19, 23. Neither the single prayer provided to this Court in the Record, nor any other facts in the Record, indicate a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose to constitute a violation of the Establishment Clause. Therefore, this Court should find that Board's method of invocation is consistent with more than 200 years of unbroken practice and tradition established by the Founding Fathers, does not advance or demean religious views, and is an appropriate, and constitutional, way to solemnize and lend gravity to legislative proceedings.

The standard set forth by this Court in *Marsh* instructs that the "content of the prayer is not of concern to judges," provided "there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Town of Greece*, 134 S. Ct. at 1814 (citing *Marsh*, 463 U.S. at 794–95). Thus, "absent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a particular prayer will not likely establish a constitutional violation. *Id.* This standard does not require that all faiths be allowed the opportunity to pray. *Pelphrey v. Cobb Cty.*, 547 F.3d 1263, 1281 (11th Cir. 2008). Rather, "[t]he

principal audience for these invocations is not . . . the public but lawmakers themselves, who may find that a moment of prayer or quiet reflection sets the mind to a higher purpose and thereby eases the task of governing." *Am. Humanist Ass'n*, 851 F.3d at 526 (citing *Town of Greece*, 134 S. Ct. at 1825).

On their face, the Board's prayers do not denigrate or threaten anyone, nor do they preach conversion whatsoever. Rather, the Board's prayers ask for "unity" and "togetherness," "no matter what religion, faith, or lack thereof." J.A. at 9. They ask for divine guidance to "treat all persons with the dignity and respect that they deserve—no matter their race, sex, religion, sexual orientation, or gender identity." *Id.* Although the Board's prayer example in the District Court and the Thirteenth Circuit opinions invokes clearly Christian references, such as using Jesus' name and citing to the Bible, the Establishment Clause does not require religious balancing. *Town of Greece*, 134 S. Ct. at 1824; J.A. at 9. The prayer-policy is non-discriminatory, and allows all Board members to pray, regardless of their faith. J.A. at 2–6.

The Board's prayers differ significantly from those in *Lund*, which the Thirteenth Circuit followed when ruling the Board's prayers unconstitutional. J.A. at 21. The Fourth Circuit in *Lund* determined the prayers did not meet this Court's requirement that legislative prayer be purposeful and respectful. *See Lund*, 863 F.3d at 273. For example, *Lund* held that prayers declaring, "[A]s we pick up the Cross, we will proclaim His name above all names, as the only way to eternal life" were inconsistent with traditional legislative prayers like those in *Marsh* and *Town of Greece*. Such themes and messages are quite different from the Board's prayers, which instead ask to "come together in a spirit of unity despite whatever differences we may have." J.A. at 9.

Ultimately, this Court should find that the Board's legislator-led prayers do not create a pattern or practice that over time denigrates, proselytizes, or betrays an impermissible government purpose. *Marsh* and *Town of Greece*, support the Board's prayer practice because it is consistent with other traditional legislator-led prayer practices throughout this country's history. Therefore, this Court should find that the Board's practice is constitutional because the legislative prayer exception to the Establishment Clause includes legislator-led prayer, and the Board's prayers do not denigrate, threaten, and preach conversion to anyone.

II. THE BOARD'S PRACTICE OF BEGINNING PUBLIC MEETINGS WITH PRAYER HAS A SECULAR PURPOSE BECAUSE THE PRAYERS' HAVE ONLY A SECONDARY RELIGIOUS ASPECT, DO NOT FOCUS ON A SPECIFIC RELIGION, DO NOT EXCESSIVELY ENTANGLE THE GOVERNMENT WITH RELIGION, AND DO NOT IMPOSE COERCIVE PRESSURE.

Should this Court decline to apply its own rationale from *Marsh* and *Town of Greece*, the Board's actions still pass constitutional muster under a more restrictive and intrusive analysis. This analysis includes evaluating the Board's prayers under the three commonly-applied Establishment Clause tests: the tripartite *Lemon* test, the *Lynch* endorsement test, and the *Lee* coercion test. *See Lee*, 505 U.S. at 599; *See Lynch*, 465 U.S. at 690; *See Lemon*, 403 U.S. at 603. The *Lemon*, *Lynch*, and *Lee* tests are regularly used to evaluate a legislative or government action, and any examination must be fact intensive without creating any *per se* rules for religious expression. *Lynch*, 465 U.S. at 678 (naming the various tests used by this Court over the years to evaluate legislative actions and conduct and whether such actions and conduct violate the Establishment Clause). Under this evaluation, the Board's practice indicates it has a legitimate secular purpose, does not endorse or advance one religion or others, does not excessively entangle religion and government, and is not coercive. Thus, this Court should find that the

Thirteenth Circuit erred because the Board's prayer practice does not violate the Establishment Clause under the *Lemon*, *Lynch* and *Lee* tests.

A. A Combination of the *Lemon, Lynch,* and *Lee* Tests is the Most Appropriate Manner to Evaluate the Board's Practice.

This Court has developed various methods for evaluating religious expression in government settings, and as such, is not limited to a single test to determine whether Board's practice of beginning public meetings with prayer supports the secular purpose of solemnizing public business. *See Town of Greece*, 134 S. Ct. at 1819; *see Marsh*, 463 U.S. at 792; *see Simpson v. Chesterfield Cty. Bd. of Supervisors*, 404 F. 3d 276, 281 (4th Cir. 2005); *see* Jill M. Misage, *Refusing to Abandon a Real Lemon of a Test: North Carolina Civil Liberties Union v. Constangy*, 28 Wake Forest L. Rev. 775, 795 (1998). The basis of this Court's scrutiny is "whether, in reality, [the challenged legislation or official conduct] establishes a religion or religious faith, or tends to do so." *Lynch*, 465 U.S. at 678*; see also Walz*, 397 U.S. at 669. Without applying *Marsh* and *Town of Greece*, this Court should then look to the other traditional tests to evaluate religious expression in government settings.

First, this Court announced its seminal tripartite test for an Establishment Clause violation in *Lemon v. Kurtzman*, 403 U.S. at 603. In *Lemon*, this Court reviewed Pennsylvania and Rhode Island statutes that provided state payments to non-secular, non-public education. *Id*. In evaluating the two statutes, this Court employed a three-part test whereby, for an act or action to be valid under the Establishment Clause, the act must (1) have a secular purpose (the "purpose prong"), (2) not advance or inhibit religion (the "effect prong"), and (3) not excessively entangle the government with religion (the "entanglement prong"). The test is conjunctive; an act must survive all three prongs to be considered constitutional. This Court found that both statutes in *Lemon* required government oversight to ensure teachers took on non-ideological roles, thus the

statutes were found invalid because they excessively entangled the government with religion and failed the third prong.

Second, *Lynch* augmented the effect prong by adding endorsement of religion as a prohibited act. *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring). In *Lynch*, this Court found that a city's 40-year traditional Holiday display did not violate the Establishment Clause, despite the display featuring a religious crèche. *Id.* This element of government endorsement of religion has since been incorporated into the effect prong of *Lemon*. *Doe v. Elmbrook School District*, 687 F. 3d 840, 850 (7th Cir. 2012) (noting that the second prong has subsumed the endorsement test first announced in *Lynch*); *Kitzmiller v. Dover Area School District,* 400 F. Supp. 2d 707 (M.D. Pa. 2005).

Third, the *Lee* test established a "forth prong" to the Lemon test, and evaluates whether a government action is coercive. *Lee*, 505 U.S. 577 (1992). In *Lee*, this Court held that prayers offered by religious leaders at a Rhode Island high school graduation violated the Establishment Clause. Id. at 599. This Court determined the religious prayers created subtle and indirect coercive pressure, which persuaded and compelled students to participate in religious exercises. *Id.* The coercion test is typically used to evaluate school related actions and their acceptability under the Establishment Clause, but has been used in other government settings as well. *See Freedom from Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ.*, 896 F.3d 1132 (9th Cir. 2018); *see Doe v. Indian River Sch. Dist.*, 653 F.3d 256 (3d Cir. 2011); *See Sch. Dist. of Abington Twp.*, 374 U.S. 203; *See Engel v. Vitale*, 370 U.S. 421 (1962). By using the four-prong *Lemon*, *Lynch*, and *Lee* tests, this Court may properly evaluate the Board's practice under the Establishment Clause, because the prayers are forms of religious expression with a secular purpose in a government setting.

B. The Board's Prayers Do Not Violate the Establishment Clause Under the Four-Prong Combination of the *Lemon, Lynch,* and *Lee* Tests.

Under the more restrictive, four-prong test, the Board's legislative prayers still pass constitutional muster, and do not violate the Establishment Clause as (1) the purpose of the legislative prayers is secular, (2) the legislative prayers do not advance, inhibit or endorse a religion, (3) the legislative prayers do not excessively entangle the government with religion, and (4) the legislative prayers do not coerce the members of the community to partake in religious activity.

1. The Board's References to Religion During Prayer Do Not Violate the Establishment Clause because the Prayers' Primary Purpose is the Secular Solemnization of Public Business.

The purpose of the Board's legislator-led prayer practice is to solemnize business. The use word "God" or other religious connotations does not alter the prayers' secular purpose, so long as the religious nature is secondary to the secular objective. *McCreary County v. ACLU*, 545 U.S. 844, 864 (2005); *Edwards v. Aguillard*, 482 U.S. 578, 590 (1987) (finding a statute limiting science course materials had a primary and predominant purpose of advancing religion). While an action's purpose may not be secondary to a religious objective, this Court has long noted that the purpose need not be one-hundred percent secular, as a complete and total separation of church and state is neither possible nor required by the Constitution. *Lynch,* 465 U.S. at 673; *Engel*, 370 U.S. at 433; *Zorach v. Clauson,* 343 U.S. 306, 314 (1952), *Illinois v. Bd. of Educ*, 333 U.S. 203, 211 (1948).

To determine an act's purpose, this Court looks to whether the "government's actual purpose is to approve or disapprove of religion." *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (quoting *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring)). The courts have rarely found a non-

secular purpose, unless the act or action employs the usage of distinctly religious items, texts, or documents. *McCreary County,* 545 U.S. at 881 (O'Connor, J., concurring) (affirming findings that a display featuring the Ten Commandments in a county courthouse showed no analytical or historical connection to the other featured historical documents). Moments of quiet reflection serve an entirely secular purpose by providing a quiet moment for Americans to think about their day. *Bown v. Gwinnett County Sch. Dist.*, 112 F.3d 1464, 1472 (11th Cir. 1997).

The Board's legislator-led prayers do not indicate a primary religious objective, and advance the secular purpose of solemnizing public business. As the Chairman of the Board, Wyatt J. Koch, states "the intent of these prayers is to solemnize public business and to offer citizens a chance to quietly reflect on matters before the Board or whatever else is going on in their lives." J.A. at 2. The prayer evaluated by the District Court and the Thirteenth Circuit demonstrates the primary purpose of the Board's prayers is to bring the community together for a moment, because it references religion only in a manner that is secondary to solemnizing business. J.A. at 9. These legislative prayers occur at the beginning of the monthly sessions to focus the Board members on the tasks at hand for the day, not during a disruptive or opportunistic moment. J.A. at 2–6. Additionally, legislative prayers are offered in conjunction with the Pledge of Allegiance with both actions serving to remind the Board of the public business and solemnize the proceedings. J.A. at 8. References to "God" do not alter the primary purpose of solemnizing the public business. *See Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1018 (9th Cir. 2010). Therefore, this Court should find the Board's legislator-led prayers serve a primary secular purpose, and do not violate the first prong of the *Lemon*, *Lynch*, and *Lee* tests.

2. Legislative Prayers Do Not Endorse or Advance One Single Religion with a Clearly Religious Purpose by Merely Referencing "God," Especially When Board Members Belong to Different Religious Denominations.

The Board's legislative prayers neither advance, inhibit, nor endorse any one religion. Each Board member is of a different faith, and a prayer-giver is not required to hide or mask his or her religion. J.A. at 2–6, 8. The prayers broadly reference religious figures and universal themes without endorsing any one, specific religion.

The effect prong requires a legislative act or action neither advance nor inhibit a religion. This means that the act or action cannot favor or disfavor one religion over others. *Agostini v. Felton*, 521 U.S. 203, 233 (1997). The act or action also may not communicate a government endorsement or disapproval of a religion. *County of Allegheny v. ACLU*, 492 U.S. 573, 592–93 (1989); *Lynch ,*465 U.S. at 692. Still, it is officially acknowledged that religion plays a role in the average American's life, and as such, brief mentioning a religious term does not necessarily advance or inhibit religion. *Lynch ,*465 U.S. at 674–678.

The standard for endorsement is whether an observer would reasonably infer that the government intended to promote religion. *Schempp*, 374 U.S. at 295 (finding that a reasonable observer seeing students reading from the Bible at the start of school days created religious ceremonies would infer an endorsement of Christianity, thus violating the Establishment Clause). A written description of legislative prayer can create a view of government endorsement. *See Doe v. Pittsylvania County,* 842 F. Supp. 2d 906 (4th Cir. 2012) (finding that the written policy of legislative prayer endorsed religion when all the given prayers were highly Christian and not secular in nature). Here, the board instead maintains an unwritten prayer-practice, indicating the Board neither primarily advances nor endorses a specific religion.

When an act explicitly permits the performance of religious actions, this Court has held such act as endorsing or advancing religion. *Wallace*, 472 U.S. at 60 (holding Alabama's law authorizing teachers to conduct regular religious services unconstitutional). However, where religious endorsement is not the primary effect, this Court has found no violation. *Lynch,* 465 U.S. at 692 (finding that a creche served a historical purpose and did not advance the Christian religion); *see also Bormuth*, 870 F. 3d at 512 (holding that legislative prayers with the effect and purpose of asking for guidance and assistance in the public works did not violate the Establishment Clause). Further, when multiple faiths are represented, the endorsement of one religion is not the primary effect. *Skoros v. City of N.Y.*, 437 F. 3d 1, 14 (2d Cir. 2006) (finding the presence of multiple religious faith's symbols promoted the secular goal of respect for diverse faiths).

The Board's actions do not constitute a religious endorsement because the practice is unwritten, and prayers are open to any individual of any faith on the Board. J.A. at 2–6. Board members draw from their own personal experiences with their prayers focused on the public business and the community as a whole. J.A. at 9. The Board's legislator-led prayers do not attribute any success or failure of the Board or the community to a religious figure or entity. *Id.* Every prayer focuses on the work to be done, and no prayer ever includes a religious document or text. *Id.* Board member John Riley notes "this prayer is not a religious exercise," and each Board member further emphasizes the distinction between the legislative prayers they offer to solemnize the proceedings, and religious prayers. J.A. 2–6. Aside from a general reference to a multi-faith religious text, there is no evidence that any Board member has ever read from or disseminated a religious text or document to the assembly. J.A. at 9.

As each Board member belongs to a different faith, the prayers do not advance or endorse one, single religion. J.A. at 8. To suggest that Lutherans, Baptists, Methodists, Presbyterians, and Catholics are all the same faith is disingenuous and demonstrates a lack of knowledge about religion. *See* Hugh Mcleod, *Protestant-Catholic Conflict from the Reformation to the 21st Century: The Dynamics of Religious Difference*, ed. John Wolffe, 130 English Historical Review 545 (2015). Christianity and Catholicism, for example, are not one and the same – entire wars were fought on this distinction alone. *Id*.

Instead, the prayers state the Board's openness to all faiths. J.A. at 9. As noted by this Court, "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach*, 343 U.S. at 313. Thus, the use of "Father" and "God" does not endorse or advance one faith. "Father" is used by multiple religions, for example Baha'i, Judaism, Christianity, and Sikhism all associate "Father" with "God." Additionally, "God" is present in all monotheistic religions. So simply by using the word "God" does not endorse or advance a single religion. *See New Doe Child #1 v. United States*, 901 F.3d 1015, 1022 (8th Cir. 2018).

This Board's religious diversity is distinguishable from *Lund* where all five members of the Board were Protestant, and during the bi-monthly meetings they offered specifically Christian prayers. *Lund*, 863 F. 3d at 273 (finding that prayers offered by a 5-member all-Protestant Board, where 97% of the prayers in the last five years were sectarian and occasionally placed Christianity above other faiths violated the Establishment Clause). In *Lund*, the prayers offered by the legislators were sectarian in nature, and "unceasingly and exclusively invoked Christianity." *Id.* at 283. Additionally, a key remark by the Fourth Circuit in *Lund* was the lack of opportunity for open prayer by attendees other than the legislators and the prevention of other

prayers from being offered. *Id.* at 280. The legislators went even further in *Lund* to "effectively insulate themselves from requests to diversify prayer content." *Id. at* 282.

There is no evidence as to whether the Board prevented, or in any way inhibited, other members of the community from participating in the solemnization of the Board meetings. However, this Court should not take silence as evidence of prevention. Respondent does not contend that the Board has mistreated her due to her faith, nor does Respondent present any facts to demonstrate that the Board denied any other community members an opportunity to offer a solemnization prayer at the outset of a Board meeting.

The Board's legislator-led prayers ultimately do not advance, inhibit, or endorse a religion. As the demographics of elected legislative bodies change each turn, the Board's practice allows those of any faith to be provide a prayer. There is also no evidence that the Board has inhibited others from offering solemnization prayers. Therefore, this Court should find that the Board's general references to religious effects do not endorse or advance religion in a country that presupposes a greater being.

3. The Board's Prayers Do Not Excessively Entangle the Government and Religion Because the Board's Prayers Do Not Aid a Religious Cause.

The Board's actions do not excessively entangle the government's work with religion, as the Board does not conduct any meetings or issue permits premised upon a religious belief requiring further oversight. Excessive entanglement occurs when the government must become more involved in its own program to ensure government aid is used for secular purposes. *Lemon,* 403 U.S. at 615. Further, the entanglement must rise to the level of excessive before "runs afoul of the Establishment Clause." *Agostini v. Felton*, 521 U.S. 203, 233 (1997) (citing *Bowen v. Kendrick*, 487 U.S. 589, 615–17 (1988)). The courts have found excessive entanglement in cases

where the act or action provides funding or other benefits to religious schools. *Lemon*, 403 U.S. at 615.

Here, the Board's prayers are not offered for the benefit of any institution to rise to the level of excessive entanglement. For instance, the Board's actions do not demonstrate preference for religious or non-religious organizations. J.A. at 18 n. 1. Furthermore, there is no religious authority involved in any way with the Board, nor does the Board speak of, or recommend any religious authority during the legislative prayers or during their meetings. J.A. at 9.

Given the lack of any connection between the Board and a religious entity, the Board's prayer practice does not cause an excessive entanglement between government and religious. Thus, this Court should find the entanglement prong inapplicable.

4. The Board's Legislative Prayers Place No Coercive Pressure on Religious Minorities, as Failure to Participate in Prayer Does Not Result in any Penalty.

The Board's legislator-led prayers do not create a coercive environment because legislative prayer exists "largely to accommodate the spiritual needs of lawmakers," not others in a legislative meeting's attendance. *Bormuth*, 870 F.3d at 511. When the Board provides a prayer, they offer simple invitations, to join, and as such do not cause religious minorities to conform to a different belief system. Further, to rise to the level of coercion, the prayer practice would need to show that the religious exercise need be adhered to by threat of penalty or force of law. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49 (2004) (Thomas, J., concurring) (quoting *Lee*, 505 U.S. at 640 (1992) (Scalia, J., dissenting)).

The coercion prong typically applies to schools, not legislative settings, because students cannot avoid listening to a religious message where attendance is mandatory by law. *See Freedom from Religion Found., Inc.*, 896 F. 3d 1132; *Indian River Sch. Dist.*, 653 F. 3d 256;

Sch. Dist. of Abington Twp., 374 U.S. 203 (1963); *Engel,* 370 U.S. 421 (1962). Courts, therefore, have been hesitant to extend coercive pressure far beyond the schoolhouse gates. *Lee*, 505 U.S. at 596 (1992) (decrying a difference between the constraining atmosphere of a public high school's graduation ceremony, and state legislature sessions where adults are free to enter and leave as they please). The public is at large is viewed as consenting adults, and coercion has not been found in instances where the community member has had a regular interaction with the alleged coercive action yet has long awaited bringing a lawsuit. *Van Orden v. Perry*, 545 U.S. 677, 691 (2005) (finding no coercion when the petitioner, Van Orden, had regularly walked before a monument of the Ten Commandments for many years before bringing his lawsuit).

In contrast, there is no evidence indicating the attendees are required to be present at the outset of the meetings, not during the entirety of the meeting. Additionally, the Board's request for attendees to "stand, recite the Pledge of Allegiance, and listen to a short prayer," J.A. at 18, is not coercive as there is no evidence that indicates that presence during these actions is mandatory. Furthermore, there is no evidence to indicate that <u>any</u> community members <u>actually</u> stand, recite the Pledge of Allegiance, and listen to a short prayer.

Additionally, Respondent's claim of coercion is inappropriate as Respondent regularly attended the Board meetings. J.A. at 1. According to Respondent, she has "attended many meetings" and "[a]t every meeting, one of the Board meetings[sic] would open up the session with a prayer." *Id.* This demonstrates that not only has Respondent regularly attended the Board's meetings, but Respondent was familiar with the Board's method of opening the meetings. As this Court held in *Van Orden*, Respondent should not be permitted to allege coercion when she has regularly attended these meetings, and only after being nervous about

speaking about her paddleboat company, does she allege any issue with the Board's practice. *Van Orden*, 545 U.S. at 691.

The Record does not demonstrate any mistreatment by the Board of any persons who declined to attend the opening of the meetings or did not participate or listen to the prayers. Therefore, it cannot be determined that the Board has exerted any coercive pressure, and as Respondent is familiar with the Board's practices, she may not now allege coercion.

The Board's legislator-led prayer practice ultimately passes the four prongs under the *Lemon*, *Lynch*, and *Lee* tests. First, the purpose of the Board's legislative prayers is secular because they solemnize the proceedings, and the religious nature is secondary. Second the legislative prayers do not advance, inhibit, or endorse a religion as all the board members belong to different religious denominations, and the prayers do not advance a cause with a clearly religious purpose. Third, the legislative prayers do not excessively entangle the government with religion, as the prayers do not involve a separate religious entity, requiring government oversight. Finally, the legislative prayers are non-coercive because there is no penalty or threat of penalty if the individuals at Board meetings do not partake in the prayers. Therefore, this Court should reverse the Thirteen Circuit's grant of summary judgment and remand to the District Court with instruction to enter summary judgment in favor of the Board.

CONCLUSION

The Thirteenth Circuit erred when it determined the that the Board's legislator-led prayers violated the Establishment Clause, because it failed to apply this Court's legislative prayer exception to the Board's practice, and the Board's prayers primary purpose is to solemnize legislative business.

First, the Board's practice is constitutionally indistinguishable from this Court's holdings in *Marsh* and *Town of Greece*. Legislator-led prayer has existed alongside other forms of legislative prayer since this country's founding, and it remains an important part of history and tradition. *Marsh* and *Town of Greece* also only differ from the Board's practice regarding the prayer-giver, not the prayer-message, meaning there is no further risk of prejudice when a legislator delivers a prayer, as opposed to a religious leader. Additionally, the prayers do not denigrate, threaten damnation, or preach conversion, meaning they comport with this Court's reasoning in *Marsh* and *Town of Greece*.

Second, the Board's practice supports the secular purpose of solemnizing public business under the four-prong *Lemon*, *Lynch*, and *Lee* tests. These tests provide that (1) the Board's prayer practice's primary purpose is secular, not religious, (2) the prayers do not endorse or advance a single religion with a clearly religious purpose, (3) the Board's practice does not excessively entangle government with religion, and (4) the prayers do not place coercive pressure on religious minorities.

Thus, the Board respectfully requests this Court reverse the Thirteenth Circuit's erroneous decision and remand to the District Court with instructions to enter summary judgment in favor of the Board.