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 PETITION FOR REVIEW FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT

RESPONDENT'S BRIEF ON THE MERITS

Team 2504
Attorney for Respondent
September 30th, 2018

QUESTIONS PRESENTED

1) Whether the Board's practice of having members offer prayer before public meeting comports with the history and tradition of legislative prayer authorized by *Marsh v Chambers* and *Town of Greece v Galloway*.

2) Whether the 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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

CASES

SECONDARY MATERIALS

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

Facts:

The Hendersonville Parks and Recreation Board ("the Board") oversees many facets of the city, including cultural arts, greenways, golf courses, historic sites, permit rentals and reservations, and outdoor recreation. J.A. at 8. The Board meets once a month to hear various issues, including a review of permit denials. J.A. at 8. Five enthusiastic followers of Christianity are the current members of the Board. J.A. at 8.

To solemnize the occasion of granting or denying permits for paddleboat businesses and similar parks and recreation decisions, the Board has an unwritten policy of opening each monthly meeting in prayer. J.A. at 8. After instructing every member of the public to stand, they recite the Pledge of Allegiance. J.A. at 8. In addition, the Board leads the group in Christian prayer. J.A. at 18. With explicit citations to the Bible and a clear religious bent, the Board alienates non-Christians with each prayer, month after month, with callous indifference towards members of minority faiths in the facilitation of its prayer practice. J.A. at 18; J.A. at 2.

As a dedicated member of her local community, Barbara Pintok regularly attends Hendersonville Parks and Recreation Board meetings to remain involved in the decision-making process and at times, seek licensing for her business activities. J.A. at 8. Barbara is consistently reminded of her childhood experiences in Christian churches when she attends the board meetings in Hendersonville. J.A. at 1. Barbara is familiar with Christianity but is a follower of Wicca, a pagan religion. J.A. at 1. Nobody has disputed the sincerity of her religious beliefs, which is relevant because she was a member of a captive audience and many times instructed to participate in the Board's prayer practice. J.A. at 17.

Due to the Board's consistent prayer practice, Barbara had to subject herself to government-approved Christian prayer to speak about a simple permit issue with a paddleboat

company she is forming. J.A. at 1. Barbara was unable to enunciate her words properly because she was so distraught and nervous over having to participate in Christian prayer. J.A. at 1. Hearing the exclusively Christian prayers, month after month, made Barbara feel like an outsider, humiliated her, and caused significant distress. J.A. at 1.

The Board states that it represents all citizens from the religiously devout to the fiercely atheistic. J.A. 2. Yet, the Board's actions alienate the people they claim to represent. J.A. at 1. A member said he would "never approve of any government practice that coerces individuals to accept majoritarian religious practices", but the prayer practice of the Board inevitably subjects the citizens of Hendersonville to the sectarian prayers recited by officials placed in power by popular vote. J.A at 18. The Board is likely unaware of the negative implications of its prayer practice according to the board members' affidavits but the Establishment Clause does not bow down to good intentions. J.A. 2–6.

Procedural History:

Barbara filed a lawsuit against the Board, seeking declaratory and injunctive relief, as well as a preliminary injunction against the Board's use of sectarian prayers at its meetings. J.A. at 10. After minimal discovery, both parties filed cross-motions for summary judgment. J.A. at 10. The District Court held that the Board's practice of legislator-led prayer is supported by the Supreme Court's decisions in *Marsh* and *Town of Greece*. J.A. at 17. The Thirteenth Circuit disagreed and held that the Board's practice fundamentality differs from the historic principles articulated by the Supreme Court. J.A. at 17. The Court reversed and remanded with instructions to enter summary judgment for Barbara. J.A. at 17. The Board appealed. J.A. at 17.

SUMMARY OF THE ARGUMENT

Freedom of conscience, and the limited deference given to deprivation of this freedom, is deeply rooted in our Nation's history and tradition. The First Amendment protects individuals from active government facilitation of religion, as well as prevents the government from restricting the free exercise of religion. These fundamentally different rights work concurrently to retain the sanctity of religion and the integrity of the government in pursuit of our great Constitutional experiment which has passed the test of time.

Legislative prayer is insulated from traditional Establishment Clause tests if the prayer practice falls within our Nation's history and tradition as articulated in *Marsh* and *Town of Greece*. Tradition reveals that legislative prayer which serves as a mere acknowledgment of the role of religion in our society or reflects the diversity of religious viewpoints in our nation is permissible under the First Amendment. However, the history of legislative prayer generally cannot be used to justify a significantly different modern practice which inches too closely to the establishment of Christianity.

Surely, our history reveals a chaplaincy is not the type of prayer practice the Establishment Clause prohibits. Even so, a chaplain may not lead prayer with unbridled discretion or coercive techniques. Contrary to a chaplaincy, well-rooted in American tradition, the Board personally facilitates continuous Christian prayer with a government stamp of approval. Regardless of the professed purposes of the Board, members of the community are left with the impression that the government prefers Christianity. The surest road to the establishment of religion is paved with good intentions.

The First Amendment protects religious minorities from inherent pressure to conform to the religion endorsed or seemingly preferred by their government. A local government is not

required to venture beyond its borders to achieve religious balancing. Yet, express exclusion is not required for a government to violate the Establishment Clause. A government body in these United States is prohibited from displaying a seeming preference for religion; moreso the government cannot show preference for a certain faith. The Board has consistently portrayed a preference for Christianity in its prayer practice contrary to the values underlying our Nation's history.

The Board is unable to rely on history and tradition of legislative prayer to justify this prayer practice. Therefore, the Court must use traditional Establishment Clause tests to examine the constitutionality of the Board's prayer practice. Under these tests, the Board's prayer practice cannot stand.

In a local board setting, the potential for a coercive prayer practice is heightened. Members of the public are not free to simply disregard the religious beliefs of elected officials, in favor of their own conscience, when the beginning of every session is kicked off with sectarian prayer. The Board streamlines its religious preferences through the channels of local government by exerting control over the prayer-giver and the prayer content. The citizens of Hendersonville Country are told to participate in prayer, standing in support of the Board's religious beliefs. Similarly, a pastor prays over the church's membership on Sundays as all stand before the altar in unity. It is not necessary for the members to require the citizens to utter the same words of prayer for the public to feel coerced to participate. Subtle, environmental coercion is sufficient to violate the Establishment Clause because the delicacy of our free consciences must be zealously protected from government intrusion.

The primary Establishment Clause test employed by the Court is the *Lemon* test. The *Lemon* test has three prongs: (1) The government practice has a secular purpose, (2) the primary

effect of the practice neither advances nor inhibits religion, (3) the practice must not foster an excessive entanglement with religion. If a practice fails any one of the three prongs, the practice fails the *Lemon* test. The Board's practice impermissibly expands the relationship between church and State that our Constitution authorize. The Board's professed secular purposes for the exclusively Christian prayer practice are unconvincing. In facilitating Christian beliefs to permeate the vessels of the local government, Hendersonville County seeks to advance a particular faith. The Board is unable to continue its current prayer practice without promoting excessive entanglement between government and religion because constant surveillance is needed to ensure the boundaries of the Establishment Clause are not trampled. Yet, no right beside the freedom of conscience is worthier of such diligent protection.

ARGUMENT

I. I. The Board's prayer practice does not comport with the history and tradition of legislative prayer authorized by *Marsh* and *Town of Greece.*

"It is proper to take alarm at the first experiment on our liberties... Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any sect of Christians, in exclusion of all other Sects?" Memorial and Remonstrance against Religious Assessments, II Writings of Madison 183, at 185–186. The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." U.S. Const. Amend. 1. In the words of Jefferson, the clause against establishment of religion by law was intended to erect a "wall of separation between church and State". *Everson v. Bd of Educ.*, 330 U.S. 1, 16 (1947) (citing *Reynolds v. United States*, 98 U.S. 145, 164 (1879)).

This religious liberty clause means that no state or federal government can "set up a church...pass laws which aid one religion, aid all religions, or prefer one religion over another."

Everson, 337 U.S. at 16; *see also McCreary Cty. V. ACLU of Ky.*, 545 U.S. 844, 881 (2005) ("This is no time to deny the prudence of understanding the Establishment Clause to require the government to stay neutral on religious belief, which is reserved for the conscience of the individual."). There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. *Zorach v. Clauson*, 343 U.S. 306, 312 (1952). The authority of the government and the authenticity of religion must remain distinct to ensure freedom of conscience for all.

The time-honored tradition of legislative prayer must not be blindly authorized by expanding the holdings in *Marsh* and *Town of Greece*. *See Marsh v. Chambers*, 463 U.S. 783 (1983); *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014). Legislative prayer as authorized by *Marsh* and *Town of Greece* are not subject to the formal tests that have "traditionally structured our inquiry" in other Establishment Clause challenges. *Marsh,* 463 U.S. at 796 (Brennan, J., dissenting) ("The Court is carving out an exception to the Establishment Clause... to accommodate legislative prayer."). When the historical principles articulated by the Supreme Court do not direct a result, a court must conduct a "fact-sensitive" review of the prayer practice. *Greece,* 134 S. Ct. at 1825. *Marsh* and *Town of Greece* in "no way sought to dictate the outcome of every subsequent case." *Lund v. Rowan Cty.,* 863 F.3d 268, 276 (4th Cir. 2017). *See Marsh*, 463 U.S. 783; *see also Greece*, 134 S. Ct. 1811.

There are critical differences that take the Board's practice "outside the ambit of historically tolerated legislative prayer". *Bormuth v. Cty. of Jackson*, 870 F.3d 494, 532 (6th Cir. 2017). First, the government sought prayer-givers outside of the elected officials in those cases, where the board-members themselves deliver the prayer in Hendersonville. Second, the prayer opportunity here was exclusively reserved for the commissioners, creating a "closed-universe" of

prayer-givers. Finally, since the actions of the Board are without the history and tradition relied on in *Marsh* and *Town of Greece,* the Court should turn to traditional Establishment Clause tests.

A. This Court upheld the constitutionality of chaplain-led prayer in Marsh.

In *Marsh*, the actions of the First Congress persuaded this Court to authorize the practice of opening legislative sessions with prayer by a state-employed clergyman. *Marsh*, 463 U.S. 783. This Court often looks to the actions of the First Congress to determine the Framer's intent, or at the very least, a common understanding of the Constitution by the founding generation while interpreting the First Amendment. *See* The First Congress Canon and the Supreme Court's Use of History, 94 Calif. L. Rev. 1745, 1748. Similarly, the First Congress hired an ordained minister selected by the officials, to open its sessions in prayer. Therefore, the prayer practice facilitated by the Nebraska state legislature was "deeply embedded" in our nation's history and tradition and permissible under the Establishment Clause. *See Marsh*, 463 U.S. at 784.

The Nebraska state legislature complied with the Establishment Clause in its decade-long practice of hiring a chaplain to give the invocation before legislative sessions. *Marsh*, 483 U.S. 783. Read broadly, the holding can be misconstrued to authorize prayer before all government sessions under all circumstances with any prayer-giver. Chief Justice Burger himself did not paint the constitutionality of legislative prayer with such broad stroke, however. *Id*. This Court was careful to frame the issue as a "challenge to the practice of opening sessions with prayers by a state-employed clergyman". *Marsh*, 463 U.S. at 786.

Prayer, in this limited context, could coexist with the principles of disestablishment and religious freedom. *Greece*, 134 S. Ct. at 1815 (quoting *Marsh*, 463 U.S. at 786). This Court, in its forward-thinking, anticipated potential facts in which a version of legislative prayer would be unconstitutional. Under these facts far distinguishable from *Marsh*, the Board treads dangerously

towards establishment of Christianity and a long way from permissible legislative prayer practices as authorized by this Court.

1. The *Marsh* opinion disclaims exclusive reliance on the mere longevity of legislative prayer.

This Court crafted an opinion identifying the "unique" history which justified this Court to stray from the "traditional tests which structured our inquiry" in upholding the practice of the Nebraska legislature. It necessarily follows that the unique history is a prerequisite to justify straying from traditional tests used in Establishment Clause challenges. Without the depth of history of a chaplaincy, the tradition of legislative history in general will not justify the actions of the Board.

Study of the practice of the First Congress serves as a useful interpretive tool in legislative prayer cases, but this tool can be easily misused. *Rowan*, 863 F.3d at 294 (Motz, concurring). One way to misuse it is to claim that a practice dating back to the First Congress justifies a significantly different modern practice. *Id*. Thus, even if there were a tradition of legislator-led prayer at the state level, this tradition would not mean that legislator-led prayer at local government meetings is constitutionally permissible. *Jackson*, 870 F.3d at 538 (Moore, dissenting). Nor would it mean that legislator-led prayer is constitutionally permissible even if every legislator offered sectarian prayers in the same faith tradition. *Id*. Nor, especially, would it mean that exclusively legislator-led prayer is constitutionally permissible when it involves a combination of these factors, taking place at local government meetings where each legislator offered sectarian prayers in the same faith tradition. *Id*.; *see also Rowan,* 863 F.3d at 268.

History, and its support of legislative prayer, has limits. The historic underpinnings in *Marsh* echo the priorities of the First Amendment Religion Clauses; if the examined legislative prayer "coexisted with the principles of disestablishment and religious freedom," it is permissible.

Marsh, 463 U.S. at 786. Here, the Board cannot rely on the same history and tradition as the Nebraska legislature. Separation, yet not hostility or entanglement, of church and state requires constant attention by the courts. *See Engel v. Vitale*, 370 U.S. 421, 443 (1962); *see also Lee v. Weisman*, 505 U.S. 577, 589 (1992). We must not needlessly and superficially depend on *Marsh* and its history to resolve the case or controversy before us when it is not justified.

2. Government mouthpieces leading prayer is not supported by a tradition of legislative chaplaincy practices.

There is a fundamental difference between government officials themselves leading persons in prayer and the practices of having outside religious figures that were deemed acceptable in *Marsh* and *Town of Greece*. J.A. at 24. Legislator-led prayer at the local level falls far afield of the historical tradition upheld in *Marsh* and *Town of Greece*. The government is inextricably intertwined with religion when actual government officials lead the prayers. *Rowan*, 863 F.3d at 278; J.A. at 21.

When the Board opens its monthly meetings with prayers, there is no distinction between the government and the prayer giver: they are one and the same. *Jackson*, 870 F.3d at 537 (Moore, dissenting). The prayers are literally "government speech." *Id*. The nuances of the establishment clause shouldn't distract from this plain fact. The elected officials are leading their constituents in a way that mirrors the way a pastor leads its congregation. *Greece*, 134 S. Ct. at 1826 (Alito, J., concurring) (distinguishing solicitations to pray by guest ministers from those by town leaders, noting that "[t]he analysis would be different if town board members" themselves engaged in the same actions).

Reference to religion in the public sphere is not the issue in this case. Therefore, any analogy to mottos with fixed wordings like "In God We Trust" or "One Nation Under God", which are permissible public acknowledgments of the role of religion in our society, is largely irrelevant.

See Marsh, 463 U.S. at 818 (Breyer, J., dissenting); *see also Sch. Dist. Of Abington Twp. V. Schempp*, 374 U.S. 203 (1963). Mottos with fixed wordings cannot transform into sectarian prayers with a heightened potential for subliminal government coercion like legislative prayer. This type of dynamic religious practice from a government official far exceeds a "mere acknowledgment" of the role of religion in our society.

B. This Court upheld the constitutionality of prayer rotations by outside-ministers in *Town of Greece.*

The First Amendment leaves the Government in a position not of hostility to religion but of neutrality. *Engel*, 370 U.S. at 443. The First Amendment teaches that a government neutral in the field of religion better serves all religious interests. *Id*. The Town of Greece at no point excluded or denied an opportunity to a would-be prayer giver in its legislative prayer practice. *Greece*, 134 S. Ct. at 1816. Even so, members of this Court believed the prayer giver selection process did "too little to reflect the religious diversity of its citizens." *Id*. at 1841 (Breyer, J., dissenting); *Id*. at 1842. (Kagan, J., dissenting) ("And I believe pluralism and inclusion in a town hall can satisfy the constitutional requirement of neutrality; such a forum need not become a religion-free zone. But still, the Town of Greece should lose this case").

1. The Founding Fathers wrote our Constitution in favor of religious plurality.

The First Amendment stands as a bulwark against official religious prejudice and embodies our Nation's deep commitment to religious plurality and tolerance. *Trump v. Hawaii*, 138 S. Ct. 2392, 2446 (2018) (Breyer, J., dissenting). The great promise of the Establishment Clause is that religion will not operate as an instrument of division in our nation. *Rowan*, 863 F.3d at 272.

Our history and tradition surrounding the Religion Clauses supports the acknowledgement of religion's role in our communities but it does not support Hendersonville's official government preference of a particular creed, namely, Christianity. For example, Thomas Jefferson refused to

issue the Thanksgiving proclamations, prescribing a National Day of Prayer that Washington had so readily embraced, out of deference to the First Amendment. *See* Letter from Thomas Jefferson to Rev. S. Miller (Jan. 23, 1808), in 5 Founders' Constitution 98; 11 Jefferson's Writings 428–430 (1905). Jefferson believed even indirect government authority over religious exercise, such as prayer, would violate the Establishment Clause. *Id*.

2. The Board's practice is a "closed-universe" of five elected officials who exclusively lead prayer before meetings.

The Establishment Clause is not absolute on the issue of inclusivity of diverse prayer-givers. It is not necessary, of course, for governments to go out of their way to achieve religious balancing in prayer content or to represent some minimum number of faiths. *Rowan*, 863 F.3d at 284. But in considering whether government has aligned itself with a particular religion, a tapestry of many faiths lessens the risk whereas invoking only one exacerbates it. *See id.; see also McCreary*, 545 U.S. 844 (holding government preference of religion over irreligion is unconstitutional); *compare to Greece*, 134 S. Ct. 1811; *Van Orden v. Perry*, 545 U.S. 677 (2005) (holding a Ten Commandments monument along with other religious monuments does not violate the Establishment Clause).

Our Government is prohibited from prescribing prayers to be recited in our public institutions to promote a preferred system of belief or code of moral behavior. *See Engel*, 370 U.S. 421. The officials became part of a closed-universe of Christian prayer-givers by election and re-election from the community. It is likely that the Board members are somewhat reflective of the religious affiliations within their community. However, elections for local government naturally "place minority views...at the mercy of the majority" and are insufficient safeguards of diversity. *Santa Fe Indep. Sch. Dist. V. Doe*, 530 U.S. 290, 304–05 (2000). Because "fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *West Virginia Bd. Of*

Ed. V. *Barnette,* 319 U.S. 624 (1943). The popular election of five board members, all of whom belong to the Christian faith, does not give the County a free pass from making efforts to distinguish between church and state, or providing opportunity for diverse prayer-givers, under the Establishment Clause. J.A. at 8. The practice of the Board "systematically excludes minority religious views." *Jackson,* 870 F.3d at 542 (Moore, dissenting).

The founding generation was acutely aware of the subliminal coercive effects of allowing a single faith to transmit religious ideology through the institutions of government. "In comparison, the First Congress provided for the appointment of two chaplains of different denominations who would alternate between the two Chambers on a weekly basis. *Marsh*, 463 U.S. at 793, n.13, *citing* S. Jour., 1st Cong., 1st Sess., 12 (1820 ed); H. R. Jour., 1st Cong., 1st Sess., 16 (1826 ed.). This rule served to promote diversity among Protestant denominations, because almost everybody in the country was Protestant at the time. *See* Fr. Robert J. Fox, The Catholic Church in the United States of America, Catholic Education Resource Center (2000). In context, providing diverse Christian viewpoints was a priority to inspire unity in government. This history surely reflects the Framer's concern with avoiding even a suggestion that Congress subscribed to the tenets of a single religion, even in a time where most of the country believed in Christianity. *Id*.

Further, in the 1850s, the judiciary committees reevaluated the constitutionality of the chaplaincies. *See Greece,* 134 S. Ct. at 1819 (discussing the history supporting the Court's earlier decision in *Marsh*). The committees concluded that the office posed no threat of an establishment because "lawmakers were not compelled to attend the daily prayer, no faith was excluded by law, nor any favored, and the cost of the chaplains' salary imposed a vanishingly small burden on taxpayers". *See* S. Rep. No. 376, 32nd Cong., 2d Sess., 2–3 (1853); H. Rep. No.

124, 33d Congress., 1st Sess., 6 (1854). Currently, the elected chaplains in Congress coordinate "guest chaplains" to deliver the invocation before legislative sessions to ensure diversity of viewpoints are presented to the legislative body. *See* Cong. Rec., January 21, 1955, p. 528; and Cong. Rec., February 9, 1961, p. 2029.

Unlike Town of Greece or our founding generation, Henderson Country links itself exclusively with Christianity by allowing only the five elected Board members to pray before meetings. The significance is that, in a context where religious minorities could exist and where more could easily have been done to include their participation, the County chose to do nothing. *Greece*, 134 S. Ct at 1840 (Breyer, J., dissenting). The Establishment Clause shields religious minorities from this kind of majoritarian indifference.

C. Hendersonville is practicing legislative prayer well-beyond the safety net of the historical principles which insulated the government in *Marsh* and *Town of Greece*.

There is no long, unbroken history going back to the First Congress of what Hendersonville County does: creating an exclusive body of permissible prayer givers among the elected officials themselves. If history has anything to tell us on this issue, it supports permitting legislative invocations that reflect diverse and minority beliefs. *Greece*, 134 S. Ct. at 1823. (Kagan, J., dissenting). Some types of prayer led by religious leaders can comport with the government's obligation of religious neutrality under *Marsh* and *Town of Greece*. J.A. at 20. However, Hendersonville's practice is outside of the limitations articulated by this Court. *Id*.

Marsh and *Town of Greece* simply do not address the constitutionality of lawmaker-led prayer and should not serve as blanket-authorization of prayer before public meetings. *Rowan*, 863 F.3d at 277; J.A. at 21. This Court was cautious in mentioning that the analysis for legislative prayer is "based on a totality of the circumstances." *Greece*, 134 S. Ct. at 1823 (holding courts should examine the prayer opportunity as a whole); *see also Rowan*, 863 F.3d at

289 (Individuals "are not experiencing the prayer practice piece by piece by piece. It comes at them whole.). It is imperative for the health of religious liberty in our Nation that we diligently examine the facts in legislative prayer cases and rely on traditional Establishment Clause tests when necessary.

1. Hendersonville's prayer practice raises the red-flags warned of in *Marsh* and *Town of Greece*.

This Court imagined government officials would misconstrue the holdings in *Marsh* and *Town of Greece*. In *Marsh*, this Court emphasized the importance of keeping a distinction between government officials leading prayer and merely acknowledging the role of religion in our society. Yet, more recently, this Court clarified that government officials leading and composing prayers is precisely the type of activity the Establishment Clause prohibits. *Lee*, 505 U.S. at 590. In *Town of Greece*, the prayers were not invariably Christian, the town made clear that it would allow any interested resident to offer an invocation, and government officials themselves did not say the prayers or direct the public to participate in prayers. *Greece.* 134 S. Ct. at 1829.

a. Hendersonville's prayer practice is more than a mere acknowledgement of the role of religion in our society.

We are a religious people whose institutions presuppose a Supreme Being. *Zorach*, 343 U.S. at 313. We guarantee the freedom to worship as one chooses. *Id*. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. *Id*. Sure, simple acknowledgement of religion is rooted in our Nation's history and tradition. However, "standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees . . ." *Marsh*, 483 U.S. at 789. The unique history of legislative prayer dating back to First Congress led this Court "to accept the interpretation of the First Amendment draftsmen who saw no real

threat to the Establishment Clause arising from a practice of prayer *similar to* that now challenged." *Id*. at 791.

Currently, the United States House of Representatives provides its guest chaplains with the following guidelines, which are designed to encourage the sorts of prayer that are consistent with an invocation for a government body in a religiously pluralistic Nation:

> "1) The guest chaplain should keep in mind that the House of Representatives is comprised of Members of many different faith traditions.
> 2) The length of the prayer should not exceed 150 words.
> 3) The prayer must be free from personal political views or partisan politics, from sectarian controversies, and from any intimations pertaining to foreign or domestic policy."

Greece, 134 S. Ct. at 1840–41. Even so, the prayer in Congress is that of a private chaplain and maintains some distinction from the government itself. Yet, unlike the Board, Congress still takes precautions to stay within the fuzzy boundaries of the Establishment Clause. In *Marsh*, the state legislature's actions survived Establishment Clause challenges because the practice was "deeply embedded in our nation's tradition and history", traced all the way back to our founding generation. *Marsh*, 483 U.S. at 786. Yet, Hendersonville County's practice is a far cry from anything reflective of the First Congress' procedures for legislative prayer.

Granted, the threat of sectarian proselytization by an elected official cannot be so easily remedied because if the government told an official *how* to pray or *what* to pray to avoid sectarian prayer, the Establishment Clause is instead threatened from a different angle. *See Lee*, 505 U.S. 577 (holding that a principal cannot parse contents to determine which prayers are permissible without violating the Establishment Clause). In Hendersonville, the Board members utter prayers, while serving in their official capacity, that can be directly attributed to the government. J.A. at 8. To make matters worse, the government cannot regulate or control their prayers without running afoul of the Establishment Clause. *Lee,* 505 U.S. 577.

b. The Board does not facilitate a prayer practice which reflects religious plurality.

The First Amendment mandates government neutrality between religion and religion, and between religion and non-religion. *McCreary.*, 545 U.S. at 860 (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which "establishes a [state] religion or religious faith, or tends to do so." *Everson,* 330 U.S. at 15–16. If elected representatives invite their constituents to participate in prayers invoking a single faith for meeting upon meeting, year after year, it is difficult to imagine constitutional limits to sectarian prayer practices. *Rowan*, 863 F.3d at 272. Hendersonville County sends the message that it prefers or accepts the teaching of Christianity over other religions. J.A. at 18.

Our founding generation took "measures to avoid sectarian preference or even the appearance of one" *Rowan*, 863 F.3d at 295. Regardless of the listener's support for, or objection to, the message, a reasonable observer will unquestionably perceive the inevitable prayer as stamped with her local government's seal of approval. *Santa Fe*, 530 U.S. at 308. The Board sends the ancillary message to members of the audience who are non-adherents "that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch* v. *Donnelly,* 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). A member of the local community should not have to endure religious pressure when attending a parks and recreation hearing. J.A. at 1.

To be clear, "an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of religious views in a legislative forum, especially, where...any member of the public is welcome in term to offer an invocation reflecting

her or her own convictions" *Greece*, 134 S. Ct. at 1827. In the case before us today, the majority is dangerously close to permitting exactly what Justice Alito said *Town of Greece* obviously does not permit government officials instructing citizens to participate in sectarian prayer before commencing government proceedings. *Jackson*, 870 F.3d at 544 (Moore, dissenting) (*citing Greece*, 134 S. Ct. at 1829 (Alito, J., concurring)). Hendersonville and its lack of inclusivity brings its prayer practice beyond the historical principles articulated in *Town of Greece*. *Greece*, 134 S. Ct. 1811. Because the actions of the Board take this prayer practice beyond the scope of *Marsh* and *Town of Greece*, this Court should analyze the prayer practice under traditional Establishment Clause tests.

II. The Court should affirm the Thirteenth Court of Appeals because the Board's prayer practice violates the Establishment Clause.

The precious nature of religious belief underlines the importance of the Establishment Clause. The media and political discourse often frame Establishment Clause cases as "religion versus anti-religion" battles. This need not be the case. This Court has recognized that separation and neutrality provided by the Establishment Clause benefit religious belief. *Marsh*, 463 U.S. at 803–805. The Free Exercise Clause and Establishment Clause work together to ensure religious liberty. *Engel*, 370 U.S. at 430.

A. The government may not coerce anyone to support or participate in religion.

The Constitution guarantees that government may not coerce anyone to participate in religion. *Lee*, 505 U.S. at 587. The Court has addressed coercion as part of its history and tradition analysis under *Marsh*. In *Town of Greece*, this Court stated that a prayer practice in a coercive environment may not fall within the tradition upheld in *Marsh*. *Greece*, 134 S. Ct. at 1826.

A court examines two factors to determine if a prayer practice is coercive. *Lee*, 505 U.S. at 586. First, a court will evaluate the government's control the prayer practice. *Id*. Second, a court will examine if participation in the prayer is coerced. *Id*.

The first factor of the coercion test focuses on government control of a prayer practice. *Id*. This Court has held that government may not control the content of a prayer. *Id*. In both *Lee* and *Santa Fe*, the government had policies limiting the content allowed in prayers as public events. *See Lee*, 505 U.S. at 589; *Santa Fe*, 530 U.S. at 306.

In *Lee,* the government attempted to make the prayers more secular by providing a rabbi with a guide to construct his prayer. *Lee*, 505 U.S. at 581. In *Santa Fe*, the government had a policy that made it more likely for the prayer to have religious content. *Santa Fe*, 530 U.S. at 307. In both cases, this Court held that these policies were a form of government control of a religious practice. *See Lee*, 505 U.S. at 589; *Santa Fe*, 530 U.S. at 306.

The government's role in selecting the prayer-giver is also a form of control of the prayer practice. *Lee*, 505 U.S. at 587. This Court has ruled that direct selection of the prayer-giver can be a form of control over the prayer practice. *Id*. Government involvement in a voting process to select a prayer-giver may also be a form of control. *Santa Fe*, 530 U.S. at 305–306.

The second factor of the coercion test shifts focus to the environment surrounding the prayer. *Id*. A coercive environment is one where someone feels compelled to join in the prayer practice. *Lee*, 505 U.S. at 593. This Court has held that voluntary attendance does not necessarily make a prayer practice not coercive. *See Lee*, 505 U.S. at 593; *Santa Fe*, 530 U.S. at 311–312. The presence of public pressure and peer pressure can make a prayer practice at a voluntary event coercive. *Lee*, 505 U.S. at 593. Surely, there is concern for minors enduring religious pressure.

Id. However, certain environments, such as local government meetings, present a heightened potential for coercion as well. *Rowan*, 863 F.3d at 287.

The "heightened potential for coercion" stems from several factors that are unique to local government. Local government can directly influence citizens in a way federal and state government cannot. *Id*. These local boards can make decisions that are important to the livelihood of citizens. *Id*. at 287. Therefore, the need to participate in these meetings may not be completely voluntary. *Id*. In addition, the power held by board members may compel citizens to act in a way to please the board members. *Rowan*, 863 F.3d at 287. Citizens may join in a prayer practice to avoid standing out to board members or other members of the public. *Id*.

1. The Board's prayer practice coerces citizens to support or participate in the Christian religion.

Government coercion of religious practice in this nation has remained a concern for hundreds of years. 1 Annals of Cong. 758–759 (J. Gales ed. 1834) (Aug. 15, 1789). James Madison explained the meaning of the Establishment Clause is that government should not "compel men to worship God in any manner contrary to their conscience." *Id*. at 758. Madison further explained that the Establishment Clause protected against those of a dominant religion compelling others to perform. *Id*. The Board's prayer practice is a form of coercion that is contrary to the meaning of the Establishment Clause and fails the coercion test.

a. The Board controlled the prayer practice.

The Board exerted control over the prayer practice by limiting who could give prayers at a meeting. By limiting who could give prayers, the board was selecting the prayer-giver as well as controlling the content of the prayers.

The Board's limitation on who could offer prayers is a form of control under the rules of *Lee* and *Santa Fe*. The limitation to a group of five people is akin to the selection of a specific person

as in *Lee*. J.A. at 8. In addition, the rotation between the five board members is a process similar to that in *Santa Fe*. Either view of the Board's policy leads to the conclusion that the Board exerted control over the prayer practice. The Board's control over the prayer practice makes the practice more coercive on those in attendance.

Additionally, the Board's policy also controls the content of the prayers. All five of the Board's members are Christian. J.A. at 8. Board Chairman Wyatt Koch stated that the Board had an unwritten practice of beginning meetings with a prayer. J.A. at 2. The policy to have a prayer limits what will be said before meetings to religious content. Also, the closed-universe of prayer-givers further limits the content to Christian prayers. This Court has recognized that it is difficult for dedicated religious people to be neutral when asked to perform a religious exercise. *See Lemon v. Kurtzman*, 403 U.S. 602, 618 (1971). It is reasonable to expect that a group of Christians would give Christian prayers when asked to give a prayer.

b. The environment of the board meetings is coercive.

As the Fourth Circuit noted in *Rowan*, the environment of local board meetings can be coercive. The Board in this case is like the county board in *Rowan*. The Board grants permits, hears appeals of denied permits, and controls city property. J.A. at 18.

In *Town of Greece*, this Court considered the impact of town board members requesting audience members to stand. *Greece*, 134 S. Ct. at 1826. The Court indicated that such a request could make an environment coercive. *Id*. In this case, Board members requested that everyone stand for the Pledge of Allegiance and the prayer. J.A. at 8. Based on the scenario proposed by the Court in *Town of Greece*, the request to stand creates coercive pressure. *Id*.

The Board can have a significant influence on the lives of Hendersonville citizens. For example, the Board denied Barbara's permit to operate a paddleboat company. J.A. at 18. From a

legal standpoint, presence at Board meetings is voluntary for members of the public. However, citizens may need to appear before the board to present an appeal, as Barbara did in this case. J.A. at 1.

Hendersonville citizens, like Barbara, may feel coerced to join the Board's prayer practice. The Board possesses the power to coerce citizens to join the prayers in order to gain favor. Whether the board members acknowledge this power does not affect that the Board, in fact, wields the authority to advocate for religious conformity. J.A. at 1; J.A. at 5. The importance of Board meetings to citizens heightens the amount of coercion. *Lee*, 505 U.S. at 596–597. Due to the high level of coercion present at Board meetings, the Board's prayer practice is unconstitutional under the coercion test.

B. Legislative prayer practices must serve a secular purpose, cannot serve to advance or inhibit religion, and cannot foster excessive entanglement between church and state.

In *Lemon*, this Court laid down the predominant Establishment Clause test. The *Lemon* test has three prongs: (1) The government practice has a secular purpose, (2) the primary effect of the practice neither advances nor inhibits religion, (3) the practice must not foster an excessive entanglement with religion. *Lemon*, 403 U.S. at 612–613. If the practice fails any one of the three prongs, the practice fails the *Lemon* test. *Edwards v. Aguillard*, 482 U.S. 578, 583–585 (1987).

1. A legislative body must have a secular purpose for beginning meetings with prayer.

The "purpose" test has rarely been the determining factor in Establishment Clause cases in this Court, but nevertheless is important for the Court to consider. *Wallace v. Jaffree*, 472 U.S. 38, 75 (1985) (Powell, J, concurring). The central tenet of the purpose test is the government's neutrality concerning religion. *McCreary*, 545 U.S. at 860. The government violates the

Establishment Clause when it abandons religious neutrality. *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987).

The requirement of neutrality should not be read as a requirement of callous indifference toward religion. *Zorach*, 343 U.S. at 314. Rather, the government may act and legislate in a way that recognizes religious beliefs and sects. *Lemon*, 403 U.S. at 614. However, the government may not act with the purpose to promote some religions over others. *Everson*, 330 U.S. at 15.

a. The government's actions can indicate whether the purpose is secular or religious.

The secular purpose required for a government practice must be genuine and not secondary to a religious objective. *Santa Fe*, 530 U.S. at 308 (O'Connor, J, concurring). This Court has stated that the government's stated purpose will receive some deference. *Edwards*, 482 U.S. at 586–587. However, courts still have a duty to distinguish between a "sham" purpose and an actual secular purpose. *Id* at 590.

The context surrounding a government practice is crucial in a court's evaluation under the purpose test. *See McCreary*, 545 U.S. at 863–864. A court will examine the text, legislative history, implementation of the statute, and other comparable official acts of government to find purpose. *Santa Fe*, 530 U.S. at 308 (O'Connor, J, concurring). Changes in policy, nomenclature, text, and acts by legislators are indicators of purpose. *See Edwards*, 482 U.S. 578 at 587; *McCreary*, 545 U.S. 844. This Court has also discounted stated purposes that could not be achieved by the government practice. *Edwards*, 482 U.S. at 586.

b. The Board's actions indicate that the prayer practice has a primary religious purpose.

Members of the Board claim the purpose of their prayer practice is to solemnize their meetings. J.A. at 2; J.A. at 4–5. The statements of the Board members may assist in finding purpose. However, the Court should also examine other factors. Examination of context

surrounding the Board's prayer practice reveals that the primary purpose was not secular. The nature of the prayer practice and the actions of Board members show that any secular purpose was secondary to religious purposes.

There is no dispute that prayer can solemnize a meeting. However, Christian prayer is surely not the only method to solemnize the Board's hearings. One Board member claimed the prayer practice is like reciting the Pledge of Allegiance. J.A. at 6. If the two practices are similar, it would indicate that prayer is not the only way to solemnize a meeting.

The goal of creating a solemn environment in the public sphere is laudable. However, the Board's exclusive use of Christian prayer to achieve that goal indicates that another purpose is primary. The Board could have incorporated a variety of practices, including prayers of many faiths, to achieve its goal. Instead, the Board only used prayers from the Christian tradition. J.A. at 18. The Board's choice to use Christian prayer alone indicates a primary religious purpose. The exclusive use of prayer shows purpose to promote religion generally. Use of Christian prayer shows purpose to promote the Christian religion specifically. This Court has consistently held that government may not act with purpose to promote some religions over others.

Barbara brought her concerns about the prayer practice to board member James Lawley. J.A. at 1. In response, Mr. Lawley told Barbara "this is a Christian country, get over it." J.A. at 1. Mr. Lawley's knee-jerk reaction to Barbara's criticism of the prayer practice reflects the inherently religious nature of the Board's actions. Mr. Lawley's response shows that a religious objective was the primary purpose in the minds of Board members.

The evidence shows that solemnization was not the primary purpose of the prayer practice. The nature of the prayer practice demonstrates that a religious objective was the primary purpose for the practice. The government is not allowed to act with a primary religious objective.

Therefore, the Court should find that the Board's prayer practice violates the Establishment Clause.

2. The primary effect of the legislative prayer must not be to advance or inhibit religion.

The principle of government neutrality toward religion is not limited to the purpose of the government practice. The second prong of *Lemon*, the "effect" test, examines the outcome of a government practice. *Church of Jesus Christ of Latter-Day Saints*, 483 U.S. at 337. The government practice may not advance or inhibit religion to pass the effect test. *Lemon*, 403 U.S. at 612.

This Court has stated that the effect test is often difficult to apply. *See Lynch*, 465 U.S. at 681. The effect test often applies to cases involving government financing of religious organizations. In these cases, the Court examines the proximity between the government action and the effect on religion. *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 771 (1973). The goal of the effect test is to prevent government sponsorship and financial support of religion. *Walz v. Tax Com. of N.Y.*, 397 U.S. 664, 668 (1970).

a. A government practice may not endorse or disapprove of religion.

The Court's opinions surrounding the effect test have largely involved how to address indirect aid of religion. *Zelman v. Simmons-Harris*, 536 U.S. 639, 669 (2002) (O'Connor, J, concurring). Justice O'Connor clarified the effect test in her concurrence in *Lynch*. *Lynch*, 465 U.S. at 689 (O'Connor, J, concurring). Focus on endorsement rather than effect alone allows for a clear conclusion under the effect test. *Lynch*, 465 U.S. at 691 (O'Connor, J, concurring). The Court has adopted the "endorsement" test as part of its Establishment Clause jurisprudence. *See Zelman*, 536 U.S. at 653–654. The analysis under the endorsement test is whether the

government practice communicates the message of endorsement or disapproval of religion. *Lynch*, 465 U.S. at 689, 692 (O'Connor, J., concurring).

The endorsement test provides courts with an analytical framework for government practices that do not involve financial aid of religion. This Court has applied the endorsement test to cases involving government support through prayer and symbolic displays. *See e.g. Santa Fe*, 530 U.S. at 307–308; *McCreary*, 545 U.S. at 866; *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 616 (1989). Analysis of endorsement requires an examination of the context surrounding a government practice. *Santa Fe*, 530 U.S. at 306–308. The history and environment surrounding the practice are a part of the context surrounding the practice. *Id*. The key question is whether an objective observer of the practice would perceive state endorsement of religion. *Id*. at 308.

b. The Board's prayer practice endorses Christianity.

The Thirteenth Circuit correctly held that the Board's prayers endorse the Christian religion. J.A. at 23. The court of appeals concluded that a reasonable person would believe that the government endorsed religion through the Board's prayers.

The Board's prayers are exclusively Christian in nature. Each of the provided prayers references the Christian deity. J.A. at 19. These prayers ask for guidance, mention Biblical scripture, and ask for blessings. J.A. at 19. One of the prayers stated as follows:

> "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 19. When presented with a similar prayer practice, the Third Circuit held that the prayer policy endorsed religion. *Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 285, (3d Cir. 2011). The Third Circuit held that a reasonable person would believe that the government endorsed religion due to the Christian nature of the prayers. *Id*. The

exclusively Christian nature of the Board's prayers would similarly lead a reasonable person to believe that the government endorsed religion.

The context surrounding the Board's prayer practice supports the conclusion that the practice is an endorsement of religion. First, the practice takes place every month at official board meetings. J.A. at 8. The official nature of the meetings makes it likely that an objective observer to believe that the government endorses the Board's prayers. *See Santa Fe*, 530 U.S. at 308.

In addition, the Board pairs the prayer practice with a recitation of the Pledge of Allegiance. J.A. at 8. The Pledge was enacted by Congress and its purpose is to foster national unity. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 6 (2004). Pairing Christian prayer with the Pledge creates the appearance that the government endorses Christianity in the same way it endorses the Pledge.

3. The legislative prayer must not generate excessive government entanglement with religion.

The final prong of the *Lemon* test further examines the effect of a government policy. *Walz*, 397 U.S. at 674. The result of a government practice must not be excessive government entanglement with religion. *Id*. Maintaining a healthy relationship between government and religion is a balancing act. This Court has stated that the goal is to prevent intrusion of government into religion and vice versa. *Lemon*, 403 U.S. at 614. However, this Court also recognizes that a relationship between government and religion is likely unavoidable. *Id*.

a. Constant surveillance of the relationship between government and religion is excessive entanglement.

The entanglement prong addresses two primary concerns resulting from government involvement in religion. *Lemon*, 403 U.S. at 621–622. The first concern is the government monitoring religion. *Id*. at 621. An entangling relationship requires "comprehensive, discriminating, and continuing state surveillance" of the practice. *Lemon*, 403 U.S. at 619.

The government often attempts impose requirements for a religious institution to receive government aid. *See e.g*. *Lemon*, 403 U.S. at 619; *Agostini v. Felton*, 521 U.S. 203, 210–212 (1997). The goal of these requirements is often to ensure that the religious institutions act in a secular manner. *See e.g*. *Lemon*, 403 U.S. at 619; *Santa Fe*, 530 U.S. at 305–306; *Lee*, 505 U.S. at 581.

In *Lemon*, the State of Rhode Island subsidized parochial school teachers' salaries. *Lemon*, 403 U.S. at 607–608. The State required that the subsidized teachers not teach religion and only use text in use in public schools. *Id*. This Court held that the State's requirement to not teach religion created an entanglement between government and religion. *Id*. at 619. This Court reasoned that textbooks can be inspected once to ascertain content. *Id*. However, it is impossible to determine the intent and beliefs of a person with a single inspection. *Id*. This Court held that consistent surveillance would be required to ensure compliance with the requirements. *Id*.

Similarly, the prayer practice of the Board will require consistent surveillance going forward. The intent and beliefs of the board members are dynamic and could easily stray from compliance under the Establishment Clause. This Court has held that legislative prayers may not proselytize or disparage other religions. *Marsh*, 463 U.S. at 794–795. Surveillance is required to ensure the Board does not proselytize or disparage other religions in the future.

b. The relationship between government and religion must not create political division along religious lines.

The second concern addressed by the entanglement prong is political division arising from the government's relationship with religion. One of the primary purposes of the Establishment Clause was to prevent political division based on religious disputes. *Lemon*, 403 U.S. at 622. Conflict over religion in the political sphere only adds to an already divisive political environment. *Id*. at 623. Some intersection between religion and politics is unavoidable. *Walz*,

397 U.S. at 670. Religious convictions often guide a person's political beliefs. *Id*. However, the Establishment Clause draws a line preventing government sponsorship or interference in religion. *Id*. at 669.

The relationship between government and religion may also have electoral consequences. *Lemon*, 403 U.S. at 622. The Board's prayer practice has already created political division, as evidenced by this case. However, more political division is likely to result from the Board's prayer practice. It is not difficult to envision electoral scenarios like this Court proposed in *Lemon*. *Id.* ("Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect"). Campaigns may quickly descend into conflicts between religious sects. *Id*. For example, politicians may seek votes by promising benefits to certain religious groups. *Id*. Such practices would likely intensify political and religious conflict within Hendersonville. *Id*.

The Board oversees a variety of public lands in the Hendersonville community. J.A. at 8. Instead of focusing on the Board's performance, elections could turn into conflicts over whether the Board should pray before meetings. Such an election would be contrary to the Establishment Clause. Accordingly, the Court should hold that the Board's prayer practice creates an excessive entanglement with religion.

CONCLUSION

The Board's prayer practice is beyond the limited historical and traditional principles articulated in Marsh and Town of Greece. The Board is unable to rely on those opinions issued by this Court to justify its prayer practice, which raises the red flags members of this Court and

the founding generation were concerned about. With lack of religious plurality and government officials leading members of the public in prayer like a pastor leading his congregation, the Board cannot depend on history and tradition to gain authorization under the Establishment Clause. Therefore, this Court should use traditional Establishment Clause tests to structure its inquiry.

Hendersonville County's prayer practice cannot survive the traditional Establishment Clause tests. The environment of a local board meeting presents a heightened potential for coercion. The Board utilizes its authority to transmit its religious beliefs without sufficient secular justification. The Board's actions send a message to the public that it favors Christianity. Further, a sectarian prayer practice such as this would require constant monitoring by the courts for proselytization or ulterior motives. It is difficult to imagine a genuine limit to legislative prayer under the Establishment Clause if this practice can continue.