No. 17-1891

IN THE

Supreme Court of the United States

OCTOBER TERM, 2018

HENDERSONVILLE PARKS AND RECREATION BOARD,
Petitioner,

v.

BARBARA PINTOK,
Respondent.

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

RESPONDENT'S BRIEF ON THE MERITS

Team #2506
Counsel for the Respondent, Barbara Pintok

QUESTIONS PRESENTED

I. Does the Board's prayer practice run contrary to the history and tradition of legislative prayer found in *Marsh* and *Town of Greece* when the invocations are delivered solely by the board members, in an intimate municipal setting, and involved audience participation?

II. Whether the Board's policy violates *Lemon* or is coercive when it is exclusively composed and controlled by state employees and is entirely Christian in nature?

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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

A. Statement of Facts

Barbara Pintok ("Respondent"), a follower of the pagan religion, Wicca, has attended various meetings held by the Hendersonville Parks and Recreation Board ("the Board"). J.A. at 8. The Board hears several issues from its residents and oversees many of the city's facets, including historic sites, cultural arts, golf courses, permit rentals, and outdoor recreation. J.A. at 8. The Board is also responsible for reviewing permit denials. J.A. at 8. In fact, Respondent has presented before the Board in an attempt to obtain a license to operate a paddleboat company on a lake controlled by the Board. J.A. at 8.

At the beginning of each monthly meeting, one member of the five-member Board asks everyone in the room to stand, while a member of the Board recites a short prayer. J.A. at 18. The prayers are Judeo-Christian in nature, making references to the Christian deity and Biblical verses. J.A. at 18. All of the prayers given by members of the Board include references to an "Almighty God," a "Heavenly Father," "Lord," or "Jesus Christ." J.A. at 19. In addition, all five members of the Hendersonville Board are followers of a Christian denomination. J.A. at 8, 18.

As a result of the Board's prayer practices, Respondent has suffered humiliation, significant distress, and has felt like an outsider at the Board's meetings. J.A. at 19. She informed the Board of her discomfort with its practices, but testified that a Board member responded with "this is a Christian country, get over it." J.A. at 19. Respondent, in turn, filed a lawsuit seeking declaratory and injunctive relief, as well as a preliminary injunction to stay the Board's prayer practices. J.A. at 10. The Board responded with affidavits from each Board member, claiming that the prayers were intended to solemnize public business and were not for proselytization. J.A. at 10.

B. Procedural History

Respondent filed suit against the Hendersonville Parks and Recreation Board in the United States District Court for the District of Caldon, seeking declaratory and injunctive relief, along with a preliminary injunction against the Board's use of sectarian prayers at its meetings. J.A. at 7, 10. After discovery, both parties filed cross-motions for summary judgment. J.A. at 10. On September 15, 2017, the district court denied Respondent's motion, and granted the Board's motion for summary judgment. J.A. at 7, 15.

Respondent appealed the decision of the district court to the United States Court of Appeals for the Thirteenth Circuit. J.A. at 16. On January 4, 2018, the Thirteenth Circuit reversed the lower court's grant of summary judgment, and remanded the case with instructions to enter summary judgment in favor of Respondent. J.A. at 24. The Board timely appealed the decision of the Thirteenth Circuit, and this Court granted certiorari. J.A. at 26.

C. Standard of Review

The questions before this Court are questions of law that are subject to a de novo standard of review. *United States v. First Nat'l Bank*, 386 U.S. 361, 368 (1967). As such, this Court need not give any deference to the legal conclusions made below by the lower court. *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231 (1991).

SUMMARY OF THE ARGUMENT

Legislative prayer. Under this Court's decisions in *Marsh v. Chambers* and *Town of Greece v. Galloway*, legislative prayer is consistent with the Establishment Clause of the First Amendment when the specific prayer practice comports with the history and tradition of prayer in the United States. However, historical practices alone do not justify violations of constitutional guarantees. If the pattern of prayer over time creates a substantial likelihood of religious coercion, then it is

violative of the Establishment Clause's guarantee that governmental bodies will not press religious observance upon its citizens. The Board's prayer practice is a world apart from the permissible practices carried out in *Marsh* and *Town of Greece*.

Instead of a volunteer prayer-giver or an outside chaplain delivering prayer, like in *Town of Greece* and *Marsh*, the Board members themselves maintain complete and exclusive control over the prayer. Important to this Court's decision in both cases was the fact that the prayers were intended for the legislators and town leaders, not their audience. At the Hendersonville Board meetings, members of the audience are encouraged to stand and participate, making the prayer practice far less internal. In addition, the intimate setting of the Board's meetings, coupled with the fact that some citizens are a captive audience, creates a heightened coercive environment.

Taken as a whole, the Board's prayer practice differs significantly from the permissible practices upheld in *Marsh* and *Town of Greece*. The member-led, externally focused, Christian-themed prayer that has continuously been delivered at the Board's meetings for thirteen years coerces religious minorities, and violates the Establishment Clause.

Lemon test. Since the Board's prayer is constitutionally different from legislative prayer, the *Lemon* test is the appropriate method to analyze the prayer practice as it is the most fact-sensitive. *Lemon* mandates that to be constitutional government action must have (1) a secular purpose, (2) not endorse nor prohibit religion, and (3) not excessively entangle religion. A policy is unconstitutional if it fails on even one of these three prongs.

The Board's practice satisfies the first prong. This standard is a fairly low burden for the government to overcome because it only requires a genuine and primary secular purpose. Here, the Board members have all stated their reason for invoking the prayer was to lend gravity to the

public meeting and offer a solemn moment for citizens to reflect which is mainly secular in nature. Accordingly, this intention stays within the bounds of the Establishment Clause.

Even though the prayer practice has survived the first prong of analysis, it can ultimately be invalidated under the second. As a foundational tenant of the First Amendment, government may neither prescribe nor proscribe religious acts directed at the public. Here, the Board's practice had the effect of prescribing or endorsing Christianity. Only Christian dogma has been delivered by the Board for over a decade. Moreover, Board members all follow Christian denominations which effectively shuts the door on any other types of religious invocations. Thus, an objective observer that has been attending these meetings over a period of time could reasonably conclude the Board, and thus the government, sanctions Christian beliefs above all others. Ultimately, this type of practice cannot be found to comport with the Constitution's prohibition on government endorsement of religion, and thus violates the second *Lemon* factor.

Even if the Board's Christian-only prayer can overcome the endorsement factor, the prayer policy dies at the third prong. As a core principal, the Establishment Clause does not allow for government to compose, control, and censor religious invocations because doing so creates a substantial entanglement with religion that is fundamentally barred. Furthermore, a hallmark of state involvement is when officials have absolute authority over the composition of speech, so a religious practice that is state-controlled immediately raises constitutional concerns. In this case, the Board members themselves composed the prayer's content, controlled their delivery, and then censored any criticism the prayer evoked. Thus, this practice is directly inapposite of the proscription against excessive government entanglement with religion.

Coercion test. In the alternative, if the coercion test is found to be applicable to the case at bar, the Board's practice is still unconstitutional. Under this framework, the focus shifts to the

constitutional guarantees that government may not subtly, or indirectly coerce citizens to participate in state-sponsored prayer. To do so would disrupt the freedom of consciousness all American citizens enjoy with respect to religious autonomy. Thus, unconstitutional coercion happens when the government formally invokes a prayer in a way that compels citizen participation. Government-controlled invocations tread a precarious line because prayer is fundamental to religion—in fact, it is religion in act. Here, the critical fact is that the prayer comes directly from the mouth of an all-Christian Board in an intimate town meeting. Consequently, the nature of the prayer and the setting of the Board meetings sway citizens to partake in the prayer or be singled out among other attendees. This type of subtle coercive pressure fails to withstand constitutional scrutiny against the backdrop of this Court's alternative test.

ARGUMENT

I. THE BOARD'S PRAYER PRACTICES DIFFER FROM THOSE IN *MARSH* AND *TOWN OF GREECE*, AND AS SUCH, THE HISTORY AND TRADITION ANALYSIS IS INAPPLICABLE.

The Establishment Clause provides that government "shall make no law respecting an establishment of religion." U.S. Const. amend. I. Establishment Clause jurisprudence makes clear that the "government may not coerce its citizens to support or participate in any religion or its exercise." *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811, 1825 (2014) (plurality opinion); *see also Van Orden v. Perry*, 545 U.S. 677, 683 (2005) (noting that "institutions must not press religious observances upon their citizens"). In fact, this Court stated that "[t]he First Amendment has erected a wall between church and state," and that this "wall must be kept high and impregnable." *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 18 (1947). Further, the Establishment Clause was intended to protect against "'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)

(quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970)). In the context of legislative prayer, however, Establishment Clause challenges must be interpreted by "reference to historical practices and understandings." *Town of Greece*, 134 S. Ct. at 1819. Yet, Chief Justice Burger stated that "[s]tanding alone, historical patterns cannot justify contemporary violations of constitutional guarantees . . . ." *Marsh v. Chambers*, 463 U.S. 783, 790 (1983).

Justice Kennedy explained in *Town of Greece* that courts must begin by determining whether challenged prayer practices fit "within the tradition long followed in Congress and the state legislatures." *Id.* Further analysis into challenged prayer practices is unnecessary "where history shows that the *specific practice* is permitted." *Id.* (emphasis added). However, if the challenged prayer practices do not comport with those found in *Town of Greece* or *Marsh*, courts must inquire into the prayer practice as a whole. *Id.* at 1824; *see also* 463 U.S. at 794-95. This inquiry "remains a fact-sensitive one that considers both the setting in which the prayer arises and the audience to whom it is directed." *Town of Greece*, 134 S. Ct. at 1825; *see also Lund v. Rowan Cty.*, 863 F.3d 268, 276 (4th Cir. 2017) (en banc). In fact, "[c]ourts remain free to review the pattern of prayer over time to determine whether they comport with the tradition of solemn, respectful prayer approved in *Marsh* [and *Town of Greece*], or whether coercion is a real and substantial likelihood." 134 S. Ct. at 1826-27.

The Board's prayer practices conducted at its monthly meetings are constitutionally distinguishable from those historical and permissible practices found in *Marsh* and *Town of Greece*. In these two cases, the prayers were delivered by outside ministers or chaplains, which kept the door open to the possibility of religious diversity; the prayers had an internal purpose, in that they were directed for the sole benefit of the legislators and town leaders themselves; and the prayer practices, as a whole, did not create a heightened coercive environment for religious

minorities. In contrast, the Board's prayer practices in Hendersonville County were led by the Board members themselves, completely excluding any possibility of religious diversity; the prayers had an external purpose, in that they were directed at the citizens of Hendersonville; and, due to the intimate setting of the Board's meetings, the regularity with which exclusive Christian prayers were delivered, and the fact that citizen attendees are considered to be a captive audience, the prayer practices created a real and substantial likelihood for religious coercion. As a result of these significant differences, the history and tradition analysis laid out in *Marsh* and *Town of Greece* is unsuitable for the facts and circumstances involved in the instant case.

A. The Board's Prayer Practices Do Not Comport with the Permissible Practices in *Marsh* and *Town of Greece* Because the Prayers Were Exclusively Given by the Board Members Themselves, Acting in Their Official Capacities.

When analyzing a challenge under the Establishment Clause, and in particular, within the legislative prayer context, this Court must evaluate the prayer opportunity "against the backdrop of historical practice." 134 S. Ct. at 1825; *see also Marsh*, 463 U.S. at 793 (holding that Nebraska's state legislative prayer practices were constitutional when "[w]eighted against the historical background"). In *Marsh*, the state legislature in Nebraska began its sessions with chaplain-led prayer. 463 U.S. at 784-85. The chaplain was chosen by the legislature, paid for by the legislature, and remained in his position for approximately sixteen years. *Id.* In finding that the legislature's prayer practices were permissible, this Court highlighted the "unbroken history" of opening legislative sessions with prayer. *Id.* at 792. Specifically, Chief Justice Burger pointed to the fact that the Continental Congress and the First Congress of the United States both selected a chaplain to open sessions with prayer. *Id.* at 787-88. Interestingly, however, Justice Brennan pointed out in his dissent that "James Madison, who voted for the bill authorizing the payment of the first congressional chaplains, [] later expressed the view that the practice was unconstitutional . . . ."

Id. at 814 (Brennan, J., dissenting). He continued, stating that "Madison's later writings should [not] be any less influential in [this Court's] deliberations than his earlier vote." *Id.* Nevertheless, since the practice of chaplain-led prayer in the legislative context had continued without interruption since the early sessions of Congress, this Court upheld the prayer practices as constitutionally permissible. *Id.* at 795.

In *Town of Greece*, this Court examined another legislative prayer challenge when citizens of Greece claimed that the town's practice of starting board meetings with minister-led prayer was violative of the Establishment Clause. 134 S. Ct. at 1816-17. Here, as opposed to *Marsh* and the instant case, the town followed an informal method for selecting its volunteer prayer-givers. *Id.* at 1816. The town would invite several ministers and chaplains from congregations within the town, and eventually compiled a list of willing volunteers that accepted invitations and agreed to offer prayers in future board meetings. *Id.* While the majority of volunteer ministers were from a Christian congregation, the town of Greece never "excluded or denied an opportunity to a would-be prayer-giver." *Id.* In fact, after some of the town's citizens complained of a lack of religious diversity, the town responded by inviting a Jewish layman, a chairman of the Baha'i temple, and a Wiccan priestess to give invocations. *Id.* at 1817. Ultimately, this Court, in applying the history and tradition analysis, determined that the town's prayer practices were consistent with those found in *Marsh*, and as such, held them to be constitutional. However, this Court, in coming to its decision stated that "[s]o long as the town maintains a policy of nondiscrimination, the Constitution does not require [the town] to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing." *Id.* at 1824.

The Board's prayer practices in Hendersonville differ drastically from those found in *Marsh* and *Town of Greece*. Instead of a hired chaplain, or an outside volunteer delivering the

prayers, the Board members themselves deliver the prayer. J.A. at 18. The legislator-led prayer in the instant case produces two results that certainly run afoul of the Establishment Clause. First, because the Board members are the exclusive prayer-givers, the opportunity for religious diversity is completely eliminated. The Board's prayer "policy" inherently leads to discrimination, or at the very least, exclusion of invocations given by religious minorities in Hendersonville. Second, the content of the prayers is exclusively in the hands of the governmental body. Similar to the Fourth Circuit's case of *Lund*, the Board members in Hendersonville are drafting religious invocations for the sole purpose of delivering the prayer to citizens of the county. In *Town of Greece*, the fact that outside ministers volunteered to give prayer at the town's board meetings kept the door open for religious minorities to express their beliefs. The "door" for religious diversity in Hendersonville is shut. Also, the board members in *Town of Greece* were in no way involved in the content or the message of the recited prayers—in Hendersonville, the content of each prayer is in the exclusive control of the Board members.

While Establishment Clause jurisprudence does not explicitly require that governmental bodies encourage religious diversity, this Court in *Town of Greece* rested its decision, at least in part, on the fact that the town had an informal system of prayer selection that allowed for diverse prayer opportunity. *See id.* (recognizing that "[t]he town made reasonable efforts to identify all of the congregations located within its borders and represented that it would welcome a prayer by any minister or layman who wished to give one"). Additionally, in both *Marsh* and *Town of Greece*, the content of the prayers was exclusively in the hands of the chaplain or the volunteer prayer-giver, not the government itself. These factors make the instant case constitutionally distinguishable from this Court's legislative prayer precedent, and as such, the Board's practices

should not be examined under the purview of the history and tradition analysis articulated in *Marsh* and *Town of Greece*.

B. The History and Tradition Analysis is Inapplicable Because the Board's Prayer Practices Were Externally Focused on the Citizenry at Large, Rather than for the Permissible Purpose of Inviting Town Leaders to Reflect Upon their Shared Ideals.

When legislative prayer does not comport with permissible, historical prayer practices, Justice Kennedy explained in *Town of Greece* that the analysis of challenged legislative prayer becomes a "fact-sensitive inquiry that considers . . . the audience to whom [the prayer] is directed." *Id.* at 1825. In fact, Justice Kennedy discussed the purpose of legislative prayer, and concluded that they are delivered "largely to accommodate the spiritual needs of lawmakers and connect them to a tradition dating to the time of the Framers." *Id.* at 1826. This Court's precedent provides that prayer delivered at legislative sessions and town board meetings are entirely for the benefit of the legislators and town leaders. *Id.* at 1825 ("The principle audience for these invocations is not, indeed, 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."); *see also Lee v. Weisman*, 505 U.S. 577, 630 n.8 (Souter, J., concurring) (describing *Marsh* as a case "in which government officials invoke[d] spiritual inspiration entirely for their own benefit without directing any religious message at the citizens they lead").

In *Town of Greece*, Justice Kennedy expressly recognized that "[t]he analysis would be different if town board members directed the public to participate in the prayers . . . ." 134 S. Ct. at 1826. However, no such thing occurred in *Town of Greece* or *Marsh*. *Id.* While in *Town of Greece* there were requests for citizens to stand, participate, or bow their heads, these requests came only from the guest prayer-givers, not the town board members themselves. *Id.* Justice Kennedy points out that this practice—requesting constituents to participate—is common practice

for ministers, and is intended to be inclusive, rather than coercive. *Id.* However, direct requests from town leaders to stand and participate highlights the difference between prayers directed, and for the benefit of, the governing body, and prayers delivered to the public by a governing body. *See Hudson v. Pittsylvania Cty., Va.*, 107 F. Supp. 3d 524, 537 (W.D. Va. 2015) (explaining that Justice Kennedy and Justice Kagan in *Town of Greece* "deemed the intended audience of the prayers to be significant").

Conversely, in the instant case, the Board members themselves requested the citizens of Hendersonville to stand and participate in the opening prayers. J.A. at 18. The Board's requests for its citizens to stand and participate makes the Board's prayer practice far less of an internal act. Instead of permissible, internal prayer carried out in *Marsh* and *Town of Greece*, the Board's prayers are externally focused and intended to reach into the lives of the town's citizens. This can be seen by some of the language embedded in the prayers given by the Board members, as well as the stated purpose of the prayers as explained by the Board's chairman. Prayers delivered by the Board members include language such as, "Please bow your heads . . .," "Lord . . . please bless our community . . .," and "Please bless everyone that comes before us . . . ." J.A. at 19. In addition to this participatory language, one Board member even explains that the prayers have an external purpose. Board Chairman Wyatt J. Koch, in his affidavit, explained that "the intent of these prayers is to . . . offer citizens a chance to reflect quietly on matters before the Board or whatever else is going on in their lives." J.A. at 2. This statement certainly shows that the intended purpose of the prayers, as well as the audience to whom they are directed, are not in line with this Court's decisions in *Marsh* and *Town of Greece*. Thus, it is clear that the prayer practices in the instant case do not conform with the historically permissible practices approved by this Court, and as such, the history and tradition analysis should not be applied to this case.

C. The Board's Prayers Are Distinguishable from Those in *Marsh* and *Town of Greece* Because the Intimate Setting of Municipal Meetings, Coupled with the Fact that the Citizens Are a Captive Audience, Creates a Potential for Heightened Coercion.

Part of Justice Kennedy's fact-sensitive inquiry into legislative prayer challenges is to consider the setting in which the prayer arises. 134 S. Ct. at 1825. In fact, Justice Kennedy, in his plurality, discussed the potential of coercive pressures that may stem from legislative prayer in municipal government settings. *Id.* at 1824-25 (noting that "the fact that board members in small towns know many of their constituents by name only increases the pressure to conform"). However, Justice Kennedy pointed to other prayer practice cases, highlighting the distinction between adult audiences and audiences made up of school children, and the potential coercive pressures that might arise based on the type of audience involved. *Id.* at 1826-27. This Court has held that, in the context of school prayer, students were a captive audience, and as such, were more susceptible to impermissible coercion. *See Lee*, 505 U.S. at 592-94 (finding that religious invocations delivered to a captive audience of public school students were coercive and violated the Establishment Clause); *see also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000) (noting that "adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention") (quoting *Lee*, 505 U.S. at 593). However, in *Marsh*, Justice Brennan recognized that "indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion" can occur "even if the individuals involved have the choice not to participate . . . ." 463 U.S. at 798 (Brennan, J., dissenting) (quoting *Engle v. Vitale*, 370 U.S. 421, 431 (1962)). Thus, even though the Board's meetings are attended by adults, the potential for coercion is nevertheless still real and substantial.

As such, we urge this Court to adopt the rationale of the Fourth Circuit in the case of *Lund v. Rowan County*. In *Lund*, on a rehearing en banc, the court held that "the intimate setting of a

municipal board meeting presents a heightened potential for coercion." 863 F.3d at 287. The facts of *Lund* are strikingly similar to the facts of the instant case. In *Lund*, Rowan County began its board meetings with Christian-themed prayers. *Id.* at 272. The prayers were delivered by the board members themselves, and the content was exclusively in their control. *Id.* at 272-73. Similar to the instant case, the board members in Rowan County directed their citizens to stand and participate in the prayers, and the prayers tended to be external in nature. *Id.* These unique facts led the Fourth Circuit to inquire into the fact-sensitive analysis described in *Town of Greece*, rather than relying on the history and tradition analysis. *Id.* at 280-81. Hendersonville County's intimate setting, coupled with the fact its citizens must seek approval from the Board for certain activities, turns the citizens into a captive audience, and creates unconstitutional coercion in violation of the Establishment Clause.

In *Town of Greece*, this Court dismissed the assertion that the attendees of Greece's board meetings were impermissibly coerced by the town's prayer practices. 134 S. Ct. at 1826-28. Yet, what is not present in *Town of Greece*—the fact that prayer was delivered by board members themselves—alters the analysis. 863 F.3d at 287-88. In *Lund*, the court recognized that the combination of legislator-led prayer in an intimate, local government setting makes "the county's prayer practice even more questionable." *Id.* Judge Wilkinson, writing for the Fourth Circuit, pointed to the fact that local government meetings, unlike Congressional and state legislative sessions, possess powers that directly affect its citizens and their economic interests. *Id.* The court stated that citizens attend local board meetings to "petition for valuable rights and benefits, to advocate on behalf of cherished causes, and to keep tabs on their [] representatives . . . ." *Id.*

In addition, the *Lund* court highlighted the fact that citizen participation, like requesting a petition or license, occurred shortly after the legislator-led prayers. *Id.* at 288. Thus, a citizen may

be coerced into participating in prayer that violates his or her beliefs, in hopes that the board members will provide them with a favorable ruling. *Id.* at 287-88; *see also Town of Greece*, 134 S. Ct. at 1820 ("[T]he setting and conduct of the town board meetings create social pressures that force nonadherents to remain in the room or even feign participation in order to avoid offending the [board members who give the prayer] and will vote on matters citizens bring before the board."). Ultimately, the court in *Lund* found that, taken as a whole, the member-led prayer practices of Rowan County's intimate board meetings did not align with those practices found in *Town of Greece* or *Marsh*, and enjoined the county from beginning meetings with prayer. 863 F.3d at 272.

The Board's prayer practices held at its intimate Board meetings are akin to those found in *Lund*. In the instant case, the five Board members, who rotate each month in their delivery of prayers, hear issues brought by local citizens. J.A. at 18. In fact, the Board is responsible for granting and denying permits and licenses, just like the Rowan County board members in *Lund*. J.A. at 18. And just like in *Lund*, the Hendersonville Board hears these issues right after the member-led prayer. J.A. at 18. This creates a "close proximity" between the impermissible prayer practice, and the citizen participation, which in turn increases the coerciveness to adhere to the Board's prayers. Due to the fact that some citizens of the county must present to the Board in order to obtain a permit or license, the attendees of the Board's meetings are similar to the audiences in school prayer settings—the citizens are a captive audience.

And while it is suggested in *Town of Greece* that mature adults are less "susceptible to religious indoctrination or peer pressure," the continuous act of reciting sectarian prayers will inevitably lead to Hendersonville citizens being implicitly coerced to participate in prayer in order to avoid the Board members' disapproval. *See* 134 S. Ct. at 1827 (quoting *Marsh*, 463 U.S. at 792);

see also Lund, 863 F.3d at 288 ("Due to the Board's requests [to participate], the plaintiffs also felt compelled to stand so that they would not stand out."). In fact, Board member James Lawley of Hendersonville County stated that the Board has been delivering prayers at the beginning of each meeting since 2005. J.A. at 6. Critical to the Fourth Circuit's decision in *Lund* was the fact that the county's Christian-themed prayer practice went unbroken for more than five years which, over time, gave its citizens an impression of religious favoritism. 863 F.3d at 273. Here, the Board's member-led, Christian-themed prayer practice has gone uninterrupted for thirteen years. Thus, for thirteen years, religious minorities in Hendersonville have been requested by their town leaders to participate in Christian-themed prayer, an act that is at the heart of religious activity. This certainly creates a real and substantial threat of religious coercion.

Taken as a whole—the Board members themselves delivering prayers, and their exclusive control of the content; the prayer's external focus on the citizens of Hendersonville; the intimate setting of the Board's meetings; the citizens being a captive audience; the thirteen years of unbroken, sectarian prayers; and the resulting coercive pressures felt by religious minorities—the prayer practices of the Board are not supported by history and tradition. Therefore, the history and tradition analysis used by this Court in *Marsh* and *Town of Greece* is inapplicable to facts and circumstances of this case.

II. BECAUSE THE BOARD'S PRAYER PRACTICE DOES NOT FOLLOW TRADITIONAL LEGISLATIVE PRAYER, *LEMON* OFFERS THE MOST FACT-INTENSIVE INQUIRY MANDATED BY THE ESTABLISHMENT CLAUSE.

Since its conception, the *Lemon* test has remained the dominant method of Establishment Clause analysis for religious involvement in government settings. *Freedom from Religion Found. v. Chino Valley Unified Sch. Dist. Bd. of Educ.*, 896 F.3d 1132, 1148 (9th Cir. 2018); *see also Am. Humanist Ass'n v. Md.-National Capital Park & Planning Comm'n*, 874 F.3d 195, 204 (4th Cir.

2017). To pass constitutional muster, *Lemon* requires that any state action must: (1) have a secular purpose, (2) not have the principal effect of advancing or prohibiting religion, and (3) not foster excessive entanglement with religion. *Lemon*, 403 U.S. at 612-13 (1971). Any government action that fails to satisfy even one of the three prongs will violate the Establishment Clause. *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987).

The reason for the myriad of Establishment Clause tests is because the Constitution does not mandate a strict line drawing when it comes to religion in the public arena. *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984). The First Amendment does not sweep so far as to eliminate all public displays of religion. *Mayle v. United States*, 891 F.3d 680, 684 (7th Cir. 2018). But it is equally prohibited for government to endorse or sponsor religion. *Id.* Rather, the inquiry must be fact-intensive and take into consideration the context, setting, and purpose of government action. *Lemon*, 403 U.S. at 612; *see e.g. Van Orden*, 545 U.S. at 700-03 (2005) (Breyer, J., concurring) (noting courts should remain faithful to the core purposes of the Establishment Clause, which *Lemon* more formally provides). Thus, the court must look to the totality of the circumstances when determining the scope of the Establishment Clause. *Id.* In the case at bar, the Board has failed to carry its burden under *Lemon*, and therefore, has not established that its action survives constitutional scrutiny.

A. The First Prong of *Lemon* Has Been Met Because the Board's Prayers Promoted a Secular Purpose as They Were Offered to Lend Gravity to the Town Meetings.

Respondent agrees with the Thirteenth Circuit's decision holding the Board's prayer practice satisfied the first prong of *Lemon* because the lower court properly looked to the Board's intended purpose of the invocation. This Court has held that when government states a reasonable secular purpose for religious policy, the "government's characterization is, of course, entitled to

some deference". *McCreary Cty. v. ACLU*, 545 U.S. 844, 864-65 (2005) (quoting *Edwards*, 482 U.S. at 586-87); *Lynch*, 465 U.S. at 681 n.6 (stating that purpose need not be exclusively secular to satisfy prong one); *see also Am. Humanist Ass'n*, 874 F.3d at 206 (demonstrating a reasonable secular purpose is a fairly low burden to meet). The court must look through the frame of an objective observer to determine if the purpose is genuine and primary rather than disingenuous and secondary. *McCreary*, 545 U.S. at 864. Furthermore, it is not necessary for the government to proffer several secular reasons to pass under *Lemon*. *Id.* Rather, courts have held even one legitimate secular purpose is enough to satisfy *Lemon*'s first prong. *Bridenbaugh v. O'Bannon*, 185 F.3d 796, 800 (7th Cir. 1999).

In the Seventh Circuit, a follower of the Satanic religion attempted to challenge and enjoin the printing of "In God We Trust" on U.S. currency. *Mayle*, 891 F.3d at 683. Mayle contested the motto because he felt the government's slogan amounted to endorsement of a "monotheistic concept of God". *Id.* The court looked to the guidelines of *Lemon* as refined by endorsement and purpose analysis to determine if the motto had a secular objective. *Id.* at 685. The Seventh Circuit found the government's reason for printing the motto was to commemorate national heritage and the historical tradition of the country (albeit a tradition founded upon religious beliefs), which nonetheless satisfied the low threshold for secular purpose. *Id.* at 686. Even though the *Mayle* court determined there was an underlying religious element in the motto, the primary purpose was a secular reflection on the nation's historical foundations. *Id.* Because the court found a legitimate secular purpose, the government actions were deemed to have a satisfied the first prong. *Id.* at 687.

Similarly, the Fourth Circuit focused on a single plausible purpose to defend the display of a forty-foot Latin cross that was ornamented with an American flag. In *American Humanist Ass'n v. Maryland-National Capital Park & Planning Commission*, the Commission constructed a cross

that was meant to serve as a memorial for those who served in World War I. 874 F.3d at 206. The court found that while there was an underlying religious element—based on the cross being the dominant symbol of Christianity—the Commission's primary purpose was secular in nature. *Id.* Thus, the Fourth Circuit held the religious display was valid under *Lemon*'s first prong. *Id.* (noting the court ultimately invalidated the display under the second and third prongs).

These cases are illustrative of the fairly low burden of the purpose prong. In the present case, each of the Board members have stated their intended purpose was to solemnize public business for the benefit of the community. J.A. at 2-6. Also, all members have expressly denied attempting to proselytize through their prayer practice. J.A. at 2-6. Board member John Riley stated the purpose of the prayer was to lend gravity to the proceedings. J.A. at 4. Board Chairman Wyatt Koch stated the practice was intended to allow citizens a moment of reflection. J.A. at 2. As Seventh and Fourth Circuit analysis shows, there need not be much more of a legitimate purpose to survive the purpose prong. Furthermore, *Lynch* makes clear the proper inquiry under the purpose prong . . . is [what] the government *intends* to convey [in] a message". *Lynch*, 465 U.S. at 691 (O'Connor, J., concurring) (emphasis added). Thus, the inquiry under the purpose prong is satisfied by the Board's intention to lend gravity to the public proceeding.

B. The Prayer Practice Fails Under the Second Prong Because the Light the Sectarian Invocations Cast Upon the Town Meetings Had the Principal Effect of Advancing Christianity.

Even though the Board's action can survive the first prong of *Lemon*, the prayer ultimately fails under the second prong. The Board members, as state actors, impermissibly engaged in prayer that both closed the doors to other religious displays and also had the primary effect of advancing Christianity thus running afoul of the Constitution. Chief Justice Burger highlighted in *Lemon* that courts must "examine the form of the relationship for the light it casts on the substance" to

determine whether government action has the primary effect of advancing or prohibiting religion. *Lemon*, 403 U.S. at 614. Following the totality of the circumstances approach, courts must look to the "cumulative impact" of the relationship between the government and citizens and analyze if that impact has the effect of favoring religion. *Id.*

It is critical to note the second prong of *Lemon* has been modified by Justice O'Connor's "endorsement test" in *Lynch*. 465 U.S. at 688 (O'Connor, J., concurring). "The endorsement test and the second *Lemon* prong are essentially the same." *Doe. v. Indian River Sch. Dist.*, 653 F.3d 256, 282 (3d Cir. 2011); *Weinbaum v. City of Las Cruces, N.M.*, 541 F.3d 1017, 1030 (10th Cir. 2008) (interpreting the effect prong of *Lemon* in light of the endorsement test); *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 593 (1989) (analyzing effect, promotion, or favoritism as synonyms of endorsement). Justice O'Connor stated that "endorsement sends a message to nonadherents 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 community." *Lynch*, 465 U.S. at 688. Thus, the amended framework of the effect prong asks the crucial question of whether or not the government practice or communication has the effect of endorsement or disapproval of religion. *Id.* at 692. This practice "must be judged in its unique circumstance" and context from the perspective of a reasonable observer. *Id.* at 694.

In *Doe*, the Third Circuit employed the above framework when confronted with school board prayer. 653 F.3d at 259 (noting the court also analyzed Justice Kennedy's coercion test specifically to the nature of school prayer and the heightened potential for coercion of students that are present at board sessions). Jane and John Doe brought suit to enjoin board members from composing and delivering Christian prayers at the beginning of regular public school board meetings. *Id.* at 260. Unsettling to the Does, the Board's religious invocations were almost

exclusively Judeo-Christian. *Id.* at 265. The prayers in this case referenced, the Lord, God, Jesus Christ, and the Heavenly Father. *Id.* at 285. The *Doe* court noted that when "government itself composed the prayer, a fact completely incompatible with the Establishment Clause", the prayer had the effect of advancing religion. *Id.* at 284. The prayers had traditionally been an informal part of board meetings, but after receiving a complaint about the invocation, the Board formally drafted a Prayer Policy. *Id.* at 287. Appropriately, the court found it "difficult to accept" that a reasonable observer would fail conclude the prayer practice, in light of the history and effect, promoted and favored one religion. *Id.* Thus, the Board's policy was found to be unconstitutional. *Id.* at 290.

To contrast, the Eleventh Circuit in *Pelphrey v. Cobb County* examined public prayer by a county planning and commission board. 547 F.3d 1263, 1266 (11th Cir. 2008). The *Pelphrey* court looked to the same framework as in *Doe* to determine if the Board's practice was within constitutional borders but reached an opposite result than *Doe*. *Id.* at 1269-71. The Eleventh Circuit found it dispositive that the commission's prayer was neither composed nor censored by the board members, was offered by volunteer religious leaders of varying faiths, and overall was a practice that invoked the umbrella of religion rather than one particular faith. *Id.* at 1277-78. Accordingly, the court found the prayer more closely followed traditional legislative prayer that was allowed in *Marsh* and thus did not impermissibly proselytize religion. *Id.*

As in *Doe*, and in contrast to *Pelphrey*, the public board meetings in this case are always led by Christian prayer. J.A. at 2. The Board members all follow Judeo-Christian sects and explicitly reference God the "Heavenly Father", "the Father and His son Jesus Christ", and the "Lord." J.A. at 8, 9. The prayers are also composed and delivered by the board members themselves. J.A. at 8. Also patently similar to *Doe* was the Board's reaction to the complaints about the prayer practice. When Respondent complained to board Member James Lawley she was

told "this is a Christian country, get over it". J.A. at 6. Mr. Lawley additionally told Respondent her "complaint was frivolous." J.A. at 1, 6. The Hendersonville Board met the complaint with resistance based on Board members' specific religious beliefs' just as the Indian River Board had. Thus, the Indian River Board shut its doors to any other religions while attempting to promote Christianity. Following the *Doe* rationale, a reasonable person who knows this backdrop of Board prayer policy would similarly find Hendersonville's Board's prayer practice as overtly favoring Christianity. This effect of proselytizing religion is exactly the conduct this Court has warned against. Consequently, as the record demonstrates, the Board's prayer practice violates *Lemon*'s second prong.

C. The Overtly Religious Display That Was Composed and Controlled by Board Members Created an Excessive Entanglement Between Religion and Government in Violation of the Third Prong.

The Board's prayer practice cannot survive the third prong of *Lemon* as well. Under the final prong, the sovereign entity "must not foster excessive government entanglement with religion." *Lemon*, 403 U.S. at 612. To determine excessive entanglement, this Court looks to "the character and purposes of the institutions that are benefited, the nature of aid the State provides, and the resulting relationship between the government and religious authority." *Id.* at 615. Examples of too much entanglement arise when a government authority is required to monitor, censor, or otherwise control religious speech or actions. *Am. Humanist Ass'n*, 874 F.3d at 211. Undue entanglement "may lie simply where the government's entanglement has the effect of advancing or inhibiting religion." *Id.*; *see Agostini v. Felton*, 521 U.S. 203, 232-33 (1997). Thus, this inquiry "is a question of kind and degree". *Lynch*, 465 U.S. 684. This prong functions as a balancing test of sorts because it is not possible to have absolute separation of religion from the state, but it is equally impermissible for government to foster religion. *Lemon*, 403 U.S. at 614.

Therefore, government action must fall somewhere in the neutral middle ground of this spectrum to be constitutional. In the present case, the Board's actions weigh heavily on the side of fostering religion so as to entangle the local government with Christianity, and thus, cannot be upheld.

The Fourth Circuit addressed the issue of a mandatory supper prayer at the Virginia Military Institute ("VMI"). *Mellon v. Bunting*, 327 F.3d 355, 360 (4th Cir. 2003). VMI, a state-ran military college, used a Cadet Chaplain to deliver a public and mandatory supper prayer in the mess hall before dinner. *Id.* at 362. Each day a new prayer was composed by the Post Chaplain for the Cadet Chaplain to recite to other students. *Id.* This Chaplain, at the direction of VMI, "composed, mandated, and monitored" the supper prayer. *Id.* at 365. Although students did not technically have to engage in the prayer, they nonetheless had the obligation to attend and stand for the pre-dinner invocation. *Id.* at 372. Employing the *Lemon* framework for analysis, the court found both the purpose and effect of the prayer was to unnecessarily promote religion. *Id.* at 373-75. Moving to the third prong, the court honed in on the fact that "the ability to regulate the content of speech is a hallmark of state involvement." *Id.* at 375. Thus, the court naturally concluded that VMI's direct and whole oversight of the prayer was a constitutional hurdle the school could not overcome, and VMI was enjoined from reciting the supper prayer. *Id.* at 376.

The present case is analogous to *Mellon* for two reasons. First, the Board held a similar mandatory prayer before the start of the public meeting where citizens, just as the students, are not given a viable option to forgo the prayer. J.A. at 8. Citizens of Hendersonville must attend the Board meetings to petition for mandatory permits and to address various issues throughout the community. J.A. at 8. The record does not indicate that citizens had an option to forego hearing the prayer or leave during the beginning and come back after the prayer. What the record does reflect is that the prayer practice is woven into the substance of the meeting. It is the Board's policy

to ask everyone to stand then listen to the Pledge of Allegiance and the prayer, then immediately begin addressing substantive issues before the Board. J.A. at 8. So here, the citizens can be analogized to the college students at VMI—they both were forced to partake in government-induced prayer at the direction of state employees. But just as in *Mellon*, the technical voluntariness of attendance cannot alone save the prayer practice. Holding such would put citizens in an untenable situation because it would ultimately place them between the rock of not attending and the hard place of attending but being obligated to partake in a religious practice they may not agree with.

Second, the Board members themselves directed and controlled the content of the prayers. J.A. at 7. As the Thirteenth Circuit and *Mellon* properly determined, this fact is constitutionally critical because in essence it places a government stamp of approval on a particular religious message. The facts here mirror those in *Mellon* where the prayers were written and given at the direction of state employees. Thus, the prayers in both cases reflected religious invocations that were entirely under the control of the government which triggers entanglement concerns. A distinguishable example would be if the government brought in an outside religious authority to deliver the prayers. In this instance, the prayer would neither be controlled nor composed by the government and would not raise the same concerns of undue entanglement. As the record establishes, this is not what happened at the Hendersonville Board meetings.

Moreover, prayer opportunity allowed for Christian-only prayer and was denied to all other religions because the content of the prayer was strictly controlled by the Board. All of the Board members are followers of various Christian denominations. J.A. at 8. Consequently, the prayer will always be entirely Christian in nature. Any violations of the prayer practice will also be subject to the Board members' review—making the members the play writes, actors, and film critics of

the practice. The combination of exclusive government control by an exclusively Christian Board leads to entanglement with Christianity in particular. Therefore, the Board's prayer practice may also be disposed under the third prong of *Lemon*.

III. IN THE ALTERNATIVE, IF THE COURT FINDS THE COERCION TEST APPLICABLE, THE BOARD'S UNDULY COERCIVE PRAYER STILL VIOLATES THE ESTABLISHMENT CLAUSE.

The Board's prayer practice caused Respondent to feel distraught, intimidated, and pressured which is exactly the type of governmental practice that is contrary to the freedom of consciousness that fuels the Establishment Clause. This Court established an alternative analysis under *Lee v. Weisman*. 505 U.S. 577 (1992). Writing for the majority, Justice Kennedy chose not to apply the *Lemon* framework to prayers that were given at high school graduations. *Lee*, 505 U.S. at 586-87. Instead, Kennedy focused on the cornerstone principal "that [at a minimum] the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise." *Id.* It is the "subtle and indirect" pressure for the dissenter to conform or be singled out on the basis of religious participation that ran contrary to the Establishment Clause. *Id.* at 593. Thus, "[u]nconstitutional coercion occurs where (1) the government directs (2) a formal religious exercise (3) in such a way as to oblige the participation of objectors." *Am. Humanist Ass'n v. McCarty*, 851 F.3d 521, 525 n.12 (5th Cir. 2017).

As a threshold observance, "[p]rayer is religion in *act* [thus] [p]raying means to take hold of a word, the end, so to speak, of a line that leads to God." *Marsh*, 463 U.S. at 811 (Brennan, J., dissenting) (internal quotations omitted). As *Lee* makes clear this distinctly unique aspect of prayer is critical because of the coercive effects it can have upon citizens when benedictions are given in public places. *Lee*, 505 U.S. at 593. Thus, the nature, setting, and audience of the prayer is of constitutional significance. *Id.*

Again, *Doe* sheds light as the Third Circuit also analyzed the school board's prayer practice under the coercion test. *Doe*, 653 F.3d at 275. Through the coercion framework, the court held the school board's prayer carried "a particular risk of indirect coercion" through peer pressure. *Id.* Indirect coercion is subtle and psychological so students that must attend the meetings are more likely to be swayed by the force of prayer or risk standing out against their peers. *Id.* at 279. The effect becomes stronger when the prayer takes place on school property and is composed by the school officials. *Id.* While it is significant to note that *Doe* focused on student participation at the meetings, it is not a dispositive fact. The presence of minors merely crystalized the constitutional underpinnings of *Lee*. *Id.* Accordingly, the setting's compound effect upon the audience led the court to invalidate the prayer policy under the coercion test.

Even through this different lens, the Hendersonville Board's prayer can again be analogized to the Indian River Board practice. The setting and audience are factually parallel. As a local body of government, the Board meetings are similarly held on government property. J.A. at 8. Also, the Board members themselves compose the prayer just as the school officials had. J.A. at 8. Thus, Respondent standing in the Board's meeting room when leaders of her community offered prayers to Jesus Christ pressured her to partake in a religious exercise, affecting her in the same manner as the students at the Indian River meetings. Moreover, the distinction between students and adults is not critical in this case. The record does not even hint that youths are excluded from Board meetings which further lends weight to the prayer practice being improperly coercive for the attendees. Noteworthy is the adult citizen's option to leave the meeting. But *Lee* stressed that "simply put, giving a [person] the option to leave a prayer is not a cure for a constitutional violation." *Id.* at 596.

Justice Scalia's dissent in *Lee* opts for a heightened standard of coercion different from Justice Kennedy's majority opinion. *Lee* at 640. Justice Scalia advocates for a true legal coercion "by force of law and threat of penalty." *Id.* First and foremost, this position is unworkable because if the threshold for coercion is set so high very little would violate the Establishment Clause. To escape First Amendment concerns, sovereign authorities could simply refrain from employing formal penalties for failure to engage in public prayer or other religious acts. Such a position would run contrary to the Founder's intentions that citizens are not to be forced into majoritarian prayer practices. *Id.* at 591. Second, the State cannot force citizens to choose between their constitutional rights and "resisting conformance to state-sponsored religious practice." *Id.* at 596. Setting the bar as high as true legal coercion would be inapposite of First Amendment principals.

Furthermore, it is not Respondent's position to require Board members to shed their religious beliefs at the door of the public meeting room. Rather, the Board may integrate their beliefs through other outlets to solemnize and lend gravity to the proceeding without running afoul of the First Amendment. For example, the Board can offer a prayer in a pre-meeting composed of only board members which is not open to the public. The Board may also take a simple moment of silence at the beginning of the meeting rather than formally invoking a religious prayer. *See Sherman v. Koch*, 623 F.3d 501, 516 (7th Cir. 2010) (holding a statute constitutional that mandated only a moment of silence before the start of a school day). Both valid options allow Board members to respectfully embrace their faiths and reflect on civic values while maintaining separation from members of the public that may not share in the religious reflection. As noted above, all Board members have expressly stated a solemn reflection is the purpose of the prayer. J.A. at 2-6. Accordingly, election of either option will satisfy the Board's valid intentions without triggering Establishment Clause concerns.

CONCLUSION

The prayer practices carried out by the Hendersonville Parks & Recreation Board are violative of the Establishment Clause. The specific prayer practice does not comport with the traditional and historical prayer that has been upheld by this Court. As such, the history and tradition analysis laid out in *Marsh* and *Town of Greece* is inapplicable. Because the history and tradition analysis is inapplicable, the Board's practices are best interpreted under the *Lemon* test. While the Board did offer a valid secular purpose for the lawmaker-led religious prayer, they failed to satisfy the remaining two prongs. The Board's prayer practice had both the principal effect of promoting a singular religion, as well as creating excessive government entanglement with religion. Accordingly, the Board's prayer practices run afoul of the Establishment Clause. Therefore, this Court should affirm the Thirteenth Circuit's holding the practice unconstitutional.