No. 2018-1

IN THE

SUPREME COURT OF THE UNITED STATES

FALL TERM 2018

Barbra Pintok

Petitioner,

v.

Hendersonville Board of Parks and Recreation

Respondent,

ON WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

BRIEF FOR THE RESPONDENT

Team 2508

Counsel for the Respondent

QUESTIONS PRESENTED

I. Under the Establishment Clause of the First Amendment, does the Hendersonville Board of Parks and Recreation's practice of praying before a legislative meeting comport with the history and tradition of legislative prayer found to be constitutional in *Marsh v. Chambers* and *Town of Greece v. Galloway*.

II. Whether the Hendersonville Board of Parks and Recreation's practice of legislative prayer supports the secular purpose of solemnizing public business in a non-coercive manner and in accordance with the First Amendment.

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JURISDICTIONAL STATEMENT

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

STATEMENT OF THE CASE

I. Summary of the Facts

This case requires the court to enter the turbulent waters of the Establishment Clause and determine whether it is constitutionally permissible for a town's legislative body to open its meetings with a sectarian prayer. Petitioner, Barbara Pintok, brings suit alleging that Respondent, the Hendersonville Board of Parks and Recreation, has violated the Establishment Clause by inviting meeting attendees to stand, recite the Pledge of Allegiance, and then listen to a short prayer prior to legislative proceedings. J.A. at 8. Finding the prayer distasteful, Petitioner alleges the Hendersonville Board of Parks and Recreation violated the Establishment Clause of the First Amendment.

The Hendersonville Board of Parks and Recreation is a five-member body of local government that meets once a month to oversee facets of community life including: outdoor recreation, cultural arts, and permit rentals and reservations. J.A. at 8. In consideration of the its solemn legislative proceedings, the Hendersonville Board of Parks and Recreation begins each meeting by requesting attendees to stand to recite the Pledge of Allegiance and invites them to listen to a short prayer. *Id.* at 8-9. While the Board members were all believers of the Judeo-Christian tradition, the prayer maintained general universal themes, asking for guidance for the difficult activity of legislating. *Id.* at 8. Most prayers were only a couple sentences long. *Id.* at 9. Some prayer referenced a deity generally and some the Judeo-Christian deity. *Id.* A recent prayer stated:

> "Almighty God, we ask for thy blessings as we conduct our work. May we act in your spirit of benevolence and good will. We know that we need your spirit watching over us as we conduct the public's work. May you guide us to preside fairly and impartially over all petitions, grievances, and arguments brought before us." *Id.*

Petitioner is a resident of Hendersonville and a practitioner of Wicca, a pagan religion. J.A. at 1. When the Petitioner attended a board meeting to request a license for her paddleboard company, she found the prayer provided by the Board to be offensive. While she presented her application after the prayer, she alleges that the prayer caused her to be distraught and to have difficulty enunciating her words. *Id*. Petitioner states that the prayer made her feel like an outsider and that she was humiliated and felt intimidated. *Id.* When she complained about the prayer to Board Member Mr. James Lawley, she states that he told her, "this is a Christian country, get over it." *Id.* Mr. Lawley disputes this claim, stating that the prayer is a secular practice and that he has never judged anyone appearing before him based on their religious affiliation. *Id.* at 6.

Similarly, the Chairman of the Board, Wyatt J. Koch, states that the purpose of the prayers is not to convert anyone to his or other Board Members personal religious beliefs. *Id.* at 2. He takes pride in the fact that the Board represents all citizens, from the religiously devout to the fiercely atheistic. *Id.* Rather the practice of having a prayer prior to legislative activities is meant to provide a solemnizing moment and a chance for citizens to reflect quietly on matters before the Board or other challenges they are encountering in their lives. *Id.*

II. Summary of the Proceedings

The United States District Court for the District of Caldon, granted summary judgement to the Hendersonville Board of Parks and Recreation, finding that the prayer used to solemnize legislative proceedings did not violate of the Establishment Clause. J.A. at 7. Legislative prayers, like those practiced by the Hendersonville Board of Parks and Recreation, comport with our nation's time-honored tradition of solemnizing legislative practice through prayer. *Id.* Petitioner filed a timely appeal on the issue of summary judgement.

The United States Court of Appeals for the Thirteenth Circuit reversed the grant of summary judgment, finding that the Hendersonville Board of Parks and Recreation could not pray before legislative activity because the First Amendment requires a complete separation of church and state. J.A. at 16-17. On certiorari, the Supreme Court will consider two issues. J.A. at 26. First, whether the Board's practice of legislator-led prayer comports with the history and tradition of legislative prayer authorized by *Marsh v. Chambers* and *Town of Greece v. Galloway*. *Id.* Second, 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 place coercive pressures on religious minorities. *Id.*

SUMMARY OF THE ARGUMENT

This court should reverse the Thirteenth Circuit Court of Appeal's holding that opening a town board meeting with a short prayer violates the Establishment Clause of the First Amendment. The First Amendment provides protection from the forced exposure of coercive religious ideology. This case, however, centers on opening a town meeting with prayer, a practice that has a long history of comporting with the Establishment Clause.

The First Amendment, applied to the States via the Fourteenth Amendment, is not violated by initiating a governmental meeting with a short prayer. *Marsh v. Chambers*, 463 U.S. 783, 786 (1983). The First Amendment was initially created to "prevent…intrusion of either church or state into the precincts of each other." *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). Courts have long recognized, however, that "total separation [between church and state] is not possible" in a definitive, and absolute, sense. *Lemon*, 403 U.S. at 614. Noting the impossibility of "some relationship" between government and religion, Courts must determine when this relationship turns unconstitutional. *Id.* When an adult is in the mere presence of both government

and prayer, a First Amendment claim suggesting "coercive pressure" lacks merit. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1827 (2014). Because Ms. Pintok, the petitioner, does not have a legitimate First Amendment claim, the historical tradition of allowing prayer before a government meeting can, and should, be upheld.

I. THE COURT OF APPEALS DECISION SHOULD BE REVERSED, AS THE PRAYER PRACTICE MIRRORED THE HISTORICAL TRADITION OF LEGISLATIVE PRAYER AUTHORIZED BY *MARSH* AND *TOWN OF GALLOWAY.*

The petitioner's claim that the Henderson Park and Recreation Board's practice of opening their meeting with prayer violated the Establishment Clause of the First Amendment is not supported by fact or law. Courts accept that total separation between church and state is "not possible in an absolute sense." *Lemon*, 403 U.S. at 614. Due to the unavoidable intersection between religion and government, it falls to the courts to determine when the line between permissible and illegal by conducting a fact-sensitive inquiry. As evidenced by *Marsh v. Chambers* and *Town of Greece v. Galloway*, the Supreme Court has a long history of condoning prayer before government-sponsored meetings. See generally, *Marsh* 463 U.S. and *Town of Greece* 134 S. Ct. 1811.

In many cases involving the Establishment Clause of the First Amendment, Courts analyze the clause through a historical lens to determine whether a prayer practice aligns with the Establishment Clause. Under this historical approach, Courts test whether there is a substantial history of tolerating the challenged practice. *Marsh*, 463 U.S. at 792; *Van Orden v. Perry*, 545 U.S. 677 (2005). If the practice was tolerated for a relatively significant amount of time, and especially if it extends back to the Founding, then Courts will typically rule the practice constitutional. *Marsh*, 463 U.S. at 790. While the Supreme Court acknowledges that historical patterns alone cannot "justify contemporary violations of constitutional guarantees," historical

context provides an idea of "what the draftsmen intended the Establishment Clause to mean" and how they interpreted the clause. *Marsh*, 463 U.S. at 790. Further, historical evidence helps shed light on "not only what the draftsmen intended the Establishment Clause to mean, but also how they thought they Clause applied" in real-world situations. *Lee v. Weisman*, 505 U.S. 577, 632 (1992).

The lawful intersection between religion and government extends back to the Founding of this nation. *Marsh*, 463 U.S. at 786. In 1774, the Continental Congress of the United States "adopted the traditional procedure of opening its sessions with a prayer." *Marsh*, 463 U.S. at 787. While prayers were not offered during the Constitutional Convention, the first Congress "adopted the policy of selecting a chaplain to open each session with a prayer" as one of its earliest acts. *Id*. Under the historical analysis, the practice of beginning legislative sessions with a prayer is clearly constitutional, as Courts and legislative members alike have accepted the practice for an "unambiguous and unbroken history of more than 200 years." *Id*. at 782.

Beyond the traditions promulgated in 1774, the United States has continued to maintain a strong relationship between constitutionally valid prayer practices and the government. In more recent history, President Bush asked the individuals attending his inauguration to "bow their heads," thereby making a prayer "his first official act as President." *Lee v. Weisman*, 505 U.S. at 633. This tradition, of beginning a presidency with a short prayer, began with President Washington on April 30, 1789. *Id.* Further, the Supreme Court continues to open their sessions with the short religious invocation of "God save the United States and this Honorable Court;" a practice that has been in effect since Chief Justice Marshall. *Id*. The long historical tradition heightens the presumptive validity of these practices. *Marsh*, 463 U.S. at 792; *Van Orden v. Perry*, 545 U.S. 677 (2005).

When a prayer practice has been occurring for a substantial period of time, Courts will likely uphold the practice as constitutionally valid. In *Marsh v. Chambers*, the United States Supreme Court ruled that the practice of opening the Nebraska Legislature with a prayer aligned with the constitution. Between 1965 and 1983, the Nebraska Legislature employed a chaplain to open each legislative day with a prayer. *Marsh*, 463 U.S. at 784. A member of the Nebraska Legislature challenged this practice as a violation of the Establishment Clause. *Id*. While Courts take extreme care in defending the constitution and the protections it provides the citizens of this country, the Supreme Court deemed this practice constitutional, as it simply reflected a time-honored tradition within this country. *Id.*

This case became the landmark court case in understanding the constitutional intersection between religion and government. As the Nebraska Legislature directly followed the unique history of valid prayer practices since the founding of this country, the United States Supreme Court ruled the practice constitutional. *Id.* Due to the "unbroken history of more than 200 years" of legislative prayer in the United States, the Nebraska Legislature simply followed an unchallenged, common, and historical practice within this country. In short, when dealing with legislative prayer, *Marsh* affirmed the "original understanding of the Establishment Clause." *Marsh*, 463 U.S. at 790. *Marsh* provides a modern-day interpretation of the First Amendment draftsman who "saw no real threat to the Establishment Clause" by practices that have, for a substantial period of time, been deemed constitutional. *Id.* at 791.

After *Marsh* pioneered the thinking of constitutionally permissible prayer before government meetings, a wave of litigation entered the Courts and re-affirmed the validity of the historical test. *Town of Greece v. Galloway* highlights Courts' modern-day thinking of the historical test and underscores the endurance of the test's legitimacy. The controversy in

Galloway surrounds opening town board meetings with a prayer. *Town of Greece* 134 S. Ct. at 1813. Since 1999, the Town of Greece's Town Board's monthly meeting began with the reading of a short prayer. *Id*. This practice was in place for a number of years before being challenged. *Id*. The Supreme Court of the United States firmly concluded that the town's prayer practice did not violate the Establishment Clause, due to the amount of time the practice had been in place before being challenged; thus, re-affirming the constitutionality of the intersection between religion and government. *Id*. at 1818.

Under *Marsh*, legislative prayer is presumptively constitutional. *Marsh*, 463 U.S. at 795. Legislative prayer, even those religious in nature, has a deep-rooted compatibility with the Establishment Clause. *Id*. at 783. In *Marsh*, the Court determined it was not imperative to delineate a precise definition of the Establishment Clause's boundaries, as "history supported the conclusion that the specific practice was permitted." *Town of Greece*, 134 S. Ct. at 1813. Following the similar logic in *Galloway*, the Court determined that the prayer practice "fit within the tradition long followed by Congress and…state legislatures." *Id*. The *Galloway* court further outlined that, since the Founding, religious invocations have regularly included references to faith without threatening an unlawful "entanglement" between the two. *Id*. at 1824. *Marsh* controls the interpretation of *Galloway*, and as the two cases are nearly indistinguishable, *Galloway* provides another context in which the Establishment Clause condones legislative prayer.

Historic tradition is an important first consideration, even though it may be overruled by other important factors. In *Lee v. Weisman*, a case debating the constitutionality of prayer before a public high school graduation ceremony, the Supreme Court made clear that providing protections to vulnerable individuals overrides allowing ultimate deference to historic tradition.

Lee, 505 U.S. at 599. In *Lee*, a public school attempted to initiate prayer before a graduation ceremony, citing *Marsh* as their guiding rationale of the constitutionality of the proposed practice. *Id.* at 585. While the school did follow the most basic guidelines established in *Marsh*, the school failed to distinguish that children attending a graduation ceremony are fundamentally different than adults at a legislative meeting. *Id.* at 581. The ages of the individuals make a difference, as minor children are at a greater risk of religious coercion than adults. *Id.* Further, *Lee* confounded the true optional nature the legislative members in *Marsh* possessed when attending the prayer session before the legislative meeting. *Id.* at 585. In *Lee*, although the school stated graduation attendance was "not…required by official decree," it may have well have been obligatory, as feeling as though one must attend an event is just as powerful as actually being forced. *Id*. at 595. Therefore, although Justice Scalia, in his dissent, disagrees with the majority and calls for a strictly historical interpretation, the Supreme Court underlined that their desire to protect vulnerable populations from possible coercive religious events was of greater importance than comporting with the historical test. *Id*. at 634.

Here, the Hendersonville Board of Parks and Recreation's practice of beginning their meetings with a prayer provides another opportunity to underscore the relationship between government and religion. For nine years, Hendersonville Board of Parks and Recreation has opened their "monthly meetings with a short prayer." J.A. at 2. While the intersection between religion and government is complex, the Establishment Clause has never created a religion-free society. The Supreme Court has time and time again recognized that citizens of the United States "are a religious people whose institutions presupposed a Supreme Being." *Zorach v. Clausen*, 343 U.S. 306, 312 (1957). The historical test, made famous by *Marsh v. Chambers*, states that if there is a strong history of tolerance for a certain challenged practice, then the practice will likely

stand. *Marsh*, 463 U.S. at 793. Here, opening the Board meetings with a short prayer has been the practice for nearly a decade without complaint, aligning it with the core tenants of the historical test. J.A. at 2.

Further, the Hendersonville Parks and Recreation Board took special care to follow in the footsteps of *Marsh* and *Town of Greece*. *Marsh* promulgated the notion that legislative prayer is an inescapable and integral part of our nation's Founding. *Marsh*, 463 U.S. at 786. In *Town of Greece*, more than 30 years after *Marsh*, the Supreme Court reiterated the protection of opening public governmental meetings with a short prayer. *Town of Greece*, 134 S. Ct. at 1813. Now, a decade after *Town of Greece*, the understanding of the Establishment Clause of the constitution remains the same. Here, just as in both *Marsh* and *Town of Greece*, the members of the legislative meets are adults who can "tolerate and perhaps appreciate a ceremonial prayer" delivered to solemnize the meeting and "express a common aspirate [of] a just a peaceful society." *Id.* at 1823. Clearly, some form of prayer can comport with the constitutional promise of religious neutrality. As the Board carefully followed the already accepted prayer practices set forth in *Marsh* and *Town of Greece*, its practice should also be deemed constitutionally valid.

The Supreme Court in *Lee* made clear that protecting vulnerable populations from religious coercion is more important than upholding the historical analysis. The composition of the Hendersonville Board contained no members of a vulnerable population. J.A. at 8. As in *Marsh*, the Board's short prayer is "not a religious exercise. It is an attempt to lend gravity to [the] proceedings." J.A. at 15. *Lee* aims at protecting vulnerable individuals from religious coercion, and the Hendersonville Board of Parks and Recreation agrees with this sentiment. J.A. at 2-6. The Board meetings are strictly voluntary and typically solely for adults. J.A. at 12. Individuals that wish to attend the board meetings and not listen to the short prayer are

encouraged to arrive after the conclusion of the prayer, typically a few minutes after the meeting is set to begin. J.A. at 6. While shielding from religious coercion is an extremely important part of the Establishment Clause, the Hendersonville Board of Parks and Recreation follows the outline set forth in *Marsh*, not in *Lee*. J.A. at 3. The Hendersonville Board of Parks and Recreation practice should be found to be constitutional.

II. LEGISLATIVE PRAYER OFFERED BY THE BOARD SERVED TO SOLEMNIZE PUBLIC PROCEEDINGS AND IS NOT COERCIVE TO RELIGIOUS MINORITIES CONDUCTING BUSINESS BEFORE THE BOARD.

Hendersonville Board of Parks and Recreation's practice of legislative prayer is consistent with hundreds of years of historical tradition and is constitutional under the Establishment Clause of the United States. Legislative bodies do not engage in impermissible coercion by merely exposing constituents to prayer they would rather not hear and in which they need not participate. *Town of Greece*, 134 S. Ct. at 1827. Adults often encounter speech they find to be disagreeable or contrary to their own religious beliefs. This does not constitute a violation of the Establishment Clause. *Id.* at 1826. Because Petitioner was not improperly coerced to support or participate in any religion or its exercise and the prayer was used to solemnize legislative proceedings, the practice should be upheld under the Establishment Clause.

A. The Hendersonville Parks and Recreations Board's practice of opening public meetings with a legislator-led prayer emphasizes the importance of the public proceeding, solemnizing the event in a way that is consistent with the Establishment Clause.

Hendersonville Board of Parks and Recreation's practice of opening their legislative meeting with a prayer is consistent with over 200 years of historical tradition. Legislative prayer is an integral and accepted part of our society. *Marsh*, 463 U.S. at 792. Perhaps because this type of prayer is so universally accepted, the Supreme Court has only twice before directly

addressed legislative prayer practice. John Gavin, *Praying for Clarity: Lund, Bormuth, and the Split Over Legislator-Led Prayer*, 59 B.C. L. Rev. 104, 110 (2018). This lack of jurisprudence has required lower courts to conduct intensive fact inquiries into the circumstances surrounding legislative prayer and to exercise sound legal judgement to consider whether the facts constitute a violation of the Establishment Clause. *See Van Orden v. Perry*, 545 U.S. at 677. While multiple tests have been developed to analyze the Establishment Clause, no matter the tests employed, or the factors considered, the Hendersonville Board of Parks and Recreation's use of legislative prayer does not violate the Establishment Clause.

i. Hendersonville Board of Parks and Recreation's is a solemnizing practice consistent with *Marsh v. Chambers and Town of Greece v. Galloway*.

Hendersonville Board of Parks and Recreation's legislative prayer practice is consistent with hundreds of years of tradition and Supreme Court precedent. Delegates to the first Congress did not consider legislative prayer to be a form of proselytizing or a symbolic government seal of approval on one religious view. *McGowan v. Maryland*, 366 U.S. 420, 442 (1961). Rather the Founding Fathers viewed legislative prayer as unifying "conduct whose… effect… [harmonized] with the tenets of some or all religions." *Id.*

In *Marsh*, the Supreme Court upheld the Nebraska State Legislator's practice of opening each legislative day with a prayer by a chaplain paid for by the state. *Marsh,* 463 U.S. at 783. This Court held that while legislative prayer is religious in nature, it has long been understood to be compatible with the Establishment Clause. Specifically, this Court specifically considered three factors when determining whether a legislative prayer practice violated the Establishment Clause. First, the Court considered the fact that the clergyman employed was of the Presbyterian denomination. *Id.* at 793. The Court found that the long-term employment of a Presbyterian chaplain, sixteen years, suggests that the chaplain was re-appointed because of his performance

and personal qualities, not because of his religious beliefs. *Id.* Second, the Court considered whether payment of the chaplain from public funds violated the Establishment Clause. The Court held that remuneration of a chaplain is consistent with historical practice of the Congress that wrote the Establishment Clause. *Id.*at 794. Finally, the Court considered the fact that the prayers were only in a Judeo-Christian tradition. The Court held that it was unnecessary to consider the content of the chaplain's prayer, because there was no indication that the prayer had been used to proselytize, advance, or disparage one faith in any way. *Id*. at 794-95.

The historical importance of legislative prayer cannot be overstated. Considering the Hendersonville Board of Parks and Recreation's practice in comparison to *Marsh*, it is clear that the Hendersonville Board of Parks and Recreation did not improperly promote religion. To the first and second factors the Court considered in *Marsh*, the Hendersonville Board of Parks and Recreation did not employ a chaplain and instead allowing individual Board members to give a short prayer at the beginning of the meeting on a rotating schedule. J.A. at 8. While the Board members were of the Judeo-Christian tradition, there is no indication that a Board member of a different religious persuasion would be discouraged from praying. *Id.* Like the permissible prayers in *Marsh*, the prayers offered by the Board members were, "to invoke [the] divine guidance on a public body entrusted with making the laws." *Marsh,* 463 U.S. at 793.

Finally, in *Marsh,* the Court did not consider the content of the legislative prayer because as there was no indication that the prayers were used to proselytize, advance, or disparage any one faith or belief. *Id.* at 794-95. The prayers offered by the Hendersonville Board of Parks and Recreation were not a tool to convert. "The intent of the prayers is not to convert anyone to our personal religious beliefs. Rather, the intent of these prayers is to solemnize public business and 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. The Chairman of the Board emphasized that there has never been an effort to proselytize or to engage in any form of religious harassment. *Id.* Prayers predominantly focused on asking for guidance in the Board's difficult work. For example, a Board member prayed, "Almighty God, we ask for thy blessings as we conduct our work.;" and "Heavenly Father, we ask for your guidance as we conduct the public's business and serve all people- no matter what religion, faith, or lack thereof." J.A. at 9. Petitioner did not allege that the Board used prayers to proselytize or disparage other faiths. She only claimed that she was intimidated by the prayer. J.A. at 1. The Board's practice of opening legislative sessions is a "tolerable acknowledgement of the beliefs widely held among the people of our country." *Marsh*, 463 U.S. at 793.

Through *Marsh*, the Supreme Court acknowledges the important role of religion in the fabric of American society. "We are a religious people whose institutions presuppose a supreme being." *Id*. Today, the Supreme Court has gone farther to recognize the practice of legislative prayer, holding that the the First Amendment does not require legislative prayer to be nonsectarian. *Town of Greece v. Galloway,* 134 S. Ct. at 1815.

In *Town of Greece*, the Court considered the legislative prayer practice of Greece. In Greece, all board meetings are opened with a roll call, recitation of the Pledge of Allegiance, and an invocation by a local clergyman. *Id.* at 1816. After the prayer, the clergyman was presented with a plaque as a thank you for serving as the board's "chaplain for the month." *Id.* Prayer-givers were unpaid volunteers and the town did not exclude the opportunity to pray. *Id.* Nor did it review the content of the prayer. *Id.* The prayer was intended to "place town board members in a solemn and deliberative frame of mind, invoke diving guidance in town affairs, and follow a tradition practiced by Congress and dozens of state legislatures" *Id.* Finding that sectarian

prayers were permissible under the First Amendment, the Court found that an inquiry into legislative prayer should focus on the general opportunity of prayer, rather than the content of any single prayer. *Id.* at 1825.

In Justice Kennedy's opinion, a prayer practice can have the following characteristics: (1) legislative prayer is not confined to meetings of Congress or state legislators but are permissible in more intimate and familiar settings such as local government meetings; (2) the prayer portion of the meeting must be conducted only during a ceremonial part of the government body's session, not mixed during a period of official policymaking; (3) the body may invite anyone in the community to give a prayer and may pay a chaplain. Officials of the body may also join in the prayer by bowing their heads or showing other signs of religious devotion; (4) the body may not dictate the content of the prayer. Although the prayer may invoke a deity of a given faith and need not embrace the beliefs of multiple or all faiths; (5) the prayers may not proselytize or promote one faith as the true faith and may not require persons of different faiths to take part in the practice; (6) prayers may not discriminate against a specific faith; (7) the audience is primarily adults; (8) a court does not have the authority to second-guess the content of individual prayer utterances. Instead a pattern of discriminatory prayers must be demonstrated. Jennifer Rubin, *A hope and a prayer from the Supreme Court,* The Washington Post (May 6, 2014), https://www.washingtonpost.com/blogs/right-turn/wp/2014/05/06/a-hope-and-a-prayer-from-the-supreme-court/?utm_term=.d04a05fd8129.

Considering Justice Kennedy's characteristics of a permissible prayer, the Hendersonville Board of Parks and Recreation practice of legislative prayer is constitutional. While the Hendersonville Board of Parks and Recreation is an intimate local government meeting, legislative prayer is permissible in such a meeting. Furthermore, the prayer was conducted at the

beginning of the meeting during the ceremonial portion, immediately after the Pledge of Allegiance. J.A. at 8.

While the Hendersonville Board of Parks and Recreation allowed Board members to give the prayer, the Court has held that the individual giving the prayer is a distinction without legal significance. *Bormuth v. Cty. Of Jackson*, 870 F.3d 494, 509 (6th. Cir. 2017). Similarly, Justice Kennedy envisioned that anyone in the community could give the prayer and considered it permissible for board members to participate in religious displays. *See Rubin*. The Hendersonville Board of Parks and Recreation solicited unpaid volunteers to complete a short invocation at the beginning of the legislative meeting. Additionally, the Petitioner makes no assertion that the content of the prayer was reviewed by the Board. J.A. at 5.

While the legislative prayers by the Hendersonville Board of Parks and Recreation are also sectarian, they did not promote one faith as the true faith or discriminate against a specific faith. The Board appealed to general themes, asking for guidance on their legislative activities. J.A. at 5. Furthermore, the Court held in *Town of Greece* a town is not required to search beyond its borders for non-Christian ministers to achieve religious balancing. *Town of Greece*, 134 S. Ct. at 1824. While the Board members were of the Judeo-Christian tradition, the Petitioner has not asserted that the Board refused invocation from other parties or that if a Board member who was not of the Judeo-Christian tradition offered a prayer, it would be refused. The legislative prayers invoked by Hendersonville Board of Parks and Recreation were in front of a primarily adult crowd and were not coercive in nature. Under *Marsh and Town of Greece*, the only two Supreme Court considerations of legislative prayer, the Hendersonville Board of Parks and Recreation prayer practice is constitutional.

ii. An alternative to the historical approach, the Hendersonville Parks and Recreation Board's practice is also permissible under the Lemon Test.

The Establishment Clause has never required absolute separation of church and state. However, while complete separation is an impossible goal, courts still must protect citizens against excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. at 614. *See also Zorach v. Clauson,* 343 U.S. at 312. In *Lemon*, the Court considered whether Pennsylvania and Rhode Island's statutory program for reimbursing nonpublic sectarian schools for secular educational services violated the Establishment Clause. In this consideration, the Supreme Court established the Lemon Test. *Lemon v. Kurtzman*, 403 U.S. at 602. For a religious activity to pass the Lemon Test, it must meet the following prongs: (1) the challenged statute must have secular legislative purpose; (2) the primary effect of the statute must neither advance nor inhibit religion; and (3) the statute must not foster an excessive government entanglement with religion. *Id.*

The first prong is an initial determination that the activity has a secular purpose. The second prong of the Lemon Test has been updated by Justice Sandra Day O'Connor's concurrence in *Lynch v. Donnelly*. Justice O'Connor was concerned for the feelings of religious minorities stating, "The Establishment Clause prohibits the government from making adherence to a religion relevant in any way to a person's standing in the political community. . .[but governmental endorsement of religion] sends a message to non-adherents that they are outsiders, not full members of the political community, . . ." *Lynch v. Donnelly*, 465 U.S. 668, 687-88 (1984). To account for this, Justice O'Connor shifted the second prong, or purpose inquiry, to detect government endorsement of religion. James Lewis & Michael Vild, *Controversial Twist of Lemon: The Endorsement Test as the New Establishment Clause Standard,* 65 Notre Dame L. Rev. 671, 674-75 (1990). Justice O'Connor's revision was adapted by the majority in *Wallace v.*

Jaffree. The question under the purpose prong is now: whether a government's actual purpose is to endorse or disapprove of religion? *Lynch,* 465 U.S. at 690 (O'Connor, J., concurring).

The third prong is an objective consideration. A relationship between the state and church may exist, as long as there is not excessive entanglement between the two. Excessive entanglement requires considering the character and purposes of the institutions, the nature of the aid provided by the state, and the relationship between the government and the religious authority. *Lemon*, 403 U.S. at 615. For example, in *Lemon,* the Court found that providing salary support to teachers at parochial schools was an excessive entanglement. The funds were clearly benefiting religious schools and the state could not guarantee that funds were used for secular purposes. *Id. Compare Lemon* with *Everson v. Bd. Of Educ*, 330 U.S. 1 (1947) (allowing a Board of Education to reimbursing parents for the cost of transporting their children to Catholic schools because the reimbursement was available to public school students.

The Hendersonville Parks and Recreation Board's legislative prayers are permissible under the *Lemon* Test. To the first prong, the Board members have a secular purpose in opening the session with a prayer, to lend gravity and seriousness to the meeting and the legislative task at hand. *See* J.A. at 2; J.A. at 5. Board meeting attendees were not required to participate in the prayer and had an opportunity to leave the room if they found the Pledge of Allegiance or prayer to be offensive. *See Brown v. Gwinnett Cty. Sch. Dist.* 112 F.3d 1464 (11th Cir. 1997) (finding that a Georgia moment of silence law called the "Moment of Quiet Reflection" passed the *Lemon* test).

The second prong asks whether the Board is endorsing or disapproving a religion through legislative prayer. The answer is no. Legislative prayer does endorse a specific religion. "Ceremonial prayers strive for the idea that people of many faiths may be united in a community

of tolerance and devotion. Even those who disagree as to religious doctrine may find common ground in the desire to show respect of the divine in all aspects of their lives. . .." *Town of Greece*, 134 S. Ct. at 1823. While the Board members were of Judeo-Christian faith, the prayers themselves appealed to universal themes. J.A. at 9. The Board neither endorsed or disparaged any religious practice and individuals were neither forced or encouraged to participate in the prayer.

The Hendersonville Parks and Recreation Board is not excessively entangled with religion. Hendersonville Parks and Recreation Board is a legislative body that uses legislative prayer to solemnize the difficult task of legislating. J.A. at 2; J.A. at 5. Furthermore, the Hendersonville Parks and Recreation Board did not pay a chaplain to perform the invocation services. Therefore the government is not financially aiding any religious body or activity. J.A. at 6. Furthermore, while the Board members are of a Judeo-Christian tradition, the Board members personal beliefs do not indicate the state is excessively entangled with religion. Every individual is entitled to their own religious beliefs. The Hendersonville Parks and Recreation Board's activity does not constitute a violation of the Establishment Clause.

B. The Hendersonville Parks and Recreations Board's practice of opening public meetings with a legislator-led prayer does not coerce religious minorities in a way that violates the Establishment Clause.

The Petitioner was not coerced by the Hendersonville Board of Parks and Recreation's short invocation. Legislative bodies do not engage in impermissible coercion merely by exposing constituents to prayer they would rather not hear and in which they need not participate. *County of Allegheny v. ACLU*, 429 U.S. 573, 670 (1989). While coercion is not a touchstone of an Establishment Clause analysis, whether an individual was coerced into participating in a

religious activity can provide insight into the determination of whether the Establishment Clause was violated. *Id.* at 660.

"At a minimum, the Constitution guarantees that government may not coerce anyone to support participate in religion or its exercise." *Lee v. Weisman*, 505 U.S. at 577 (1992). Coercion may occur in either a direct or non-direct manner. A state has directly coerced a citizen to participate in a religious activity if it intentionally, forces him or her to make a choice between religion and nonreligion, and this choice is accompanied by a negative sanction for choosing in a way that the state does not approve. Cynthia V. Ward, *Coercion and Choice Under the Establishment* Clause, 39 U.C. Davis L. Rev. 1621, 1660 (2006). Indirect coercion occurs when when although the state has not expressed a preference in behavior choice, private citizens take action to pressure or ostracize a religious. *Id.*

While extreme cases of indirect coercion may rise to the level of violating the Establishment Clause, courts have been wary about labeling coercion as a casual occurrence. For example, in *Lee v. Weisman,* this Court limited the definition of coercion to only when the negative social sanction is a reasonably foreseeable consequence of requiring religious dissenters to make a choice about religious participation. *Lee v. Weisman*, 505 U.S. at 643 (1992). In *Lee*, the public high school and middle school principals had a policy of inviting members of the clergy go offer invocation and benediction prayers as a part of the schools' formal graduation ceremonies. *Id.* at 580. The principal invited a rabbi to give the benediction, giving him a pamphlet entitled "Guidelines for Civic Occasions," and recommending that the prayers be nonsectarian. *Id.* at 581. On certiorari, this Court held that the inclusion of an invocation from a member of the clergy at a public secondary school graduation is forbidden when it contains the following characteristics: (1) state officials direct the performance of such an exercise; (2) the

state compels attendance and participation in the exercise; and (3) the state does not allow students to object or protest participation. *Id.* at 577. Given the vulnerability of children to social pressure, the potential for social ostracism for dissenters was both foreseeable and substantial. *Id. See also Santa Fe Independent School District v. Doe,* 530 U.S. 290 (2000) (holding that prayer prior to school football games, on school property, and authorized by school policy was a violation of the Establishment Clause because social ostracism of dissenters was foreseeable).

Petitioner's case does not present these vulnerabilities. "The atmosphere at a state legislature's opening, where adults are free to enter and leave with little comment and for any number of reasons, cannot compare with the constraining potential of the one school event most important for the student to attend." *Lee v. Weisman,* 505 U.S. at 577. *See also Marsh*, 463 U.S. at 783 (finding that, "Individuals can choose to leave or stay and neither choice represents an unconstitutional imposition as to mature adults, who are presumably not readily susceptible to religious indoctrination or peer pressure."). *Lee* emphasized the school setting and vulnerability of students. Petitioner is not a student, she was requesting a permit to begin a paddleboard business. J.A. at 1. Furthermore, Petitioner was not required to attend the prayer or participate in the prayer in any manner. There would have been no political ramifications Petitioner not standing for the prayer or Pledge of Allegiance. J.A. at 4 ("In my years on the Board, we have never even considered the religious faith–or lack thereof–of any citizen or person who has appeared before us."). Hendersonville Board of Parks and Recreation's practice of legislative prayer is not coercive and is not a violation of the Establishment Clause.

CONCLUSION

This court should reverse the holding of the Thirteenth Circuit Court of Appeals. It does not violate the petitioner's First Amendment protection against established religion to allow the

Hendersonville Parks and Recreation Board to open their meeting with a short prayer. The prayer practice, based on a long-standing historical tradition, does not place coercive pressure on religious minorities. The First Amendment does not protect against every relationship between government and religion. As the petitioner is not part of a vulnerable population–such as a minor–the possibility of religious coercion vastly decreases. To determine if a prayer practice violates the Establishment Clause, the main factors considered are the duration the practice has been in place and the individuals present during the practice. As the opening prayer has been in place for a substantial period of time, it follows the constitutional parameters set forth in *Marsh*. Additionally, as the petitioner does not belong to a vulnerable population, the threat of religious coercion outlined in *Lee* greatly decreases. Therefore, due to the totality of these circumstances, the town's prayer practice should be ruled constitutional and this court should reverse the holding of the Thirteenth Circuit Court of Appeals.