No. 17-648

IN THE SUPREME COURT OF THE UNITED STATES

HENDERSONVILLE PARKS and
RECREATION BOARD,

Petitioners

v.

BARBARA PINTOK,

Respondent

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

BRIEF FOR PETITIONERS

Team 2509
Counsel for Petitioner

QUESTIONS PRESENTED

I. Whether the Hendersonville Parks and Recreation Board's practice of having members deliver a short prayer before public meetings comports with the history and tradition of legislative prayer authorized by *Marsh v. Chambers*, 463 U.S. 783 (1983) and *Town of Greece v. Galloway*, 134 S.Ct. 1811 (2014).

II. Whether the Hendersonville Parks and Recreation Board's practice of beginning public meetings with a short prayer supports the secular purpose of solemnizing public business, and does not have a religious purpose or place coercive pressures on religious minorities.

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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 the Facts

The Hendersonville Parks and Recreation Board ("the Board") is a local government body that oversees areas and activities within the city that include cultural arts, greenways, golf courses, historic sites, permit rental and reservations, and other outdoor recreation. J.A. at 8. The Board is composed of five members and meets monthly to conduct business. J.A. at 8. All of the current Board members belong to a different sect of Christianity; Chairman Wyatt J. Koch is a Baptist, Alvania Lee is a Methodist, John Riley is a Catholic, James Lawley is a Presbyterian, and Monique Johnson is a Lutheran. J.A. at 8.

Since at least 2005, the Board has maintained a tradition of opening its sessions with an invocation. J.A. at 6. The unwritten policy proceeds with one of the Board members inviting everyone present to stand, recite the Pledge of Allegiance, and listen to a short prayer delivered by one of the Board members. J.A. at 2, 8. Because all the Board members are Christian, the prayers tend to have Judeo-Christian references. J.A. at 8, 9. However, references to universal sentiments and ideals are present throughout the prayers, and the Board members insist that the practice is for the purpose of solemnizing the proceedings, not preaching conversion. J.A. 2-6, 9. For example, Board members have delivered the following prayers:

> "Almighty God, we ask for thy blessing 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."

> "May we reflect on the awful violence and mass shootings in this country. May God place His Healing Hand on the hurt communities and families who suffered grievous losses. We know that evil exists in the world, but we humbly ask for peace and togetherness in this trying time. We ask for a moment of quiet reflection to allow all present in this room to reflect on the pressing moments of

> their day. We pray that we can all come together in a spirit of unity despite whatever differences we may have."
>
> "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. May we conduct ourselves in the proper manner at all times. Father, the world seeks to divide often on the basis of race. Let us treat all persons with the dignity and respect that they deserve—no matter their race, sex, religion, sexual orientation, or gender identity. We are all God's people."
>
> "Please bow your heads. Lord, help us to make good decisions. Bless our troops and their family members who are missing their loved ones who are making sacrifices for us all. Please bless our community with peace. We know that we are tasked with making decisions that impact the lives of members of our community. Please bless everyone that come before us and give peace to them in their daily lives."
>
> "We are all sinful but as the book of Isaiah reads, though our sins are like scarlet, they shall be as white as snow. We all fall short of the glory of God. We must strive to conduct our business in a way consistent with the careful hand of the Father and His son Jesus Christ."

Barbara Pintok (hereinafter "Respondent" or "Ms. Pintok") is a resident of Hendersonville who has attended, and at times participated, in meetings of the Board. J.A. at 8. As a practicing member of the Wiccan religion who has a troubled history with Christianity, Respondent was offended by the Board's practice of opening each meeting with a short prayer. J.A. at 1. Respondent allegedly complained about the practice to a member of the board, but nothing became of that complaint. J.A. at 1. Subsequently, the Respondent filed a lawsuit seeking declaratory and injunctive relief against the Board's prayer practice. J.A. at 10.

B. Procedural History

The Respondent sued in the United States District Court for the District of Caldon seeking declaratory and injunctive relief, and a preliminary injunction against the Board using sectarian prayers at its meetings. J.A. at 10. Both the Respondent and the Board members produced affidavits and, after a minimal discovery period, both sides filed cross-motions for

summary judgment. J.A. at 10. The District Court denied the Respondent's motion and granted summary judgment in favor of the Board, reasoning the Board's practice is permissible under *Marsh v. Chambers*, 463 U.S. 783 (1983) and *Town of Greece v. Galloway*, 134 S.Ct. 1811 (2014), and that the Board did not intend to coerce anyone through its practice. J.A. at 12-13. In sum, the District Court determined "[t]he intent of the Board members is to solemnize public business, offer citizens a moment of quiet reflection, and to engage in a time-honored tradition across the United States of America." J.A. at 15.

On appeal, the United States Court of Appeals for the Thirteenth Circuit reversed, and remanded the case to the District Court with instructions to enter summary judgment for Respondent. J.A. at 24. The Thirteenth Circuit did not apply *Marsh* or *Town of Greece* and instead analyzed the case under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), holding the Board had a secular purpose for the prayer practice, but that the practice had a primary effect of advancing religion, which is impermissible under the Establishment Clause. J.A. at 22. A timely petition for writ of certiorari was filed and granted by this Court. J.A. at 26.

C. Standard of Review

Appellate courts review grants of summary judgment in the First Amendment context *de novo*. *Bose Corp. v. Consumer Union*, 466 U.S. 485, 499 (1984). Under a de novo standard of review, the court should make independent determinations on issues of law and not afford special weight to the determinations of the lower court. *United States. V. Raddatz*, 447 U.S. 667, 690 (1980). The entire record must be reviewed to assure the judgment does not undo this country's 200-year history and tradition of the important practice of legislative prayer. *Marsh v. Chambers*, 463 U.S. 783, 786 (1983).

SUMMARY OF THE ARGUMENT

This Court should reverse the ruling of the Thirteenth Circuit Court of Appeals and hold that the prayers delivered by the Hendersonville Parks and Recreation Board members did not violate the First Amendment's Establishment Clause. The board members began each of their sessions by asking everyone in the room to stand, recite the Pledge of Allegiance, and listen to a brief prayer. This practice comports with the history and tradition of legislative prayer set forth in *Marsh* and *Town of Greece*, and in no way places coercive pressure on religious minorities.

Hendersonville's Parks and Recreation Board members' practice of opening its meeting with a short prayer comports with the history and tradition of legislative prayer under *Marsh* and *Town of Greece* because, as a whole, the prayers were not used as a means of advancing certain religious beliefs or disparaging others. The prayers were delivered prior to the commencement of the meetings and, though primarily involving Judeo-Christian themes due to the variety of Christian sects the members belonged to, the prayers invoked universal themes and goals. The fact that the board members themselves delivered the prayers is of no significance, as this Court has condoned the practice of opening legislative sessions and meetings with a prayer.

Furthermore, the Hendersonville Parks and Recreation Board members' practice of opening its meetings with a prayer serves the legitimate function of solemnizing public business and affairs, and in no way coerces religious participation onto others. Firstly, the board members clearly stated in their affidavits that they did not intend to coerce any audience members; rather, they intended to solemnize public business before conducting such business. Secondly, while Ms. Pintok stated she felt intimidated by these prayers, there is no evidence in the record to show that the board members were coercing their religious beliefs onto her. Neither participation nor attendance was required by the audience during the course of these short prayers. Moreover,

there is no evidence in the record showing that a lack of participation by audience members in any way negatively impacted the way in which the board members voted on certain issues. In light of this, this honorable Court should reverse the ruling of the lower court and hold that the legislative prayers in this case were not violative of the First Amendment's Establishment Clause.

ARGUMENT

I. THE HENDERSONVILLE PARKS & RECREATION BOARD'S PRAYER PRACTICE COMPORTS WITH THE TRADITION OF LEGISLATIVE PRAYER AND THE LONG HISTORY OF LEGISLATORS LEADING SUCH PRAYER.

The Supreme Court recognized the tradition of legislative prayer in the United States, and enshrined it into our Constitution, for the first time in *Marsh v. Chambers*, 463 U.S. 783, 786 (1983). The prayer practice at issue in that case was upheld on the grounds that it fit within the deep-seated history of legislative prayer practiced since the very founding of our nation, and it was not used as an opportunity to advance one religion or disparage another. *Id*. at 793-795. The Court revisited the issue, and reached the same result, just over 30 years later in *Town of Greece v. Galloway*, 134 S.Ct. 1811, 1820, 1824 (2014). In *Town of Greece*, the Court was clear in holding that, when a court is asked to determine whether a particular legislative prayer practice comports with the tradition authorized by the Supreme Court, *Marsh* "requires an inquiry into the prayer opportunity as a whole." *Id*. at 1824.

Nevertheless, *Town of Greece* offered some "relevant constraint(s)" surrounding legislative prayer practice, which analyzed individually, lend a degree of clarity to the judgment that is to be passed on the prayer opportunity as a whole. *Id*. at 1823. Those constraints derive from the prayer's place at the opening of legislative sessions, the content of the prayer being meant to lend gravity to the occasion, and the prayer being "solemn and respectful in tone,"

inviting "lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing." *Id.* Lower courts have since followed the lead of the Supreme Court and analyzed individual components of the prayer practice in order to pass judgment on the prayer practice as a whole. *See Freedom From Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ.*, 896 F.3d 1132, 1143 (9th Cir. 2018) (analyzing "certain characteristics of setting and content" set out in *Marsh* and *Town of Greece* that "mark legislative prayer."); *Bormuth v. Cty. of Jackson*, 870 F.3d 494, 512-15 (6th Cir. 2017) (analyzing identity of prayer giver, content of prayer, and method of selecting prayer giver); *Lund v. Rowan Cty.*, 863 F.3d 268, 281 (4th Cir. 2017) ("we examine each of these features in turn:" identity of prayer giver, content of prayer, invitations for participation, and local government setting).

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. While the Constitution's command is clear, "[t]his Court's Establishment Clause jurisprudence is in disarray." *Rowan Cty. v. Lund*, 138 S.Ct. 2564 (2018) (Thomas, J. dissenting from denial of certiorari). All that is clear about the jurisprudence surrounding legislative prayer is this: (1) the prayer opportunity as a whole must not be used to advance or disparage any particular religion; and (2) the prayer practice must be grounded in history and tradition.

The following subheadings will demonstrate that the Hendersonville prayer practice is in accordance with the tradition of legislative prayer both in its component parts and as a whole; the practice does not advance any particular religion or disparage another; and there is a long history of legislators leading legislative prayer in the United States.

A. The Time and Setting of the Prayer Practice in Hendersonville was Identical to that of the Practice in *Town of Greece.*

"The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country." *Marsh*, 463 U.S. at 786. Invocations at the opening of legislative sessions lend a sense of gravity and common purpose to the occasion, which allows "lawmakers to transcend petty differences in pursuit of a higher purpose, and express a common aspiration to a just and peaceful society." *Id*. at 1818, 1823.

The Hendersonville prayer practice occurred at the opening of each meeting of the board following the Pledge of Allegiance. J.A. at 8. The sequence of events of opening town board meetings in *Town of Greece* was identical. *Town of Greece*, 134 S.Ct. at 1813. The Nebraska state legislature and Congress have been opening each of their sessions with legislative prayer for centuries. *Marsh*, 463 U.S. at 790. "[T]here can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society." *Id.* at 792. The timing of the Hendersonville prayer practice aligns with the history and tradition of legislative prayer, and the setting of the practice is not any more problematic.

The Court had little difficulty extending the tradition of opening legislative sessions with prayer from state legislatures to local legislative bodies because the practice of local bodies opening meetings with prayer "has historical precedent." *Town of Greece*, 134 S.Ct. at 1819 (citing Reports of Proceedings of the City Council of Boston for the Year Commencing Jan. 1, 1909, and Ending Feb. 5, 1910, pp. 1-2 (1910) (Rev. Arthur Little)). *See Bormuth* 870 F.3d at 505 ("This tradition extends not just to state and federal legislatures, but also to local deliberative bodies like city councils"); *Smith v. Jefferson Cty. Bd. of Sch. Comm'rs*, 788 F.3d 580, 588 (6th Cir. 2015) ("At the state and local levels, too, legislative prayer has long been accepted").

While the more intimate setting of a local government meeting may be a relevant component of the coercion inquiry, it has no bearing on whether the setting of such a meeting comports with the tradition of legislative prayer, especially where *Town of Greece* clearly extended the tradition to include such a setting. The timing and setting of the prayer practice of the Hendersonville Parks & Recreation Board comports with the tradition recognized in *Marsh* and *Town of Greece* and presents no risk of offending the Establishment Clause.

B. The Content of the Prayers Given by the Hendersonville Board Member's Comports With the Tradition of Legislative Prayer.

Insistence on nonsectarian prayer is inconsistent with the tradition of legislative prayer. *Town of Greece*, 134 S.Ct. at 1820. "The Congress that drafted the First Amendment would have been accustomed to invocations containing explicitly religious themes of the sort respondents find objectionable." *Id.* Traditionally, legislative prayer has served to solemnize the occasion for public business, and prayer that reflects beliefs specific to only some creeds can still serve that purpose so long as the practice over time is not used to advance one religion or disparage another. *Id.* at 1823. Invocation of Divine guidance upon a public body for the purpose of solemnization is not an "establishment" of religion or even a step in that direction; "it is simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh,* 463 U.S. at 792. Ultimately, "the content of the prayer is not of concern to judges where … there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Id.* at 794-95.

The five members of the Hendersonville Board each belonged to a different sect of Christianity, and it is therefore not surprising that many of the prayers offered by the Board invoked themes of a Judeo-Christian nature. J.A. at 8-9. At times, the prayers made explicit reference to religion by invoking names such as "Almighty God," "Heavenly Father," "Jesus

Christ," and "Lord." J.A. at 9. However, the prayers frequently invoked universal themes and goals such as government impartiality, the awful nature of gun violence, inclusion of all people, and peace for members of the community. J.A. at 9. There is nothing in the record to suggest that the Board reviewed and/or altered the content of prayers before they were given, and each member of the Board submitted affidavits adamantly rejecting the assertion that any of the prayers were intended to advance one faith or disparage another. J.A. at 2-6. The Hendersonville board members offered prayers that solemnized the occasion for public business without advancing one religion or disparaging another, bringing this case closely in line with *Town of Greece*, and making it distinct from *Lund* and *Freedom From Religion*.

In *Town of Greece*, the prayers led by chaplains often invoked Christianity by referring to "God," "Jesus Christ," "Lord," and "Heavenly Father," just as the Hendersonville Board did. *Town of Greece*, 134 S.Ct. at 1816. The chaplains in that case arguably went a step further by ending prayers with an "Amen," and occasionally invoking religious holidays, scripture, or doctrine. *Id.* However, the prayers also invoked universal themes "by celebrating the changing of the seasons or calling for a "spirit of cooperation" among town leaders." *Id.* at 1824. The Court rejected the argument that the content of the prayers violated the Establishment Clause because ceremonial prayers strive for the goal of uniting people of many faiths around common ideals, and "our tradition assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith." *Id.* at 1823 (citing Letter from John Adams to Abigail Adams (Sept. 16, 1774), in C. Adams, Familiar Letters of Jon Adams and His Wife Abigail Adams, During the Revolution 37-38 (1876)).

Further, the Court astutely noted that requiring invocations to be nonsectarian would require legislatures that sponsor prayers and courts that decide cases concerning legislative

prayer to act as supervisors and censors of religious speech, "a rule that would involve government in religious matters to a far greater degree than is the case" under the town's current practice. *Town of Greece*, 134 S.Ct. at 1822. Our government is not permitted to mandate a civic religion any more than it is permitted to mandate religious orthodoxy, and once government "invites prayer into the public sphere," it must "permit a prayer giver to address his or her own God or gods as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian." *Id.* at 1822-23. That is all the Hendersonville Board members did, followed their conscience and invoked their own God when seeking to lend gravity to the important proceedings being initiated. J.A. at 8, 9.

By contrast, *Freedom From Religion* and *Lund* are guiding examples of prayers composed of content that is likely to weigh in favor of an Establishment Clause violation. In *Freedom From Religion*, members of a local school board opened meetings with invocations where Christian beliefs, Bible readings, and further prayer were a regular feature of board meetings. *Freedom From Religion*, 896 F.3d at 1140. At one meeting, a board member "urged everyone who does not know Jesus Christ to go and find Him;" at another, the same board member espoused that "God appointed us to be here;" and on another occasion, a different board member thanked a school principal "for placing God before herself and praying for every classroom on Saturday." *Id.* Similarly, in *Lund*, members of the Board of Commissioners all but turned the board room into a confessional during their invocations by asking God for forgiveness for neglecting his guidance, not loving Him enough, and being sinners. *Lund*, 863 F.3d at 273. On another occasion, an invocation was given that implied Christianity was superior to other faiths by stating, "[a]s we pick up the Cross, we will proclaim His name above all names, as the only way to eternal life." *Id*. These are examples of invocations that indicate a prayer

opportunity is being exploited to proselytize, and that is the only time a court should concern itself with the content of a legislative prayer invocation. *Marsh,* 463 U.S. at 794-95.

The content of the prayers offered by members of the Hendersonville Board conformed to the tradition of legislative prayer in that they invoked religious themes, not to advance or disparage any particular religion, but to solemnize public business by providing particular means to universal ends, and the fact "that a prayer is given in the name of Jesus, Allah, or Jehovah, or that it makes passing reference to religious doctrines, does not remove it from that tradition." *Town of Greece*, 134 S.Ct. at 1823.

C. Hendersonville Board Member's Leading Prayers Did Not Violate the Establishment Clause in Light of the Long History of Legislators Leading Legislative Prayer.

While *Marsh* and *Town of Greece* were decided in the context of a chaplain leading legislative prayer, neither case "restricts *who* may give prayers in order to be consistent with historical practice." *Bormuth*, 870 F.3d at 509 (emphasis in original). However, the reasoning of those cases were rooted deeply in history, and "history shows that legislator-led prayer is a long-standing tradition." *Id.*; *see Rowan Cty. v. Lund*, 138 S.Ct. 2564, 2566 (2018) (Thomas, J. dissenting from denial of certiorari) ("For as long as this country has had legislative prayer, legislators have led it."). Legislator-led prayer predates the founding of our nation and has been a tradition in various state capitals for more than 150 years. *Bormuth*, 870 F.3d at 509. Congress permits legislator-led prayer, and in Rhode Island *only* legislators are permitted to deliver legislative prayers. *Id.* at 511. Some of the States even opened their constitutional conventions with legislator-led prayer. *Rowan Cty. v. Lund*, 138 S.Ct. 2564, 2566 (2018) (Thomas, J. dissenting from denial of certiorari). Simply put, "the Establishment Clause indeed allows

lawmakers to deliver invocations in appropriate circumstances. Legislator-led prayer is not inherently unconstitutional." *Lund*, 863 F.3d at 280.

The facts of our case track the facts of *Bormuth* and *Lund* almost identically. *See* J.A. at 8-9. Those cases resulted in a circuit split that led to this case coming before the Court. In light of the long established history of legislator-led prayer, this Court should remain consistent with the holdings of *Marsh* and *Town of Greece* by resolving this conflict in favor of the reasoning employed by the Sixth Circuit in *Bormuth* rather than the Fourth Circuit's reasoning in *Lund*.

In *Lund*, the Fourth Circuit decided that Rowan County conducted legislator-led prayer in an inappropriate manner. *Lund*, 863 F.3d at 290. That case involved a prayer practice where members of the county board, who were all Christian, took turns on a rotating basis beginning each meeting by asking everyone to stand for the Pledge of Allegiance and a prayer. *Id.* at 272-73. The court held that a "combination" of elements made the practice unconstitutional, but the majority focused particularly on the identity of the prayer giver, the fact that all the board members were Christian, and the setting of a local meeting. *Id.* at 281-83. "To the extent that *Town of Greece* touches on the constitutional relevance of the prayer-giver's identity, the decision takes for granted the use of outside clergy." *Id*. In addressing this issue, the Fourth Circuit focused on the fact that in Rowan County, it was the government officials asking the attendees to stand as opposed to an invited clergy. *Id*. Similarly, the government officials were the ones who spoke the words "let us pray." *Id*. at 287. The Court held this was an important difference because the ordinary observer is aware that phrases such as "let us pray" are virtually reflexive for a clergy. *Lund*, 863 F.3d at 287.

Bormuth involved a prayer practice substantially similar to the one in *Lund,* but reached a different result. *Bormuth*, 870 F.3d at 519. In declining to strike down a legislative prayer

practice because it was led by a legislator, the Sixth Circuit reasoned that, "consistent with our Nation's historical tradition, prayers by agents (like in *Marsh* and *Town of Greece*) are not constitutionally different from prayers offered by principals." *Id.* at 512. It is difficult indeed to see how a prayer coming from the mouth of a legislator at the opening of a legislative session is any more of a government endorsement or establishment of religion than similar words coming from the mouth of a court officer or a chaplain, both of whom are paid with tax dollars, or "In God We Trust" being printed on our currency. *See Bormuth,* 870 F.3d at 503 (every session of the Supreme Court begins with an invocation including "God save the United States and this Honorable Court"); *Marsh*, 463 U.S. at 788-90 (upheld Nebraska legislature paying a chaplain to lead legislative prayer with tax dollars); *New Doe Child #1 v. United States*, 901 F.3d 1015, 1021-23 (2018) (holding that printing "In God We Trust" on currency does not violate the Establishment Clause under a *Marsh*/*Town of Greece* analysis).

Furthermore, the *Lund* Court's argument hinged on the language "[t]o the extent *Town of Greece* touches on the constitutional relevance of the prayer-giver's identity, the decision takes for granted to use of outside clergy." *Lund*, 863 F.3d at 278. The *Bormuth* Court explains that the Supreme Court, in both *Town of Greece, N.Y.* and *Marsh*, did not take this fact for granted. *Bormuth*, 870 F.3d at 509. "[N]either *Marsh* nor *Town of Greece* restricts *who* may give prayers in order to be consistent with historical practice." *Id*.; *see also Marsh*, 463 U.S. 783 (1983); *Town of* Greece, 572 U.S. 565 (2014). In fact, in *Marsh*, this Court noted that both paid legislative chaplains *and* opening prayer are both consistent with the Framer's intent with respect to the First Amendment's Establishment clause. *Bormuth*, 870 F.3d at 509 (citing *Marsh*, 463 U.S. at 488 ("Clearly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains *and* opening prayer as a violation of that Amendment, for the practice

of opening sessions with prayer has continued without interruption ever since that early session of Congress.") (emphasis added). The latter part of the excerpt shows that the Supreme Court condones "opening prayer" generally; the use of paid chaplains happens to be a means by which this is often achieved. *See Marsh*, 463 U.S. at 488. Thus, the Fourth Circuit in *Lund* misconstrued the Supreme Court's holding in both *Marsh* and *Town of Greece, N.Y.* to the extent its reasoning relied on the fact the the Supreme Court had remained silent on the issue of the prayer-giver's identity.

The fact that all of the current members of the Hendersonville Board belong to various denominations of Christianity does not make out an Establishment Claus violation either. J.A. at 8. In the first instance, our democratic process makes elected bodies dynamic rather than static in nature, which is not a trait normally associated with "establishment." *Bormuth*, 870 F.3d at 513. Secondly, so long the Hendersonville Board maintains a policy of nondiscrimination, "the Constitution does not require it to search … for non-Christian prayer givers in an effort to achieve religious balancing." *Town of Greece*, 134 S.Ct. at 1824. There is nothing in the record to suggest that Hendersonville maintains any policy of discrimination in its prayer practice. The record is also silent as to Hendersonville's demographics, but it is possible the town has a predominantly Christian population; much like Greece was composed of predominantly Christian congregations in *Town of Greece*. *Id.* Surely the Constitution does not require Hendersonville to comb through their population and choose particular citizens to encourage running for political office based on a rubric of religious diversity. Finally, how long the Board has been composed entirely of Christians is of no constitutional significance, so long as it does not maintain a policy of discrimination or use prayer opportunities to advance one faith or disparage another. *See Marsh,* 463 U.S. at 793-94 (16-year tenure of Nebraska legislature's

Presbyterian chaplain leading opening prayer did not conflict with Establishment Clause absent proof that reappointment stemmed from an impermissible motive).

The tradition of legislative prayer does not turn on the identity of the prayer giver. *Bormuth,* 870 F.3d at 512. The Sixth Circuit in *Bormuth* cited to an amicus brief that surveyed the various prayer practices across state legislatures, which was submitted to the Court in *Marsh* by the National Conference of State Legislatures stating, "[t]he opening legislative prayer may be given by various classes of individuals. They include chaplains, guest clergymen, legislators, and legislative staff members." *Id.* at 510. A 2002 study by the same organization reinforced that conclusion finding that "[f]orty-seven chambers allow people other than the designated legislative chaplain or a visiting chaplain to offer the opening prayer. Legislators, chamber clerks and secretaries, or other staff may be called upon to perform this opening ceremony. *Id.* at 511. *See American Humanist Ass'n v. McCarty*, 851 F.3d 521, 527 (9th Cir. 2017) (upholding the practice of a school board opening its meetings with invocation led by a student under a *Marsh*/*Town of Greece* analysis). But even if this tradition did turn on something so trivial, the "tradition of legislator-led prayer makes sense in light of legislative prayer's purpose—it 'invites lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing.' " *Bormuth*, 870 F.3d at 511 (quoting *Town of Greece*, 134 S.Ct. at 1823).

Therefore, this Court should endorse the outcome in *Bormuth* by using this case to "decline the invitation to find an appreciable difference between legislator-led and legislator authorized prayer given its historical pedigree." *Bormuth,* 870 F.3d at 512.

D. The Hendersonville Board's Prayer Practice, As a Whole, Comports With the Tradition of Legislative Prayer Authorized by *Marsh* and *Town of Greece.*

"From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom." *Marsh*, 463 U.S. at 786. Chaplains, legislators and legislative staff alike have engaged in the practice of leading such prayer. *Bormuth*, 870 F.3d at 511. The tradition of legislative prayer has a long history of being practiced at every level of government from Congress to city council. *Town of Greece*, 134 S.Ct. at 1819. Frequently throughout history legislative prayers have included references to Christianity and have been delivered by people of Christian faith, and so long as there was no policy of discrimination or exploitation of the prayer opportunity to proselytize, this has not traditionally been understood as a violation of the Establishment Clause. *See Marsh,* 463 U.S. at 794; *Town of Greece,* 134 S.Ct. at 1823-24; *Bormuth,* 870 F.3d at 506.

The Hendersonville Parks and Recreation Board is a locally elected legislative body made up of five members, all of whom happen to belong to a different sect of Christianity. J.A. at 8. Before each monthly meeting, the Board asks everyone to stand, recite the Pledge of Allegiance, and listen to a short prayer given by one of the Board members. J.A. at 8. All of the Board members being Christian, it is not uncommon for their invocations to invoke Christian themes as means to universal civic ends. J.A. at 9. The Board's prayer practice is not a written policy, and there is nothing in the record to suggest that the Board reviews, or has any requirements for, the content of the prayers. J.A. at 1. Moreover, all of the Board's members have submitted affidavits to the effect that the prayer opportunity is for the purpose of solemnizing and lending gravity to the occasion, and that they would never participate on a board that exploited a prayer opportunity to proselytize. J.A. 2-6. There is no evidence in the record of

the Board engaging in any discrimination, or advancement of one particular religion or disparagement of another; even Respondents allegation that Board member Lawley made "remarks stray[ing] from the rationale set out in *Marsh*" does "not despoil a practice that on the whole reflects and embraces our tradition." *Town of Greece,* 134 S.Ct. at 1824.

"We are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). While it is critically important that our country maintain a separation of church and state, there is no constitutional requirement that government be hostile toward religion and actively work against religious influence in society. *Id.* at 314. The only difference, on the whole, between the prayer opportunity in this case and *Town of Greece* is that a legislator led the prayer in this case. The drafters of the First Amendment simply "did not intend to prohibit a just expression of religious devotion by the legislators of the nation, even in their public character as legislators." *Bormuth*, 870 F.3d at 509, (quoting S. Rep. No. 32-376, at 4 (1853)).

"It is of course true that great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow." *Marsh*, 463 U.S. at 795 (quoting *Sch. Dist. of Abington Tp. v. Schempp*, 374 U.S. 203, 208 (1963)). The case presented before this honorable Court is a mere shadow as opposed to a real threat.

Therefore, we ask this Court to reverse the decision of the Thirteenth Circuit and hold that the Hendersonville Board's prayer practice does comport with the tradition of legislative prayer authorized by *Marsh* and *Town of Greece*.

II. THE HENDERSONVILLE PARKS & RECREATION BOARD'S PRAYER PRACTICE SOLEMNIZES PUBLIC BUSINESS AND DOES NOT COERCE RELIGIOUS MINORITIES.

Despite the sprawling jurisprudence on the Establishment Clause, and the confusion among the circuit courts regarding the *Marsh* exception, this case really boils down to a simple yet controlling proposition: can the Hendersonville Parks & Recreation Board begin public meetings with legislator-led prayer? The Supreme Court has not answered this question, but *Marsh* and *Town of Greece* come close. *Marsh* establishes that legislative prayer—as a general matter—is constitutionally permitted. *Marsh v. Chambers*, 463 U.S. 783, 791 (1983). *Town of Greece* reiterates this principle but emphasizes that *Marsh* does not permit any practice "that would amount to a constitutional violation if not for its historical foundation." *Town of Greece v. Galloway*, 134 S.Ct. 1811, 1819 (2014). The Board's practice is a variation on the legislative prayer permitted under *Marsh* and *Town of Greece*; the variation being that a legislator is leading the prayer, not a minister or a clergyman. Therefore, analogizing the Board's practice to those in *Marsh* or *Town of Greece* does not conclude the analysis because, as the *Town of Greece* Court explained, historical foundations will not insulate a practice that violates the Constitution. *Town of Greece*, 134 S.Ct. at 1819.

Town of Greece unearths two general principles that cannot be ignored in this case. First, the Court identified a legitimate purpose—solemnizing public business—and determined that the practice of beginning legislative sessions with prayer "serves that legitimate function." *Town of Greece*, 134 S.Ct. at 1823. Second, the Court conceded that the government can never coerce religious participation. *Id*. at 1825. Making it clear that the Establishment Clause permits a prayer practice that "elevate[s] the purpose of the occasion and to unite[s] lawmakers in their common effort," so long as that practice is not "exploited to proselytize or advance any one, or

to disparage any other, faith or belief." *Id*. at 1823 (quoting *Marsh*, 463 U.S. at 794–95). In other words, *Town of Greece* tells us the government can use prayer to solemnize public business, but it cannot use prayer to coerce religious observance. *Id*. at 1827-28. The second question on certiorari draws on this principle as it asks whether the Board's practice of beginning public meetings with prayer supports the secular purse of solemnizing public business, or whether legislator-led prayer has a clearly religious purpose and places coercive pressures on religious minorities. J.A. at 26.

A. The Board's Practice Supports the Secular Purpose of Solemnizing Public Business the Same Way Traditional Legislative Prayer Does.

The secular purpose requirement looks at "whether government's actual purpose is to endorse or disapprove of religion." *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)). The inquiry is objective, looking at "readily discoverable fact[s]" and taking into account the "the traditional external signs that show up in the 'text, legislative history, and implementation of the statute,' or comparable official act." *McCreary Cty. v. ACLU of Ky.,* 545 U.S. 844, 862 (2005) (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)). When a government's act is "motivated wholly by religious considerations" instead a secular purpose, it violates the Establishment Clause. *See id*. at 865 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984)); *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (stating government action cannot be "entirely motivated by a purpose to advance religion).

An objective inquiry in this case shows the Board's practice supports the secular purpose of solemnizing public business and does not endorse or disapprove of religion. The Board members' affidavits state their practice was intended to "solemnize public business" and "lend gravity to [their] proceedings." J.A. at 2-6. This "Court often does accept governmental

statements of purpose," unless such purpose is an "apparent sham." *McCreary Cty.*, 545 U.S. at 865. There are no facts which indicate this stated purpose is a sham. Furthermore, history shows that legislatures use prayer to solemnize public business and this Court "presume[s] that the reasonable observer is acquainted with this tradition and understands that its purposes are to lend gravity to public proceedings." *Town of Greece*, 134 S.Ct. at 1825. This presumption applies here, the Board engaged in a historical practice common among legislatures—taking a moment to solemnize the ensuing business—and it used the traditional symbolic expressions—short, solemn prayers—associated with that practice. *See* J.A. at 8, 18; *Marsh*, 463 U.S. at 791.

B. The Board's Practice Did Not Have a Clearly Religious Purpose Merely Because the Prayers Harmonize with the Members' Religious Views.

The fact that the Board members used Christian prayers does not show they were motivated by wholly religious considerations. This Court has held a practice does not violate the Establishment Clause because "its 'reason or effect merely happens to coincide or harmonize with the tenets of some . . . religions.' " *Lynch*, 465 U.S at 682 (quoting *McGowan v. Maryland*, 366 U.S. 420, 442 (1961)). The Board's prayers came right after the Pledge of Allegiance; they were unscripted, short, and given by the Board members—all of whom are Christian—just before the public meetings began. J.A. at 8,18. As the *Town of Greece* Court noted, "[f]or members of town boards . . . ceremonial prayer may also reflect the values they hold as private citizens" and it is an "opportunity for them to show who and what they are without denying the right to dissent by those who disagree." *Town of Greece*, 134 S.Ct. at 1826. The Board's short prayers—which happen to harmonize with their private religious views—are not motivated by religion, but by the historical practices that serve to "connect [lawmakers] to a tradition dating to the time of the Framers." *Town of Greece*, 134 S.Ct. at 1826. "That a prayer is given in the

name of Jesus, Allah, or Jehovah, or that it makes passing references to religious doctrines, does not remove it from that tradition." *Id*. at 1823.

In sum, this Court will invalidate a government practice "when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations." *Lynch*, 465 U.S. at 680. This is not such a case. An objective inquiry shows that the Board intended to solemnize public business; that prayer is traditionally used to solemnize public business; and that reasonable observers understand that legislatures use prayer to lend gravity to—or solemnize—public business. As a result, this Court should conclude that the Board's practice supports the secular purpose of solemnizing public business without endorsing or disapproving of religion.

C. Legislator-Led Prayer Does Not Place Coercive Pressures on Religious Minorities Unless There is Evidence the Board Made Religion a Factor in its Decisions.

The second issue stemming from the certified question is coercion, which is not permitted under any Establishment Clause test. The Board's practice is not obnoxious to this principle. *Town of Greece* explains that a coercion analysis is a fact-sensitive inquiry which considers the setting where the prayer was given and audience it was given to. *Town of Greece*, 134 S.Ct. at 1825. In *Town of Greece*, it was argued the town meeting's intimate setting, coupled with the fact that citizens were there seeking a favorable judgment from the board, compelled participation in the board's opening prayers. *Id*. at 1824-25. In a similar vein, the plaintiff argued the prayers were offensive and "made them feel excluded and disrespected." *Id*. at 1826. This Court rejected those arguments because there was no evidence the board members "allocated benefits and burdens based on participation in the prayer" and because offense "does not equate to coercion." *Id*. at 1825-26.

This case parallels *Town of Greece* in many respects and this Court should conclude, as it did then, that an intimate setting and taking offense to contrary religious views are not evidence of coercion. Much like in *Town of Greece*, the Board meetings are intimate, and people often attend to obtain a favorable ruling from the Board. J.A. at 8. Likewise, the respondent attended the meeting to address a permit issue and she states that the Board's prayer made her "feel like an outsider," and that she was intimidated by the Christian nature of the prayers. J.A. at 1. However, as in *Town of Greece*, nothing in the record indicates the Board dealt with her permit issue any differently because she opposed the prayers. Moreover, feeling like an outsider and taking offense does not constitute coercion. As this Court noted, "an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum." *Town of Greece*, 134 S.Ct. at 1826. In sum, the intimate Board meetings, which people attend seeking favorable action, and the respondent's subjective feelings stemming from contrary religious views do not equate to coercion. *Id*.

D. The Board Members Did Not Direct Attendees to Participate in the Prayers nor Require Their Attendance During the Prayers, Further Evidencing that Coercion is not Present Here.

The main fact distinguishing this case from *Town of Greece* is that the Board members led the prayers, not a minister. *See* J.A. at 8; *Town of Greece*, 134 S.Ct. at 1818. This does not make the Board's practice coercive. In *Town of Greece*, the guest ministers, not the town leaders, directed the audience to stand, and the board members participated by standing, bowing their heads, or signing the cross. *Town of Greece*, 134 S.Ct. at 1826. However, the Court emphasized that the board members "at no point solicited similar gestures by the public" or directed the audience participate in the prayers. *Id*. Moreover, the Court presumed the guest ministers were accustomed to directing their congregations to stand and "might have done so

thinking the action was inclusive, not coercive." *Id*. In the end, the Court held the town's practice was not coercive, but indicated that, had the town members directed participation in the prayers or treated nonparticipants adversely, the analysis would be different. *Id*.

Although the Board members in this case led the prayers, they did not direct anyone to participate in them and there are no facts showing anyone was treated adversely during the meetings. It is important to note the context in which the prayers arose; before each monthly meeting, a Board member would ask those present to stand, recite the Pledge of Allegiance, and *listen* to a short prayer. J.A. at 8, 18. Nowhere in the record does it indicate the Board affirmatively directed anyone to stand, pledge, or pray; the Board only asked them to listen as they spoke. Furthermore, standing for the Pledge of Allegiance is customary, and nothing suggests that citizens were expected to remain standing for the prayers, all the board asked in that regard is that they listen.

In a similar vein, the record does not show citizens appearing before the Board were required to attend the opening prayers—which notably occurred before the Board began hearing grievances. J.A. at 8. This Court has previously declined to infer coercion where there is no indication "that members of the public are dissuaded from leaving the meeting room during the prayer, arriving late, or even, as happened here, making a later protest." *Town of Greece*, 134 S.Ct. at 1827. This is just such a case. Moreover, in *Lee*, this Court distinguished the coercive atmosphere at a high school graduation ceremony—where the state essentially compels students to attend and participate—from "[t]he atmosphere at the opening of a session of a state legislature where adults are free to enter and leave with little comment and for any number of reasons." *Lee v. Weisman*, 505 U.S. 577, 592 (1992).

In this case, anyone at the Board meeting could have walked out during the prayer or arrived after the pledge and prayers ended. Even those who needed to contest a permit denial could have walked out when the prayers began; and, in the context of a legislative meeting, if "nonbelievers choose to exit the room during a prayer they find distasteful, their absence will not stand out as disrespectful or even noteworthy." *Town of Greece*, 134 S.Ct. at 1827. On the contrary, those who decide to stay in the room are not being coerced into religious observance because "quiet acquiescence will not, in light of our traditions, be interpreted as an agreement with the words or ideas expressed." *Id*. at 1827.

E. One Off-Hand Remark from a Board Member Does Not Make the Board's Practice Coercive.

Finally, an off-hand remark by one of the Board members does not make the Board's practice coercive. In *Town of Greece*, the respondent made a similar point, arguing that the town's practice was impermissible because guest ministers characterized objectors as minorities who are ignorant of history. *Town of Greece*, 134 S.Ct. at 1824. The *Town of Greece* Court acknowledged that such remarks stray from Marsh's rationale but stated "they do not despoil a practice that on the whole reflects and embraces our tradition." *Id*. Here, the Board did not compel participation, denigrate nonbelievers, or punish nonparticipants—a stray remark does not pollute a practice that is otherwise entirely permissible. Furthermore, as Justice Thomas noted in a separate *Town of Greece* opinion, it is not subtle pressures that implicate Establishment Clause, but rather actual legal coercion:

> [T]o the extent coercion is relevant to the Establishment Clause analysis, it is actual legal coercion that counts—not the "subtle coercive pressures" allegedly felt by respondents in this case. The majority properly concludes that "[o]ffense ... does not equate to coercion," since "[a]dults often encounter speech they find disagreeable[,] and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum." I would simply add, in light of the foregoing

> history of the Establishment Clause, that "[p]eer pressure, unpleasant as it may be, is not coercion" either.

Id. at 1838 (alterations in original and internal citations omitted). The Board's practice is not coercive under either standard laid out in *Town of Greece*—the fact-sensitive coercion analysis or Justice Thomas's legal coercion standard—because the only evidence of pressure is subjective offense the respondent incurred and an off-hand remark by one of the Board members. These facts were present in *Town of Greece* and this Court should, as it did then, reject the argument that they rise to the level of coercion.

CONCLUSION

Plainly stated, the Board's practice does not violate the Establishment Clause. Legislative prayer is a historical tradition and has long been understood as a legitimate way to solemnize public business. The fact that the Board members themselves performed the prayers does not change that. Furthermore, there is no evidence the Board's legislator-led prayer coerced religious minorities. The respondent does not claim she felt compelled to participate in the prayers, only that the Christian nature of them offended her and made her feel isolated. These subjective feelings do not equate to coercion and having a minister pray instead of a legislator would not have prevented her being offended. As this Court has stated:

> We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation. We know too that sometimes to endure social isolation or even anger may be the price of conscience or nonconformity.

Lee v. Weisman, 505 U.S. 577, 597-98 (1992). This is just such a case.