Docket No. 17-1891

In the

Supreme Court of the United States

October Term, 2018

HENDERSONVILLE PARKS and RECREATION BOARD,

Petitioner,

v.

BARBARA PINTOK,

Respondent.

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

BRIEF FOR RESPONDENT

Team 2512
Counsel of Record
Attorneys for Respondent

September 30, 2018

QUESTIONS PRESENTED

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

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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

Barbara Pintok (herein "Ms. Pintok" or "Respondent") is a resident of Hendersonville as well as a devout follower of the pagan religion, Wicca. J.A. at 1. Ms. Pintok has attended numerous meetings of the Hendorsonville Board of Parks and Recreation over the years (herein "Board" or "Petitioner"), and even presented an appeal of a permit denial for her to operate a paddleboat company on a lake under the control of the Board. J.A. at 18. The Board is a five-member body of local government which hears a variety of issues as the Board controls the city's cultural arts, greenways, golf courses, historic sites, permit rentals and reservations, as well as outdoor recreation. J.A. at 18.

Before every monthly meeting, one member of the five-member Board requires everyone in the room to stand, recite the Pledge of the Allegiance, and listen to a short prayer which is then recited by one of the Board members. J.A. at 18. All five members of the Board are Christian and the prayers openly promulgate Christian beliefs. J.A. at 18. The prayer each month is conducted by one member of the Board. J.A. at 8. Despite Board Chairman's Wyatt J. Koch's assertion that "the Board represents all citizens from the religiously devout to the fiercely atheistic," the prayers overtly reference the monotheistic Christian deity and are interspersed with references to Biblical verses and the Holy Trinity. J.A. at 2; J.A. at 18. Indeed, Board members, such as Alvania Lee, admit that the prayers have "referenced [their] specific religious faith." J.A. at. 3. The Board's prayers have quoted from the book of Isaiah and often refer to "Almighty God," "His Healing Hand," "Heavenly Father," and "the Father and his son Jesus Christ." J.A. at 18-19. The Board members preach about how "though the sins [of the community] are like scarlet, they shall be as white as snow. We all fall short of the glory of

God." J.A. at 9. All of the prayers cited in the Thirteenth Circuit's decision have invoked the Christian God. J.A. at 9.

Ms. Pintok was deeply upset and offended by the Christian prayers and testified that "hearing those Christian prayers made [her] feel like an outsider, humiliated [her], and caused [her] significant distress." J.A. at 1. Ms. Pintok was unable to leave the meeting due to her pending permit appeal and was thus a "captive audience" before the Board. J.A. at 17. Ms. Pintok felt intimidated by the overtly sectarian prayers and was so distraught that she was unable to properly enunciate her words during her permit appeal. J.A. at 1. After the meeting, Ms. Pintok complained to Mr. James Lawley, one of the Board members, about her disagreement with the Board's prayer practice. J.A. at 1. Mr. Lawley replied to Ms. Pintok's complaint by stating that "this is a Christian country, get over it." J.A. at 1.

Ms. Pintok filed suit in the U.S. District Court for the District of Caldon, seeking declaratory and injunctive relief, as well as a preliminary injunction against the Board's use of sectarian prayers at its meeting. J.A. at 10. After minimal discovery, both sides filed cross-motions for summary judgment and the District Court granted summary judgment in favor of the Board. J.A. at 15. Ms. Pintok appealed the District Court's ruling and the U.S. Court of Appeals for the Thirteenth Circuit reversed the grant of summary judgment for the Board and remanded the case to the District Court with instructions to enter summary judgment for Ms. Pintok. J.A. at 24. The Board petitioned for writ of certiorari. J.A. at 26.

SUMMARY OF THE ARGUMENT

The Establishment Clause of the First Amendment prohibits the government from making any laws which advance one religion through governmental endorsement or establishment. U.S. Const. amend. I. The Establishment Clause prohibits the government from

"prescribing prayers to be recited in public institutions in order to promote a preferred system of belief or code of moral behavior." *Engle v. Vitale*, 370 U.S. 421, 430 (1962).

In *Marsh v. Chambers*, the Supreme Court upheld the practice of sectarian prayer delivered before a legislature, finding that the Nation's history and tradition show that prayer in this context "coexist with the principles of disestablishment and religious freedom." 463 U.S. 783, 786 (1983). In 2014, the Court again sustained the practice of legislative prayer in *Town of Greece v. Galloway*, while clarifying that "*Marsh* must not be understood as permitting a 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). Rather, legislative prayer practices must comport with the basic principles of the Establishment Clause, by not "coerc[ing] anyone to support or participate in religion or its exercise, or otherwise act in a way which establishes a [state] religion or religious faith, or tends to do so." *Lee v. Weisman*, 505 U.S. 577, 587 (1992). Accordingly, legislative prayer practices must not be "exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Marsh*, 463 U.S. at 794-795.

While the Court upheld the constitutionality of prayers said before a legislative body, the Court did not rule on the issue of prayers led by legislators themselves. Thus, the question of the constitutionality of the Hendersonville Board's practice of the Board members leading prayers before its monthly meetings is not settled by looking merely to the history of legislative prayer, as outlined in *Marsh* and *Greece*. Furthermore, a fact-sensitive analysis of both the content of the prayers and the prayer process as a whole reveals that the Board's prayer practice did not comport with the practice of legislative prayer authorized by *Marsh* and *Greece*, because the Board's prayer practice proselytizes Christianity while disparaging other religions. *Marsh*, 463 U.S. 794-5. The content of the prayers advances Christianity through explicitly invoking

Christian tenets and deities, excludes reference to other religions, and denigrates non-believers through its messages of superiority and threats of damnation. *Greece*, 134 S. Ct. at 1823; J.A. at 9. Additionally, the Board's prayer process as a whole fails to comport with the traditional values of legislative prayer upheld in *Greece* because the Board is comprised solely of Christian members, who say the prayers themselves, and exclude non-Christians from the opportunity to participate in the invocation process. J.A. at 2, 6, 8.

Because the Board's prayer practice does not comport with *Marsh* and *Greece*, this Court should analyze the practice instead under the *Lemon* test. The tripartite test helps define the often imprecise Establishment Clause jurisprudence involving legislator-led prayer by providing distinct factors to determine constitutionality. *Doe v. Indian River Sch. Dist.,* 653 F.3d 256, 271 (3rd Cir. 2011). The Court has analyzed whether the challenged governmental conduct has (1) a secular, legislative purpose; (2) a primary effect which neither advances nor inhibits religion; and (3) whether it creates excessive government entanglement with religion. Despite having a purportedly secular purpose, the Hendersonville Board endorsed Christian religion and placed coercive pressure on religious minorities by restricting the prayer-givers to Board members, the use of ecumenical prayer language, and the intimate setting of the Board meetings. J.A. at 21-22. This Board's prayer practice endorsed Christianity in violation of the Establishment Clause.

ARGUMENT

I. THE BOARD'S PRAYER PRACTICE DOES NOT COMPORT WITH THE HISTORY AND TRADITION OF LEGISLATIVE PRAYER AUTHORIZED BY *MARSH* AND *GREECE* BECAUSE THE BOARD MEMBERS PERSONALLY DELIVERED THE PRAYERS, THE CONTENT OF THE PRAYERS ADVANCED CHRISTIANITY, AND THE PROCESS EXCLUDED NON-CHRISTIANS FROM PARTICIPATION IN THE PRAYER OPPORTUNITY

This Court has twice ruled on the constitutionality of prayer said before a legislative body. *See Marsh v. Chambers*, 463 U.S. 783 (1983); *Town of Greece* v. *Galloway*, 134 S. Ct. 1811 (2014). This Court's decisions in *Marsh* and *Greece* stand for the principle that legislative prayer is compatible with the Establishment Clause because of its deeply embedded roots in the history and tradition of the United States. *Marsh*, 463 U.S. at 786. The *Marsh* Court reasoned that the tradition of opening legislative sessions with prayer has "coexisted with the principles of disestablishment and religious freedom since the colonial period." *Id*. Through a historical and traditional analysis, *Marsh* "sustained legislative prayer without subjecting it to the formal tests that traditionally structured this inquiry." *Greece*, 134 S. Ct. at 1818. The Court reasoned that legislative prayer is compatible with the Establishment Clause because "invok[ing] divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh*, 463 U.S. at 791-2.

Although *Marsh* effectively "carved out an exception" to its Establishment Clause jurisprudence on legislative prayer, the Court cautioned that "*Marsh* must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation." *Greece*, 134 S. Ct. at 1819. Rather, the Establishment Clause must be interpreted "by reference to historical practices and understandings." *County of Allegheny v. ACLU*, 492 U.S. 573, 670 (1989). Therefore, despite their historical roots, legislative prayer practices must still fall within the permissible bounds of the Establishment Clause, which "guarantees at a minimum that a government may not coerce anyone to support or participate in religion or its

exercise, or otherwise act in a way which establishes a [state] religion or religious faith, or tends to do so." *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

Today, the tradition of legislative prayer is maintained as part of our expressive idiom, through which we "reflect upon shared ideals and common ends" and "seek peace for the Nation, wisdom for its lawmakers, and justice for its people." *Greece*, 134 S. Ct. at 1823, 1825. Even sectarian prayers before a legislative body are constitutional, as long as they serve the legitimate function of "lend[ing] gravity to the occasion and reflect[ing] values long part of the Nation's heritage." *Id*. at 1823. Thus, permissible legislative prayers are those that are "solemn and respectful in tone, [and] invite lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing." *Id*. However, the legislative prayer practice must not be "exploited to proselytize or advance any one, or to disparage any other, faith or belief," as doing so would violate the minimum protections of the Establishment Clause central to our country's tradition. *Marsh*, 463 U.S. at 794-5. "If the course and practice over time show that the invocations denigrate non-believers or religious minorities, threaten damnation, or preach conversion, many present may consider the prayer to fall short of the desire to elevate the purpose of the occasion and to unite lawmakers in their common effort." *Greece*, 134 S. Ct. at 1823.

To determine whether a legislative prayer practice is constitutional, courts must inquire into the "prayer opportunity as a whole" and conduct a fact-sensitive review of the setting, audience, and pattern of prayers over time. *Lund v. Rowan County*, 863 F.3d 268, 280-281 (4th Cir. 2017) (quoting *Greece*, 134 S. Ct. at 1824-1825). A fact-sensitive review of the Hendersonville Board's prayer practice reveals that its practice departs from the history and tradition of legislative prayer practice upheld by this Court in *Marsh* and *Greece* because (i) the

Board members themselves delivered the prayers; ii) the content of the prayer practice proselytized Christianity and disparaged other religions, and (iii) the prayer process excluded non-Christians from participation in the prayer opportunity.

A. The Board Members' Personal Delivery of the Prayers Is Not a Historically or Traditionally Authorized Practice

Where legislative prayer has been historically upheld, the prayers have been said by outside chaplains, ministers, or volunteers.[1] *Lund*, 863 F.3d at 277. In *Marsh*, this Court examined the history of legislative prayer in upholding the constitutionality of the Nebraska Legislature's practice of opening each of its sessions with a prayer led by a Presbyterian minister. *Marsh*, 463 U.S. at 784. The Court reasoned that by the Framers deciding on the wording of the Bill of Rights just three days after the First Congress voted to authorize the appointment of paid chaplains before legislative sessions, the Framers must have not have intended for the Establishment Clause to prohibit legislative prayer. *Id*. at 787. In *Greece*, this Court upheld the Town of Greece's practice of inviting an outside clergyman to open its monthly board meetings with a prayer, because the practice fell within the "tradition reflected in *Marsh*, [which] permits chaplains to ask their own God for blessings of peace, justice, and freedom that find appreciation among people of all faiths." 134 S. Ct. at 1823. However, in ruling that sectarian legislative prayer was constitutional, the *Greece* Court took for granted the use of outside clergy. *Lund*, 863 F.3d at 278 ("The Court not once described a situation in which the legislators themselves gave the invocation, [but] instead recounts how the First Congress made it an early item of business to appoint and pay *chaplains*, [and] both the House and Senate have maintained the office virtually uninterrupted since that time") (internal citations omitted).

[1] *See, e.g.*, *Greece*, 134 S. Ct. at 1822 ("The law and the Court could not draw this line for each specific prayer or seek to require *ministers* to set aside their. . . .personal beliefs") (emphasis added); *Id*., at 1823 ("The tradition reflected in *Marsh* permits *chaplains* to ask their own God for blessings") (emphasis added).

While *Marsh* and *Greece* sustained the constitutionality of legislative-prayer—that is, prayers said before a legislative body—the Court did not rule on the constitutionality of prayers led by the legislators themselves. *See Lund*, 863 F.3d at 277. Contrary to the historical practice of chaplain-led legislative prayer upheld in *Marsh* and *Greece*, the Hendersonville Board members delivered the prayers themselves. J.A. at 8. Thus, the Board's prayer practice is factually distinct from the legislative prayer practices historically authorized by *Marsh* and *Greece*. *See Lund*, 863 F.3d at 277. However, the circuit courts are split on whether prayers said by legislators as opposed to chaplains is of constitutional significance in deciding whether the prayer practice fits within the tradition authorized by this Court in *Marsh* and *Greece*. *Bormuth v. County of Jackson*, 870 F.3d 494, 509 n.5 (6th Cir. 2017) (en banc).

In 2017, the Fourth Circuit en banc held in *Lund v. Rowan County* that the Rowan County Board of Commissioners' practice of delivering Christian prayers before town meetings was unconstitutional and fell outside of the historical exception authorized by *Marsh* and *Greece*. 863 F.3d at 272 (finding "the prayer practice identif[ied] the government with Christianity and risked conveying to citizens of minority faiths a message of exclusion, [and] because the commissioners were the exclusive prayer-givers, [the] practice falls well outside the more inclusive, minister-oriented practice of legislative prayer described in *Town of Greece*"). Four months after the Fourth Circuit's decision in *Lund*, the Sixth Circuit en banc held in *Bormuth v. County of Jackson* that prayers offered by the entirely Christian Jackson County Board of Commissioners were constitutional, finding no significant difference between legislative prayers said by chaplains and those said by the legislators themselves. 870 F.3d at 512. The Sixth Circuit reasoned that "in *Marsh*. . . .the Supreme Court separately listed 'paid legislative chaplains *and* opening prayers' as consistent with the Framers understanding of the Establishment Clause," and

"*Greece* made it clear that we are to focus upon 'the prayer opportunity as a whole' in light of 'historical practices and understandings.'" *Id.* at 504 (quoting *Marsh*, 463 U.S. at 788; *Greece*, 134 S. Ct. at 1819, 1824).

However, Respondent contends that the Sixth Circuit's holding relies on a misinterpretation of *Marsh* and *Greece*: the fact that the Court did not specifically *forbid* legislator-led prayer does not indicate that the Court intended to *permit* legislator-led prayer. *See Lund*, 863 F.3d at 279-80. Even if the *Marsh* Court contemplated legislator-led prayer as falling within permissible historical bounds, the Court did not intend to imply that history endorsed *all* legislative prayer. *See Marsh*, 463 U.S. at 790 ("Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees"). Although the *Greece* Court did not hold legislator-led prayer *per se* unconstitutional, the Court instructed that a prayer-giver's identity is relevant to the constitutional inquiry. *See Lund*, 863 F.3d at 274. Indeed, the *Greece* Court specifically distinguished between prayers led by chaplains and prayers led by legislators.[2] Accordingly, Respondent asserts that the Fourth Circuit properly applied *Marsh* and *Greece* in its analysis of the legislators' identity as the sole prayer-givers.

The Hendersonville Board members' practice of leading the prayers themselves was a significant factor in determining the constitutionality of the prayer practice as a whole. By delivering the prayers themselves, the Board members "identifie[d] the government with religion." *Lund*, 863 F.3d at 274. Although the Board's mere welcoming of religion into the legislative sessions was not in itself unconstitutional, the Board members' personal delivery of

[2] "The analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity. . . .Although board members themselves stood, bowed their heads, or made the sign of the cross during the prayer, they at no point solicited similar gestures by the public." *Greece*, 134 S. Ct. at 1826.

the prayers exacerbated the unconstitutional effects delivering Christian prayers and excluding non-Christians from the potential to participate in the prayer opportunity. *See Id*. at 278.

B. The Content of the Board's Prayers Proselytized Christianity and Disparaged Other Religions, Regardless of the Boards' Intent

The Board's prayer practice falls outside of the permissible bounds of legislative prayer authorized by this Court in *Marsh* and *Greece*, because the Board's prayer content proselytized Christianity and disparaged non-believers or minority religions. *Marsh*, 463 U.S. at 794-5. Respondent acknowledges that the *Marsh* Court did not intend to categorically forbid sectarian references in legislative prayer or "imply the rule that prayer violates the Establishment Clause any time it is given in the name of a figure deified by only one faith or creed." *Rubin v. City of Lancaster*, 710 F.3d 1087, 1094 (9th Cir. 2013); *See also Greece*, 134 S. Ct. at 1821. Thus, when a legislative prayer practice falls within the history and tradition authorized by Marsh and Greece, "the content of the prayer is not of concerns to judges." *Greece*, 134 S. Ct. at 1821.

However, the Court did "not imply that no constraints remain on [legislative prayers'] content." *Id*. at 1823. Prayers' content must "serve the legitimate function" of solemnly and respectfully "inviting lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing." *Id*. Prayers may not be given to further the "impermissible motive," of "proselytiz[ing] or advanc[ing] any one religion, or disparag[ing] any other faith or belief. *Marsh*, 463 U.S. at 794-5. The Court should find a prayer practice contrary to the traditional values sanctioning legislative prayer "if the course and practice over time shows that the invocations denigrate non-believers or religious minorities, threaten damnation, or preach conversion." *Greece*, 134 S. Ct. at 1823.

1. The Content of the Board's Prayers Proselytized Christianity and Disparaged Other Religions

The Hendersonville Board's prayers were overwhelmingly Christian in content. In each of the five prayers detailed in the record, the Board repeatedly invoked a single religion's belief. *See* J.A. at 9. Two prayers made overt references to Christianity, speaking of the "Heavenly Father," the "Father and His son Jesus Christ," and "Almighty God."[3] By additionally using the word "we" throughout its prayers, the Board "characterized the political community as a Christian one," and "crossed the line from 'reflecting upon shared ideals and common ends' to 'promoting a preferred system of belief.*"* J.A. at 9; *Lund*, 863 F.3d at 284 (quoting *Greece*, 134 S. Ct. at 1822).

While the Board's explicit reference to Christianity affiliated the legislature with that faith, Respondent concedes that this reference alone does not render the Board's practice unconstitutional. *See Greece*, 134 S. Ct. at 1824. Rather, the Board's Christian references were unconstitutional because they were exclusive of other religions. *See id*. at 1819. When the *Marsh* Court upheld the legislative prayers said by a Presbyterian minister, the Court noted that the prayers were "nonsectarian" and not explicitly Christian, because they were within the "Judeo-Christian" faith. *Marsh*, 463 U.S. at 793 n. 14. The Hendersonville Board falsely claims that its prayers were all Judeo-Christian. *See* J.A. at 8. The only potentially Judeo-Christian reference made was when the Board's prayer mentioned the Old Testament Book of Isaiah. *Id*. at 9. However, the prayer immediately qualified this reference with the mention of the Christian deity, the "Father and His son Jesus Christ." *Id*. The term "Judeo-Christian" is defined as "having roots in both Judaism and Christianity." *Judeo-Christian*, MERRIAM-WEBSTER.COM, www.merriam-

[3] J.A. at 9; *See, e.g.*, *Allegheny*, 492 U.S. at 598 (where engraving read "Glory to God in the Highest," this Court found "this praise to God in Christian terms is indisputably religious --indeed sectarian--just as it is when said in the Gospel or in a church service"); *Bormuth*, 870 F.3d at 498 (finding prayers which referenced "God," "Lord," or "Heavenly Father," were "generally Christian in tone).

webster.com/dictionary/Judeo-Christian (last visited Sept. 27, 2018). By referencing Jesus Christ, the Board's prayer invoked a deity in which *only* Christians believe—not one common to both faiths. *Wynne v. Town of Great Falls*, 376 F.3d 292, 300 (4th Cir. 2004).

Therefore, the Board's prayers are dissimilar to those in *Marsh*, because the Board's prayers "demonstrate an official preference for Christianity, and a corresponding official discrimination against all non-Christians." *Allegheny*, 492 U.S. at 604 n.53. The Board's prayers "embody the precise kind of 'advancement' of one particular religion that *Marsh* cautioned against." *Wynne*, 376 F.3d at 301 (holding legislator-led prayers referring to Jesus Christ unconstitutional); *See Rubin v. City of Burbank*, 124 Cal. Rptr. 2d 867, 873 (2002) (finding although only twenty percent of invocations mentioned Jesus Christ, any amount of proselytization is unconstitutional; to hold otherwise would "promote a test [requiring] a certain incidence of unconstitutional prayer is proven").

The Boards' prayers further exceed the permissible bounds of legislative prayer authorized by *Marsh* and *Greece* because the prayers "denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion" *Greece*, 134 S. Ct. at 1823. For example, by saying "we are all sinful," and "we all fall short of the glory of God," the Board confessed the spiritual shortcomings on behalf of the community and effectively threatened damnation of nonbelievers.[4] By asking "may God place His Healing Hand" and declaring "we need your spirit watching over us," the Board's prayers suggested that Christianity was the one way to salvation and implied that other religions were condemned, thereby denigrating non-Christians.[5] Further,

[4] *See, e.g.*, *Lund*, 863 F.3d at 284 (holding prayers "promoted a preferred system of belief" when they said: "Lord, we confess that we have not loved you," "neglected to follow the guidance of your Holy Spirit," "allowed sin to enter into our lives").

[5] *See, e.g.*, *id.* at 285 (holding prayers which "characterized Christianity as 'the one and only way to salvation,'" were proselytizing and denigrating, such as by saying "You saved us. . . .We are the richest people in the world. . . . [W]e're going to live forever with Him").

by the Board dictating "we must strive to conduct our business in a way consistent with the careful hand of the Father and His son Jesus Christ," the Board's prayers effectively preached conversion, proselytized Christianity, and disparaged other faiths.[6] J.A. at 9.

Where legislative prayers referencing Christianity have been upheld under *Marsh*, the prayers either referred to other religions in addition to Christianity, or the prayer process as a whole was inclusive of other religions. For example, in *Simpson v. Chesterfield Cty. Bd. of Supervisors*, the Fourth Circuit upheld legislator-led prayers which "described divinity in wide and embracive terms," such as "Lord God, our creator," "the God of Abraham, of Moses, Jesus, and Mohammad." 404 F.3d 276, 283 (4th Cir. 2005). The court explained that this "openness" was consistent with the nation's "character both as a nation of faith and a county of free religious exercise and "broad religious tolerance." *Id*. Additionally, in *Greece*, the Court acknowledged that although some prayers invoking the name of Jesus, the Heavenly Father, or the Holy Spirit strayed from the rationale set out in *Marsh* and were disparaging to outside religions, the contents of those prayers did "not despoil a practice that on the whole reflects and embraces our tradition" because the prayer process was inclusive of other religions. *Greece*, 134 S. Ct. at 1824.

In *Bormuth v. Cty. of Jackson*, the Sixth Circuit held that "although the prayers offered before the Board generally espouse the Christian faith, this does not make the practice incompatible with the Establishment Clause" because the "content of the prayers at issue here falls within the religious idiom accepted by our Founders." 870 F.3d at 512. Similarly, this Court in *Lynch v. Donnelly* explained that there are "countless other illustrations of the Government's acknowledgment of our religious heritage," such as the statutorily prescribed

[6] *See, e.g.*, *id.* (prayer preached conversation when it said "open our hearts to Christ's teachings, and enable us to spread His message. . . .through the applying of the sacred words in our everyday lives")

motto "In God We Trust," and the Pledge of Allegiance language, "One Nation under God." 465 U.S. 668, 676 (1984). However, the religious content of the Board's prayers is distinguished from today's idiomatic use of religious words in a secular context, because the latter are permissible today only because they have lost their religious value. *See Marsh*, 463 U.S. at 818 (Brennan, J., dissenting). Contrarily, when religious words are said in the context of prayer, they carry a religious meaning. *See id*. Thus, under an analysis consistent with *Greece*—considering the setting and pattern over time of the prayers—the Christian references within the Board's prayers are not merely traditional idioms. *See Greece*, 134 S. Ct. at 1826-27.

2. The Board's Ex Post Facto Claims of The Prayers' Intent to Solemnize is Irrelevant to This Court's Analysis

In their depositions, the Board members expressed that they intended for the prayer practice "to solemnize business," not to "convert" or "coerce anyone to adopt [their] religious beliefs." J.A. at 2-6. However, the Board's intent is irrelevant to this Court's analysis because it was not made clear to the audience prior to or during the Board meetings. In *Jones v. Hamilton Cty. Gov't*, the Sixth Circuit upheld Hamilton County's legislative prayer policy under *Marsh*, in part because although the prayers contained explicitly Christian language, the Commission released a disclaimer in its published schedule of events prior to its meetings and its "policy expressly state[d] that it is 'intended to acknowledge and express the Commission's respect for the diversity of religious denominations and faiths represented and practiced among the citizens.'" 530 Fed. Appx. 478, 488 (6th Cir. 2013). Similarly, in *Lynch v. Donnelly*, this Court held unconstitutional a city's annual Christmas display when the "City has done nothing to disclaim government approval of the religious significance of the crèche, to suggest that the crèche represents only one religious symbol among many others. . . . or to disassociate itself from the religious content of the crèche." 465 U.S. at 706. Further, this Court explained that an

"otherwise secular setting alone does not suffice to justify" an otherwise unconstitutionally religious government practice. *Id*. at 707. The Hendersonville Board's practice did not expressly make its intent known to the meeting attendees. Rather, the Board made merely *ex post facto* claims of its intent to solemnize, which are both unsupported and contradicted by the evidence of their actions.

Moreover, subjective intent does not justify an unconstitutional policy or practice. By making intent relevant, the "Court makes the subjective motivation of legislators the decisive criterion for judging the constitutionality of a state legislative practice." *Marsh*, 463 U.S. at 823 n.1 (Stevens, J., dissenting). Instead of giving weight to the subjective intent of the Board, "in cases involving state participation in a religious activity, one of the relevant questions is 'whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer.'" *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 307 (2000). Ultimately, despite the subjective intent of the legislature, "what is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, *whether intentionally or unintentionally*, that make religion relevant, in reality or public perception, to status in the political community." *Lynch*, 465 U.S. at 692 (emphasis added). Accordingly, it is reasonable for an attendee listening to the Board's prayers—both in their individual content and in relation to the pattern of prayers as a whole—to "discern the [Board]'s intent" as proselytizing and denigrating non-Christian religions. *See Greece*, 134 S. Ct. at 1824; *See also Lynch*, 465 U.S. at 690.

C. The Board's Prayer Process Excluded Non-Christians from Participating in the Prayer Opportunity

A legislative prayer practice does not violate the Establishment Clause merely because it allows Christian prayer-givers to lead Christian prayers. *See Marsh*, 463 U.S. at 794-795; *Greece*, 134 S. Ct. at 1819. Even in today's diversifying society, legislative prayer practices may be permissible without proscribing the sectarian content of the prayer. *Greece*, 134 S. Ct. at 1820-21. Nonetheless, a primarily Christian legislative prayer practice may not be upheld simply because prayer-givers were often historically Christian. *Id.* at 1821. Rather, sectarian prayer practices are constitutional where they honor the history and tradition of diversity in our country. *See Allegheny*, 492 U.S. at 589 ("This Nation is heir to a history and tradition of religious diversity that dates from the settlement of the North American Continent. Sectarian differences among various Christian denominations were central to the origins of our Republic.") The *Greece* Court instructed that constitutional legislative prayer practices "acknowledge our growing diversity. . . .by welcoming ministers of many creeds." 134 S. Ct. at 1820-21. Accordingly, today's Congress, for example, is constitutionally permitted to maintain a legislative prayer practice because it hosts chaplains who are not only Christian, but also Buddhist, Jewish, Hindu, and Muslim. *Id.*

The Hendersonville Board's prayer practice does not comport with the history and tradition of *Marsh* and *Greece* because it was not inclusive of other religions. In *Greece*, although the town's prayer practice was primarily Christian, "the town at no point excluded or denied an opportunity to a would-be prayer giver. Its leaders maintained that a minister or layperson of any persuasion, including an atheist could give the invocation." 134 S. Ct. at 1816. The Hendersonville Board not only presented prayers which were primarily Christian in content, but for at least thirteen years, the five Christian Board members have rotated the leading of the prayers exclusively amongst themselves. J.A. at 6, 8.

Although the Board has no written policy excluding non-Christians, over the course of thirteen years, the Board effectively solidified its practice of reserving the prayer opportunity for only the Board members themselves. *See* J.A. at 2, 6. Even without a formal policy on the matter, the unconstitutional effects of the Board's practice remain the same: the attendees, who "hear prayers, not the policy," could reasonably conclude that the Board's practice identified the government with Christianity and favored Christianity over other religions. *Joyner v. Forsyth Cty., N.C.*, 653 F.3d 341, 354 (4th Cir. 2011) (holding "while the Board's policy itself states that it is 'not intended. . . .to affiliate the Board with, nor express the Board's preference for any faith or denomination,'" the Board's practice was unconstitutional because "we cannot turn a blind eye to the practical effects of the invocations here"); *See also Lund*, 863 F.3d at 278 (finding the risk of legislator-led prayer identifying the government with religion is "especially true where legislators are the only *eligible* prayer givers").

Moreover, even without affirmatively *excluding* non-Christian religions, the Board took no steps to *include* other religions. This Court has instructed that the Constitution not only "require[s] complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch*, 465 U.S. at 673. Religious accommodation in this circumstance requires the Board make "reasonable efforts" to welcome any religion to partake in the invocation opportunity. *See Greece*, 134 S. Ct. at 1824. In *Greece*, although a predominantly Christian set of ministers led the town's prayers, "the town made reasonable efforts to identify all of the congregations located within its borders and represented that it would welcome a prayer by any minister or layman who wished to give one." *Id.* Similarly, in *Rubin v. City of Lancaster*, the Ninth Circuit held that although the invocations were all Christian and delivered by only Christian volunteers, the City's prayer policy did not

affiliate the City itself with Christianity, because the City took active steps to extend the prayer opportunity to all religions by sending out invitations to various religious groups listed in the *Yellow Pages*. *Lancaster*, 710 F.3d 1087, 1089 (9th Cir. 2013). The City could not control who responded to its invitations or "which religious congregations settle within its limits." *Id*. at 1099.

The Hendersonville Board's prayer practice is distinguished from those in *Greece* and *Lancaster*, because the Board took no steps to include other religions, even by simply referencing other religions or inviting the attendees to volunteer. Moreover, the effect of the Board's failure to attempt to include other religions is exacerbated by the fact that the Board members said the prayers themselves. As opposed to in *Lancaster* where the City could not control the content of the prayers or the denominations of the prayer-givers, the Hendersonville Board has exclusive control over the content of the prayers. *Id*. By choosing nonetheless to deliver exclusively Christian prayers, the Board effectively identified the government with Christianity and advanced one faith over others, in violation of the Establishment Clause and contrary to *Marsh* and *Greece*. *Lund*, 863 F.3d at 274 (finding prayers "exclusively prepared and controlled" by the government "constitut[e] a much greater and more intimate government involvement in the prayer practice than in *Greece*") (internal citations omitted).

Respondent does not suggest that the Board take extreme measures to find non-Christian invocation leaders. *See Greece*, 134 S. Ct. at 1824 ("So long as the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing"). However, there is no evidence that the Board took even minimal steps to open the prayer opportunity to other religions. Additionally, in *Greece*, "after respondents complained that Christian themes pervaded

the prayers, to the exclusions of citizens who did not share those beliefs, the town invited a Jewish layman. . . .the chairman of the local Baha'i temple, [and] a Wiccan priestess. . . .to give the invocation." *Id.* at 1817. However, when Respondent complained to the longest standing Hendersonville Board member, the Board called diminished her complaint as "frivolous," and took no steps to attempt to accommodate Respondent's concerns. J.A. at 6. Therefore, because of the exclusively Christian content and process of the Hendersonville Board's prayer practice, this Court should find that the Board's prayer practice proselytized Christianity and disparaged other religions, and thereby failed to comport with the historical and traditional legislative prayer practices authorized by *Marsh* and *Greece*. *Greece*, 134 S. Ct. at 1824.

II. THE BOARD'S PRAYER PRACTICE PLACES COERCIVE PRESSURES ON RELIGIOUS MINORITIES THROUGH THE BOARD-MEMBERS' UNILATERAL DELIVERY OF THE PRAYERS, THE INTIMATE SETTING OF THE BOARD MEETINGS, AND THE USE OF SECTARIAN INVOCATIONS

The Establishment Clause protects against the advancement of one religion at the expense of another through government participation. U.S. Const. amend. I. While the Establishment Clause attempted to create a wall separating church and state, the practical application of this provision by courts has resulted rather in a "blurred, indistinct and variable barrier depending on all of the circumstances of a particular relationship." *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). This Court has acknowledged that is had not yet "define[d] the precise boundary of the Establishment Clause." *Greece*, 134 S. Ct. at 1819.

The prayer custom practiced by the Board falls outside the history and tradition set forth in *Marsh* and *Greece* as the Supreme Court has not yet addressed a situation in which the lawmakers themselves led the prayer. *Lund*, 863 F.3d at 277 ("The conspicuous absence of case law on lawmaker-led prayer is likely no accident. . . .[T]his type of prayer both identifies the

government with religion more strongly than ordinary invocations and heightens the constitutional risks posed by requests to participate and by sectarian prayers."). While there is a long history of opening legislative sessions with a chaplain or member of the clergy, the Supreme Court has not yet determined the constitutionality of legislator-led prayer. *Lund*, 863 F.3d at 277. The analysis set forth in *Marsh* and *Greece* was "in no way [meant to] dictate the outcome of every subsequent case. *Id.* at 276. The tripartite test set forth in *Lemon v. Kurtzman* is the principal standard for determining the constitutionality of state action under the Establishment Clause. *See Santa Fe*, 530 U.S. 290 (2000); *Doe v. Indian River Sch. Dist.,* 653 F.3d 256, 271 (3rd Cir. 2011). The Lemon test helps define the often-imprecise Establishment Clause jurisprudence involving legislator-led prayer by providing distinct factors to determine constitutionality. *See Indian River Sch. Dist.*, 653 F.3d at 271.

As set forth in *Lemon v. Kurtzman*, a governmental practice must (1) have a secular, legislative purpose; (2) have a primary effect must neither advances nor inhibits religion; and (3) not create excessive government entanglement with religion. *Lemon*, 403 U.S. at 613. The *Lemon* test is sequential, and if the contested state action fails to satisfy any of the three prongs, the state action will be declared unconstitutional under the Establishment Clause. *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987).

A. A Finding of a Secular Purpose Does Not Preclude a Finding of Impermissible Endorsement of Religion

The challenged government action must have a secular legislative purpose, which is "genuine, not a sham, and not merely secondary to a religious objective." *McCreary Cty., Ky. v. ACLU of Ky.*, 545 U.S. 844, 864 (2005). This Court has historically deferred to the legislature's alleged secular purpose for the challenged action. *See e.g., Id.*; *Santa Fe*, 530 U.S. at 308 ("When a government entity professes a secular purpose for an arguably religious policy, the

government's characterization is, of course, entitled to some deference"). While Respondent acknowledges that the Thirteenth Circuit was correct in its determination that the Board's prayer practice contained a secular purpose, the fact that the purpose of the prayer was to solemnize board meetings does "not mean that it does not also impermissibly endorse religion." *Indian River Sch. Dist.,* 653 F.3d at 285; *See also Borden v. Sch. Dist. of Twp. of E. Brunswick*, 523 F.3d 153, 177-78 (3rd Cir. 2008). ("[T]he inquiry is not whether [the government] intends to endorse religion, but whether a reasonable observer, with knowledge of the history and context of the display, would conclude that [the government] is endorsing religion.").

The Board alleges its use of prayers at the beginning of monthly meetings was meant to "solemnize public business and to offer citizens a chance to reflect quietly on matters before the Board." J.A. at 2. While the Board purportedly did not intend to advance a distinctly religious purpose, their prayer practice resulted in the alienation and humiliation of attendees of the Board meetings who were religious minorities, through the ecumenical language of the distinctly Christian prayers and the coercive pressure to participate. J.A. at 1. Despite surviving the first part of the *Lemon* test, the Board's prayer practice clearly fails the second and third prong through the Board's attempts to proselytize and advance a Christian religion as well as through the excessive government entanglement. *Lemon,* 403 U.S. at 613; J.A. at 23.

B. The Board's Prayer Practice Advanced a Christian Religion and Placed Coercive Pressures on Religious Minorities

The Board's prayer practice fails the second part of the *Lemon* test because the Board unequivocally endorses Christianity and places coercive pressure on religious minorities by restricting the prayer-givers to only Board members, placing pressure on attendees to participate through the close proximity between the adjudication of permit appeals and the prayers as well as the sectarian language of the prayers.

1. The Second Prong of the *Lemon* Test is Supplemented by Justice O'Connor's Concurring Opinion in *Lynch v. Donnelly*

The second prong of the *Lemon* test, which states a government practice may not have a primary effect that neither advances or inhibits religion, has been refined by Justice Sandra Day O'Connor's concurring opinion in *Lynch v. Donnelly*, 465 U.S. 668 (1984). Justice O'Connor clarified that the effect prong of the *Lemon* test should be properly interpreted not to invalidate a government practice merely because it causes advancement or inhibition of religion, but instead be focused on whether the practice has the "effect of communicating a message of *government endorsement or disapproval of the religion*." *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring) (emphasis added). Government endorsement of a particular religion "sends a message to outsiders, [that they are] not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Id.* at 688.

Justice O'Connor stated that whether a government activity endorses a religion is "not a question of simple historical fact…[but] is a legal question to be answered on the basis of judicial interpretation of social facts." *Id.* at 694. The inquiry is not whether the government intended to convey an endorsement or disapproval of religion, but whether a "reasonable observer familiar with the history and context of the [disputed action]" would perceive the practice as a being sanctioned by the government. *Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 282-83 (3d Cir. 2011) (internal citations omitted).

2. The Court Must Examine the Totality of the Circumstances When Assessing Coercive Pressures of a Challenged Legislative Prayer Practice

The Supreme Court's jurisprudence has established that legislative prayer is a "fact-sensitive [inquiry] that considers both the setting in which the prayer arises and the audience to

whom it is directed;" the Court must look to the totality of the circumstances when examining whether the Board's prayer practice violates the Establishment Clause. *Greece*, 134 S. Ct. at 1825.

This holistic approach was first discussed in Justice Kennedy's plurality opinion in *Greece,* where the Court ruled that the town's monthly prayer practice, which was led by a member of the local clergy, was constitutional under the Establishment Clause. *Greece,* 134 S. Ct. at 1813. Justice Kennedy focused on whether a "reasonable observer" would consider the primary effect of invocations as advancing Christian ideology; the Court also examined the prayer setting as well as the primary audience of the prayers. *Id.* at 1814. While the Court ultimately ruled that the prayers were constitutional, Justice Kennedy cautioned that the Court's holding would be different if "town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that [the Board's] decisions might be influenced by a person's acquiescence in the prayer opportunity." *Id.* at 1826.

The Supreme Court has rejected the "divide and conquer" approach in which each feature of the challenged prayer is examined separately. *See United States v. Arvizu*, 534 U.S. 266, 274 (2002); *Bormuth*, 870 F.3d at 539; *see also Lund*, 863 F.3d at 268. Although a prayer practice may be regarded as constitutionally permissible when it's elements are separately examined, the practice as a whole may be unconstitutional. *Bormuth*, 870 F.3d at 539 (Moore Dissent); *Lund*, 863 F.3d at 289. In order to adhere to the Establishment Clause, the Court must carefully analyze all factors surrounding the challenged prayer practice. *Greece*, 134 S. Ct. at 1825-28 (scrutinizing various factors including who gave the prayers, the language of the prayers, and the setting of the prayers). Here, the Thirteenth Circuit correctly examined the identity of the prayer-givers, the coercive setting of the town board meeting as well as the sectarian language of

the invocations, and found that the Board's prayer practice advanced and endorsed Christianity. J.A. at 23-24.

3. The Board's Prayers Were Unilaterally Led by the Christian Board Members

The identity of the prayer giver is extremely relevant to the constitutional inquiry under the Establishment Clause. While the Supreme Court has held that legislative prayer, in which a chaplain offers prayer at the beginning of a meeting, may be constitutional under certain circumstances, the Court has not yet addressed the constitutionality of *legislator-led prayer*. *Lund*, 863 F.3d at 277; *See Marsh*, 463 U.S. at 784 (Court determined Nebraska Legislature's practice of opening sessions with a paid chaplain was constitutional); *Greece*, 134 S. Ct. at 1811 (holding the town's practice of beginning its monthly town board meetings with a hired "chaplain of the month" was constitutional).

In *Marsh* and *Greece*, the law-makers "neither edit[ed] or approve[d]" the prayers, but instead hired an outside chaplain or clergy member to deliver the invocations. *Greece*, 134 S. Ct. at 1822. Here, the Board had full autonomy over the contents of the prayers since the prayers were drafted and delivered by one of the five Christian Board members. J.A. at 18. Indeed, Board Member Alvania Lee testified that not only had she opened Board meetings with prayers she drafted, but that her prayers explicitly "referenced [her] specific religious faith, which is Methodist." J.A. at 3. When lawmakers lead the prayers, and thus control the contents of the prayers themselves, the government becomes inextricably intertwined with religion and potential for coercion of religious minorities is intensified. *Lund*, 863 F.3d at 278.

The Board's prayer practice was also constrained to the religiously homogenous Hendersonville Board of Parks and Recreation, whose members are all followers of various Christian sects. J.A. at 8. Hendersonville Board members contend that they were "not trying to

promote or endorse the Christian faith with [the] prayers," but admit that the prayer practice has been limited to Board members for at least thirteen years. J.A. at 5-6. Since all members of the Board were Christian, only Christian prayers were delivered; there were no other faiths represented at Board meetings. J.A. at 8. By restricting prayer-givers to members of the Board, the Board rejected religious pluralism and created a "'closed universe' of prayer-givers dependent solely on election outcomes." *Lund*, 863 F.3d at 282 (internal citations omitted). This exclusionary practice implied that religious minorities such as Wiccans, were expected to elect a member to the Board with similar religious views in order to be adequately represented. *Id.*

The Supreme Court has stressed that legislatures are able to accommodate diverse faiths by opening the prayer practice to others. *Greece*, 134 S. Ct. 1821 (The way to acknowledge "our growing diversity [is] not by proscribing sectarian content but by welcoming ministers of many creeds"). In *Greece*, for example, when attendees of the Board meetings complained about the Christian prayers, the Board allowed a Jewish layman and a Wiccan priestess to lead the meetings' prayers. *Id.* at 1817. Here, when the Respondent complained about the sectarian language of the prayers to the Board, she was scoffed at and told that "this is a Christian country, get over it." J.A. at 1.

In failing to represent any other religion besides Christianity at their meetings, Hendersonville Board of Parks and Recreation publicly endorsed Christianity and communicated to attendees, especially religious minorities, that "[non-Christian] views are not similarly worthy of public recognition nor entitled to public support." *Lynch*, 465 U.S. at 668 (Brennan, J., dissenting). By restricting the prayer-givers to Christian board-members, the Board undeniably communicated to Respondent and other attendees that they endorsed Christianity as the Board's "one true faith" at the expense of other religions. J.A. at 24; *Lund*, 863 F.3d at 284.

4. The Board Meeting's Intimate Setting Placed Coercive Pressure on Attendees to Participate

Greece emphasized that courts should consider the setting in which the prayer arises and assess whether the principal audience for the invocations is the lawmakers or the public. *Greece*, 134 S. Ct. at 1825-26. Justice Kennedy clarified that the Court's analysis would have been different had the town board members forced "the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that [the Board's] decisions might be influenced by a person's acquiescence in the prayer opportunity." *Greece*, 134 S. Ct. at 1826 ("Although board members themselves stood, bowed their heads, or made the sign of the cross during the prayer, they at no point solicited similar gestures by the public.").

Here, the prayers were delivered at the Hendersonville Parks and Recreation Board's public meetings in which citizens attend to appeal their permit denials and advocate for personal causes. J.A. at 1. At the beginning of each meeting one of the members of the Board asks that everyone in the room stand, recite the Pledge of Allegiance, and listen to a short prayer which is delivered by a Christian Board member. J.A. at 8. After the prayer is finished, citizens are able to present their appeals for the Board's review. J.A. at 1.

The Fourth Circuit in *Lund* recognized that the intimacy of a town board meeting could become overtly coercive as local governments possess the power to directly influence both individual and community interests. *Lund*, 863 F.3d at 287. The Hendersonville Parks and Recreation Board is the ultimate decision-maker when it comes to issues affecting the city's cultural arts, greenways, golf courses, permit rentals and reservations, and outdoor recreation. J.A. at 18. Respondent attended numerous Board meetings and even appealed a permit issue with a paddleboat company she was forming with the Board. J.A. at 1. While the Board meeting was not mandatory, Respondent had no choice but to attend as she risked her appeal being

denied if she missed the meeting J.A. at 1; *see Lund*, 863 F.3d at 287 ("The decision to attend local government meetings may not be wholly voluntary in the same way as the choice to participate in other civic or community functions.").

Furthermore, the Hendersonville Board considered appeals directly after delivering the opening prayer which compounded the coercive effect. J.A. at 8. Since the prayers preceded the adjudicatory portion of the meeting, Respondent felt pressured to participate in order to improve the chances of her appeal being granted; indeed, Respondent stood during the prayers despite feeling "distraught and nervous over [their] recitation." J.A. at. 17. Respondent was also pressured by the risk of community disapproval should she abstain from participating in the prayer practice. *See Lund*, 863 F.3d at 288.

Similarly, in *Lee v. Weissman*, this Court recognized there were heightened concerns of indirect coercion against students forced to participate in school-sponsored prayers at graduation. 505 U.S. at 592. While the Supreme Court stated that teachers and principals "retain a high[er] degree of control" over the precise contents of a graduation program when compared to a state legislature, the Court failed to examine a local government's practice which also exercised adjudicatory functions. *Id.* at 597. The Court concluded that during state legislature sessions, adults are "free to enter and leave with little comment." *Id.* Here, however, Respondent was kept as a "captive audience" before the Hendersonville Parks and Recreation Board while she awaited her turn to appeal her permit denial. J.A. at 17. The close proximity between the Board's Christian prayers and its consideration of Respondent's appeal placed coercive pressure on Respondent, a Wiccan, to participate. J.A. at 17-18.

5. The Clearly Sectarian Language of the Prayers Alienated Religious Minorities and Proselytized the Christian Faith

The Hendersonville Parks and Recreation Board's prayers are replete with references to the Christian deity as well as specific biblical verses; the language of the prayers are invariably and unambiguously Christian. J.A. at 19. Board members frequently invoked "Heavenly Father," "God," "Jesus Christ" as well as quoted biblical verses such as the Book of Isaiah. J.A. at 18-19.

In *Lund*, the Fourth Circuit identified particular portions of the contested prayer that were sectarian in nature. The prayers in *Lund* often implored attendees to accept Christianity; for example, a prayer stated that "Father, I pray that all may be one as you…I pray that they may be one in you." *Lund*, 863 F.3d 268. Another prayer stated "We are all God's people." J.A. at 23. Similarly, on one occasion, a member of the Hendersonville Parks and Recreation Board beseeched attendees to "strive to conduct [their] business in a way consistent with the careful hand of the Father and his son Jesus Christ." J.A. at 19. Several board members also testified that their prayers referenced their specific faith. J.A. at 3-4. Other prayers referenced sin and asked for forgiveness on the community's behalf or asked for the Christian deity to bless the community. J.A. at 18-19 ("May God place His Healing Hand on the hurt communities…who suffered…").

The Hendersonville Board never invited a person of a non-Christian faith to say the prayers, and one of the Board members scoffed when Respondent complained about the ecumenical nature of the prayers. J.A. at 1 (Board member James Lawley stated "this is a Christian country, get over it."). Respondent testified that "hearing those Christian prayers made [her] feel like an outsider, humiliated [her], and caused [her] significant distress." J.A. at 1. When viewed through the lens of a "reasonable observer," there is no doubt that the sectarian language of the prayers in conjunction with Hendersonville Board's unified religious background

is evidence of proselytization and coercion. *See Indian River Sch. Dist.*, 653 F.3d at 285. The Hendersonville Parks and Recreation Board unequivocally communicated its endorsement of Christianity over other faiths, in violation of the second prong of the *Lemon* test.

C. The Board's Legislator-Led Prayer Practice Creates Excessive Entanglement Between Church and State

The Supreme Court held that when a government practice violates a prong in the sequential *Lemon* test, there is no need to proceed further with the remaining parts of the test. *Edwards*, 482 U.S. at 583. The Board's prayer practice failed the second part of the *Lemon* test, and thus there is no need to assess the third prong. However, even if the Board's prayer practice passed the second prong, it would still be declared unconstitutional under the third prong of the *Lemon* test for causing "excessive government entanglement with religion." *Lemon*, 403 U.S. at 613.

In order to analyze the extent of government entanglement, the Court must examine the "character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority." *Id.* at 615. Firstly, the prayer practice has been an institutionalized part of the Hendersonville Board's meetings since at least 2005. J.A. at 6. *See also Indian River Sch. Dist*, 653 F.3d at 288 ("The prayers are not spontaneous, but a formal part of the Board's activities"). Secondly, the prayers are completely controlled by the Board who has complete control over the agenda of the meeting, the identity of the prayer-givers, and the content of the prayers. J.A. at 18. As observed by the Third Circuit, the composition of a prayer is a "hallmark of state involvement." *Id.* at 288. In *Engel v. Vitale*, for example, the Supreme Court struck down a school prayer that was composed by a government agency; the Court found the fact that the "prayer was composed by

government officials as part of a governmental program to further religious beliefs." *Engel v. Vitale*, 370 U.S. 421, 425 (1962).

Lastly, the Board's prayer practice has resulted in political divisiveness between supporters of the prayers and dissenters. J.A. at 1. In *Greece*, when the Board received complaints they opened up the prayer-practice to everyone, including a Jewish layman and a Wiccan priestess. *Greece*, 134 S. Ct. at 1817. When Respondent complained about her intimidation and nervousness from the Christian prayers, Board member James Lawley said "this is a Christian country, get over it." J.A. at 1. The Supreme Court has cautioned that "political division along religious lines . . . is a threat to the normal political process," and is therefore "one of the principal evils against which the First Amendment was intended to protect." *Lemon*, 403 U.S. at 622. The Board's prayer practice causes excessive government entanglement and should be invalidated under the third prong of the *Lemon* test.

CONCLUSION

The Board's prayer practice does not comport with the history and tradition of legislative prayer authorized in *Marsh* and *Greece* because the board members personally delivered the prayers, as opposed to hiring an outside chaplain or clergy member, and the sectarian language of the prayers distinctly advanced Christianity while also excluding religious minorities. Under the *Lemon* test, the Board's prayers failed the second and third prongs because the prayer-practice unmistakably placed coercive pressure on religious minorities and encouraged excessive government entanglement. Respondent respectfully requests that this Court affirm the Thirteenth Circuit's decision reversing summary judgment in favor of the Board.