Team 2514

Docket No. 2018–01

SUPREME COURT OF THE UNITED STATES

In The
October Term, 2018

HENDERSONVILLE BOARD OF PARKS AND RECREATION,
Petitioners,

V.

Barbara PINTOCK,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Thirteenth Circuit

Brief for RESPONDENT

Team 2514
Attorneys for the Respondent
March 5th, 2018

QUESTIONS PRESENTED

1) In *Marsh* and *Town of Greece*, this Court authorized legislative bodies to open their sessions with chaplain-led sectarian prayer when it is respectful in nature and meant to solemnize public business. The Hendersonville Board of Parks and Recreation's prayers are delivered only by Board members, exclusively Christian in content, and have been used on more than one occasion to single out non-believers. Is this practice consistent with the tradition of legislative prayer authorized by *Marsh* and *Town of Greece*?

2) As this Court held in *Lee v. Marsh*, governmental bodies cannot force citizens to choose between participating in important public business and practicing their religion, free from coercion. Here, the Board is forcing Ms. Pintock into choosing between her right to petition the government for a paddleboat license and her right to be free from religious coercion. Is this practice consistent with the First Amendment's Establishment Clause?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Other Authorities

JURISDICTION STATEMENT

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

STATEMENT OF THE CASE

I. MS. PINTOCK

Barbara Pintock ("Pintock") is a resident of Hendersonville, Caldon, where she operates a paddleboat company on the City's lakes and waterways. J.A. at *1. Pintock is also an active member of the Wiccan religion. *Id.* Wicca is a modern pagan religion which emphasizes a reverence for the environment and the natural world. *Id.* at 17.

To ensure that her business had the proper permits, she has, in several instances, appeared before the Hendersonville Parks and Recreation Board ("the Board"). *Id.* The Board is a five-member body that has a wide array of authority, including controlling Hendersonville's "cultural arts, greenways, golf courses, historic sites, permit rentals and reservations, and outdoor recreation." *Id.* at 18. The Board meets once each month and they regularly deal with issues of permitting and rentals. *Id.* at 8

II. THE BOARD'S PRAYER

The Board also has a regular practice of opening up their monthly meetings by asking everyone in the audience to stand, recite the pledge of allegiance, and then listen to a prayer. *Id.* This prayer is written and delivered exclusively by different members of the Board, who rotate the responsibility each month. *Id.* at 5. The Board is constituted entirely by followers of Christianity, although they each individually belong to different Christian sects.[1] *Id.* at n.3. Frequently, the prayers refer to specific aspects of the individual Board member's faiths, including Bible verses, religious stories, and direct reference to Christian deities. *Id.* at 3. For example, the Board has delivered the two following prayers:

[1] "Board Chairman Wyatt J. Koch is a Baptist, Board member Alvania Lee is a Methodist, Board member John Riley is Catholic, Board member James Lawley is a Presbyterian, and Board member Monique Johnson is Lutheran. The prayers tend to be short but sometimes directly reference the Deity." J.A. at *15

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

Id. at *9

III. THE MEETING

In 2017, Pintock attended a meeting of the Board in an attempt to secure permits for her paddleboat business. *Id.* at 1 As they typically do, the Board opened with a Christian prayer. *Id.* As the prayer was being delivered, Pintock "felt very intimidated," as they were inconsistent with her beliefs and "made [her] feel like an outsider." *Id.* Because of her deep discomfort, when she stood up to speak on behalf of her permitting issue, Pintock "could not enunciate [her] words properly." *Id.*

But despite Pintock's discomfort and trouble speaking, she composed herself and objected to the Board's prayer practice. *Id.* at 19. When she voiced her concern, the Chairman of the Board, Mr. James Lawley, dismissively stated that "this is a Christian country, get over it." *Id.* at 1. The Board then summarily rejected Pintock's paddleboat licensure. *Id.* Pintock testified that this "humiliated [her], and caused [her] significant distress." *Id.*

Following this incident, Pintock filed a lawsuit in the United States District Court for the District of Caldon seeking declaratory relief and a preliminary injunction against the Board to prevent them from delivering sectarian prayer before any more of their meetings. *Id.* at 10. The lawsuit alleged, first, that the writing, presentation, and delivery of exclusively Christian prayer by the Board violated the Establishment Clause of the First Amendment, and, second, that such

prayers constituted impermissible coercion of a minority religion. *Id.* Shortly after discovery began, the parties filed cross-motions for summary judgment. *Id.* The district court entered summary judgment in favor of the Board on the basis that the prayers neither violated the Establishment Clause nor were unduly coercive. *Id.* at 15. Pintock appealed, and the United States Court of Appeals for the Thirteenth Circuit reversed on both counts. *Id.* at 25. The Board appealed to this Court. *Id.* at 26.

SUMMARY OF ARGUMENT

The Board's Practice of Legislative Prayer is Inconsistent With the *Marsh* and *Town of Greece* exception

The Establishment Clause of the First Amendment guarantees not only that the government shall not formally establish a religion, but also that it will not take an action endorsing or promoting a specific religion. As with any categorical rule, this clause has its exceptions and carve-outs. One such important exception is that recognized by this Court in *Marsh v. Chambers*—where it held that legislative prayer led by a paid chaplain before sessions of the Nebraska legislature did not violate the Establishment Clause. The Court reaffirmed this exception in *Town of Greece*, where it again ruled that chaplain-led legislative prayer was acceptable in the context of a municipal board meeting. In both of these instances, the Court underscored that these legislative prayer practices were acceptable because they were consistent with instances of chaplain-led legislative prayer at the founding of our nation, were made available to people of all religions, and did not seek to shame or proselytize to minority religions. The prayer practice of the Hendersonville Board of Parks and Recreation radically differs from these cases. The Board's prayers, unlike those at the time of the founding, are given by the board members themselves. The opportunity to pray is only ever available to Christians, and these prayers often become a soap-box from which the Board proselytizes to and, even in one instance, shames minority religions.

First, the Board's prayer does not fit the relevant exception to the Establishment Clause because it is delivered exclusively by the Board members, as opposed to paid chaplains or priests. In both *Marsh* and *Town of Greece*, the Court highlighted that legislative prayer is consistent with the Establishment Clause because it matches with prayers given at the time of the

founding. This is important, because in every relevant instance of legislative prayer on or around the founding, the prayers were delivered by chaplains or priests hired by legislative bodies. This practical difference should carry the day, because having a non-legislative religious official deliver the prayer eliminates many of the constitutional risks present when legislators deliver the prayer. Where the Board members, who are vested with great power over the meeting participants, make clear their religious preferences, this creates profound "peer pressure" on religious minorities in the room to conform to their beliefs in order to effectively plead their cases to the Board.

Second, the complete lack of any religious diversity in the Board's prayer-givers proves that the prayers do not fit the exception. In *Marsh*, and particularly *Town of Greece*, the Court praised the fact that the relevant legislative bodies invited and accepted prayer by a host of different religious officials. The court emphasized that these lessened the potentially coercive effects of legislative prayer by breaking up the consistency with which Christianity is presented. The failure to even attempt to diversify their list of prayer-givers should be the Board's undoing, as their prayer practice is wholly inconsistent with this Court's precedent, and the history of legislative prayer.

Finally, even where legislative prayer is acceptable as a means to solemnize public business or put legislators in the right state of mind, the Board's practice fails this purpose because it singles out individual religions and seeks to proselytize. The *Marsh* and *Town of Greece* Courts highlighted that prayer is only acceptable where it does not single out religions or shame them. Here, the Board not only delivered several prayers which were oblique attempts to preach the gospel of Christianity, but also openly excoriated Pintock for her beliefs, stating that she should just "get over it." This is unacceptable behavior by a legislative body *generally*, but

particularly where that Board gives regular Christian prayer, it demonstrates the unconstitutionality of the practice. Because the Board's legislative prayer is delivered by the Board members themselves, because it is only ever Christian in nature, and because it has been morphed into an opportunity to excoriate minority religions, it cannot be acceptable under this Court's precedents in *Town of Greece* and *Marsh*.

The Board's Practice of Legislative Prayer is Impermissibly Coercive, and therefore a Violation of the First Amendment's Establishment Clause

The Board's practice of composing, reciting, and leading prayer before every meeting violates the Establishment Clause of the First Amendment. The Establishment Clause imposes a mandate on governmental bodies that they shall not establish or promote the practice of any particular religion. The Board's prayer violated this mandate by unconstitutionally coercing Pintock into participating in Christian prayer, and represents a clear endorsement of the faith itself. This violation is even more reprehensible when, as it does here, the prayer puts pressure on non-religious citizens to conform to the Board's religion to access other fundamental Constitutional rights. Here, when Pintock approached the Board, she was exercising her constitutional right to petition the government and redress her grievances.

Even if this Court does not find that Ms. Pintock was coerced into practicing Christianity at the cost of sacrificing her other rights, the Board's practice still nonetheless violates the Establishment Clause. Establishment clause violations occurs where either (1) the government practice has a non-secular purpose, (2) it advances or inhibits the free exercise of religion, or (3) creates excessive entanglement between church and state. Any of these three alone demonstrate that a practice violates the Establishment Clause, but the violation is the most clear when the practice meets all three, as is the case here. The facts clearly show that the practice does not have

a secular purpose, that it advances Christianity and inhibits all other religions, and that the Christian prayer by the Board is excessively entangling Christianity with the government.

By beginning each meeting with prayer, the Board is coercing Ms. Pintock into participating with them in their pursuit of Christian principles, or at least creating a religious barrier to those who seek to petition them for redress. When the Board begins each meeting with Christian prayer and invites attendees to participate, non-Christians like Ms. Pintock have two options. First, they can abandon their personal or religious beliefs and participate in order to garner the Board's favor. Or, second, they can choose not to participate at all, at the expense of tarnishing their constitutional right to petition the government. In other words, this setting asks Ms. Pintok to choose between exercising her constitutional right to practice her religion or exercising her right to petition the government. The Constitution forbids this forced choice, and this Court should must not force citizens into choosing one right at the cost of abandoning another.

This Court has repeatedly emphasized that demonstrating impermissible religious coercion does not require the party to actually be coerced into converting, but rather the *attempt*, by and of itself, to proselytize to a sectarian religious believer constitutes a violation. With this reasoning, it is clear that the Constitution also strictly forbids the Board from coercing citizens into practicing Christian prayer at the expense of forsaking a right to petition the government; an inarguably worse violation than previous instances that this Court has found such violations because the right to petition is enshrined in the very same Amendment as the Establishment Clause.

Given the religious makeup of the board, every prayer is Christian in nature, superseding any supposed secular purpose the Board hopes to accomplish with this opening. Secondly, the

Board's practice, and specifically Mr. Lawley's statement clearly shows an endorsement of Christianity and disapproval of Pintok's Wiccan faith. Finally, the prayer shows an excessive entanglement between the Board and Christianity. When the Board members who make executive decisions that effect individuals and communities are the same ones who compose and recite prayers that are exclusively Christian, that arises to excessive entanglement between the State and Christianity. Altogether, the practice violates numerous tests this Court has made that seek to root out Establishment Clause violations. If this Court refuses to find one such violation here, where all the factors of every relevant test are met, the Establishment Clause has little value at all. As a result, this Court must affirm the decision of the Thirteenth Circuit.

ARGUMENT

I. THE BOARD'S PRAYER PRACTICE DOES NOT COMPORT WITH THE HISTORY OF LEGISLATIVE PRAYER AS AUTHORIZED BY *MARSH* AND *TOWN OF GREECE*.

The Board's regular practice of opening its hearings with Christian prayer does not comport with the narrow Establishment Clause exception created in *Marsh* and *Town of Greece*, nor does it bear any resemblance to the historical practice of legislative prayer. In *Marsh*, this Court first recognized an exception to its traditional Establishment Clause analysis for legislative prayer that is solemn in nature, respectful, does not single out any particular religion or individual, and given by a paid chaplain as opposed to a state legislator. *Marsh v. Chambers*, 463 U.S. 783, 795 (1983). In *Town of Greece*, this Court again blessed the practice of chaplain-led legislative prayer, this time in the context of a municipal regulatory board. *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811, 1818 (2014). In dissent, Justice Elena Kagan conceded that she agreed with at least some of the Plurality's underlying reason, but cautioned that, as the initial *Marsh* exception expanded, it would usher in an era in which local legislative bodies use unbridled legislative prayer to coerce followers of minority religions and undermine the "First Amendment's promise that every citizen, irrespective of her religion, owns an equal share in her government." *Id.* at 1841 (Kagan, J, dissenting). That era is now upon us.

The Board contends that their prayers are solemn in nature, but they are not. They contend that they do not single out a particular religion, but the prayers and board members themselves have openly condemned non-Christians. They suggest that there is no problem that the legislators are the ones who deliver the prayers, but indeed this forms the very basis of coercive power against religious minorities that the Establishment Clause sought to outlaw. *See e.g. Everson v. Board of Education,* 330 U.S., 1, 13 (1947) (quoting Virginia Bill for Religious Liberty, 12 Hening, Statutes of Virginia 84 (1823)). These are not permissible exercises of the

legislature's plenary authority. The time has come for this Court to draw a clear line around the practices acceptable under the Establishment Clause, and declare emphatically that non-chaplain led coercive sectarian prayer falls outside of those limits, ending the uncertainty following *Marsh* and *Town of Greece*.

A. Legislator-Led Prayer does not comport with the Historical Practice of Legislative Prayer and does not fit the Exception Authorized by *Town of Greece* and *Marsh.*

To determine whether a prayer fits into the exception the Court "must undertake a 'fact-sensitive' inquiry, in which [it] take[s] into account" all of the surrounding circumstances. *Freedom From Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ.*, 896 F.3d 1132, 1144 (9th Cir. 2018). These often include the identity of the speaker, the religion of the speaker, and the content of the prayer. *Marsh*, 463 U.S. at 801.

The fact that the Board's prayer giver was a board member, as opposed to a pastor or chaplain, demonstrates that the prayer does not comport with the exceptions of *Town of Greece* and *Marsh*. The prayer-giver's identity is relevant to the constitutional inquiry "in relation to the surrounding circumstances." *Lund v. Rowan Cty., N. Carolina*, 863 F.3d 268, 274 (4th Cir. 2017), cert. denied sub nom. *Rowan Cty., N.C. v. Lund*, 138 S. Ct. 2564 (2018). In particular, the relevant inquiry tends to focus on whether the prayer giver is a chaplain or a legislator. This is because prayers given by board members or legislators, as opposed to religious officials, do not meet the legislative prayer exception as understood by the founders or emphasized by the *Town of Greece* and *Marsh* Courts.

As the Court eluded to in *Marsh*, and as commentators have repeatedly noted since the decision, one of the basic principles that underlies the legislative prayer exception in the first place is the notion that, if the practice existed at the time of the founding, it must be able to live

harmoniously with the Establishment Clause, or at least the manner in which the Establishment Clause was meant to be interpreted by the framers. *See Marsh*, 463 U.S. at 788; Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements*, 94 Minn. L. Rev. 972, 984 (2010). Therefore, it is of crucial importance that the practice of legislator-led prayer has no historical basis in this nation's historical record, and that every record of permissible legislative prayer has been led by chaplains, priests, or non-legislator laymen. *Marsh* gives two examples to support its argument that legislative prayer is historically permissible—prayer at the opening of the Continental Congress and the official legislative prayers at the First Congress—but both of these were performed by specially appointed chaplains and priests. *Marsh*, 463 U.S. at 788. At the First Continental Congress, the chaplain was officially selected and compensated by the body, and at the first formal meeting of the Congress, one of the Senate's first orders of duty was to devise a statute authorizing the selection and payment of chaplains which operated for decades following. *Marsh*, 463 U.S. at 787-88 (citing 1 J. of the Continental Cong. 26 (1774)). Clearly, there is no historical support for the legislator-led prayer practiced by the Board, which makes its invocation inconsistent with the long-running historical practice of legislative prayer in the first place.

But this is no mere historical quibble about which type of prayer existed at the founding. The Court, in both *Town of Greece* and *Marsh*, highlighted the threats to freedom of religion that the prospect of lawmakers writing and delivering their own sectarian legislative prayers would pose. Indeed, the *Town of Greece* Court expressly cautioned that, although the legislative prayer at issue narrowly met the exception, "[t]he analysis would be different if *town board members* directed" the prayer. 134 S. Ct. at 1811 (2014) (emphasis added). Although this portion of the holding was technically dictum, the reasoning underscoring it is simple and salient:

combing the secular authority to legislate, and the churchly power to say what the religion ought to be into a single absolutely powerful body is the exact theological authoritarianism that the founders fled in England and sought to eliminate in drafting the Establishment Clause. *See generally Engel v. Vitale*, 370 U.S. 42 432 (1962) ("the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand"). The *Marsh* Court stressed that such a prayer could create "coercive peer pressure" against minority religions, which would contravene the specific purpose of the First Amendment. 463 U.S. at 792. In an instructive example, just this year, the Sixth Circuit Court of Appeals struck down a legislator-led prayer practice for this very reason: because when the legislators give the prayer, that prayer becomes government speech. *Bormuth v. Cty. of Jackson*, 849 F.3d 266, 282 (6th Cir.). This is the critical distinction between legislative prayer delivered by chaplains and delivered by legislators: where allowing a chaplain to give a prayer is merely the objective *presentation* of a particular religious viewpoint, legislature-led prayer is the government itself *speaking* in favor of that religious viewpoint, essentially using the powerful voice of the legislature to endorse a religion. Combining the stately powers to legislate and the religious power to say what the prayers should be is dangerous and impermissible. Because legislator-led prayer does not comport with the well-worn historical conception of permissible legislative prayer, it cannot fit the *Marsh* and *Town of Greece* exception.

B. The Board's Prayer Practice does not comport with the Marsh and Town of Greece Exception because the Opportunity to Deliver Prayer is Exclusively Available to Christians.

The Board's prayer practice also fails to meet the *Marsh* and *Town of Greece* exception because the prayers were exclusively delivered by Christian speakers and Christian in content.

Both the *Marsh* and *Town of Greece* Courts heralded the importance of religious diversity in legislative prayer. In *Greece* "the town invited a Jewish layman and the chairman of the local Baha'i temple to deliver prayers. A Wiccan priestess who had read press reports about the prayer controversy requested, and was granted, an opportunity to give the invocation," much to the Court's approval. *Town of Greece*, 134 S. Ct. at 1817. The Court went on to praise the fact that "[t]he 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." *Id*.

Indeed, this practice of religious diversity traces its roots back to our nation's founding. As the *Town of Greece* Court noted, it was at the very First Continental Congress, shortly prior to the adoption of the First Amendment, that the notoriously outspoken Samuel Adams made a point of inviting an Anglican Priest to deliver the opening prayer despite the colonists hatred of the Anglican Church and its status as a minority religion in the colonies. *Id.* at 1833. Despite the Congress' initial skepticism about inviting a devotee of the very religion that persecuted the first colonists to give the prayer, John Adams later wrote that the prayer was so well-received that it "filled the bosom of every man in attendance." *Id.* This provides the nation's first historical example of a sectarian legislative prayer "adding solemnity" to legislative business, and indeed the religious diversity of this practice was a foundational element of the Court's decision in *Town of Greece* to authorize legislative prayer.

But again, the principles at issue have a deeper root that mere historical trivia. The religious diversity practiced at the First Continental Congress and heralded by the *Town of Greece* Court is critical to the constitutionality of legislative prayer practice. This is because without at least some reasonable attempt to expand the pool of religious affiliations who get to

give the prayer, "[t]here are no opportunities for persons of other faiths to counteract this endorsement by offering invocations," and lessen their potentially coercive effect of a repetitively sectarian prayer on the captive audience. *Bormuth v. Cty. of Jackson*, 849 F.3d 266, 282 (6th Cir.). In *Marsh*, the Court emphasized this point and warned against the coercive practices that would take root if the time-honored tradition of legislative prayer devolved into a "steady drumbeat of Christian prayer, unbroken by invocations from other faith traditions, tend[ing] to affiliate the town with Christianity." *Marsh*, 463 U.S. at 801. In Hendersonville, once a month, at the meeting of the Parks and Recreation Board, that drumbeat can be heard loud and clear, pulsing against the clear warnings laid forth by Madison, *Marsh*, and *Town of Greece*.

The Board practices a closed legislative-prayer system, in which only the legislators, who are entirely Christian, are allowed to give the prayer. J.A. at *8. This closes the universe of religions that Hendersonville citizens could ever be exposed to during this prayer and does not comport with the historical exception of *Marsh* and *Town of Greece*. It is not necessary for the Board to guarantee equal time to every religion in the known universe—indeed, it is not even necessary for Hendersonville "to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing." *Town of Greece*, 134 S. Ct. at 1817. However, what *is* required is that Hendersonville make a "reasonable effort[] to identify all of the congregations located within its borders and represent[] that it would welcome a prayer by any minister or layman who wished to give one." *Id.* at 1824. Clearly, the town has not attempted to satisfy this principle, and its practice lies in clear violation of the Court's precedents on legislative prayer in *Town of Greece* and *Marsh*.

Even if this inquiry were to still result in a vast predominance of Christian speakers and prayer-givers at the monthly Board meetings, the practice of opening up the meetings to more

perspectives would challenge any coercive effects that a steady drumbeat of Christian prayer might have, and thus help the practice to pass constitutional muster. In describing his decision to invite an Anglican Priest to speak at the Continental Congress, Samuel Adams stated that "he was no bigot, and could hear a prayer from any gentleman of piety and virtue, who was at the same time a friend to his country." *Town of Greece*, 134 S. Ct. at 1833. The Board's rejection of religious diversity imperils this important principle, central to the founding of our nation and this Court's decisions in *Town of Greece* and *Marsh*. Therefore, the Board's prayer practice should be rejected as inconsistent with the legislative-prayer exception.

C. The Board's Prayer Practice does not Comport with the *Marsh* and *Town of Greece* Exception because the Prayer is Being Used to Proselytize, not Solemnize the Occasion.

While a constitutional challenge to a legislative prayer that is solely based on the prayers contents "will not likely establish a constitutional violation," the nature and content of the prayer is still "germane to the constitutionality of a prayer practice." *Id.* at 1826; *Lund*, 863 F.3d 277. To determine if the content of a legislative prayer meets the exception authorized by *Marsh* and *Town of Greece*, "the relevant constraint on faith-specific prayer derives from its place at the opening of legislative sessions, where it is meant to lend gravity to the occasion and reflect values long part of the Nation's heritage." *Id.* (quoting *Town of Greece*, 134 S. Ct. at 1823) (internal quotations omitted). The two seminal cases on this issue give us two different examples of prayers that do not met these relevant considerations. First, the *Marsh* Court warned that any prayer which is "exploited to proselytize or advance any one or to disparage any other, faith or belief," cannot pass muster under the legislative prayer exception. *Marsh*, 463 U.S. at 795. Second, the Court in *Town of Greece* held that legislative prayers which "denigrate nonbelievers

or religious minorities, threaten damnation, or preach conversion," fail their mission to add solemnity or seriousness to legislative meetings and therefore fail the legislative prayer exception. *Town of Greece*, 134 S. Ct. at 1823. Here, the Board's practice includes prayers which directly correspond to these forbidden examples, and fails to add solemnity to the occasion of legislating.

First, the Board is clearly using their opening prayer to proselytize or advance the Christian religion and to disparage others. It again bears repeating that the Board uses a closed prayer system, in which only the Christian Board members are allowed to express their religious beliefs to the captive audience that is the Board meeting. This exclusivity serves the direct purpose of elevating the Judeo-Christian perspective above that of other religious beliefs. But what's more, is that the Boards comments to Pintok, after she complained about this prayer practice, demonstrate a concurrent attempt to disparage minority religious beliefs. The statement of "this is a Christian nation, get over it," advances the Christian viewpoint as primary religon and serves to disparage any of those who might hold an alternative viewpoint—in this case, Pintok. Board Member James Lawley contends that he does not recall making the comment, but remembers dismissing Ms. Pintok's complaint as "frivolous," again without specific knowledge as to what else he said. More importantly, the lower courts—with a better view of the facts—ultimately found that this comment was at least likely made, cementing the derogatory conduct of the Board. J.A. at *19.

Second, in at least one instance the Board clearly used their prayer practice to criticize non-believers and preach conversion. In one opening prayer, the Board stated "[w]e 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." J.A. at *9. This line directly calls for non-believers to

convert, lest they fall short of the glory of Heaven and suffer eternally in Hell. The referenced line, Isaiah 1:18, is in fact a purported conversation between Jesus and a sinner, used often by Christians to convert non-believers. William D. Barrick, *Living a New Life: Old Testament Teaching About Conversion*, 11 Masters Seminary J. 19, 24–25 (2000). This monopolization of a prayer to attempt to convince non-Christians to convert is clearly outside of the scope of the intended legislative prayer exception and therefore should not pass constitutional muster.

The work of maintaining the facilities, art museums, cultural locations, historical sites, and outdoor recreational facilities of a city or town is indeed a very important job that touches the lives of countless citizens—a job obviously deserving of solemn reflection before decision-making begins. But instead of using prayer to develop this solemnity in the common interest of the townspeople, the Board has monopolized this forum for proselytizing and shaming minority religions. This behavior is a clear violation of the principles underlying *Marsh* and *Town of Greece*, and therefore does not fit the legislative prayer exception as historically understood by this Court.

II. THE BOARDS' PRACTICE OF BEGINNING PUBLIC MEETINGS WITH PRAYER HAS A CLEAR RELIGIOUS PURPOSE AND FAILS THIS COURT'S *LEMON* TEST, VIOLATING THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

The Board-member led practice of delivering exclusively Christian prayer before every meeting violates not only the Establishment clause of the First Amendment, but also the right to "petition for a governmental redress of grievances", which this Court held is "implicit in the very idea of government, republican in form." U.S. Const. amend. I; *McDonald v. Smith*, 472 U.S. 479, 482 (1985) quoting *United States v. Cruikshank*, 92 U.S. 542, 552 (1876). The Constitution expressly prohibits the government, not only from establishing a religion, but also from exacting

religious conformity at the cost of other fundamental rights. This is precisely what the Board is doing to Ms. Pintok and every other citizen at their monthly meeting. By reciting Christian prayer before every meeting, the Board is sending messages to non-Christians that they are outsiders, and not members of the political community.

However, even if this Court does not accept the plain fact that the Board coerced Ms. Pintok using Christian prayer, the Board would still be in direct violation of the Establishment Clause because its actions fail all three prongs of the *Lemon v. Kurtzman* test, which is used to assess whether or not governmental religious practice qualifies as the establishment of a religion. 403 U.S. at 602 (1971). As Section III.A.3 explains in greater detail, even if legislative prayer sometimes serves a legitimate secular purpose, the Board's practice of Christian prayer does not have a secular purpose because it is being used to single out minority religions for coercion. Second, the very nature of the prayers in question demonstrate an endorsement of the Christian religion, its traditions, and its specific teachings. Finally, the practice of having members of the government literally draft, edit, and deliver scripted secular prayers fosters an excessive government entanglement with religion that the Establishment Clause is designed to protect against. All of these prongs, separately, account for an Establishment Clause violation, much less when the practice fails all three. For these reasons, this Court must affirm the decision of the Thirteenth Circuit.

A. The Board's use of exclusively Christian prayer combined with Board member James Lawley's statement to Ms. Pintok Violates the First Amendment to the Constitution by impermissibly coercing her to conform to Christianity.

Indeed, "[t]he Establishment Clause, grounded in experiences of persecution, affirms the fundamental truth that no matter what an individual's religious beliefs are, he has a valued place

in the political community." *Chino Valley Unified Sch. Dist. Bd. of Educ.*, 896 F.3d at 1137. Pintock's place in this political community was compromised and eliminated when she attended the Board meeting and was publicly excoriated for being Wiccan. The Board's decision to use exclusively and explicitly Christian prayer before every monthly meeting not only violates the Establishment Clause, but it also interfered with Ms. Pintock's Constitutional right to petition the government, another crucial building block of the First Amendment. U.S. Const. amend. I

"The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. . . . [T]he Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise[.]" *Lee v. Weisman*, 505 U.S. 577, 587 (1992). This same principle, that the government may accommodate the free exercise of religion—even when occasionally exercised by a government official—must not frustrate another core principle of the First Amendment: the deeply rooted right to "petition the Government for a redress of grievances". U.S. Const. amend. I. "It is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice." *Lee*, 505 U.S. at 596. The Board is forcing Pintock into either exercising her freedom of religion at the cost of abandoning her right to petition the government, or vice versa; a choice that the First Amendment expressly forbids. The First Amendment was never intended to balance one of its clauses against another, especially when the balancing act is weighed against two separate clauses, and especially when they can all work together.

The standard to determine whether a particular act is coercive is not whether or not someone was actually coerced, instead it is whether or not there was an *attempt* to coerce someone into performing a religious ritual that violated their sincerely held beliefs. *Lee*, 505

U.S., at 604, quoting *Committee for Public Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756, 786 (1973) (Blackmun, J., concurring) ("Proof of coercion is not a necessary element of any claim under the Establishment Clause"). While the Court noted in *Lee* that adolescents are especially susceptible to peer pressure, a failure to successfully coerce a captive adult at a board meeting is no less unconstitutional. *Id*. at 593. As the court stated, "[t]he Establishment Clause proscribes public schools from conveying or *attempting* to convey a message that religion or a particular religious belief is favored or preferred . . . even if the schools do not actually impose pressure upon a student to participate in a religious activity." *Id*. at 604–05, quoting *Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens*, 496 U.S. 226, 261, (1990) (Kennedy, J., concurring in part and concurring in judgment) (emphasis added) (internal quotation marks and citations omitted).

In *Lee*, this Court held that a governmental body cannot "persuade or compel a student to participate in a religious exercise." 505 U.S. at 599. School officials brought in a rabbi to lead prayer at a high school graduation. *Id*. at 583. The prayer was heavily sectarian, and referred to specific aspects and religious tenets of Judaism. *Id.* At the graduation, the students stood for the Pledge of Allegiance and then, as the students remained standing, the rabbi began to deliver the prayer. *Id*. In holding that this practice violated the Establishment Clause, this Court said that this looked like an "attempt to employ the machinery of the State to enforce a religious orthodoxy." *Id*. at 592. The Court refuted the school's argument that the high school graduation was voluntary by arguing that "to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme." *Id*. at 595. This Court pointed out that a graduation is "one of life's most significant occasions" and that an absence would "require forfeiture of those intangible benefits which have motivated the student through youth and all her high school

years." *Id*. As a result, "[t]he Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation." *Id*. at 596. While the entire prayer practice at issue here is coercive in a similar manner to *Lee*, there are essentially two highly coercive aspects of the Board's prayers which violate this test: the Board's statements to Pintock, and the fact that the prayers were delivered by exclusively Christian Board-members.

First, the state's attempt to coerce Ms. Pintock into "get[ting] over it" because "this is a Christian country" is inarguably a worse violation of the Establishment Clause than that of *Lee*, because of the setting, and because she is participating in constitutionally protected activity at the Board meeting—petitioning the government for the ability to practice her livelihood. As the Fourth Circuit pointed out in *Lund*, "the intimate setting of a municipal board meeting presents a heightened *potential* for coercion." *Lund*, 863 F.3d at 287 (emphasis added). Municipal boards "possess the power to directly influence both individual and community interests." *Id*. And, just like with high school graduations, "[t]he 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." *Id*. at 288. Furthermore, like a high school graduation, petitioning the government when a citizen has an issue preventing them from operating their business is not really voluntary because a choice to not do so would abandon a constitutional right to air grievances and pursue life and liberty in the manner they see fit. Indeed, unlike a high school graduation, petitioning the government is a fundamental, constitutionally protected right, making the coercion a strikingly more harmful violation. Here the Board is using the First Amendment as a sword against itself, when the purpose of the entire Amendment is to be used altogether as a shield, protecting all citizens.

In *Town of Greece*, this Court held stated that the test for whether or not an otherwise permissible legislative prayer is coercive "remains a fact-sensitive one that considers both the setting in which the prayer arises and the audience to whom it is directed." 134 S.Ct. at 1825. Here, the facts indicate that Board member, Mr. James Lawley, specifically ordered Ms. Pintock to accept that this country is a Christian one. J.A. at *1. If this blunt statement, coupled with prayer that calls everyone sinners, isn't proselytizing Christianity and disparaging all other faiths, then the rule itself carries little force. This is the exact situation this Court has held goes over the line, and crosses into coercive territory.

Second, as simply stated by the Thirteenth Circuit Court of Appeals, "[t]he prayer practices of the Board applied coercive pressures upon [Pintock], a religious minority." J.A. at *25 (Rodriguez, J., Concurring). In *Town of Greece*, the plurality importantly highlighted that the decision 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." 134 S.Ct. at 1811 (2014). This is, of course, the difference between *Town of Greece* and the instant case, where Ms. Pintock was specifically singled out for not adhering to Christianity. Further, the facts are also similar to *Lund* and differ from *Town of Greece* where:

> [T]he county's Board of Commissioners composed and delivered pointedly sectarian invocations. They rotated the prayer opportunity amongst themselves; no one else was permitted to offer an invocation. The prayers referenced one and only one faith and veered from time to time into overt proselytization. Before each invocation, attendees were requested to rise and often asked to pray with the commissioners. The prayers served to open meetings of our most basic unit of government and directly preceded the business session of the meeting.

Lund, 863 F.3d at 272.

With all of these facts in mind, in an *en banc* decision, the Fourth Circuit Court of Appeals held that the County Board of Commissioners' legislative prayer violated the Establishment Clause. *Id*. at 275. Adhering to this Court's precedents, the Fourth Circuit stated that "the Establishment Clause does not countenance prayers that 'denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion' or, per *Marsh*, prayers that proselytize or advance or disparage a particular faith. *Id*. at 277, quoting *Marsh* 463 U.S. at 794; quoting *Town of Greece*, 134 S.Ct. at 1823. "Because the invocations here placed Christianity on a higher plane than other faiths and urged attendees to embrace that religion, the requests to participate in those prayers are clear indicators of an effort "to promote religious observance among the public." *Lund*, 863 F.3d at 287.

The facts in the record clearly show that the Board members engaged in this unconstitutional activity to the distress of Pintock in almost the exact same manner that the County Board of Commissioners did in *Town of Greece*. Again, perhaps the most important prayer in the record is that prayer in which the board calls all people "sinful" in the eyes of the Lord, and implores the audience members to repent to the lord so that their hearts are "as white as snow." J.A. at *19.

B. The Board's practice and preference of Christian prayer violates this Court's *Lemon* test, and the subsequent refinement of it *Lynch v. Donnelly*, because the practice clearly endorsed Christianity and disapproved of minority religions.

The Constitution "mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch v. Donnelly*, 465 U.S. 668 (1984). "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). Even if this Court finds that Pintock

was not coerced by the Board's statement and practice of exclusively Christian prayer, the Board's practice is still unconstitutional under the *Lemon* test and Justice Sandra Day O'Connor's "refinement" of the *Lemon* test as set forth in *Lynch v. Donnelly*. *Lemon v. Kurtzman*, 403 U.S. 602 (1971); 465 U.S. 668, 688 (O'Connor J., concurring). As the Thirteenth Circuit correctly pointed out in its opinion on this matter, the Board's practice violates both tests, individually and separately. J.A. at 22–23.

Under *Lemon*, a government practice must (1) have a secular government purpose; (2) have a primary effect that neither advances or inhibits religion and (3) not create excessive entanglement between church and state. 403 U.S. at 612 –13. A violation of any of these three prongs is fatal to the government and demonstrates the unconstitutionality of the practice. *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987). First, even if the prayer has the stated goal of serving some secular purpose, it clearly does not fulfill this purpose and is instead an opportunity for the Board to take pot-shots at a minority religion. Next, the prayer practice here explicitly advances the Christian religion. Finally, as the Thirteenth Circuit Court of Appeals pointed out, the practice of having the government draft and deliver prayers certainly entangles religion and government. J.A. at 22–23.

As previously discussed in section III.A.3, the prayer here does not have a secular government purpose. Respondent, of course, does not contend that there is no instance in which a legislative prayer may serve the secular legislative purpose of solemnizing public business, but it is clear here that the prayer was used to single out a minority religion, failing to achieve that stated purpose. The Board's prayer practice also violates the second prong of the test. As the Court pointed out, this test is often supplemented by Justice O'Connor's "Endorsement Test", as articulated in her concurring opinion in *Lynch v. Donnelly*. 465 U.S. at 688. Justice O'Connor

explained that the Establishment Clause is violated when there is "government endorsement or disapproval of religion". *Id*. "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message." The facts make it clear that the Board endorsed Christianity and explicitly disapproved of all other religions.

Every prayer on the record directly references the Christian deity, all members of the Board are Christian, and again, as the lower court correctly pointed out these prayer practices "send an undeniable signal that the government is endorsing Christianity." J.A. at *24. The record clearly demonstrates that each prayer has specifically referenced the speaking member's denomination—a Christian denomination in every single instance. *Id.* at *3 ("My prayers have referenced my specific religion faith, which is Methodist"). As this Court pointed out in *Lee*, the Rabbi's prayer at the high school graduation "is a solemn avowal of divine faith and supplication for the blessings of the Almighty. The nature of such a prayer has always been religious." *Lee*, 505 U.S. at 603 (1992), quoting *Engel*, 370 U.S. at 424.(1962).

The Board has the option to solemnize the meeting with a moment of silence, a prayer from any other religion, or any number of nonsectarian methods, but it has instead exclusively practiced Christian prayer. As the Third Circuit Court of Appeals correctly pointed out in *Doe v. Indian River Sch. Dis,* where the facts are strikingly similar, "[g]iven that the prayers recited are nearly exclusively Christian in nature, including explicit references to God or Jesus Christ or the Lord, we find it difficult to accept the proposition that a 'reasonable person' would not find that the primary effect of the Prayer Policy was to advance religion." 653 F.3d 356, 385 (3d Cir. 2011). The Board's clear endorsement and advancement of Christianity, as well as their explicit

disapproval of all other religions, including Ms. Pintock's, is a clear violation of the second prong of the *Lemon* test. As a result, this Court should hold that the Board's practice violates the Establishment Clause.

Even if this Court does not find that the Board's practice violated the first or second prong of the *Lemon* test, it should still find that it violated the last prong, a violation of which would still be fatal to the Board's practice. Part three of the *Lemon* test provides that the government conduct in question may "not foster an excessive government entanglement with religion." *Lemon*, 403 U.S. at 613. "[T]o assess entanglement, we have looked to the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority." *Agostini v. Felton*, 521 U.S. 203, 232 (1997) (internal quotation marks omitted).

In *Doe*, where the Third Circuit Court of Appeals found that a school board meeting opening prayer was unconstitutional, it held that several institutional aspects of the prayer recitation were troubling. *Doe*, 653 F.3d at 288. The Court highlighted "[t]he prayers are not spontaneous, but a formal part of the Board's activities. The Board explicitly decided that a prayer or a moment of silence should be part of every School Board meeting." *Id*. The Court then cited *Lee* in stating that "[t]he decision that an invocation and a benediction should be given is a choice attributable to the State." *Id*., (quoting *Lee*, 505 U.S. at 587). Here, the facts are the nearly the exact same. The Board has a policy of beginning every meeting with a prayer, all of which are Christian. "That level of 'involvement,' the Supreme Court cautions, is 'troubling.'" *Id*., quoting *Lee*, 505 U.S. at 587.

The Third Circuit Court of Appeals went on to highlight another cause of entanglement by pointing out that the Board meetings are completely controlled by the state. *Id*. The court

noted that "[t]he Board sets the agenda for the meeting, chooses what individuals may speak and when, and in this context, recites a prayer to initiate the meeting. Thus, the circumstances surrounding the prayer practices suggest excessive government entanglement." *Id*. Again, those facts are present at the case at hand. The Board members have tremendous power at these meetings, power that citizens like Ms. Pintock must petition in order to enjoy their livelihood. When these Board members demonstrate their clear and exclusive affinity for Christianity, and when they have the authority to make concrete government decisions, that is when the entanglement with religion becomes excessive and unconstitutional.

Furthermore, "[g]overnment participation in the composition of prayer is precisely the type of activity that the Establishment Clause guards against." *Doe*, 653 F.3d at 288. It is clear in the instant case that the Board is listening to the events of the day, and composing prayers which address these topical issues. *See* J.A. at *9. At the very least, it can be inferred that the Board is *involved* with the composition and substance of the prayers, which still rises to the level of an unconstitutional violation. *See Engel*, 370 U.S. at 425.This is highly problematic from a constitutional perspective, because it means that government officials are literally establishing the religious prayer for a group of constituents. Frankly, it does not get any closer to the establishment of a religion than that

The Board's practice of opening every meeting with Christian prayer, and having a member explicitly purvey Christianity—including the occasional criticism of minority religions—is precisely the activity that the Establishment Clause forbids. If this Court does not find that Ms. Pintock was coerced into practicing Christianity, then the entire test for coercion holds little force indeed. Similarly, while this Court has not strictly followed the *Lemon* test, this Court's precedent would be completely meaningless if it did not find an Establishment Clause

violation when all three prongs of the original test are so clearly violated. As a result, this Court must affirm the decision of the Thirteen Circuit Court of Appeals and hold that the Board's practice of beginning meetings with prayer violates the Establishment Clause of the First Amendment.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court affirm the decision of United States Court of Appeals for the Thirteenth Circuit on both counts.

Respectfully submitted,
/s/ Team # 2514
September 30, 2018
Counsel for Respondent