No. 17-1891

In The Supreme Court of the United States

October Term, 2018

HENDERSONVILLE PARKS and RECREATION BOARD,
Petitioner-Defendant,

v.

BARBARA PINTOK,
Respondent-Plaintiff.

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

BRIEF FOR THE RESPONDENT

Team No. 2518

Counsel for Respondent

QUESTIONS PRESENTED

I. Does the Board's policy of opening public meetings with legislator-led prayer comport with the history and tradition of legislative prayer authorized by *Marsh v. Chambers* and *Town of Greece v. Galloway*, where the prayer is initiated, prescribed, and led exclusively by legislators sitting in a position of authority?

II. Does the Board's policy of opening public meetings with legislator-led prayer principally advance the solemnization of public business, where the Board's legislator-led prayer serves the religious purpose of endorsing Christianity and places coercive pressures on religious minorities?

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JURISDICTION STATEMENT

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

STATEMENT OF THE CASE

The Board Meeting

Small town government boards across every corner of our country serve their citizenry in their function as legislators, administrators, and adjudicators. Their actions and solutions are guided by the diverse citizenry who participate in our democratic process. These actions affect the citizenry personally, and in many cases, impact the community at large. Ms. Barbara Pintok ("Ms. Pintok") is but one active citizen seeking a solution regarding a business permit issue.

Ms. Pintok sought to improve her community through creating a small business and engaging in her local government. As a resident of Hendersonville, Ms. Pintok is also a follower of Wicca, a pagan religion. J.A. at 1. Over the years, Ms. Pintok attended many meetings of the Hendersonville Board of Parks and Recreation (the "Board"). J.A. at 1. At each Board meeting, Ms. Pintok observed that the Board began their meetings with prayer. J.A. at 1. These prayers were all Christian in nature and led solely by Board members. J.A. at 8.

Ms. Pintok wanted to resolve a permit issue she had with a paddleboat company she was forming. J.A. at 1. At the start of the meeting, she heard the Christian themed prayer yet again. J.A. at 1. This reminded her that as a child she was exposed to Christianity, a memory that reminded her of the lack of tolerance many Christians in her community had for outside religions, such as Wicca. J.A. at 1. Due to the prayer, Ms. Pintok, a non-Christian, felt intimidated, as though she was back at the Christian church of her youth. J.A. at 1. The prayer made Ms. Pintok feel like an outsider. J.A. at 1. She also felt humiliated and suffered significant distress as a result. J.A. at 1.

Barbara complained about the prayers to James Lawley ("Mr. Lawley"), the longest-serving member of the Board. J.A. at 1; J.A. at 6. In response, Mr. Lawley said to Ms. Pintok,

"This is a Christian Country, get over it." J.A. at 1. In the end, the Board dismissed Ms. Pintok's complaint as frivolous. J.A. at 6.

When Ms. Pintok stood up and spoke about her permit issue, she was unable to enunciate her words properly, because she was distraught and nervous from the Board's prayer. J.A. at 1. As a result, Ms. Pintok suffered from a nervous spell and lost her ability to effectively engage with her local government. J.A. at 1.

The Board Members

The local government in Hendersonville, similar to those across the country, hear and address local concerns from its citizenry. They meet regularly and all citizens are required to seek their approval for community projects, including addressing permit issues, as was the case with Ms. Pintok. J.A. at 1.

The Board is comprised of five members who oversee the Parks and Recreation entities of Hendersonville. J.A. at 2-6. All members are Christians. J.A. at 8. At each meeting, the members select a fellow member to deliver the opening prayer. J.A. at 8. Every prayer is Christian themed and rife with religious with religious invocations. J.A. at 9.

In 2009, Wyatt J. Kock ("Mr. Kock") became the Chairman of the Board and began leading the public prayers. J.A. at 2. Mr. Kock acknowledged that the monthly prayers began before he started serving. J.A. at 2. He contends that the prayers are used to solemnize the meetings and not to harass anyone about their religious practice. J.A. at 2. Mr. Kock stated that the Board represents all citizens from Hendersonville. J.A. at 2.

Board member Alvania Lee ("Ms. Lee"), who started serving in 2013, also opened the meeting with a Christian themed prayer. J.A. at 3. Ms. Lee is a Methodist Christian and she led Board meeting prayers in accordance with her religious faith. J.A. at 3. Ms. Lee stated that her

prayers never intended to coerce anyone either directly or subtly. J.A. at 3. She contends that the Board prayers are short and do not constitute any form of religious worship. J.A. at 3.

Likewise, John Riley ("Mr. Riley"), a Board member since 2011, proudly professes his Catholic Christian faith. J.A. at 4. Mr. Riley acknowledged that each meeting is opened with a prayer, but that prayer is not a religious exercise. J.A. at 4. Mr. Riley claims he would not engage in religious coercion. J.A. at 4.

The youngest serving member of the Board, Monique Johnson ("Ms. Johnson"), acknowledges the Board regularly leads the public in prayer. J.A. at 5. Since Ms. Johnson was elected in 2017, she noted that all prayers were Christian themed. J.A. at 5. She also contends that the prayers are intended to solemnize each meeting, and not to coerce anyone to adopt her religious beliefs. J.A. at 5.

Finally, Mr. Lawley, the longest-serving member of the Board since 2005, also acknowledged the regular prayer practice at each meeting. J.A. at 6. He claimed the prayers never intended to coerce religious conformity. J.A. at 6. Mr. Lawley characterized the prayers similar to reciting the Pledge of Allegiance. J.A. at 6.

The Suit to Enjoin

In 2017, Ms. Pintok decided to challenge the Board's regular Christian prayer practice to prevent others from experiencing the humiliation she experienced at the meeting. So, on September 15, 2017, she brought suit against the Hendersonville Parks and Recreation Board. J.A. at 7. She sought declaratory and injunctive relief, as well as a preliminary injunction against the Board's use of exclusively Christian themed prayers at their meeting. J.A. at 10. While the prayers contained references to a Christian deity, along with other religious phrases throughout its content, the Board continued to allege that their prayers were only used to solemnize the

meetings and not for proselytizing. J.A at. 10. As a result, both parties filed cross-motions for summary judgment.

The District Court denied Ms. Pintok's motion for summary judgment and granted the Board's motion instead. J.A. at 15. The court found no impermissible practice by the Board, and instead, credited the Board's testimony that their intent was not to coerce. J.A. at 15.

Ms. Pintok appealed to the Court of Appeals for the Thirteenth Circuit. J.A. at 16. On December 5, 2017, the case was argued, and on January 4, 2018, a decision was issued. J.A. at 16. The Court of Appeals reversed the Circuit Court's decision and held that the Board's practice was unconstitutional as it endorsed Christianity and placed coercive pressures on religious minorities. J.A. at 24.

The Board petitioned for writ of certiorari to the Supreme Court of the United States. J.A. at 26.

SUMMARY OF THE ARGUMENT

The Establishment Clause creates a separation between church and state through prohibiting the governmental establishment of religion. In *Marsh v. Chambers* and *Town of Greece v. Galloway,* this Court found that legislative prayer does not violate the Establishment Clause. However, neither *Marsh* nor *Galloway* addressed the act of legislator-led prayer, an act that wholly dissolves the separation between church and state through allowing a government agent, sitting in a position of authority, to initiate, prescribe, and lead their political constituents in prayer. Additionally, the Supreme Court ("this Court") traditionally considers several factors when assessing the constitutionality of law or policy under the Establishment Clause, including whether or not the law or policy (1) has a secular purpose, (2) has the primary effect of endorsing religion, (3) fosters excessive entanglement with religion, or (4) places coercive pressures on non-adherents to support or participate in religion. This Court should find that legislator-led prayer violates the Establishment Clause, because (I) it does not comport with the history and tradition of *Marsh* and *Galloway* and (II) its primary purpose is the advancement of religion and it places coercive pressures on non-adherents to support and participate in religion.

This case highlights the problematic nature of legislator-led prayer. When a legislator leads their political constituents in prayer, in accordance with their personal beliefs, the prayer dissolves the separation of church and State, because the legislator is acting as both church and State. This is uniquely problematic given the exclusivity and authoritative nature of legislator-led prayer. Here, Ms. Pintok attended a public meeting of the Hendersonville Parks and Recreation Board (the "Board") in hopes of securing a permit for her small business. Unfortunately, Ms. Pintok found herself, along with her community members, a captive audience to the Board's prayer. The Board's legislator-led prayer was unnerving to Ms. Pintok who suffered from a

nervous spell after hearing her elected officials utter zealous religious proclamations, condemnations, and invocations of the Christian deity. Ms. Pintok, a Wiccan, was intimidated by the Board's Christian prayer and feared she would be treated as an outsider; a fear confirmed when the longest-standing member of the Board dismissed her concerns as frivolous and told her "This is a Christian country, get over it."

The Board's legislator-led prayer is done with the religious purpose of endorsing Christianity and it imposes coercive pressures on non-adherents, like Ms. Pintok, to engage in and support religion. While the Board has asserts their prayers help solemnize public business, this secular purpose is merely a façade used to veil the true religious purpose behind the legislator-led prayer. The Board, all of whom are Christians, focus the majority of their prayers on making Christian proclamations, invocations, and condemnations to endorse their personal faith. This endorsement of religion is apparent to a reasonable observer, such as Ms. Pintok. Likewise, the Board's prayer policy places coercive pressures on members of religious minorities, like Ms. Pintok, to either partake in the legislator-led prayer or risk condemnation by their elected officials and community.

Due to its uniquely problematic nature, this Court should find that legislator-led prayer violates the Establishment Clause, because (I) it does not comport with the history and tradition of *Marsh* and *Galloway*, and (II) its primary purpose is to advance religion and place coercive pressures on non-adherents to support and participate in religion.

ARGUMENT

The Establishment Clause of the United State's Constitution states that "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I. This constitutional prohibition on the establishment of religion functionally erects "a wall of separation between Church and State." *See* Letter from Thomas Jefferson to Danbury Baptists (Jan. 1, 1802) (on file with the Library of Congress). Creating a strong separation between church and state was deliberate on the part of this nation's forefathers, many of whom suffered religious persecution. *School Dist. of Abington Tp. v. Schempp,* 374 U.S. 203 (1963). As Justice Clark articulated over half a century ago:

> Nothing but the most telling of personal experiences in religious persecution suffered by our forebears, could have planted our belief in liberty of religious opinion any more deeply in our heritage...This freedom to worship was indispensable in a country whose people came from the four quarters of the earth and brought with them a diversity of religious opinion.

Id. at 214. Even today, the United States' religious landscape reflects a diverse citizenry with a myriad of religious and non-religious affiliations.[1] Thus, judicial fortification of the Establishment Clause remains vital to the protection of this nation's enduring religious melting pot.

This Court should thwart any attempts to tear down the wall between church and state, such as legislator-led prayer. In accordance with the Constitution, this Court should affirm the Thirteenth Circuit's holding and find that the Board's legislator-led prayer (I) does not fit within the history and tradition of *Marsh v. Chambers* and *Town of Greece v.*

[1] In a 2016 study entitled America's Changing Religious Identity, the Public Religion Research Institute found that Americans affiliate themselves with a plethora of religious groups, including Protestant, Catholic, Mormon, Orthodox Christian, Jehovah's Witness, Judaism, Islam, Buddhism, Hindu, and other unaffiliated or non-religious groups. The United States' religious landscape reflects a diverse citizenry who exemplify a myriad of religious and non-religious associations. *See* Daniel Cox and Robert P. Jones, *America's Changing Religious Identity*: *Findings from the 2016 American Values Atlas*, Public Religion Research Institute (PRRI), Sept. 6, 2017, at 10.

Galloway, where the act is State-initiated, led, and prescribed by legislators sitting in a position of authority, and (II) violates the Establishment Clause, where it principally serves the religious purpose of endorsing Christianity and places coercive pressures on religious minorities.

I. BOARD MEMBER-LED PRAYERS DOES NOT FIT WITHIN HISTORY AND TRADITION, BECAUSE THE ACT IS INHERENTLY STATE-INITIATED AND PRESCRIBED WHICH PROSELYTIZES, ADVANCES, AND DISPARAGES RELIGION DUE TO ITS EXCLUSIVE AND AUTHORITATIVE NATURE.

This Court should affirm the Thirteenth Circuit and hold the Board's policy of beginning each public meeting with a legislator-led prayer as unconstitutional. The First and Fourteenth Amendments forbid the government from enacting laws "respecting an establishment of religion." U.S. CONST. amend. I; *see Marsh v. Chambers*, 463 U.S. 783, 790-91 (1983). The prohibition extends to various practices that create or attempt to create, a national religion or preference of one religion, including legislative prayers, financial support, special accommodations, or the role of religion in public schools. *See McCreary County v. ACLU*, 545 U.S. 844, 876 (2005) (holding that the display of the Ten Commandments in public schools and courthouses violated the Establishment Clause); *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 316 (2000) (holding that a public school district's policy permitting student-led, student-initiated prayer at football games violated the Establishment Clause); *See Lee v. Weisman*, 505 U.S. 577, 629 (1992) (holding that a Rhode Island public school bringing in a rabbi to offer prayers at a graduation ceremony violated the Establishment Clause); *See County of Allegheny v. ACLU*, 492 U.S. 573, 598-602 (1992) (holding that the display of a nativity scene on public property was unconstitutional).

Furthermore, this Court has long maintained that "the separation [between church and state] must be complete and unequivocal." *Zorach v. Clauson*, 343 U.S. 306, 312 (1952). There is no exception to this rule; "the prohibition [from preferring a religion] is absolute." *Id.*

This Court also continually maintains a carefully balanced approach in its assessment of practices involving religion and government. *See Lund v. Rowan Cty., N.C.*, 863 F.3d 268, 278 (4th Cir. 2017). Within the context of symbolic support for religion, specifically for legislative prayers, this Court established the constitutionality of such practice in *Marsh* on grounds that it is generally "deeply embedded in the history and tradition of this country." 463 U.S. at 786. *Town of Greece v. Galloway* further affirmed the constitutionality of legislative prayers irrespective of whether these were sectarian or non-sectarian in content, so long as they were delivered by private individuals: paid chaplains, guests, or volunteers. *See Town of Greece v. Galloway*, 572 U.S. 565, 134 S. Ct. 1811, 1824 (2014).

Neither *Marsh* nor *Galloway* addressed the legal significance of legislator-led prayers. *See Lund*, 863 F.3d at 277. However, in both cases, this Court warned about the dangers of government proselytizing, advancing, or disparaging a religion. *See Marsh*, 463 U.S. at 74; *see also Lund*, 863 F.3d at 277. Any attempt to further any of these dangers, this Court noted, breaches the constitutionality of legislative prayers, because contrary to our history and tradition, the act endorses or attempts to endorse a religion. *Id.*

Thus, the practice of legislator-led prayers breaches the constitutional walls of the Establishment Clause, because it proselytizes, advances, and disparages religion when it erases the line between religion and government, and imposes discriminatory practices in the delivery of legislative prayers. Put simply, prayers led by government officials create a government-

sponsored religious act. Accordingly, this Court should find legislator-led prayers violate the Constitution.

A. A legislator acting as prayer-giver is constitutionally significant because the act inherently becomes state initiated and prescribed.

This Court should find that legislator-led prayer unconstitutionally places the government in the business of prescribing prayers. It is a well-established principle that government is not in the business of religion, much less establishing or preferring a religion. *See Galloway*, 134 S. Ct. at 1822. *See also Lee v. Weisman*, 505 U.S. 577, 588 (1992) (quoting *Engel v. Vitale*, 370 U.S. 421, 425 (1962). In fact, this Court in *Galloway* reiterated that "[o]ur Government is prohibited from prescribing prayers to be recited in our public institutions in order to promote a preferred system of belief or code of moral behavior." *Id*. Thus, the difference between "legislator-led" prayer and "legislator-authorized" prayer, as in *Marsh* and *Galloway*, is constitutionally significant. The former places the government in the business of prescribing prayers, whereas the latter does not. *Contra Bormuth v. County. of Jackson*, 870 F. 3d 494, 512 (6th Cir. 2017).

The constitutional significance of legislator-led prayer is a case of first impression. In *Marsh*, the only significant inquiry addressed was whether legislative prayers led by a paid chaplain was constitutional. *Marsh*, 463 U.S. at 784. In *Galloway*, the inquiry was over the content of prayer and whether other community members, such as invited guests and volunteers were allowed to recite the invocation. *Galloway*, 134 S. Ct. at 1815; *See also Lund*, 863 F. 3d at 281. Here, the inquiry is an entirely different one: whether legislators are allowed to initiate and prescribe prayer mainly for one religion. J.A. at 26. Thus, neither *Marsh* nor *Galloway* control here. Those cases only considered prayer delivered by private individuals where the risk for the practice becoming State-sponsored was deemed a "mere shadow." *Marsh*, 463 U.S. 783 at 795,

(quoting *Sch. Dist. Of Abington Twp. v. Schempp*, 374 U.S. 203, 308 (1963)) (Goldberg, J., concurring).

The legal significance between legislator-led prayer and private citizen-led prayer produces a "real threat" of "constitutional adjudication" because of the distinction between representatives and constituents. *Id*. It is a well-founded principle that legislators as agents of the government do not speak for themselves as individuals, but instead speak on behalf of their constituents. *See Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 125-26 (2011). In *Carrigan* this Court noted that "[t]he legislative power committed is not personal to the legislator but belongs to the people; the legislator has no personal right to it." Thus, "[t]he procedures for [voicing] in legislative assemblies . . . pertain to legislators not as individuals but as political representatives executing the legislative process." *Id*. (quoting *Coleman v. Miller*, 307 U.S. 433, 469-70 (1939)). *See also Santa Fe Indep. Sch. Dist. V. Doe*, 530 U.S. 290, 302 (2000) (reiterating the crucial distinction between "government speech endorsing religion" forbidden by the Establishment Clause and private speech endorsing religion protected by the Free Speech and Free Exercise Clauses). Thus, when a legislator leads a prayer in his official capacity, it is no longer a personal religious matter, but is now government business.

Accordingly, precedent shows that chaplains are paid to lead a prayer, guests are invited to recite a prayer, and even volunteers are encouraged to share a prayer. *See Galloway*, 134 S. Ct. at 1824. However, legislators are elected to legislate, administrate, or adjudicate, but not to lead prayers, because it inherently converts prayers into an element of government business. *See Lund*, 863 F. 3d at 281. Precisely because the prayer is initiated and prescribed by the government, the act becomes "'elbow-deep' in the activities banned by the Establishment Clause." *Id*. Thus, the identity of prayer-givers as legislators is constitutionally significant.

B. Legislator-led prayer proselytizes, advances, and disparages other non-dominant religions because of the exclusivity and authoritative nature of the act.

This Court should find that legislator-led prayers create a government-sponsored religion and run afoul of the history and tradition of legislative prayers. This Court in *Marsh* and *Galloway*, acknowledged that legislative prayer provides significant benefits to the function of government because it allows representatives, and those in attendance, "to reflect upon shared ideals and common ends before [embarking] on the fractious business of governing." *Id*. at 1823. Nevertheless, a cornerstone of American democracy is to "safeguard religious liberty and [ward] off "political division along religious lines." *Id*. at 275 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971)). The Establishment Clause ensures this principle by requiring "government neutrality in matters of religion." *Lund*, 863 F.3d at 275 (quoting *Gillette v. United States*, 401 U.S. 437, 449 (1971)).

In *Galloway*, this Court acknowledged that legislators, as public servants, remain the "principal audience" of legislative prayers, but not the actors themselves. 134 S. Ct. at 1825. Legislative prayers benefit and bless elected leaders, a "religious worship for national representatives," because it helps connect them with our history and tradition dating back to the time of the Framers. *Id*. At 1825-26, (quoting *Atheists of Fla. Inc. v. Lakeland*, 713 F. 3d 577, 583 (11th Cir. 2013)); Madison's Detached Memoranda 558. Nevertheless, as Justice Joseph Story remarked almost 200 years ago: "[t]he real object of the [First] Amendment was . . . to prevent any national ecclesiastical establishment, which should give to an[sic] hierarchy the exclusive patronage of the national government. *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984) (quoting, 3 J. Story, Commentaries on the Constitution of the United States 728 (1833)). Thus, defraying from this neutral role presents the government with "an opportunity to proselytize or force truant constituents in the pews." *Galloway*, 134 S. Ct. at 1825.

In the present case, the Board member led prayer broke away from the principles of neutrality and inclusivity advanced by *Marsh* and *Galloway*. In *Marsh*, the legislative prayers were conducted by paid chaplains, and in *Galloway*, the prayer was led by community members and invited guests. *See Lund*, 863 F. 3d at 281. Here, only Board members are allowed to lead the prayers. J.A. at 8. As a result, the government became too involved in religious matters, something this Court warned against in *Galloway*. In effect, the Board's exclusive control of the prayers promoted a preferred faith: Christianity. *See Galloway*, 134 S. Ct. at 1822.

Similarly, the exclusivity over prayers gives credence to one preferred religion. In *Marsh* and *Galloway*, "ministers of many creeds" were invited to lead the invocation. *See Id*. At 1820-21. This practice diversified the number of religious representations at the legislative sessions. *Id*. Here, all members of the Board, albeit from different sects, are Christians. J.A. at 8. Essentially, because only Board members are allowed to lead the prayers, all other religious minority groups are automatically excluded.

Furthermore, the exclusivity creates religious homogeny on the Board and the only entrance to diversify religious representations is through the election of a new member. Contrary to the principle of harmony advanced by *Galloway*, religious diversity dependent on election outcomes risks creating "competing religious factions" and moves one step closer to a "religious litmus test for public office." *Lund*, 863 F. 3d at 282; *see Galloway*, 134 S. Ct. at 1818.

Moreover, the exclusivity held by the Board increases political divisions along religious lines; something the Establishment Clause seeks to prevent. *See Lund*, 863 F. 3d at 282 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971)). When the Respondent, Ms. Pintok, complained about the prayers and informed the Board about how it made her feel, the Board dismissed her claim as "frivolous." J.A. at 6. One of the members, Mr. Lawley, told her "This is a Christian

country, just get over it." J.A. at 1. Ms. Pintok was distraught and nervous while she petitioned for her permit. *Id*. As a result, Ms. Pintok felt like an outsider, humiliated, and could not enunciate her request to the Board knowing fully well that she was speaking to an all Christian Board. *Id*. The exclusivity of the Board, along with its religious homogeny, created a clear distinction along religious lines, which alienated non-Christian members of the community, like Ms. Pintok. This interfered with her political effectiveness. Such division along religious lines is antithetical to the principles of neutrality and inclusivity advanced by both *Marsh* and *Galloway*. *See Galloway*, 134 S. Ct. at 1823; *see also Lund*, 863 F. 3d at 275 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984)).

When *Marsh* "carv[ed] out an exception" to the Establishment Clause jurisprudence, it did so while adhering to the history and tradition of legislative prayers where "no faith was excluded by law, nor any favored." *Galloway*, 134 S. Ct. at 1819. *Marsh* and *Galloway* acknowledged that legislative prayers are compatible with "principles of disestablishment and religious freedom" because of the historical tradition of its welcoming nature. *See Id*. at 1820-21. *Galloway* further added that so long as "the [government] maintains a policy of nondiscrimination," the Constitution does not require extra efforts to make its prayer practice compatible with the Establishment Clause. *See Id*. at 1824.

Yet here, the Board's prayer practice religiously discriminates against non-Christians. *See Lund*, 863 F. 3d at 283. All members of the Board are Christians. J.A. at 8. Some are deeply proud of their faith, others admittedly referenced their specific religious faith in their prayers. J.A. at 3; J.A. at 4. Also, all prayers exclusively maintained Christian themes. J.A. at 9. At times, some of the prayers explicitly promoted Christianity by using words such as "book of Isaiah" and "His son Jesus Christ." J.A. at 9. As a result, non-Christian faiths are systematically

excluded from the prayers, because only Christian Board members lead prayers. J.A. at 8. *Marsh* and *Galloway* considered these factors over time likely to violate the Establishment Clause. *Galloway*, 134 S. Ct. at 1824. Even more, the systematic exclusion of all other religions provides a greater pattern of prayers that betray a permissible government purpose. *Id*.

Likewise and over time, the Board member-led prayers linked the Board with one single faith. R. at 6. When all the community hears from their elected officials are Christian themed prayers, "that faith comes to be perceived as the one true faith, not merely of individual prayer-givers, but of government itself." *Lund*, 863 F. 3d at 284. This Transforms "One Nation Under God" to one government under God. 4 U.S. Code § 4. Since 2005, the Board always begins with a short prayer. J.A. at 6. All Board members acknowledged that the prayers are always Christian themed. J.A. at 8. Inevitably, attendees came to expect Christian themed prayers at all meetings and concluded, as did Ms. Pintok here, that the Board had aligned itself with one faith only. *See Lund, 863 F.3d at 284*.

Finally, the authoritative nature of the Board-led prayer places the people against its government and causes serious harm to both. *See Id*. at 286. When Ms. Pintok's complaint was dismissed as nothing but "frivolous," she felt like a second-class citizen forced to return to a religious belief she abandoned long ago. J.A. at 1. Even more, because of her many experiences with the Board's Christian-centric practice, Ms. Pintok became distrusting of the Board's impartiality to treat her concerns with the seriousness it deserved. J.A. at 1. This Court cautioned against these two symptoms: one affecting the people and other affecting the government. First, Ms. Pintok's freedom to worship as she pleased was put in danger by the Board when "[it] placed its official stamp of approval upon one particular kind of prayer". *See Lund*, 863 F.3d at 286 (quoting *Engel*, 370 U.S. at 429). The second danger as showed here undermined "the

democratic legitimacy of [the Board's] actions." *See Lund*, 863 F.3d at 286 (quoting *Engel*, 370 U.S. at 431).

Accordingly, the practice of legislator-led prayer is constitutionally significant because the act is inherently state initiated and prescribed. Moreover, such act proselytizes, advances, and disparages other religions due to the authoritative and exclusive nature of the Board members. Thus, this Court should hold that legislator-led prayer does not fit within the history and tradition of legislative prayers.

II. THE BOARD'S POLICY OF BEGINNING PUBLIC MEETINGS WITH LEGISLATOR-LED PRAYER VIOLATES THE ESTABLISHMENT CLAUSE, BECAUSE IT PRINCIPALLY SERVES A RELIGIOUS PURPOSE AND PLACES COERCIVE PRESSURES ON RELIGIOUS MINORITIES.

This Court should affirm the Thirteenth Circuit's decision, because the Board's prayer violates the Establishment Clause, as it serves a religious purpose, it endorses Christianity, and it applies coercive pressures on religious minorities. "The Establishment Clause prohibits [the] government from making adherence to a religion relevant in any way to a person's standing in the political community." *Lynch v. Donnelly,* 465 U.S. 668, 687 (1984) (O'Connor, J., concurring). Over the years, this Court consistently maintained a separation of Church and State. To this end, this Court developed multiple ways of analyzing the purpose and effects of government law and policy within the context of the Establishment Clause. This Court typically applies one or more of three main tests in an effort to fortify the barrier between Church and State: (1) the *Lemon* Test, (2) the Endorsement Test, or (3) the Coercion Test. *See Lemon v. Kurtzman,* 403 U.S. 602 (1971), *Lynch v. Donnelly,* 465 U.S. 668 (1984), *County of Allegheny v. ACLU Greater Pittsburgh Chapter,* 492 U.S. 573 (1989). All three tests are relevant and applicable in this case.

To begin, the touchstone decision in *Lemon v. Kurtzman* established the longstanding *Lemon* Test, which provided clarity to the secular role of government under the Establishment Clause. *Lemon* recognized that a statute or policy must (1) have a secular legislative purpose, (2) its principal or primary effect must be one that neither advances nor inhibits religion, and (3) it must not foster "an excessive government entanglement with religion." *Lemon v. Kurtzman,*403 U.S. 602, 622 (1971). The three-pronged *Lemon* Test is sequential and courts do not have to look into the second or third prongs of the *Lemon* Test if the policy fails the first prong of secular purpose. *Wallace v. Jaffree,* 472 U.S. 38 (1985). Thus, if the court finds that a questionable government policy lacks a secular purpose, then the court does not have to consider the principal effect of the policy, rather, the lack of secular purpose renders the policy unconstitutional.

Later, this Court refined the second prong of the *Lemon* Test to include what is now known as the Endorsement Test in an effort to recognize the alienation that government endorsement of a religion has on a diverse political community. *See Lynch v. Donnelly*, 465 U.S. 668 (1984) (O'Connor, J., concurring). Under the Endorsement Test, a government policy or law is unconstitutional if a reasonable observer would believe that the government was endorsing one religion over another. *Id.* Thus, this standard applies in cases where, even if a secular purpose exists, the primary effect of the government policy results in the endorsement of a singular religion, which renders the policy unconstitutional.

In addition to the *Lemon* Test and Endorsement Test, this Court developed the Coercion Test as a less stringent alternative to analyzing Establishment Clause issues. *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989). The Coercion Test was premised on two limiting principles: (1) the "government may not coerce anyone to support or participate in any religion or its exercise," and (2) "it may not, in the guise of avoiding hostility or callous

indifference, give direct benefits to religion." *Id.* at 659. This standard extends beyond "direct coercion in the classic sense" to include a subtler form of coercion: psychological coercion. *Lee v. Weisman,* 505 U.S. 577, 661 (1992). Thus, the Coercion Test renders a government policy unconstitutional when it either directly or indirectly places coercive pressures on the public to support or participate in religion.

Here, the Board's practice of beginning public meetings with a legislator-led prayer violates the Establishment Clause, because it serves a religious purpose, it endorses Christianity, and it applies coercive pressures on religious minorities.

A. The Board's prayer violates the Establishment Clause, because the secular purpose of solemnizing public business is mere pretext where the Board's prayer principally serves a religious purpose.

"A purpose to favor one faith over another, or adherence to religion generally, clashes with the understanding . . . that liberty and social stability demand a . . . tolerance that respects the religious views of all citizens." *McCreary Cty. v. ACLU of Ky.,* 545 U.S. 844 (2005), (citing *Zelman v. Simmons–Harris,* 536 U.S. 639, 718 (2002)). Under the first prong of the *Lemon* Test, the Board's legislator-led prayer violates the Establishment Clause, because the secular purpose of the prayer offered by the Board is a mere pretext and the Board's policy of opening each board meeting with prayer is a stealthy effort to promote one religion over another.

In *Lemon*, this Court considered whether state statutes that provided reimbursement to private sectarian schools for teacher salaries, textbooks, and other instructional materials violated the Establishment Clause. 403 U.S. 602 (1971). This Court held that state statutes violate the Establishment Clause when the statute or policy: (1) lacks a secular purpose, (2) has the principal or primary effect of either advancing or inhibiting religion, or (3) fosters an excessive entanglement with religion. *Id.* In *Lemon*, This Court struck down the state statutes as

unconstitutional, because they fostered excessive entanglement with religion by providing direct public funding to sectarian schools. *Id.*

In analyzing the first prong of the *Lemon* Test, this Court should not accept the Board's purported secular purpose on its face, instead, this Court should consider whether or not the secular purpose is genuine and "not a sham." *McCreary Cty. v. ACLU of Ky.,* 545 U.S. 844, 864 (2005). Additionally, the secular purpose cannot be secondary to the religious purpose of the government action. *Id.*, *see*, *e.g., Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290, 308 (2000). In evaluating whether or not the secular purpose is genuine or mere pretext, this Court should consider the context and history behind the government action, and whether an objective observer reasonably believes that the government is endorsing religion. *McCreary County,* 545 U.S. 844. For example, in *McCreary*, this Court found that displaying framed copies of the Ten Commandments in a courthouse was unconstitutional, even though the government asserted the display was put up for the secular purpose of educating the public on the foundation of American law and government. *Id.* After reviewing the record, both history and context indicated that the purpose of the display was, in fact, the endorsement of Judeo-Christian religion. *Id.*, *See also Engel v. Vitale,* 370 U.S. 421 (1962) (This Court found that imposing a government composed prayer in schools for the promotion of morals is unconstitutional), *Wallace v. Jaffree,* 472 U.S. 38 (1985) (This Court found that requiring a moment of silence "for meditation and prayer" in schools was unconstitutional).

Here, the Board's policy of opening meetings with legislator-led prayer lacks a genuine secular purpose. *Lemon v. Kurtzman,* 403 U.S. 602. Although the Board claims that the prayer serves the purpose of solemnizing public business, in fact, this claim of a secular purpose is a mere façade used to veil the pious motivations behind the Board's religious exercise. Moreover,

the secular purpose is, at best, secondary to the religious purpose driving the Board's prayer policy.

The Board is comprised of five members, all of whom profess their adherence to the Christian religion. J.A. at 17. Each member of the Board led prayers at the monthly meeting, and these prayers often included references to the Christian deity. J.A. at 18. Some of the prayers offered include recitations of specific Biblical verses, and others are full of explicit religious references and invocations. J.A. at 18-19. The prayers include zealous phrases, such as "Almighty God...we need your spirit watching over us" and "We must strive to conduct our business in a way consistent with the careful hand of the Father and his son Jesus Christ". *Id.* It is also worth noting that at least one prayer offered by a Board member commanded the public to participate in the exercise of religion by telling the public to "bow your heads." J.A. at 19.

As aforementioned, the Board claims their opening prayer serves a secular purpose of solemnizing public business, however, upon further review of the record, it becomes clear that the secular purpose is a mere pretext given the striking history and context surrounding the Board's prayer practice. This is especially true in light of the comment made to Ms. Pintok by the longest-serving member of the Board. When Ms. Pintok brought a complaint against the prayer to the Board, Mr. Lawley sniped back that "This is a Christian country, get over it" and told Ms. Pintok that her complaint was frivolous. J.A. at 1, 6.

Given the facts in this case, this Court should not simply accept the Board's assertion of a secular purpose on its face. Instead, this Court should consider the context in light of the predominantly Christian composition of the Board, the proselytizing nature of its prayers, and the pro-Christian comments made by its member to Ms. Pintok in defense of the prayer practice. In doing so, this Court should find that the Board's purported secular purpose is a pretext and the

legislator-led prayer principally serves the religious purpose of promoting Christianity. *See Engel v. Vitale,* 370 U.S. 421 (1962) (Court noted that "it is no part of the business of government to compose official prayer for any group of American people"). Absent a genuine secular purpose, the Board's legislator-led prayer fails the first prong of the *Lemon* Test and violates the Establishment Clause. *Lemon v. Kurtzman,* 403 U.S. 602.

Even if the Board's prayer serves the secular purpose of solemnizing public business, this secular purpose is secondary to the Board's religious purpose of endorsing Christianity through publicly mandated prayer. This is evidenced by the fact that the Board's prayers are composed primarily of religious invocations and minimal, if any, time is spent expressing concern for conducting business. J.A. at 9. As aforementioned, the secular purpose asserted cannot be secondary to the religious purpose, thus, the Board's secular purpose is insufficient and their prayer violates the Establishment Clause. *McCreary Cty. v. ACLU of Ky.,* 545 U.S. 844, 864 (2005), *Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290, 308 (2000).

B. Even if the prayer helps solemnize public business, the Board's prayer still violates the Establishment Clause, because the primaryLffect of the Board's prayer is the endorsement of the Christian religion.

Assuming that the Board's prayer withstands the first prong of the *Lemon* Test, the Board's prayer still violates the Establishment Clause, because the policy of opening every public meeting with legislator-led prayer endorses religion. Under the second prong of the *Lemon* Test, a government law or policy is unconstitutional if its principal or primary effect either advances or inhibits religion. *Lemon v. Kurtzman,* 403 U.S. 602 (1971). The primary effect should be analyzed from the objective view of a reasonable person. *See Doe v. Indian River Sch. Dist.,* 653 F.3d 256 (3rd Cir. 2011). The second prong of the *Lemon* Test was later refined by Justice Sandra Day O'Connor in *Lynch v. Donnelly,* to include what is now known as the Endorsement Test. 465 U.S. 668 (1984).

In her well-known concurrence to *Lynch*, Justice O'Connor articulated the Endorsement Test, which considers whether or not a reasonable observer believes a government law or policy endorses one religion over another. *Id.* at 688. The Endorsement Test is aimed at preventing an outsider versus insider mentality among America's community of diverse believers and non-believers. *Id.* As Justice O'Connor articulated, "Endorsement sends a message to nonadherents [sic] 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." *Id. at 688,* (citing *School Dist. of Abington Tp. v. Schempp,* 374 U.S. 203 (1963)). Thus, this Court should consider whether or not a government action has the primary effect of advancing or inhibiting religion and, in doing so, should also consider whether or not a reasonable person would believe the government is endorsing one religion over another.

Here, legislator-led prayer principally advances religion through endorsing Christianity. To a reasonable observer, opening every public meeting with legislator-led prayer fosters an appearance that the government is promoting or favoring Christianity. This is especially true when the prayer is viewed within the context of a public meeting which is conducted by a board compromised solely of devout followers of a single religion: Christianity. J.A. at 18.

However, the homogenous religious composition of the Board and the fact that the prayers are led by individual government officials are not the only factors to consider. A reasonable person, like Ms. Pintok, who comes to a monthly meeting and observes the Board's prayer would surely believe the government is endorsing Christianity when they hear the zealous utterings of religious proclamations, invocations, references to the Christian deity, and Biblical passages contained within the prayers. J.A. 18-19. Moreover, members of the public, such as Ms. Pintok, who are not adherents to Christianity will most certainly be made to feel like outsiders

when they hear explicit proclamations of the Christian religion and are instructed to partake in the religious exercise by bowing their heads in accordance with the prayer. J.A. at 19.

Thus, even if the Board's prayer serves some alleged secular purpose, it still violates the Establishment Clause, because its primary effect is the advancement of religion through the endorsement of Christianity at the expense of religious minorities. The Board's prayer creates a hostile environment of adherents versus non-adherents in direct conflict with the principles of religious freedom set forth in the Establishment Clause. *Lynch v. Donnelly*, 465 U.S. 688 (1984) (citing *School. Dist. of Abington v. Schempp,* 374 U.S. 203 (1963)). A hostile environment which is reinforced by government officials proclaiming, "This is a Christian country, get over it." J.A. at 1.

C. Lastly, the Board's prayer violates the Establishment Clause, because it places coercive pressures on religious minorities.

Establishment Clause jurisprudence often involves an alternative analysis of whether or not a government action places coercive pressures on religious minorities, known as the Coercion Test. *See County of Allegheny v. ACLU Greater Pittsburgh Chapter,* 492 U.S. 573 (1989), *Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290 (2000), *See also Lee v. Weisman, 505 U.S. 577 (1992).* The Coercion Test first emerged several decades ago in Justice Kennedy's dissent to the majority opinion in *Allegheny*. 492 U.S. 573. Justice Kennedy introduced the Coercion Test in his dissent as an alternative way of analyzing Establishment Clause issues in hopes of allowing the government "some latitude in recognizing and accommodating the central role religion plays in our society." *Id.* Justice Kennedy's Coercion Test was premised on two limiting principles: (1) the "government may not coerce anyone to support or participate in any religion or its exercise," and (2) "it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion." *Id.* at 659.

In *Lee v. Weisman*, the Coercion Test was extended beyond "direct coercion in the classic sense" to include psychological coercion. 505 U.S. 577, 661 (1992) (Psychological coercion was found where the government "place[d] objectors in the dilemma of participating" in a benediction prayer over a graduation ceremony). Justice Kennedy noted in *Lee* that "The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." *Id.* Thus, government actions that incorporate subtle or indirect coercive pressures on religious minorities are unconstitutional. *Id.* Likewise, the "government may no more use social pressure to enforce orthodoxy than it may use more direct means," nor can it use subtle coercion to require participation in a religious exercise. *Id.* Thus, a government action violates the Establishment Clause if it either directly or indirectly places coercive pressures on religious minorities. *See Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290 (2000) (Court held that pre-game prayers are coercive because they force the audience to participate in a religious activity).

Here, the Board's legislator-led prayer places indirect coercive pressures on those who do not adhere to Christianity. The Board's action places members of the public, some of whom do not adhere to the Christian religion, in an unnerving position of choosing whether or not to participate in government-prescribed religious exercise. Although this Court rejected the assertion that members of the public were coerced by having to listen to prayer in *Galloway*, here, the facts are distinguishable. 572 U.S. 565 (2014). Unlike *Galloway*, in this case, members of the Board, themselves, lead the public in prayers in accordance with their personal religious convictions. J.A. at 18-19, *contrast Galloway,* 572 U.S. 565 (2014) (Prayer was led by, and reflected the beliefs of, private individuals rather than the government). This distinction is notable and persuasive in this case.

Much like students are at the mercy of their teachers and principals, the people of Hendersonville are at the mercy of the Board, which holds discretionary power over important issues such as public permitting. J.A. at 8. For example, Ms. Pintok depends upon the grant of a permit by the Board to operate her paddleboat business. J.A. at 18. Without the approval of the Board, many members of the public, including Ms. Pintok, will not be able to provide for themselves through the operation of their small businesses. It is in this context that this Court must consider the unique power imbalance and coercive pressures placed on the people of Hendersonville.

When the public is instructed to bow their heads, the Board is using its position of authority to coerce religious minorities to participate in religious exercise. Even more so, the Board is ordering the public to partake in the religious exercise of prayer in accordance with the personal religious convictions of each member, all of whom are devout adherents to Christianity. J.A. at 8. This unique predicament presents this Court with more definitive evidence of coercion than what was seen in *Galloway*.

Additionally, like the students in *Lee*, members of the public are placed under social pressure and fear the condemnation or judgment from their peers, or even worse, the Board, if they object to, walk out on, or refuse to participate in the legislator-led prayer. *Lee v. Weisman,* 505 U.S. 577 (1992). For example, Ms. Pintok was distraught, nervous, and intimidated by the Board's prayer and feared she would be treated as an outsider by Board members and her community. J.A. at 1. The psychological and social coercion of the people of Hendersonville is significant when they are faced with the choice to either participate in their elected officials' religious practices or face the prying eye of Board members that hold their livelihood in the balance. Under these tenuous circumstances, the Board's prayer violates the Establishment

Clause by placing coercive pressures on the public to validate their personal religious beliefs or risk condemnation by the Board members.

CONCLUSION

For the foregoing reasons, Respondent, Ms. Barbara Pintok, respectfully requests that the Honorable Supreme Court of the United States affirm the judgment of the Thirteenth Circuit granting Summary Judgment in favor of Ms. Pintok.

Respectfully submitted.

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