Docket No. 17-1891

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2018

HENDERSONVILLE PARKS and RECREATION BOARD, Petitioners,

v.

BARBARA PINTOK, Respondent.

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

BRIEF FOR PETITIONER

Team 2519
Counsel for Petitioner

QUESTIONS PRESENTED

I. Whether the Board's practice of having members offer prayer before public meetings comports with the history and tradition of legislative prayer authorized by *Marsh v Chambers* and *Town of Greece v Galloway*.

II. Whether the Board's practice of beginning public meetings with prayer supports the secular purpose of solemnizing public business, or whether legislator-led prayer has a clearly religious purpose and places coercive pressures on religious minorities.

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STATEMENT OF JURISDICTION

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

Summary of the Facts

This case arises out of a challenge to the Hendersonville Parks and Recreation Board's ("the Board's") practice of beginning each meeting with a short, solemnizing prayer delivered by one of the members. J.A. at 8. The prayer practice arose to give the board members an opportunity "to solemnize public business and to offer citizens a chance to reflect quietly on matters before the Board." J.A. at 2. The practice is informal, unwritten, and uncodified. J.A. at 2. The prayers are usually short and often ask for assistance from a deity in performing the work of the Board. For example, prayers have included statements such as: "Heavenly Father, we ask for your guidance as we conduct the public's business and serve all people;" and "Lord, help us to make good decisions…. [w]e know that we are tasked with making decisions that impact the lives of members of our community." J.A. at 9. The Petitioner, Barbara Pintok, objected to the prayer practice because she did not appreciate the Judeo-Christian nature of the prayers. J.A. at 6. After what she perceived as an inadequate response from the Board, the Petitioner proceeded to file suit. J.A. at 10.

Summary of the Proceedings

Respondent filed suit in the U.S. District Court for the District of Caldon, "seeking declaratory and injunctive relief, as well as a preliminary injunction against the Board's use of sectarian prayers at its meetings." J.A. at 10. The Board responded to the lawsuit "with affidavits from Board members, emphasizing that the prayers are used to solemnize public business and not for proselytization." J.A. at 10. Both sides filed for summary judgment. J.A. at 10. The District Court rejected the Respondent's request that the case be analyzed under the *Lemon* test, and instead applied the legislative-prayer analysis utilized in *Marsh v. Chambers* and *Town of Greece v.*

Galloway. J.A. at 12. The District Court held that the Board's prayer practice falls comfortably within the historical tradition identified by *Marsh*. J.A. at 13. Further, the "Court credit[ed] the testimony of the Board members who uniformly explained that their intent is not to coerce anyone to agree with their personal religious beliefs" and found that the Plaintiff was not coerced into religious practice by the Board's prayer policy. J.A. at 14-15. The Court therefore granted summary judgment in favor of the Petitioners. J.A. at 15.

Respondent appealed to the Court of Appeals for the Thirteenth Circuit. J.A. at 16. The panel at the Thirteenth Circuit rejected the lower court's use of *Marsh* and *Town of Greece*. J.A. at 17. Concluding that, "[w]hen actual government officials lead the prayers, the government is inextricably intertwined with religion and the potential for coercive pressure heightens on religious minorities," the panel proceeded to analyze the case under the "much-maligned" *Lemon* test. J.A. at 21. The Thirteenth Circuit accepted the Board's proffered secular purpose of lending gravity to the meetings. J.A. at 22. However, the panel went on conclude that "the [Board]'s prayer practice has a primary effect of advancing the Christian religion" and therefore violates the Establishment Clause. J.A. at 22-24. Judge Rodriguez filed a concurring opinion, in which he agreed that summary judgment should be awarded to the Plaintiff. J.A. at 24. However, he argued that "the coercion test provides the proper analysis for the resolution of this case" because the *Lemon* test "has long outlived its utility or even its majoritarian support on the Supreme Court." J.A. at 25. The Board appealed that decision and this Court granted certiorari. J.A. at 26.

Standard of Review

The question of whether a given legislative-prayer practice violates the Establishment Clause is a question of law. *See Bormuth v. Jackson Cty.*, 870 F.3d 494, 503 (6th Cir. 2017) ("review[ing] the district court's grant of summary judgment de novo"). As such, this Court may

therefore review this issue *de novo*. *See Highmark, Inc. v. Allcare Health Mgmt. Sys., Inc.,* 134 S. Ct. 1744, 1748 (2014) ("Traditionally, decisions on 'questions of law' are 'reviewable de novo.'") (quoting *Pierce v. Underwood*, 487 U.S. 552, 558 (1988)).

SUMMARY OF THE ARGUMENT

The Establishment Clause does not prohibit the government from engaging in legislative prayer so long as that prayer comports with historical tradition, does not create undue government entanglement with religion, and does not coerce the public into participating in the prayer. Under this Court's well-established precedent, the prayer practice of the Board's meetings does not violate the Establishment Clause. Therefore, the judgment of the Thirteenth Circuit should be reversed.

Legislative prayer has been a central part of legislative meetings in this land since before the ratification of the Constitution. Practiced at all levels of government, legislative prayer, both chaplain-led and legislator-led, serves a vital role in ensuring the unity and effectiveness of legislative bodies. The Board's informal policy of allowing a member to deliver a short prayer before each meeting falls comfortably within the tradition of legislative prayer in this nation. The fact that the Board chooses to have members deliver the prayer themselves, as opposed to hiring an outside clergy member, does not place the practice outside the bounds of acceptable legislative prayer established by this Court in *Marsh v. Chambers* and *Town of Greece v. Galloway*. Lawmakers have been leading prayers at the local level dating back to before the Founding, the Hendersonville Parks and Recreation Board is merely continuing that honored tradition. As this Court's jurisprudence depicts, legislators have delivered opening invocations at all levels of government. The identity of the prayer-giver, whether a chaplain or a legislator, has never been relevant to the Constitutional analysis.

Rather, courts have instead focused on the preservation of this historical tradition and the possibility of coercion in prayer practices. The proper analysis for determining the constitutionality of prayer practices, which this Court has accepted, evaluates the secular and unifying purposes of the prayers, their coercive effect, and whether or not the prayer practice and regulation thereof leads to impermissible government entanglement with religion. Because the Board's practice of legislator-led prayer has an acceptable secular purpose, fails to amount to either endorsement or coercion, and does not create excessive entanglement with religion, it does not violate the Establishment Clause. The Thirteen Circuit erred in awarding summary judgment to the Respondent. We ask this Court to reverse the judgment and direct the District Court to award summary judgment to the Petitioner.

ARGUMENT

"[L]egislative prayer lends gravity to public business, reminds lawmakers to transcend petty differences in pursuit of a higher purpose, and expresses a common aspiration to a just and peaceful society." *Town of Greece v. Galloway*, 134 S.Ct. 1811, 1818 (2014). In *Town of Greece*, this Court reaffirmed the central holding from *Marsh v. Chambers*, that legislative prayer "is deeply embedded in the history and tradition of this country," *Marsh v. Chambers*, 463 U.S. 783, 786 (1983), and therefore not "an 'establishment' of religion or a step towards establishment." *Id*. at 792. This Court also held in *Town of Greece* that legislative prayer that does not coerce the public into participation, as is the case here, will not run afoul of the Establishment Clause. 134 S.Ct. at 1824-27. The First Amendment commands that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. The Board's prayer practice does not violate that command.

I. THIS COURT SHOULD REVERSE THE THIRTEENTH CIRCUIT BELOW BECAUSE LAWMAKER-LED PRAYER COMPORTS WITH THE HISTORICAL TRADITION IDENTIFIED IN *MARSH* AND *TOWN OF GREECE*.

The Board's practice of opening meetings with a solemnizing prayer led by a board member comports with that historical practice identified in *Marsh*. The judgment of the Thirteenth Circuit Court of Appeals below—holding that the Board's practice violates the Establishment Clause—must therefore be reversed because its analysis focused on an irrelevant consideration: the identity of the prayer-giver. This conclusion is compelled by three primary reasons. First, legislator-led prayer comports with the historical tradition identified in *Marsh* and *Town of Greece*. Second, all legislative prayer is government speech—individual legislators delivering the invocation does not alter the analysis. Lastly, the Thirteenth Circuit erred in relying on the Fourth Circuit's decision in *Lund v. Rowan Cty.*, 863 F.3d 268 (4th Cir. 2017), which dealt with a factually distinct scenario, instead of the Sixth Circuit's decision in *Jackson v. Bormuth Cty.*, 870 F.3d 494 (6th Cir. 2017), which addressed a more similar set of facts. The strong and enduring practice of lawmaker-led prayer at the local level clearly falls within the "unique…and unbroken history" of legislative prayer identified by this Court in *Marsh* and reaffirmed in *Town of Greece*. *Marsh*, 463 U.S. at 791; *Town of Greece*, 134 S.Ct. at 1819. This Court should protect that tradition and correct the Thirteenth Circuit's error.

A. Legislator-led prayer comports with the historical tradition upheld in *Marsh* and *Town of Greece*.

In *Marsh*, this Court held that "[i]n light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society," and therefore does not violate the Establishment Clause. 463 U.S. at 792. In *Town of Greece*, this Court further clarified that challenges to legislative-prayer practices "must be evaluated against the backdrop of historical practice." 134

S.Ct. at 1825. *Town of Greece* also set out the process for determining whether a given legislative prayer practices violates the Establishment Clause: the "inquiry…must be to determine whether the prayer practice fits within the tradition long followed in Congress and the state legislatures." *Id.* at 1819.

The Thirteenth Circuit below failed to conduct that inquiry. Had the Thirteenth Circuit examined the history of legislator-led prayer at the local level in this country, they would have found a robust tradition dating back to the Founding. *See Rowan Cty v. Lund*, 138 S.Ct. 2564, 2566 (2018) (Thomas, J., dissenting from denial of certiorari) ("For as long as this country has had legislative prayer, legislators have led it."). In fact, when that examination was performed for legislative-prayer cases in the Fourth and Sixth Circuits, the findings showed that "[a]t the state and local levels, member-led prayer is commonplace, with the practice stretching back to the Founding." Brief for Members of Congress as *Amici Curiae* in Support of Respondents at 8, *Lund v. Rowan Cty.*, 863 F.3d 268 (4th Cir. 2017) (No. 15-1591). The strong historical underpinnings of legislator-led prayer place it firmly within the bounds of the doctrine established by *Marsh* and *Town of Greece*.

Nothing in this Court's precedent governing legislative prayer indicates that the identity of the prayer-giver affects the analysis. As the Sixth Circuit recently held, "neither *Marsh* nor *Town of Greece* restricts *who* may give prayers in order to be consistent with historical practice." *Bormuth,* 870 F.3d at 509 (emphasis in original). The only circuit to have ruled that a practice of legislator-led prayer violated the Establishment Clause—the Fourth Circuit in *Lund*—noted within that opinion that "the Establishment Clause indeed allows lawmakers to deliver invocations in appropriate circumstances." *Lund*, 863 F.3d at 280. At the federal level, Senators have often delivered the opening prayer in the Senate Chamber without objection. *See, e.g.*, 161 Cong. Rec.

S3313 (daily ed. May 23, 2015) (invocation by Oklahoma Senator James Lankford). As this Court has noted, "it would be incongruous to interpret [the Establishment Clause] as imposing more stringent First Amendment limits on the States [and localities] than the draftsmen imposed on the Federal Government." *Marsh*, 463 U.S. at 790-91. The identity of the prayer-giver did not affect this Court's analysis at the federal and state levels. The same should hold true for local legislative prayer. *See Bormuth*, 870 F.3d at 516 (declining to view prayers at local government meetings differently from those at larger legislative sessions because Justice Kagan's dissent raised that distinction in *Town of Greece* but the majority resoundingly rejected it).

The drafters of the Establishment Clause "did not intend to prohibit a just expression of religious devotion by the legislators of the nation, even in their public character as legislators." S.Rep. No. 376, 32d Cong., 2d Sess., 4 (1853). The Thirteenth Circuit below ignored this fact and placed great weight on the identity of the legislator as the prayer-giver in its analysis. Despite the insistence of the Thirteenth Circuit that the lawmakers leading the prayers themselves changes the analysis, that fact of is no Constitutional importance. In addressing legislative prayer, this Court has focused on the historical tradition and coercive nature of the practice, not the identity of the prayer giver. Further, even if legislators leading the prayers themselves is distinct from chaplain-led prayer, legislators have been leading prayers in the country from the Founding up until today, putting it squarely within the historical tradition identified in *Marsh* and *Town of Greece*. *See Bormuth*, 870 F.3d at 510 (noting that the "history of legislators leading prayers is uninterrupted and continues in modern time"). Absent evidence that the Board exploited the prayer practice to proselytize or disparage another faith, the Board's prayer practice falls comfortably within the tradition identified in *Marsh* and *Town of Greece*. The record in this case is devoid of any such evidence.

1. In *Marsh* and *Town of Greece*, this Court feared censorship by the legislature as a body, not individual legislators.

This Court's Establishment Clause doctrine loathes the government acting as a censor. This Court has warned that government officials "scrutinize[ing] the content" of sponsored speech [such as prayers] would "raise[] the specter of governmental censorship." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 844 (1995). Censorship of that kind "would be far more inconsistent with the Establishment Clause's dictates than would governmental provision of secular [invocations] on a religion-blind basis." *Id*. at 845. The Thirteenth Circuit below focused on the fact that the town board members delivered the speeches themselves, arguing that meant the board members had more control over the content than previous legislative prayer cases. J.A. at 21. That distinction is irrelevant to the Constitutional analysis. *Town of Greece* made clear the focus and fear of censorship relates to the governmental entity as a whole, not the individuals that make up its membership. *See* 134 S.Ct. at 1822 ("[t]o hold that invocations must be nonsectarian would force the *legislatures* that sponsor prayers…to act as supervisors and censors of religious speech") (emphasis added). That fear does not apply to legislator-led prayer.

No editing or censorship on the part of the government occurs when an individual legislator, or board member, chooses a prayer that "reflects the values they hold as private citizens." *Town of Greece*, 134 S.Ct. at 1826. The individual board members open meetings by following "[t]he tradition reflected in *Marsh*" and "ask[ing] *their own God* for blessings of peace, justice, and freedom." *Id.* at 1823 (emphasis added). The very purpose of legislature prayer this Court has said is "to accommodate the spiritual needs of *lawmakers* and connect them to a tradition dating to the time of the Framers." *Id.* at 1826 (emphasis added). Legislators themselves delivering a prayer accomplishes that purpose. While the benefits of legislative prayer flow to the lawmakers themselves, the concerns surrounding it all focus on the actions of the governmental entity as a

whole. Therefore, the Thirteenth Circuit should not have viewed the lawmakers delivering the prayers themselves as an unconstitutional form of censorship.

2. Legislator-led prayer is widespread at the local level today.

In addition to the historical evidence that shows a specific prayer practice is permitted, this Court has explained that the practice may also be examined to see if it "has withstood the critical scrutiny of time and political change." *Id.* at 1819. The National Conference of State Legislatures ("NCSL") noted that at that time this Court decided *Marsh*, 1983, all but one of the one-hundred state legislative bodies in the United States opened their sessions with prayer. Brief of the National Conference of State Legislatures as *Amicus Curiae* not Supporting Either Party at 2, *Marsh v. Chambers*, 463 U.S. 783 (1983) (No. 82-23). Of note to this case, the NCSL also stated that the opening prayer at those legislatures "may be given by…chaplains, guest clergymen, *legislators*, and legislative staff members." *Id*. (emphasis added). Turning to the present day, according to an Amicus Brief filed by multiple states in support of this Court granted certiorari and overturning the Fourth Circuit's decision in *Lund*, legislator-led prayer continues in 35 states today, with three of those states allowing only legislator-led prayer. Brief of the State of West Virginia, et al. as *Amci Curiae* in Support of Petitioner at 3, *Lund v. Rowan Cty.*, 138 S.Ct. 2564 (2018) (No. 17-565). These numbers show that legislator-led prayer "has [more than] withstood the critical scrutiny of time and political change"—it has thrived under it. *Town of Greece*, 134 S.Ct. at 1819.

For local deliberative bodies, the option of legislator-led prayer may be the only one available due to economic constraints. Some rural areas may also have trouble recruiting volunteer clergy. Across the country, "hundreds of local deliberative bodies use lawmaker-led prayer." Brief of the State of West Virginia, et al. as *Amci Curiae* in Support of Petitioner at 3, *Lund v. Rowan Cty.*, 138 S.Ct. 2564 (2018) (No. 17-565). Statistics from the Fourth and Sixth Circuits show a

widespread use of legislator-led prayer at the local level. *See* Brief of the State of West Virginia, et al. as *Amci Curiae* in Support of Appellant at 24, *Lund v. Rowan Cty.*, 863 F.3d 268 (4th Cir. 2017) (No. 17-565) ("Of the 276 counties in the Fourth Circuit from which data were available…144 begin their deliberative meetings exclusively with lawmaker-led invocations."); *see also* Brief of the State of Michigan, et al. as *Amci Curiae* in Support of Appellant, 10-12, *Bormuth v. Cty. of Jackson*, 870 F.3d 494 (6th Cir. 2017) (No. 15-1869) (concluding "lawmaker-led prayer is a common occurrence at the local level" and collecting available statistics for states within the Sixth Circuit).

The importance of legislator-led prayer to legislators themselves is highlighted by the fact that some states have passed laws protecting legislator's right to deliver invocations. *See e.g.*, Va. Code Ann. § 15.2-1416.1 (commanding that "expressions by members of the governing body…shall be held consistent with the individual's First Amendment right of freedom of speech"). The Thirteenth Circuit's decision below threatens the longstanding and widespread custom of legislator-led prayer and may leave local deliberative bodies with no means by which to "accommodate the spiritual needs of lawmakers." *Town of Greece*, 134 S.Ct. at 1826. Such a holding creates a world in which "the state and religion [are] aliens to each other—hostile, suspicious, and even unfriendly." *Zorach v. Clauson*, 343 U.S. 306, 312 (1952). This Court cannot allow that perversion of the Establishment Clause to stand.

3. The content of the Board's prayers resembles those from *Marsh* and *Town of Greece*.

When addressing a challenge to the content of a legislative-prayer practice, this Court "requires an inquiry into the prayer opportunity as a whole." *Town of Greece*, 134 S.Ct. at 1824. As an initial matter, the Plaintiff originally sought "declaratory and injunctive relief, as well as a preliminary injunction against the Board's use of *sectarian* prayers at its meetings." J.A. at 10

(emphasis added). As noted above, this Court's precedent "does not mandate ecumenical or nonsectarian prayer." *Fields v. Speaker of the Pa. House of Rep.*, 251 F.Supp. 3d 772, 786 (M.D. Pa. 2017). As the district court below correctly stated: "the Establishment Clause does not create a religion-free zone in society." J.A. at 11. Therefore, the District Court correctly awarded summary judgment to the Board. J.A. at 15.

Additionally, the Board's prayer practice "did not denigrate or mock any religion or threaten any adherents to other religions." J.A. at 13. Many of the prayers preached the exact opposite message, including: "We pray that we can all come together in a spirit of unity despite whatever differences we have." J.A. at 9. And, "Heavenly Father, we ask for your guidance as we conduct the public's business and serve all people—no matter what religion, faith or lack thereof." J.A. at 9. These prayers share "universal themes" with the ones this Court approved in *Town of Greece*, including a call for a "spirit of cooperation among town leaders." 134 S.Ct. at 1824 (internal quotation marks and citations omitted). Accordingly, they do not offend the Establishment Clause.

B. The Circuit Court below erred in applying the *Lemon* test, failing to recognize that all legislative prayer is government speech—individual legislators delivering the invocation does not alter the analysis.

The Thirteenth Circuit below distinguished the current case from *Marsh* and *Town of Greece* because in its view, "[w]hen actual government officials lead the prayers, the government is inextricably intertwined with religion." J.A. at 21. To support their position, the Circuit Court cited to *Lund*, which had held that legislator-led prayer "identifies the government with religion more strongly than ordinary invocations." *Lund*, 863 F.3d at 278. This conclusion utilizes the language and reasoning from *Lemon v. Kurtzman*, and thus holds no weight in the context of legislative prayer. 403 U.S. 602, 613 (1971) ("the statute must not foster an excessive government

entanglement with religion") (internal citations omitted); *see also Town of Greece*, 134 S.Ct. at 1818 (describing *Marsh* as "'carving out an exception' to the Court's Establishment Clause jurisprudence" by analyzing "legislative prayer without subjecting the practice to 'any of the formal tests that have traditionally structured'" the inquiry) (internal citations omitted). The Thirteenth Circuit attempted to explain the use of the *Lemon* test instead of that established in *Town of Greece*. *See* J.A. at 20-21. However, such a decision ignores this Court's direct instructions. In *Lund* itself, the Fourth Circuit noted—despite the fact they were mere mistakenly applying *Lemon*—that "Marsh and Town of Greece provide our doctrinal starting point." *Lund*, 863 F.3d at 276. Neither of this Court's cases addressing legislative prayer utilized the outdated *Lemon* balancing test. The Thirteenth Circuit erred in failing to follow this Court's precedent and failing to recognize that "*Lemon's* endorsement test is inapplicable to legislative prayer cases." *Bormuth*, 870 F.3d at 515.

Further, the contention that legislative prayer led by lawmakers themselves instead of outside chaplains somehow associates the government more strongly with the religious message of the speech is deeply misguided. Legislative prayer, regardless of who delivers the invocation, always constitutes "government speech." *Turner v. City Council*, 534 F.3d 352, 355 (4th Cir. 2008) (O'Connor, J., sitting by designation); *see also Rosenberger,* 515 U.S. at 833. As such, a listener will always associate the message of the legislative prayer with the government entity at issue. *See Pleasant Grove City v. Summum*, 555 U.S. 460, 472 (2009) (holding that privately donated monuments in public parks constituted government speech because "[p]ublic parks are often closely identified in the public mind with the government unit that owns the land" and noting that government speech is "meant to convey and have the effect conveying a government message"). All legislative prayer by definition slightly intertwines religion with the government. This Court

in *Marsh* looked to legislative prayer as "conduct whose ... effect ... harmonize[s] with the tenets of some or all religions." *Marsh,* 463 U.S. at 792 (quoting *McGowan v. Maryland*, 366 U.S. 420, 442 (1961)). This harmonization does not represent "an 'establishment' of religion or a step toward establishment," but "simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh*, 463 U.S. at 792. This Court saw no issue with the fact that legislative prayer may cause the listener to identify religion with the government. Legislative prayer by definition inherently associates religion with the actual government officials, regardless of who delivers the invocation. This Court has found no Establishment clause violation stems from that association. The Circuit Court therefore erred in its analysis.

C. The Thirteenth Circuit below should have looked to the faithful analysis of the Sixth Circuit, not the mistaken reasoning of the Fourth Circuit.

In finding the Board's practice to be unconstitutional, the Thirteenth Circuit cited to *Lund v. Rowan Cty.* for the proposition that "[w]hen actual government officials lead the prayers…the potential for coercive pressure heightens on religious minorities." J.A. at 21 (citing *Lund,* 863 F.3d at 278). This assertion is false. As discussed above, the mere fact that legislators led the prayers themselves does not change the analysis set out in *Town of Greece*. In his opinion, Justice Kennedy in *Town of Greece* stated that the prayers in that case were not unconstitutionally coercive because "[a]lthough board members themselves stood, bowed their heads, or made the sign of the cross during the prayer, they at no point solicited *similar gestures* by the public." 134 S.Ct. at 1826 (emphasis added). The concurrence by Justice Thomas went further. He, and Justice Scalia concurring with him, would find no coercion in the absence of legal force. 134 S.Ct. at 1837 (Thomas, J., concurring in part and in the judgment). Under either analysis, the identity of the prayer-giver remains irrelevant. The mere fact that legislators themselves lead the invocations in Hendersonville does not coerce citizens into participating any more than an outside chaplain

delivering the invocation like in *Town of Greece*. In fact, this Court has previously stated that "prayers by legislators do not insistently call for religious action on the part of citizens." *McCreary Cty. v. ACLU*, 545 U.S. 844, 877 (2005). Instead of following the mistaken analysis of the Fourth Circuit, the court below should have looked to the Sixth Circuit's decision in *Bormuth*, which faithfully performed the inquiry from *Town of Greece*.

1. The Fourth Circuit Court of Appeals decision in *Lund v. Rowan County* failed to faithfully apply this Court's precedent and dealt with a factual distinct set of circumstances.

In *Lund*, the Fourth Circuit held that "lawmaker-led sectarian prayer," which "veered…into overt proselytization" when "attendees were requested to rise and often asked to pray," ran afoul of the Establishment Clause. *Lund*, 863 F.3d at 272. Such a practice "served to identify the government with Christianity and risked conveying to citizens of minority faiths a message of exclusion." *Id*. The facts and reasoning of Lund cannot be applied to this case. Unlike in *Lund*, the record in this case contains no indications of proselytization or attempts to engage citizens in the prayer process. *See* J.A. at 15.

In addition to the facts being distinguishable, the reasoning in *Lund*, copied by the Thirteenth Circuit below, contains key errors. Most importantly, the Fourth Circuit in *Lund* erred by focusing on the sectarian nature of the prayers. *See Lund*, 863 F.3d at 296 (Niemeyer, J., dissenting) (stating that the majority held Rowan County's prayer practice violated the Establishment Clause "essentially because the prayers were sectarian"). This attack by the Fourth Circuit on the use of sectarian prayers flies in the face of this Court's precedent. In *Town of Greece*, this Court quite strongly "reject[ed] the suggestion that legislative prayer must be nonsectarian." *Town of Greece*, 134 S.Ct. at 1823 (majority opinion). The Fourth Circuit unfortunately ignored that rejection.

The *Lund* court also contended that "*Town of Greece* simply does not address the constitutionality of lawmaker-led prayer." 863 F.3d at 277 (majority opinion). While on its face that statement may seem true, upon closer inspection such reasoning falls apart. This Court sets out the analytical framework by which lower courts may decide similar cases. To hold that every specific circumstance not addressed by a given Supreme Court decision is considered unconstitutional would be absurd. The *Town of Greece* court set out the necessary framework and described the inquiry that should be conducted by courts when addressing issues of legislative prayer. The Fourth and Thirteenth Circuits should have conducted that inquiry instead of finding a minor factual distinction and using that as a reason to revert to traditional Establishment Clause tests.

2. The Sixth Circuit in *Bormuth* performed the required historical analysis based on similar facts to those at hand.

Unlike the Fourth Circuit in *Lund*, the Sixth Circuit in *Bormuth* faithfully applied this Court's legislative prayer jurisprudence. On similar facts to this case, the Sixth Circuit held that the Jackson County Board of Commissioner's "invocation practice is consistent with the Supreme Court's legislative prayer decisions…and does not violate the Establishment Clause." *Bormuth*, 870 F.3d at 498 (internal citations omitted). The scenario in *Bormuth* bears a striking resemblance to this case and therefore is illustrative. The practice in *Bormuth* involved "each elected [board member], regardless of his religion (or lack thereof), [being] afforded an opportunity to open a session with a short invocation based on the dictates of his own conscience." *Id*. In the case at hand, one member of the Board delivers a short prayer at the beginning of each meeting. J.A. at 8. No member of the Jackson County Board, "nor the Board as a whole, review[ed] or approve[d] the content of the invocations." *Bormuth*, 870 F.3d at 498. In Hendersonville, each board member also delivers a prayer without any input from other members or review by the board as a whole.

J.A. at 8. Lastly, the Plaintiff in *Bormuth* offered "no evidence that the Board adopted this practice with any discriminatory intent." *Bormuth*, 870 F.3d at 498. In the present case, as stated above, the District Court "credit[ed] the testimony of the Board members" who averred "that their intent is not to coerce anyone to agree with their personal religious beliefs." J.A. at 15. Nor is there anything in the record to suggest discrimination on the basis of acquiescence to, or participation in, the invocation. *See, e.g.*, J.A. at 6 (Affidavit of James Lawley) (affirming that he has "never judged anyone appearing before [him] on the Board based on their religious affiliation").

Based on almost identical facts to the case at hand, the en banc hearing of the Sixth Circuit held that the Jackson County practice "fit within the tradition long followed in Congress and the state legislatures." *Bormuth*, 870 F.3d at 509 (citing *Town of Greece,* 134 S.Ct. at 1819). The *Bormuth* court surveyed this Court's rulings on legislative prayer and concluded that "neither *Marsh* nor *Town of Greece* restrict *who* may give prayers in order to be consistent with historical practice." 870 F.3d at 509 (emphasis in original). Further, as discussed above, the Sixth Circuit correctly noted that "legislator-led prayer is a long-standing tradition" existing "[b]efore the founding of our Republic." *Id*. Accordingly, the Sixth Circuit "decline[d] the invitation to find an appreciable difference between legislator-led and legislator-authorized prayer given its historical pedigree." *Id*. at 512.

The Thirteenth Circuit should have followed the Sixth Circuit's lead and recognized that the historical pedigree of lawmaker-led prayer places it comfortably within the tradition identified by this Court. While *Marsh* and *Town of Greece* did deal with prayers offered by agents of the government, whereas in this case principals are delivering the prayers, that distinction is of no constitutional import. *See id*. This case closely resembles the *Bormuth* facts, and given the in-depth

and accurate analysis performed by the Sixth Circuit, the Thirteenth Circuit below erred by relying on *Lund* instead. That reliance led to an erroneous conclusion and should be reversed.

II. THE BOARD'S PRACTICE OF BEGINNING PUBLIC MEETINGS WITH PRAYERS DELIVERED BY A BOARD MEMBER HAS A CLEAR SECULAR AND SOLEMNIZING PURPOSE, AND DOES NOT COERCE CITIZENS IN ATTENDENCE TO PARTICIPATE.

The Board's practice of beginning public meetings with prayer has the secular purpose of solemnizing public business. Not only is this practice consistent with longstanding American tradition, as explained above, but it is also fully within the constitutionally acceptable boundaries for secular purpose. When confronted with an Establishment Clause challenge, "[e]very analysis…must begin with consideration of the cumulative criteria developed by the Court over many years," namely that the statute or practice: "must have a secular legislative purpose…; cannot have a primary effect of advancing or inhibiting religion…;" nor can it foster "an excessive government entanglement with religion." *Lemon*, 403 U.S. at 612-13 (citing *Walz v. Tax Comm'n of the City of N.Y.*, 397 U.S. 664, 674 (1970)).

This Court has not held fast to the *Lemon* test, instead refining it over the years. The most prominent refinement comes from Justice O'Connor concurring opinion in *Lynch v. Donnelly*, in which she stated: "[t]he effect prong of [of the *Lemon* test] asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval." 465 U.S. 668, 690 (1984) (O'Connor, J., concurring). As properly interpreted, the *Lemon* test does "not to require invalidation of a government practice merely because it in fact causes, even as a primary effect, advancement or inhibition of religion." *Id*. at 691-92. This contention is borne out by the fact that this Court has yet to strike down a statute based solely on the primary effect prong. David W. Cook, Note, *The Un-Established Establishment Clause: A*

Circumstantial Approach to Establishment Clause Jurisprudence, 11 Tex. Wesleyan L. Rev. 71, 87 (2004).

The Thirteenth Circuit relied on *Lemon* when entering summary judgement for the Respondent, erroneously holding that the Board's prayer had the primary effect of advancing religion. J.A. at 21-22, 24. The *Lemon* test has proved contentious and unworkable, leading this Court to refrain from using it rigidly, noting that the *Lemon* factors serve as "no more than helpful signposts." *Van Orden v. Perry*, 545 U.S. 677, 686 (2005). As Justice Alito remarked, "if there is any inconsistency between any of [the Establishment Clause] tests and the historic practice of legislative prayer, the inconsistency calls into question the validity of the test, not the historic practice." *Town of Greece*, 134 S.Ct. at 1834 (Alito, J., concurring). However, even utilizing the *Lemon* factors, the Board's practice holds up to constitutional scrutiny, and the Thirteenth Circuit's decision should therefore be reversed.

Further, the Board's practice does not "coerce[] participation by nonadherents." *Town of Greece*, 134 S.Ct. at 1824 (plurality opinion). Just like in *Town of Greece*, the board members do not "direct[] the public to participate in the prayers, single[] out dissidents for opprobrium, or indicate[] that their decisions might be influenced by a person's acquiescence in the prayer opportunity." *Id*. at 1826. Contrary to the Thirteenth Circuit's contention, the adults attending the board meetings are not a captive audience. Moreover, the cases relied upon by the Circuit Court below to find coercion all dealt with schools and children, not with mature adults who are "not readily susceptible to religious indoctrination or peer pressure." *Marsh*, 463 U.S. at 792.

A. The Board's prayers have a clear secular and solemnizing purpose.

While *Lemon* requires the government to have a secular purpose, the analysis only requires that the government's preferred purpose is "genuine, not a sham…" *McCreary Cty. v. ACLU*, 545

U.S. 844, 864 (2005). This inquiry looks to whether the government "activity was motivated *wholly* by religious considerations." *Lynch,* 465 U.S. at 680 (emphasis added). Given that "the court often...accept[s] governmental statements of purpose, in keeping with the respect owed...to such official claims," *McCreary*, 545 U.S. at 866, the Respondent must meet the high burden of showing that the government's secular purpose is inauthentic on its face. As the Thirteenth Circuit correctly acknowledged, the plaintiff does not meet this burden because the Board proffers a legitimate secular purpose. J.A. at 22.

1. The Thirteenth Circuit conceded that the Board's prayers have a secular purpose.

The Thirteenth Circuit below "accept[ed] that the Board's gravity of purpose and providing a moment of quiet reflection are secular purposes." (J.A. at 22, citing *Brown v. Gwinnett Cty. Sch. Dist.*, 112 F.3d 1464, 1472 (11th Cir. 1997)). The Board members all submitted affidavits to that effect. Specifically, Board Member James Lawley considered the prayers to be "more of a secular practice than a religious exercise," as he compared the practice to the recitation of the Pledge of Allegiance. (J.A. at 6). Board Member Monique Johnson also provided that "the intent of the prayers is to solemnize public businesses and to emphasize the gravity of our mission." (J.A. at 5). The Respondent has not offered any evidence to show that the Board has an improper purpose, thus the Thirteenth Circuit correctly acknowledged the secular purpose of the Board's practice. (J.A. at 22).

2. *Marsh v. Chambers* and *Town of Greece v. Galloway* both held that the primary purpose of legislative prayer is unity, not piety.

The Court in *Town of Greece* reaffirmed the holding from *Marsh*, that the purpose of legislative prayer is to "lend gravity to public proceedings." *Town of Greece,* 134 S.Ct. at 1818 (citing *Lynch*, 465 U.S. at 693). Prayer that provides an opportunity for "reflect[ion] upon shared ideals and common ends…serves that legitimate function" of lending a sense of unity to the

occasion. *Town of Greece*, 134 S.Ct. at 1823. *Town of Greece* found it unnecessary to purge all sectarian content, extending the secular solemnizing ability of prayer even to those prayers that reflect specific beliefs or creeds. *Id*. As the Court noted, "[o]ur tradition assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith." *Id*. Legislative prayers only extend beyond the scope of unifying purposes when those prayers proselytize or advance one religion, or disparage another. *Id.*

The Board's prayers do not proselytize, advance one religion, nor disparage any others. Board Chairman Wyatt J. Koch assures that these prayers are intended by the Board to "solemnize public business and offer citizens a chance to reflect quietly on matters before the Board… there has never been any effort to proselytize or to engage in any form of religious harassment." J.A. at 2. The Board's prayers serve the purpose exalted by this Court, they "set[] the mind to a higher purpose and thereby ease[] the task of governing." *Town of Greece*, 134 S.Ct. at 1825. The Thirteenth Circuit's decision below deprives the Board of that solemnizing opportunity.

B. The prayers have the primary effect of understanding and unity, not endorsement, and therefore are not coercive.

The second prong of the *Lemon* test requires that the "principal or primary effect" of government action "must be one that neither advances nor inhibits religion." *Lemon*, 403 U.S. at 612-13. In addressing primary effect, the Court has "repeatedly emphasized… unwillingness to be confined to any single test or criterion in this sensitive area," *Lynch,* 465 U.S. at 687, instead suggesting several approaches, notably Justice O'Connor's endorsement test and Justice Kennedy's coercion test. *Lynch,* 465 U.S. at 687-88 (O'Connor, J., concurring); *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 659 (Kennedy, J., concurring and dissenting). In the legislative prayer context, this Court has applied the coercion test. *See Town of Greece*, 134 S.Ct. at 1824.

In *Cty. of Allegheny*, this Court articulated that the endorsement test merely refined *Lemon* and then proceeded to apply both. 492 U.S. at 592-94. By this standard, the primary effect of government action is religious only if it results in governmental aid to religion that amounts to endorsement. *Lynch,* 465 U.S. at 682-83. The primary effect of the Board's practice is unity and solemnity, amounting to neither endorsement nor coercion. The practice is therefore constitutional under either test; however, the correct focus would be the coercion analysis articulated in *Town of Greece*.

1. Under *Lemon v. Kurtzman* and *Lynch v. Donnelly* a primary effect of promoting religion is only unconstitutional when it amounts to endorsement.

The Boards prayer does not amount to endorsement because it "does not run afoul of any of three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion: it does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement." *Agostini v. Felton*, 521 U.S. 203, 234 (1997). Legislative prayer fulfills a proper secular purpose, and merely exposing citizens to sectarian prayer does not rise to the level of governmental indoctrination. The Board does not determine the recipients of its services by any religious metric. Furthermore, the Respondent has not raised the issue of being denied any services as a result of the prayer. J.A. at 18 n.2. Accordingly, that issue is not before this Court.

It is not enough for the primary effect of a prayer to advance or inhibit religion; it must be so strong that it amounts to endorsement. For example, in *Board of Education v. Allen*, the Court did not find endorsement when public funds were used to supply textbooks to students attending church-sponsored schools. 392 U.S. 236, 244 (1968). This Court in *Everson v. Board of Education* and *Tilton v. Richardson* similarly did not find endorsement even though public funds were used to transport students and build church-sponsored institutions. *See* 330 U.S. 1, 14 (1947); 403 U.S.

672, 679 (1971). Finding the Board's prayer unconstitutional would require holding that it exceeds the level of endorsement allowed in tax exemptions for church property upheld in *Walz*, 397 U.S. 664, laws requiring Sunday closing in *McGowan*, 366 U.S. 420, as well as the legislative prayers upheld in *Marsh,* 463 U.S. at 783, and *Town of Greece,* 134 S. Ct. at 1826.

2. Based on the fact-specific inquiry from *Town of Greece*, the Board's prayers are constitutional and not coercive.

As discussed above, the sectarian or nonsectarian nature of the prayers carries no weight in matters regarding legislative prayer practices. The Thirteenth Circuit therefore erred in focusing on the Christian nature of the Board's prayers. *See Town of Greece*, 134 S.Ct. at 1821 (reasoning that determinations based upon the sectarian content of prayers, or lack thereof, would encourage censorship, leading to impermissible governmental entanglement). Additionally, the Thirteenth Circuit's reliance on *Doe* was improper as that court conducted an analysis on the coercive effect of school prayers on children and rested its holding on the sectarian nature of those prayers. *See* J.A. at 23; *Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 285 (3d. Cir. 2011). The Supreme Court has established that insistence on nonsectarian prayer is "not consistent with the tradition of legislative prayer" accepted by this court's jurisprudence. *Town of Greece,* 134 S.Ct. at 1820.

The proper analysis to determine the constitutionality of prayers given at a town board meeting is garnered from the *Town of Greece*'s plurality coercion analysis authored by Justice Kennedy.[1] In *Town of Greece*, Justice Kennedy discussed that the appropriate factors relevant for a coercion analysis include: the audience at which the conduct is aimed, the setting in which it happens, and the content of those prayers. *Id*. at 1824-28. Justice Kennedy's analysis there focused

[1] "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds….'" *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).

on *adults* [emphasis added] as the audience of town board meetings. There is "no unconstitutional imposition as to mature adults, who 'presumably' are 'not readily susceptible to religious indoctrination or peer pressure,'" in town board meetings where prayers are offered. *Id*. at 1827 (citing *Marsh*, 463 U.S. at 792) (distinguishing that cases involving children are factually different).

The Thirteenth Circuit's reliance on *Doe* was improper as the prayer practice in that case is factually distinguishable from the Board's; the *Doe* court dealt with the inquiry of prayers directed at children in a school. *Doe,* 653 F.3d at 275. As school-prayer case jurisprudence suggests, coercion concerns are heightened when the conduct at issue involves elementary and secondary public school students. *Freedom From Religion Found. Inc., v. Concord Cmty. Sch.,* 885 F.3d 1038, 1048 (7th Cir. 2018); *see also Doe* at 275, (citing *Lee v. Weisman*, 505 U.S. 577, 593 (1992) (explaining that "children are more susceptible to pressure from their peers")); *Lee,* 505 U.S. at 592 ("there are heightened concerns with protecting freedom of conscience from subtle coercive pressure" in schools).

The distinction lies in the degree of choice inherent in the audience member's position; "the law reaches past formalism" *Lee*, 505 U.S. at 595 (noting that children don't have a "real choice" about attending their graduation). In stark contrast to *Doe*, the setting here is a town board meeting with an audience comprised of adult members of the community who are free to leave should they so choose, with no discernable repercussions. This is completely dissimilar from the prayer practices in schools where children presumably cannot leave if they are uncomfortable or offended. Therefore, the setting and audience of the Board meetings far more accurately parallels legislative sessions of adults than classrooms of children.[2]

[2] The majority in Town of Greece rejected Justice Kagan's dissenting contention that state boards differ from state legislatures. *Town of Greece*, 134 S. Ct. at 1824.

"Kennedy's plurality opinion in *Town of Greece* advises courts to assess whether the 'principal audience' for the invocations is the lawmakers or the public. An internally-focused prayer practice 'accommodate[s] the spiritual needs of lawmakers while an externally-oriented one attempts "to promote religious observance among the public."' *Lund,* 863 F.3d at 286. The practice in *Lund* violated the Establishment clause because the Commissioners in that case were seeking audience involvement, not merely addressing fellow legislators.

In the present case, the prayer practice would be accurately categorized as internally-focused, as the prayers themselves are aimed at board members and not the general public. "[W]e ask for thy blessings as we conduct our work. May we act in your spirit of benevolence and good will… as we conduct the public's work." J.A. at 9. These words do not indicate that the prayers might fall upon the ears of the public, but that they serve as a primer for the Board members to reflect upon before conducting Board tasks. The Board does not project their beliefs onto the public at the beginning of its meetings, but rather shares a moment among the individual members of the Henderson Town Board to "ask for… guidance as we conduct the public's business and serve all people." J.A. at 9.

Analyzing the coercive pressure of prayers in the setting of a monthly county board meeting, the court in *Bormuth* held that the act of "soliciting adult members of the public" to stand quietly during prayers did not rise to the level of coercion, but was a permissible practice that served a solemnizing purpose. 870 F.3d at 517 (citing *Am. Humanist Ass'n v. McCarty*, 851 F.3d 521, 526 (5th Cir. 2017) ("polite requests" by government officials to stand for invocations "does not coerce prayer.")). While the audience of the Board's meeting is more similar to that of Town of Greece's board meetings—since both of those meetings were comprised of their own respective members as opposed to members of the public (as found in *Bormuth*) —*Bormuth* still found that

soliciting participation of the audience at public meetings was not coercive. *See Town of Greece*, 134 S.Ct. at 1825; *Bormuth*, 870 F.3d at 497.

That case goes even a step further than the Board's prayer practice does here, as that prayer practice asked the members of its audience to participate by rising from their seats and standing in quiet reverence as the prayers were given. The court reasoned that this communal act did not coerce, but rather unified the members of the meeting. Here, the Board's prayer practice differs since it does not require any participant to join in the prayers; the Board does "not pressure anyone to join [their] religious beliefs," J.A. at 4.

As part of living in a pluralistic society, "adults often encounter speech they find disagreeable." *Town of Greece*, 134 S.Ct. at 1826. While courts find coercion in settings where people feel unable to leave upon hearing information with which they do not agree, mere exposure to prayer and offense at its sound is not enough to detain a prayer practice from passing constitutional muster. *See id.* ("Legislative bodies do not engage in impermissible coercion by exposing constituents to prayer they would rather not hear and in which they need not participate"). Even still, the court in *Bormuth* found a prayer practice that arguably strongly encouraged participation in the invocation of those prayers to be non-coercive. 870 F.3d at 498.

C. The Board's prayer practice does not create an excessive entanglement between church and state.

The third prong of the *Lemon* test focuses on the fear of excessive entanglement between church and state. *Lemon,* 403 U.S. at 612-13. Determining entanglement requires an analysis of "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 the religious authority." *Id*. at 615. The Board's actions do not run afoul of any step in the analysis. First, the prayers have a secular purpose, as discussed above, and thus did not benefit any religious purpose or institution.

Second, there was no aid provided to religion merely by the presence of sectarian prayers before the Board. Third, the Board did not have a categorical rule regarding prayer, and took no action to promote or approve the prayers as a government body; instead members simply participated in their individual capacity. As a result, the practice did not create excessive entanglement between church and state and should be upheld.

1. The entanglement analysis focuses on the deliberative body as a whole, and the Board's practice did not involve official government action.

This Court's inquiry into entanglement concentrates on the deliberate action of the government by reviewing the purpose and nature of the aid provided. *Id.* at 615. The three-step approach to this final prong of the *Lemon* test has resulted in a jurisprudence that makes it "difficult to perceive a situation where a law would have an excessive entanglement with religion but would not have either an impermissible purpose or effect." David W. Cook, Note, *The Un-Established Establishment Clause: A Circumstantial Approach to Establishment Clause Jurisprudence,* 11 Tex. Wesleyan L. Rev. 71, 87 (2004). Excessive entanglement might also arise out of "the divisive political potential" of a state statute or program. *Marsh,* 463 U.S. at 799 (citing *Lemon,* 403 U.S. at 622). However, political divisiveness cannot invalidate otherwise permissible conduct on its own. *Lynch*, 465 U.S. at 684.[3] The Board's actions do not involve "a direct subsidy to church-sponsored schools or colleges, or other religious institutions, and hence no inquiry into potential political divisiveness is even called for." *Id.* (citing *Mueller v. Allen,* 463 U.S. 388, 402 (1983)).

No bright line exists to determine how much entanglement is too much. *See Lynch,* 465 U.S. at 684 ("Entanglement is a question of kind and degree."). In this case, there is nothing similar to the "comprehensive, discriminating, and continuing state surveillance" or the "enduring

[3] Further, "A litigant cannot" commence a lawsuit to "create the appearance of divisiveness and then exploit it as evidence of entanglement." *Lynch* at 684.

entanglement" present in *Lemon*, 403 U.S. at 619-22. Individual board members praying of their own accord does not amount to the involvement upheld in *Marsh* where the Nebraska Legislature began sessions with prayer offered by a single, sectarian chaplain chosen by the Executive Board of the Legislative Council and paid with public funds. *Marsh*, 463 U.S. at 385. When the Court does find entanglement, it was because the government had become so involved in the practice as to formally write and disseminate the prayer itself. *Engel v. Vitale*, 370 U.S. 421, 425 (2002) ("[I]t is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government."). The Board does not involve taxpayer funds in its practice, nor does legislative prayer in this case function under official governmental approval. This ensures that the practice falls well outside the reaches of the entanglement prong and should be upheld.

2. The Board's practice involved individual actors praying based on their own faith, without any Board-wide action or written policy.

Government control over the content of prayers would come closer to violating the entanglement prong of *Lemon*. *Rosenberg,* 515 U.S. at 844. However, the Board is not a censor. The Board did not come together as a government body to approve or disapprove of prayer. Each member merely spoke as they felt led by their individual beliefs, and the Establishment clause is not a bar to individual action even if that action is sectarian in nature. *Town of Greece*, 134 S.Ct. at 1823. Furthermore, entanglement has not been found even when taxpayer funds were involved in the religious entity or practice. *See, e.g., Everson*, 330 U.S. 1 (1947) (holding that public funding for transportation to religious schools violated the establishment clause); *Walz*, 397 U.S. 664 (finding no Establishment Clause violation in tax exemption for church property). The Board here does not use government funds to promote or continue its practice of legislative prayer. J.A. at 2.

In sum, Legislator-led prayer is no more entangled with religion than the prayer led by outside religious figures upheld by this Court in *Marsh* and *Town of Greece*.

CONCLUSION

The American "custom of opening sessions of all deliberative bodies and most conventions with prayer" has long been recognized by this Court. *Holy Trinity Church v. U.S.*, 143 U.S. 457, 471 (1892). The Thirteenth Circuit's decision—that the Henderson Board's prayer practice runs afoul of the Establishment Clause—violates this Court's command that "no constitutional requirement [exists] which makes it necessary for government to be hostile to religion." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). Since before the founding of this country, and continuing through today, deliberative bodies from the local to the national level have begun their sessions with prayers. Some of those entities recruit volunteer clergy, some hire chaplains, and some have members of the body deliver the prayer themselves. All of those options comport with the historical tradition of legislative prayer identified by this Court.

Regardless of the prayer giver, the Board's practice does not purport a religious purpose, coerce its audience, nor encourage government entanglement. As a result, it is not offensive to the Establishment Clause doctrine accepted by this Court. However, the Thirteen Circuit erred by finding a significance in the identity of the prayer-giver. That error led to the circuit below incorrectly reversing the district court's decision, and awarding summary judgment to the Respondent. This Court should reverse the Thirteenth Circuit and hold that lawmaker-led prayer fits within the historical tradition identified in *Marsh* and reaffirmed in *Town of Greece*.