No. 17-1891

In the Supreme Court of the United States

OCTOBER TERM, 2018

HENDERSON PARKS and RECREATION BOARD, Petitioner

v.

BARBARA PINTOK, Respondent

On Writ of Certiorari to the Supreme Court of the United States

BRIEF FOR THE RESPONDENT
TEAM: 2520

QUESTIONS PRESENTED

1) Whether the history and tradition exception established in *Marsh v. Chambers* and *Town of Greece v. Galloway* applies to the Hendersonville Parks and Recreation Board's practice of Board members delivering their own prayers at public meetings without violating the Establishment Clause of the United States Constitution.
2) Whether the Board's practice of lawmaker-led prayer of Christian nature violates the Establishment Clause pursuant to the Lemon test by advancing Christianity and entangling church and state or whether the practice violates the Coercion Test by creating coercive pressure on religious minorities to follow Christianity.

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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

I. Procedural History

Barbara Pintok ("Ms. Pintok") filed a lawsuit with the United States District Court for the District of Caldon ("the District Court"), seeking declaratory and injunctive relief, and a preliminary judgment against the Hendersonville Parks and Recreation Board ("the Board" or "Board") for opening their Board meetings with sectarian prayers in violation of the First Amendment's Establishment Clause. J.A. at 7, 10. Each Board member and Ms. Pintok filed individual affidavits, and Ms. Pintok and the Board filed cross-motions for summary judgment. J.A. at 10. On September 15, 2017, the District Court denied Ms. Pintok's motion for summary judgment, but granted the Board's summary judgment motion, reasoning that the Board members used the prayers to solemnize the meetings and not to coerce others to believe in Christianity. J.A. at 15.

On appeal in the United States Court of Appeals for the Thirteenth Circuit ("the Thirteenth Circuit"), the court reversed the Board's grant of summary judgment and remanded for the District Court to grant summary judgment for Ms. Pintok. J.A. at 17. On January 4, 2018, the Thirteenth Circuit held that *Marsh v. Chambers* and *Town of Greece v. Galloway* do not apply in this case, and rather, applied Lemon Test. J.A. at 15, 21. The concurring judge, Rodriguez, agreed that *Marsh* and *Galloway* do not apply, but rather, the coercion test was the more appropriate test than the Lemon test. J.A. at 24.

II. Statement of Facts

The five-member local Board holds one monthly meeting to manage various aspects of Hendersonville, such as cultural arts, permit rentals and denials, and outdoor recreation, to name a few. J.A. at 8. Ms. Pintok has attended numerous meetings, and at one meeting, Ms. Pintok

appealed a permit denial for her to obtain a paddleboat company license to operate on a lake controlled by the Board. J.A. at 8, 18. At the beginning of each meeting, a Board member will say the Pledge of Allegiance and deliver a short prayer while everyone in the room stands. J.A. at 8. All five Board members belong to different Christian sects (Baptist, Methodist, Catholic, Presbyterian, and Lutheran). J.A. at 8. The following prayers, all addressing the Judeo-Christian religion and often referencing Biblical verses and a Christian Deity, have been created and recited by the Board members:

> "'Almighty God, we ask for thy blessings as we conduct our work. May we act in your spirit of benevolence and good will. We know that we need your spirit watching over us as we conduct the public's work. May you guide us to preside fairly and impartially over all petitions, grievances, and arguments brought before us.'
>
> 'May we reflect on the awful violence and mass shootings in this country. May God place His Healing Hand on the hurt communities and families who suffered grievous losses. We know that evil exists in the world, but we humbly ask for peace and togetherness in this trying time. We ask for a moment of quiet reflection to allow all present in this room to reflect on the pressing moments of their day. We pray that we can all come together in a spirit of unity despite whatever differences we may have.'
>
> 'Heavenly Father, we ask for your guidance as we conduct the public's business and serve all people – no matter what religion, faith, or lack thereof. May we conduct ourselves in the proper manner at all times. Father, the world seeks to divide often on the basis of race. Let us treat all persons with the dignity and respect that they deserve – no matter their race, sex, religion, sexual orientation, or gender identity. We are all God's people.'
>
> 'Please bow your heads. Lord, help us to make good decisions. Bless our troops and their family members who are missing their loved ones who are making sacrifices for us all. Please bless our community with peace. We know that we are tasked with making decisions that impact the lives of members of our community. Please bless everyone that comes before us and give peace to them in their daily lives.'
>
> 'We are all sinful but as the book of Isaiah reads, though our sins are like scarlet, they shall be as white as snow. We all fall short of the glory of God. We must strive to conduct our business in a way consistent with the careful hand of the Father and His son Jesus Christ.'"

J.A. at 9, 18-19. Ms. Pintok follows Wicca, a pagan religion. J.A. at 1. When Ms. Pintok was a child, she was exposed to a Christian community which lacked tolerance for outside

religions. J.A. at 1. In her affidavit, Ms. Pintok stated that hearing the above Christian prayers made her feel "like an outsider, humiliated [her], and caused [her] significant distress." J.A. at 1, 19. When Ms. Pintok tried to appeal her permit denial in front of the Board, she "could not enunciate [her] words properly, because [she] was distraught and nervous over the recitation of these Christian prayers." J.A. at 1. Ms. Pintok complained about the prayers to the Board member James Lawley, who responded with, "'this is a Christian country, get over it.'" J.A. at 1, 19. James Lawley denies that he responded to Ms. Pintok in this way, but stated in his affidavit that "her complaint was frivolous." J.A. at 6. The other four Board members believe that the prayers are not meant as a religious exercise, but to lend gravity to the meetings by solemnizing public business. J.A. at 2-5.

SUMMARY OF THE ARGUMENT

This Court should uphold the Thirteenth Circuit's decision, which reversed summary judgment for the Board, and instead, enter summary judgment for Barbara Pintok. First, the Board violated the Establishment Clause of the First Amendment when the Board members recited their own Judeo-Christian prayers before each Board meeting. Although *Marsh v. Chambers* and *Town of Greece v. Galloway* are seminal Supreme Court cases, the history and tradition exception is not applicable because both *Marsh* and *Town of Greece* dealt with chaplains and outsiders leading Board meeting prayers, rather than the Board members themselves. Moreover, *Marsh* and *Town of Greece* do not address the issue of whether lawmaker-led prayers are constitutionally permissible without violating an individual's fundamental constitutional right. Second, the lawmaker-led prayers violate the Lemon test because the prayers: (1) do not have a secular purpose; (2) have a primary effect to advance Christianity; and (3) causes an excessive entanglement between church and state. If the Lemon

test is found inapplicable here, then the Coercion Test applies because the dominate Christian nature of these lawmaker-led prayers created coercive pressure on Ms. Pintok to conform to Christianity within the Board meetings.

ARGUMENT

Summary judgment should be granted only if "[t]here is no genuine issue as to any material fact and . . . the moving party is entitled to judgement as a matter of law. Fed. R. Civ. P. 56(c). The party moving for summary judgment carries the initial burden of proving that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 574, 587 (1986). After a summary judgment motion is submitted, the court must draw all reasonable inferences in favor of the non-moving party to ensure that there is no genuine issue of material fact. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). "In response to a summary judgment motion, [a party] can no longer rest on such 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts,'" proving that summary judgment cannot be granted. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992) (quoting Fed. Rule Civ. Proc. 56(e)); *See also Anderson v. Liberty Lobby*, Inc., 477 U.S. 242, 248 (1986).

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. The Establishment Clause of the First Amendment is applied to the States through the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 205 (1963). The Supreme Court has recognized "[w]e are . . . religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). This Court stated that the fundamental principal of the Establishment Clause is to ensure that the government "must be neutral in matters of religious theory, doctrine, and practice." *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968). *See*

also Good News Club v. Milford Cent. Sch., 533 U.S. 98, 114 (2001) ("[The Supreme Court has held] that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their *neutrality* towards religion." (internal quotation marks omitted)). "The Establishment Clause embodies a judgement, born of a long and turbulent history, that, in our society, religion 'must be a private matter for the individual, the family, and the institutions of private choice…'" *Marsh v. Chambers*, 463 U.S. 783, 802 (1983) (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971)). The Establishment Clause requires the court to evaluate the particular facts of each case because the government should not involve itself in religion. *Wheeler v. Barrera*, 417 U.S. 402, 426 (1974).

This Court should affirm the decision of the Court of Appeals for the Thirteenth Circuit and hold that the Thirteenth Circuit was correct by granting summary judgment for Respondent, Barbara Pintok, as there are no genuine issues of material facts in dispute. First, the district court's holding was erroneous by failing to abide by prior Supreme Court precedent, ignoring the doctrine of *stare decisis,* when the district court ignored the religious neutrality principle established in *Epperson v. Arkansas*; Second, the history and tradition principle established in *Marsh v. Chambers* and *Town of Greece v. Galloway* are inapplicable to this case because the facts established in this case are distinct from those established in *Marsh* and *Town of Greece*; Third, under the current doctrinal test for the Establishment Clause established in *Lemon v. Kurtzman* ("The Lemon Test"), the practice of having the board members recite only Christian based prayers does not pass constitutional muster; and finally, the Board members practice of having a state actor perform only Christian prayers does not pass constitutional muster under the coercion test established by this Court in *Lee v. Weisman*.

I. THE THIRTEENTH CIRCUIT PROPERLY DETERMINED THAT THE ESTABLISHMENT CLAUSE WAS VIOLATED BECAUSE THE RELIGIOUS NEUTRALITY PRINCIPLE WAS DISREGARDED WHEN THE BOARD MEMBERS RECITED SOLELY CHRISTIAN PRAYERS BEFORE EVERY MEETING, MAKING THE HISTORY AND TRADITION EXCEPTION INAPPLICABLE AS THIS EXCEPTION DOES NOT APPLY TO LAWMAKER-LED PRAYERS

A. The Legislative Prayers Disregard the Neutrality Principle Established in *Epperson v. Arkansas* Because the Prayers are Solely in Accordance with the Christian Faith

The government must remain neutral in religious matters and cannot favor one religion over another. In *Epperson v. Arkansas*, Susan Epperson, a young teacher of 10th grade biology, filed suit against an Arkansas statute that made it unlawful for a teacher, in any school, to teach the Darwinian theory. 393 U.S. at 98-99. This Court held that the statute was unconstitutional because it was vague and in direct conflict with religious doctrine. *Id.* at 103-04. In doing so this Court stated that the First Amendment mandates governmental neutrality between religion and between religion and non-religion." *Id*. "Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice." *Id*. at 103-04. The government may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite." *Id*. at 104.

Religious neutrality is fundamental to our nation and the Constitution. In 1872, this Court said: "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." *Epperson*, 393 U.S. at 104 (quoting *Watson v. Jones*, 80 U.S. 679, 728 (1872) ("In this country the full and free rights to entertain any religious belief, to practice any religious principle and to teach any religious doctrine which does not violate the laws of morality . . . [or] infringe personal rights, is conceded to all."). Therefore, religious neutrality is extremely fundamental to

our judicial system and our nation, such that it requires the government to not engage in such a way where it would be forced to choose one religion over another.

Here, the Board violated the longstanding principle of religious neutrality when the Board members chose to begin every monthly meeting with a Christian prayer. Moreover, the Board has never sought to engage all religions, and instead, has only engaged in prayer based on the religious belief of the Board Members. J.A. at 2. In effect, by beginning their monthly meetings with prayers of only Christian faith, the Board is choosing one religion over another, thus, violating the Establishment Clause of the United States Constitution.

It is conceded that local citizens attend the monthly meetings to seek permits and to address other concerns within their community. *See* J.A. at 1. Local citizens, like Ms. Pintok, should not be obligated or forced to engage in the practice of another religion while trying to resolve issues or seek a permit within their community. Ms. Pintok is a follower of Wicca, a pagan religion. J.A. at 1. Ms. Pintok attended several Board meetings and was required to speak at one meeting about a permit issue related to a paddleboat company. *Id.* In every meeting Ms. Pintok attended, she was subjected to listen to Christian prayers, which caused her significant distress. *Id.* Furthermore, after Ms. Pintok was subjected to listen to the Christian prayers, she became so distraught that she was unable to enunciate her words properly when discussing her permit and was humiliated. *Id.*

This Court concluded in *Epperson,* that the government must not foster or promote one religion over another. *Epperson*, 393 U.S. at 104. As applied to this case, Ms. Pintok, or any citizen, should not be subjected to engage or listen to a prayer service of another religion—the only prayer of religion offered at the meeting—before speaking on issues affecting their personal life. J.A. at 1-6. The Board's practice on choosing Christianity over all other religions, and by forcing individuals who attend the meeting to listen to a Christian prayer before the Board addresses their

concerns, violates the fundamental principle of religious neutrality and is inconsistent with the longstanding principles established in *Epperson v. Arkansas.* 393 U.S. 97.

Therefore, the Board's practice of reciting only Christian prayers is a direct violation of the Establishment Clause of the United States Constitution. Thus, the Appellate Court of the Thirteenth Circuit was correct in granting Ms. Pintok's motion for summary judgment.

B. The History and Tradition Exception Applied in *Marsh v. Chambers* and *Town of Greece v. Galloway* are Inapplicable to this Case Because the Prayers are Led by the Board Members, Not by Outside Chaplains

Legislative prayers are constitutional because it comports with the history and tradition of our nation. *Marsh*, 463 U.S. at 794-95. The Court in *Marsh* only addressed legislative prayers in the context of outside chaplains and not prayers performed by board members themselves. In *Marsh*, this Court held that it was constitutional to open a legislative hearing with prayers from an outside chaplain paid by the State. *Id.* However, this Court did not address the issue of whether the actual board members can conduct a prayer service in accordance with their own religious beliefs without violating an individual's constitutional rights. Instead, as Justice Brennan recognized in his dissent, the Court in *Marsh* carved out a history and tradition exception but failed to analyze *Marsh* under test already established by the Court's Establishment Clause jurisprudence. *Id.* at 796. "The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country." *Id.* at 786.

1. The History and Tradition exception established in *Marsh v. Chambers* is a limited exception of the Establishment Clause and does not address the issue of whether legislative-led prayer is constitutionally permissible

In *Marsh*, the Court supported its holding by stating that all courts in the United States open with the announcement "God save the United States and this Honorable Court," solidifying

its rationale for supporting legislative prayer. *Marsh*, 463 U.S. at 786. The Court further explained, the intent of the Framers supports the constitutionality of the legislative prayer since the First Congress also appointed a chaplain for each House, which they argue goes to the intent of the Framers. *Marsh*, 467 U.S. at 790; Cf. *Lee v. Weisman*, 505 U.S. 577, 591 (1992) ("In religious debate or expression the government is not a prime participant, for the Framers deemed religious establishment antithetical to the freedom of all."). The majority acknowledged that prayers were not offered during the Constitutional Convention. *Marsh*, 467 U.S. at 787. Furthermore, the Court in *Marsh* recognized certain limitations on legislative prayer practice. The prayer cannot be "exploited to proselytize or advance [a particular faith] or to disparage any other." *Id.* at 794-95.

Here, the Board's practice of opening its monthly board meetings with a Christian prayer is factually different from *Marsh* because of the role the Board members have in reciting the prayer. In *Marsh*, the prayers were conducted by outside chaplains, whereas in this case, the prayers are conducted by Board members. *Marsh*, 463 U.S. at 794-95; R. at 1-6. Unlike in *Marsh* where the prayers were conducted by a clergyman, here, the prayers are conducted by state actors on behalf of their own Christian faith. *Id*. at 786; J.A. at 2-6. Dissimilar to *Marsh,* where the Court found the opening practice of the Court "God save the United States" similar to a legislative prayer, here, the Board takes it a step further by having the board leaders recite prayers speaking to "Father and his son Jesus Christ." J.A. at 19. Board's practice on condoning board leaders to say prayers referencing Jesus Christ is offensive to several religions. Further, citizens attending the meeting to resolve permit or personal issues have no choice but to listen to the government promoting one religious' ideology over another. The Board's practice is a clear violation on the Establishment Clause since religion is a personal choice and is distinct from

political debate. "Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect." *Marsh*, 463 U.S. at 799.

Therefore, although *Marsh* held that legislative prayers by a clergy are constitutional, this case is factually different and goes a step further requiring a different result. Here, government actors are directly participating and influencing their religious beliefs on citizens who attend the meetings to seek redress on certain issues and thus, a clear violation of the Establishment Clause because the government must not favor one religion over another.

2. *Town of Greece v. Galloway* only provides a starting point to the legislative prayer analysis and does not address the constitutionality of lawmaker-led prayer.

Legislative prayers before a town meeting do not in themselves violate the Establishment Clause. In *Town of Greece v. Galloway*, the Town of Greece opened its monthly town board meetings with a prayer given by a local clergy. 134 S. Ct. 1811, 1816 (2014). The town established an informal method of selecting volunteers to do the prayer and was open to all creeds. *Id.* The Court held that there was no violation of the Establishment Clause because having a prayer before a legislative meeting is supported by the history and tradition of our nation. *Id.* at 1828. Justice Kennedy, writing for the majority, stated that "The analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decision might be influenced by a person's acquiescence in the prayer opportunity." *Id.* at 1826.

Town of Greece only supports the constitutionality of chaplain-led prayer and not lawmaker-led prayer. Like in *Town of Greece*, this case involves the constitutionality of a legislative prayer at a board meeting. However, this case is distinct from *Town of Greece* in that

state actors from the Board are conducting the prayer and are not utilizing an outside chaplain. Additionally, this case is distinct from *Town of Greece* because *Town of Greece* did not discriminate against other religions. In this case, the only prayers performed by the Board members were of Christian faith and were in accordance with their own religious views. If this Court were to extend the constitutionality of legislative prayers to state actors, it would be no different than having a town's City hall use an amplifier to announce only Christian based prayers within its building. In fact, such conduct would expose the government to an unconstitutional practice by state actors endorsing one religion over another, which as this Court held in *Epperson*, violates the principle of religious neutrality. *Epperson*, 393 U.S. at 103-04.

The Establishment Clause requires the court to consider the facts of each specific case. *Wheeler*, 417 U.S. at 426. Since the facts in this case are distinct from the facts in *Town of Greece*, this Court should not use the history and tradition exception adopted by the Court in *Marsh* and *Town of Greece*. As Justice Kennedy recognized in the majority opinion, the holding of *Town of Greece* is extremely limited to the facts in that case and any additional fact, such as having lawmaker-led prayer, could render a different result. *Town of Greece*, 134. S.Ct. at 1826.

Therefore, *Town of Greece* only supports the constitutionality of having a legislative prayer but does not address the issue in this case as to whether lawmaker-led prayer is constitutional. As such, the history and tradition exception to the Establishment Clause in *Town of Greece* is inapplicable.

C. The Board's Legislative-led Prayer Violates the Establishment Clause Because the Government Must Not Favor One Religion Over Another

Lawmaker-led prayer is irreconcilable to *Marsh* and *Town of Greece* and both are silent as to the constitutionality of such a practice. Rather, the purpose of the Establishment Clause is to forbid the government from siding with one religion over another. *Epperson*, 393 U.S. at 104.

In *Lund v. Rowan County*, the Fourth Circuit found that the practice of lawmaker-led prayer is unconstitutional as a violation of the Establishment Clause. 863 F.3d 268, 275 (4th Cir. 2017). The Fourth Circuit struck down a prayer practice when the commissioners themselves led the community in prayer, and they composed each invocation according to their personal faiths. *Id*. at 278. "[W]hen a seat of government begins to resemble a house of worship, the values of religious observance are put at risk, and the danger of religious divisions rises accordingly." *Id.* at 280.

Here, the facts are analogous to *Lund* and the Board's practice of lawmaker-led prayer should also be invalidated. Like *Lund*, where the commissioners are leading the invocation in accordance with their own religious belief, here, the Board is also conducting prayers that conform to their religious belief. Furthermore, Ms. Pintok approached a Board member, James Lawley, to discuss how the prayers made her feel uncomfortable. Thereafter, James Lawley responded, "this is a Christian country, get over it." J.A. at 1. This type of behavior is the exact behavior the court warned against and thus, it is extremely critical that this Court apply the strictest scrutiny in this case in order to protect basic fundamental rights and to avoid governmental interference with religion. *See Epperson*, 393 U.S. at 104; See also *Lee*, 505 U.S. at 590 (The Establishment Clause forbids the government from adopting one religion over another as all "creeds must be tolerated, and none favored.").

The Sixth Circuit holding in *Bormuth v. County of Jackson* is erroneous because state actors cannot engage in a practice where they are forced to choose one religion over another. 870 F.3d 494, 512 (6th Cir. 2017). (holding that "The Establishment Clause does not tolerate, much less require, such mechanical line-drawing). Based on the logic of the Sixth Circuit, they would find permissible a practice where the Senate majority leader can address Senators every day by

reciting a Catholic prayer and inevitable choosing one religion over another in his governmental capacity. In fact, such mechanical line drawing is very appropriate whenever discussing religion because the First Amendment prohibits the government from choosing one religion over another, as both *Marsh* and *Epperson* recognize. *Marsh*, 467 U.S. at 794-95; *Epperson*, 393 U.S. at 103-04.

Therefore, the Thirteenth Circuit was correct in granting summary judgment in favor of Ms. Pintok because the government may not engage in the practice of adopting one religion over another. Such a practice violates the Establishment Clause. Moreover, *Marsh v. Chambers* and *Town of Greece v. Galloway* only provide a starting point under the Establishment Clause analysis. As such, the Establishment Clause history and tradition exception in *Marsh* and *Town of Greece* are not binding on this Court to uphold the constitutionality of lawmaker-led prayer since they are factually different from the facts in the present case.

II. THIS COURT SHOULD APPLY THE LEMON TEST BECAUSE THE PRAYERS DO NOT HAVE A SECULAR PURPOSE, ADVANCES THE CHRISTIAN RELIGION, AND CREATES AN EXCESSIVE ENTANGLEMENT BETWEEN CHURCH AND STATE AS LAWMAKER-LED PRAYERS CAUSE THE GOVERNMENT TO INTERTWINE WITH RELIGION AND IMPLIES COERCIVE PRESSURES ON INDIVIDUALS WHO BELONG TO A DIFFERENT RELIGION

Cases involving the Establishment Clause require careful scrutiny. *Bd. of Educ. v. Grumet*, 512 U.S. 687, 722 (1994) ("[A] religious accommodation demands careful scrutiny to ensure that it does not so burden non-adherents or discriminate against other religious as to become an establishment."). This Court should analyze this matter under the legal framework created in *Lemon v. Kurtzman*. 403 U.S. 602 (1971). Although the "Lemon Test" has been legally controversial, it has undergone a multitude of judicial interpretations. The "Establishment Clause jurisprudence is a mess—both hopelessly confused and deeply contradictory." *See* Steven

G. Gey, Reconciling the Supreme Court's Four Establishment Clauses, 8 U. Pa. J. Const. L. 725 (2006). However, the legal importance of the Lemon Test lives on.

The court has embraced the origins of the Lemon Test and the three following factors reflect the goals of the Establishment Clause: "protection of liberty and government neutrality with respect to religion." *Wheeler*, 417 U.S. at 426. With an eye toward these goals, *Lemon* established that courts should 'carefully evaluate the particular facts of each case due to the fact-intensive nature of religion issues.'" *Id*. at 426. Under the Lemon Test, a governmental practice must: (1) have a secular governmental purpose; (2) have a primary effect that neither advances or inhibits religion; and (3) does not create excessive entanglement between church and state. *Lemon*, 403 U.S. at 612-13. Although it has been questionable whether the Lemon Test would continue to be applied in cases of this sort, the court assesses Establishment Clause cases "by reference to the three factors first articulated in *Lemon v. Kurtzman*…which guides the general nature of our inquiry in this area." *Santa Fe Indep. Sch. Dist. v. Jane Doe*, 530 U.S. 290, 314 (2000).

This Court should conclude that governmental activity, such as the lawmaker-led prayer, violates the Establishment Clause because these prayers do not have a secular purpose, do not have the primary effect of advancing religion, and creates an excessive entanglement between church and state.

A. The Board's Lawmaker-led Prayer Does Not Have a Secular Governmental Purpose Because There is Overwhelming Religious Context, and Results in Making Citizens like Ms. Pintok Feel Humiliated

The Board's prayer practice does not have a secular governmental purpose, and instead, humiliates citizens like Ms. Pintok due to the overwhelming religious context. The purpose of the governmental practice needs to be non-secular. *Lemon*, 403 U.S. 602 (1971). Board

members argue that they open each session with a prayer to emphasize the seriousness of the meetings and provide a moment for quiet reflection. The Court has struck down governmental action when a secular purpose is lacking, but only when there is no question that the activity was motivated exclusively by religious considerations. *See Epperson*, 393 U.S. 97, 107-109 (1968).

To determine whether an activity was motivated by religious considerations, this Court should look at the alternatives. There are different ways of initiating meetings without having to recite specific religious phrases. A moment of silence may suffice. *See Bown v. Gwinnett Cty. Sch. Dist*, 112 F.3d 1464 (11th Cir. 1997) (finding that a moment of silence with the purpose of quiet reflection satisfied the Lemon Test). Although the Board members have stated in their respective affidavits that the purpose is in fact secular, mere recitation of a secular purpose is insufficient. *Stone v. Graham*, 449 U.S. 39 (1980); J.A. at 2-7.

In *Stone*, the law at issue required a copy of the Ten Commandments to be posted on the walls of public classrooms statewide. *Id*. at 41. Beneath the last commandment on each poster, the following words were printed: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." *Id*. The Court concluded that despite this footnote and a legislative history which assumed the law's secular purposes, mere recitation of a secular purpose is insufficient to prevent the failure of the Lemon Test's first-prong. *Id*. at 45-46. Further, the Court explained that the Ten Commandments conveyed a religious undertone, explaining the duties of believers such as worshipping the Lord alone, avoiding idolatry, and not using the Lord's name in vain. *Id*. at 42.

Similarly, in this case, these prayers convey a religious undertone. Phrases such as "we know that we need your spirit watching over us as we conduct the public's work…we are all

God's people…please bow your heads…we know that evil exists in the world…we must strive to conduct our business in a way consistent with the careful hand of the Father and his son Jesus Christ…," are central to the beliefs of Christianity and sound similar to the type of prayers heard inside of a Christian church. J.A. at 9, 18-19. Individuals who belong to Ms. Pintok's religion, Wicca, reject what they feel is the autocracy, paternalism, sexism, homophobia, and lack of sensitivity to the environment that are found in the wings of some of the larger religions. For example, the Wicca religion is centered on the belief of the feminine as being as important as the masculine. Each of the prayers found on record contain the following words: "Lord, Almighty God, God, Heavenly Father, God's people, Father, and Spirit," all of which refer to one single, fatherly deity. Activities such as Bible recitations and religious bent also take place in the meetings, all of which are central and representative of Christianity. J.A. at 18. Ms. Pintok stated that she was exposed to Christianity as a child and she is "familiar with the lack of tolerance of many Christians in her community for outside religions." J.A. at 1.

Although exclusive focus on the religious component of any activity would possibly lead to its invalidation under the Establishment Clause, it is important to take other factors into consideration. *Stone*, 449 U.S. at 39. Although two of the prayers comport with having religious neutrality serving all people, the message itself was directed to the people of the community but does not change the way the practice itself directly affects Ms. Pintok emotionally. *See* J.A. at 2-7. Moreover, because of being emotionally disturbed from the prayer, Ms. Pintok informed one of the members, James Lawley, that she found the prayer practice distasteful and that it was humiliating her, to which he responded: "this is a Christian country, get over it." J.A at 1. James Lawley stated in his own affidavit that he does not recall making this statement, however,

Lawley does concede that he told Ms. Pintok that her complaint was frivolous, which should also be considered a way of dismissing her concerns. J.A. at 6.

The Board's lawmaker-led activity does not have a secular governmental purpose because of the overwhelming religious context, making citizens like Ms. Pintok feel humiliated. If this Court were to find that there was a secular purpose, the Lemon Test survives because the first prong is not outcome determinative. *See Edward v. Aguillard*, 482 U.S. 578, 583-85 (1987).

B. The Board's Lawmaker-led Prayers Have a Primary Effect that Advances Religion Because this Prayer Made Ms. Pintok Feel Like an Outsider

The Board members' practice has a primary effect that advances religion because the Christian prayers made Ms. Pintok feel like an outsider, given that all members of the Board are believers and belong to different sects of Christianity. When references made are central to the religion in question and it is being done in a secular setting, it is difficult to see where the governmental act draws the line. *See Lynch v. Donnelly*, 465 U.S. 668, 707 (1984) (acknowledging that an otherwise secular setting alone does not suffice to justify a governmental practice that has the effect of aiding religion.).

The references made by the Board members are central to monotheistic religions and discriminates against polytheistic religions or atheistic individuals. This exclusivity makes it reasonable to believe that the government is advancing religion. *See Doe v. Indian River Sch. Dist*., 653 F.3d 256, 285 (3d Cir. 2011) (finding that the policy in question, which involved prayers at school board meetings, impermissibly advanced religion). In *Indian River*, it was argued that the primary purpose of the policy was to solemnize the Board's proceedings. *Id*. at 256. However, there was enough evidence from which a reasonable observer could conclude that advancing religion was the prayer's primary effect. The court focused on the largely religious content which renders the activity biased.

1. The lawmaker-led prayer does not conform with religious neutrality because the prayers only involve the Christian religion

The governmental practice must remain neutral when it involves individuals from different religions. For instance, an individual who affiliates with Islam believes in Allah. An individual who affiliates with Buddhism does not believe in a personal God. An individual who affiliates with Hinduism has a complex concept of God and their beliefs depend upon each individual and the tradition and philosophy followed. An individual who belongs to Judaism believes in one unique God. Finally, an individual affiliated with the Wicca religion does not believe in the God Christians believe in. Ms. Pintok does not believe in a Heavenly Father, a Jesus Christ, the Holy Spirit, or any of the other Christian-like references stated in each of the prayers at the meeting. Despite this, all Board members have consistently framed their prayers in a way that advances their own religion. *See Lee*, 505 U. S. 577 (concluding that a prayer delivered by a rabbi at a graduation ceremony violated the Establishment Clause). At a minimum, the Constitution guarantees that "[the] government may not coerce individuals to support or participate in religion or its exercise, or otherwise act in a way that establishes a state religion or religious faith or tends to do so." *Id*. at 587. The governmental practice must remain neutral when it involves individuals from different religions because equal deference to all religions is at the core of the Establishment Clause.

2. The Board was endorsing religion because the lawmaker-led prayers created a divisive environment by making Ms. Pintok feel alienated from the community

When the government engages in religion endorsement, a divisive environment is created and could potentially make individuals who practice a different religion feel like outsiders. The Endorsement Test, which is fundamentally equal to the second prong of the Lemon Test, applies to this case. *See ACLU of New Jersey v. Black Horse Pike*, 84 F.3d 1486, 1488 (3d Cir. 1996).

Here, the Board did nothing to protect the integrity of all religions. Rather, the lawmaker-led prayers involved an actual and perceived endorsement of one religion, Christianity, and the record is silent as to the Board taking any initiative to have non-Christian prayers. J.A. 8-10.

Considering Ms. Pintok's complaint to James Lawley regarding her embarrassment from hearing the Christian-specific word usage in the lawmaker-led prayers, it would be difficult for a reasonable observer not to perceive this practice as a form of religion advancement. *See Lynch*, 465 U.S. at 707 (O'Connor, J., concurring "Endorsement sends a message to non-adherent that they are outsiders, not full members of the political community"). The Board's legislative prayer practice is not neutral and is nothing more than an absolute endorsement of Christianity. Therefore, the Board's prayer practice equally fails the Endorsement Test.

C. There is an Excessive Entanglement Between Church and State Because the Lawmaker-led Prayers are Not Spontaneous, the Government Has Control Over the Activity, and the Activity Itself is Being Conducted by Government Actors

The lawmaker-led prayers are an excessive entanglement between church and state because of the government's immense control and participation in the activity. "[T]o assess entanglement, the court has looked to 'the character and purpose of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority.'" *See Agostini v. Felton*, 521 U.S. 203, 233 (1997) (quoting *Lemon*, 403 U.S. at 615). The activity of opening a public meeting with non-secular prayers is prohibited by the Establishment Clause as there must be a wall between church and state. *See Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947). Whenever a government official leads a prayer, the government is intertwined with religion and the potential for coercive pressure increases on religious minorities.

The case of *Indian River* gives us a clear line of analysis to determine whether there was entanglement of church and state. 653 F.3d at 288. The court focused on: (1) the spontaneity of the activity; (2) how much control the state has over the activity; and (3) the activity itself. *Id*.

In this case, before each meeting, one Board member asks everyone in the room to stand and listen to a prayer. J.A. at 18. Further, the Board itself composes and recites the prayers. "Government participation in the composition of prayer is precisely the type of activity that the Establishment Clause guards against." *Indian River*, 653 F.3d at 288.

The Court noted that when a "prayer was composed by government officials as part of a governmental program to further religious beliefs," there is a significant entanglement. *Engel v. Vitale*, 370 U.S. 421, 425 (1962) (explaining that "the constitutional prohibition against laws respecting an establishment of religion must . . . mean that in this country it 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."). Similarly, here, the Board members in their governmental capacity had control over the lawmaker-led prayer and were reciting them. Therefore, there exists an entanglement between church and state.

D. Even if this Court Decides Not to Apply the Lemon Test, this Court Should Analyze this Case Under the Coercion Test Because Coercion Exists when Government Actors Recite Legislative Prayers in a Secular Setting

If this Court decides that the Lemon Test is the inappropriate test to use, the Coercion Test, which was clearly articulated in *Lee v. Weisman*, should be the one to use because given the setting and the way this practice was conducted by government actors, indirect coercion is heightened. 505 U. S. 577. The court has argued that unconstitutional coercion may be either direct, involving an explicit, state-imposed sanction for non-preferred religious behavior or belief, or indirect. *Cty. of Allegheny v. ACLU*, 492 U.S. 662 (1989).

In *Allegheny*, the Court was faced with determining the constitutionality of a Christmas crèche. *Id*. at 573. The Court determined that the creche display violated the Establishment Clause because it endorsed a "patently Christian message." *Id*. The crèche, located inside the city hall, had the constitutional effect of conveying a coercive of religion. Similarly, in this case, the prayers contain a clear and overwhelming Christian message.

Although the Coercion Test has been mainly used in school related cases, the analysis focuses on the practice showing a degree of denigration toward non-believers or religious minorities. *Lund*, 863 F.3d at 305. Ms. Pintok found herself feeling humiliated due to the lawmaker-led prayer. At one Board meeting, Ms. Pintok had to stand up in front of the rest of the members, to speak about a paddleboat permit issue. Ms. Pintok found herself unable to enunciate her words properly because she was distraught and nervous due to the Christian prayers. She felt intimidated, which is ultimately at the core of coercion. J.A. at 1.

In *Town of Greece*, the Court stated that adults often encounter speech they find disagreeable and an Establishment Clause violation is not made every time a person experiences an expression contrary to their own religious views. However, the Court failed to address the context in which the governmental act is made. Here, Ms. Pintok was not solely listening to the Board members speak about their respective views. She was compelled to listen, bow down her head, and pray.

Social pressure that could potentially rise to the level of coercion should not be measured by the age of the individual. Although it is true that prayer in public schools create a risk of indirect coercion given the age and susceptibility of the students, however, social pressure can occur at any age, especially when the person feeling coerced is the only one in the room who believes in a different religion. There are psychological studies pointing out to the subtypes of

pressure an individual encounters, such as the pressure to conform to the expectations of others about how one ought to think and act. A person and the environment they experience should be viewed as one single dynamic body. *See* Laher, Sumaya. (2007). The Relationship between Religious Orientation and Pressure in Psychology I Students at the University of the Witwatersrand. South African Journal of Psychology. 37. 530-551. 10.1177/008124630703700310.

Further, the random election to initiate meetings did not insulate the Board from the coercive elements of this practice and the prayers encouraged a divisive environment that rendered Ms. Pintok to feel alienated from the Board. Even if every meeting was regarded as voluntary, the practice itself had the damaging effect of coercing individuals present at the meetings to participate in the act of religious worship. Ms. Pintok may not be a high school student, but she is an individual susceptible to the pressures of her environment. The Coercion Test can be used to analyze this case given the setting and the way this practice is being conducted by government actors.

CONCLUSION

Based on the aforementioned reasons, the Thirteenth Circuit correctly granted summary judgment as no genuine issues of material facts exist because the Board admits to only advancing prayers of Christian faith, thus, violating the Establishment Clause of the First Amendment.