

Docket No. 17-1891

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2018

HENDERSONVILLE PARKS and RECREATION BOARD, Petitioner,

v.

BARBARA PINTOK, Respondent.

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

BRIEF FOR PETITIONER

Team 2521
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

Statement of the Facts

The Hendersonville Parks and Recreation Board (“the Board”) is a five-member body of local government that oversees various facets of the city, such as cultural arts, greenways, golf courses, historic sites, permit rentals and reservations, and outdoor recreation. J.A. at 8. Before each weekly meeting, one member of the board leads the room in the recitation of the Pledge of Allegiance and then gives a short prayer. J.A. at 8. The short prayers tend to be in the Judeo-Christian religious tradition, as all five members of the Board are Christian. J.A. at 8.

Respondent, Barbara Pintok, is a resident of Hendersonville and a follower of Wicca, a pagan religion. J.A. at 1. Pintok states that at one Board meeting she had to address the Board about a permit issue and could not enunciate her words properly as she was nervous over the recitation of prayer. J.A. at 1. Pintok further stated that she was distressed by hearing the Judeo-Christian prayers and felt like she was “back at Christian church in [her] youth.” J.A. at 1. Pintok complained about these prayers to Mr. James Lawley, one of the Board members, and claims he told her that, “this is a Christian country, get over it.” Pintok decided to file suit against the Board’s prayer practice at its meetings, seeking declaratory and injunctive relief. J.A. at 10. The Board responded with affidavits from each of its members, which emphasized the use of the prayers for solemnizing public business and not for proselytization. J.A. at 10.

While the prayers have at times directly referenced the Deity (“Almighty God,” “Heavenly Father,” “Jesus Christ”), every member of the Board explicitly stated in their affidavits that the Board has no intent to coerce any person into following any religious faith. J.A. at 2, 3, 4, 5, 6. Rather, as Board Chairman Wyatt J. Koch states, “[T]he intent of these prayers is to solemnize public business and to offer citizens a chance to reflect quietly on matters

before the Board or whatever else is going on in their lives. . . not to engage in any form of religious harassment.” J.A. at 8. Board member John Riley states the board has “never even considered the religious faith—or lack thereof—of any citizen or person who has appeared before us.” J.A. at 4. Another member of the Board states that she would never engage in any practice to coerce anyone to adopt her beliefs and the intent of the prayers is to emphasize the gravity of the Board’s mission. J.A. at 5. In many of the prayers, Board members asked for “guidance” in conducting town business, making “good decisions,” and being fair and impartial. J.A. at 9. In one excerpt a Board member prayed for the Board to treat “[A]ll persons with the dignity and respect that they deserve—no matter their race, sex, religion, sexual orientation, or gender identity.” J.A. at 9. Mr. James Lawley states that the prayer practice is similar to reciting the Pledge of Allegiance and is more of a secular practice than a religious exercise. J.A. at 6. Furthermore, Lawley denies Pintok’s allegation that he disregarded her concerns, maintaining that it is not something he would say. J.A. at 6. Additionally, he is offended that any person would think that he or any other Board member intends to coerce religious conformity from their prayers, and further contends that he has “never judged anyone appearing before me on the Board based on their religious affiliation.” J.A. at 6.

Summary of the Proceedings

Ms. Pintok sued the Hendersonville Parks and Recreation Board in the United States District Court for the District of Caldon seeking declaratory and injunctive relief, as well as a preliminary injunction against the Board’s prayer practice at its meetings. J.A. at 10. Both parties filed motions for summary judgment. J.A. at 10. Holding that the prayers offered by the members of the Board did not denigrate any religion, threaten any adherents to other religions, or intend to coerce anyone to follow their own personal beliefs, the District Court properly denied

Ms. Pintok's motion for summary judgment and granted the Board's motion for summary judgment. J.A. at 15.

Ms. Pintok appealed to the United States Court of Appeals for the Thirteenth Circuit. J.A. at 16. The Thirteenth Circuit erroneously found that prayer led by government officials intertwined government with religion and heightened the potential for coercive pressure on religious minorities, and thus held that the Board's prayer practice was in violation of the Establishment Clause. J.A. at 21, 24. The Thirteenth Circuit reversed the District Court's ruling and remanded the case with instructions to grant Pintok's motion for summary judgment. J.A. at 24.

Hendersonville appealed the Thirteenth Circuit's decision and this Court granted certiorari. J.A. at 26.

Standard of Review

The standard of review on cross-motions for summary judgment is de novo. *Freedom from Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ.*, 896 F.3d 1132, 1142 (9th Cir. 2018).

SUMMARY OF THE ARGUMENT

The Establishment Clause is not read to create a religion-free society, only to prevent the establishment of a state religion or government coercion to participate in religion. Prayer that comports with the legislative-prayer tradition in both content and setting is Constitutional. The prayer practice of the Hendersonville Parks and Recreation Board meets this standard. The prayers do not promote religion because they do not proselytize, hold one religion higher than another, or chastise non-believers. While the prayers make sectarian references, they still comport with the legislative-prayer tradition because they are uplifting and intended to

emphasize the gravity of the Board's mission. Even with the sectarian references, absent evidence of proselytization, courts examine the prayer practice as a whole rather than parsing the contents of a single prayer. The prayers, which are only given during the ceremonial portion of the Board meetings, do not create a church-like atmosphere or the potential to constrain attendees because the adult audience is free to enter or exit at their desire. The prayers are akin to the Pledge of Allegiance—a secular practice with ceremonial affect.

Of course, prayer by a government official has the possibility of violating the Establishment Clause, but only if it has an exclusively religious purpose and crosses the threshold into religious coercion. The Board's prayers were initiated as a means of solemnizing public business and offering citizens a chance to reflect. The prayers effectuate these stated purposes, and there is no indication in the record that they are actually intended for a different purpose. The Board's prayer is not at all coercive because it does not place social or direct pressure on the adult audience. Board members have never singled out dissidents or indicated that their decision might be influenced by participation or nonparticipation in the prayer. In fact, Board members have specifically stated that they would never participate in or approve of any activity that could be construed as proselytizing, coercive, or religious harassment in any way. The mere allegation that Respondent felt offended by the prayers has no bearing on their Constitutionality.

The tradition of legislative prayer has been a part of the fabric of our society since the founding of the United States. They have shown to be an effective method of lending gravity to public meetings and guiding lawmakers in their public service. The secular purposes of these prayers have been consistently upheld by this Court, with the understanding that adult citizens in

the audience should not feel targeted or offended by a lawmaker’s expression of their faith coupled with their desire to be impartial and just.

ARGUMENT

The First Amendment to the United States Constitution provides, in part, that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. Const. amend. I, cl. 1. This Establishment Clause is made applicable to the states and municipal governments by the Fourteenth Amendment. *Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 849 (7th Cir. 2012). Nevertheless, some relationship between government and religious organization is inevitable, and total separation between church and state is not possible. *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). The line of separation is far from a “wall;” it is an indistinct and variable barrier that depends on the circumstances of a particular relationship. *Id.* Legislative prayer has been consistently understood as compatible with the Establishment Clause when it fits within the tradition long followed in Congress and state legislatures. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1818-19 (2014). The Establishment Clause simply provides that the government may not coerce anyone to support or participate in religion or establish a state religion. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000).

I. THE BOARD’S PRACTICE OF MEMBERS OFFERING PRAYER BEFORE PUBLIC MEETINGS COMPORTS WITH THE HISTORY AND TRADITION AUTHORIZED BY *MARSH* AND *TOWN OF GREECE* BECAUSE THE PRAYER PRACTICE ITSELF DID NOT PROMOTE IMPERMISSIBLE CONTENT AND THE SETTING OF THE MEETINGS FIT THE TRADITIONAL STANDARDS OF A LEGISLATIVE SESSION.

Under the *Marsh-Greece* framework expressed by this Court, legislative prayer that fits within the historic tradition, are not subject to the typical Establishment Clause analysis. *Freedom from Religion Found., Inc. v. Chino Valley Unified Sch. District. Bd. of Educ.*, 896 F.3d 1132, 1143 (9th Cir. 2018). Rather, the inquiry requires courts to analyze, on a case by case

basis, if the prayer practice fits the framework long followed in Congress and state legislatures. *Bormuth v. Cty. of Jackson*, 870 F.3d 494, 506 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 2780 (2018). Neither *Marsh* nor *Town of Greece* restricts who may give the prayers in order to be consistent with historical practice. *Id.* at 509. In fact, if the legislative prayer analysis is predicated on the identity of the speaker, potentially absurd results would ensue as the Establishment Clause does not require such mechanical line drawing. *Id.* at 513.

In evaluating whether a particular prayer practice falls within the framework, courts must undertake a fact-sensitive inquiry, in which the court considers the content of the prayers and the setting in which the prayer arises. *Freedom from Religion Found., Inc.*, 896 F.3d at 1145. To analyze content, courts must consider the prayer opportunity as a whole and determine if the pattern of prayers betrays the impermissible government purpose of promoting a certain religion. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1824 (2014). To analyze setting, courts consider the potential influence of the prayers on the audience. *Lee v. Weisman*, 505 U.S. 577, 597 (1992). Because the Board's practice falls within the historical tradition, this Court should reverse the appellate court and find that the Board's legislative prayer practice comports with the history and tradition authorized by *Marsh* and *Town of Greece*.

A. The Board's Prayer Practice Did Not Betray the Impermissible Government Purpose of Promoting Religion Because the Prayers Offered Were Not Intended to Proselytize or Hold One Religion Higher Than Another.

The Board's practice of prayer was not intended to promote religion, rather, its purpose was to solemnize and lend gravity to the session. Prayers that are intended to promote unity and solidarity do not serve the purpose of promoting religion. *Town of Greece*, 134 U.S. at 1824.

In the seminal legislative-prayer framework case, *Town of Greece*, a group of citizens challenged the town board's prayer practice of inviting clergy to pray to open the session. *Town*

of Greece, 134 U.S. at 1816. The prayers were given by mostly Christian ministers and consisted of both religious and civic themes. *Id.* at 1816. While prayers made references to Judeo-Christian tenets, the prayers also contained phrases that asked for “wisdom” and “discernment” for decision-makers in the community, blessings for members appearing before the board, the safety of military members, and peace throughout the world. *Id.* at 1816. This Court held that the Town’s prayer practice fit within the historical tradition as the prayers offered were not meant to disparage any other people or religion but instead invoked universal themes, called for a “spirit of cooperation,” and invited lawmakers to “reflect upon shared ideals and common ends before they embark on the fractious business of governing.” *Id.* at 1823-1824.

Consequently, the Sixth Circuit in *Bormuth* also held that language that spoke to universal themes fit within the historical tradition. In *Bormuth*, a citizen challenged a county Board of Commissioners prayer practice where a commissioner opened the session with an invocation. *Bormuth*, 870 F.3d at 498. The prayers often asked for guidance for the Commissioners and blessings for others in the community, such as those experiencing hardships, military members and first responders within the county. *Id.* at 498. The Sixth Circuit found the prayers to fit within the framework created by *Town of Greece* reasoning that these kinds of “solemn,” and “respectful-in-tone” prayers were consistent with the universal themes embraced by this Court. *Id.* at 512.

Additionally, absent a pattern of chastisement of other religions, the presence of some sectarian content will not likely establish a constitutional violation. *Bormuth*, 870 F.3d at 506-512 (holding that prayers offered by lawmakers that were generally Christian in tone fit within the bounds of the historical tradition, as those prayers fit within the religious idiom accepted by our Founders because they were respectful, seeking out guidance, and still served the purpose of

solemnizing despite the prayers reflecting the individual beliefs of the commissioners); *Compare Lund v. Rowan Cty., N.C.*, 863 F.3d 268, 272-75 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 2564 (2018) (holding that prayers offered by a Board of Commissioners that made reference to pointedly sectarian Christian concepts did promote the Christian religion because the prayers implied Christianity was superior to other faiths and on occasion implored attendees to accept Christianity); *see also Snyder v. Murray City Corp.*, 159 F.3d 1227, 1235 (10th Cir. 1998) (holding that a citizen’s prayer during the invocation at a council meeting did not fall within the framework of the historical tradition because the prayer disparaged people of faith using words such as “misguided,” “stupid,” and “weak” while also aggressively proselytizing his own beliefs).

Lastly, even if certain prayers made sectarian references, absent any indication that the prayer opportunity is being used to proselytize or disparage any other faith, it is not the duty of the courts to parse the content of a single prayer. *Marsh v. Chambers*, 463 U.S. 783, 795 (1983) (holding that even if some individual prayers within the prayer opportunity made sectarian references, it was not the duty of the court to parse the contents from each prayer because absent the disparaging of another faith, the prayer opportunity already fits within the tradition and is not a threat to the Establishment Clause).

1. The prayers offered by the Board members were uplifting and intended to emphasize the gravity of their mission.

Here, the Board’s prayer practice is within the tradition outlined by *Town of Greece* and *Bormuth*. The prayers offered by the Board members feature similar phrases stated in the two cases. Requests such as “benevolence,” “good will,” “unity,” and “impartiality” are all mentioned in different prayers by Hendersonville Board members. These phrases mirror the same requests for “wisdom” and “discernment” stated in *Town of Greece*. In three of the prayers

in the record, the board member specifically asks for “guidance” in the decisions they are making for the community just as the prayers in both *Town of Greece* and *Bormuth*. Another prayer by a Hendersonville Board member requests that the Board, “[T]reat all persons with the dignity and respect that they deserve—no matter their race, sex, religion, sexual orientation, or gender identity.” Compared to the prayers in *Town of Greece* and *Bormuth*, this language is even more universally themed as it specifically encompasses a myriad of different groups of people that could all appear before the Board.

Furthermore, like in *Town of Greece* and *Bormuth*, not only can it be inferred through the content of the Board’s prayers that they were intended to uplift, but here the members also expressly state their intentions. This is even more demonstrative of the purpose of the prayers as all five members of the Board have independently stated in affidavits that the intention of the prayer practice was not to proselytize or force people to convert to Christianity but to solemnize the session and seek guidance. These references demonstrate that like the universally themed prayers in *Town of Greece* and *Bormuth*, the content of the board’s prayers was not intended to disparage any other people or religion but remind the board members of their duties of impartiality. As in *Bormuth*, the Board’s prayers were respectful and community focused with the intended effect of fostering inclusiveness and respect for all members within the community. Like the prayers in *Town of Greece* and *Bormuth*, the content of the Board’s prayers demonstrates no evidence of impermissible content and are valid under the Establishment Clause.

2. **The sectarian references made in some of the Board’s fit within the religious idiom authorized by the Marsh-Town of Greece framework and did not promote a particular religion or chastise nonbelievers.**

The Board's prayers in the record were largely nonsectarian and devoid of any disparagement of nonbelievers. Like in *Bormuth*, the prayers exclusively reference some Christian concepts such as "God" and "Heavenly Father" but similarly the prayers never chastised people of other faiths and appealed to the same religious idiom of the Founders. This is evidenced by the majority of the prayers speaking to themes like "unity," "cooperation," and the inclusion of all people no matter their "race, sex, religion, sexual orientation, or gender identity." Additionally, like the prayers in *Bormuth*, the Board's prayers were respectful and used to solemnize the Board as seen through the affidavit from Chairman Koch who states the intent of the prayers is to "solemnize public business" and that there was no effort to "engage in any form of religious harassment."

This contrasts from the prayers in *Lund* and *Snyder* that the Fourth and Tenth Circuits, respectively, held violated the Establishment Clause. In contrast from the lawmaker led prayer in *Lund* that overtly proselytized by implying the Christian faith was superior to other faiths and imploring attendees to accept Christianity, the Hendersonville Board members never used their prayers to promote Christianity. In fact, the sectarian language referenced in most of the Board member's prayers were sparse and instead focused on community themes like "unity." Similarly, unlike the prayer in *Snyder*, that used words such as "misguided," "stupid," and "weak" to describe those who did not agree with him, none of the Hendersonville Board Members ever used any negative terms to describe people in the community. Rather, the Board members prayed for their well-being, healing and peace. In addition to the disparaging words, the citizen in *Snyder* also aggressively proselytized his beliefs during the prayer. Here the prayers of the Board are a reversal of that, as they never speak to converting to any faith and none of the Board members state an intention to promote their own faith.

3. Even if the Board’s prayer practice does make sectarian references, absent clear promotion of religion, it is not the duty of courts to parse contents of prayers.

This Court makes the distinction in *Marsh* that absent the promotion of religion or proselytizing, legislative prayer is valid as it already fits the historical tradition. Therefore, inquiries into the constitutionality of legislative prayer practices need not continue once it is determined that no promotion of religion is occurring.

Here, the record does not reflect any intention of proselytizing or any impermissible purpose. Like the prayer practice in *Marsh*, there is also no evidence of religious promotion. In fact, the prayers largely speak to universal themes of cooperation and unity. Additionally, Board members state in their affidavits that the prayer practice is only intended to “solemnize public business” and as Chairman Koch stated, “[t]here has never been any effort to proselytize or to engage in any form of religious harassment.” Because the Board’s practice fits within the legislative tradition, this Court can end this inquiry and find the prayer practice fits the historical framework outlined by *Marsh*.

B. The Setting of the Board’s Prayer Practice Fits the Historical Tradition Because the Atmosphere Did Not Have the Potential to Constrain the Audience.

The setting of the Board’s legislative meetings did not trespass the bounds of the traditional legislative prayer practice. Legislative prayer practices that are ceremonial and give the freedom to mature adults to participate or not are valid under the *Marsh-Town of Greece* framework. *Town of Greece*, 134 U.S. at 1827 (holding that prayer that was delivered in the beginning of the town meeting did not have the potential to constrain anyone because the prayer occurred during the very beginning of the meeting before any policymaking and mature adults that had the freedom to enter and leave presumably would not be susceptible to religious

indoctrination); *Compare Wynne v. Town of Great Falls*, 376 F.3d 292, 301 (4th Cir. 2004) (holding that the prayer practice at a town’s council meeting did not fit within the historical tradition because the “church-like environment” was constraining as the plaintiff who chose not to participate in the prayers was reprimanded and felt ostracized by the Council, and the prayers frequently referenced “Jesus Christ” while attendees shouted “Amen” and “Hallelujah” several times during the prayers).

On the other hand, courts have consistently held that prayer in front of audiences with minors is outside the *Marsh-Town of Greece* framework because minors are much more likely to be vulnerable to outside influences. *Lee v. Weisman*, 505 U.S. 577, 597 (1992) (holding that a prayer before a high school graduation did not meet the traditional prayer practices outlined by *Marsh* because there was great potential for the audience to be influenced as they were minors and this was an event that was most important for them to attend); *Freedom from Religion Found., Inc.*, 896 F.3d at 1146-47 (holding that prayer before a school board meeting did not meet the traditional prayer practices outlined by *Marsh-Town of Greece* because the presence of children was integral to the meeting and the possibility of influence is a concern of which courts should be vigilant).

The atmosphere at the Board’s meetings does not create pressure that would constrain or improperly influence any mature adults. Like the session in *Town of Greece*, the practice is ceremonial and occurs before there is any policy making or administrative duties. As in *Town of Greece*, the Board’s prayer is partnered with the ceremonial recitation of the Pledge of Allegiance, further demonstrating the ritualistic manner of the prayer. A board member even states in his affidavit that the prayer is so ceremonial, it is “more of a secular exercise than a religious one.” This differs from the nature of the prayer practice in *Wynne*, where audience

members shouted “Amen” and “Hallelujah” in a very church-like environment. Here, the Board’s prayer practice fostered no such environment, as the prayers were short and featured no worship-like outbursts. Furthermore, just as this Court presumed in *Town of Greece*, there is no mandate from the Hendersonville Board that any member appearing before them must participate in the prayer. The citizens in *Town of Greece*, as well as the citizens appearing before the Board can enter and exit as they please and receive equal treatment. The Chairman of the Hendersonville Board even states that the Board “represents all citizens, from the religiously devout to the fiercely atheistic.” This sharply contrasts from the council in *Wynne* who not only reprimanded the citizen who chose not to participate in prayer but also ostracized her.

The non-constraining atmosphere in the Board’s meetings is strongly distinguished from the atmosphere in *Lee* and *Freedom from Religion Found*. In both of those cases, the possible presence of children removed the prayer practices from the *Marsh-Town of Greece* framework. The Hendersonville Board oversees facets of the city that include cultural arts, greenways and historic sites. Not among their supervisory duties are schools or other institutions directly relating to minors. This distinction is important as it sets apart the Board’s prayer practice from the practices found in *Lee* and *Freedom from Religion Found*. Taken together, both cases establish that courts are more concerned about the atmosphere of the site when minors are an integral component of the audience, such as a high school graduation or a school board meeting. Here, as evidenced by the duties of the Board, the audience at the Board’s meetings likely consists of adults who presumably possess the ability to think independently. Furthermore, the Board does not deal with any school issues or other issues specific to minors and therefore does not carry the potential of indoctrination with their legislative prayer practice. This Court should

find that the Board's setting fits within the legislative tradition framework outlined by *Marsh* and *Town of Greece* and hold the prayer practice valid under the Establishment Clause.

II. THE BOARD'S PRACTICE OF BEGINNING PUBLIC MEETINGS WITH PRAYER SUPPORTS THE SECULAR PURPOSE OF SOLEMNIZING PUBLIC BUSINESS AND DOES NOT PLACE COERCIVE PRESSURE ON RELIGIOUS MINORITIES BECAUSE THE SECULAR PURPOSE IS SINCERE AND NO PRESSURE HAS BEEN PLACED ON THE AUDIENCE TO PARTICIPATE.

Prayer that has a solemnizing and unifying purpose and is conducted before an audience of mature adults free from the coercive pressures to participate does not violate the Establishment Clause. *Freedom from Religion Foundation Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Edu.*, 896 F.3d 1132, 1142 (9th Cir. 2018). Government action violates the Establishment Clause when the government's predominant purpose is to advance or favor religion, *Id.* at 1149, and the action applies coercive pressure on an individual to support or participate in religion. *Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 850 (7th Cir. 2012).

A. The Board's Practice of Beginning Public Meetings with Prayer Serves the Secular Purpose of Solemnizing Public Business Because the Circumstances Show that the Secular Purpose is Sincere and Entitled to Deference.

The state-sponsored practice need not be exclusively secular and only violates the secular purpose requirement if it is entirely motivated by a purpose to advance religion. *Mellen v. Bunting*, 327 F.3d 355, 372 (4th Cir. 2003); *Bown v. Gwinnett Cty. Sch. Dist.*, 112 F.3d 1464, 1469 (11th Cir. 1997). In *Mellen*, former cadets at the Virginia Military Institute challenged the school's daily supper prayer as a violation of the Establishment Clause. *Mellen*, 327 F.3d at 363. Each day, the prayer began with "Almighty God," "Heavenly Father," or "Sovereign God," and was focused on giving thanks or asking for God's blessing. *Id.* at 362. The court ruled the prayer to be motivated by secular goals because the school proffered several secular purposes for the prayer, including religious education, promotion of religious tolerance, and internal reflection.

In *Bown*, a former teacher challenged the Georgia Moment of Quiet Reflection in Schools Act (“the Act”), arguing it violates the Establishment Clause because he was terminated for continuing to teach during the moment of silence, while some students silently prayed. *Bown*, 112 F.3d at 1466-68. The Act, which was introduced in response to violence in schools, was intended to provide students with an opportunity for a brief period of quiet reflection to prevent further violence. *Id.* at 1469. Nevertheless, a subsection of the Act provided that it “shall not prevent student initiated voluntary school prayer,” and the legislative history shows that some legislators intended for the bill to enact school prayer. *Id.* at 1466-67. The court held the Act had a secular purpose because the language of the statute showed a clearly secular purpose. *Id.* at 1472.

To determine if a state-sponsored action has a demonstrably secular purpose, courts analyze the unique circumstances that surround the action. *Lynch v. Donnelly*, 465 U.S. 668, 671-92 (1984) (holding the inclusion of a creche with depictions of Mary, Jesus, Joseph, and other Christian figures in the city’s annual Christmas display had a secular purpose because the overall holiday setting of the creche negated any message of endorsement of the religious content); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 307-08 (2000) (holding the purpose of a public high school policy of prayer before football games to be religious when the prayer was delivered at a school-sponsored function, with players, band members, cheerleaders, and the crowd itself displaying the school name and colors, because the context would lead members of the audience to perceive the message as a public expression of the views of the majority of the student body).

Although the secular purpose of the state-sponsored activity must be sincere and not a sham, the state’s characterization of its purpose is entitled to deference. *Santa Fe*, 530 U.S. at

308-09 (holding the stated secular purpose of fostering free expression through the “Prayer at Football Games” regulation to be a sham because the policy could not foster such expression when only invocations with one type of message were approved, and the continuation from a previous prayer practice indicated that the school actually intended to preserve the practice of prayer before football games); *Coles by Coles v. Cleveland Bd. of Educ.*, 171 F. 3d 369, 384 (holding the school board’s practice of opening meetings with an invocation had a religious purpose because the Board’s president directly contradicted that purpose when he stated that the prayers were an acknowledgment of the schools’ Christians and he wanted to keep the Lord in the school); *Mellen*, 327 F.3d at 372-74 (holding the daily supper prayer at the Virginia Military Institute did not violate the Establishment Clause because although prayer is an intrinsically religious act, the court deferred to the Institute’s proffered secular purposes).

1. The prayer practice does not violate the secular purpose requirement because is not entirely motivated by a purpose to advance religion.

Similar to the prayers in *Mellen*, the prayers by the Hendersonville Board do acknowledge the Christian faith, but that is not their only purpose. The prayers in *Mellen* referenced “Almighty God,” “Heavenly Father,” or “Sovereign God,” and were dedicated to giving thanks and asking for God’s blessing. Similarly, the Board’s prayers refer to the Christian Deity, but they also address a number of secular concerns, including guidance as the members conduct their business, quiet reflection on current events, and unity among people of different religions, races, and sexualities. The fact that the prayers focused on these secular concerns, as opposed to the religious concerns in *Mellen*, shows that the Board’s prayers were even more secular than those in *Mellen*. In addition, the secular purposes proffered by the Virginia Military Institute in *Mellen*, such as religious education, promotion of religious tolerance, or internal

reflection, are very similar to those offered by the Board, namely “to solemnize public business and to offer citizens a chance to reflect quietly.”

Similar to the Act in *Bown*, the Board’s prayers were often a reaction to secular, current events. The Act in *Bown* was introduced in response to violence in schools, and the purpose of the Act was to provide students with an opportunity for a brief period of quiet reflection to prevent further violence. Similarly, the Board’s prayers respond to and reflect on secular, social issues, such as violence, mass shootings, and war. Although, the Act in *Bown* provided a state-sanctioned opportunity for students to pray in public schools, and some legislators even intended for the bill to enact school prayer, the court still found the Act was secular because the language of the act reflected a secular purpose. Similarly, although the Board’s prayers contain some non-secular language, the Board member’s affidavits reflect the secular purpose of their prayers.

2. The circumstances surrounding the Board’s practice of beginning public meetings with prayer support the stated secular purpose of solemnizing public business and offering citizens a chance to reflect.

Similar to the creche in *Lynch*, the Board’s prayer is used in a secular context. In *Lynch*, the city’s Christmas display included a creche with depictions of Mary, Jesus, Joseph, and other Christian figures, but the court ruled it did not have a religious purpose because of the overall holiday setting. The secular reasons given by the Board for the prayer—to solemnize public business, emphasize the gravity of the board’s mission, and offer citizens an opportunity to reflect quietly on matters before the Board—are supported by the setting of the prayers in the Board meeting, prior to the start of their adjudicatory duties. Unlike the prayer in *Santa Fe*, there is nothing in the record to indicate a bystander would perceive the prayers to represent all attendees at the Board meeting. In *Santa Fe*, the homogeneous nature of a school football game gave the impression that the prayer was a public expression of the views of the majority of the

student body. A Board meeting, however, is markedly different from a school football game in that no one is dressed alike or giving the appearance of being on the same team as the Board members. An observer, therefore, would not perceive the prayers to be a representation of the beliefs of all in attendance.

3. The prayers by the Hendersonville Board achieve their stated secular purpose because they provide a means to the stated end and no other purpose has ever been indicated.

The Hendersonville Board's prayer practice provides a means to the stated purpose of solemnizing public business and offering citizens an opportunity to reflect. The prayer policy in *Santa Fe* was found to have a religious purpose because it was not possible that it could foster free expression when only one type of speech each year was approved. The Board's prayers, on the other hand, further the stated purposes because they ask for guidance "to preside fairly and impartially," "a moment of quiet reflection," and "help to make good decisions," all of which reflect the purposes of solemnization of their adjudicatory duties and a time of reflection. Most importantly, the prayers before the meeting provide the necessary demarcated time for such reflection. Finally, the evolution of the prayer practice by the Hendersonville Board is not at all the same as the *Santa Fe* regulation. In *Santa Fe*, the school wrote the policy as a codification of previous prayer practices, which directly contradicted the stated purpose. In the present case, the Hendersonville Board has a long-standing unwritten practice of prayer that developed specifically for the stated purpose of solemnization.

In addition, unlike the prayer by the school board in *Coles*, the Hendersonville Board has never indicated there is any other purpose for their prayers. In *Coles*, a school board member stated publicly that the prayer practice was an acknowledgement of the Christians in the school and an attempt to keep the Lord in the school, despite claiming the purpose was to give the

meetings a more professional decorum. Every member of the Hendersonville Board stated under oath that the prayers have a secular purpose, and there is nothing in the record to indicate that purpose has been contradicted by the words or actions of Board members. Therefore, the Hendersonville Board prayer should be afforded the same treatment as the prayer in *Mellen*, where the court deferred to the secular purpose of the prayer given by the Institute, even if prayer is typically a religious act. The precedent of deferring to the uncontradicted stated purpose of the prayer should be followed in this case.

B. If the Board's Prayer Practices Had a Religious Purpose, it Still Does Not Place Coercive Pressure on Religious Minorities Because it Does Not Place Social or Direct Pressure, and Board Members Did Not Single Out Dissidents or Indicate to the Adult Audience That Their Participation May Influence the Board's Decision-Making.

State activity is coercive when the setting of the prayer results in social or more direct pressure to participate in a religious exercise. *Santa Fe*, 530 U.S. at 312 (holding a prayer at the start of a football game had a coercive effect to participate on those present because high school students are either required to attend, feel immense social pressure to attend, or have a truly genuine desire to participate in the football game); *Mellen*, 327 F.3d at 371-72 (holding prayer was coercive when it was a part of a method of education that emphasizes detailed regulation of conduct, indoctrination, and mandatory and ritualized activities because of the coercive atmosphere of the school).

Courts are primarily concerned about coercive pressure when the audience of the prayers are elementary through secondary public-school students. *Lee v. Wiseman*, 505 U.S. 577, 597-98 (1992). In *Lee*, this Court held prayer at a public high school graduation ceremony was coercive because the ceremony was much more constraining than a state legislature session where adults are free to enter and leave for any number of reasons. *Id.* at 597. Because the event was of

“singular importance” to every student and objecting students had no real alternative, this Court ruled that the state had essentially compelled attendance and participation in a religious exercise. *Id.* at 598. Notably, this Court limits the holding to school children and not mature adults. *Id.* at 593.

Although some circuits have found that the intimate setting of a municipal board meeting presents a heightened potential for coercion, religious activity is not coercive when it merely exposes constituents to prayer that they would rather not hear and in which they do not have to participate. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1826-27 (2014) (finding that the town board’s prayers were not coercive when resident respondents stated that the prayers offended them and made them feel excluded and disrespected, but the prayers did not chastise dissenters nor attempted lengthy discourse on religious dogma and nothing in the record indicated the public was dissuaded from leaving the room, arriving late, or protesting later because offense does not equal coercion, and “an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views”); *Bormuth v. Cty. of Jackson*, 870 F.3d. 494, 516-19 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 2780 (2018) (finding the plaintiff had not carried his burden to overcome the presumption set forth by the plurality in *Town of Greece* because at most he had shown he was offended by the Christian nature of the Board’s prayers, but “offense does not equate to coercion”); *Lund v. Rowan County*, 863 F.3d 268, 287 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 2564 (2018).

In *Lund*, the County Board of Commissioners delivered “pointedly sectarian invocations” to open their meetings. *Id.* at 272. Some of the prayers implied that Christianity was superior to other faiths while others appeared to implore attendees to accept Christianity. *Id.* at 273. When residents began to complain about the prayer practice, a number of commissioners publicly

announced they would continue delivering Christian invocations for the community's benefit. *Id.* at 273. One person who spoke out against the prayer practice was booed and jeered by her fellow constituents. *Id.* at 288. The court found the prayer practice was coercive because the prayers amounted to overt proselytization and communicated exclusivity, leaving residents who subscribe to minority faiths unwilling participants or discomforted observers. *Id.* at 290.

Religious activity at a town board meeting is coercive if board members direct the public to participate, single out dissidents, or indicate their decision might be influenced by a person's participation, but it is not coercive when board members merely solicit adult members of the public to assist in solemnizing the meetings. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1826 (2014) (finding prayer at a town board meeting was not coercive because nothing in the record showed that they allocated "benefits or burdens" based on participation, nor that residents were received differently based on whether they joined or declined to participate); *Bormuth*, 870 F3d. at 516-19 (finding prayer at a County Board of Commissioners meeting was not coercive when the Commissioners asked everyone in attendance to "rise and assume a reverent position," two Commissioners turned their backs on the resident plaintiff when he was speaking, and two others publicly stated their dislike of him because the requests to stand were commonplace and do not mandate participation and nothing in the record suggested that the Commissioners were expressing antagonism to the plaintiff's religious beliefs, notwithstanding the comment that "at worst reflects a stray statement by one of the nine Commissioners").

1. The Board's prayer does not place coercive pressure on religious minorities because the setting does not place social or direct pressure and the adult audience is less susceptible than school children.

Unlike the prayer in *Santa Fe* or *Mellen*, the Hendersonville Board meetings did not place social pressure or more direct means of pressure on audience members to participate in the

prayers. In *Santa Fe*, the coercive pressure derived from the prayer's context in a high school football game and the social pressures inherent in that environment. In addition, some students were required to attend the games. Although Hendersonville residents must attend the Board meetings if they have business before the Board, they are not required to attend the entirety of the meeting. Additionally, the setting of a town Board meeting is not at all the same as a high school football game, and the record does not reflect any immense social pressure to attend the Board meetings. In *Mellen*, the coercive pressure was caused by the setting of the military school with its indoctrination and ritualized method of education that left little room for voluntariness or free thought. The audience of the Hendersonville Board meetings, though, are free members of society who can choose to attend the meetings and are far more self-directed than students at a military college.

In addition, the prayers are not coercive because the adult audience members of the Hendersonville Board meetings are not susceptible to the same peer pressure that students in elementary or secondary schools face. The audience of the graduation ceremony in *Lee* was especially susceptible to coercion because it was comprised primarily of students who were compelled to attend by the "singular importance" of the event. A monthly town board meeting does not have nearly the same lifetime importance to a resident as a high school student's only graduation ceremony. Additionally, residents can choose to join the meeting after the prayer, while a high school student presumably must attend the entirety of the graduation ceremony. Therefore, neither the setting nor the audience of the Board meetings lend themselves to a coercive atmosphere.

2. **The Hendersonville Board prayers are not coercive simply because Respondent felt offended and intimidated but was not required to participate.**

Respondent has not carried her burden to overcome the presumption set forth by the plurality in *Town of Greece* that the prayer's purpose is to lend gravity to the proceedings and acknowledge the role religion holds in many citizens' lives. Just like the plaintiff in *Bormuth*, who proved only that he was offended by the Board's Christian prayers, Respondent has not alleged any facts beyond mere offense. The prayers in *Town of Greece* did not chastise dissenters or give a lengthy discourse on religious dogma. Similarly, the prayers in the present case focus on guidance in performing the work of the Board and responding to current events, not proselytizing. Additionally, in *Town of Greece*, residents were not dissuaded from leaving the room, arriving late, or protesting later. Similarly, nothing in the record shows that the Board treated nonparticipation or objection to the prayer in a different manner. An Establishment Clause violation does not exist every time a citizen of this diverse world experiences a sense of affront from an expression of religious views contrary to their own.

The prayer practice in Hendersonville is not at all like that in *Lund* because the prayers are not nearly as proselytizing or exclusive and the response to citizens' complaints was not nearly as hostile. In *Lund*, the prayers implied that Christianity was superior to other faiths implored attendees to accept Christianity. The prayers in the present case simply asked for guidance while conducting their business, help in making good decisions, and quiet reflection. Some of the prayers even specifically mention "serv[ing] all people—no matter what religion, faith, or lack thereof;" and "treat[ing] all persons with the dignity and respect that they deserve—no matter their race, sex, religion, sexual orientation, or gender identity." Most importantly, when the plaintiffs in *Lund* spoke out against the prayer practice they were jeered and booed. Although Mr. Lawley adamantly denies telling Respondent "this is a Christian country, get over it," even if he had, that response does not at all rise to the same level as the response in *Lund*.

Therefore, the prayer practice in Hendersonville does not meet the standard of coercion set by *Lund*.

3. The prayer practice is not coercive because board members did not single out dissidents or indicate their adjudicatory decisions might be influenced by participation.

The prayer practice in Hendersonville is similar to that in *Town of Greece* and *Bormuth* because they did not mandate participation in the prayer or indicate their decision-making might be influenced by participation. In *Town of Greece*, the board did not allocate benefits or burdens based on participation in the prayer, nor did they treat any residents differently because of their decision to participate or not participate. Similarly, in the present case, the board has “never even considered the religious faith—or lack thereof—of any citizen or person who has appeared before [them],” according to the affidavit of board member John Riley. Additionally, according to board member James Lawley, he has “never judged anyone appearing before [him] on the Board based on their religious affiliation.”

In *Bormuth*, the county Commissioners asked residents to rise and assume a reverent position. Similarly, the Hendersonville Board members ask attendees to stand, recite the Pledge of Allegiance, and listen to a short prayer. Neither of these requests mandate participation, they are simply a polite and commonplace request. In addition, the Hendersonville Board’s request has even less possibility of coercion because it does not mention reverence. Furthermore, the Commissioners in *Bormuth* publicly expressed their dislike for the resident plaintiff, including turning their backs on him when he spoke. Nothing in the record indicates that members of the Hendersonville Board ever treated Respondent with such outward disdain. Even if Mr. Lawley did tell Respondent “this is a Christian country, get over it,”—which he adamantly denies—that is at worst, a “stray statement” by a Board member, similar to the statement by the

Commissioner in *Bormuth*. Therefore, the prayer practice by the Hendersonville Board did not serve a religious purpose nor did it place coercive pressure on religious minorities.

CONCLUSION

The Hendersonville Board's practice of members offering prayer before public meetings comports with the history and tradition authorized by *Marsh* and *Town of Greece* because the prayers did not promote impermissible content and the setting of the prayer fit the traditional standard of a legislative session. Furthermore, the Board's practice of beginning the meetings with prayer supports the secular purpose of solemnizing public business and does not place coercive pressure on religious minorities. Hendersonville Board respectfully requests this Court reverse the entry of summary judgment for Respondent Pintok and find that the prayer practice does not violate the Establishment Clause.