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 RESPONDENT

Team 2522
Counsel for Respondent

QUESTIONS PRESENTED

I. Whether government officials personally presenting exclusively Christian prayer comports with the history and tradition of this Court's jurisprudence authorizing chaplain-led prayer before a legislature.

II. Whether government officials, in the course of their duties, issuing explicitly and exclusively Christian prayer to a captive audience of citizens present to petition for assistance is simultaneously coercive and primarily religious in purpose.

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

STATEMENT OF THE CASE

Summary of the Facts

The Hendersonville Parks and Recreation Board ("the Board") is a local governmental body in Hendersonville, Caldon. (J.A. at 7.) The Board has the authority to oversee and control the cultural sites, greenways, historic sites, and outdoor recreation areas, as well as managing permits for rentals, reservations, and outdoor recreation activities. (J.A. at 8.)

The Board has adopted the custom of opening each of its monthly meetings by having one member of the five-member Board instruct the room of assembled citizens to stand. (J.A. at 8.) First, the Pledge of Allegiance is recited, at which time the board member instructs the room to listen to a prayer delivered by one of the board members. (J.A. at 8.) The prayers given by the Board are exclusively Christian in nature, as all five members of the Board are Christian. (J.A. at 8.) While each is of a different sect – specifically, Board members are Baptist, Methodist, Catholic, Presbyterian, and Lutheran – prayers commonly reference the Christian God, and His name is invoked beseeching guidance and intervention in the affairs of Hendersonville. (J.A. at 8-9.) The prayers also often recite Biblical verses and "clearly portray a religious bent." (J.A. at 18.) Some illustrative prayers are as follows:

> "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."

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

> "We are all sinful but as the book of Isaiah reads, though our sins are like scarlet, they shall be as white as snow. We all fall short of the glory of God. We must strive to conduct our business in a way consistent with the careful hand of the Father and His son Jesus Christ."

(J.A. at 9.)

Respondent Barbara Pintok ("Ms. Pintok") is a citizen of Hendersonville and a Wiccan, ascribing to non-Judeo-Christian beliefs. (J.A. at 8.) Ms. Pintok has attended several Board meetings, including one meeting to acquire a license to operate a paddleboat company on a lake that the Board controls. (J.A. at 8.) Ms. Pintok's request was denied, a decision that she is still in the process of appealing. (J.A. at 18.) While attending these board meetings, Ms. Pintok was exposed to the repeated Christian prayers of the Board, an event that caused her a great deal of personal discomfort and dismay. (J.A. at 1, 17.) Ms. Pintok felt excluded, an outsider, demeaned and subordinated. (J.A. at 1.) The distress was so great that Ms. Pintok stumbled over her words when submitting her paddleboat company proposal, rendering her unable to effectively present it. (J.A. at 1.) The veracity of Ms. Pintok's distress is not disputed. (J.A. at 17.)

Ms. Pintok at some point addressed her concerns with James Lawley, a Presbyterian member of the Board. (J.A. at 19.) Though he does not recall saying so, Ms. Pintok attests that Mr. Lawley stated "this is a Christian country, get over it" in response to her complaint. (J.A. at 1, 6, 19.) Ms. Pintok, feeling that her rights were violated, subsequently brought the instant case to court. (J.A. at 10.)

Summary of the Proceedings

Ms. Pintok filed the instant action in the United States District Court for the District of Caldon, seeking declaratory and injunctive relief and a preliminary injunction against the Board's use of specifically sectarian prayers at its meetings. (J.A. at 7, 10.) Upon the filing of the suit, the Board members filed affidavits claiming that the prayers offered by the Board members are for the

purpose of solemnizing public business and are not intended to proselytize. (J.A. at 10.) Both Ms. Pintok and the Board filed motions for summary judgment. (J.A. at 10.)

Reviewing the cross-motions for summary judgment, the District Court issued an opinion authored by Judge Miller, assessing the prayers as nonsectarian and finding that they fell within the bounds of traditional legislative prayer. (J.A. at 7.) The District Court consequently granted the Board's motion for summary judgment and denied Ms. Pintok's motion for summary judgment. (J.A. at 7.)

Upon appeal to the Thirteenth Circuit, the grant of the Board's motion for summary judgment was reversed and remanded the case to the lower court with instructions to grant Ms. Pintok's motion. (J.A. at 24.) Judge Andries wrote the opinion, joined by Judge Senter, with Judge Rodriguez authoring a concurring opinion, finding that "[t]he prayer practices in question send an *undeniable* signal that the government is endorsing Christianity." (J.A. at 24.) (emphasis added). The Thirteenth Circuit found this to be an unconstitutional violation of the Establishment Clause. (J.A. at 16-24.) Upon appeal by the Petitioner, this Court granted certiorari and scheduled oral arguments for the October term of 2018. (J.A. at 26.)

Standard of Review

This Court may review issues of constitutional law under a *de novo* standard of review. *Highmark, Inc. v. Allcare Health Mgmt. Sys., Inc.,* 134 S. Ct. 1744 (2014) (matters of law are reviewed *de novo*).

SUMMARY OF THE ARGUMENT

This Court now has the opportunity to affirm the basic principles of the First Amendment's absolute prohibition against the government establishment of religion. In holding that the longstanding tradition of legislative prayer, recognized by its decisions in *Marsh* and *Town of Greece*, does not extend to the wholesale authorization of legislators – and only legislators – to lead constituents in religious observance at governmental meetings, this Court would stand by the most fundamental precepts of the First Amendment.

This Court's prior decisions on the issue of legislative prayer focus specifically upon the tradition most often embodied by the United States Congress' practice - the invitation of clergy from countless faiths to present invocations. This chaplain-led prayer has been upheld based on the long, unique, and unbroken history of inviting clergy members to deliver prayer that has existed since the First Congress. Such a history does not exist to support the actions of the Board in the instant case. Board members retained the exclusive authority to give prayer, dictating the prayers of their choice to a captive audience, which is worlds apart from the prayer tradition this Court has previously upheld.

Even if the Board's practice comported with our country's history, the prayer practice itself would still be unconstitutional. This Court has previously noted that tradition and history alone cannot guarantee that a policy is non-violative of the Constitution, and has emphasized that there still must be a constitutional analysis put into place even if custom has held that a given practice is ordinary for a community. Subjecting the Board's practice to a proper constitutional analysis, the conclusion must inevitably be reached that its prayer practice violates the First Amendment rights guaranteed to its constituents. This Court has previously held that the identity of the prayer givers, the identity of the audience members, and the localized format of the meetings in question

all influence the assessment of the government practice by the Court, and the practice in the instant case creates an unconstitutional establishment and endorsement of religion on the part of the Board.

In addition to violating the traditional strictures imposed upon legislative prayer and the specific forms of legislative prayer authorized by this Court in *Town of Greece* and *Marsh*, the Board's prayer practice violates the constitutional commandments not to use the force of the state, perceived or otherwise, in supporting or endorsing an official or seemingly official religion. One of the most fundamental functions of the First Amendment is to protect the religious liberties of the public by prohibiting, absolutely and irrevocably, the cloaking of religion in the authority of the state. In the instant case, the Board took advantage of its power and authority to issue exclusively Christian prayers given by exclusively Christian government officials. As the record clearly reflects, the prayers contained countless references to the Christian deity. While this Court need not enforce a strict rule against sectarian content in the context of legislative prayer, the exclusionary effect of the prayers plays a vital role in coercing the people of Hendersonville. In addition to such concerns, courts have repeatedly noted the significance of who is delivering the public prayer. In the instant case, not only have the government officials charged with fairly representing the community intertwined themselves with religion but indeed cloaked it with the authority of the state. Additionally, while courts have emphasized the importance of how receptive a governmental body is to open the floor to other speakers for the delivery of invocations, the Board in the instant case neglected even that basic manner of protecting its citizens' rights.

Though the Board will no doubt claim that the exclusively Christian prayers provided by the exclusively Christian members of the board had an important secular purpose – chiefly, to "solemnize the weighty task of governance" in accordance with custom – the practice of legislative

prayer delivered by legislators to their constituents from a position of power is inherently hostile to the alleged purpose of unifying the community. Regardless of the Board's assertions of innocent and gracious intentions in enacting its prayer practice, the citizens of Hendersonville are presented, time and again, with a practice that upon even the slightest analysis appears to wholly align the governmental body that they beseech with a religious faith in violation of the Constitution. Even accepting the Board's argument that the legislative prayer at issue in the instant case is designed to instill solemnity, the practice of prayer is not the only way to enforce a period of mutual respect and appreciated gravity. Indeed, it is perhaps the most problematic way to do so. Ms. Pintok need not prove that her First Amendment rights have been shattered and discarded entirely – the Board cannot claim that it could have violated her rights more than it already has in order to have its practice found unconstitutional.

The Board faces a moral, legal, and constitutional imperative to ensure that its citizens are fairly and adequately represented, free not only to pray as they wish but to be free from governmental coercion and insidious efforts to bend the government to the service of a specific religious faith. For that reason and those stated above, this Court should affirm the ruling of the Thirteenth Circuit.

ARGUMENT

The Establishment Clause of the First Amendment prohibits the establishment of religion by the government. U.S. Const. amend. I. Although a law may not explicitly establish a religion, it is violative of the First Amendment if it is a "step" that could lead to the establishment of a religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). The present case illustrates such a "step:" the state sponsorship of a religion through a policy of exclusively legislator-led prayer. Specifically, the Board's legislative prayer practice is unconstitutional because (1) it is not in accord with the history of this nation's legislative prayer doctrine; (2) it places impermissible coercive pressures on religious minorities; and (3) it acts for a predominantly religious purpose.

I. THE BOARD'S PRACTICE OF HAVING COMMISSIONERS OFFER PRAYER BEFORE PUBLIC MEETINGS FAILS TO COMPORT WITH THE HISTORY AND TRADITION OF LEGISLATIVE PRAYER AUTHORIZED BY *MARSH V. CHAMBERS* AND *TOWN OF GREECE V. GALLOWAY*.

As the United States Supreme Court has only dealt with legislative prayer in the context of chaplain-led prayer, the Board's practice of allowing commissioners – and only commissioners – to lead prayer prior to town meetings violates the principles of the Establishment Clause and fails to comport with the history and tradition of legislative prayer. Although legislator-led prayer is not a per se violation of the Establishment Clause, it should not receive the same historical protection as chaplain-led prayer because legislator-led prayer is more closely aligned to government sponsorship of a specific religion, in addition to being both less common and less constitutionally acceptable than chaplain-led prayer.

a. Legislator-led prayer is not encompassed within the history and tradition of legislative prayer.

This Court's precedent has clearly established that the opening of legislative sessions with prayer is embedded in the history and tradition of this country. In *Marsh v. Chambers*, the United

States Supreme Court addressed a challenge to Nebraska's practice of opening legislative sessions with prayers by a State-employed clergyman. 463 U.S. 783, 785 (1983). The Court upheld the Nebraska legislature's practice and held that legislative prayer "has coexisted with the principles of disestablishment and religious freedom" since our country's founding. *Id.* at 787. The Court looked to the historical tradition of legislative prayer to determine that the Founders considered this action compatible with the Establishment Clause. *Id.* at 790. The Court reasoned:

> Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees, but there is far more here than simply historical patterns. In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress—their actions reveal their intent.

Id. Legislatures have been paying legislative chaplains "for two centuries in the National Congress, and for more than a century in Nebraska and in many other states." *Id.* at 795. The *Marsh* decision, however, dealt strictly with chaplain-led legislative prayer and its unique history – a situation not presented within the facts of the instant case, nor legally equivalent to the Board's practices.

Following *Marsh*, this Court once again dealt with the issue of legislative prayer in *Town of Greece*. In *Town of Greece*, monthly town board meanings would begin with roll call, the Pledge of Allegiance, and a local clergyman delivering an invocation to the room. 572 U.S. 565, 134 S. Ct. 1811, 1816 (2014). The local clergymen were volunteers who were selected from the congregations listed in a publically-accessible local directory. *Id.* The town never excluded or denied anyone from giving the prayer and stated that *any* minister or lay person, regardless of religion or lack thereof, would be welcome to give the prayer. *Id.* The town, however, was mostly comprised of Christians and from 1999 to 2007, all of the ministers were Christian. *Id.* After a complaint was made, the town invited a Jewish layman, the chairman of the local Baha'i temple, and a Wiccan priestess to give an invocation. *Id.* at 1817.

This Court built upon its early decision in *Marsh* and held that "[t]he Court's inquiry, then, must be to determine whether the prayer practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures." *Id.* at 1819-20. The Court emphasized that there is no necessity that prayer be nonsectarian to avoid violating the Establishment Clause. The proper inquiry does not allow a constitutional violation simply because it has a historical foundation, but instead, requires that the Establishment Clause be interpreted "by reference to the historical practices and understanding." *See id.* at 1819 (quoting *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 670 (1989)).

This Court, however, has never addressed whether legislator-led prayer should be treated the same as chaplain-led prayer. Only two circuit courts have addressed this issue and have reached divergent opinions. The Fourth Circuit determined that legislator-led prayer is inconsistent with the principles of the Establishment Clause. *See Lund v. Rowan Co., N.C.*, 863 F.3d 268, 272 (4th Cir. 2017), *cert. denied sub nom. Rowan Cty., N.C. v. Lund*, 138 S. Ct. 2564 (2018). In *Lund*, the Fourth Circuit analyzed the Rowan County Board of Commissioners' practice of beginning its meetings with prayer. Each meeting began with a prayer delivered by one of the commissioners. *Id.* The board members would rotate who would deliver the prayer each meeting and each commissioner had complete control over the content of his or her prayer, much like in the instant case. *Id.* at 273. Also similarly to the instant case, the prayers given by the commissioners were "invariably and unmistakably Christian in content" with 97% of the prayers mentioning Jesus, Christ, or the Savior. *Id.* Three plaintiffs filed suit against Rowan County claiming that the prayers sent a message that the Board favored Christianity and Christians. *Id.* at 274.

On rehearing en banc, the Fourth Circuit decided that the general principles behind the Establishment Clause bar legislator-led prayer. With *Marsh* and *Town of Greece* as its doctrinal

starting point, the Fourth Circuit determined that the county's practice of legislator-led prayer falls outside of the tradition of chaplain-led legislative prayer recognized by this Court. The Fourth Circuit stated:

> The survey cited by the state amici clarifies that "it is a tradition for a chaplain to be selected to serve the [legislative] body." Twenty-seven state legislative chambers designate an official chaplain. Seventy-nine invite "visiting chaplains [who] usually rotate among religions." Second, Rowan County and amici elide the distinction between extending the prayer opportunity to lawmakers (as many legislatures do) and restricting it to those lawmakers (as Rowan County did here). For the reasons we discuss below, the latter approach poses greater risks under the Establishment Clause.

Id. at 279 (citations omitted). The Fourth Circuit emphasized that the Establishment Clause does not prohibit *all* legislator-led prayer and "the Establishment Clause indeed allows lawmakers to deliver invocations *in appropriate circumstances*." *Id.* at 280 (emphasis added). However, the identity of the prayer giver is clearly a factor relevant to the constitutional inquiry. *Id.* The Fourth Circuit emphasized various factors that led them to conclude that the legislator-led prayer was unconstitutional – notably, the members composed and delivered prayers featuring one faith and prevented others from offering invocations. *Id.* In doing so, "Rowan County's prayer practice...clearly identif[ied] the government with a particular faith," a direct parallel to the actions of the Board in the case at bar. *Id.*

The Fourth Circuit's analysis clearly illustrates that, although legislator-led prayer is not per se unconstitutional, it should not be given the same historical protection that chaplain-led prayer is given under *Marsh* and *Town of Greece*. Legislator-led prayer, although present in our history, never had the same "unambiguous and unbroken history of more than 200 years" that supports chaplain-led prayer's constitutionality. *See Marsh*, 463 U.S. at 792. Legislator-led invocations are "the exception to the rule," especially where the prayer is only given by the legislators who are government officers. *Lund*, 863 F.3d at 279. Furthermore, the Fourth Circuit

emphasized that many of the statistics do not differentiate between extending the prayer opportunity to lawmakers or restricting it to lawmakers. *Id.* Accordingly, a search of the records from the First Congress "does not yield *even one example* of legislator-led prayer during the First Congress." *Id.* at 294 (Motz, J., concurring) (emphasis added). The type of unique and unbroken history that exists in support of chaplain-led prayer .clearly does not exist in support of legislator-led prayer and, thus, a factual analysis must occur without any presumption of constitutionality.

Disagreeing with the Fourth Circuit, the Sixth Circuit held that legislator-led prayer was not inconsistent with the legislative prayer decisions. Although the decisions of the Fourth and the Sixth Circuits are not completely at odds, since the Fourth Circuit did not hold that all legislator-led prayer is unconstitutional, they do differ on whether legislator-led prayer has the same unique history as chaplain-led prayer. The Sixth Circuit in *Bormuth v. County of Jackson* relies on the amicus brief by the National Conference of State Legislatures (NCSL) in its decision. 870 F.3d 494, 510 (6th Cir. 2017). The NCSL surveyed various state practices and determined that "[t]he opening legislative prayer may be given by various classes of individuals. They include chaplains, guest clergymen, *legislators*, and legislative staff members. ... All bodies, including those with regular chaplains, *honor requests from individual legislators either to give the opening prayer* or to invite a constituent minister to conduct the prayer." *Id.* (emphasis in original) (quoting Brief of NCSL as Amicus Curiae, *Marsh v. Chambers*, 463 U.S. 783 (1983) (No. 82–83), 1982 WL 1034560, at *2, *3). This survey, however, does not address the issue presented in Hendersonville's prayer practice. For a legislator to give an invocation on a special occasion, perhaps in recognition of a particularly solemn or exciting event, is permissible under the Establishment Clause, but a policy of allowing *only* legislators to give prayer is an entirely different situation.

The Sixth Circuit's contention that legislator-led prayer has the same unbroken historical tradition as chaplain-led prayer exaggerates what minimal history exists in support of legislator-led prayer. In *Marsh*, this Court emphasized the length of tradition and the fact that it had been unbroken since the First Congress. 463 U.S. at 790. It is clear that that same history does not exist for legislator-led prayer. Legislators have usually been given the option of leading an invocation, but there is no unbroken tradition of allowing only legislators to lead the legislative prayer. As such, this Court should hold that the history and tradition test laid out in *Marsh* and *Town of Greece* does not extend to legislator-led prayer.

b. A policy of exclusively legislator-led prayer is unconstitutional under the Establishment Clause, regardless of any historical treatment.

Even if this Court were to hold that there is some historical support to legislator-led prayer and that the findings of tradition in *Marsh* and *Town of Greece* should be extended, this Court has made clear that a historical treatment alone is not sufficient to uphold unconstitutional activity. *See Marsh,* 463 U.S at 790 (holding that "standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees"); *see also Town of Greece*, 134 S. Ct. at 1819 ("Yet Marsh must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation"). Both *Marsh* and *Town of Greece* solely address chaplain-led legislative prayer, which is worlds apart from the legislator-led prayer present in the instant case. The Thirteenth Circuit below correctly held that "[g]overnment's officials leading and composing prayer is precisely the type of activity that the Establishment Clause prohibits." (J.A. at 21.) With legislator-led prayer, the government endorsement is undeniable. This is a government official – moments prior to acting in his or her governmental capacity – asking their constituents to join in their religion's prayer. Both *Marsh* and *Town of Greece* had a degree of separation between the government and prayer through a chaplain that is lacking herein.

This Court in *Town of Greece* was concerned about involving government officials in censoring religious speech. 134 S. Ct. at 1814. The court stated:

> To hold that invocations must be nonsectarian would force the legislatures sponsoring prayers and the courts deciding these cases to act as supervisors and censors of religious speech, thus involving government in religious matters to a far greater degree than is the case under the town's current practice of neither editing nor approving prayers in advance nor criticizing their content after the fact.

Id. The Court's hesitance to insert government officials into censoring chaplain-led speech clearly illustrates that government officials *actually delivering* that same religious speech is a violation of the First Amendment. If overt censoring of the content of religious speech by a government official is a violation of the First Amendment, then the same government official editing and approving his or her own prayer would also be a violation of the Establishment Clause.

Furthermore, in *Town of Greece*, this Court emphasized that the prayer givers were members of the public, not the legislature, in their constitutional analysis. 134 S. Ct. at 1826 (Kennedy, J., plurality opinion). The Court stated that "[a]lthough board members themselves stood, bowed their heads, or made the sign of the cross during prayer, they at no point solicited similar gestures by the public." *Id.* The Court went on to emphasize that any requests to rise for prayer or bow one's head came from guest ministers, not the town leaders. *Id.* With this analysis, the Court indicated that legislator-led prayer or action may not have the same historical protection, given that it would likely be more coercive in view of the Establishment Clause.

These Establishment Clause concerns are further intensified when considering the size and nature of the board meetings at issue in the instant case. Here, we have commissioners leading prayer to a small group of people who are bringing personalized concerns to the Board. (J.A. at 8.) The Board oversees cultural and recreational aspects of the city, including licensing, such as when Ms. Pintok requested a license to operate a paddleboat company. (J.A. at 8.) Just like in *Town of*

Greece, the Hendersonville Parks and Recreation Board deals with legislative issues, but also more specialized individual concerns. (J.A. at 8.) This personal role, as Justice Kagan noted in her dissent in *Town of Greece*, "calls for Board members to exercise special care to ensure that the prayers offered are inclusive—that they respect each and every member of the community as an equal citizen." *Town of Greece*, 134 S. Ct. at 1845 (Kagan, J., dissenting). Small board meetings hold a specialized role in society and are an opportunity for citizens of all creeds to meet with the government on a specific issue.

A practice of exclusively legislator-led prayer is an affront to the Establishment Clause on policy grounds alone. Although legislator-led prayer can occasionally be permissible, a policy that exclusively allows legislators to give the invocation is unconstitutional. Given the small and personalized nature of the board meetings, the undeniable appearance of government sponsorship, and the insertion of governmental officials into the religious realm, this Court should hold that any historical support for legislator-led prayer is insufficient to justify this unconstitutional practice.

II. THE BOARD'S PRACTICE OF BEGINNING PUBLIC MEETINGS WITH LEGISLATOR-LED PRAYER PLACES COERCIVE PRESSURE ON RELIGIOUS MINORITIES AND ULTIMATELY SERVES A PREDOMINANTLY RELIGIOUS PURPOSE.

In addition to violating the traditional strictures imposed upon legislative prayer and the specific forms of legislative prayer authorized by this Court in *Town of Greece* and *Marsh*, the Board's prayer practice violates the constitutional commandments not to use the force of the state in supporting or endorsing an official (or seemingly official) religion. In looking to the illegitimacy of the Board's prayer practice, this Court should note definitively that the Board's practice coerces the citizenry of Hendersonville and serves a predominantly religious purpose incompatible with the First Amendment, and for those reasons among others this Court should affirm the ruling of the Thirteenth Circuit.

a. The specific setting of the legislative prayer in the instant case engenders an unconstitutional level of coercion.

As this Court noted in *Lee*, "[i]t is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise." *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (internal quotations omitted). Not only do this Court's precedent and the fundamental tenets of the Constitution both condemn such coercion but they go further in saying that public officials are barred from "otherwise act[ing] in a way which establishes a state religion or religious faith or tends to do so." *Id.* While the Board may insist that no one was compelled by force to participate in the prayers, this Court has previously and vigorously noted that sponsoring a particular form of religious observance places "indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion," even if the individuals involved have the opportunity to decline participation. *Engel v. Vitale*, 370 U.S. 421, 431 (1962). Even though the individual citizens attending the Board's meetings were not held at gunpoint and ordered to participate in the prayer, precedent acknowledges that coercive pressure is still at play – citizens may feel compelled to pray, lest they be outcasted, degraded, or judged more harshly than those that did engage in the prayer. As such, religious minorities – those that would not freely engage in the prayer of their own accord or even have deep spiritual convictions against the prayer practice being employed – may feel coerced into doing so in direct violation of the precepts of the First Amendment.

This is especially notable when the institution engaging in the legislative prayer has the ability to directly affect the citizenry as a result of nonparticipation in the observance. As the dissent in the narrowly-decided *Bormuth* case noted, "[t]he setting—a local government meeting with constituent petitioners in the audience—amplifies the importance of the identity of the prayer giver in our analysis, and heightens the risks of coercion." *Bormuth*, 870 F.3d at 537 (Moore, J.,

dissenting). Indeed, *Bormuth*'s dissent followed on the heels of Fourth Circuit precedent in *Joyner* deciding precisely the same issue, noting that the plaintiff in *Joyner* "believ[ed] that if she had failed to comply, it would have negatively prejudice[d] consideration of [her] intended petition as a citizen appearing for public comment." *Joyner v. Forsyth County, N.C.*, 653 F.3d 344 (4th Cir. 2011) (cert. denied, 565 U.S. 1157).

The prayers delivered by the Board are clearly and unmistakably biased in favor of the Christian faith, excluding deference to those citizens of Hendersonville that follow other or no religion. As the record clearly reflects, the prayers were rife with references to the Christian deity – for example, "Almighty God," "Lord," "the Father and His son Jesus Christ," and other references appear throughout. (J.A. at 9.) Courts have repeatedly and consistently found the frequent mention of Christian deities without the mention of other religious icons from different faiths to be clearly inappropriate, lending the weight of the government to a specific religious ideology if the governmental body in question does not take steps to ensure that other faiths and beliefs are respected. *See, e.g., Wynne v. Town of Great Falls, South Carolina*, 376 F.3d 292, 298-299 (4th Cir. 2004) (holding it unacceptable that the prayers sponsored by the local government "frequently contained references to Jesus Christ, and thus promoted one religion over all others, dividing the Town's citizens along denominational lines").

Courts have often noted the significance of who exactly is delivering the public prayer. For instance, the Fourth Circuit determined only a year ago that lawmakers, specifically, delivering the public prayer greatly enhances the danger of coercion, citing, inter alia, the fact that that "type of prayer both identifies the government with religion more strongly than ordinary invocations and heightens the constitutional risks posed by requests to participate and by sectarian prayers." *Lund*, 863 F.3d at 278. Most notably, this Court, by a vote of seven to two, denied certiorari to Rowan

County. While this Court did not issue a written opinion on the matter, denying the appeal and permitting the Fourth Circuit's opinion to stand sent a clear message that that type of regimented and government-sponsored prayer would no longer rest easily upon its laurels; instead, the prior leniency shown by the courts to those engaging in legislative prayer draws rapidly to a close. This case provides this Court with the ability to stand by its denial of certiorari to Rowan County and affirm the ruling of the Thirteenth Circuit.

While the Board may argue in turn that its practices amount to mere tradition or commonplace practice, and as such should not be judged as harshly as a state statute or official regulation might, the potentially insidious nature of violating First Amendment rights is not lessened in wickedness by the relatively low stature of its undertakers. In the instant case, not only have the government officials charged with fairly representing the community intertwined themselves with religion but they have also cloaked it with the authority of the state. For instance, the prayers spoken by the Board contain an admonition for the assembled citizenry to bow their heads for the prayer – an order from a state actor for citizens and onlookers, not the Board members themselves, to obey the dictate of a religion that they may not follow. (J.A. at 9.) As this Court noted in *Lee*, when an official under the aegis of the state "decide[s] that an invocation and a benediction should be given," that action "is a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur." *Lee*, 505 U.S. at 587. As soon as the Board members elected to issue exclusively Christian prayers to begin their meetings, they lent the power of the state to a single religious mandate and in turn to the denigration of the rights of the citizenry. As this Court found in *Larkin*, the perceived state support for a single religious faith "provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred." *Larkin v. Grendel's Den*, 103 S. Ct. 505, 511 (1982). The

actions of the Board in the instant case exerted the might of the state in invoking one faith only, which is the exact kind of coercive state-sponsored religious speech against which the First Amendment was intended to act as a bulwark in the common defense.

Courts have also emphasized the importance of how open the floor is to other speakers, particularly speakers of other denominations. For instance, the Fourth Circuit in *Lund* noted that permitting only committee members to give invocations created a "closed-universe of prayer givers," a fact that the court noted made *Lund* "a conceptual world apart" from the majority of First Amendment legislative prayer jurisprudence. *Lund*, 863 F.3d at 275. Granting sole control of the prayer process to an exclusively Christian body that then used that discretion to give exclusively Christian prayers fundamentally violates the principle that the state must remain neutral in matters of faith.

b. The prayer practices of the Board serve a predominantly religious purpose.

Additionally, while the principal argument of the Board is no doubt that the exclusively Christian prayers provided by the exclusively Christian members of the board had an important secular purpose – chiefly, to "solemnize the weighty task of governance" in accordance with custom – the practice of legislative prayer "has the potential to generate sectarian strife," and, thus, "[does] violence to the pluralistic and inclusive values that are a defining feature of American public life." *Joyner*, 653 F.3d at 347. As such, the very principle that the Board attempts to invoke in order to justify its subversion of the First Amendment rights of its citizens is countermanded by the manner in which they do so – indeed, the entire purpose of legislative prayer is frustrated by the divisiveness of the very practices the Board seeks to maintain.

As the Third Circuit noted in *Doe*, the exclusively Christian nature of prayers given to commence governmental proceedings makes it "difficult to accept the proposition that a

'reasonable person' would not find that the primary effect of the Prayer Policy was to advance religion." *Doe v. Indian River Sch. Dist*., 653 F.3d 256, 285 (3d Cir. 2011). Were the Board to invite clergy or citizens of other faiths to deliver the invocations instead, as the United States Congress does, perhaps the thin veneer of the prayer practice's legitimacy could be preserved; instead, not even the shadow of a genuine backing underlies the proposition that the legislative prayer in the instant case is not intended primarily as a religious statement. The prayers provided by the Board are exclusively Christian and delivered by exclusively Christian Board members, and those facts combined with their frequent invocation of the Christian God suggest a systemic effort on the part of the Board to issue religious statements under the veil of legitimacy and with the power of the government behind them. (J.A. at 8-9.)

Regardless of the Board's assertions that the prayer practice is simply meant to instill a sense of moral uprightness and that the delivering of exclusively Christian prayers is not meant to achieve a discriminatory purpose or denigrate other faiths, "citizens attending Board meetings hear the prayers, not the policy." *Joyner*, 653 F.3d at 354. While the members of the Board may have had only the purest and most inclusive intentions, the message sent to the public was clear: one faith has the endorsement of the government, and all the rest do not. As the *Joyner* court noted, "we cannot turn a blind eye to the practical effects of the invocations at issue here" – no amount of equivocation after the fact can change the fundamental message broadcast loud and clear by the Board's practice. *Id*.

This analysis is in accordance with this Court's holdings that the purported motives behind a potential violation of the Establishment Clause cannot act as a shield to defend unconstitutional conduct. *See, e.g., McCreary Cty. v. ACLU of Ky*., 545 U.S. 844, 860-61 (2005) (holding that the purpose apparent from government action can have an impact more significant than the intent

expressly decreed); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000) (holding that "it is nonetheless the duty of the courts to 'distinguis[h] a sham secular purpose from a sincere one'"); *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 777 (1995) (holding that "the Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions"). To merely assert that a prayer practice is not primarily religious and have that assertion alone protect the state from civil action taken by citizens excluded or marginalized by the practice would be to grant the state absolute protection from any First Amendment challenge. Any number of wrongs could be accomplished directly against the letter and spirit of the Constitution if the assertion of constitutionality could be taken as constitutionality itself.

This stance is bolstered by precedent that looks not only to the speaker of a public body's invocation but its audience. For instance, this Court in *Town of Greece* noted that part of why the prayer practice of the government body therein was constitutionally acceptable is because the "principal audience for [the] invocations" is not the public "but lawmakers themselves." *Town of Greece*, 134 S. Ct. at 1826. While the members of the Board may gain some satisfaction of their own from the prayers, the prayers are specifically and deliberately addressed at the crowd, which is asked to stand in respect and listen to the prayer offered by the Board itself. (J.A. at 8.) There is no viable assertion to be made that the crowd is not the primary audience intended for the prayer; though the Board may argue that since some of the prayers refer to legislative functions the lawmakers are the only true audience, explicitly beseeching the crowd of non-Board members to hear the prayer's message sends the clear and unmistakable signal that the audience is indeed the crowd itself, in violation of both the alleged justification for legislative prayer and the civil rights of the citizens.

Even accepting the Board's argument that the legislative prayer at issue in the instant case is designed to instill solemnity, the practice of prayer is not the only way to enforce a period of mutual respect and appreciated gravity. Indeed, it is perhaps the most problematic way to do so, as state-sponsored prayer is a practice "whose very nature is apt to entangle the state in details of administration," and, as such, causes more disunity than unity. *Lemon*, 403 U.S. at 615. Put more strongly, as the dissent in *Marsh* noted,

> whatever secular functions legislative prayer might play—formally opening the legislative session, getting the members of the body to quiet down, and imbuing them with a sense of seriousness and high purpose—could so plainly be performed in a purely nonreligious fashion that to claim a secular purpose for the prayer is an insult to the perfectly honorable individuals who instituted and continue the practice.

Marsh v. Chambers, 463 U.S. at 796-797. While there is no specific requirement instilled by this Court's precedent to require the Board to always act in the most inclusive manner possible, the precepts of constitutional law already have outlined in other situations that governments should perform their duties in the manner least likely to affront the Constitution where practicable to do so – for instance, the least restrictive means doctrine.

As constitutional and precedential concepts like the least restrictive means doctrine adopted by this Court in *Zauderer* clearly indicate, the government is bound not only to acknowledge the necessity of constitutionality in the event of a court ruling on the matter but as a general mandate in executing its duties, adopting where practicable the "least restrictive possible means of achieving a substantial governmental interest." *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 644 (1985). While the least restrictive means doctrine is usually applied to specific areas of the law or specific doctrines or theories, it reflects a longstanding principle common not only in the jurisprudence of this Court but across the legal

landscape of the United States and the core legal frameworks of modern democracy as a whole. As Dr. Alan Sykes, a Yale law professor and eminent legal scholar, noted,

> Least restrictive means requirements and related legal principles, which require regulators to pursue regulatory objectives in the manner that is "least restrictive" of other societal values, pervade national and international legal systems. In American constitutional law, they appear in First Amendment cases, in Equal Protection cases, and in Dormant Commerce Clause cases, among others. They perform similar functions in European Law…They may be found in a number of articles of the North American Free Trade Agreement (NAFTA), and they play an essential role in the law of the World Trade Organization (WTO).

Alan O. Sykes, *The Least Restrictive Means*, 70 U. CHI. L. REV. 403 (2003). The Board is not required only to respect the rulings of this Court but to defer to the Constitution in all that it does, and in so doing honor the binding foundational document of our society. Were the goal of the public prayer merely to solemnize the proceedings in which the Board engages, the Board could easily adopt a method of doing so that does not entirely exclude non-Christian members of the community that it purports to serve.

Furthermore, even if the practice of delivering prayer to open committee sessions is constitutional, there are unquestionably ways of doing so in a fairer and more constitutionally acceptable manner than the one the Board selected. *See, e.g., Town of Greece*, 134 S. Ct. at 1821 (commending the Congressional standard of recognizing diversity by "welcoming ministers of many creeds," not only Christian ones). By not opening the floor to persons of different faiths and ensuring that only the Board's exclusively Christian members could provide prayer, the Board achieved a goal contrary to every essence of the concept of religious neutrality, violating the long-held precept that the state must, in matters of religion, enforce a policy of strict neutrality. *See Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947) (holding that the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers"); *McCreary Cty.,* 545 U.S. at 860 (holding that "[m]anifesting a purpose to favor one faith over

another, or adherence to religion generally, clashes with the understanding, reached ... after decades of religious war, that liberty and social stability demand a religious tolerance that respects the religious views of all citizens").

It is also not necessary to demonstrate that the religious purpose of the prayer was achieved or that the preclusion of diverse religious faiths was complete; rather, the Constitution prohibits even a partial derogation of First Amendment rights. *See, e.g., Lemon*, 403 U.S. at 612 (holding that "[a] law may be one 'respecting' the forbidden objective while falling short of its total realization" and that "[a] given law might not establish a state religion but nevertheless be one 'respecting' that end…and hence offend the First Amendment"); *Larkin*, 103 S. Ct. at 511 (holding that "the mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred"); *Wynne*, 376 F.3d at 299 (holding that "to 'advance' a religious belief means simply to 'forward, further, [or] promote' the belief," and that, as such, even minor support of specific faiths by the government is violative of the First Amendment). As such, Ms. Pintok need not prove a complete and systemic derogation of her First Amendment rights in order to prevail; rather, even a modest or tempered invasion of her civil liberties is an unconstitutional usurpation of her rights and the liberties granted to her by the First Amendment, a standard met and exceeded by the actions of the Board in the instant case.

Lastly, the Board may offer the defense that presenting exclusively Christian prayer before meetings is a mere result of coincidence and population prevalence and not an issue of concern for this Court. This is an assertion that entirely derogates the meaning and intention of the First Amendment. As this Court in *Town of Greece* noted, "[t]he First Amendment is not a majority

rule," and the ubiquity of adherence to a particular faith does not make state endorsement of that adherence or faith constitutionally permissible. 134 S. Ct. at 1822. As the *Joyner* court noted,

> The dissent suggests that the "frequency of Christian prayer" was merely the "product of demographics,"… and the County "could not control whether the population was religious"…What the dissent offers as a defense of the policy, however, is one of the problems with it. Take-all-comers policies that do not discourage sectarian prayer will inevitably favor the majoritarian faith in the community at the expense of religious minorities living therein.

653 F.3d at 354. Mere coincidence that the majority religion has the only seats on the Board and thus the exclusive ability to proselytize and endorse the majority religion does not excuse the unconstitutional nature of the Board's prayer practice. Indeed, the imperative to avoid a state establishment of religion is heightened in importance, not degraded in importance, when a strong religious community for a single faith exists in the given government's jurisdiction, as that makes it all the more likely that holders of minority religious belief may feel isolated, degraded, or outcast. The Board ignored and countermanded this constitutional imperative, violating the civil rights of Ms. Pintok and the community at large.

CONCLUSION

While the Board could have instituted a moment of quiet reflection or a minute of silence to begin meetings, or rotated through different religious faiths with guest speakers and prayer-leaders, or even simply performed the Pledge of Allegiance or the Star Spangled Banner, the Board ultimately decided to institute a practice violative of the Constitution and of the basic rights of its constituents. While the Board could have engendered a sense of community, inclusiveness, and mutual respect, it instead constructed an atmosphere of majoritarian judgment and pernicious discrimination. While the Board could have followed the law, it chose not to. For those reasons and those aforementioned, this Court should affirm the ruling of the Thirteenth Circuit and hold that the Board's custom violates the traditions upheld in *Marsh* and *Town of Greece*, instills undue coercive pressure on religious minorities, and violates the mandate of supreme secular purpose required for constitutional legislative prayer.