No. 17-1891

In the Supreme Court of the United States

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

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BRIEF FOR THE PETITIONER

Team No. 2523
Counsel for Petitioner
September 30, 2018

QUESTIONS PRESENTED

1. Whether a municipal Board's long-standing practice of having members offer prayer before board meetings comports with this country's history and tradition of legislative prayer, where the prayers stated are identical and permissible if stated by clergymen or laymen in the same setting.

2. Whether a municipal Board's practice of beginning public meetings with prayer violates the Establishment Clause, where the prayers are not recited with the intent to coerce, do not mention a specific deity, and are recited for the purpose of solemnizing public business.

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JURISDICTION STATEMENT

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

STATEMENT OF THE CASE

The Hendersonville Parks and Recreation Board ("the Board") has a long-standing tradition of opening their board meetings with prayer. J.A. at 8. Currently, five individuals serve on the Board. *Id.* Each meeting, a different member invites the attendees to stand for the pledge of allegiance and a short prayer. *Id.* Although all five Board members belong to a sect of Christianity and recite a prayer rooted in Judeo Christian tradition, the prayers are primarily secular in nature. *Id.*

Respondent, Barbara Pintok, is a follower of Wicca, a pagan religion. J.A. at 1. Respondent attended one of the board meetings in order to obtain a license to operate a paddleboat company she was forming. J.A. at 8. Despite Respondent's regular attendance at the board meetings, she felt distraught and intimidated during the recitation of the prayer. J.A. at 1. Respondent discussed her concerns with Board member Mr. James Lawley, who she claims told her "this is a Christian country, get over it." *Id.* However, Mr. Lawley insists he told Respondent that her complaint was frivolous and does not recall telling Respondent "this is a Christian country, get over it." J.A. at 6.

In their affidavits, the Board members clarify that the tradition of the prayers is a secular practice rather than a religious practice. J.A. at 2-6. Although all of the prayers mention "God," the majority of the prayers recited by the Board members do not reference a specific deity. J.A. at 9. More importantly, the prayers do not criticize or disparage other religions. *Id.* For example, the prayers include language such as, "[W]e ask for your guidance as we conduct the public's business and serve all people—no matter what religion, faith, or lack thereof," "We ask for peace and togetherness . . . , " "We ask for your guidance as we conduct the public's business and serve all people . . . ," "Lord help us to make good decisions . . . ," "May you guide us to

preside fairly and impartially over all petitions, grievances, and arguments brought before us . . . ," "We pray that we can come together in a spirit of unity despite whatever differences we may have . . . ," "Please bless everyone that comes before us and give peace to them in their daily lives . . . ," and "Let us treat all persons with the dignity and respect that they deserve—no matter their race, sex, religion, sexual orientation, or gender identity." *Id.*The Board members did not intend to coerce any of the attendees with their prayers, nor did they intend to convert anyone to their specific religion. J.A. at 2-6.

Respondent filed a lawsuit against the Board. She sought declaratory and injunctive relief including "a preliminary injunction against the Board's use of sectarian prayers at its meetings." J.A. at 10. The United States District Court for the District of Caldon granted summary judgement in favor of the Board. J.A. at 15. On appeal, the Thirteenth Circuit reversed the District Court's decision and found that the prayer practices of the Board were unconstitutional because the Board members, themselves, led the prayers. J.A. at 24. The Thirteenth Circuit also found that the "prayer practice has a primary effect of advancing the Christian religion." J.A. at 22. A writ of certiorari was granted by this Court to determine whether the Board's prayer practices are constitutional. J.A. at 26.

SUMMARY OF THE ARGUMENT

In line with the Constitution, this Court should reverse the decision of the Thirteenth Circuit Court of Appeals. The Court of Appeals incorrectly found that the Board's prayer practice was unconstitutional because the practice of beginning meetings with legislator-led prayer comports with the long-standing tradition of legislative prayer and does not place coercive pressures on religious minorities.

The Court of Appeals erroneously based its decision on the Fourth Circuit case, *Lund v. Rowan Cnty*. There, the Fourth Circuit placed too much emphasis on the arbitrary distinction between legislator-led and clergymen or laymen led prayer. Under this Court's precedents of *Marsh v. Chambers* and *Town of Greece v. Galloway*, there is a history and tradition of legislative prayer. Because of this precedent, a *Lemon* test analysis is not required in this case. Legislator-led prayer fits the confines of *Marsh* and *Town of Greece*. Here, the Board followed tradition by beginning their meetings with a short prayer. It is immaterial that the Board members, themselves, led the prayers.

However, as *Town of Greece* indicates, a fact sensitive inquiry, that considers the setting in which the prayer rises and the audience with whom it's directed, may be conducted if a court is unsure whether a legislative prayer practice comports with the history and tradition of this country. Here, the environment of the meetings was identical to early congressional sessions and the prayers were intended to clear the minds of the Board members. Under this inquiry, the Board's prayers are constitutional.

Furthermore, the lower court incorrectly found that the Board's prayer practice advanced the Christian religion and heightened the potential for coercion. This Court should follow its

precedent in *Marsh v. Chambers* and find that the Board's prayer practice supports the secular purpose of solemnizing public business.

Following the Sixth Circuit holding in *Bormuth v. Cnty. of Jackson*, this Court should find prayers that reflect beliefs specific to one creed can still serve to solemnize the occasion. Here, although the Board members' prayers were Christian in nature, the prayers served to solemnize the meeting without placing coercive pressures on the attendees.

Even if this Court applies the *Lemon* test, it will find that the Board's prayer practice does not violate the Establishment Clause because the purpose of the prayer was not to endorse or disapprove of a religion, its primary effect did not advance or inhibit religion, and there was no excessive entanglement between government and religion. Here, the prayers do not reference a specific deity and the Board members do not require the attendees to stand up or recite the prayer in unison. Therefore, the Board's prayer practice does not violate the Establishment Clause.

This Court should reverse the lower court's holding and find that the Board's prayer practice is constitutional. The Board's prayer practice fits the long-standing tradition of legislator-led prayer and does not impose any coercive pressures.

ARGUMENT

I. THIS COURT SHOULD REVERSE THE HOLDING OF THE COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT BECAUSE HENDERSON PARKS AND RECREATION BOARD'S PRAYER PRACTICE COMPORTS WITH THE HOLDINGS FROM *MARSH* AND *TOWN OF GREECE*.

This court should reverse the holding of the Court of Appeals for the Thirteenth Circuit because the court incorrectly found the precedent rulings of *Marsh* and *Town of Greece* inapplicable, when holding that the Board's prayer practices are unconstitutional. Under the Establishment Clause, "Congress shall make no law respecting the establishment of religion . . . ." U.S. Const. amend. I. This Court explicitly addressed the constitutionality of legislative prayer in *Marsh* and *Town of Greece*. *Marsh v. Chambers*, 463 U.S. 783, 795 (1983); *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1828 (2014). Under these rulings, legislative prayer is constitutional so long as it comports with the history and tradition of the United States. *Id.*

In this case, the Court of Appeals incorrectly determined that the Board violated the Establishment Clause because board members led the prayers rather than clergymen or laymen. *Marsh* and *Town of Greece* do not limit the breadth of their holdings in this way. The Fourth and Sixth Circuits have reached different conclusions on the validity of lawmaker or legislator-led prayer because of different analyses. The Fourth Circuit incorrectly narrowed the rulings of *Marsh* and *Town of Greece* by focusing on the arbitrary distinction between legislator-led prayer and clergymen or layperson led prayer. Therefore, the Fourth Circuit erred in its ruling that legislator-led prayer is unconstitutional. The Sixth Circuit correctly applied the precedents and found legislator-led prayer constitutional. As the Sixth Circuit ruled, *Marsh* and *Town of Greece* do not state that the identity of the prayer giver in legislative prayers directly correlates with constitutionality. *Bormuth v. Cnty. of Jackson*, 870 F.3d 494, 509 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 2708 (2018), *reh'g denied*, 2018 WL 403750737507 (Aug. 24, 2018). Therefore, this

Court should validate the opinion of the Sixth Circuit and reverse the holding of the Thirteenth Circuit.

A. Because of the history and tradition of legislative prayer in the United States, the prayers provided by the Henderson Parks and Recreation Board members comport with this Court's holdings from *Marsh* and *Town of Greece*.

The practice of legislator-led prayer comports with the rulings from *Marsh* and *Town of Greece.* Legislative prayer comports with the holdings of *Marsh* and *Town of Greece* when the prayer complies with the history and tradition of legislative prayer in American society. *Marsh v. Chambers*, 463 U.S. 783, 795 (1983); *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1828 (2014). When a court is unsure of whether legislative prayer comports with the historical tradition of the United States, a fact sensitive inquiry should be made. *Town of Greece*, 134 S. Ct. 1811 at 1825.

The opening of legislative sessions with prayer "is deeply embedded in the history and tradition of this country." *Marsh*, 463 U.S. 783 at 786. In *Marsh*, this Court determined whether the petitioner's practice of opening legislative sessions with a prayer delivered by a Presbyterian chaplain was constitutional under the Establishment Clause. *Id.* at 784. The lower court applied the *Lemon* test and found that the petitioner's practice violated all prongs of the test. *Id.* at 795. This Court reversed the holding of the lower court, *without applying the Lemon test*, and held that the practice of the petitioner was constitutional. *Id.*

In its reasoning, this Court traced the tradition of legislative prayer to early congressional sessions in 1774. *Id.* at 787-88. This Court also looked to historical evidence to reveal the intent of the Establishment Clause drafters. *Id.* at 790. The drafters viewed legislative prayer as conduct whose effect harmonized with the tenets of all religions; this conduct presented no threat to the Establishment Clause. *Id.* at 792. "There can be no doubt that the practice of opening legislative

sessions with prayer has become the fabric of our society." *Id.* This Court rejected the respondent's contention that choosing a clergyman of one faith advanced the beliefs of such faith. *Id.* at 793. Furthermore, this Court stated that "The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other faith or belief." *Id.* at 794-95. "We conclude that legislative prayer presents no [unconstitutional] establishment [of religion] . . . ." *Id.* at 791.

Even if this Court determines that the Board's actions do not fit within the *Marsh* analysis, under this Court's ruling in *Town of Greece* a fact sensitive inquiry should be conducted. *Town of Greece*, 134 S. Ct. 1811 at 1825. In *Town of Greece*, this Court was again faced with the question of the constitutionality of legislative prayer. *Id.* at 1815. The petitioner had an informal practice of selecting volunteer prayer givers to give short invocations before monthly board meetings. *Id.* at 1816. "[The town] leaders maintained that a minister or layperson of any persuasion, including an atheist, could give the invocation, though past prayers had been Christian in nature." *Id.* Respondents contended that the prayers violated their religious and philosophical views. *Id.* at 1817. Respondents also asserted that the petitioner's practices "violated [the] . . . Establishment Clause by preferring Christians over other prayer givers . . . ." *Id.* More specifically, that *Marsh* did not approve of prayers containing sectarian language and such sectarian language created a coercive atmosphere. *Id.* at 1820. This Court reversed the judgment of the lower court and concluded that the petitioner's practices did not violate the Establishment Clause. *Id.* at 1828.

In its reasoning, this Court rebutted the respondents' arguments in stating "It is not necessary to define the precise boundary of the Establishment Clause where history shows that

the specific practice is permitted." *Id.* at 1819 (citing *Marsh*, 463 U.S. 783 at 792). Furthermore, as stated above, *Marsh* does not stand for the proposition that the constitutionality of legislative prayer is dependent on the content of the prayer. *Town of Greece*, 134 S. Ct. 1811 at 1821. However, this Court noted that the content of prayer could be a factor in the analysis of legislative prayer if the prayer "denigrate[d] nonbelievers or religious minorities . . . ." *Id.* at 1823. "Prayer that is solemn and respectful in tone, that invites lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing, serves a legitimate function." *Id.* An inquiry into the prayer practices as whole, rather than a single prayer was required. *Id.* at 1824.

In response to respondent's coercion claims, this Court stated that a fact sensitive inquiry "that considers both the setting in which the prayer arises and the audience with whom it is directed" was required. *Id.* at 1825. This inquiry must be assessed against the history and tradition of legislative prayer. *Id.* The primary audience of legislative prayers are the legislators and not the public. *Id.* at 1824. "The purpose is . . . to accommodate the spiritual needs of lawmakers and connect them to a tradition dating to the time of the framers." *Id.* at 1826. The prayers delivered in the Town of Greece did not fall outside the tradition discussed in *Marsh. Id.* at 1824.

In *Marsh*, this Court created an exception to traditional Establishment Clause tests. This exception encompasses legislative prayer. *Marsh* stands for the proposition that general establishment clause tests, like the *Lemon* test, do not apply to the practice of legislative prayer. Instead, when a court is determining whether an act of legislative prayer is constitutional, the practice should be held against this country's history and tradition of legislative prayer while conducting a fact sensitive inquiry.

Here, the actions of the Board fall within the bounds of *Marsh* and *Town of Greece* because neither holding prohibits legislator-led prayer. *Marsh* should be read to include legislator-led prayer as this country's history and tradition of legislative prayer includes legislator-led prayers. Under *Marsh*, it is immaterial that all members of the Board are Christian as choosing a clergyman of one faith to lead all prayers was not found to advance such faith. J.A. at 2-6. Furthermore, the Board's prayers do not disparage faiths outside Christianity; the prayers are directed at the Board's ability to make decisions in the best interests of the public. *Id.* "We ask for peace and togetherness. . . ," "We ask for your guidance as we conduct the public's business and *serve all people* . . . ," "Lord, help us make good decisions . . . ," and "May you guide us to preside fairly and impartially over all petitions, grievances, and arguments brought before us." J.A. at 9. These prayers are respectful and solemn in tone.

Respondent in the current case claims *Town of Greece* is inapplicable to the current case because of specific language by this Court: "The analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity." *Town of Greece*, 134 S. Ct. 1811 at 1826. This Court did not state that the prayer practices in *Town of Greece* would have been found to be unconstitutional if the prayers were legislator-led. This Court simply stated that *the analysis would be different*. *Id.* Therefore, Respondent's contention is unfounded.

After applying the fact sensitive inquiry mentioned in *Town of Greece* to the actions of the Board, this Court should reverse the holding of the Thirteenth Circuit. Here, the setting of the prayer comports with the history and tradition of legislative prayer as the environment is identical to that of early congressional sessions. Moreover, the words of the prayers indicate the

directed audience to be the board members themselves. J.A. at 9. The Board asks attendees to stand and listen, but they do not single out opponents of the prayers or make decisions based on the approval of their prayers. J.A. at 2-6. Under *Marsh* and *Town of Greece,* the actions of the Board are constitutional.

B. The identity of the prayer giver in legislative meetings should not be the primary focus when analyzing the constitutionality of legislative prayer.

The constitutionality of the legislative prayer is not dependent on the identity of the prayer giver. In this case, the Board acted within the confines of the Establishment Clause despite the fact that Board members led the prayers before monthly meetings. Though the Fourth and the Sixth Circuits have held differently on this matter, this Court should apply the opinion of the Sixth Circuit when analyzing the facts of this case. The Sixth Circuit's application of the holdings from *Marsh* and *Town of Greece* conforms to this Court's rationale when deciding *Marsh* and *Town of Greece*. Thus, the Board members did not violate the Establishment Clause by leading the prayers before board meetings.

1. The Fourth Circuit incorrectly focused on the arbitrary distinction between legislator-led prayer and clergymen or laymen led prayer.

The Fourth Circuit Court of Appeals incorrectly narrowed the precedent rulings of *Marsh* and *Town of Greece*. Under *Marsh* and *Town of Greece*, "legislator-led prayer is not inherently unconstitutional," but the opinion of the Fourth Circuit displays this unsubstantiated position. *Lund v. Rowan Cnty*., 863 F.3d 268, 280 (4th Cir. 2017), *cert. denied,*138 S. Ct. 2564 (2018).

The identity of the prayer giver should not be the primary factor when a court is determining the constitutionality of legislative prayer. In *Lund,* on rehearing en banc, the Fourth Circuit evaluated the constitutionality of legislator-led prayer. *Id.* at 271-72. Rowan County's

Board of Commissioners drafted and delivered prayers prior to the start of their open meetings. *Id.* at 272. During these prayers, the commissioners sat at the front of the room facing their constituents. *Id.* "Board members rotate the prayer opportunity among themselves as a matter of long-standing custom," as individuals outside the board were prohibited from offering a prayer. *Id.* at 273. Christianity was the only religion represented in the prayers, and statements that placed Christianity above other religions were often included. *Id.* Plaintiffs asserted that the prayer practices of the Board violated the Establishment Clause because the prayers "sent a message that the county and the Board favor Christians . . .." *Id.* at 273-74. The Fourth Circuit found that the prayer practices of the commissioners did not fit the tradition of legislative prayer, thus the practices were unconstitutional. *Id.* at 275.

The court began its analysis by reviewing *Marsh* and *Town of Greece. Id.* at *276. "Marsh* and *Town of Greece* . . . in no way sought to dictate the outcome of every subsequent case." *Id.* The court determined that *Marsh* and *Town of Greece* did not answer the question of the constitutionality of legislator-led prayer. *Id.* Despite the court's uncertainty in its evaluation, the court proceeded to use *Marsh* and *Town of Greece* as a starting point for its analysis. *Id.*

"*Marsh* stands for the principal that legislative prayer, while religious in nature, has long been understood as compatible with the Establishment Clause." *Id. (*citing *Town of Greece,* 134 S. Ct. 1811 at 1818). *Town of Greece* "held that that the Establishment Clause does not require nonsectarian or ecumenical prayer as a single, fixed standard." *Lund,* 863 F.3d 268 at 277 (citing *Town of Greece,* 134 S. Ct. 1811 at 1820). *Marsh* and *Town of Greece* combined indicate the Supreme Court's overall support of legislative prayer. *Lund,* 863 F.3d 268 at 277. Despite this Court's precedent, the Fourth Circuit distinguished the County's prayer practices for two reasons. *Id.* First, the legislators gave the prayers themselves and second, "the prayer

opportunity was reserved for the commissioners, creating a closed universe of prayer givers." *Id.* The court determined that because the commissioners led the prayers themselves, *Marsh* and *Town of Greece* contained dissimilar facts and did not explicitly rule on the constitutionality of legislator-led prayer: the prayers did not fit the historical practice of prayer. *Id.* at 278. The court also found that that identity of the prayer giver was pertinent to the constitutionality of the prayer. *Id.* at 280. Guided by *Town of Greece,* the Fourth Circuit partook in a fact sensitive inquiry of the Commissioner's conduct. *Id.* at 281. But, because members of the board exclusively drafted and delivered the prayers, their conduct fell outside the breadth of *Town of Greece. Id.* at 280.

The Fourth Circuit's analysis placed too much emphasis on the identity of the prayer giver. More specifically, the Fourth Circuit assumed that because the facts of *Lund* did not align perfectly with the facts of *Marsh* or *Town of Greece,* their holdings were inapplicable. This arbitrary distinction determined the outcome of the case. Because the court did not find *Marsh* or *Town of Greece* were applicable, the court focused on distinguishing *Lund* from *Marsh* and *Town of Greece*. The court's analysis did not appear to follow the precedents of *Marsh, Town of Greece,* or traditional establishment clause tests. The court invented its own analysis and therefore found that the government was too entwined with the prayers. Because the Fourth Circuit did not apply the rulings of *Marsh* and *Town of Greece* generally, the court reached the wrong conclusion.

2. This Court should use the framework and analysis of the Sixth Circuit's ruling, in *Bormuth,* as guidance in this case because the court correctly applied this Court's precedents from *Marsh* and *Town of Greece*.

Despite nearly identical facts, the Sixth Circuit reached a different conclusion on the constitutionality of legislator-led prayer. *Marsh* nor *Town of Greece* indicate that the identity of

the prayer giver cannot be a legislative official. *Bormuth v. Cnty. of Jackson*, 870 F.3d 494, 509 (6th Cir. 2017).

The distinction between legislator-led prayer and clergy led prayer is arbitrary. In *Bormuth v. Jackson*, the Sixth Circuit rejected the Fourth Circuit's narrow interpretation of legislative prayer. *Bormuth*, 870 F.3d 494 at 498. The Jackson County Board of Commissioners began its public meetings with a commissioner led prayer. *Id.* The prayers were primarily Christian in character. *Id.* The appellant asserted that the prayers were unconstitutional because they were commissioner led. *Id.* The Sixth Circuit held that even though the commissioner's themselves led the prayers, the Board's prayer practice was consistent with the decisions of *Marsh* and *Town of Greece,* and thus were permissible under the Establishment clause. *Id.*

Referencing the holdings of *Marsh* and *Town of Greece*, the Sixth Circuit stated "the opening of sessions of legislative and other deliberate public bodies with prayer is deeply embedded in the history and tradition of this country." *Id.* at 503 (citing *Marsh*, 463 U.S. 783 at 795; *Town of Greece*, 134 S. Ct. 1811 at 1828). The court noted that this Court has twice approved the constitutionality of legislative prayer. *Bormuth*, 870 F.3d 494 at 503. Furthermore, the court highlighted the fact that *Marsh* upheld legislative prayer without "subjecting the practice to any formal tests." *Id.* at 504. *Town of Greece* advanced the Marsh decision by rejecting the contention that the constitutionality of legislative prayer was reliant on the "neutrality of its content." *Id.* at 506.

In order to determine whether the practices of the Commissioners fit the mold of *Marsh* and *Town of Greece,* the Sixth Circuit had to determine whether legislator-led prayer is constitutional." *Id.* at 509. The court found that "there was no support for the appellant's granular view that permissible legislative prayer does not include prayers led by legislators." *Id.*

Moreover, *Marsh* and *Town of Greece* indicate that "we are to focus upon the prayer opportunity as a whole in light of historical practices and understandings." *Id.* "More significantly, history shows that legislator-led prayer is a long-standing tradition." *Id.* (citing *Town of Greece*, 134 S. Ct. 1811 at 1833).

The Sixth Circuit did not find any significance in the fact that the prayer givers were on the Board of Commissioners. *Bormuth*, 870 F.3d 494 at 512. Prayers given by legislative officials are consistent with the history of the United States. *Id.* "If the constitutionality of a legislative prayer is predicated on the identity of the speaker, potentially absurd results would ensue. Under such holding, an invocation delivered in one county by a guest minister would be upheld, while the identical invocation delivered . . . by one of the legislators would be struck down." *Id.*

As the Sixth Circuit states in *Bormuth*, neither *Marsh* or *Town of Greece*, explicitly state that the identity of the prayer giver correlates with unconstitutionality. Here, the Thirteenth Circuit's analysis fails to consider the long history of legislator-led prayer in the United States. The Board's actions are consistent with this nation's precedents; therefore, they are constitutional.

II. EVEN IF THIS COURT DOES NOT FIND *MARSH* AND *TOWN OF GREECE* APPLICABLE, HENDERSONVILLE PARK AND RECREATION BOARD'S PRAYER PRACTICE SUPPORTS THE SECULAR PURPOSE OF SOLEMNIZING PUBLIC BUSINESS AND DOES NOT PLACE COERCIVE PRESSURES ON RELIGIOUS MINORITIES.

This Court should find that Hendersonville Parks and Recreation Board did not violate the Establishment Clause by opening their board meetings with prayer. Opening public meetings of legislative and other deliberative public bodies with prayer "supports a secular purpose of solemnizing public business because it is deeply embedded in the history and tradition of this country." *Marsh v. Chambers*, 463 U.S. 783, 786 (1983). Although this Court has stated that standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees, intent of the legislature plays a role in determining an Establishment Clause violation.

In this case, Petitioner's legislator-led prayer does not violate the Establishment Clause because it is part of a time-honored tradition, the content of the prayers pass the *Lemon* test, and the attendees of a town's board meeting are not as vulnerable and immature as minors at a school function. *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000). It is irrelevant that the prayers were read by a Board member rather than a clergyman because the intent of the Board members is to solemnize public business and their actions do not place coercive pressures on the attendees or violate the *Lemon* test.

A. The Board's practice of beginning public meetings with prayer supports the secular purpose of solemnizing public business because there is a time-honored tradition of legislative prayer that reflects the respect of each faith.

The Board's practice serves only the secular purpose of solemnizing public business through tradition without imposing religious coercion. There is a "time-honored tradition of legislative prayer that reflects the respect of each faith for other faiths and the aspiration,

common to so many creeds, of finding higher meaning and deeper purpose in these fleeting moments each of us spends upon this earth." *Lund v. Rowan Cnty.*, 863 F.3d 268, 272 (4th Cir. 2017), *cert. denied*,138 S. Ct. 2564 (2018). Beginning meetings with prayer is a tradition still practiced today because a "religious message is the most obvious method of solemnizing an event." *Santa Fe Indep. Sch. Dist.*, 530 U.S. 290, 291. A single prayer will not "despoil a practice that on the whole reflects and embraces our tradition" of legislative prayer. *Lund*, 863 F.3d 278.

Last year, the Sixth Circuit upheld a county's practice of opening board meetings with legislator-led prayer. In *Bormuth v. Cnty. of Jackson*, the plaintiff, a "self-professed Pagan and Animist," objected to the prayers recited by the board commissioners at the beginning of the meetings. *Bormuth v. Cnty. of Jackson*, 870 F.3d 494, 498 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 2708 (2018), *reh'g denied*, 2018 WL 403750737507 (Aug. 24, 2018). Plaintiff claimed the prayers were "unwelcomed" and "severely offensive" to him as he is a "believer in the Pagan religion, which was destroyed by followers of Jesus Christ." *Id.* Plaintiff also stated that the prayers made him feel like "he was in church" and that he was "being forced to worship Jesus Christ in order to participate in the business of County Government." *Id.* The court's first inquiry was to determine if the county's prayer practice "fits within the tradition long followed in Congress and the state legislatures." *Id.* at 506. They found it did; history illustrates legislator-led prayer is a long-standing tradition. *Id.* at 509.

Furthermore, "prayer that reflects beliefs specific to only some creeds can still serve to solemnize the occasion, so long as the practice over time is not "exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Id.* at 506 (quoting *Town of Greece v. Galloway*, 572 U.S. 134 S. Ct. 1811, 1822-23 (2014)). The court disagreed with plaintiff's

argument that soliciting adult members of the public to assist in solemnizing the meetings by rising and remaining quiet in a reverent position is coercive because the "risk of prejudice is no greater if the request is delivered by a commissioner than if it is delivered by a guest chaplain. In both situations, the commissioners are equally capable of observing those who comply and those who do not." *Id.* at 518.

On the issue of coercion, the Sixth Circuit reiterated Justice Kennedy's explanation in *Town of Greece*, stating, "inquiry into whether the government has engaged in coercion is 'a fact-sensitive one that considers both the setting in which the prayer arises and the audience to whom it is directed'." *Id.* at 532. Rejecting plaintiff's argument that two of the board members turned their back on him in order to coerce and show their disapproval of plaintiff staying seated during the prayer, the court determined that those "isolated incidents are not indicative of a 'pattern and practice' of coercion against nonbelievers of religion." *Id.* at 517. When challenges to the practice first arose about thirty-five years ago, this Court clarified that "such prayers are constitutional so long as they do not coerce non-believers." *Id.* at 519 Additionally, plaintiff's claims at most showed "'subtle coercive pressures' which do not remotely approach 'actual legal coercion'." *Id.* Prayer opportunity is "evaluated against the backdrop of a historical practice showing that prayer has become part of the Nation's heritage and tradition." *Town of Greece v. Galloway,* 134 S. Ct. 1811, 1813 (2014). It is presumed that the "reasonable observer is acquainted with this tradition and understands that its purposes are to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens." *Id.*

Finally, although the prayers offered before the board "generally espouse Christian faith, this does not make the practice incompatible with the Establishment Clause." *Id.* at 512. The

content, of the prayers, in this case falls "within the religious idiom accepted by our Founders." *Id.* at 513. Consistent with *Town of Greece*, "the solemn and respectful-in-tone prayers demonstrate the commissioners permissibly seek guidance to 'make good decisions that will be best for generations to come' and express well-wishes to military and community members." *Id.* Even if the prayers reflect the individual commissioners' religious beliefs it "does not mean the he or she is 'endorsing' a particular religion, Christianity or otherwise." *Id.* at 514. Creed-specific prayers alone do not violate the First Amendment. *Id.* at 513.

Using the recent rulings from the Fourth and Sixth Circuits, this Court should find the Board's prayers did not violate the Establishment Clause. Like *Lund*, the Board's prayers are recited by the Board members and no outside religious leader is invited to recite the prayer. J.A. at 8. However, unlike *Lund*, where the prayers sought to bring people towards Christianity, the Board's prayers are neutral. J.A. at 9. In *Lund*, the board used the phrases "although you sent Jesus to be Savior of the world, we confess that we treat Him as our own personal God" and "we have also neglected to follow the guidance of your Holy Spirit and have allowed sin to enter into our lives." *Lund*, 863 F.3d 268, 273.

Here, the Board uses very broad and neutral language, "we pray that we can all come together in a spirit of unity despite whatever differences we may have" and "please bless everyone that comes before us and give peace to them in their daily lives." J.A. at 9. In one prayer, a commissioner specifically states, "let us treat all persons with the dignity and respect that they deserve—no matter their race, sex, religion, sexual orientation, or gender identity." *Id.* Multiple Board members have stated that the secular purpose of opening the meetings with prayer is to solemnize public business. J.A. at 2, 4-6. Although a prayer may name a religious

figure, one prayer by one board member does not invalidate a practice that reflects and embraces the tradition of legislative-led prayer. J.A. at 9.

This Court should follow the ruling in *Bormuth* because prayers specific to a faith or sect can still serve to solemnize the occasion. It is irrelevant that the prayers are given by a Board member instead of a religious leader. Moreover, because the prayers are given by a Board member, the prayer's sole purpose is to solemnize the meeting rather than relay a religious message. Furthermore, Respondent would have felt the same prejudice had the prayer been given by a clergyman, which this Court has already deemed constitutional.

Respondent's claim that she suffered indirect coercion is unwarranted. J.A. at 14. All Respondent was asked to do was remain silent for a sixty second prayer. J.A. at 8. Like the plaintiff in *Bormuth*, respondent had the choice to remain seated for the prayer. *Id.* Similar to *Bormuth*, Respondent is also of a pagan religion who felt uncomfortable when hearing the Board's prayers. J.A. at 1. Following Justice Kennedy's explanation, hearing a prayer Respondent does not agree with or follow, does not invoke an Establishment Clause violation. Furthermore, all five of the Board members denied reciting the prayer in order to coerce members into conforming with their faith. J.A. at 2-6. All Board members state that they would never allow or be a part of such practice. *Id.* Finally, Respondent claims she complained to a Board member, James Lawley, who told her to "get over it" and "this is a Christian country." J.A. at 6. However, Mr. Lawley does not recall saying those words. *Id.* Even if this Court accepts Respondent's affidavit and finds that Mr. Lawley responded to her in that manner, his response was an isolated incident that does not establish a pattern of coercion. When weighing Mr. Lawley's statement and Respondent's feelings, like *Bormuth*, this Court will find Respondent

showed, at most, "subtle coercive pressures" which do not "remotely approach actual legal coercion." *Bormuth*, 870 F.3d 494 at 519.

Here, the content of the prayers, the diversity of member's Christian faiths, and the freedom to sit or stand during the beginning of the meetings, affirm that the prayer practice had a secular purpose of solemnizing public business which placed no coercive pressures on religious minorities. J.A. at 8-10.

B. The Board's legislator-led prayers do not violate the Establishment Clause because the prayer practice satisfies all three prongs of the *Lemon* test.

This Court created the *Lemon* test in order to determine an Establishment Clause violation. If this Court applies the *Lemon* test, it will find the Board's member led prayers pass all three prongs of the *Lemon* test. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). A statute is not guilty of violating the Establishment Clause if it "has a secular legislative purpose, its principal or primary effect is one that neither advances nor inhibits religion, and it does not foster an excessive government entanglement with religion." *Id.* at 612-13. This analysis is sequential, which means that if the governmental practice violates the first prong of *Lemon*, there is no need to proceed further with the other two prongs of the test. *Edwards v. Aguillard*, 482 U.S. 578, 583−85 (1987).

1. Secular Purpose

In *Brown v. Gwinnett Cnty. Sch. Dist.*, the Eleventh Circuit used the *Lemon* test in order to determine whether "The Moment of Quiet Reflection in Schools Act," which required teaches to dedicate sixty seconds of silence in the beginning of each school day for meditation, reflection, prayer, etc., violated the Establishment Clause. *Brown v. Gwinnett Cnty. Sch. Dist.*, 112 F.3d 1464, 1468 (11 Cir. 1997). The court applied each prong starting with *secular purpose*, explaining a statute's purpose need not be exclusively secular. A statute violates the

Establishment Clause if it is "entirely motivated by a purpose to advance religion." *Id.* at 1469. *See also Agostini v. Felton*, 521 U.S. 203, 218 (1997). The Act had a clear secular purpose because its preamble explained the purpose of the Act was to provide students with an "opportunity for a brief period of quiet reflection before beginning the day's activities." *Id.*

More recently in *Doe v. Indian River Sch. Dist.*, the Third Circuit used the *Lemon* test in order to determine whether allowing prayer at school board meetings which were routinely joined by local school districts, violated the Establishment Clause. *Doe v. Indian River Sch. Dist.*, 653 F.3d 256 (3d Cir. 2011). The plaintiff contended that the prayers "pervaded the lives of teachers and students." *Id.* at 260. While applying the *Lemon* test, the court also explained the purpose of each prong. The first prong askes "whether government's actual purpose is to endorse or disapprove of religion." *Id.* at 283. A statute only needs *some* secular purpose to survive the first prong. *Id.*; *Freethought Soc. of Greater Phila. v. Chester Cnty.*, 334 F.3d 247, 269 (3d Cir.2003)(explaining the purpose prong of *Lemon* only requires some secular purpose, and not that the purposes . . . are exclusively secular.) The court found the Policy violates the Establishment Clause because its primary effect is to advance religion and it "fosters excessive government entanglement in religion." *Doe*, 653 F.3d 256 at 283.

Applying the first prong of the *Lemon* test to the current facts, this Court will find that the Board's prayer practice does not violate the Establishment Clause. Beginning with *secular purpose*, both *Brown* and *Doe* explain that there only needs to be *some* secular purpose and that the action does not need to be exclusively secular. Taking into consideration the affidavits of the Board members, the majority of members state the purpose of the prayer is to solemnize meetings. J.A. at 2-6. Here, the Board's prayers served some secular purpose and therefore satisfy the first prong of the *Lemon* test.

2. Primary Effect

The second prong of the *Lemon* test, *primary effect*, asks whether, "irrespective of the government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval of religion." *Brown,* 112 F.3d 1464 at 1472. A statute violates the Establishment Clause if its primary effect is to *advance* or inhibit religion. *Id.* The court determined neither the Act nor the announcement beginning the moment of silence inhibits or advances religion. *Id.* Although the moment of silence prevents students from engaging in audible prayer, the Act mandates only a moment of quiet reflection, not a moment a silent prayer. *Id.* The *Brown* court explained a practice violates the Establishment Clause if it's motivated by a purpose to advance religion; the Board's practice was solely a traditional way to start meetings, and like *Brown*, an opportunity for attendees to quietly reflect. J.A. at 2. Unlike *Doe*, the majority of the Board's prayers do not include explicit references to Jesus Christ or the Lord. The sole prayer that cites a specific deity is not enough to prove no secular purpose.

Furthermore, *primary effect* requires the court to determine whether, "under the totality of the circumstances, the challenged practice conveys a message favoring or disfavoring religion." *Doe,* 653 F.3d 283 at 284. The largely religious content of the prayers "would suggest to a reasonable person that the primary effect of the Policy is to promote Christianity." *Id.*

This Court should examine *primary effect* by looking at whether the content of the prayers endorse or disapprove of a certain religion or religions. Here, none of the prayers suggest a disapproval of any religion or religious practice. The Respondent has not claimed that the prayers made her feel as if the Board members disapproved of her religion. Like *Brown,* Respondent did not have to pray along with them, she could have simply recited a silent prayer she deemed appropriate or have taken that moment to reflect. Different from *Doe*, where the

content of the prayer was largely religious, the content of the Board's prayers conveyed secular ideas like respect, business, and refection. J.A. at 9. The mention of God in the beginning of the prayer is insufficient proof that the prayers endorsed a *specific* religion. Therefore, the primary effect of the Board's prayer practice did not advance or inhibit religion.

3. Excessive Entanglement

The third prong, *excessive entanglement*, has been interpreted to mean that some governmental activity "that does not have an impermissible religious effect may nevertheless be unconstitutional, if in order to avoid the religious effect the government must enter into an arrangement which requires it to monitor the activity." *Brown*, 112 F.3d 1464 at 1473. In *Brown*, the Act required students and teachers to remain silent during the moment of quiet reflection. *Id.* at 1474. A teacher who stops a student who is praying audibly or otherwise making noise during the moment of quiet reflection will not result in excessive government entanglement with religion. *Id.*

In *Doe*, the court looked to "the character and purpose of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority." *Doe*, 653 F.3d 288 at 289. *Excessive entanglement* "requires more than mere '[i]nteraction between church and state', for some level of interaction has always been 'tolerated'." *Id.* The prayers were recited in official meetings that were completely controlled by the state. *Id.* The board chose which individuals spoke and when. *Id.* Thus, the circumstances surrounding the prayer practices suggest excessive government entanglement. *Id.* The court held the policy rose above the level of interaction between church and state permissible by the Establishment Clause. *Id.* at 290.

In this case, there is no *excessive entanglement* because there is no government policy to control or monitor the prayer and there is a low level of interaction between church and state. Like *Brown*, there are absolutely no restrictions on the Respondent to participate in the prayer nor a restriction on her to silently recite her own prayer. J.A. at 2-6. The Board members do not tell each other which prayers they can or cannot recite. *Id.* They each recite one from their religion or sect. *Id.* Furthermore, if Respondent wanted to remain seated while the Board recited the prayer, she would not face any repercussions or mistreatment. Had Respondent remained seated and faced any negative consequences, her claim may have merit, but this is not the case. Unlike *Doe*, Hendersonville did not have a "policy" nor did the Board members allow attendees to recite prayers. On the contrary, by limiting the people who could deliver the prayer to Board members, the Board ensured that the moment was used to pray for business and not to endorse or reject any religion. Anyone elected to the Board in the future may recite a secular prayer from their respective religion. J.A. at 2-6.

The Hendersonville Board's prayer practice passes all three prongs of the *Lemon* test because the prayers served a secular purpose, the primary effect was not to advance religion, and there was no excessive entanglement.

C. Henderson Park and Recreation Board is held to a lower standard of coercion than school functions and therefore does not violate the Establishment Clause.

The Board's prayer practice does not violate the Establishment Clause because the meeting attendees of the board are adults rather than school children; therefore, the coercion standard is lower than the standard for a school's prayer practice. The "atmosphere at the opening of a session of a state legislature where adults are free to enter and leave with little comment and for any number of reasons cannot compare with the constraining potential of the one school event most important for the student to attend." *Lee v. Weisman*, 505 U.S. 577, 597

(1992). This Court held in *Lee*, the school was held to a higher standard of coercion because "research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention." *Id.* at 593. A State may not "place primary and secondary school children in this position." *Id.*

Furthermore, this Court explained that although it was not going to address whether this practice affected "citizens are mature adults," it did not hold "every state action implicating religion is invalid if one or a few citizens find it offensive." *Id.* at 597. "People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation." *Id.* Sometimes to "endure social isolation or even anger may be the price of conscience or nonconformity." *Id.*

Here, the coercion standard for the Board's prayers is lower than the one used in *Lee* because the attendees of the Board meetings were mature adults who were not pressured to conform to social pressures. No one pressured Respondent to stand up or recite the prayer. J.A. at 2-6. Furthermore, since the prayers were recited at the beginning of each meeting, Respondent had the option of arriving late or waiting outside until the conclusion of the prayer. *Id.* Respondent was uncomfortable with the prayers, which this Court has held does not prove an Establishment Clause violation because people can take offense to anything and everything. The alleged coercion must be more than offensive, which in this case, it is not.

This Court's decision should set a clear precedent for courts to reference in similar cases. Here, the Board's prayer practices follow this nation's tradition of solemnizing public business. The content of the prayers is secular and places no coercive pressures on religious minorities.

Church and state were separated in order to prevent an excessive entanglement between the two; there is no entaglement here.

CONCLUSION

For the reasons set forth above, the Petitioner asks this Court to reverse the decision of the Court of Appeals for the Thirteenth Circuit and find that the Petitioner's prayer practice is constitutional. This holding will protect the long-standing tradition of solemnizing public business through legislator-led prayer. Thus, Petitioner should be authorized to continue its prayer practices.