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 THIRTEEN CIRCUIT

BRIEF OF RESPONDENT

Team 2524
Counsel for Respondent

QUESTIONS PRESENTED

I. Whether the Hendersonville Parks and Recreation Board's prayer practice of having board members open its quasi-adjudicatory proceedings with Judeo-Christian prayer fell within the narrow historical and traditional circumstances articulated in *Marsh v. Chambers*, 463 U.S. 783 (1983) and *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014).

II. Whether the Board's member-led prayer practice serves a legitimate secular legislative purpose, or whether it fosters an excessive government entanglement with religion by advancing Christianity and coercing religious minorities to conform to the Christian practices of the Board members.

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A Formal Statement of Jurisdiction has been omitted in accordance with the Rules of 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's ("Board") prayer practice advances Christianity and places coercive pressure on Respondent, Ms. Barbara Pintok ("Ms. Pintok"), to participate in a strictly Christian prayer. The Board's practice has a primary effect of advancing an identifiably Christian religion. J.A. at 8.

Ms. Pintok is a follower of Wicca, a minority pagan religion in Hendersonville. J.A. at 1. As a child, Ms. Pintok was exposed to Christianity, and she is familiar with the intolerance many Christians in her community have for religious minorities like Wiccans. J.A. at 1. This intolerance is the underlying cause behind Ms. Pintok's claim. J.A. at 1, 6.

While living in Hendersonville, Ms. Pintok has attended various Board meetings. J.A. at 8. The Board is a local government body composed of five Christian members who meet once a month to review permit denials, J.A. at 8, and preside over citizens' "petitions, grievances, and arguments." J.A. at 9. Before each meeting, one of the Board members directs everyone in the room to stand, recite the Pledge of Allegiance, and listen to a prayer. J.A. at 8. The prayers tend to be in the Judeo-Christian tradition and explicitly reference God, Jesus Christ, and Biblical verses. J.A. at 8-9. This has been the practice since Board Member James Lawley, the longest serving member on the Board, joined in 2005. J.A. at 6. No other religion has ever been represented in the Board's invocations and no one other than the Board members may offer an invocation. J.A. at 8.

During one of the Board meetings, Ms. Pintok had to address the Board about the denial of her permit to operate a paddleboat company on a lake under the Board's control. J.A. at 8. After a Board member led the assembled citizens in Christian prayer, Ms. Pintok had to present her permit issue to the Board. J.A. at 1. However, hearing the Christian prayers intimidated Ms. Pintok

and caused her to feel like she was back at the Christian church from her childhood. J.A. at 1. She was so distraught and nervous over the recitation of the Christian invocations that she could not enunciate her words properly and suffered humiliation and significant distress. J.A. at 1.

Ms. Pintok complained to Mr. Lawley about the exclusively Christian nature of the prayers, to which Mr. Lawley responded, "this is a Christian country, get over it." J.A. at 1. Although Mr. Lawley does not recall saying this, he has not denied the statement. J.A. at 6. Additionally, Mr. Lawley conceded that he told Ms. Pintok that her complaint was frivolous. J.A. at 6.

The Board members claim their prayer practice has a secular purpose to solemnize public business and offer a moment of quiet reflection. J.A. at 2-5. Some members denied trying to promote Christianity or coerce religious observance, J.A. at 2-5, but the prayer practice—and the Board's longest serving member—say something else. J.A. at 6, 9. Although Mr. Lawley claimed that coercing religious conformity is not the intent of the Board, he still implied that the Board's prayer practice is partially a religious exercise: "[t]he prayer practice is *almost* more of a secular practice than a religious exercise." J.A. at 6. (emphasis added). Additionally, over a thirteen-year period, the Board members directed explicitly Christian invocations toward the audience, some of which solicited audience participation— "Please bow your heads" —while others pointed out the spiritual shortcomings of the audience: "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." J.A. at 9. Ms. Pintok subsequently filed a lawsuit, seeking declaratory and injunctive relief, and a preliminary injunction against the Board's use of sectarian prayers at its meetings. J.A. at 10.

Summary of the Proceedings

The parties filed cross motions for summary judgment in the district court. The district court erroneously granted the Board summary judgment when it found that Ms. Pintok's claim

failed as a matter of law. J.A. at 10. Ms. Pintok filed a timely appeal to the United States Court of Appeals for the Thirteenth Circuit. J.A. at 16. The Thirteenth Circuit heard arguments on December 5, 2017. J.A. at 16. On January 4, 2018, the court held that the Board's legislator-led practice fundamentally differed from the chaplain-led prayer in *Marsh v. Chambers* and the minister-led prayer in *Town of Greece*. J.A. at 16-17. The court ultimately reversed the district court's grant of summary judgment to the Board and remanded the case with instructions to enter summary judgment for Ms. Pintok. J.A. at 17.

In reversing the judgment, the Thirteenth Circuit determined that the Board's practice violated the Establishment Clause of the First Amendment, using the *Lemon* test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971). J.A. at 21-23. Although the Thirteenth Circuit decided not to employ the coercion test, it concluded that the Board's "prayer practices send an undeniable signal that the government is endorsing Christianity." J.A. at 24 (Rodriguez, J., concurring). Judge Rodriguez's concurrence explained that the Board's prayer practice placed coercive pressures upon Ms. Pintok, a religious minority, and that the majority "used the correct legal test but misapplied the coercion standard to the facts presented." J.A. at 25.

SUMMARY OF THE ARGUMENT

I. The appellate court correctly concluded that Petitioner's prayer practice violated the First Amendment of the United States Constitution. The Establishment Clause of the First Amendment protects citizens' fundamental right to religious freedom by prohibiting the government from aligning itself with a particular faith. *Marsh v. Chambers* acknowledged a narrow exception to the Establishment Clause in the context of legislative prayer similar to what was accepted by the Framers of the Bill of Rights—sectarian prayer offered by a paid chaplain at the beginning of legislative sessions. Here, the Board's practice of opening monthly

adjudicatory meetings with strictly Christian, board member-led prayer falls outside the narrow historical circumstances of legislative prayer established in *Marsh*. Because its practice is not a longstanding, uninterrupted tradition in federal or local government, it lacks the foundational purpose of the legislative prayer exception. Additionally, the Board's practice fails to comport with the tradition outlined in *Town of Greece* because it intentionally restricted the number of faiths that could be represented during its meetings and failed to accommodate diverse faiths in attendance, which impermissibly discriminated against minority religions and showed government preference to Christianity. Because these practices occurred consistently for the last thirteen years, the Board's prayer practice served to advance Christianity and showed the government's preference for that faith. As such, the Board's prayer practice does not comport with the history and tradition outlined in *Marsh* and *Town of Greece* and violates the Establishment Clause of the First Amendment.

II. Because the Board's prayer practice is not governed by the legislative prayer exception in *Marsh* and *Town of Greece*, the appellate court correctly employed the leading test for Establishment Clause challenges—the *Lemon* test—to determine the constitutionality of the Board's prayer practice. To pass the *Lemon* test, the challenged government action must have a secular purpose, must not have a primary effect of advancing or endorsing a religion, and must not excessively entangle the government with religion. In this case: The Board's excessive and exclusive use of Christian prayers exceeded what was necessary to satisfy the secular purpose of solemnizing public business; its practice of having the Board members give the invocations coerced religious observance and endorsed Christianity on behalf of the state; and the Board exercised complete control over the prayer practice which fostered excessive

government entanglement. Therefore, this Court should affirm the appellate court's conclusion that the Board's prayer practice violates the Establishment Clause of the First Amendment.

ARGUMENT

I. THE BOARD'S STRICTLY MEMBER-LED SECTARIAN PRAYER PRACTICE VIOLATES THE HISTORY AND TRADITION OF LEGISLATIVE PRAYER OUTLINED IN *MARSH* AND *TOWN OF GREECE*.

The Board's practice of having its members open its public meetings with prayer does not comport with the time-honored tradition of legislative prayer and violates the Establishment Clause of the First Amendment. When a case comes before this Court on appeal from a preliminary injunction, this Court reviews the district court's legal rulings *de novo*, and its ultimate conclusion for abuse of discretion. *See McCreary Cty., Ky. v. ACLU*, 545 U.S. 844, 867 (2005) (citing *Ashcroft v. ACLU*, 542 U.S. 656 (2004)).

The First Amendment states that "Congress shall make no law respecting an establishment of religion…" U.S. Const. amend. I. This part of the First Amendment, also known as the Establishment Clause, prohibits the government from aligning itself with or showing preference to a particular faith. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1822 (2014). However, in 1774, the Continental Congress appointed a paid chaplain to open legislative sessions with a prayer in order to "invoke Divine guidance on the legislators." *Marsh v. Chambers*, 463 U.S. 783, 788 (1983). A few years later, the First Congress adopted the same procedure, then approved the draft of the First Amendment for submission to the states. *Id*. at 790. This legislative prayer practice continued uninterrupted for the next 200 years. *Id*. at 790-92. This unique history and long-standing, uninterrupted tradition led this Court to interpret the constitutionality of legislative prayer by reference to historical practices and understandings. *See generally Marsh*, 463 U.S. at 790; *Town of Greece*, 134 S. Ct. at 1822. It is worth noting, however, that recent Establishment Clause

challenges have led to split circuit decisions as to the constitutionality of legislative prayer. *See Lund v. Rowan Cty., N. C.*, 863 F.3d 268, 276 (4th Cir. 2017); *But see Bormuth v. Cty. of Jackson*, 870 F.3d 494 (6th Cir. 2017).

This Court's 1983 decision in *Marsh v. Chambers* determined that the unique history of legislative prayer revealed how the Framers of the Constitution intended the Establishment Clause to apply to a prayer practice similar to the one adopted by the First Congress—specifically, nonsectarian chaplain-led prayer before legislative sessions. *See Marsh*, 463 U.S. at 791. As such, this Court held that a legislative prayer practice consistent with the one accepted by the Framers would, generally, not violate the Establishment Clause of the First Amendment.

Thirty years later, this Court's 2014 decision in *Town of Greece v. Galloway* interpreted the constitutionality of legislative prayer by reference to the historical practices and understandings outlined in *Marsh*. *Town of Greece*, 134 S. Ct. at 1822. This Court in *Town of Greece* refined its holding from *Marsh*, concluding that guest ministers could offer sectarian prayers, so long as the public body maintains a nondiscriminatory policy in prayer-giver selection and the prayer practice over time does not serve to proselytize, advance, or disparage any faith. *Id*. at 1817, 1824.

Therefore, for legislative prayer to comport with the history and tradition outlined in *Marsh* and *Town of Greece*, the prayer practice (1) must be consistent with the long-standing, uninterrupted tradition of legislative prayer established by the Framers, and (2) must not discriminate against minority faiths or serve to advance, disparage, or align the government with any other. *See Marsh*, 463 U.S. at 791; *Town of Greece*, 134 S. Ct. at 1817, 1823.

In Ms. Pintok's case, the Board's prayer practice does not comport with the history and tradition established in *Marsh* and *Town of Greece*. First, strictly board member-led sectarian prayer is not a longstanding and uninterrupted tradition similar to the one accepted by the Framers.

Second, the Board purposefully discriminated against minority faiths and advanced Christianity by restricting the prayer opportunity to the Christian board members. Therefore, Ms. Pintok respectfully requests this Honorable Court to affirm the Appellate Court's decision.

A. The Board's practice of opening monthly meetings with strictly Christian, board member-led prayer is not a longstanding, uninterrupted tradition in federal or state government and betrays the purpose of legislative prayer.

The Board's practice of having its members lead the invocations at the beginning of public meetings is not a contemporaneous prayer practice that comports with the history and tradition of legislative prayer. Because the constitutionality of legislative prayer hinged on the Framers' intent, *Marsh*'s history and tradition analysis is limited to the historical circumstances of that case—chaplain-led prayer before legislative sessions that reflects the Framers' intent to lend gravity to the occasion and unite lawmakers in their common efforts. *See Marsh*, 463 U.S. at 792-94; *see also N.C.C.L. Union Legal Found. v. Constangy*, 947 F.2d 1145, 1148 (4th Cir. 1991).

Thus, for the Board's prayer practice to comport with history and tradition, it must reflect the Framers' intent from the unique history outlined in *Marsh*. *See Marsh*, 463 U.S. at 791; *Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 279 (3d Cir. 2011); *Constangy*, 947 F.2d at 1148. The Board's prayer practice falls outside *Marsh*'s narrow application because (1) the Framers of the Constitution did not intend the Establishment Clause to allow government-led prayer, and (2) the Board directed its prayers toward the public, which negated the purpose of lending gravity to the legislative proceedings and uniting lawmakers in their common goals.

1. The Board's practice of opening its meetings with prayer given by a Board member does not fit within the unique history outlined in *Marsh* because the Framers did not contemplate strictly board member-led prayer.

The Board's unwritten prayer practice is not comparable with the more than 200-year tradition outlined in *Marsh* because it involves board member-led prayer at the beginning of quasi-

adjudicative proceedings. *Marsh* is narrowly interpreted to apply to chaplain-led prayer at the opening of legislative sessions. *See Constangy*, 947 F.2d at 1148; *Soc'y of Separationists, Inc. v. Whitehead*, 870 P.2d 916, 930 (Utah 1993). Although *Town of Greece* extended the legislative prayer exception to include "local legislative bodies," courts have refused to extend the exception to adjudicative proceedings. *E.g. Town of Greece*, 134 S. Ct. at 1819; *Constangy*, 947 F.2d at 1148. A legislative body is one that makes rules and regulations where "the people can reserve to them the power to deal directly with matters which might otherwise be assigned to the legislature." *City of Eastlake v. Forest City Enter., Inc.*, 426 U.S. 668, 672 (1976); *See Pelphrey v. Cobb Cty. Ga.*, 547 F.3d 1263 (11th Cir. 2008) (Middlebrooks, J., dissenting). Adjudication, on the other hand, "determines the rights of a 'relatively small number of persons…, who are exceptionally affected, in each case upon individual grounds." Kenneth E. Johnson, *Limiting the Legislative Veto: Chadha v. Immigration Naturalization Service*, 81 Colum. L. Rev. 1721 (1981) (quoting *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915).

Courts have refused to extend the *Marsh* exception where the relevant facts differ from the circumstances in *Marsh*. *See Constangy*, 947 F.2d at 1148; *Whitehead*, 870 P.2d at 930. When the tradition is not one that factually fits within the prayer practice accepted by the Framers, *Marsh* does not apply. *See Lund*, 863 F.3d at 276.

For example, the Fourth Circuit in *Lund* held that applying *Marsh* and *Town of Greece* to legislator-led prayer would be inappropriate because neither decision contemplated strictly legislator-led prayer. *Id.* Additionally, the Fourth Circuit in *Constangy* declined to extend *Marsh* to courtroom prayer because *Marsh* was "predicated on the particular historical circumstances presented in that case," specifically, chaplain-led prayer at the beginning of legislative sessions.

Constangy, 947 F.2d at 1148. Because *Constangy* involved prayer offered by the presiding judge before adjudicatory proceedings, *Marsh* and *Town of Greece* did not apply. *Id.*

Courts have also refused to extend the legislative prayer exception where evidence of a longstanding, unbroken tradition is lacking. *Whitehead*, 870 P.2d at 930. The Supreme Court of Utah in *Whitehead* refused to apply *Marsh* to a city council's prayer practice that ceased between 1911 and 1979. *Id*. The court determined that the council's short and broken history was less persuasive than the history relied upon in *Marsh*, and thus was too factually different for *Marsh*'s legislative prayer exception to apply. *Id*.

Here, the Board's prayer practice is nearly identical to the prayer practice in *Lund* in that the prayers are exclusively led by board members, rather than chaplains. J.A. at 18. *Marsh* and the Framers specifically approved of prayer led by chaplains, and *Marsh* emphasized that the prayer practice had to be similar to the one accepted by the Framers. Because prayer given by board members is nonexistent in both *Marsh* and the traditional history of legislative prayer, *Marsh* cannot apply to this case.

The Board's practice is also similar to *Constangy* in that the prayers are taking place at the beginning of adjudicatory proceedings. The record refers to the Board as a "body of local government" that meets once a month to "hear various issues, including a review of permit denials." J.A. at 8. Determining permit denials is an adjudicative process because it involves the rights of a small number of people (those who were denied permits) who are affected on individual grounds (why they were denied). Additionally, some of the prayers the Board members offered referred to business that is much more adjudicatory in nature, such as: "guide us to preside fairly and impartially over all petitions, grievances, and arguments brought before us;" "Lord, help us make good decisions…We know that we are tasked with making decisions that impact the lives of

members of our community." J.A. at 9. Based on those invocations, the Board is involved in impartial decision-making over petitions, grievances, and arguments. Additionally, not one of the prayers references the Board's hand in drafting rules and regulations. J.A. at 9. Therefore, the Board is really opening quasi-adjudicative proceedings with prayer, which clearly falls outside *Marsh*'s historical limitation to prayer at the opening of *legislative* sessions.

Finally, like in *Whitehead*, the Board's unwritten practice does not have a longstanding history to prove it was a practice intended by the Framers. First, the only evidence of the history of the Board's unwritten prayer practice exists in the members' affidavits, which show that the longest standing board member has served for thirteen years. J.A. at 2-6. Thirteen years can hardly be comparable to the unbroken practice of chaplain-led prayer for the last 200 years. Second, even if the Board's practice existed for decades, strictly board member-led prayer at the beginning of quasi-adjudicatory proceedings does not have a long-standing history in state or national governments worthy of the exceptional treatment given to legislative prayer. Considering that there is no historical evidence that the Framers' accepted prayer at the opening of adjudicative proceedings led by government officials, *Marsh* cannot apply to the circumstances of this case.

Because *Marsh* did not include government-led prayer during quasi-adjudicative proceedings in its historical analysis, those factual differences are significant enough to push the Board's prayer practice outside *Marsh*'s narrow application. Additionally, the Board's member-led prayer lacks a sufficient history to prove the practice was one intended by the Framers. As such, the Board's practice of strictly board member-led prayer does not comport with the history and tradition established in *Marsh*.

2. The Board member-led prayer betrays the Framers' intended purpose by directing the invocations toward the assembled citizens rather than toward the board members.

The Board's prayers do not achieve its secular purpose of lending gravity to the occasion and uniting the lawmakers because the intended audience is clearly the public rather than the Board. The principal audience for legislative prayer is the lawmakers, not the public. *Town of Greece*, 134 S.Ct. at 1825. The purpose of the prayer is to lend gravity to the occasion and unite lawmakers in their common aspirations to serve the public. *Id*. Prayers that "accommodate the spiritual needs of lawmakers" and ease the task of governing serve the historical purpose of legislative prayer. *Id*. Prayer that is directed at the public, however, does not target the appropriate audience for legislative prayer and risks government coercion to participate in religious exercise, which would violate the Establishment Clause. *See Hudson v. Pittsylvania Cty.*, 107 F. Supp. 3d 524 (2015); *Simpson v. Chesterfield Cty. Bd. of Supervisors*, 404 F.3d 276, 289 (4th Cir. 2005); *see also Lee v. Weisman*, 505 U.S. 577, 587 (1992).

Courts have consistently recognized the importance of directing the prayers toward the lawmakers and not the assembled citizens in order to preserve the purpose of legislative prayer. In *Town of Greece*, this Court upheld a town's practice of inviting guest ministers and laymen of many creeds to open meetings with prayer. *Town of Greece*, 134 S. Ct. at 1824. Although *Town of Greece* found that the intended audience for the prayers was the town board members, this Court noted that its analysis may have been different had the board members, rather than the guest ministers, directed the public to participate. *Id*. at 1826. This Court explained that requests on behalf of the board members could have a coercive effect on the public to participate. *Id*. In *Hudson*, a board of supervisors led prayers and asked for audience participation. *Hudson*, 107 F. Supp. 3d at 537. The court held that the board's practice of delivering prayers to the assembled citizens was not an "internal act" within the tradition historically followed by Congress and state

legislatures. *Id*. In *Lund*, a board of commissioners sought audience involvement by asking them to join in prayer with phrases such as, "let us pray." *Lund*, 863 F.3d at 287. The Fourth Circuit held that those requests indicated "an effort 'to promote religious observance among the public.'" *Id.* (quoting *Town of Greece*, 134 S. Ct. at 1825). *Lund* also pointed out that such invitations were permissible in *Town of Greece* because those requests came from guest ministers and not the town leaders—when members of the public body make those requests, they become requests on behalf of the state. *Lund*, 863 F.3d at 287.

Similar to the prayer practice in *Hudson* and *Lund*, the Board here led the prayers and asked for audience participation. J.A. at 8. At each meeting, a member of the Board would ask everyone in the room to stand, recite the Pledge of Allegiance, and listen to the prayer. J.A. at 8. Not only did the Board request the audience to stand, but they requested that they listen. J.A. at 9. Some prayers made additional requests, such as: "[p]lease bow your heads" and "[w]e 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. Like the invocations in *Lund*, the Board's invocations requested citizen participation and promoted religious observance, making the assembled citizens the intended audience for the prayer. By calling the public to participate in the religious practices of the prayer-giver, the invocations were not an internal act and betrayed the purpose of accommodating the spiritual needs of lawmakers.

The Board's practice of having its members open meetings with prayer directed at the assembled citizens betrays the intended purpose of legislative prayer and is not a practice similar to the one accepted by the Framers. Therefore, the Board's prayer practice does not comport with the history and tradition of legislative prayer outlined in *Marsh*.

B. The Board's prayer practice fails to comport with the tradition outlined in *Town of Greece* because it favors Christianity to the exclusion of all other faith traditions and impermissibly affiliates itself with that faith.

The Board has purposely restricted its prayer opportunity to its Christian members for thirteen years, which served to discriminate against minority faiths and affiliate the Board with Christianity. *Town of Greece* upheld a prayer practice that extended the prayer opportunity to any minister or layman who wished to give one. *Town of Greece*, 134 S. Ct. 1824. It reiterated *Marsh*'s generally constitutional practice of opening legislative sessions with nonsectarian prayer offered by a paid chaplain but clarified that prayers could include sectarian content so long as the prayer opportunity as a whole does not proselytize, advance, disparage, or "betray an impermissible government purpose." *Id*. This Court again examined the history and tradition of legislative prayer and found that the tradition was meant to embody the principle "that people of many faiths may be united in a community of tolerance and devotion." *Id.* at 1823.

The relative constraint on faith-specific prayer hinges on its purpose of lending gravity to the occasion and reflecting values "long part of the Nation's heritage." *Id*. This Court emphasized the importance of nondiscriminatory practices and refraining from government entanglement in order to preserve a permissible ceremonial purpose. *Id.* at 1824. Moreover, this Court found that the prayer practice in *Town of Greece* did not betray the permissible purpose of legislative prayer grounded in tolerance and devotion, emphasizing that the town did not discriminate among faiths in its chaplain selection process because it welcomed prayer by any minister or layman, no matter their creed. *Id*. Additionally, this Court upheld the sectarian content of the prayers—even though the majority of ministers observed a Christian faith—because the open prayer opportunity diminished the risk for denigration, advancement, and proselytization. *Id*. at 1823.

Unlike the sectarian prayers in *Town of Greece*, the Board's prayer practice betrays the permissible purpose of legislative prayer for the following reasons: (1) restricting the prayer opportunity to the Christian board members creates a closed-universe of prayers, which discriminates against minority faiths; and (2) for the last thirteen years, the board members all offered invocations in the Judeo-Christian tradition, which reveals a pattern of prayers that impermissibly affiliates the government with one religion and advances Christianity. As such, the Board's prayer practice does not comport with the history and tradition outlined in *Town of Greece*.

1. The entirely Christian Board intentionally failed to accommodate the diverse faiths in attendance, which impermissibly discriminated against minority religions and showed government preference to Christianity.

Not only was legislator-led prayer not contemplated in the history and tradition established in *Marsh* and *Town of Greece*, but the particular legislator-led practice in this case violates the permissible purpose of legislative prayer by creating a closed-universe that purposefully discriminates against minority faiths and affiliates the government with Christianity. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 224 (1982). Additionally, the government is prohibited from dictating prayers in public settings in order to promote a preferred belief. *Town of Greece*, 134 S. Ct. at 1822; *see also Engle v. Vitale*, 370 U.S. 421, 430 (1962). The constitutionality of legislative prayer in part rests on the role of the government to uphold the tradition of tolerance and diversity by not intentionally excluding a particular faith or favoring another. *Town of Greece*, 134 S. Ct. at 1819, 1824. In fact, the historical purpose of legislative prayer prohibits intentional discrimination against minority faiths. *See Williamson v. Brevard Cty.*, 276 F. Supp. 3d 1260, 1281-82 (M.D. Fla. 2017).

Town of Greece upheld sectarian prayer on the condition that the government neither exclude nor favor any religion. *See Town of Greece*, 134 S. Ct. at 1817. This Court emphasized the legislature's ability and effort to accommodate diverse faiths, especially whenever citizens expressed concern over a particular religious theme. *Id*. at 1817. The board in *Town of Greece* showed its inclusive policy by inviting prayer-givers of many different creeds upon citizens' requests. *Id.* . (the town invited prayer by a Jewish man, the chairman of the local Baha'i temple, and a Wiccan priestess). Noting the town's open prayer opportunity, which accommodated all faiths and excluded none, this Court upheld the town's practice, finding no impermissible preference for Christianity. *Id.*

Conversely, the board in *Lund* restricted the prayer opportunity to its commissioners who, in their official capacity, "composed and delivered their own sectarian prayers featuring but a single faith." *Lund*, 863 F.3d at 280. When members of the public requested that the board diversify prayer content, the board refused. *Id.* at 282. The Fourth Circuit held that this prayer practice impermissibly identified the government with a particular faith by intentionally restricting the number of faiths that could be represented at the meetings. *Id.* at 281. Thus, this restrictive practice fell outside the constitutional parameters articulated by this Court in *Marsh* and *Town of Greece*. *Id*. at 281-82.

Similarly, The United States District Court for the Middle District of Florida in *Williamson* acknowledged the difference between predominantly Christian invocations being the product of circumstance as in *Town of Greece* and predominantly Christian invocations being the product of intentional discrimination. *Williamson*, 276 F. Supp. 3d at 1276-77. In *Williamson*, a county denied the plaintiff his request to offer an invocation because he did not believe in a monotheistic faith. *Id*. at 1281. The court held that such a practice strayed from the respectful and accommodating

purpose of legislative prayer and reflected intentional discrimination on the part of the county, which violated the Establishment Clause. *Id*. at 1281-82.

Here, the Board purposefully discriminates against non-Christian faiths by voluntarily restricting the prayer opportunity to the entirely Christian board. Like the board in *Lund*, the Board here restricts the prayer opportunity to the board members who compose and deliver Christian prayers at every meeting. J.A. at 8. Unlike the accommodating prayer practice in *Town of Greece* that opened the opportunity to all faith traditions upon a citizen's request, the Board employed a practice much more similar to the discriminating policy in *Lund* and *Williamson*. Specifically, when, Ms. Pintok complained about the lack of religious diversity in the invocations, the Board ignored her complaint. J.A. at 6. In fact, board member Lawley dismissed her complaint as "frivolous," and told her, "this is a Christian Country, get over it." J.A. at 6, 19. Although the board member states that he does not "recall" saying that to Ms. Pintok and claims that it "doesn't sound like something [he] would say," he did not deny the statement. J.A. at 6. Lack of recollection does not equate to a denial.

The Board's denigrating response and refusal to change its unwritten practice to acknowledge a citizen's religious beliefs reveals an impermissible motive to purposefully discriminate against minority faiths. Such intentional discrimination falls outside the traditional purpose outlined in *Marsh* and *Town of Greece* and reflects the Board's impermissible preference for Christianity, which violates the clearest command of the Establishment Clause.

2. The Board advanced Christianity by limiting the prayer opportunity to the board members and opening its meetings with prayers exclusively in the Judeo-Christian tradition for at least thirteen years.

Members of the Board have offered prayers exclusively in the Judeo-Christian tradition for at least thirteen years, a pattern that advances Christianity and betrays the Board's preference for

that faith over all others. The Establishment Clause prohibits a legislative prayer practice that over time is "exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Lund*, 863 F.3d at 284 (quoting *Marsh*, 463 U.S. at 794-95). A board's practice violates the Constitution if it sends the message that it prefers or accepts one religion over another. *Lund*, 863 F.3d at 292 (Motz, J, concurring).

In *Lund*, the Fourth Circuit concluded that legislators reciting one religion's creed year after year without extending the opportunity to members of other religions would lead a reasonable observer to conclude that the government body preferred that religion over all others. *Id.* at 293. It held that the county's five-year practice of its commissioners evoking "a single religion in nearly every prayer over a period of many years" created the perception that the government believed it to be "the one true faith." *Id.* at 284. Additionally, *Lund* found that the prayer practice served to advance Christianity by purporting "to confess spiritual shortcomings on the community's behalf." *Id*.

The instant case is similar to the practice in *Lund* because the Board members are the only people who give the invocations, every member is Christian, and each member typically recites a prayer in the Judeo-Christian tradition. J.A. at 8. Most prayers directly reference God or Jesus Christ, J.A. at 8, and occasionally the prayers point out the community's spiritual shortcomings. J.A. at 9. Specifically, one of the prayers preached, "[w]e are all sinful but as the book of Isaiah reads, though our sins are like scarlet, they shall be white as snow. We all fall short of the glory of God." J.A. at 9. The longest serving Board member, Mr. Lawley, expressed that the Board has opened with prayer since he began serving on the Board in 2005. J.A. at 6. Thus, these explicitly Christian prayers have been the routine for roughly thirteen years, which is over two times as long as the practice in *Lund*. As such, if a reasonable observer would conclude that the government

preferred Christianity from the five-year practice in *Lund*, the Board's thirteen-year practice would lead a reasonable observer to the same conclusion.

Therefore, the Board's practice of limiting the prayer opportunity to the members of an entirely Christian Board purposefully discriminates against minority faiths. Additionally, the Board impermissibly advanced and aligned itself with Christianity by maintaining a pattern of exclusively Christian invocations for thirteen years. Thus, the Board's prayer practice betrays the traditional purpose of legislative prayer and advances Christianity.

The Board's practice of opening monthly meetings with strictly Christian, board member-led prayer falls outside the narrow historical circumstances of legislative prayer established in *Marsh*. Because its practice is not a longstanding, uninterrupted tradition in federal or local government, it lacks the foundational purpose of the legislative prayer exception. Additionally, the Board's practice fails to comport with the tradition outlined in *Town of Greece* because it intentionally restricted the number of faiths that could be represented during its meetings and failed to accommodate diverse faiths in attendance, which impermissibly discriminated against minority religions and showed government preference to Christianity. Because these practices occurred consistently for the last thirteen years, the Board's prayer practice served to advance Christianity and showed the government's preference for that faith. As such, the Hendersonville Board's prayer practice does not comport with the history and tradition outlined in *Marsh* and *Town of Greece* and violates the Establishment Clause of the First Amendment.

II. THE BOARD'S COERCIVE PRAYER PRACTICE IMPERMISSIBLY ENDORSED CHRISTIANITY AND FOSTERED EXCESSIVE GOVERNMENT ENTANGLEMENT WITH RELIGION.

The Board's prayer practices infringed upon Barbara Pintok's First Amendment rights and violated the Establishment Clause because the prayer practice has a distinctly religious purpose

and places coercive pressures on religious minorities. Because the Board's prayer practice did not comport with the history and tradition of legislative prayer outlined in *Marsh* and *Town of Greece*, the longstanding, traditional Establishment Clause tests will apply. *See Indian River,* 653 F.3d at 282.

To determine the constitutionality of a particular government practice under the Establishment Clause, courts typically employ one of three tests: the *Lemon* test, the endorsement test, and the coercion test. *See Id.*at 267. Under the *Lemon* test, the government practice undergoes a three-part inquiry asking: "(1) whether the government practice had a secular purpose; (2) whether its principal or primary effect advanced or inhibited religion; and (3) whether it created an excessive entanglement of the government with religion." *Id.* at 282 (quoting *Lemon*, 403 U.S. at 612-13. The endorsement test is essentially the same as the second prong of the *Lemon* test, asking whether a reasonable observer would conclude that the government practice had "the effect of communicating a message of government endorsement or disapproval of religion." *Indian River*, 653 F.3d at 272; *see also Lambeth v. Bd. Of Comm'rs of Davidson Cty., N.C.*, 407 F.3d 266 (4th Cir. 2005) (stating endorsement test is an enhancement to second prong of *Lemon* test).

The coercion test is another variation of the second prong of the *Lemon* test, asking whether the government coerced support or participation in religion or acted in a way that established, or seemed to establish, a state religion or faith. *See generally Lee*, 505 U.S. at 587 (citing *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)). In other words, the coercion test examines whether the government's practice endorsed or promoted religion through coercive pressures. *See Lee*, 505 U.S. at 604 ("Government pressure to participate in a religious activity is an obvious indication that the government is endorsing or promoting religion.").

Although the *Lemon* test has been criticized by the courts, it has not been overruled and is therefore still the dominating test in evaluating Establishment Clause challenges. *See Mellen v. Bunting*, 327 F.3d 355, 370 (4th Cir. 2003) (citing *Koenick v. Felton*, 190 F.3d 259, 264 (4th Cir. 1999)). Additionally, because the endorsement test and the coercion test enhance the second prong of the *Lemon* test, the *Lemon* test provides the most complete analysis on the Board's unconstitutional prayer practice. Nevertheless, if the government's practice fails any single prong of *Lemon* test, then it fails the entire test; and thus, is unconstitutional. *See Indian River*, 653 F.3d at 283-84.

Here, by endorsing Christianity and coercing religious minorities to participate in religious exercise, the Board's prayer practice fails all three prongs of the *Lemon* test. First, the Board used the prayers to promote Christianity rather than to solemnize business. Second, a reasonable observer would conclude that the Board's prayer practice had a primary effect of endorsing Christianity through coercing religious minorities to participate in Christian prayer. Third, the Board fostered an excessive entanglement with religion through its continuation and control of the prayers. Because the Board's prayer practice fails all three prongs of the *Lemon* test, it is unconstitutional under the Establishment Clause. Therefore, we respectfully request that this Court affirm the appellate court's decision that the Board violated the Establishment Clause as its prayer practice undeniably signaled that the government endorsed Christianity.

A. The Board uses its prayers to advance the religious purpose of promoting Christian prayer rather than to solemnize public business.

Although the Board claims that its purpose for offering prayer was to solemnize public business, its exclusively Christian prayer reveals that its purpose was actually to promote Christianity. Although the Supreme Court has allowed the government to engage in certain religious acts, religious government action is unconstitutional if it lacks a secular legislative

purpose. *See Lemon*, 403 U.S. at 612-13; *see also Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 384 (6th Cir. 1999). Thus, when the government's principal purpose is to advance religion, it violates a central principle of the Establishment Clause—official religious neutrality. *See McCreary*, 545 U.S. at 860. Additionally, although the courts typically defer to statements by the government regarding its intended secular purpose, courts have nevertheless rejected these claims when the state-sponsored activity is visibly religious in character and exceeds what is necessary to further the alleged secular purpose. *See Id.*; *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000). In determining whether the religious nature of the practice exceeds the state's alleged secular purpose, courts typically examine the context within which the government activity arose. *See McCreary*, 545 U.S. at 866.

For example, this Court in *McCreary* held that a state courthouse's new display exhibiting the Ten Commandments was unconstitutional because its religious content exceeded what was necessary to achieve the state's secular purpose. *Id.* at 872. Because the display "quoted more purely religious" content than previous displays, the court determined that the state could achieve (and has achieved) its secular purpose through less religious means. *Id.* The display's explicitly religious nature compared to prior displays.

Additionally, in *Santa Fe*, this Court found that the district's use of invocations that frequently described "an appeal for divine assistance" and "always entail[ed] a focused religious message" exceeded what was necessary to achieve the school district's alleged secular purpose to promote sportsmanship and student safety. *Santa Fe*, 530 U.S. at 309. Because the religious nature of the prayers exceeded what was required to solemnize the sporting event, this Court found that the invocations' purpose was not what the school district claimed it to be, but rather to preserve a state-sponsored religious practice. *See Id.*

Similarly, the Sixth Circuit in *Coles* found a school board's opening prayer practice unconstitutional because the frequent requests for divine assistance, references to the Bible, and specific mentions of Jesus by name exceeded what was necessary to solemnize the meetings. *See Coles*, 171 F.3d at 384. Additionally, the court noted that the school board could have solemnized the meetings using non-religious means or language—as one speaker had done before—by using the inspirational words of President Abraham Lincoln or the speeches of Dr. Martin Luther King, Jr., rather than relying upon "the intrinsically religious practice of prayer to achieve its stated secular end." *Id*.

Here, the Board members claim their prayer practice has a secular purpose to solemnize business and offer a moment of quiet reflection; whereas, some members even deny trying to promote Christianity. J.A. at 2-5. However, the prayer practice—and the Board's longest serving member—say something else. J.A. at 2-5. Like the exhibit in *McCreary* that contained visibly religious messages, the Board's prayers are visibly religious. The invocations explicitly reference God, Jesus Christ and the Bible. J.A. at 18-19. In fact, every invocation quoted in the record refers to either "God," Jesus Christ," "Heavenly Father," or "Lord" at least once. J.A. at 9. The invocations also specifically cite Judeo-Christian doctrine and scriptures, such as, "as the book of Isiah reads, though our sins are like scarlet, they shall be white as snow." J.A. at 9. These references exceed what is necessary to solemnize public business.

Additionally, the Board's practice is similar to the policies in both *Santa Fe* and *Cole* that used religious invocations to the exclusion of all other means to achieve their alleged secular purposes. As the Court noted in *Cole*¸ the Board could have solemnized the meetings using non-religious means and language by using the inspirational words of President Abraham Lincoln or the speeches of Dr. Martin Luther King, Jr., rather than relying upon prayer to achieve its stated

secular end. Instead, the Board specifically chose to offer explicitly religious prayer to lend gravity to its business for the last thirteen years. J.A. at 2, 6. Furthermore, although some of the board members claim the prayer's purpose is secular, Mr. Lawley implied that the Board's prayer practice is partially, possibly mostly, a religious exercise: "[t]he prayer practice is *almost* more of a secular practice than a religious exercise." J.A. at 6 (emphasis added). Therefore, the context surrounding the prayer practice reveals that the Board's purpose is not to solemnize public business, but to promote Christianity and religious observance.

Reviewed in context, the Board's prayer practice reveals its religious purpose to promote Christianity because: the invocations' excessive religious references surpass what is necessary to solemnize public business; the Board exclusively and continuously uses prayer rather than other means to solemnize public business; and comments made by the longest serving board member expose the Board's religious intent. Thus, this court should find that the Board's prayer policy lacked a valid secular legislative purpose and violated the Establishment Clause.

B. The Board's prayer practice constituted government endorsement of Christianity and coerced religious minorities into participating in religious practices.

Regardless of the government's intended secular purpose, if its actions either (1) create the effect that the government endorses a particular religion or (2) coerces religious observance, then the government practice is unconstitutional. In this case, the Board (1) endorses Christianity through the consistent and exclusive use of Christian prayer, and (2) coerces citizens of minority faiths to participate in Christian prayer to avoid Board disapproval.

1. The Board endorses Christianity through the consistent and exclusive use of Christian prayer to open its monthly board meetings.

To determine whether a State action conveys a message of religious endorsement or disfavor, Courts examine the totality of the circumstances under the perspective of the objective

reasonable observer. *See Indian River*, 653 F.3d at 284. The objective reasonable observer is one who is familiar with the history and context of the challenged government action. *See McCreary*, 545 U.S. at 866. Thus, evaluating the history of the government practice is vital in determining how a reasonable observer would perceive said practice. *See Indian River*, 653 F.3d at 285. When a prayer-giver constantly makes pointed references to religious texts and specific deities in the prayer, courts consider those actions as government endorsement of a religion. *Id.* at 284-87. The government also signals its religious preferences by pointing out the spiritual shortcomings of those in attendance. *Lund*, 863 F.3d at 285 (citing *Town of Greece*, 134 S. Ct. at 1826 (plurality opinion)). Additionally, prayers that recite "one religion's creed month after month, year after year, allowing no opportunity for members of any other religion to lead a prayer" will also lead the reasonable observer to conclude the government's preference for that faith. *Lund*, 863 F.3d at 293 (Motz, J., concurring).

For example, in *Indian River*, the Third Circuit found that the board's creation of a permanent prayer policy; the board's specific references to Jesus Christ, God, or Lord; and the board's use of intimidation on non-adherents through showings of disfavor for non-compliance during the meetings indicated the board's endorsement of religion *See Indian River*, 653 F.3d at 284-87. Additionally, in *Lund*, the Fourth Circuit found that the board's "prayers implicitly 'signal[ed] disfavor toward' non-Christians" by pointing out the audience's spiritual shortcomings. *Lund*, 863 F.3d at 285 (citing *Town of Greece*, 134 S. Ct. at 1826 (plurality opinion)). The court also found that the board showed its preference for Christianity by reciting prayers invoking that faith, and only that faith, in every prayer for five years. *Lund*, 863 F.3d at 284.

Here, the Board's practice is most similar to *Lund* in how it endorsed Christianity. First, the Board invoked Christianity in nearly every prayer over the course of at least thirteen years.

J.A. at 2-6. Second, the Board has given prayers that point out the spiritual failings of the audience. J.A. at 9. For example, one member's prayer preached: "We are all sinful[,]" "[w]e all fall short of the glory of God[,]" and "[w]e must strive to conduct our business in a way consistent with…the Father and His son Jesus Christ." J.A. at 9. These invocations not only point out spiritual shortcomings, they also preach conversion by claiming that observance of the Christian faith is the only way to avoid damnation. As stated in part I of the argument above, if an objective reasonable observer would conclude that *Lund*'s five-year pattern of invoking Christianity in every prayer served to align the board with that faith, then the reasonable observer would conclude that the Board's nearly identical thirteen-year practice shows the Board's preference for Christianity. Thus, because the Board signaled disfavor towards non-Christians through thirteen-years' worth of explicitly Christian prayer, the reasonable observer would conclude that the Board prefers Christianity.

2. The Board coerces religious minorities to participate in Christian prayer by having a government official lead the invocations in an intimate setting.

Justice Kennedy's plurality opinion in *Town of Greece* provides the approved analysis for government coercion. *See Bormuth*, 870 F.3d at 521, 540 ("The Supreme Court and Sixth Circuit precedent dictate that Justice Kennedy's opinion is controlling"). In this opinion, Justice Kennedy stated that coercion was not present when the invitation to participate was given by the guest ministers, but that the analysis would be different if the instruction was given by the government representatives themselves. *See Id.* at 533-34. It is a fact-sensitive examination that considers the setting in which the prayer arises, the audience to whom it is directed, and the backdrop of historical practice. *Id.* at 507 (citing *Town of Greece*, 134 S.Ct. at 1825).

The Fourth Circuit in *Lund* further explained Justice Kennedy's position, stating that when requests to join in religious practices are made by elected representatives acting in their official

capacity, "they become a request on behalf of the state [and] [t]he invitations suggest that the lawmaker conceives of the political community as comprised of people who pray as he or she does." *Lund*, 863 F.3d at 287. The court also found that the close proximity between a board's sectarian exercises and its consideration of specific individual petitions presents the opportunity for abuse, as it may cause attendees to participate in the prayer practice in order to avoid the community's disapproval. *See Id.* at 288. Similarly, in *Bormuth*, Judge Moore's dissenting opinion found that the board's instruction to participate in the prayer, the intimate setting of the municipal meeting, and the refusal of the board to act on the objection of the practice all exhibited coercion of minority religious views. *Bormuth*, 870 F.3d at 541-44 (Moore, J., dissenting).

In this case, the Board's practice is similar to *Lund* and *Bormuth* because the board members have the exclusive opportunity to give a prayer by virtue of their positions on the Board, so the requests they make to stand, to listen, to pray, or to "[p]lease bow your heads" are all requests on behalf of Hendersonville. J.A. at 8-9. The coercive effect the Board's prayers have is reflected through Ms. Pintok's experience. The Christian prayers intimidated and humiliated her, reminding her of the intolerance Christians in her community have for minority faiths like hers. J.A. at 2. Because the Board delivers these invocations right before it presides over citizens' grievances, any reasonable person in Ms. Pintok's situation would not appreciate the coerciveness of the situation. J.A. at 8. In Ms. Pintok's case, she sought review of a permit denial that prevented her from obtaining a license to operate a paddle boat company on a lake under the Board's control. J.A. at 1, 8. She had to plead her case immediately following the Board's Christian prayers where they requested citizen participation. Like the court noted in *Lund*, the close proximity between the Board's prayer exercises and its considerations of specific individual petitions presents the

opportunity for abuse. Furthermore, it likely coerces attendees like Ms. Pintok to participate in the prayer practice purely to avoid the community's disapproval.

The Board's prayer practice serves to endorse Christianity by its continuous and exclusive use of Christian prayer since 2005, and by preaching conversion toward minority faiths. Additionally, because the Board's practice involves government representatives leading citizens in Christian prayer immediately preceding the Board's deliberative proceedings, the Board's prayer practice fosters a coercive environment which compels citizens of minority faiths to participate in religious exercise to avoid Board disapproval. As such, the prayer practice impermissibly shows the Board's preference for Christianity and coerces religious minorities to participate in Christian prayer; thus, failing the second prong of the *Lemon* test.

C. The Board is excessively entangled with religion because of the exclusive control it exercises over the content of the prayers.

The Board's decision to open quasi-adjudicatory meetings with prayer led and controlled by its members is an excessive entanglement with religion. The Establishment Clause requires that the government "pursue a course of complete neutrality toward religion" to avoid excessive entanglement. *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985). In determining whether the government is entangled with religion, courts are "particularly concerned about 'ongoing, day-to-day interaction between church and state." *Constangy*, 947 F.2d at 1152 (quoting *Lynch*, 465 U.S. at 684). The State's ability to regulate the prayer is "a hallmark of state involvement." *See Indian River*, 653 F.3d at 288 (citing *Adler v. Duval Cty. Sch. Bd.*, 250 F.3d 1330, 1337 (11th Cir. 2001). Therefore, excessive government entanglement is exhibited through "comprehensive, discriminating, and continued state surveillance of religious exercise." *Lambeth*, 407 F.3d at 273 (citing *Lemon*, 403 U.S. at 619). The government is inevitably entangled when it is hosting prayer at public meetings led by a government representative, but the entanglement becomes excessive

when the government involves itself in the composition of, or control over, the prayers. *Coles*, 171 F.3d at 385.

In *Constangy*, the Fourth Circuit held that in the context of judicial process, judges cannot open court proceedings with prayer because they must be neutral and apply the law without letting bias or personal belief influence their decisions. *Constangy*, 947 F.2d at 1152. The court reasoned that the judge's practice of opening court with prayer was an excessive government entanglement because it "inject[ed] religion into the judicial process and destroy[ed] the appearance of neutrality." *Id.* Additionally, in *Indian River*, the Third Circuit found excessive entanglement where the board composed and monitored a daily prayer, noting that it showed where the school had taken a position on appropriate religious worship. *Indian River*, 653 F.3d at 289-90 (citing *Mellen*, 327 F.3d at 375).

Here, the Board's prayer practice is similar to the circumstances described in *Constangy* because, although the Board is not an official court, it is still responsible for making decisions that determine the rights of individuals, such as permit denials. J.A. at 8. Additionally, one of the members alluded to the Board's duties in a prayer, saying: "May you guide us to preside fairly and impartially over all petitions, grievances, and arguments brought before us." J.A. at 9. The board member giving that prayer described a responsibility of neutrality equivalent to that of a judge. Because the Board is involved in the decision-making process, requiring a degree of neutrality akin to a judge, the Board's use of prayer before its meetings would serve to inject religion into a judicial process and destroy the appearance of neutrality.

Furthermore, like the board in *Indian River*, the board members have the exclusive opportunity to give the prayers as well as exclusive power over the content of the prayers. J.A. at 2-8. Here, the Board is a state actor; therefore, the messages its representatives choose to give

become messages on behalf of the state. Accordingly, every Board member is Christian and tends to offer obviously Christian invocations, the state is sending Christian messages to its citizens. J.A. at 9. This level of excessive government entanglement with Christianity falls outside the bounds of what the Establishment Clause allows.

Therefore, the Board's prayer practice excessively intertwines the government with religion by destroying the image of neutrality inherent in the Board's duties as adjudicative officers and by assuming direct and exclusive control over the prayer content. As such, the Board's practice fails the third prong of the *Lemon* test and violates the Establishment Clause.

CONCLUSION

The Board's procedure of opening its monthly Board meetings with Christian prayer led by its members violates the Establishment Clause of the First Amendment. Because member-led prayer before adjudicatory proceedings fall outside the narrow historical circumstances articulated in *Marsh* and *Town of Greece*, the Board's prayer practice cannot claim its constitutionality under the exception of legislative prayer. Additionally, the Board's practice served to advance Christianity rather than to solemnize public business, endorsed Christianity and coerced religious observance from citizens of minority religions, and fostered an excessive government entanglement with Christianity. Thus, for the aforementioned reasons, the Board's prayer practice fails all three prongs of the *Lemon* test and cannot pass constitutional muster. Therefore, we respectfully ask this court to affirm the appellate court's decision that the Board violated the Establishment Clause, and further hold that the Board's prayer practices fall outside the history and tradition of legislative prayer established in *Marsh* and *Town of Greece* and sends an undeniable signal that the government endorses Christianity.