Docket No. 17-1891

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2018

HENDERSONVILLE PARKS and RECREATION BOARD, Petitioner

v.

BARBARA PINTOK, Respondent

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

BRIEF FOR PETITIONER

Team 2525
Counsel for Petitioner

QUESTIONS PRESENTED

I. Whether the Board's practice of having members offer prayer before public meetings comports with the history and tradition of legislative prayer authorized by Marsh v Chambers and Town of Greece v Galloway.

II. Whether the Board's practice of beginning public meetings with prayer supports the secular purpose of solemnizing public business, or whether legislator-led prayer has a clearly religious purpose and places coercive pressures on religious minorities.

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STATEMENT OF JURISDICTION

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

STATEMENT OF THE CASE

Summary of the Facts

Hendersonville Parks and Recreation Board ("the Board") is a five-member government committee which has various oversight roles for the city. (J.A. at 8.) The Board meets monthly to conduct business, including hearing appeals of permit denials. (J.A. at 8.) Barbara Pintok ("Respondent") is a resident of Hendersonville who follows the pagan religion of Wicca. (J.A. at 1.) Respondent presented before the Board, as she sought to appeal a permit denial for her to operate a paddleboat company on a lake under the control of the Board. (J.A. at 8, 18.). The record does not associate this permit denial with Pintok's religion.

A member of the Board opens each meeting with the recitation of the Pledge of Allegiance and then a Board member leads a short prayer with Christian idioms. (J.A. at 8). Each member of the Board is Christian but representing different denominations of Christianity. The Board members have offered the following prayers:

> "Almighty God, we ask for thy blessings as we conduct our work. May we act in your spirit of benevolence and good will. We know that we need your spirit watching over us as we conduct the public's work. May you guide us to preside fairly and impartially over all petitions, grievances, and arguments brought before us."
>
> "May we reflect on the awful violence and mass shootings in this country. May God place His Healing Hand on the hurt communities and families who suffered grievous losses. We know that evil exists in the world, but we humbly ask for peace and togetherness in this trying time. We ask for a moment of quiet reflection to allow all present in this room to reflect on the pressing moments of their day. We pray that we can all come together in a spirit of unity despite whatever differences we may have."
>
> "Heavenly Father, we ask for your guidance as we conduct the public's business and serve all people no matter what religion, faith, or lack thereof. May we conduct ourselves in the proper manner at all times. Father, the world seeks to divide often on the basis of race. Let us treat all persons with the dignity and respect that they deserve no matter their race, sex, religion, sexual orientation, or gender identity. We are all God's people."

> "Please bow your heads. Lord, help us to make good decisions. Bless our troops and their family members who are missing their loved ones who are making sacrifices for us all. Please bless our community with peace. We know that we are tasked with making decisions that impact the lives of members of our community. Please bless everyone that comes before us and give peace to them in their daily lives."
>
> "We are all sinful but as the book of Isaiah reads, though our sins are like scarlet, they shall be as white as snow. We all fall short of the glory of God. We must strive to conduct our business in a way consistent with the careful hand of the Father and His son Jesus Christ."

(J.A. at 9.)

Pintok sued the Board, wanting the court to grant declaratory and injunctive relief against the Board's Christian prayers at the meetings. (J.A. at 11). In an affidavit submitted by Pintok, she states she felt "very intimidated by these prayers, which were all Christian in nature." (J.A. 17). At one time, she approached a Board member with her opinion about the prayers, and while the Board member's exact response is disputed, the response showed that member did not care for Pintok's opinion or complaint. (J.A. at 6, 19). All members of the Board claim the prayers were not meant to coerce, intimidate, or convert any member of the community - in fact many of the Board members declared they would never subscribe to a practice that coerced others into a religious acts or beliefs. (J.A. at 2–6.) Instead, the members state that the prayers are meant to "solemnize public business" and "lend gravity to our proceedings." (J.A. at 2, 4).

Summary of the Proceedings

The United States District Court for the District of Caldon held in favor of the Petitioner. (J.A. at 7). The District Court determined that the facts of this case should be "analyze[d] under the history and tradition analysis offered in *Marsh v. Chambers*, 463 U.S. 783 (1983), and *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014)." (J.A. 13). The Court held that under analysis of *Marsh* and *Town of Greece*, the prayers offered by the members of the Board did not violate the

Establishment Clause. (J.A. at 15.) The District Court cited *Marsh* in which the Supreme Court stated "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country." (J.A. at 20). The District Court noted the Supreme Court reaffirmed prayer before public meetings is not a violation of the Constitution in *Town of Greece*. (J.A. at 12).

The United States Court of Appeals for the Thirteenth Circuit reversed and held in favor of the Pintok. (J.A. at 17). The Court of Appeals held the Establishment Clause test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), was the applicable test. (J.A. at 21). The Court, in applying the *Lemon* test, found the prayer had the "primary effect of advancing the Christian religion" and therefore violated the second prong of the *Lemon* test as refined in Justice O'Connor's concurring opinion in *Lynch v. Donnelly*, 465 U.S. 668 (1984). (J.A. at 24).

Standard of Review

The inquiry into whether prayer in legislature violates the Establishment Clause is one of law not fact. Where the dispute is one of law, the standard of review is de novo. Summary judgment is given when there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The Court must consider the evidence in a light most favorable to the nonmovant, Barbara Pintok, because "Rule 56[] mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

SUMMARY OF THE ARGUMENT

The Establishment Clause allows for the opening of sessions of legislative and other deliberative public bodies with prayer because it is so embedded in the fabric of our society and the history

and tradition of this country. An exception to the Establishment clause jurisprudence was carved out in *Marsh* and further established *Town of Greece*. Both cases show that the prayer opportunity as a whole must be weighed against the backdrop of history and tradition, before determining whether any features of the context or content denigrate non-believers, proselytize, or betray an impermissible government purpose.

Legislator-led prayer, like legislative prayer, has substantial evidence of history and tradition and is not *per se* unconstitutional. Although legislative prayer is silent on the issue of the prayer giver distinction, *Marsh* and *Town of Greece* provide the framework for all legislative prayer. The Board's practice of having members lead the invocation should also be accessed by this framework.

The *Lemon* Test should not be applied to the legislative prayer context because the test was intended for new innovations that lacked the support of historical evidence, the teacher-student relationship, and statutes. The Board's practice of having board members lead with a short prayer is a practice with historical support, a practice concerning adults, and not a codified practice. Also, applying the Lemon test to the Board's practice would lead to the governmental entanglement that the Establishment warns against.

Legislative prayers must then be assessed for their context and content to determine whether the practice is coercive and outweighs the historical practice. A factual inquiry into the features of the prayer practice shows the prayer does not denigrate non-believers, proselytize, nor betray an impermissible government purpose. The features of the Board's prayer practice include: placement at the beginning of the meeting, the principal audience for the prayer was the board, the wording of the prayers were constitutionally permissible, and the record does not show the legislators discriminating against non-participants. The prayer practice of the Board is

consistent constitutional legislative-led prayer with the rationale of the, 6th Circuit decision, *Bormuth* and factually distinct from the unconstitutional legislative-led prayer of the 4th Circuit in *Lund*. Legislative Prayer is not per se unconstitutional; therefore it cannot be the determinative factor in finding the Board's practice coercive.

ARGUMENT

I. The Board's Practice of Having Members Offer Prayers Before Public Meetings Comports with the History and Tradition of Legislative Prayer as Authorized by *Marsh* and *Town of Greece*

The First Amendment "reflects the philosophy that Church and State should be separated." *Zorach v. Clauson*, 343 U.S. 306, 312 (1957). However, that separation does not need to be in "every and all respects." *Id.* This Court has recognized that the American people are a religious people and American institutions "presuppose a Supreme Being." *Id.* at 313. Opening legislative sessions with prayer is one such institutional practice that is "deeply embedded in the history and tradition of this country." *Marsh v. Chambers*, 463 U.S. at 786.

The tradition of opening legislative sessions with prayer dates back to the British colonies. *Id.* at 787. The practice was formally adopted by the Continental Congress in 1774. *Id.* After the Constitution was ratified, one of the first orders of business for the First Congress was to adopt a policy of selecting a chaplain to offer opening prayers. *Id. at 788.* The very men who wrote the First Amendment Establishment clause did not consider "opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress." *Id.*

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A. The Board's legislative-led prayer comports with the History and Tradition Analysis of the Supreme Court in *Marsh* and *Town of Greece*

1. Legislator-Led Prayer Comports with the History and Tradition of *Marsh*

Marsh is considered a "carv[ed] out … exception" to the Court's Establishment Clause jurisprudence, where the Court allowed legislative prayer without applying "any formal tests that have traditionally structured in this inquiry". *Id.* at 1818, (citing *Marsh*, at 796, 813) (Brennan, J., dissenting)). This exception is grounded in the factual and legal reasoning of *Marsh*, which is applicable to the Board's legislator-led prayer.

In *Marsh*, this Court held the Nebraska legislature's practice of opening each session with a prayer by a chaplain paid with public funds did not violate the establishment clause. *Marsh*, 463 U.S. at 795. This Court reasoned "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom." *Id.* 3333. The Court noted multiple historical examples of "traditional procedures" involving opening legislative sessions with prayers offered by chaplains. *Id.* at 787.

After analyzing the historical evidence, this Court determined the "First Amendment draftsmen . . . saw no real threat to the Establishment Clause arising from a practice of prayer similar [to what is being] challenged." *Id.* at 791. Notably, this Court addressed the opposition of

John Jay and John Rutledge on beginning the first session of the Continental Congress with prayer, and Samuel Adam's response to the objection. John Jay and John Rutledge opposed the fact that the delegates to the Congress "were so divided in religious sentiments . . . that [they] could not join in the same act of worship"; Samuel Adams responded, "he was no bigot and could hear a prayer from a gentlemen of piety and virtue, who was at the same time a friend to his country." *Id.* at 792 (citing C. ADAMS, FAMILIAR LETTERS OF JOHN ADAMS AND HIS WIFE, ABIGAIL ADAMS, DURING THE REVOLUTION 37-38, reprinted in Stokes, at 449). Furthermore, this court used this "interchange" as a segue to determine "the delegates did not consider opening prayers as a proselytizing activity or as symbolically placing the government's official seal of approval on one religious view." *Id.* This determination was at the forefront of this Court's decision before addressing the content and context of the specifics of *Marsh*'s Nebraska legislative prayer.

Next, this Court addressed "whether any features" of the Nebraska practice "violate the Establishment Clause." *Id.* This Court identified "beyond the bare fact that a prayer is offered" the following three distinguishing points: (1) the clergyman of only one denomination has been selected for 16 years; (2) the chaplain was paid at public expense; and (3) the prayers were Judeo-Christian; and when all points were "weighed against the historical background … do not invalidate the practice." *Id* at 793. This Court stated in three folds, (1) long tenure does not conflict with the Establishment Clause absent proof the chaplain's appointment came from impermissible motive; (2) history and current practices "support that legislators paid chaplains at public expense"; (3) the content of the prayer does not concern judges, when there is no suggestion that the prayer opportunity was used to proselytize, advance one religion, or disparage other beliefs. *Id.* at 792-94. "[I]t is not for use to embark on a sensitive evaluation or to

parse the content of a particular prayer." *Id.* at 794–795. This Court's breakdown of its analysis is instructive, the prayer opportunity was validated before it was determined whether "any features" invalidated the practice. *Id.* at 792.

The Hendersonville Parks and Recreation Board practice of legislative led prayer is a prayer opportunity that is validated by *Marsh*. The practice here is *per se* valid unless proof can be provided that the prayer opportunity in itself has been exploited to proselytize, advance, or to disparage any other belief. None of the Board members have stated they intend this prayer opportunity to proselytize, advance, or disparage religious beliefs -- in fact, they have made statements to the contrary. (J.A. at 2-6.) Absent proof that the prayer opportunity was impermissible, the legislator-led prayer aspect is but a feature that must be "weighed against the historical background" to determine whether it invalidates the practice. *Id.* at 793.

2. The Board's Practice Comports with the History and Tradition of *Town of Greece*

In *Town of Greece*, this Court stated in the context of legislative prayers, "[the] inquiry must be to determine whether the prayer practice … fits within the tradition long followed in Congress and the state legislatures." *Town of Greece*, 134 S. Ct. at 1819–20. The question posed to this Court was whether the town of Greece's prayer practice of containing sectarian language and the setting and conduct of the town board meetings "falls outside that tradition." *Id.* at 1820. This Court answered by separating the two issues.

First, this Court emphasized what was already made clear in *Marsh*: that the "constitutionality of legislative prayer" does not "turn[] on the neutrality of its content." *Id.* at 1821. There is a long history of legislative prayer invoking "explicitly religious themes," dating back to the First Congress when Rev. William White offered Christian prayers including the Lord Prayer and prayer that sought "the grace of our Lord Jesus Christ." *Id.* at 1820. This Court

reaffirmed that the content of the prayer is not of concern unless the "prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or believe." *Id.* at 1821–22 (quoting *Marsh*). The Court held that the prayers containing sectarian language did not "fall outside the tradition this Court has recognized." *Id.* at 1824

The Court then addressed whether the setting and conduct of prayer "in the intimate setting of a town board meeting differs in fundamental ways from the invocations delivered in Congress and state legislatures, where the public remains segregated from legislative activity and may not address the body except by occasional invitation." *Id.* at 1824–25. Respondents argued that because citizens are not only present at town board meetings but often invited to petition the board for "actions that may affect their economic interest," the public may feel pressured to participate in prayers inconsistent with their own beliefs. *Id.* at 1825. This Court again acknowledged there is a history and tradition of prayer in these settings. *Id.* at 1825. Court sessions, where citizens are present and participate, often have an "inaugural prayer, or the recitation of 'God save the United States and this honorable Court.'" *Id.* "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, not to afford government an opportunity to proselytize or force truant constituents into the pews." *Id.* The prayers offered in Town of Greece were "ceremonial" and not offered while the members were engaging in policy making, and were therefore permissible. *Id.* at 1827–28.

3. There is History and Tradition of Legislator-Led Prayer

While *Marsh* and *Town of Greece* address the history and tradition of legislative prayer, the prayers offered in those cases were delivered by religious leaders, not legislators. However,

there is a history and tradition of legislator-led prayer in the United States which should be similarly recognized by this Court.

The Sixth Circuit, in determining whether legislator-led prayer during a county board meeting comports with history and tradition, outlined the "long-standing tradition" of such prayer. *Bormuth*, 870 F.3d at 509. That court acknowledged the tradition of legislator-led prayer dates back to "[b]efore the founding of our Republic." *Id.* The court cites various state capitals which have engaged in legislator-led prayer, including the Michigan House of Representatives and Senate which "have documented legislator-led prayer examples dating back to at least 1879 and 1898, respectively." *Id.* at 509-10. The court also cited the record of *Town of Greece* to show that the tradition continues today. *Id.* at 511. One of the prayers offered during a board meeting in the town of Greece was offered by a councilman, while other council "offered silent prayer, directing the audience to 'remain standing' and 'bow heads.'" *Id.* Ultimately, the Sixth Circuit found that legislator-led prayer is not a *per se* First Amendment violation because the history and tradition reflects the significance of such prayer. *Id.* at 498.

The Fourth Circuit similarly analyzed the history and tradition of legislator-led prayer in *Lund v. Rowan Cty*, 863 F.3d 268 (2017). The Fourth Circuit acknowledged that "lawmaker-led prayer is far from rare" and that "a majority of state legislators allow lawmakers to offer invocations 'on at least some occasions.'" *Id.* at 279 (quoting Brief of Amici Curiae State of West Virginia and 12 Other States, at 13-14.) The court goes on to state that "the Establishment Clause indeed allows lawmakers to deliver invocation in appropriate circumstances," and "[l]egislator-led prayer is not inherently unconstitutional." *Id.* at 280. While the court ultimately found that Rowan County's prayer violated the Establishment Clause, it was a context specific analysis that determined that the features of the prayer in totality were outside the bounds of the

Establishment Clause. *Id.* at 290. Despite that, the court reiterated "that legislator-led prayer can operate meaningfully within constitutional bounds." *Id.*

Given the historical evidence, this Court should recognize that the history and tradition of legislative prayer extends beyond prayers offered by religious leaders. Legislative prayer also includes prayers offered by legislators themselves.

II. The Appeals Court Erred in Applying the Lemon Test in the Context of Legislative Prayer

Marsh and *Town of Greece* offer the framework with which to analyze claims against legislative prayer. This Court has intentionally avoided analyzing legislative prayer under the *Lemon* test. As stated earlier, the *Lemon* test was previously rejected in this context because it cannot account for the significance of the history and tradition of legislative prayer in particular. *See Marsh* 463 U.S. at 801–02. This Court created the separate analysis in *Marsh* and *Town of Greece* for claims against legislative prayer.

In *Lemon*, Chief Justice Burger wrote the majority opinion in which this Court invalidated two statutes under the Establishment Clause because both were excessive entanglement of state with church. *Lemon*, 403 U.S. at 602. The first statute was Rhode Island's 1969 Salary Supplement Act which gave a 15% salary supplement to teachers in non-public schools where the per student expenditure on secular education was below the average. *Id*. The Act required that the eligible teachers must teach only subjects offered in public school. This Court decided the Rhode Island Statute was unconstitutional because of the "potential if not actual hazards of this form of state aid." *Id.* at 618. The sole beneficiaries of the Act were Roman Catholic elementary schools and the "characteristics of the schools make them a powerful vehicle for transmitting the Catholic faith to the next generation." *Id.* at 616. This Court

recognized the process of religious indoctrination was "enhanced by the impressionable age of the pupils." *Id.*

This Court dismissed testimony that the teachers were not "guilty of bad faith" and instead focused on the "potential for impermissible fostering of religion." *Id.* at 619. The potential was considered because the Court believed it would be difficult for a teacher to separate between secular and religious teaching and "[u]nlike a book, a teacher cannot be inspected . . . so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment." *Id.* Also, this Court noted another aspect of entanglement, where state inspection and evaluation of religious content is required to determine how much a school expends for secular education and how much to religious activity. *Id.* at 620.

The second statute this Court invalidated in *Lemon* was Pennsylvania's Nonpublic Elementary and Secondary Education Act, which gave state aid to parochial schools for teachers' salaries. *Id.* at 620. This court held, "the very restrictions and surveillance necessary to ensure that teachers play a strictly non-ideological role give rise to entanglement between church and state." *Id.* at 621. This Court also worried about the divisive political potential of these state programs, where Candidates will be forced to declare and voters to choose whether they were in support of state assistance for church-related schools. *Id.* at 622. The test states: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, finally, the statute must not foster an excessive government entanglement with religion." *Id.* at 612 (1971) (internal quotations and citations omitted).

Particularly, this Court stated, "To have States or communities divide on the issues presented by state aid to parochial schools would tend to confuse and obscure other issues

of great urgency," because "[w]e have an expanding array of vexing issues, local and national, domestic and international, to debate and divide on." *Id.* at 623. Notably this Court went on to say, "It conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections that they could divert attention from the . . . issues and problems that confront every level of government." *Id.* Inherent in the Court's recognition of history and tradition is the distinguishing factor of *Lemon* and *Marsh* jurisprudence.

The *Lemon* Court distinguished itself from accepted historical practices, thereby envisioning the test to be applied to "new innovations" that lack a "long history." *Id.* at 624. This Court distinguished Lemon from the acceptable practice of Walz, where this Court upheld a tax exemption for places of religious worship. *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970). Addressing the argument against "inevitable progression" of Walz "leading to the establishment of state churches and state religion," the argument "could not stand against more than 200 years of virtually universal practice imbedded in our colonial experience." *Lemon* at 624. This Court concluded the state programs were an "innovation," therefore it was more persuasive for the state churches and state religion, given "modern governmental programs have self-perpetuating and self-expanding propensities." *Id.* at 625. This Court finalized by stating, "Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government. [W]hile some involvement and entanglement are inevitable, lines must be drawn." *Id.*

The Lemon facts and rationale are inapplicable to the Board's legislative prayer practice and the legislative prayer jurisprudence in general. Consideration should be given to the fact Chief Justice Burger wrote the opinion in *Lemon* and then wrote an exception to it in *Marsh*. The

Eighth Circuit applied the *Lemon* Test to *Marsh* and Chief Justice Burger instead chose not to apply it. Instead *Marsh*, validated the legislative prayer of the Nebraska legislature because of history and tradition and the fact the plaintiff was an "adult" who is not "presumably" and not readily susceptible to "religious indoctrination or peer pressure." *Marsh* at 792, (citing *Tilton v. Richardson*, 403. U.S 672, (1971) (noting there is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination)); *Colo v. Treasurer & Receiver Gen'l*, 392 N.E. 2d 1195, 1200 (Mass. 1979) (Legislative prayer is unlikely to advance religious belief either among the legislature or their constituency, even if it does give recognition to the traditional place that prayer has occupied in such a ritual for two centuries).

Justice Brennan's dissent in *Marsh* stresses the importance of the *Marsh* exception to the Establishment Clause and the reluctance to apply the Lemon test to the legislative prayer context. Justice Brennan wrote, "In sum, I have no doubt that any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional. *Marsh*, 463 U.S. at 801 (J., Brennan. dissenting). Therefore, it is not surprising that the Thirteenth Circuit came to the conclusion that the Hendersonville Board's practice of legislative prayer violated the Establishment Clause under the *Lemon* test, where legislative prayer in general is "unanimously … unconstitutional." *Id.* The Hendersonville Board's practice of legislative prayer, regardless of the prayer giver distinction, like Marsh or Town of Greece would be held unconstitutional. The *Marsh* and *Town of Greece* jurisprudence in its recognition of the place of legislative prayer in our "fabric society" should be the framework for all legislative prayer.

The Hendersonville practice of having one member of the Board delivering a short prayer is less persuasive of the "inevitable progression … leading to the establishment of state churches and state religion," given the support of the history of legislative-led prayer. Legislative-led prayer is not a "new innovation" - that the Lemon Test concerns itself with - that lacked a "long history." As previously stated, legislators leading prayer is evident throughout history and continues as a practice across many states today.

Also, the Board members and their constituency are not analogous to the teacher-student relationship that *Lemon* warned of. The teacher-student relationship comes with the presumption of the potential of impermissible fostering of religion, whereas legislative prayer the individual as an adult is presumed to be not readily susceptible to religious indoctrination or peer pressure. Legislative Boards, unlike teachers, are books where they can be inspected to determine the extent and intent of their personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. The determination of impermissible violations of the First Amendment can be determined by an analysis of the Board's decisions and the prayer practice over time. The focus is not the on the "potential" of impermissible violations, but the evidence upon the record. *See Bormuth*, 870 F.3d at 499. The adult distinction is still evident in legislative-led prayer and ignoring the distinction is inconsistent with the rationale of Lemon, Marsh, and Town of Greece, and therefore the Establishment clause jurisprudence.

Creating a distinction for legislative-led prayer for the Lemon test, i.e. a stricter scrutiny than the legislative prayer, would ignore the warnings of excessive entanglement in the Establishment Clause. Lemon warns of "state inspection and evaluation of the religious content of a religious organization" is the sort of "entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive government direction of church schools and

hence of churches." The Lemon Court could not ignore "the danger that pervasive modern governmental power will ultimately intrude on religion and thus conflict with the Religion Clause. *Lemon*, 403 U.S. at 619.

In accord with *Lemon*, Town of Greece stated, "to hold invocations must be nonsectarian would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech, a rule that would involve government in religious matters to a far greater degree than is the case under the town's current practice of neither editing or approving prayers in advance nor criticizing their content after the fact." *Town of Greece*, 134 S. Ct. at 1822 (citing *Hosanna- Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694, 705-706, 181 L. Ed. 2d. 650 (2012). "Our Government is prohibited from prescribing prayers to be recited in our public institutions in order to promote a preferred system of belief or code of moral behavior." *Town of Greece*, 134 S. Ct. at 1822 (citing *Engel v. Vitale*, 82 S. Ct. 1261, 8 L. Ed. 2d 601 (1962). It would be but a few steps removed from that prohibition for legislatures to require chaplains to redact the religious content from their message in order to make it acceptable for the public sphere. *Town of Greece*, 134 S. Ct. at 1822.

The cure is worse than the disease - holding constitutional acceptable invocations cannot be given by the legislator themselves would force the legislatures that sponsor the prayers and the courts to act as supervisors and censors of prayer givers. This rule would involve the government in religious matters to a greater degree than what the Hendersonville Board's current practice of neither choosing Board members based on religion or editing or approving the prayers in advance nor criticizing their content after the fact. Requiring legislators to find third party religious and non-religious chaplains and not lead the prayer themselves is a few steps removed from the prohibition of government and court supervision.

In conclusion, given the evidence of the history and tradition of legislative-led prayer, the fact the constituency in legislative meetings are adults, and applying the *Lemon* Test would ironically be an entanglement of the Establishment clause this Court warns of. This Court created intended the Lemon test to analyze "innovative" statutes or practices that lacked a long history and tradition and the context of teacher-student relations because of the impressionability of school children. This test was not intended to be applied to every action by government that may encompass some relationship with religion or instances where *Marsh* or *Town of Greece* are silent. This Court recognized that the *Lemon* test cannot be applied in all First Amendment cases and has since created a new, more appropriate analysis in *Marsh* and *Town of Greece* for cases like the one before the Court presently.

III. The Features of the Prayer Do Not Outweigh the History and Tradition of Legislative Prayer, Nor on Their Own Do They Violate the Establishment Clause

History and tradition cannot alone excuse a government practice that is coercive in its attempt to push one religion over another on citizens. *Marsh*, 463 U.S. at 790; *see also Lund*, 863 F.3d at 275. It is therefore important to delve into the features of the prayer opportunity to determine whether it is coercive. This Court discusses coercion in legislature prayer in two primary ways: if the prayer denigrates or disparages non-believers or religious minorities, or if the prayer is used to proselytize or advance one religion over others. *Marsh*, 463 U.S. 783 at 794-95; *Town of Greece*, 134 S. Ct. at 1824. This Court emphasized that analysis of the prayer must involve the history and tradition of using prayer at the start of legislative meetings to solemnizing the proceedings. *Town of Greece*, 134 S. Ct. at 1826-27. But absent the coercive natures identified above, "legislative bodies do not engage in impermissible coercion merely by exposing constituents to prayer they would rather not hear and in which they need not participate." *Id.* at 1827.

Considering the coercive tests of the concurrences of Justice Kennedy and Justice Thomas in T*own of Greece,* Courts have struggled to determine the appropriate standard for coercion. *See Bormuth*, 870 F.3d at 509 ("Admittedly, the precise role of coercion in an Establishment Clause inquiry is unclear, especially within the context of legislative prayer); *Id.* (Referencing the contention of both Kennedy and Thomas the Sixth Circuit applied both standards); *Lund*, 863 F.3d at 268 ("[F]acts presented in Town of Greece, five Justices concurred that unconstitutional coercion did not occur). *Bormuth* states the issues of applications in the concurrences adeptly: "The majority's holding was that there was no coercion. According to Justice Kennedy this was because there was no coercion in the record. According to Justice Thomas, this was because there could never be coercion absent formal legal compulsion." *Bormuth*, 870 F.3d at 281. There is merit to both arguments of which concurrence is the narrowest grounds, but on the most basic level all Courts have agreed that both concurrences accepted the prayer practice of Town of Greece was not coercive, therefore constitutional. Proving unconstitutional coercion did not occur at least requires an analysis of both standards, thereby coinciding with a decision that all five Justices would agree to.

Beginning with the Concurrence written by Justice Thomas, it is clear-cut that the Board's practice was not coercive. Pintok only contends that "she suffered indirect coercive pressure" and does not approach "actual legal coercion" that Justice Thomas warranted as coercion. J.A. at 14; *see, Town of Greece*, 134 S. Ct. at 1838 (Thomas J., concurring in part and in the judgment).

The Concurrence of Justice Kennedy calls for an "inquiry [which] … is fact-sensitive one that considers both the setting in which the prayer arises and the audience to whom it is directed." *Town of Greece*, 134 S. Ct. at 1825. Kennedy's factual inquiry is a determination of

whether "the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion, many present may consider the prayer to fall short of the desire to elevate the purpose of the occasion and unite lawmakers in their common effort." *Id.* at 1823. A factual inquiry into the features on the record of the prayer practice of the Hendersonville Board showcases that it is uncoercive and therefore constitutional.

A. The Features of the Member-led Prayer - Its Content, Audience, and Intent - Do Not Denigrate Non-believers, Proselytize, Nor Betray an Impermissible Government Purpose

After considering the history and tradition of prayer to solemnize an occasion, the opportunity for prayer must itself be analyzed in order to discern whether the use of prayer offends the First Amendment. This Court looked at the prayer opportunity as a whole and its features - not just the content of the prayers - to identify whether the prayers "denigrate, proselytize, or betray the impermissible government purpose." *Town of Greece*, 134 S. Ct. at 1824 (citing *Marsh v. Chambers*, 436 U.S. at 794-795). Specifically, this Court looks for prayer practices that "denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion" or that have a "pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose." *Bormuth*, 870 F.3d at 512 (quoting to *Town of Greece*, 134 S. Ct. 1823-24), *see also Lund*, 863 F.3d at 277. Based on the record, the following features can be analyzed for the coercive characteristics outlined above: when the prayer is offered, the audience of the prayer, the content or words of the prayer itself, how a reasonable observer might perceive the prayer, and who is giving the prayer.

This Court did not ignore the content of the prayers in both *Town of Greece* and *Marsh*. Instead the Court used the sectarian language of the prayers to make the point that Congress and other legislative bodies should not censor nor edit the religious nature of the prayers to make

them generic but instead work to "welcome ministers of many creeds." *Town of Greece*, 134 S. Ct. at 1820-21; *see Lee v. Weisman*, 505 U.S. 577, 590 (1992). The prayer itself should not be evaluated if "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." *Marsh*, 463 U.S. at 794-95. Additionally, if the wording of the prayer is to be considered, it must not be analyzed alone but weighed against the history and tradition of prayer in legislative bodies. *Town of Greece*, 134 S. Ct. at 1820; *see also Marsh*, 436 U.S. at 792.

Thus, the features of the prayer opportunity at the Hendersonville meetings must be assessed in the same way this Court evaluated the prayer opportunities in *Marsh*, *Town of Greece*, and in subsequent cases decided by Circuit Courts relying on this Court's precedent.

1. How the Board Used the Prayer Opportunity at the Beginning of Each Meeting Suggests the Intent Behind the Prayer Was Not to Proselytize the Audience but to Solemnize the Occasion

An important feature when considering prayer offered in legislature, is the time of the prayer. This Court acknowledged that a "relevant constraint derives from [prayer's] place at the opening of legislative sessions, where it is meant to lend gravity to the occasion." *Town of Greece*, 134 S. Ct. at 1822. In its analysis of the history and tradition of prayer in legislature, this Court focused exclusively on the practice of opening legislative sessions with prayers. *Marsh*, 436 U.S. at 786, 788, 792.

The case at hand considers prayer in legislature that is used to commence the proceedings (J.A. at 1). Like the facts in *Marsh* and *Town of Greece,* this case deals with a practice of opening legislative meetings with a prayer. 436 U.S. at 784; 134 S. Ct. at 1816. The timing of the prayer is significant because the tradition of opening with prayer is premised with the idea that

prayer solemnizes the proceedings and helps unify the lawmakers around a shared end. *See Marsh* 463 U.S. at 792; *Town of Greece,* 134 S. Ct. at 1818; *Lynch v. Donnelly*, 465 U.S. 668, 693, (1984) (O'Connor, J., concurring). A board that prays throughout the meeting or at any other time would have a hard time claiming the intent of the prayer is to solemnize the proceedings and not to proselytize or advance the religion. That is not the case here, and thus this feature of the timing of the prayer does not raise concern of coercion.

2. The Audience for the Prayer Is Primarily the Board Members Themselves and the Public Are Not Coerced to Participate in the Prayer

Because it is fundamentally understood that the Establishment Clause forbids government from coercing religion on people, this Court must make a fact-sensitive inquiry into both the setting of the prayer and the audience of the prayer. *Town of Greece*, 134 S. Ct. at 1825 (2013); *see also County of Allegheny*, 492 U.S. 573, 659 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part). While the board meetings have an audience of citizens, like in *Town of Greece,* the prayers are conducted by, and are generally for, the Board members to "solemnize public business," "to lend gravity to [the] proceedings," and "to emphasize the gravity of [their] mission." (J.A. at 2-6); 134 S. Ct. at 1816. This Court reflected that had participation in the prayer been demanded, or if dissidents were singled out, then the analysis of the constitutionality of the prayer would be different. But just as it was in *Town of Greece*, the record for the case at hand does not suggest the Board made such demands or used prayer participation to influence their decisions. *Town of Greece,* 134 S. Ct. at 1826; (J.A. at 2-6).

This inquiry into the audience feature of the prayer opportunity is incomplete without considering how the audience members participated or were asked to participate in the prayer. The record shows that the Board member giving the invocation for the day would ask the audience "to stand, recite the Pledge of Allegiance, and then listen to a short prayer." (J.A. at 8).

Some of the prayers offered opened with asking audience members to "please bow your heads." (J.A. at 9). Nowhere do the Board members command participation in the prayer, and audience members can leave, sit, or even late after the prayer has concluded. The affidavits provided by the Board members attest to the fact that it is never their intention to coerce; in fact they are strongly against government proselytizing (J.A. at 2) or directly or subtly coercing religious participation (J.A. at 3, 4, 5).

The Fourth Circuit heard a similar case of legislator-led prayer before meetings and held the prayer practice was unconstitutional. The circuit conducted a similarly appropriate and careful analysis of the prayer opportunity as a whole and found the feature of asking audience members to participate was but one of many features that in sum convinced the court that the prayer practice was unconstitutional. *Lund*, 863 F.3d at 287. Specifically, the prayers offered in *Lund* reached a "degree of proselytization" that when taken in tandem with the legislator-led prayer and request for audience participation, resulted in exceeding the permissions the Establishment Clause provides for prayer in legislature. *Id*.

But the case at hand does not present the same cumulation of features that in sum offend the First Amendment. Regarding the audience feature, as the board members expressed, the intent of the prayer is for the Board members to settle into the appropriate frame of mind, and while audience members are invited to participate, that invitation is not meant to be coercive or a threat that non-participation results in biased or punishing Board rulings. (J.A. 2, 4, 6).

3. The Wording of the Prayer Should Not Be Evaluated Because the Prayer Opportunity Is Not Used to Proselytize, Advance One Religion or Disparage Other Beliefs

Following the direction given by this Court, the content of board member's prayers should not be considered if the prayer opportunity has not been exploited for proselytizing,

denigrating others, or advancing one religion over others. *Town of Greece*, 134 S. Ct. at 1820; *Marsh*, 463 U.S. at 794-95. While for a time courts were confused about the role prayer content played in constitutional consideration - confusion which arose from dicta in *Marsh* describing the judeo-christian nature of prayers - this Court corrected this misconception that constitutionality hinged on the prayer's content neutrality. *Bormuth*, 870 F.3d at 504. In *Town of Greece*, this Court made clear that the constitutionality of prayer does not turn on the content of the prayer being religiously neutral, and thus overturned cases where content determined the practice's permissibility. 134 S. Ct. at 1820-24. This Court never intended for the judiciary to supervise or censor prayers to achieve neutrality - a dangerous path that risks violating the Establishment Clause to a greater degree than the original prayer itself. *Town of Greece*, 134 S. Ct. at 1822.

As detailed in the prior sections, the prayer opportunity for this case shows the Board is not using prayer to proselytize or advance their religious persuasions. Because the intent of the prayer is to solemnize the occasion - and the Board's intent follows in the history and tradition of Congress and local legislatures opening proceedings with a prayer - it is inappropriate and against this Court's directive for the judiciary to review the wording of the prayers. *Bormuth*, 870 F.3d at 504 (citing *Town of Greece*, 134 S. Ct. at 1822). Even if it were the case that the content of these prayers had to be evaluated, this Court permits, and even expects, those offering prayer in government to do so influenced by their faith and beliefs. *Town of Greece*, 134 S. Ct. at 1820. In looking at the prayers in this case, the prayers have religious aspects - saying "the Father," "Jesus Christ," "our sins," and "the glory of God." But they cannot be dismissed as unconstitutional because of their religious idioms. Instead, the religiously-bent prayers must be weighed against the history and tradition of prayer in legislative bodies. *Town of Greece*, 134 S.

Ct. at 1820 (2013). Per the analysis offered above, the long-standing history and tradition of legislator-led prayer allows for prayers to have an unambiguous religious bias. *Bormuth*, 870 F.3d at 512.

The Sixth Circuit properly followed this Court's standard for how wording of prayers ought to be considered in the overall evaluation of the constitutionality of a board's prayer practice. Similar to the present case, in *Bormuth* the prayers varied in religiosity and used many of the same Christian-specific wording. Yet the religious tone of the prayers in *Bormuth* did not persuade the Sixth Circuit to find the prayer practice unconstitutional, and that court closely followed this Court's reasoning in *Town of Greece*. *Bormuth*, 870 F.3d at 512; 134 S. Ct. at 1820. The case at hand presents the same situation as found in *Bormuth* before the Sixth Circuit. Just as the Sixth Circuit appropriately considered the whole prayer opportunity in light of the history and tradition, the Christian leaning prayers in this case stand in line with a strong history and tradition of legislator-led and legislator-authorized prayer.

The Fourth Circuit went through similar consideration of the total features of the prayer opportunity, including an analysis of the wording of the prayer. It chose to evaluate the prayer content because other features in the prayer opportunity - only legislator-led prayer, and strictly linked to a single faith - alerted the court to potential exploitation of the prayer opportunity for the purpose of proselytization and coercion. *Lund*, 863 F.3d at 283. The prayers offered by the board in *Lund* used strong language to encourage town members to convert to Christianity. *Lund*, 863 F.3d at 284. "The record [in *Lund*] is replete with other invocations proclaiming that Christianity is exceptional and suggesting that other faiths are inferior. This message risks "denigrating nonbelievers and religious minorities." *Lund*, 863 F.3d 268, 285 (4th Cir. 2017).

The prayers on record for this case are significantly different, and certainly do not evoke the same extreme messages as those in the prayers of Lund. (J.A. 8-9).

Both the Fourth and Sixth Circuits properly assessed all features of the prayer opportunity and not just the prayers alone. While the Sixth Circuit found sectarian but not proselytizing language in the prayers, the record before the Fourth Circuit contained prayers demonstrating a clear preference for one faith over all others and a call for conversion to that faith. *Bormuth*, 870 F.3d at 512; *Lund*, 863 F.3d at 285. Thus, the Fourth Circuit combined the prayer language with the other features suggesting denigration of non-believers and proselytization, and arrived at a holding that the totality of the prayer practice violated the Establishment Clause. *Lund*, 863 F.3d at 289 (4th Cir. 2017). Because the case at hand presents prayers similarly phrased as the prayers in *Bormuth* and not *Lund*, the prayer content in this case is not a feature suggesting government coercion. (J.A. at 9); *Bormuth*, 870 F.3d at 498.

4. A Reasonable Observer of the Board Members' Prayers Would Not Believe the Prayers Are Meant to Proselytize, Preach to, or Denigrate Non-Believers

This Court reflected that legislature prayer must be analyzed "against the backdrop of historical practice," and a reasonable observer ought to be familiar with the use of prayer to commence public proceedings, and also understand that this society is a religious one before judging the coercive nature of the prayers. *Town of Greece*, 134 S. Ct. at 1825; *see also Marsh*, 463 U.S. at 792. A reasonable observer of the prayers offers a necessary perspective into how the audience might perceive the tone and intent, in order to shed light on whether the prayers have a coercive effect. But even if the perception is that the city has aligned itself with one religion through the prayer, it is not conclusive that the practice is constitutionally invalid. *Lynch v. Donnelly*, 465 U.S. 668, 683 (1984). Rather, if the Board uses the prayers in a way that promotes

one religion over another such that it "sends a message to non-adherants that they are outsiders," this feature analysis would suggest an impermissible government purpose and coercion that must be considered within the totality of the prayer practice. *Lynch*, 465 U.S. at 688; *Lund*, 863 F.3d at 287.

Considering the case at hand, a reasonable observer would not see the prayers offered by the Hendersonville Parks and Recreation Board indicates the city government as a whole has aligned with Christianity and is promoting that religion above others. A reasonable observer might feel like an outsider given the language of the prayer, but this Court makes the necessary assumption that adults can "tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith," and is not impressionable to "religious indoctrination." *Town of Greece*, 134 S. Ct. at 1823; *see also Marsh*, 463 U.S. at 792 (quoting *Tilton v. Richardson*, 403 U.S. 672, 686 (1971)). Additionally, this Court provided thoughtful commentary on how a prayer which offends an observer is not immediately labeled a coercive prayer. Adults must have a tolerance for disagreeable speech "and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum. . . ." *Town of Greece*, 134 S. Ct. 1826. The outcome of the reasonable observer analysis here is distinguishable from the facts before the Fourth Circuit, where a reasonable observer of the prayers and behavior of the board members could credibly believe the government body was actively promoting a religion with the intent of preaching and proselytizing to the public in attendance. *Lund*, 863 F.3d at 272.

The reasonable observer feature to this prayer practice does not suggest that the Board is coercing the public by proselytizing and denigrating through their sectarian prayers.

5. The Fact the Prayers Are Led by Legislators Does Not *Per Se* Make the Practice Unconstitutional and the Record is Does Not Show the

Legislators Affirmatively Excluded the Public for Not Participating in the Prayer

The Fourth and Sixth Circuits were presented with cases of legislator-led prayers, and both circuits followed this Court's analysis of prayer in legislature. The Fourth Circuit found a violation of the Establishment Clause while the Sixth Circuit found the prayers did not violate the Establishment Clause. The Sixth Circuit looked at a county's practice of praying, and in considering the prayer opportunity as a whole in light of the history and tradition, determined that the legislator-led prayer does not violate the Establishment Clause. *Bormuth*, 870 F.3d at 512. The Sixth Circuit directly addressed the difference of legislator-authorized prayers (as in *Marsh* and *Town of Greece*) and legislator-led prayers, as was in the case in *Bormuth*, and decided the difference is insignificant and "the Establishment Clause does not tolerate, much less require, such mechanical line drawing." *Id.* The Fourth Circuit agrees the standard for analysis must be the totality of the circumstances where "a fact may be relevant to the court's inquiry while not outcome-determinative." *Lund*, 863 F.3d at 289.

While the Fourth Circuit used legislator-led prayer as one of the features pointing to government coercion and promotion of a religion, it was not outcome determinative. *Lund*, 836 F.3d at 277. Instead, after inspecting the prayer practice as a whole, the exclusivity of the invocations of Rowan County, the fixed religious affiliation of the invocations, the preaching and proselytizing characteristics of the prayers themselves, and the board's direction to the public to participate in the prayer were all features that in sum pointed to government coercion in violation of the Establishment Clause. *Lund*, 863 F.3d at 277-87. But the Fourth Circuit stayed away from claiming that the feature of legislator-led prayer in itself equals government entwinement and coercion. "[W]e would not for a moment cast all legislator-led prayer as constitutionally suspect. . . And legislative prayer's solemnizing effect for lawmakers is likely heightened when they

personally utter the prayer. Accordingly, the Establishment Clause indeed allows lawmakers to deliver invocations in appropriate circumstances. Legislator-led prayer is not inherently unconstitutional." *Lund*, 863 F.3d at 279-80 (internal quotations omitted).

So while legislator-led prayer is not *per se* unconstitutional, it is important to recognize the additional weight legislator-led prayer adds to the analysis of whether a prayer practice violates the Establishment Clause. *Bormuth*, 870 F.3d at 509. The case here involves legislator-led prayers used to commence board proceedings. J.A. at 8. Prayer givers are not local ministers hired or invited to lead the prayers as was the case in both *Marsh* and *Town of Greece*. 463 U.S. at 784; 134 S. Ct. at 1816.

The record is silent on whether the Board has refused to allow non-Christian prayers before the assemblies or have treated non-observers of the prayers any differently than those who participate in the prayer. As this Court has noted, if a government actively excludes other religious representation or treated individuals differently based on their participation in the prayer, then this would be a different case and likely a different outcome. *Town of Greece*, 134 S. Ct. at 1826. Ms. Pintok had a negative interaction with one of the Board members, though the facts of that communication are unclear. J.A. at 1, 6. Similarly, the facts in *Bormuth* depict a hostile response from certain board members toward Bormuth's comments, and yet the Sixth Circuit made clear that "these isolated incidents are not indicative of a "pattern and practice" of coercion against nonbelievers of religion." *Bormuth*, 870 F.3d at 517 (quoting *Town of Greece*, 134 S. Ct. at 1826 (Kennedy, J. concurrence). Thus, Ms. Pintok's unfortunate interaction with Board member James Lawley does not speak to the pattern of behavior subscribed to by the Board as whole.

B. The Features of This Case Mirror the Facts Presented to the Sixth Circuit and Do Not Suggest the Government Is Coercive in Its Use of Legislator-Led Prayer to Commence Board Proceedings

Following this Court's precedent, both circuit court cases aptly consider the totality of the circumstances in light of the history and tradition of prayer in legislature and do not let a single feature of the prayer practice determine the constitutional outcome. In this framework of analysis, the features of the prayer practice by the Board in Hendersonville do not present coercion concerns to invalidate the practice, especially when taken in light of the history and tradition of prayer in legislature. The features here closely align with the facts in *Bormuth*, where in both cases the legislator-led prayers evoked Christian themes but were not so blatant in their proselytizing agenda, nor did the audience lack an opportunity to leave or disengage from the prayer, and the prayer itself intended to solemnize the occasion for the Board members and was not primarily for the benefit of the audience. The Sixth Circuit, in closely following this Court's framework for analysis of both history and tradition alongside the content and context of the prayers, correctly held the prayer was constitutional under the Establishment Clause. In the same way, the case at hand is also constitutional.

IV. Conclusion

This Court has laid a strong foundation for considering the constitutionality of prayer in legislature. The test to be applied first asks if there is a history or tradition for this prayer practice, and then against that historical background to consider if the prayer denigrates or disparages non-believers or religious minorities, or if the prayer is used to proselytize or advance one religion over others. The Circuit Courts have in turn taken this test and applied it to the cases before the courts. Following this precedent, the case at hand should also be taken through the same test. The outcome is that the features of the prayer, when held against the strong historical

background of legislative prayer, in totality are not coercive and thus the prayer practice by Hendersonville Parks and Recreation Board is constitutional per the Establishment Clause.