No. 17-1891

In the Supreme Court of the United States

October Term, 2018

HENDERSONVILLE PARKS AND RECREATION BOARD,
Petitioner,

v.

BARBARA PINTOK,
Respondent,

On Writ of Certiorari to the
United States Court of Appeals for the Thirteenth Circuit

BRIEF FOR RESPONDENT

Team 2526
Counsel for Respondent

QUESTIONS PRESENTED

1. 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*.

2. 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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JURISDICTION STATEMENT

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

STATEMENT OF THE CASE

The Hendersonville Parks and Recreation Board (the "Board") maintains exclusive control of the city's most vital resources and activities, ranging from its historic sites and greenways to outdoor recreation to permit rentals and reservations. J.A. at 8, 18. This Board, comprised entirely of Christian members, J.A. at 8, 18, infuses its religion into its monthly Board meetings. Before each meeting, a Board member asks everyone in attendance to stand, recite the Pledge of Allegiance, and listen to a short prayer. J.A. at 8, 18. This prayer is always delivered by a member of the Board himself or herself, is often Christian in nature, and frequently recites Bible verses and references the Christian God. J.A. at 8, 18.

For example, Board members have delivered the following prayers during their meetings:

> "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, 18-19.

Barbara Pintok, a Hendersonville resident, attended various Board meetings. J.A. at 8, 18. Ms. Pintok—a member of a religious minority residing in a town intolerant to outside religions—reasonably felt intimidated by these Christian prayers, testifying that they made her feel like an outsider, humiliated her, and caused her significant distress. J.A. at 1, 19. Although the Board asserted that the intent of the prayers was not to proselytize, but rather, was to solemnize business, J.A. at 10, the Board's Christian invocations caused great distress to Ms. Pintok. Indeed, at one meeting in which Ms. Pintok was appealing the Board's permit denial, she was so disturbed by the Board's Christian prayers that she was unable to enunciate her words properly. J.A. at 1. When Ms. Pintok informed a Board member of her concerns about the prayers, he responded "this is a Christian country, get over it." J.A. at 1, 19.

Ms. Pintok filed this claim pursuant to the Establishment Clause, seeking declaratory and injunctive relief, as well as an injunction against the Board's delivery of prayers at its future meetings. J.A. 10. In response to Pintok's complaint, the Board moved for summary judgment. The district court granted the Board's motion. J.A. 15. However, the U.S. Court of Appeals for the Thirteenth Circuit reversed, explaining that the district court relied on the inapplicable historical analysis test. J.A. 21, 24. This appeal followed.

SUMMARY OF THE ARGUMENT

In *Marsh* and *Town of Greece*, the Supreme Court recognized that certain forms of prayer in legislative sessions were compatible with the First Amendment of the United States Constitution. *See Marsh v. Chambers*, 463 U.S. 783, 795 (1983); *see also Town of Greece v. Galloway*, 134 S.Ct. 1811, 1828 (2014). These prayers were permitted because they were led by clergymen as opposed to lawmakers, had the purpose of solemnizing public sessions, and did not seek direct participation from attendees. In each of these respects, the Hendersonville Parks and Recreation Board overstepped the bounds of tolerable behavior by a government body. The members of the Board led the prayers themselves, advanced their own religion, and coerced constituents into participating. As a result, the Board's practice of offering prayer before its public sessions does not comport with the legislative prayer authorized by *Marsh* and *Town of Greece*. Its behavior tramples on the Establishment Clause and commits the very violations the First Amendment was designed to prevent.

The original complaint filed by the Respondent concerns a situation that is completely separate from those of *Marsh* and *Town of Greece*. In the present case, the Board members of Hendersonville broke from historical tradition by leading prayer themselves. They did not bring in a volunteer or hire a chaplain, but rather crossed the boundary separating church and state by proselytizing their faith directly to their constituents. Justice Kennedy noted that having legislators themselves lead prayer would be sufficient to change the analysis in *Town of Greece*. That is exactly what happened here, meaning that we cannot look to the history and tradition argument to decide this case. Quite simply, *Marsh* and *Town of Greece* did not address the issue of legislator-led prayer, which undermines the separation of church and state. This risks bringing about the precise danger envisioned by the Constitution: a destruction of the barrier between

government and religion, thereby opening the door to oppression. The prayers in *Marsh* and *Town of Greece* respected this separation, but the Hendersonville Board's did not. Consequently, the actions of the Board do not even remotely comport with the history and tradition of legislative prayer. They take it to a level that the Constitution simply does not allow.

The Board further distanced itself from the traditions upheld in *Marsh* and *Town of Greece* when it used its prayers coercively to promote religious observation amongst its citizens rather than to solemnize public business. Unlike in *Marsh* and *Town of Greece*, here, there is a close proximity between the Board's prayer and its policymaking proceedings, forcing citizens to choose between being exposed to unwanted prayer or being deprived of the right to participate in the democratic process. The Board then compounds this coercive condition by directing citizens to participate in its prayers, singling out citizens who fail to participate, and repeatedly suggesting it will rule favorably for citizens who participate in its prayers. Such behavior not only opens the door to religious oppression, but cordially embraces it. If our Constitutional principles are to remain intact, this behavior cannot be permitted.

ARGUMENT

The First Amendment of the United States Constitution erects a wall between church and state that must be kept "high and impregnable." *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947). Without this wall, the people are left vulnerable to religion oppression at the hands of the government. The First Amendment's purpose, in conjunction with the Fourteenth Amendment, was to prevent federal and state governments from "interfer[ing] with the individual's freedom to believe, to worship, and to express himself in accordance with the dictates of his own conscience." *Wallace v. Jaffree*, 472 U.S. 38, 49 (1985). In Hendersonville County, the Board

offends the First Amendment and violates this foundational principle every time it leads a prayer during its monthly board meetings. Ms. Pintok's freedom to believe and express herself in accordance with her religious identity is infringed. This practice is in violation of the Establishment Clause because it (I) does not comport with the history and tradition of legislative prayer, (II) does not solemnize public business when it coerces the public to participate, and (III) fails the *Agostini* test for Establishment Clause compliance.

I. THE BOARD'S PRACTICE DOES NOT COMPORT WITH THE HISTORY AND TRADITION OF LEGISLATIVE PRAYER.

The Board's practice of having members offer prayer before legislative sessions does not comport with the history and tradition of legislative prayer. While the Supreme Court recognized that prayer in legislative settings is permissible under certain conditions, the situation in the present case is not one of them.

A. Legislator-led Prayer is Distinct from the Legislative Prayer in *Marsh* and *Town of Greece*.

Marsh and *Town of Greece* are distinguishable from the present case because of the identity of the prayer givers. Legislative prayer led by chaplains or clergymen is permitted, while legislative prayer led by government officials is not. *Town of Greece*, 134 S.Ct. at 1826 (Kennedy, J., concurring); *Lund v. Rowan Cty.*, 863 F.3d 268, 272 (4th Cir. 2017). In *Marsh*, the Nebraska state legislature's practice of inviting a chaplain, paid with public funds, to lead a prayer at the beginning of its legislative sessions was not a violation of the Establishment Clause. *Marsh*, 463 U.S. at 795. In *Town of Greece*, a similar prayer practice led by volunteer clergymen from different religious backgrounds was also not a violation of the Establishment Clause. *Town of Greece*, 134 S.Ct. at 1828. In both cases, a non-government individual acted as the buffer

between church and state. This was one of the few factors that prevented the practice of legislative prayer from colliding with the Establishment Clause. In fact, Justice Kennedy himself, the author of the *Town of Greece* opinion, commented that "[t]he analysis would be different if town board members directed the public to participate in the prayers." *Town of Greece*, 134 S.Ct. at 1826 (Kennedy, J., concurring). Justice Kennedy laid out precisely the type of condition that would make a legislative prayer impermissible, and that exact condition is present here. In a case like this, there is a thin wall separating permissible and impermissible government religious activity. The presence of a chaplain or clergyman is the mortar that holds this wall together. Without their presence, the wall crumbles and the Establishment Clause is left in tatters. In Hendersonville, the lack of an intermediary between government and citizen completely changes the constitutionality of the prayer practice. Barbara Pintok does not see a third party standing between the government and religion. J.A. at 18. As a result, the risk of violating the Establishment Clause is much higher for the Hendersonville Board than it was for the legislative bodies in either *Marsh* or *Town of Greece*. A government official leading prayer and a non-governmental third party leading prayer are distinct for obvious reasons. The former carries with it the authority and force of government, while the latter does not. To look to *Marsh* and *Town of Greece* for guidance on this issue would therefore be unwise.

The situation before us is far closer to that of *Santa Fe* than it is to *Marsh* or *Town of Greece*. In *Santa Fe*, a public school violated the Establishment Clause when it permitted a student to give a religious invocation before a football game. *Santa Fe Independent School District v. Doe*, 530 U.S. 289, 301 (2000). The invocation was intended to "solemniz[e] the event" in accordance with a "long-sanctioned practice of prayer before football games": a justification that is eerily similar to the one espoused in *Marsh*, *Town of Greece*, and Pintok. But

this is where the similarities end. Despite this justification, the invocation practice in *Santa Fe* was constitutionally problematic because it directly involved school officials in the planning process. *Santa Fe*, 530 U.S. at 305. In Hendersonville, not only do the members of the Board plan the prayer, they lead it themselves. In other words, this is a more extreme version of the events from *Santa Fe*. If a student-led prayer that is supported by public school officials violates the Establishment Clause, then a government-official-led prayer supported by other government officials is far worse. At this point, the Board has ventured far beyond the boundaries of *Marsh* and *Town of Greece*. As a result, they cannot use "history and tradition" as a justification for violating the Establishment Clause.

In response to these arguments, the petitioner may argue that the rationale from *Bormuth v. Cty. of Jackson* controls here. *Bormuth* interpreted the Supreme Court's decision in *Marsh* to mean that legislative prayer is permissible regardless of the prayer-giver's identity. *Bormuth v. Cty. of Jackson*, 870 F.3d 494, 509 (6th Cir. 2017). The Sixth Circuit's interpretation, however, is misguided and should not factor into the analysis here. *Bormuth* claims that because the Supreme Court separately listed "paid legislative chaplains and opening prayers" as consistent with the Framers' understanding of the Establishment Clause, *all* opening prayers are thus permissible. The Sixth Circuit jumps to this conclusion by taking a small portion of the opinion and analyzing it out of context. If the Sixth Circuit were to read the next six words following its quoted passage, the full sentence would be: "Clearly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as *a violation* of that Amendment." *Marsh*, 463 U.S. at 788 (emphasis added). The words "as a violation," with "violation" being singular, demonstrate that the Supreme Court analyzed paid legislative chaplains and opening prayers jointly. If the Supreme Court truly meant to permit the two

components separately, it would have written "paid legislative chaplains and opening prayers *as violations* of that Amendment" or "paid legislative chaplains *or* opening prayers as a violation of that Amendment." The Supreme Court wrote neither. *Marsh*, 463 U.S. at 788. Thus, it is the combination of paid legislative chaplains and opening prayers that is permissible under the Establishment Clause. Any attempts by the petitioner to conjure up an alternate interpretation are founded on a misreading of the *Marsh* opinion. This Court should therefore disregard *Bormuth*.

The Sixth Circuit's analytical errors, however, do not end there. The court also disregarded the paragraph immediately preceding the one it quotes from *Marsh*. The Supreme Court's discussion in that part of *Marsh* evaluated legislative prayer "with the limiting function of [its] performance by a paid chaplain." *See Marsh*, 463 U.S. at 787-88; John Gavin, *Praying for Clarity: Lund, Bormuth, and the Split Over Legislator-Led Prayer*, 59 B.C. L. Rev. E-Supplement 104, 116 (2018) (concluding that *Bormuth* conducted a shallow and incomplete analysis of the *Town of Greece* opinion, whereas *Lund* properly concluded that legislator-led prayer was impermissible based on more in-depth analysis). This leaves no doubt that *Marsh* was a narrow authorization of legislative prayer only when accompanied by a paid chaplain, rather than a broad, unrestricted license to freely infuse government business with religious prayer.

But even if the Circuit court split between *Lund* and *Bormuth* is inconclusive, the simple fact remains that *Marsh* and *Town of Greece* were both instances of chaplain- or clergymen-led prayer. Evaluating those court opinions in the context of their facts strongly suggests that their holdings were narrower, rather than broader. The Supreme Court found legislative prayer in both cases to be permissible under the Establishment Clause in situations where government officials were not the ones leading prayer. Any attempt to expand the holdings of those cases to this case fall flat because the facts are distinct. Pintok is not *Marsh*, nor is it *Town of Greece*. It presents a

unique legal question that has yet to be answered definitively by this Court. In answering it for the first time here, this Court should at the very least refrain from relying on the flawed reasoning of *Bormuth*.

B. Legislator-led Prayer is the Equivalent of Government-led Prayer and Violates the Establishment Clause of the First Amendment.

Because the Hendersonville Board members lead their constituents in a prayer that is clearly Christian in nature, they commit the very religious entanglement the Constitution sought to prohibit, thereby breaking from the tradition of *Marsh* and *Town of Greece*. A county board member leading prayer is the functional equivalent of the state itself leading prayer, which is expressly prohibited by the Establishment Clause. *See Lund*, 863 F.3d at 281; *Engel v. Vitale*, 370 U.S. 421, 425 (1962). In *Lund*, a case with virtually identical facts to the respondent's, the court held that when county board members lead their constituents in prayer, it is akin to the government itself doing so. This is problematic because "it is no part of the business of government to compose official prayers for any group of the American people" as e doing so would "breach[] the constitutional wall of separation between Church and State." *Engel*, 370 U.S. at 425. The *Engel* Court grounded its concerns in history, citing government composition of prayer as one of the key oppressive practices that drove colonists to flee England. *Id.* This same concern permeates the situation in Hendersonville, because there is no check on the government's involvement with religion. This breaks from the tradition in *Marsh* and *Town of Greece* where a third party acted as a buffer between the state and the church. Audience members could see that it was not the government itself professing religious ideas. When Board members give prayers directly to constituents, they are trampling on this separation and in turn offending a core tenet of the First Amendment. Unlike *Marsh* and *Town of Greece*, citizens who

attend the Hendersonville board meetings hear government officials in their government capacities leading prayers in a government setting. J.A. at 8, 18. The Hendersonville board's practice thus does not comport with history and tradition. If the Board's legislator-led prayers are allowed to continue, the constitutional protections meant to separate Church and State will be destroyed, opening the door to potential oppression. *See McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 880 (2005) (holding that a display of the Ten Commandments in a public courthouse violated the Establishment Clause because it threatened to infringe on free religious expression and liberties); *Engel*, 370 U.S. at 443 (Douglas, J., concurring) (warning that if government does not remain neutral on matters of religion, it will be a divisive and harmful force within society). Indeed, the danger of oppression has already been realized, as Ms. Pintok stated she was "humiliated" and felt "like an outsider" as a result of the prayers. J.A. at 19. If the Establishment Clause cannot be used to protect constituents like Ms. Pintok from such oppression, then it has failed its purpose. For this reason, the Board must be enjoined from giving prayers before its county board meetings.

The current case is not in line with the history and tradition of *Marsh* and *Town of Greece*. Justice Kennedy, when writing the *Town of Greece* opinion, explicitly stated that the outcome of that case would have been different if it were legislators, not third parties, leading prayer. In this case, that is exactly what happened. To claim that the Board's practice falls under the history and tradition of *Town of Greece* would be to ignore the very language of *Town of Greece*. Pintok is not *Marsh*, nor is it *Town of Greece*. It is instead a different species of legislative prayer: one that tears down the wall separating church and state. This Court has itself warned that excessive government entanglement with religion aggravates "political fragmentation and divisiveness." *Lemon v. Kurtzman*, 403 U.S. 602, 623 (1971). The Board's

practice is therefore dangerous if it is allowed to continue. Due to these risks, the prayers do not comport with any recognized tradition of legislative prayer and violate the Establishment Clause.

II. THE BOARD'S PRACTICE DOES NOT SOLEMNIZE BUSINESS WHEN IT COERCES THE PUBLIC TO PARTICIPATE IN PRAYER

Even if this Court finds *Marsh* and *Galloway*'s historical practice test controlling, this does not mean the Board prevails under that test. Evidence that legislative prayer is an established practice is but the first hurdle that such prayer must cross to be permissible under the Establishment Clause. To survive under the Establishment Clause, legislative prayer must also serve a legitimate function, such as solemnizing public business. *Town of Greece*, 134 S. Ct. at 1823 (2014).

The Board argues that its prayer serves this very purpose; however, this is not so. To solemnize business, legislative prayer must be respectful in tone and must invite lawmakers to reflect upon shared ideals. *Id.* Furthermore, it must not be coercive, as coercion suggests that the prayer serves not to solemnize the proceeding, but rather, exists to "promote religious observance among the public." *See id.* at 1823, 1826. Although we concede that the Board's prayer was respectful in tone and reflected upon shared values such as supporting the military and ending gun violence, it was clearly coercive, and thus, does not solemnize business. Coercion is "a fact-sensitive" inquiry that "considers both the setting in which the prayer arises and the audience to whom it is directed." *Id.* at 1825. Here, the setting was "coercive" when (A) Hendersonville residents were obligated to sit through a prayer in order to participate in important policymaking processes, and (B) the prayer was directed at the public, rather than the board.

A. The Setting was Coercive When Members of the Public Could Not Leave the Prayer Without Missing Important Policymaking Opportunities

The setting for the board meeting was highly coercive. A setting is coercive when members of the public are obligated to stay for a prayer to gain the benefits associated with that setting. *See Lee v. Weisman*, 505 U.S. 577, 588 (1992). In *Lee v. Weisman*, a graduation ceremony constituted a coercive setting when students had to choose between attending the ceremony and listening to unwanted prayer or avoiding the ceremony entirely. *Id.* at 595. Although students could elect not to attend the ceremony, this would "require forfeiture of [the] intangible benefits" of graduating, such as having the opportunity to celebrate with family and friends. *Id.* In contrast, in *Town of Greece*, a town board meeting was not a coercive setting when residents could leave the meeting for the prayer component but re-enter later to participate in the board's policymaking process, and when absence from prayer did not deprive residents of any noted benefit of participation. *See Town of Greece,* 134 S. Ct. at 1827.

The situation before us is far closer to *Lee* than to *Town of Greece*. There are no indications that residents are free to leave for the prayer portion of the board meetings and reenter later. Indeed, that the Board directs everyone in attendance to "stand … and listen to a short prayer," J.A. at 8, 18, indicates that attendance at the prayer is obligatory. Petitioner might respond by arguing that here, unlike in *Lee*, the affected persons are adult residents rather than adolescent students, and thus are less susceptible to pressures to stay. However, this argument fails to account for the unique nature of municipal board meetings. As *Lund* highlights:

> [T]he intimate setting of a municipal board meeting presents a heightened potential for coercion. Local governments possess the power to directly influence both individual and community interests…The decision to attend local government meetings may not be wholly voluntary in the same way as the choice to participate in other civic or community functions. Lund, 863 F.3d at 287, *cert. denied sub nom. Rowan Cty. v. Lund*, 138 S. Ct. 2564 (2018).

This is to say that the power differentials implicated in local government meetings render residents particularly susceptible to pressure. Furthermore, even if residents felt empowered to leave the prayer, they would almost certainly be stripped of a tangible benefit of the setting. Particularly, policymaking decisions of the Hendersonville Board of Parks and Recreations occur directly after the prayer. J.A. at 8, 18. Accordingly, if a member leaves for the prayer, he or she may reenter "early" and still be exposed to unwanted prayer, or reenter "late" and miss the opportunity to petition for valuable rights and benefits, to advocate on behalf of particular causes, and to participate in the democratic process. This stands in stark contrast to *Town of Greece*, where the prayer initiated the ceremonial (non-policymaking) portion of the meeting that included swearing-in new police officers, inducting high school athletes, and recognizing volunteers. *Town of Greece*, 134 S.Ct. at 1827. Given this significant delay between the prayer and policymaking, residents leaving for the prayer, unlike Hendersonville residents, stood little risk of missing the opportunity to participate in the board's policymaking decisions.

Further distinguishing *Town of Greece* is the fact that the board there bifurcated its meetings into legislative and adjudicative portions, and the prayer "preceded only the portion of the town meeting that [was] essentially legislative." *Id.* at 1829 (Alito, J., concurring). As Justice Alito explained in his concurrence, *Town of Greece* did not "involve the constitutionality of a prayer prior to what may be characterized as an adjudicatory proceeding." *Id.* Our case, however, is different. Here, decisions on permit applications are adjudicatory, rather than legislative, proceedings, *id.*, and the Board's prayer occurred prior to one of these adjudicatory proceedings, J.A. at 8. Therefore, *Town of Greece* in no way addresses the constitutionality of the practice considered before this court. To address this question, then, we must turn to *Lund*.

Lund almost exactly mimics the setting found before us. In *Lund*, town hall meetings began with a prayer, immediately followed by the Pledge of Allegiance, before the legislative and adjudicatory proceedings began. *Lund,* 863 F.3d at 272. This "close proximity" between the board's prayer and its "consideration of specific individual petitions" contributed to a coercive setting in violation of the Establishment Clause. *Id.* at 288. Here, the proximity between the board's prayer and its consideration of individual permits is even closer than the proximity found in *Lund*, and thus, is a clear violation of the Establishment Clause.

B. The Board's Prayers Were Directed at Members of the Public

Prayer directed at legislators themselves solemnizes a business occasion by "setting [legislators'] minds to a higher purpose," thereby "eas[ing] the task of governing." *Town of Greece*, 134 S.Ct. at 1825. However, prayer directed to the public is coercive in that it suggests "an effort to promote religious observance among the public." *Id*. Prayer is directed to the public when town board members (1) "direct[] the public to participate in the prayers," (2) "single[] out dissidents for opprobrium," or (3) "indicate[] that their decisions might be influenced by a person's acquiescence in a prayer opportunity." *Id*. at 1826. All of these factors are found here. Thus, the board's prayer is clearly directed to the public and is unconstitutionally coercive.

(1) The Board Directed the Public to Participate in Its Prayers

The Board irrefutably directed the public to participate in prayers. A board directs the public to participate in prayers when it solicits the involvement of the public, rather than only the legislators themselves. *See Town of Greece,* 134 S. Ct. at 1826 (plurality opinion). This may include requests that the public rise for prayer, bow their heads, make the sign of the cross or engage in "similar gestures." *Id.* In *Town of Greece*, a local board did not direct the public to participate in prayers when, although legislators themselves stood and bowed their heads for

prayer, they "at no point solicited similar gestures by the public." *Id.* Comparatively, in *Lund*, a county board directed the public to participate in prayers when they "told attendees to rise" and invited them to pray with statements such as, "Please pray with me," "Let us pray," and "Let's pray together." *Lund,* 863 F.3d at 286; *see also Hudson v. Pittsylvania Cty.,* 107 F. Supp. 3d 524, 525 (W.D. Va. 2015) (county board directed the public to participate in board-led prayers when it asked them to stand for prayer). An identical case lies before us. Here, the Board undeniably directed members of the public to participate in its prayers when Board members consistently requested that the public rise and listen to a short prayer, J.A. at 8, 18, and when these prayers included clear directives such as "Please bow your heads," or take "a moment of quiet reflection to allow all present [at the Board meeting] to reflect on pressing moments of their day," J.A. at 9, 19.

Petitioner may point to *Town of Greece* and assert that similar directives did not amount to direction of the public. However, as the plurality makes clear, that was because the request "came not from town leaders but from guest ministers, who presumably are accustomed to directing their congregations in this way." *Town of Greece*, 134 S.Ct. at 1826 (plurality opinion). Indeed, "the analysis would be different if town board members directed the public to participate." *Id.* Here, the directives came not from a guest minister, but from the board members themselves. This is precisely the "different" circumstance that *Town of Greece* describes and identifies as impermissible in the eyes of the Establishment Clause. Accordingly, this Court must find that the Board members impermissibly directed the public to participate in their prayer, lest it blind itself to the very circumstances that *Town of Greece* highlighted as problematic.

(2) The Board's Prayers Singled Out Dissidents for Opprobrium

A board singles out dissidents for opprobrium when it signals that nonparticipants are "disfavor[ed]" or have a "diminished" value in the community. *Town of Greece*, 134 S.Ct. at 1826 (plurality opinion). A board sends these signals when it "proclaim[s] the spiritual and moral supremacy of Christianity," "character[izes] the political community as a Christian one," or advocates Christianity "as the sole path to salvation." *Lund*, 863 F.3d at 286. Here, the Board has done exactly that.

First, it proclaimed the spiritual and moral supremacy of Christianity. By stating that it "need[ed] [the Almighty God's] spirit watching over" it and that it "must … conduct [its] business with the careful hand of the Father," J.A. at 9, 19, the Board implicitly established the necessity and supremacy of Christianity. Similarly, its request for the "Heavenly Father's" guidance in serving people "no matter what religion," J.A. at 9, 19, implied a "wrongness" with these religions and reduced them to a secondary status. Second, the Board clearly characterized the political community as a Christian one, describing Hendersonville residents as "all God's people," J.A. at 9, 19, and telling Ms. Pintok that "this is a Christian country," J.A. at 1. Third, it advocated Christianity as the sole path to salvation. The Board's prayer that, "We are all sinful but as the book of Isaiah reads, though our sins are like scarlet, they shall be as white as snow," J.A. at 9, 19, clearly indicates that there is but one route to redemption—adherence to the Christian Bible. Accordingly, the Board clearly singled out dissidents for opprobrium.

(3) The Board Indicated Its Decisions Would Be Based On A Person's Acquiescence To Its Prayers

Furthermore, the Board strongly indicated that its decision would be influenced by a person's participation in its prayers. In *Town of Greece*, a board did not indicate that its decision

might be influenced by the public's acquiescence to legislative prayer when there was no indication that the board "allocated benefits and burdens based on participation in the prayer." *Town of Greece*, 134 S.Ct. at 1826 (plurality opinion). These are far from the facts before us. Here, the Board repeatedly indicated that a person's participation in its prayers might influence its decision. On numerous occasions the Board asked the Christian God to "guide" their decisions regarding all "petitions, grievances, and arguments" brought before it, asked the Christian Lord to assist in "mak[ing] good decisions," and stated that it must "strive to conduct [its] business in a way consistent with the careful hand of the Father and His son Jesus Christ," J.A. at 9, 19. These statements strongly imply that (1) the Board's decisions on public matters are guided by Christian principles, and accordingly, that (2) persons who exhibit behavior in line with these principles (i.e. by publicly praying) are more likely to receive a favorable decision by the Board than those who exhibit behavior not in line with this principles (i.e. by refraining from public prayer). That is, a person who engages in prayer is "consistent" with the values of Christianity, and is more likely to receive a favorable vote from the Board as it conducts its business, while a person who fails to publicly engage in prayer is "inconsistent" with the values of Christianity, and therefore less likely to receive a favorable vote from the Board.

For the above reasons, the board's practice is coercive and exists to promote religious observance among the public, rather than to solemnize a business occasion. Such behavior is clearly impermissible in the eyes of the Establishment Clause.

III. THE BOARD'S PRAYER PRACTICE FAILS THE AGOSTINI TEST

As established above, *Marsh* and *Town of Greece* are inapplicable. Thus, this Court must analyze this case under the Supreme Court's modern Establishment Clause test—the *Agostini*

test. To be permissible under *Agostini*, a governmental practice neither have the (A) "purpose," or (B) "effect" of advancing religion. *Agostini v. Felton,* 521 U.S. 203, 222–223 (1997). The Board's prayer fails both of these requirements.

A. The Board's Prayers Have the Clear Purpose of Advancing Christianity

The Board contends that its prayer serves the purpose of solemnizing business and lending gravity to its proceedings. As established above, the Board's practice does not solemnize business. Rather, it is a coercive practice and, accordingly, exists only "promote religious observance among the public." Thus, the Board's practice fails to satisfy the first *Agostini* prong and is unconstitutional.

B. The Board's Prayers Have the Undeniable Effect of Advancing Christianity

Even if this Court finds that the Board's practice serves the purpose of solemnizing business, the Board's prayer would still not pass muster under *Agostini*. Under *Agostini's* second prong, a governmental practice must not have the "effect" of advancing religion. *Id.* A governmental practice has the effect of advancing religion when it (1) constitutes government indoctrination, (2) defines beneficiaries by reference to religion, and (3) creates an excessive entanglement with religion. *Agostini,* 521 U.S. at 234. Here, the Board's prayer practices meet all three requirements, and resultantly, is unconstitutional.

First, the Board's prayer practice constitutes government indoctrination. Government indoctrination occurs when the "*government itself* has advanced religion through its own activities an influence." *Mitchell v. Helms*, 530 U.S. 793, 809 (2000). As demonstrated above, the Board itself delivers the Christian prayers, calls upon God to guide the public meetings, and

directs citizens to participate in the prayers. It is absurd to argue that these actions constitute anything but the government itself advancing religion through its activities and influence.

Second, the Board's prayers define beneficiaries by reference to their religion. As demonstrated above, the Board repeatedly indicated that a citizen would receive a favorable decision if he or she participated in the Board's Christian prayers. Accordingly, the Board clearly defined a class of beneficiaries on the basis of their religion.

Last, the Board's prayer creates an excessive entanglement with religion. While this Court has remained silent on what constitutes "excessive entanglement with religion," that all of the prayers are led by Board members, invoke a Christian God, and clearly call upon that God for guidance in leading government-business would seemingly satisfy this third and final factor. For these reasons, the Board's prayer has the clear effect of advancing religion, and is unconstitutional.

CONCLUSION

Ms. Pintok no longer feels comfortable participating in Hendersonville Parks and Recreation Board meetings because its legislator-led prayer practice offends her religious beliefs. Because the Board's prayer practice breaks from history and tradition of legislative prayer, fails to solemnize public business, and coerces the citizens of Hendersonville County, Ms. Pintok asks this Court to affirm the decision of the Thirteenth Circuit and protect the religious freedoms guaranteed her by the First Amendment.