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 2527
Counsel for Petitioner

Questions Presented

1. Whether the Hendersonville Parks and Recreation 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 Hendersonville Parks and Recreation Board's prayer practice (if not protected under *Marsh* and *Town of Greece*) violates the Establishment Clause as protected by the *Lemon* and the *Lee v. Weisman* coercion tests.

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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 (hereinafter "the Board"), a five-member subsidiary of the local government, meets each month to discuss business and to oversee "cultural arts, greenways, golf courses, historic sites, permit rentals and reservations, []outdoor recreation," and more. J.A. at 8. They also review and grant permits that fall under their jurisdiction. *Id*. In an effort to "solemnize [this] public business and to emphasize the gravity of [their] mission," these public servants begin each meeting with a moment of prayer. *Id.* at 5. Each member, however, belongs to a different Christian sect. *Id*. at 8. These differences do not deter them from continuing in the tradition and they rotate the responsibility of opening their meetings. *Id*.

To open the meetings, a Board member invites everyone in attendance to "stand, recite the Pledge of Allegiance, and listen to a short prayer." J.A. at 8. The prayers are the product of the individuals, with each speaking as they see fit. *See id*. at 8-9. These recitations do sometimes "directly reference the Deity," but do not proselytize. *See id*. at 9. If a Wiccan, Muslim, Buddhist, or adherent of any other religion – or of no religion at all – were elected to the Board, nothing would prevent them from opening meetings with a prayer or a solemn statement that accords with their beliefs and the purpose of the meetings. They might even choose to forego the prayer opportunity altogether.

Respondent Barbara Pintok (hereinafter "Ms. Pintok") is a member of the local

community and has been a frequent attendee of many of the Board's meetings. J.A. at 1. She is also a follower of Wicca, a pagan religion, and has been since childhood. *Id*. After one of these meetings, which she attended to discuss a permit for a new paddleboard company she was forming, she expressed some discomfort at the Christian tone of the prayers. *Id*. She said the prayers made her feel like an outsider. *Id*. When she felt her discomfort was not adequately acknowledged by the Board, who did not act to change their tradition after her complaint, she brought the current action in the District Court of Caldon. *See id*. at 7.

Each Board member has expressed distress that their actions would ever make someone feel coerced or unwelcome. *See J*.A. at 2-6. That, they all insist, has never been their intention, and they reaffirmed that religion has never affected their judgment in their public capacities as members of the Board. *Id*. In fact, the majority of the Board expressed their distaste of religious coercion and denounced it. *Id*.

Both parties filed cross-motions for summary judgment with the District Court of Caldon. J.A. at 7. The judge, on reviewing the motions, held that the *Marsh v. Chambers* and *Town of Greece v. Galloway* protection of prayer in government meetings was clearly applicable to the current situation and granted summary judgment in favor of the Board. *Id*. at 15.

Ms. Pintok then appealed her case to the United States Court of Appeals for the Thirteenth Circuit. J.A. at 16. That court reversed and remanded the lower court's order, instead holding that *Marsh* and *Town of Greece* were not applicable and that the Board's prayer was an endorsement of religion that violated both the *Lemon* test and the ***Lee v. Weisman*** coercion test of Establishment Clause jurisprudence. *Id*. at 23-24.

Summary of the Argument

The question before the Court today is whether or not these short, member-led, opening

prayers are protected by *Marsh* and *Town of Greece*, or whether they are in violation of the Establishment Clause of the First Amendment.

This nation's jurisprudence is built around the Constitution, the document that has guided our nation nearly since its inception. The vital nature of the rights enumerated therein are inarguably protected by our law, and the Establishment Clause is no exception. Defining the tests that govern the relationship between church and state are therefore critical, and this Court has long worked to create tests that would constitutionally do so. These tests include the standard created by *Marsh* and *Town of Greece* in regard to legislative prayer, the *Lemon* test to prevent government entanglement in religion, and the *Lee v. Weisman* coercion test that prevents religion from becoming a tool for discrimination.

Each is applicable in different situations, but the appellate court inappropriately applied the *Lemon* test and *Lee v. Weisman* coercion test to the Board's prayers. Instead, the *Marsh* and *Town of Greece* standard protecting legislative prayer is clearly applicable. Even if that standard is too broad, the Court could create a new test that not only recognizes the importance of legislative prayer, but protects against coercion. The Board's prayers would clearly not be unconstitutional under such a test. However, even if these standards are not applied, the Board's actions do not violate either the *Lemon* or *Lee v. Weisman* coercion tests.

Argument

The First Amendment of the Constitution states that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend 1. This, coupled with the prohibition on any law restricting the free exercise of religion, is the constitutional basis for religious freedom and a basic requirement of any pluralistic society. *See Cohen v. California*, 403 U.S. 15, 24 (1971) (discussing the importance of First Amendment protections in a society "as diverse

and populous as ours").

The Establishment Clause developed from the fundamental idea that churches and states should remain distinct and separate. *Reynolds v. United States*, 98 U.S. 145, 164 (1878). This idea was closely tied to the personal experience of colonial Americans, many of which had fled Europe seeking freedom from government-initiated religious oppression and their inability to practice their beliefs as they saw fit. *Religion and the Founding of the American Republic*, America as a Religious Refuge: The Seventeenth Century, Part 1. https://www.loc.gov/exhibits/religion/rel01.html (last visited Nov. 18). The Establishment Clause was a reaction to this, making explicit the need to protect the practice of religion from government intrusion. Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. Rev 346 (2002).

However, it was never meant to be a hindrance to religion, as "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clausen*, 343 U.S. 306, 312 (1957). Though this Court did hold that the "First Amendment … erected a wall between church and state[, which] must be kept high and impregnable," it was to ensure the continued vitality of both churches and the state. *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947). Indeed, "the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *McCollum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948).

This Court later recognized, however, that the separation was less of a wall and more of a "blurred, indistinct, and variable barrier." *See Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). In fact, religion and the freedom of belief remains an integral "part of the fabric of our society." *Marsh v. Chambers*, 463 U.S. 783 (1983). Therefore, this Court has long worked to protect it by

defining the outer boundaries of the Establishment Clause's promised protections, creating multiple tests to deal with the many and varied areas where government and religion overlap. These protections, initially only applicable to the federal government, have also been applied to the states, providing necessary protection from state interference in religious affairs. *Id.* at 211 (citing *Everson*, 330 U.S. at 14–15). This required protection of religion has thus served as one of our country's guiding principles and is a fundamental pillar in this Court's Establishment Clause jurisprudence.

One such test was developed in *Lemon v. Kurtzman*, where the Court created a clear test for determining if a law resulted in unlawful entanglement. 403 U.S. at 612-13. Originally, this test had three prongs: The Court looked for (1) a primary secular purpose, (2) the primary effect, and (3) if there was excessive entanglement. *Id*. Though its structure has changed over time, it continues to be a viable test for applying the Establishment Clause. *See Utah Highway Patrol Ass'n v. Am. Atheists, Inc*., 565 U.S. 994 (2011); *Agostini v. Felton*, 521 U.S. 203 (1997); *Witters v. Wash. Dep't of Servs. for Blind*, 474 U.S. 481 (1986); *Lynch v. Donnelly*, 465 U.S. 668 (1984).

Another test created to uphold the Constitution was the coercion test, a test first clearly set forth in *Lee v. Weisman* by Justice Kennedy. *See* 505 U.S. 577 (1992). In *Weisman*, a rabbi's prayer at a school graduation violated the Establishment Clause because attendant students had little choice but to stand and listen. *Id.* at 587. Given the age of the students, the relative lack of choice, and the appearance of acquiescence, the Court declared that such prayer was "coercive" and accordingly unconstitutional. *See id.* at 588.

If, however, the matter is one of public prayer in legislative or governmental settings, the Court's *Marsh* and *Town of Greece* decisions provide guidance. *See* 463 U.S. at 783; 134 S.Ct. 1811 (2014). In those cases, the Court recognized (for several reasons) the importance of

opening "sessions of legislative and other deliberative public bodies with prayer," and chose to protect it. *Marsh*, 463 U.S. at 786.

These tests and others have been used for one purpose – to protect the constitutionally mandated separation of church from state. They were not, just as the district court stated, meant to create a "religion-free zone in society." J.A. at 11. Rather, each test makes clear that the importance of religion and the protection of personal beliefs within the bounds of society cannot and should not be understated. First, *Marsh* carved out an exception specifically for legislative prayer to these formal Establishment Clause tests. *Town of Greece* then expanded this to town councils and other government bodies outside of legislatures alone. It also clarified that *Marsh*'s legislative prayer exception proscribed judicial scrutiny of sectarian prayer content. 463 U.S. at 806. To say that the instant case does not fit within this rule would be to carve an exception within the exception, effectively hobbling the Court's earlier decisions.

Even if the Court finds that these standards are not sufficient, Petitioners ask this Court to adopt a more narrowly tailored two-prong test. The first prong would require *prima facie* evidence that the instant governmental prayer is constitutional in its keeping with history and tradition. Under the second prong, however, a challenger could refute this upon a showing of coercion, including proselytization, denigration, or threats towards nonparticipants.

Whatever the applicable test, however, the facts of the instant case do not support a finding that the Board's actions were in violation of the First Amendment. The appellate court's decision should therefore be reversed.

I. THE APPELLATE COURT'S OPINION SHOULD BE REVERSED, AS THE BOARD'S PRAYER PRACTICE IS CONSISTENT WITH THAT PROTECTED IN *MARSH v. CHAMBERS* AND *TOWN OF GREECE V. GALLOWAY*.

In both *Marsh* and *Town of Greece*, the matter of opening the meetings of a government

body with prayer was at issue. *See* 463 U.S. at 783, 134 S.Ct. at 1811. In *Marsh*, the Nebraska legislature paid a chaplain to open each of its sessions with prayer. 463 U.S. at 783. *Town of Greece*, on the other hand, involved the monthly board meetings of the town of Greece, which were opened by "clergy selected from the congregations listed in a local directory." 134 S.Ct. at 1811. Both instances of prayer were upheld as constitutional. Given the instant facts, it is well-supported that these standards are applicable and that the Board's use of prayer in their monthly meetings is equally constitutional.

A. Because of their similar nature, history, and purpose, the Board's opening prayers are as equally entitled to protection as the prayers in both *Marsh v. Chambers* and *Town of Greece v. Galloway*.

The Board's practice of member-led prayer before its meetings fits clearly within the guidelines set out in *Marsh* and *Town of Greece*. These prayers were similar in nature to those prayers, built upon the same long line of tradition, and served similar – if not the same – legitimate purposes.

Respondent argues, and the court of appeals agreed, that this case is incompatible with *Marsh* and *Town of Greece* for two reasons. First, the Board's practice involves prayers led by the members themselves rather than state-paid chaplains. *See* J.A. at 21. Second, the Board's prayers had the "a primary effect of advancing the Christian religion." *Id.* at 22. Respondent and the court of appeals have misapprehended the holdings and analysis of this Court. Petitioners therefore argue that this Court should apply the same methods of interpretation used in *Marsh* and *Town of Greece* and reverse the appellate-level decision.

In *Marsh*, this Court held that legislative prayers given by state-paid chaplains did not violate the Establishment Clause of the First Amendment. *Marsh*, 463 U.S. at 794. The Court gave great weight to the historical traditions of the nation. *Id.* at 786. According to the Court, the

practice did not violate the Establishment Clause because "the opening of sessions of legislative prayer and other deliberations is deeply embedded in the *history and tradition* of this country." *Id.* (emphasis added). Since the founding of this republic, "the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom." *Id.* Because Nebraska's practice of using state-paid clergy was in line with the "history and tradition" of this nation, this Court found the practice constitutional. This Court also noted that such a "deeply embedded" tradition that had "continued without interruption for almost 200 years," "shed[] light not only on what the drafters of the First Amendment intended the Establishment Clause to mean but also on how they thought that Clause applied..." in their time. *Id*. at 783. Therefore, this Court reasoned, the First Amendment could not be supposed to impose an even greater burden on the states than it does on the federal government. *Id.*

In *Town of Greece*, this Court again faced a challenge to prayers before governmental meetings. However, this time, it was not at the legislative level, but rather a town's board meetings. *Town of Greece*, 134 S. Ct. at 1813. Respondents in *Town of Greece* tried to distinguish Greece's prayer practice from prayers at issue in *Marsh* in that it "coerces participation by nonadherents" and legislative prayer differs significantly from prayers conducted "in the intimate setting of a town board meeting." *Id.* at 1824. According to the respondents, the more intimate setting of a board meeting pressures participants to participate and conform against their will. *Id.* at 1825.

Once again, this Court disagreed. First, this Court held that *Marsh* does not require prayers to be nonsectarian in order for them to coexist with the Establishment Clause. "*Marsh* nowhere suggested that the constitutionality of legislative prayer turns on the neutrality of its content." *Id.* at 1821. Rather, the Court thought such an approach would require legislatures and

courts to "act as supervisors and censors of religious speech." *Id.* at 1822. In this Court's view, such an approach would have even greater First Amendment complications. *Id*. Second, like in *Marsh*, this Court also relied on history and tradition to support the notion that secular prayers can coexist with the Establishment Clause. Speaking for the majority, Justice Kennedy wrote, "*Marsh* stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause *where history shows that the specific practice is permitted*." *Id.* at 1819 (emphasis added). Religious, sectarian, legislative prayers were consistent with history, because they fit "within the tradition long followed in Congress and the state legislatures." *Id*.

The secular purpose that the prayers served was even held forth as a factor in favor of its protection. *Id*. at 1823. Such prayer was considered a way to "lend gravity" and to "reflect [on] values long part of the Nation's heritage" to the proceedings. *Id*. Such "respectful in tone" and "solemn" prayer could even serve the "legitimate function" of "invit[ing] lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing." *Id*. Even the possible threat posed by such prayer to the separation of church and state created by the Establishment Clause was considered negligible, not a "real threat" to Establishment Clause jurisprudence. *Marsh*, 463 U.S. at 783.

It is clear, then, that the facts of the instant case fall clearly within the exception created by these two cases. Denial of this would gut the existing exemption, inanely imposing an exception to the exception *Marsh* carved out of Establishment Clause jurisprudence for legislative prayer. This Court should therefore affirm the district court's holding.

B. Even if *Marsh* and *Town of Greece* are insufficient, however, the Court should simply tailor these tests instead of overturning them completely.

It is true that *Marsh* and *Town of Greece* do not permit unbridled forms of all governmental prayer. This Court acknowledge possible instances where the content of the prayer

could render it unconstitutional. In *Marsh,* this Court admitted that the content of prayer may concern judges when it "has been exploited to proselytize or advance any one or to disparage any other, faith or belief." 463 U.S. at 794-95. In *Town of Greece,* this Court stated in dicta that the case would be different if "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 to unite lawmakers in their common effort." 134 S. Ct. at 1823. However, in neither case did the practices of Nebraska or Greece rise to this level of proselytization or denigration.

Petitioners accordingly ask this Court to once again approve a practice "where history and tradition show that th[at] specific practice is [indeed] permitted." *Id.* 1819. According to the holdings of both *Marsh* and *Town of Greece*, if the Board's practice is consistent with the history and traditions of this nation, it does not run afoul of the Establishment Clause. However, under a broad interpretation of *Marsh* and *Town of Greece*, prayers that comport with history and tradition may still be unconstitutional if the prayers proselytize, denigrate, or threaten.

In keeping with this, Petitioners ask this Court to adopt a two-prong test. First, petitioners can establish *prima facie* evidence that governmental prayer is constitutional if it comports with this nation's history and tradition. However, for the second prong, a respondent can refute this evidence upon the showing of a pattern of proselytization, denigration, or threats. *See id.* at 1814.

First, member-led prayer comports with the history and traditions of the United States. Before the founding of this republic, legislative members offered prayers before legislative meetings. *See, e.g.*, American Archives, Documents of the American Revolutionary Period, 1774–76, v1:1112 (documenting legislator-led prayer in South Carolina's legislature in 1775). The South Carolina legislature is not the only state to engage in member-led prayer. The Court of

Appeals for the Sixth Circuit found, "[l]egislator-led prayer has persisted in various state capitols *since at least 1849*." *Bormuth v. Cty. of Jackson*, 870 F.3d 494, 509 (6th Cir. 2017); *see also* Brief for the State of Michigan and Twenty-One Other States as Amici Curiae, p. 5-6, *Bormuth v. Cty. of Jackson*, 870 F.3d 494, 509 (6th Cir. 2017); Brief for Local and State Legislators and the Commonwealth of Kentucky as Amici Curiae, p. 5-9, *Bormuth v. Cty. of Jackson*, 870 F.3d 494, 509 (6th Cir. 2017); Brief for Members of Congress as of Amici Curiae, p. 4, *Bormuth v. Cty. of Jackson*, 870 F.3d 494, 509 (6th Cir. 2017).

Furthermore, the Michigan House of Representatives and Senate have a tradition of member-led prayer dating back to 1879. *See id.* at 510; *see also* H.R. Journal, at 10, 82, 591, 956 (Mich. 1879) (prayers by representatives); S. Journal, Extra Sess., at 180 (Mich. 1898) (prayer by senator). "Historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress." *Marsh*, 463 U.S. at 790. So too here. It is difficult to understand how the very states which saw fit to approve the language of the First Amendment and its Establishment Clause would continue to engage in the very behavior they voted to abolish. Such an interpretation would be absurd. The logical conclusion is the inverse. The framers and early legislators saw "no real threat to the Establishment Clause arising from a practice of" legislative-led prayer. *Id*. at 791.

Legislative prayer is not only historically based, it is an American tradition. A tradition is a "custom or belief that has been passed on from one generation to another." *Tradition*, Oxford English Dictionary (2010). Member-led prayer in government meetings is not an atypical practice that was followed by a few states for only a few years. It is a practice that started with the nation's founding and has continued unbroken until today. More than half of the states

continue to conduct legislative prayer without the exclusive use of a chaplain. In *Marsh*, this Court relied on and cited to the brief for Nat'l Conference of State Legislatures (NCSL), submitted as *Amicus Curiae*. 463 U.S. at 794. The NCSL surveyed the practices of state legislatures across the nation and conclusively repudiated the notion that "chaplain-only prayers are the norm." *Bormuth*, 870 F.3d at 510. Rather, across the nation legislative prayers are offered by "chaplains, guest clergymen, *legislators,* and legislative staff members." Brief for Nat'l Conference of State Legislatures as Amicus Curiae, *Marsh v. Chambers*, p. 2-3, 463 U.S. 783 (1983). Even legislative bodies that have chaplains will "*honor requests from individual legislators []to give the opening prayer." Id*.

A 2002 NCSL study found that forty-seven legislative bodies allowed individuals other than a designated chaplain to offer the opening prayer. *See Bormuth*, 870 F.3d at 511. Member-led prayer specifically occurs in 31 states. *Id.* Interestingly enough, Nebraska is among the states where both chaplains and legislative members give prayer. "The unbroken practice . . . for more than a century in Nebraska . . . gives abundant assurance that there is no real threat." *Marsh*, 463 U.S. at 795. At the time of *Marsh*, Nebraska had legislative-led prayer. *Id*. And while the Court's analysis focused specifically on chaplain-led prayer, the Court still saw fit to declare that Nebraska's practices were in line with history. *Id*.

The continued practice up until today demonstrates that member-led prayer in government groups is embedded in the history and traditions of the United States. So too is the Board's practice in line with history. Its practice of having board members give a prayer before meetings "coexist[s] with the principles of disestablishment and religious freedom." *Id.* at 786. The Board's conduct of having its members give prayers, rather than chaplains, is no different than what legislatures across this nation have done for more than 150 years. Also, the fact that

this is a town board rather than the state legislature is not relevant to the constitutional analysis. *See Town of Greece*, 134 S. Ct. at 1816. The standard set forth in *Marsh* and *Town of Greece* should therefore apply, whether construed as before or in a more narrowly tailored fashion.

II. EVEN IF MEMBER-LED PRAYER IS NOT PROTECTED UNDER *MARSH* AND *TOWN OF GREECE*, THE BOARD'S ACTIONS DO NOT VIOLATE EITHER THE *LEMON* OR THE *LEE V. WEISMAN* COERCION TESTS.

Nothing in either *Marsh* or *Town of Greece* suggests any constitutionally significant difference between member-led and chaplain-led prayer in government meetings. Nevertheless, even if this Court does not read this fact as extending precisely the same protection to member-led prayer, the Board's prayer practice remains constitutional under both the *Lemon* test and the *Lee v. Weisman* coercion test.

Under the *Lemon* test, the Board's prayers are constitutionally viable in that they are admittedly secular in purpose, they are neutral in their effect on religion in general, and they do not unlawfully entangle the government in religion – thus passing all three elements of the test. *See Lemon*, 403 U.S. at 612-13.

Regarding coercion, the appellate court incorrectly applied the test created in *Weisman*. If applied correctly, the Board's prayers should not be found to be unconstitutionally coercive.

For all these reasons, this Court should reverse the holding of the appellate court.

A. Because the appellate court impermissibly declined to follow this Court's precedents in *Marsh* and *Town of Greece*, neither the *Lemon* test nor the *Lee v. Weisman* coercion test is applicable in the instant case.

The Supreme Court has directly addressed the constitutionality of legislative prayer in only two cases: *Marsh* and *Town of Greece*. In each case, the Court remarked upon the unique place held by legislative prayer in Establishment Clause jurisprudence and emphasized the necessity of assessing it under a different framework that accounts for the special significance of

its historical practice and acceptance. *See Town of Greece*, 134 S.Ct. at 1818 ("*Marsh* is sometimes described as 'carving out an exception' to the Court's Establishment Clause jurisprudence, because it sustained legislative prayer without subjecting the practice to any of the formal tests that have traditionally structured this inquiry.").

Legislative prayer as practiced by the specific parties in *Marsh* and *Town of Greece* involved prayers that were given by chaplains, while the Board begins its meetings with an invocation offered by one of its members. This difference, according to the appellate court, is sufficient to render this Court's decisions wholly inapplicable. However, neither *Marsh* nor *Town of Greece* specify who may pray in governmental settings, and nothing in their treatment of member-led prayer for government bodies indicates that their precedential authority turns on prayer-giver identity. Even the appellate court's rationale for finding the Board's prayer practice unconstitutional never once mentions prayer-giver identity, notwithstanding the court's insistence upon the "constitutional significance" of this factor. J.A. at 21. Prayer-giver identity is, in fact, not significant at all to the appellate court's analysis of legislative prayer under the Establishment Clause. It is, rather, a pretext for sidestepping *Marsh* and *Town of Greece*.

Thus having absolved itself of precedent, the court launches into its own free-wheeling approach to legislative prayer under the *Lemon* test. The consequences of this approach, in defiance of *Marsh* and *Town of Greece*, are threefold: First, it disregards historical analysis of legislative prayer (including member-led prayer practices), which *Marsh* and *Town of Greece* found dispositive. Second, it smuggles disapproval of sectarian prayer and judicial scrutiny of prayer content back into the analysis – criteria prohibited by *Town of Greece*. Third, the appellate court's decision dramatically expands the coercion inquiry as it was understood to apply in *Town of Greece*.

These consequences and those discussed above accordingly show that the appellate court was incorrect to apply either the *Lemon* test or the *Lee v. Weisman* coercion test, and its holding should therefore be reversed.

B. Even if the *Lemon* test applies, it is not violated by the Board's prayer practice.

The *Lemon* test itself is a three-prong test. *Santa Fe Independent School District v. Jane Doe*, 530 U.S. 290, 314 (2000). The Court looks for (1) a primary secular purpose, then for (2) the primary effect, and then finally asks (3) if there was excessive government entanglement. *See Lemon*, 403 U.S. at 612-13.

The first element of the test looks at the purpose of the action in question, with the court generally respecting the government's stated motive, unless there is evidence that it is misleading. *See Lemon*, 403 U.S. at 612-13; *see also McCreary County v. ACLU*, 545 U.S. 844, 911 (2005). There is no serious dispute that the Board's practice of beginning its monthly meetings with prayer supports the secular purpose of solemnizing public business. Although assessing it improperly under the *Lemon* test, even the appellate court held that the purpose of the Board's prayer practice was appropriately secular. J.A. at 22. The court accepted the Board's description of its purpose: "to lend gravity to the seriousness of the meetings and to provide a moment of quiet reflection." *Id*.

The Court in *Town of Greece* discussed purpose in regard to legislative prayer, stating that, "its purposes are to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens." *See Town of Greece*, 134 S.Ct. at 1814. The Board's prayer practice does not differ in any meaningful respect from the one upheld in *Town of Greece*. Consequently, conclusions about the purpose of the prayer practice challenged in that case may also be appropriately applied to the Board's practice.

While it is true that such prayer could mean that the town in question was demonstrating or even stating the importance of religion through its actions, the Supreme Court nevertheless held in *Town of Greece* that a prayer practice of which one purpose was "acknowledging the central place that religion, and religious institutions, hold in the lives of those present" was acceptable. *Id*.

The presence or absence of this auxiliary purpose in a municipality's prayer practice is one issue – perhaps the only issue – for which the distinction of the Board's *sans*-chaplains prayer practice approaches a noticeable legal difference: The prayer practice in *Town of Greece* went somewhat *beyond* the standard secular purpose of solemnizing public business, while that of the Board does not. The Board's prayer practice, unlike the one upheld in *Town of Greece*, involves no public display of the community's religious leadership and no leveraging of the occasion to pronounce official recognition of those leaders as symbols of the importance of religion and religious institutions in our lives. There is simply the solemnizing of public business as it has been done in our country at all levels of government since ratification of the First Amendment.

All that truly distinguishes the Board from its counterpart in *Town of Greece*, then, is that the former has chosen not to go as far as it constitutionally could have – indeed, as far as the *Town of Greece* council *did* go – in employing its prayer practice to furnish public recognition and generalized support for religion and religious institutions. The Board's prayer practice is arguably more secular in purpose than the chaplain-led prayer practices that have already been upheld by this Court.

The second element of the *Lemon* test examines the primary effect of the government action. Even if it has a secular purpose, it can still fail the *Lemon* test if its primary effect is

religious. For the effect of an action to pass constitutional muster, it "must be one that neither advances nor inhibits religion." *Id*. On its face, the Board's prayer practice does indeed meet that requirement. Because the Board has not demonstrated "a pattern of prayers that over time denigrate [or] proselytize," its prayer practice cannot be said to either advance or inhibit religion. *Town of Greece*, 134 S.Ct at 1814.

Another of the most important factors of the second primary secular effect prong is entanglement. *See Aguilar*, 473 U.S. at 409. While this was originally the third prong of the *Lemon* test, it was later folded into the primary effect prong, effectively making the *Lemon* test only two-part. *Agostini*, 521 U.S. 203 at 232. However, the analysis remains largely the same. *Id*.; *see Lemon*, 403 U.S. at 208.

Entanglement must be excessive to violate of the Establishment Clause. *Agostini*, 521 U.S. at 233; *Waltz*, 397 U.S. at 674. It violates the Establishment Clause when the lines between religion and state are impermissibly blurred. *Lemon*, 403 U.S. at 614–15. This Court has looked to "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority" in making such a decision. *Id*. at 615.

This element of the standard (the resulting relationship between the government and the religious authority) is often broken down still further. *See Aguilar*, 73 U.S. at 412–13. Entanglement here can thus be either administrative or political, with administrative being the far more common of the two. *Id*. at 410. Administrative entanglement takes place when a "symbolic union" is formed between church and state. *Sch. Dist.*, 473 U.S. at 392.

Political entanglement, another aspect of the standard, involves the division of the polity along religious lines. As this divisiveness in a case or controversy increases, so too does the

political entanglement. *Aguilar*, 473 U.S. at 414. This Court did acknowledge, however, that this political division on its own was not sufficient to be excessive entanglement. *Agostini*, 521 U.S. at 234. It must then be accompanied by other factors to reach the level necessary to constitute a violation of the Establishment Clause. *Id.*

In the instant case, therefore, there is nothing that could support an argument that the Board's prayer creates excessive entanglement, whether administrative or political. Regarding administrative entanglement, there is no clear connection between the Board and any one religion. Without any one religion being "symbolically unified" with the Board through the prayers, there can be no administrative entanglement.

Nor is there sufficient political entanglement to violate the *Lemon* test. While the matter of one's religion could influence voting in regard to a member of the Board, that alone would not be unlawful entanglement. Practically, the fact that all the Board members are Christian is likely only representative of the demographics of their locality. It may very well be that someday a follower of Wicca may be elected to the Board, and it would be in keeping with their current tradition to allow such a member to begin meetings with their own solemn word or prayer or even nothing.

Given the primary secular purpose of the Board's prayers, their relative neutrality towards religion in general, and the lack of unlawful entanglement, the Board's actions are clearly not in violation of the *Lemon* test.

C. Even if the coercion test as set out by Justice Kennedy in *Lee v. Weisman* is applicable in the instant case, the Board's actions do not violate it.

The test used in *Lee v. Weisman*, now known as the "coercion test," has been used in a few Establishment Clause cases to date. As developed in these cases the test, in effect, states that government action is unconstitutional if it is also an act of coercion. *See Weisman generally*. In

Weisman, a parent objected to a rabbi praying at his daughter's graduation. *Id*. The Court held that such inclusion of clergy and their prayers violated Establishment Clause because students who wished to walk at their graduation not only had to attend but stand and listen respectfully. *Id*. at 587. Given the appearance of agreement that this would create, the school-created guidelines for the prayer, and especially the underage nature of the students involved, the Court held that such an application of prayer was indeed "coercive." *See id*. at 588

In the instant case, however, the appellate court's arguments that the Board's prayer practice is impermissibly coercive all rest upon its disapproval of the prayers' sectarian content. *Town of Greece*, which the appellate court takes pains to ignore, unequivocally prohibited such an analysis, declaring sectarian prayer to be beyond the reach of Establishment Clause scrutiny.

Nevertheless, the following is a summary of the criteria the appellate court used to conclude the Board's prayer practice is coercive:

1. All five members of the Appellee are Christian.
2. They all delivered Christian-based prayers.
3. They all referenced the Christian deity.
4. References in some of the prayers included:
    a. "We are all God's people;"
    b. "We all fall short of the glory of God;"
    c. "We must strive to conduct our business in a way consistent with the careful hand of the Father and His son Jesus Christ;"
    d. "May God place His Healing Hand on the hurt communities and families who suffered grievous losses."
5. The prayers were replete with direct references to the Christian deity.

J.A. at 22.

There is nothing about the Board's prayer practice to which the appellate court objects that was not expressly approved in *Town of Greece*. *See generally*. A holding that the Board fails the coercion inquiry would require this Court to accept all the same arguments it rejected in *Town of Greece*. *Id*.

Judge Rodriguez's concurrence in the lower opinion notes that the Christian content of the prayers caused Ms. Pintok to feel uncomfortable, and equates such feelings with coercion. J.A. at 25. "She believed that she was an outsider in her own community. That is not what the United States of America is about." *Id*. This reasoning is out of step with the Supreme Court's explanations of what coercion is and is not. Justice Kennedy stated that "[o]ffense ... does not equate to coercion." *Town of Greece*, 134 S.Ct at 1826. He went on to observe that "[a]dults often encounter speech they find disagreeable," even in a legislative forum, but that does not give rise to an Establishment Clause violation. *Id*. Rather, the historical acceptance and traditional practice of legislative prayer recognizes that "citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith." *Id*. at 1823 (majority opinion).

In *Town of Greece*, this Court observed that legislative prayers containing explicitly religious, sectarian, and Christian references were widely accepted at the time of the First Congress, and that such acceptance continued throughout American history into modern times. *Id*. at 1813. Therefore, the Court concluded, "[a]n insistence on nonsectarian or ecumenical prayer as a single, fixed standard is not consistent with [our accepted] tradition of legislative prayer." *Id*. at 1820. The Court specifically overturned the "nonsectarian" interpretation of *Marsh* put forward in *County of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573 (1989),

calling it dictum "that was disputed when written and has been repudiated by later cases." *Town of Greece*, 134 S. Ct. at 1821; see also *id*. ("Marsh nowhere suggested that the constitutionality of legislative prayer turns on the neutrality of its content.").

The Court therefore determined to be of no moment the fact that the invited prayer-givers were predominantly Christian: "[s]o long as the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing." *Id*. Continuing, the Court observed that "[t]he quest to promote a diversity of religious views would require the town to make wholly inappropriate judgments about the number of religions it should sponsor and the relative frequency with which it should sponsor each," a form of government entanglement with religion that is far more troublesome than the current approach. *Id*. at 1824. In fact, "[a]bsent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a particular prayer will not likely establish a constitutional violation." *Id*. at 1814.

For these reasons, the Court should recognize that the *Lee v. Weisman* coercion test is not applicable, but that (even if it does apply) the Board's actions in opening their monthly meetings with prayer do not violate it.

Conclusion

As the Board's monthly prayers to open their meetings are clearly within the standards created by *Marsh* and *Town of Greece*, the Court should recognize their actions as constitutionally protected. Even if these standards are found to be inapplicable, however, the Board's actions do not violate either the *Lemon* test or the *Lee v. Weisman* coercion test and the appellate court's ruling should accordingly be reversed.