DOCKET NO. 17-891

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

RESPONDENT'S BRIEF ON THE MERITS

TEAM NO. 2528
COUNSEL FOR RESPONDENTS

QUESTIONS PRESENTED

I. Under the Establishment Clause of the First Amendment, was the Hendersonville Parks and Recreation Board of Commissioners legislative prayer practice unconstitutional when the practice was squarely outside of the historical tradition of legislative prayer authorized by this Court in *Marsh v. Chambers* and *Town of Greece v. Galloway*.

II. Under the Establishment Clause of the First Amendment, was the Hendersonville Parks and Recreation Board of Commissioners practice of delivering sectarian invocations impermissibly coercive and unconstitutional when the prayers were consistently sectarian in nature, and the all-Christian Board of Commissioners drafted, recited and proselytized in the intimate setting of a town meeting in the presence of members of the non-legislative public.

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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

A. Factual Background

Ms. Barbara Pintok, Respondent, is a citizen in the town of Hendersonville. (J.A. at 1, 8.) A local business owner, Ms. Pintok is an active and committed member in the local community, participating in and attending local board meetings. (J.A. at 1, 8.) Petitioners, the Hendersonville Board of Parks and Recreation (hereinafter referred to as "the Board"), are a local governmental body responsible for the maintenance and development of Hendersonville's parks and recreational activities. (J.A. at 8.) The town's recreational activities include, but are not limited to, cultural arts centers, historical sites, golf courses, and historical sites. (J.A. at 8.) Also, the five Commissioners on the Board have sole control over permit and reservation requests for recreational activities, including the lake which is central to Ms. Pintok's paddleboarding company. (J.A. at 8.) When Board meetings are called to order, all attendees are directed to stand for the Pledge of Allegiance and to listen to the meeting prayer. (J.A. at 8.) In addition to asking meeting attendees to stand, attendees have been asked to bow their heads during the prayer. (J.A. at 19.) The prayers recited are created by the Board members, all of whom are members of Christian-based religions. (J.A. at 8.) While clear, repeated references to Christianity have been made in the invocations by the Commissioners with prayers directed at "Almighty God," "Heavenly Father," the Father and his son Jesus Christ," and the "Lord," representation of other religious faiths in the invocations is nonexistent. (J.A. at 18-19.) Even further, the prayers at the Board meetings are directed at the attendees, with prayers asking

Christian deities to "bless our community and "[p]lease bless everyone that comes before us." (J.A. at 9, 19.) Also, Board members refer to attendees in prayers as "God's people." (J.A. at 9.) The prayers are focused on the work of the Board and its Commissioners, stating:

> Almighty God, we ask for they 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.
>
> Heavenly Father, we ask for your guidance as we conduct the public's business and serve all people . . .
>
> Lord, help us to make good decisions . . . We know that we are tasked with making decisions that impact the lives of members of our community.

(J.A. at 18-19.)

And while some of the prayers have solemnly asked for "a moment of quiet reflection," other prayers have been significantly more sectarian, including:

> "We are all sinful but as the book of Isaiah reads, though are 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 19.)

Ms. Pintok is familiar with the Christianity but is currently not part of the Christian church. (J.A. at 1.) The Commissioners have delivered the examples above while Ms. Pintok was in attendance for permit review requests. (J.A. at 8, 18, 23.) The sectarian prayers triggered deep-rooted emotional responses from Ms. Pintok. (J.A. at 1.) As a result, a simple permit request became a considerably distressing and humiliating experience for Ms. Pintok. (J.A. at 1.) Rather than experiencing a solemnizing effect, Ms. Pintok would spend the meetings "distraught and nervous," and intimidated in such a way that she was left unable to "enunciate her words properly." (J.A. at 1.) Compounding the distress was the fact that Ms. Pintok's livelihood

depended on her attendance at the meeting — attending the meetings was necessary to obtain the permit for her business — making the option to leave potentially financially and professionally devastating. (J.A. at 1.) Further, because of the Commissioner's directives for attendees to stand and bow their head, Ms. Pintok felt coercive pressure to participate in the prayers. (J.A. at 14, 24.) She feared refusing to stand or bow her head would result in public denigration and exclusion from the local community. (J.A. at 1.) When attempting to voice an opinion about the Christian prayers, a board member expressly told her "this is a Christian country, get over it." (J.A. at 1.)

B. Procedural History

Ms. Pintok, the Plaintiff-Appellant below, filed this action in the U.S. District Court for the District of Caldon. (J.A. at 7.) Ms. Pintok alleged that the Petitioner's use of prayers at public board meetings violated the Establishment Clause of the First Amendment. (J.A. at 7.) Specifically, Ms. Pintok sought declaratory relief and both a preliminary and permanent injunction against the Board's delivery of sectarian prayers at board meetings. (J.A. at 7, 10.) After filing, both Ms. Pintok and the Petitioner filed motions for summary judgement. (J.A. at 10.) The district court refused to enjoin the Board's prayer practice, granting summary judgement in favor of the Petitioners and denying Ms. Pintok's motion for summary judgement. (J.A. at 15.) Declining to utilize the *Lemon* test, the district court arrived at its decision by focusing on the "history and tradition analysis" of *Marsh* and *Town of Greece*. (J.A. at 13.) In determining whether the Petitioners had placed coercive pressure on Ms. Pintok — indirect or otherwise —the district court gave great weight to the alleged intent of the Petitioner's Board members, as testified to in their affidavits. (J.A. at 15.)

On appeal, a three-judge panel of the U.S. Court of Appeals for the Thirteenth Circuit reversed and remanded the district court's decision with an order for summary judgement to be entered in favor of Ms. Pintok. (J.A. at 16.) While conceding that *Marsh* and *Town of Greece* do provide scenarios in which legislative prayer may be constitutional, the Thirteenth Circuit disagreed with the application of *Marsh* and *Town of Greece* under the facts at bar. (J.A. at 20-21.) Instead, the Thirteenth Circuit found that the fact-sensitive *Lemon* test was the appropriate analysis. (J.A. at 21.) The Thirteenth Circuit decided that the "primary effect" of the Board's prayers was to "advanc[e] the Christian religion." (J.A. at 22.) Additionally, the court noted that, given the content of the prayers and the public context delivery, "[i]t would be hard given the exclusively Christian nature of the prayers for a reasonable person not to believe that the government was advancing religion." (J.A. at 23.) Therefore, the Board's practice of legislative prayer "sen[t] an undeniable signal that the government was endorsing Christianity," in violation of the Establishment Clause of the U.S. Constitution. (J.A. at 24.) In his concurrence, Judge Rodriguez came to the same conclusion under the coercion test of *Lee*, stating that the "coercive pressures to conform to the majoritarian religious practices of the Board members . . . [made] [Respondent] believe[] that she was an outsider in her own community. This is not what the United States of America is about." (J.A. at 25.) The Petitioners filed for and were granted a writ of certiorari for the October term, 2018. (J.A. at 26.)

Standard of Review

This case comes on a grant of certiorari for constitutional questions following the reversal of a grant of summary judgment. (J.A. at 16.) The Court may review the present issues of constitutional law using a de novo standard of review. *McCreary Cty v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 867 (2005).

SUMMARY OF THE ARGUMENT

The Establishment Clause of the First Amendment protects religious freedom and diversity and helps ward off he ill-effects which inevitably occur when government and religion becoming impermissibly intertwined. In looking at the constitutionality of a prayer practice, the courts must first look to the historical tradition of legislative prayer in the United States. Legislative prayer must be for a secular purpose and cannot exceed the bounds of the Establishment Clause by having a purpose to advance or prohibit religion of any kind, nor may it have the effect of the government advancing or prohibiting religion or becoming excessively entangled in religion. Lastly, a prayer practice violates the guarantees of the Establishment Clause if it coerces an individual into participating in or accepting a particular religion. The Petitioners' legislative prayer practice at town meetings exceeds all of these limits and is unconstitutional.

The Petitioners' prayer practice does not fall within the history and tradition of legislative prayer because it the prayers are delivered by the Board Commissioners and not traditional legislative paid chaplains or local volunteer clergyman. The Board's prayer practice is for a non-secular purpose, and the repetitive pattern of monolithic prayers would, to a reasonable observer, be considered an act of the government to advance a particular religion. Further, because the Board members construct and deliver invocations in a strict-Christian theme, the government is necessarily entangled with religion, in strict conflict with the Establishment Clause. Lastly, Ms. Pintok was coerced by the Board to participate in a religion which did not adhere to when legislative prayers which went against her faith were proselytized and directed at her when she attended public town meetings necessary which her business required her to attend. In sum, the Petitioners' prayer practice exceeds the bounds of constitutional history and practice of the

Establishment Clause of the First Amendment, is for a non-secular purpose, and causes undue coercion on religious minorities like Ms. Pintok.

ARGUMENT

The First Amendment of the United States Constitution protects citizens by stating that "Congress shall make no law respecting an establishment of religion. . . ." U.S. Const. amend. I. This clause is known as the Establishment Clause. *Id.* The purpose of the Establishment Clause goes beyond encouraging tolerance of religious diversity; it is a constitutional protection which inspires the respectful accommodation of all religions and keeps the "wall between church and state." *Everson v. Board*, 330 U.S. 1, 18 (1947) (holding that the "wall must be kept high and impregnable. We could not approve the slightest breach.").

Religion is one of the many components which were woven together to create the intricate foundation of the United States. *See Zorach v. Clauson*, 343 U.S. 306, 313 (1952) ("[w]e are a religious people whose institutions presuppose a Supreme Being."); *Engel* v. *Vitale*, 370 U.S. 421, 434 (1962) ("[t]he history of man is inseparable from the history of religion."). Consequently, religion is "part of our expressive idiom," integrated into numerous facets of everyday life, as well as in the branches of American government. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1825 (2014) (Kennedy, J.) (plurality opinion) (detailing examples of religion in everyday American life, such as "the "Pledge of Allegiance, inaugural prayer, or the recitation of 'God save the United States and this honorable Court' at the opening of [judicial] sessions") (citing *Lynch v. Donnelly*, 465 U.S. 668, 676, (1984) (explaining that history is full of "official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders."); (O,Connor, J., concurring). One example of religion in government is legislative prayer. *See Town of Greece*,

134 S. Ct. at 1811 (stating that legislative prayer is "a benign acknowledgment of religion's role in society"); *see also Marsh v. Chambers*, 463 U.S. 783, 792 (1983) (considering legislative prayer to be "part of our fabric of society."). Ultimately, legislative prayer must convey a message of respect and welcoming of people of all beliefs.

In this case, the issue is whether the legislative prayer in controversy goes against the Establishment Clause and contravenes traditional, appropriate practices of legislative prayer. A legislative prayer practice may violate the Establishment Clause if it is found to fall outside of what would have been deemed appropriate by the Framers and if it is inconsistent with the history and tradition of the United States. *See generally Marsh*, 463 U.S. 783. The Board's prayer practice is an impermissible form of legislative prayer. First, the prayer practice is inconsistent with tradition and the historical standards outlined in *Marsh* and *Town of Greece* because here, the legislators led the prayers, a material factor not contemplated by controlling precedent and not supported by the historical roots of legislative prayer in the United States. Second, the prayer practice fails to pass the most traditional test for Establishment Clause concerns, the *Lemon* test. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Third, the prayer practice violates the basic tenet of the Establishment Clause because it places an impermissible amount of coercive pressure on Ms. Pintok, a member of a religious minority, to conform with a particular religious belief. Finally, it is in the interest of public policy that this Court should clarify an Establishment Clause analysis for legislative prayer that goes beyond historical comparisons and also requires analysis under a traditional Establishment Clause test, such as the *Lemon* test.

VI. THE PETITIONERS' PRAYER PRACTICE IS UNCONSTITUTIONAL BECAUSE IT DOES NOT COMPORT WITH TRADITIONAL, HISTORICALLY AUTHORIZED LEGISLATIVE PRAYER, AS FOUND IN *MARSH V. CHAMBERS* AND *TOWN OF GREECE V. GALLOWAY*.

The Petitioners' recitation of the prayer does not comport with the traditionally authorized prayer that is found in *Marsh* and *Town of Greece* because, though legislative prayer can have a solemn purpose, the practice here does not rest upon shared, historical ideals. Under the Establishment Clause of the First Amendment of the United States Constitution, the government is prohibited from making laws regarding religion. U.S. Const. amend. I. Historically, invocations given at the opening of legislative sessions encourages lawmakers to come together in solemnity and to bring the common goal of the legislative proceedings to the forefront. *Marsh*, 463 U.S. at 818. This Court has made clear that the historical traditions of the Establishment Clause must be "the touchstone" when looking at the appropriateness of a prayer practice. *Town of Greece*, 134 S. Ct. at 1819 ("the historical inquiry that control[s] legislative prayer must also be the touchstone of any Establishment Clause analysis.").

Legislative prayer practice comports with history and tradition if the particular practice in question is "deeply embedded in the history and tradition of this country" in such a way that it is "a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change." *Marsh*, 463 U.S. at 786; *Town of Greece*, 134 S. Ct. at 1819; *see also* Cty. of *Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 670 (Kennedy, J., concurring) (stating that Establishment Clause cases should be analyzed "by reference to historical practices and understandings."). In *Marsh*, the Nebraska legislature hired a Presbyterian minister to open every legislative session with a prayer. *Marsh*, 463 U.S. at 784-85. A member of the legislature claimed the invocations violated the Establishment Clause of the First Amendment and sought to enjoin the prayer practice. *Id.* at 785. The issue before the Court was whether legislative prayer violated the First Amendment's Establishment Clause when a paid chaplain delivered solemnizing prayers at the beginning of state legislative sessions. *Id.* at 784. The Court held it

did not. *Id.* at 794. The Nebraska legislature's prayer practice was found to be in accordance with the history of legislative prayer because the First Congress finalized the language of the First Amendment only three days after employing paid chaplains to deliver legislative prayers. *Id.* at 813. Therefore, the Court reasoned, the case of legislative prayers conducted by paid chaplains before them was not a threat to the Establishment Clause because it was unlikely that the Framers saw legislative prayer conducted by paid chaplains as a threat to the Establishment Clause. *Id.* at 791. To the Court, it seemed unlikely that the Framers would have intended to prohibit a specific use of prayer that they had just authorized. *Id.* at 790-91; *but see Allegheny*, 492 U.S. at 603 (Blackmun, J.) (noting that "*Marsh* plainly does not stand for the sweeping proposition . . . that all accepted practices 200 years old and their equivalents are constitutional today"). Writing for the majority, Chief Justice Burger acknowledged that the holding was binding on cases "similar to that now challenged," but that legislative prayer should be evaluated in context with historical evidence based on legislative prayer practice having "coexisted with the principles of disestablishment and religious freedom." *Id.* at 791, 786. The Court reasoned that history "sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on what they thought that Clause applied to the practice authorized by the First Congress.") *Id.* at 783.

Applying the reasoning from *Marsh*, when looking through a historical lens, there is no implication that the Framers intended to endorse members of the government personally giving legislative prayer can be drawn from looking through a historical lens; the Board's commissioners are not the same as the chaplains employed by the Framers to deliver legislative prayers. *Id.* at 790. *Marsh* held that paid chaplains were not a perceived threat to the Establishment Clause in that specific case because the draftsmen did not recognize a similar

threat to the Establishment Clause, as evidenced by their payment to chaplains immediately before drafting the Establishment Clause. *Id.* at 790-91. But no such threat can be ruled out here under historical analysis when the utilization of legislator-led prayer was not the *specific practice* endorsed by the Framers. Legislator-led prayer, therefore, is not "deeply embedded" in the history of this country and fails to meet the historical standard set by *Marsh* because it has not "withstood the scrutiny of time and political change." *Id.* at 786. Therefore, this Court should find that the Board's prayer practice is dissimilar from the authorized prayer practice in *Marsh*. *Id.*

Adding nuance to the historical evaluation of legislative prayer practice, the Court in *Town of Greece* held that it was constitutional for legislative prayer in town board meetings to be conducted by local volunteer ministers. *Town of Greece*, 134 S. Ct. at 1823. In *Town of Greece*, a town board invited local ministers to deliver invocations at the start of board meetings. *Id.* at 1813. Even though numerous local religious leaders were invited, there was a period of only Christian ministers reciting prayers. *Id.* at 1817. In a 5-4 decision written by Justice Kennedy, the Court applied historical context to inform the Court's understanding, keeping with the precedent set in *Marsh*, because history and tradition were "necessary to define the precise boundary of the Establishment Clause." *Id.* at 1816, 1819. First, the Court found that the legislative prayers performed by the volunteer ministers aligned with the historical use of local chaplains because the tradition of appointing paid official chaplains has "long [been] followed in Congress and the state legislatures." *Id.* at 1819, 1828. The prayer practice of volunteer chaplains was not unconstitutional because, amongst other reasons, the "requests to rise for prayer came not from town leaders but from the guest ministers." *Id.* at 1826. Furthermore, the fact that the lawmakers were not the individuals in control of the content of the prayers was also weighed by

the Court in determining the legislative prayer practice was consistent with history and tradition. *Id.* at 1820. Second, the Court acknowledged that legislative prayers can be sectarian and still fall within the bounds of tradition because "[p]rayer that reflects beliefs specific to only some creeds can still serve to solemnize the occasion . . . ." *Id.* at 1823. The Court stated that its "analysis would be different if town board members directed the public to participate in the prayers." *Id.* at 1825. The Court expressly states that legislative prayer inquires require an evaluation of "the prayer opportunity as a whole." *Id.* at 1824; *see also Lund v. Rowan Cty.*, 863 F.3d 268, 277-78 (4th Cir. 2017) (en banc), *cert. denied*, 128 S. Ct. 2564 (2018) (noting that Supreme Court legislative prayer precedent was "supportive of legislative prayer" but that the decisions were "measured and balanced."). "[W]hen the historical principles articulated by the Supreme Court do not direct a particular result, a court must conduct a 'fact-sensitive' review of the prayer practice." *Lund*, 863 F.3d at 276 (quoting *Town of Greece*, 134 S. Ct. at 1825).

Despite some other factual similarities, the *Town of Greece* reasoning does not indicate that the Board's prayer practice in Ms. Pintok's case is historically traditional. The reasoning is not fully applicable to the case at hand because the invocations Ms. Pintok listened to were delivered by the *lawmakers* and not *volunteer chaplains*, as in *Town of Greece*. Neither *Marsh* nor *Town of Greece* explicitly states that it should be blindly applied to any legislative prayer challenges which followed. *See Lund*, 863 F.3d at 276 ("*Marsh* and *Town of Greece* . . . in no way sought to dictate the outcome of every subsequent case.") Nor does either case expressly prohibit lower courts from evaluating whether the identity of the prayer-giver is constitutionally relevant. *See Bormuth v. Cty. of Jackson*, 870 F.3d 494, 509 (6th Cir. 2017) (noting that "neither *Marsh* nor *Town of Greece* restricts *who* may give prayers to be consistent with historical practice."). Simply put, the prayer practice, in this case, was not "similar to that [] challenged"

in *Marsh* or *Town of Greece*. *Marsh, 463 U.S.* at 791. Heeding *Town of Greece,* the analysis of the Board's prayer practice *should be different* because the "town board members directed the public to participate in prayers." *Town of Greece,* 134 S. Ct. at 1826.

B. The Court Below Correctly Applied the Precedents of *Marsh* and Town of Greece When it Agreed with the District's Court Analysis of History and Tradition and Affirmed that History is the Doctrinal Starting Point of Establishment Clause Jurisprudence.

Despite its inapplicability, the court of appeals below dutifully applied the precedent of *Marsh* and *Town of Greece* when it acknowledged the "doctrinal starting point" of analysis was the history of legislative prayer. (J.A. at 20.) The court did not make blanket statements that legislative prayer is always unconstitutional. On the contrary, the court noted—and did not disagree with—the significant purpose of legislative prayer and the role it plays in legislative proceedings. (J.A. at 20.0 The court even goes so far as to affirm the district court's decision to evaluate *Marsh* and *Town of Greece*, stating that it agrees that "some types of prayer led by religious leaders can comport with the government's obligation of religious neutrality." (J.A. at 20.) In discussing *Marsh*, the court below unequivocally stated in its opinion that chaplain-led prayer, and invocations delivered at the beginning "of legislative and other deliberative public bodies" are fundamental components of our national history. (J.A. at 20.) Further, in its analysis, the U.S. Court of Appeals for the Thirteenth Circuit acknowledged that *Town of Greece* shows that the use of prayer in town hall meetings may be constitutional when led by "religious leaders of different religious faiths." (J.A. at 20.) Finally, the fact-sensitive analysis indicated by *Town of Greece* was applied by the court below in its decision because lawmakers had sole control over the content of the prayers delivered at the Town Board meetings, a relevant fact in the analysis of *Town of Greece*. *Id.* at 1820. Thus, even though the Petitioners' prayer practice itself does not comport with the prayer practices in *Marsh* and *Town of Greece,* the overall

decision still followed the holdings of those cases appropriately when it gave due deference to the standard of historical tradition for guidance. Therefore, the Court should affirm the grant of summary judgement below on the basis that the decision adequately heeded the precedents of this Court in looking to history and tradition under *Marsh* and *Town of Greece* but simply came to a different conclusion based on the facts of the case at hand.

VII. THE PRAYER PRACTICE OF THE PETITIONERS' BOARD IS UNCONSTITUTIONAL BECAUSE LEGISLATOR-LED PRAYER IN A PUBLIC FORUM IS NOT SUPPORTED BY HISTORY, AS REQUIRED BY *MARSH* AND *TOWN OF GREECE*.

The Petitioner's construction and recitation of prayer by their own board members, as opposed to construction and recitation by a third-party clergy-man, within a public forum is not supported by history. Legislative prayers conducted by lawmakers is an exception and not the historical norm. See *Lund, 863 F.3d at 279.* At its inception, the Establishment Clause was written by the Framers in recognition and protection of religious diversity. In early American history, religious services were held by an Episcopalian reverend in the United States Capitol building prior to Congress beginning legislative sessions there in 1800. William A. Glaser, Comment, *Worshiping Separation: Worship in Limited Public Forums and the Establishment Clause*, 38 Pepp. L. Rev. 1053, 1074 n.145 (2011). Thomas Jefferson regularly attended church services administered by a Congressional chaplain in the House of Representatives for most of his presidential term. *Id.* at 1074 n.45, n.47. Further, there is substantial history regarding "ministers of all denominations preach[ing] in the Capitol building." *Id.* at 1076 n. 156.

Conversely, there is no evidence or history to indicate that the First Congress, in their drafting of the Establishment Clause, intended to allow "one of its own members [to] deliver the opening prayer. *See Lund*, 863 F.3d at 294 (Motz, J., concurring) (stating that the plaintiffs in

that case "[did] not cite a single authority suggesting that the First Congress engaged in a practice similar to the one at issue—that is, having one of its own members deliver the opening prayer."). In *Lund*, a board of commissioners held bimonthly town meetings, which members of the public could attend the meetings to get their permits granted and other issues. *Id.* at 276. At the meetings, one of the five Protestant commissioners would ask all attendees to stand and participate in the invocation. *Id.* at 272. A commissioner gave all of the prayers, and the content of the prayers placed an apparent preference on Christian religions above all others. *Id.* The plaintiffs, who were not Christian, claimed the legislative prayers violated the Establishment Clause because the prayer practice it made them feel excluded from their local social and political community. *Id.* at 274. The court, guided by the precedent in *Marsh* and *Town of Greece*, found this form of legislative prayer unconstitutional.

Judge Wilkinson, writing for the majority, considered the county board's prayer practice to be "a conceptual world apart," and, as a result, unprecedented from *Marsh* and *Town of Greece*. *Id.* at 277. The court refused to ignore the plain difference between who delivered the invocation in *Marsh* and *Town of Greece* — chaplains and laypeople of various faiths — and the party delivering invocations in the case in front of them —the legislators. *Id.* at 281. The court found constitutional significance in this detail, reasoning that the "conspicuous absence of case law on lawmaker-led prayer is likely no accident" based on the increased risk of a constitutional violation when a government entity is preparing and leading prayers. *Id.* at 278. "[T]his type of prayer both identifies the government with religion more strongly than ordinary invocations and heightens the constitutional risks posed by requests to participate and by sectarian prayers."). *Id. Town of Greece*, the court pointed out, gave "leeway [to local governments] in designing a prayer

practice that brings the values of religious solemnity and higher meeting to public meetings, but at the same time "recogniz[ing] that *there remain situations that in their totality exceed what* Town of Greece *identified as permissible bounds*." *Id.* at 278-79 (quoting *Town of Greece*, 134 S. Ct. at 1215) (emphasis added). The significant problem with legislators being the only individuals to give the legislative prayers is that "the prayer-giver [is] the state itself." *Id.* at 281. *See also Lee v. Weisman*, 505 U.S. 577, 596-97 (1992) (Kennedy, J.) (in a case of prayer at a public school graduation ceremony, Justice Kennedy insisted there was an "obvious difference[]" between prayer being challenged and the legislative chaplains of *Marsh)*; *compare Bormuth*, 870 F.3d at 512-13 (in the only other judicial decision to contemplate legislator-led legislative prayer, board meetings conducted by an all-Christian board of commissioners was constitutional after "looking through history's lens as dictated by *Marsh* and *Town of Greece*," in part because the prayer practice in front of the Court "pale[d] in comparison to the litany of prayers the Fourth Circuit concluded impermissibly advanced Christianity in *Lund*.").

Applying the reasoning of *Lund*, the monthly meetings held by the Board are a "conceptual world apart" from the history of legislative prayer contemplated in *Marsh* and *Town of Greece* based on the identity of the person delivering the prayers. Here, the Board members requesting individuals to stand for prayer at the opening of town hall meetings demonstrates that the Board's prayer practice is ahistorical, just as the concurring opinion in *Lund* found such practice was not supported by historical evidence. Like in *Lund*, where it was against history for Board members to be the only individuals delivering invocations, the Board's prayer practice should also be found inconsistent with tradition because the Board members are the only individuals who give the legislative invocations. The Board

commanding exclusive control over the delivery of opening prayers in a public forum cannot be verified as a historical practice because such control over the legislative prayer goes against the diverse and tolerant religious representation which should be apparent in local government meetings. Thus, the Petitioners' legislative prayer practice is unconstitutional because no historical equivalent can be found and theefore it falls outside of history and tradition of the United States.

VIII. THE PRAYER PRACTICE OF THE PETITIONERS' BOARD EXCEEDS THE CONSTITUTIONAL BOUNDS OF LEGISLATIVE PRAYER UNDER THE *LEMON* TEST AND THE ENDORSEMENT TEST BECAUSE RELIGIOUSLY DIVERSE REPRESENTATION WAS NON-EXISTENT, AND TO A REASONABLE OBSERVER THE PRAYER PRACTICE THE GOVERNMENT USING LEGISLATIVE PRAYER WOULD SEEM LIKE THE GOVERNMENT IS ENDORSING AND ENTANGLING ITSELF IN A SINGULAR RELIGION.

The Board's true secular purpose was unconstitutional because the Commissioners proselytized towards citizens in a public forum; the meetings inhibited minority religions from speaking out; and the sectarian prayers were developed and recited by the Board members themselves, resulting in direct entanglement. The most common and established constitutional test for determining whether actions comport with the Establishment Clause of the First Amendment is the *Lemon* test, aptly named for the case it is derived from, *Lemon v. Kurtzman*. *Marsh*, 463 U.S. at 796-97 (Brennan, J., dissenting). The *Lemon* test consists of three prongs of analysis. *Lemon*, 403 U.S. at 612-13. The governmental actions must: (1) have a secular purpose; (2) not have a primary effect of advancing or prohibiting religion; and (3) "must not foster excessive state entanglement with religion." *Id.*; *see also Edwards v. Aguillard*, 482 U.S. 578, 583-85 (1987) *(*stating that the failure of any prong is sufficient in determining a violation).

A. The Purpose of the Board's Prayer Practice was not Secular Because the Repetitive Proselytizing of Monolithic Prayers Resulted in a Non-secular Purpose.

Petitioners' invocations were developed and recited solely by Board Commissioners and included many monolithic phrases and acknowledgements that go far beyond a secular purpose. Under the first prong of the *Lemon* test, a court must ask whether the government's actual purpose is to endorse or disapprove religion. *Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 283 (3d Cir. 2011). Moments of quiet reflection pass the secular purpose of the *Lemon* test, but prayer practice may be impermissible if it goes beyond a secular purpose and "exploit[s] to proselytize or advance any one, or to disparage any other, faith or belief." *Bown v. Gwinnett Cty. Sch. Dist.*, 112 F.3d 1464 (11th Cir. 1997); *Town of Greece*, 134 S. Ct. at 1823 (citing *Marsh*, 463 U.S. at 794-95). In *Lund*, invocations at town hall meetings included "[W]e'd like to thank you for the resurrection. Because we do believe that there is only one way to salvation, and that is Jesus Christ." *Lund v. Rowan Cty.*, 837 F.3d 407, 436 (4th Cir. 2016). Overall, the Court agreed with the argument that the prayer practice transcended a secular purpose and was proselytizing because:

> [The] elected officials took up a ministerial function and led the political community in prayers that communicated exclusivity, leaving members of minority faiths unwilling participants or discomforted observers to the sectarian exercises of a religion to which they did not subscribe. The solemn invocation of a single faith in so many meetings over so many years distanced adherents of other faiths from that representative government which affects the lives of all citizens and which American of every spiritual persuasion have every right to call their own.

Lund, 863 F.3d at. 290; *see also Indian River*, 653 F.3d at 282 (holding that a public policy of opening public meetings with sectarian prayer violated the Establishment Clause with monolithic prayers even though the school board argued the prayers were strictly for solemnizing meetings).

In this case, the Board's use of monolithic phrases such as "heavenly father," and "His son Jesus Christ" cross the line and have a primary purpose which exceeds solemnization, just like the monolithic prayers in *Lund*. Even though the Board Commissioners state in their affidavits that the prayers are for a secular purpose, just as the school board stated their purpose was secular in *Indian River*, the resulting purpose of their prayers goes beyond solemnization and crosses over into non-secular proselytizing purpose. *Compare Lynch*, 465 U.S. at 680-82 (finding that a city-sponsored nativity scene had a legitimate secular purpose because it was for a celebration of a federally recognized holiday). Thus, the Court should find that this prong of the *Lemon* test fails because it results in the approval of a specific religion, and is not, in practice and actuality, for a secular purpose.

B. The Primary Effect of the Board's Prayer Practice was Unconstitutional Because a Reasonable Observer Would Perceive the Purposeful Lack of Religious Diversity, and Representation of Only One Faith in the Content of the Board's Legislative Prayers, Over a Period of Time, is Equivalent to the Government Endorsing and Advancing a Particular Religion.

A reasonable person would perceive the Petitioners' overall prayer practice as having an unconstitutional effect because the prayers were written and recited by Board Commissioners to solely represent their personal Christian ideals. "Regardless of its purpose," a government practice "cannot symbolically endorse or disapprove of religion." *Indian River*, 653 F.3d at 274. The second prong of the *Lemon* test, therefore, requires that the government cannot have the primary effect of advancing or inhibiting religion through its actions. *Lemon*, 403 U.S. at 612. A similar test with an identical analysis is the Endorsement test, which the Court has articulated requires that government actions may not have the "effect of communicating a message of government endorsement or disapproval of religion." *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring); *see also Indian River*, 653 at 282. ("endorsement test and the second *Lemon prong*

are essentially the same."). The Endorsement test coincides with the second prong of the *Lemon* test. As stated by Justice O'Connor, "[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring). Both tests lean on a "reasonable observer standard" based on the fact that "[r]easonable observers have reasonable memories, and . . . precedents sensibly forbid an observer [from] '[] turn[ing] a blind eye to the context in which the [policy] arose." *McCreary Cty.*, 545 U.S. at 846 (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000)).

When every religion is welcomed and invited to deliver invocations, but not every religion is represented due to a regional lack of diversity, the primary effect is not an advancement of religion. *Town of Greece*, 134 S. Ct. at 1840. In *Town of Greece*, the city invited local ministers to pray at the start of town meetings; every religion was welcomed, and numerous local religious leaders were asked to deliver prayers, including a Jewish layman, a local Baha'i priest, and a Wiccan priestess. *Id.* at 1817. Eventually, the diversity of the religious leaders ceased because, since the town was primarily Christian, a period of eight years passed where the invocations were delivered exclusively by Christian ministers. *Id.* Even though all of the volunteer ministers were Christian because congregations in the town were predominantly Christian, the Court held this was not an exemplification of government bias. *Id.* at 1824; *compare Lynch*, 465 U.S. at 683 (insisting that a "display of the [nativity] is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself"); *compare Lemon*, 403 U.S. at 618 (finding that state laws

providing monetary funds for religious-based schools was an example of the government advancing religion).

The prayer practice in question was not inclusive of a tapestry of religions. Despite claims by the Board of Commissioners that every religion is welcome, unlike in *Town of Greece*, religious leaders from multiple sects were not invited or asked to deliver invocations at the Board meetings. Each Board member practices Christianity, therefore each prayer reflects each Commissioner's Christian faith, in turn creating the primary effect of the government advancing Christianity. To reiterate Judge Andries opinion from the U.S. Court of Appeals for the Thirteenth Circuit, "It would be hard, given the exclusively Christian nature of the prayers for a reasonable person not to believe that the government was advancing religion." To a reasonable observer, the Board's control and exercise of the monolithic prayer practice creates a "closed-universe" and creates a primary effect of government promotion and advancement of Christianity. See *Town of Greece* (in dissent, Justice Kagan stated failure to recognize a multiplicity of sects results in "[l]egislative prayers steeped only one faith, addressed toward members of the public."). For this reason alone, the Court should find that this prong of the *Lemon* test also fails.

The content and repetition of sectarian prayers can also demonstrate to a reasonable observer that the primary effect of a practice is to promote a particular religion. See *Town of Greece* (Justice Kennedy cautioning that while the content of prayers was not dispositive of its constitutionality, the content and practice could not "over time denigrate proselytize, or betray an impermissible government purpose"); *compare with Bormuth*, 870 F.3d at 518 (explaining that a lack of a pattern of sectarian legislative prayers at a town meeting was indicative of its permissibility and distinguishable from the impermissible practice in *Lund* because "[t]his point

separates this case from *Lund*, where the Fourth Circuit found *multiple examples of prayers* portraying non-Christians as "spiritually defective.") (emphasis added); *see also Lee*, 505 U.S. at 588 ("[I]t is a cornerstone principle of our Establishment Clause jurisprudence that it 'is no part of the business of government to compose official prayer'") (quoting *Engel*, 370 U.S. at 425); *see also Engel*, 370 U.S. at 430 (holding that the government "is without power to prescribe . . . any particular form of prayer which is to be used as an official prayer in carrying on any programs of governmentally sponsored religious activity"); compare with *Town of Greece*, 794-95 (stating that "the content of the prayer is not a concern to judges . . . where 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.").

In *Indian River*, a public school policy of opening public meetings with sectarian prayer was challenged under the Establishment Clause by students and parents. The predominantly sectarian content of the prayers was telling to Court because it suggested to a reasonable person that the primary effect of the school board's policy was to promote Christianity. *Indian River Sch. Dist.*, 653 at 284. Also, the Court drew context from the sequence of events which led to the policy being implemented. The school board enacted the prayer policy during an atmosphere of contention when individuals were asking for prayers to be eliminated from school events. Therefore, the policy was closely linked to the *desire to maintain praye*r at school events. Id. At 287; see also *id.* at 290 (noting that because the analysis for both the second prong of the *Lemon* test and the Endorsement test is the same, the case failed under the second prong of the *Lemon* test, leading to it necessarily failing under the Endorsement test.)

Following the court's reasoning in *Indian River*, the Board's practice of only allowing Commissioners who are of the Christian faith to repeatedly recite sectarian legislative

invocations created the primary effect government endorsing one religion. Similarly, the lengthy history of *desire to maintain a particular prayer policy* is evidenced by the fact that the Board commissioners stated that this was the way the legislative prayers had always been done and lack of diversity during invocations. For the reasons listed, this prong of the Lemon test also fails.

C. The Board's Prayer Practice is a Violation of the Establishment Clause Because the Board Commissioners' Control over the Content and Delivery of the Legislative Prayers Excessively Entangles the Government in Religion.

The Petitioners' prayer practice excessively entangles the government in religion because the Board decides who will develop and recite the prayers and preclude outsiders, be it third-party clergy-man or citizens, from participating in the Board invocations. This strict structure illustrates the entanglement between the Board and Christianity. The effect of a governmental action may not result in the government becoming excessively entangled with religion. *Lemon*, 403 at 612. The proper analysis includes analyzing the "character and purpose of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority." *Indian River Sch. Dist.*, 653 at 288. Because a certain degree of "[i]nteraction between church and state is inevitable and some level has always been tolerated between the two," certain levels of entanglement are acceptable. *Agostini v. Felton*, 521 U.S. 203, 233 (1997); see also *Walz*, 397 u.s. 675 (stating that there is "an *impermissible* degree of entanglement") (emphasis added).

Concerns of excessive government entanglement were raised by the Court in *Lemon* because religious programs being implemented in schools required the states to supervise and control the schools and the spiritual programs at the schools. *Lemon*, 403 at 602. In *Lemon*, two states adopted questionable statutory programs for non-public schools which either provided supplemental salary and reimbursed teachers for expenditures related to educational instruction

in secular subjects. *Id.* The question before the Court was whether the statutory programs created an excessively entangled relationship between church and state. Because the state would have to exercise surveillance and control over the implementation of the legislative policies, a continuing, intimate relationship was created between the schools and the state. *Id.* At 603. Such a relationship is "pregnant with dangers of excessive government direction of church schools and hence of churches," and was held to be a violation of the Establishment Clause. *Id.* at 602, 620; *see also Indian River at 284* (holding that a school board policy which expressly permitted prayer in school meetings created excessive entanglement because government participation in the composition of prayer and recitation of that prayer is precisely the type of activity that the Establishment Clause guards against).

Looking to the relationship between the Board — in their capacity as actors of the state — and religion — the sectarian and monolithic legislative prayers —, as instructed by the third prong of the *Lemon* test, the Board's prayer practice fails the third prong of the *Lemon* test. The Board's oversight and control of the legislative prayer practice creates a continuous relationship between the State and religion, just as the states in *Lemon* were excessively entangled because of the control over the religious-based statutory programs in public schools. Congruent with the reasoning in *Indian River*, the government is excessively entangled with religion here because the Board Commissioners participate in the composition and recitation of prayers. Further, when the Board instructs local community members to stand and leads to the government becoming entangled in religion because they are members of the government directing members of the public to participate in the recitation of prayer. Thus, an impermissible degree of entanglement is found in the Board's prayer practice based on the Board Commissioners controlling, composing, and reciting prayer.

For the reasons listed, failure of all three prongs of the Lemon test are found. Because only one failure of a prong is needed to find a violation of the establishment clause, analyzing the case under the Lemon test clearly exemplifies the unconstitutional act by the Board.

IX. THE BOARD'S LEGISLATIVE PRAYERS VIOLATE THE ESTABLISHMENT CLAUSE BECAUSE BOTH THE INTIMATE SETTING OF THE TOWN BOARD MEETING AND THE LEGISLATOR-LED PRAYER CAUSED MS. PINTOK, A MEMBER OF A RELIGIOUS MINORITY, TO SUFFER COERCIVE PRESSURE TO CONFORM TO A PARTICULAR FAITH.

Ms. Pintok was coerced because she had no choice but to go before the Board in an intimate setting to stand and wait for recitation of a prayer reflecting a religion she did not believe in, in order for her permit issue to be heard. "It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'" *Lee*, 505 U.S. at 587 (quoting *Lynch*, 465 U.S. at 678). Coercion of this nature goes against the Establishment Clause because it is a clear and obvious indication of government endorsement or promotion of religion. *Id.* at 604. Even subtle, indirect pressure is unacceptable as it weakens the rights of citizens to choose what to believe in voluntarily. *Id.* at 605. The purpose of the Coercion test lies in the interest of stopping the government from being "behind a particular religious belief." *Engel*, 370 U.S. at 431. This imposes serious harm on both the individual and the state. *See Lee*, 505 U.S. at 592 ("A state-created orthodoxy puts at grave risk that freedom of belief and conscience"); *see also Engel*, 370 U.S. at 429 ("[O]ne of the greatest dangers to the freedom of the individual to worship in his suffered by the individual in his own way lay[s] in the Government's placing its official stamp of approval upon one particular kind of prayer . . ."); see also *Lund* ("A well-founded perception that a government favors citizens subscribing to a particular faith would undermine the democratic legitimacy of its

actions") (citing *Engel*, 370 U.S. at 431) ("[W]henever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs.").

A. The Intimate Setting of the Board Meeting Placed Coercive Pressure on Ms. Pintok Because not only did she Have to Stay to Obtain a Necessary Professional Permit but Leaving During the Legislative Prayer was also Impractical Without Drawing Significant Attention to Herself and Causing Embarrassment.

The intimate setting of the board meeting created impermissible coercive pressure on Ms. Pintok when the ministerial function of the meeting was coupled with the sectarian legislative prayer practice. Coercive pressure can exist when an individual is unable to freely leave the setting in which the legislative prayer is taking place. In *Lee*, a high school allowed for prayers at a high school graduation ceremony. *Lee*, 505 U.S. at 584. A student and her parents brought suit against the school on the issue of whether the school's policy on prayer at graduation ceremonies violated the Establishment Clause of the First Amendment. *Id.* at 581. The argument made by the school principal— that attendance at the ceremony was not required and therefore "excuses any inducement or coercion"— was rejected by the Court. *Id.* At 578. High school graduations are, "one of life's most significant occasions, and a student is not free to absent herself." *Id.* At 578..

Along the lines of *Lee*, the Board meetings in the case at hand are essential events for Ms. Pintok to attend because her professional success is dependent on her attendance at the Board meetings. Ms. Pintok must show up to, and participate in, Board meetings to obtain the permits necessary for her outdoor recreational business to be granted by the Commissioners. As stated in *Lee*, coercive pressure can come when prayer is conducted at an event that an individual is required to attend, or the event is not easy or feasible for the individual to leave. Even though

the Board has claimed participation in the invocations is voluntary, mandatory participation is implied when the Board Commissioners have told Ms. Pintok to "get over it" when she expressed her disagreement with the prayers, indicating participation is not necessarily voluntary or flexible and causing Ms. Pintok emotional distress and embarrassment. The reaction by the Board Commission, or inaction rather, to Ms. Pintok's concerns are precisely the religious intolerance which the Establishment Clause is in place to protect. Just as the Court in *Lee* found this placed coercive pressure on the student at her high school graduation, the Court, in this case, should find the same.

County board meetings allow the attendance of the public. Therefore legislative prayers are directed at the public instead of just the legislators. This intimate setting has been recognized by the U.S. Court of Appeals for the Fourth Circuit to create a higher likelihood of coercion than a legislative proceeding with only legislators present. In *Lund*, elected members of a county board developed and delivered sectarian prayers. *Lund*, 863 F.3d at 272. The court articulated that, for legislative prayer, courts should follow *Town of Greece* and "assess whether the 'principal audience' for invocations is the lawmakers or the public. An internally-focused prayer practice accommodates the spiritual needs of lawmakers, while an externally-oriented one attempts to promote religious observance among the public." Lund, 863 F.3d at 286 (quoting *Town of Greece*, 134 S. Ct. at 1825) (citations omitted). The intimate setting of a town board meeting presented a heightened potential for coercion, because the "close proximity" between a board's sectarian exercises and its consideration of specific individual petitions "presents, to say the least, the opportunity for abuse." *Id.* at 288 (citing *Lund*, 837 F.3d at 436) (citations omitted). In coming to its conclusion, the court also considered whether the lawmakers directed the public to participate in the legislative prayers. *Id.*

The atmosphere in the case at hand is nearly identical to that of the board meetings hosted by the board in *Lund*. These prayers are developed and recited by the Board Commissioners. The legislative prayers are directed at the public, not just the legislators, as indicated by their requests for individuals to rise for the prayer. The Board serves a quasi-adjudicatory role in reviewing permits and local recreational activities, and therefore their sectarian legislative prayer is in "close proximity" to the government business, such as Ms. Pintok's paddleboat permit review. *Lund*, 837 F.3d at 436.

The identity of the prayer-giver may also create coercive pressure if the prayer-giver is the government directing an individual to participate in the prayer. In *Town of Greece*, the court analyzed whether prayers before a town meeting violated the First Amendment by coercing participation of non-adherents. *Town of Greece*, 134 S. Ct. at 1814. Guest ministers asked guests to rise for prayer, and the Court found this was not coercive because the ministers were directing the attendees as they would direct those in their respective congregations to come together in prayer. *Id.* at 1826. Even though board members would stand, bow their heads, or make the sign of the cross, this was not coercion because *the board members did not "solicit[] similar gestures"* from those in attendance. *Id*.; *see also Zorach*, 343 U.S. at 314 *(*"[t]he government . . . may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone . . . to take religious instruction."). The Court found the board's prayer practice was not coercive. *Town of Greece*, 134 S. Ct. at 1827. In a robust dissent, Justice Kagan, joined by Justices Sotomayor, Justice Ginsburg, and Justice Breyer, found "[t]he practice at issue here differs from the one sustained in *Town of Greece* because *Greece's* town meetings involve participation by ordinary citizens, and the invocations given —directly to those citizens —were predominantly sectarian in content." *Id.* at 1842.

Unlike third-party clergyman reciting prayers in *Town of Greece*, the prayers are narrated by the Board Commissioners. Thus, unlike the harmless intention behind a volunteer third-party minister asking others to join him in prayer because it is his or her standard practice in a general congregation, the Board Commissioners are not in the usual routine of directing a religious service; they help the community with local issues about parks and recreation. Here, the Board's actions are distinguishable because, as *Town of Greece* noted, the board members *solicited attendees to stand* for the prayer, while every single one of the Board Commissioners stood and bowed their head while one of their colleagues gave the invocation. And just like Justice Kagan pointed out in the dissent, the practice here can be contrasted with the acceptable prayer practice in *Marsh* because it "involve[s] participation by ordinary citizens" and the invocations are "directly to those citizens." *Town of Greece*, 134 S. Ct. at 1842. As stated by Judge Rodriguez's concurring opinion in the Thirteenth Circuit decision below, "[Ms. Pintok] felt coercive pressures to conform to the majoritarian religious practices of the Board members. She believed that she was an outsider in her own community. That is not what the United States of America is about." (J.A. at 23-24). Thus, even if the Court were to analyze the case under the coercion test, it still fails. The intimate setting and exemplification of dismay for Ms. Pintok's concern are clear exemplifications of the unconstitutional behavior the Establishment Clause intends to protect.

X. IN THE INTEREST OF PUBLIC POLICY, THE COURT SHOULD ENDORSE A LEGISLATIVE PRAYER ANALYSIS THAT GOES BEYOND THE CONCRETE PARAMETERS OF "HISTORY AND TRADITION" TO RESOLVE CONFUSION BECAUSE, AS WE MOVE FURTHER FROM THE TIME OF LEGISLATIVE PRAYER KNOWN BY THE FOUNDING FATHERS, UTILIZING HISTORY ALONE IS INSUFFICIENT IN CREATING CONSISTENTLY CONGRUENT JURISPRUDENCE.

Analyzing Establishment Clause violations under the broad and ambiguous analysis of traditional constitutional meaning requires courts to look into the recesses of time to the meaning of the Establishment Clause at the time of its inception and its reasons for inclusion in the founding document of our nation. Not only is historical practice sometimes unclear, but the genesis of a constitutional clause is not necessarily dispositive. *See* Glaser, *supra* at 1067 (stating that history is relevant, but "the Court has indicated that history is at least not conclusive"); *see also* Recent Case, *First Amendment—Establishment Clause—Fourth Circuit Holds that County Commissioners' Practice of Offering Sectarian Prayers at Public Meetings is Unconstitutional—Lund v. Rowan County, 863 F.3d 268 (4th Cir. 2017)*, 131 Harv. L. Rev. 626, 630 (2017) ("*Lund*'s analytical difficulties highlight why traditional Establishment Clause tests should be used when history and precedent provide no analogue to a given prayer practice.") "If Establishment Clause analysis is not conducive to addressing these issues, the Court needs to scrutinize and potentially alter its current approach." James A. Campbell, Note, Newdow *Calls for a New Day in Establishment Clause Jurisprudence: Justice Thomas's "Actual Legal Coercion" Standard Provides the Necessary Renovation*, 39 Akron L. Rev. 541, 541-42 (2006).

In the wake of *Marsh* and *Town of Greece*, nothing short of pandemonium has ensued in the lower courts. Eric J. Segall, *Mired in the* Town of Greece*: Legislative Prayers, Moments of Silence, and the Establishment Clause*, 63 U. Miami. L. Rev. 713, 714 (2009) (describing the "chaos" which has resulted from the use of "history and tradition" in *Marsh*); *see also* *Elk Grove*, 542 U.S. at 45 (Thomas, J., concurring) ("Our jurisprudential confusion [in Establishment Clause cases] has led to results that can only be described as silly."). The precedent set by *Marsh* and *Town of Greece* should not be interpreted as a blanket approval of all legislative prayer. If anything, the divergent conclusions reached in cases with factual similarities, such as in *Lund*

and *Bormuth*, are telling of the confusion which will continue to affect the lower federal courts. It seems inevitable that, with the passage of time, legislative prayer practice will drift further away from what is considered historical prayer practice as contemplated by the Framers. As such, it is to the benefit of this Court to establish a precedent which can be swiftly, and unwaveringly, applied to create jurisprudence which is true to the Founding Fathers but consistent with the current times. "Therefore, when a prayer practice has no strong analogue in history or precedent, placing it within the framework of a doctrinal test — whether endorsement, coercion, or *Lemon* — would help alleviate some of the issues seen in *Lund*." *See* Recent Case, *supra*, at 632-33 (hypothesizing that "[a]s prayer practices become more and more dissimilar from Founding-era traditions, analogies run out, and courts will find themselves in situations similar to *Lund*"); *see also* Campbell, *supra*, at 543 (finding "[t]he current multi-test approach is completely inadequate because it cultivates uncertainty").

The Court needs a test which effectively ensures the judicial system precludes government support of religion and prohibits when the government is acting in a manner in which religious groups or non-religious groups feel disrespected. This is precisely what the Lemon test is designed to do. Daniel O. Conkle, Lemon Lives, 43 Case W. Res. L. Rev. 865, 868 (1993). Though traditional tests have drawn criticism in how and when they should be applied, the Lemon test "continues to champion crucial, largely agreed-upon principals underlying the relationship between religion and the state." Karthik Ravishankar, The Establishment Clause's Hydra: The Lemon Test in the Circuit Courts, 41 U. Dayton L. Rev. 261, 263 (2016) Also, scholars have noted that the Lemon test has led to "increasingly uniform outcomes. In effect, the Lemon test has "filled out" its prongs, demonstrating "the sort of nuance necessary to properly address Establishment Clause cases." *Id.; see also* Emily H. Harvey & David L. Hudson, Jr.,

First Amendment Tests from the Burger Court: Will They Be Flipped?, 44 Hamline L. Rev. 52, 57 (2018) ("[W]hile it has faced a litany of criticism, the *Lemon* test survives and even thrives, particularly in the lower courts.") Therefore, this Court should endorse the combination of a traditional test with historical deference to quell confusion and encourage the courts to safely broaden decisions to reach consistent Establishment Clause and legislative prayer precedents.

CONCLUSION

The U.S. Court of Appeals for the Thirteenth Circuit correctly found Petitioners' legislative prayer practice was an unconstitutional violation of the Establishment Clause of the First Amendment. The Petitioners' prayer practice fell outside the scope of history and tradition, and the Petitioners' prayer practice was for a non-secular purpose and placed an impermissible degree of coercive pressure on Ms. Pintok. For the foregoing reasons, Respondent respectfully requests that this Court affirm the decision in favor of Ms. Pintok from the U.S. Court of Appeals for the Thirteenth Circuit.

Dated this 30th day of September, 2018.

Respectfully submitted,

Team 2528

Attorneys for the Respondent