NO. 18-1308

IN THE
SUPREME COURT OF THE UNITED STATES

ROSS GELLER, DR. RICHARD BURKE, LISA KUDROW, AND PHOEBE BUFFAY,

PETITIONER,

V.

CENTRAL PERK TOWNSHIP,

***RESPONDENT*,**

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

BRIEF FOR RESPONDENT

ORAL ARGUMENT REQUESTED

Team A
Counsel for Respondent

Dated: September 14, 2018

QUESTIONS PRESENTED

I. Are the Central Perk Town Council's legislative prayer policy and practices constitutional when the Town Council Members either deliver the invocations themselves or select their own personal clergy to do so, and the invocations have been theologically varied but exclusively theistic?

II. Are the Central Perk Town Council's prayer policy and practices unconstitutionally coercive of

1. All citizens in attendance when several invocations included language implying the supremacy of sectarian dogma, or

2. High school students who were awarded academic credit for presenting at meetings where their teacher also was a Council member who gave an invocation?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Amendments

Federal Statutes

Supreme Court Cases

Federal Appellate Cases

Other Authorities

STATEMENT OF JURISDICTION

The United States District Court for the Eastern District of Old York, in and for Ross Geller, Dr. Richard Burke, Lisa Kudrow, and Phoebe Buffay, entered judgment on February 17, 2017. Central Perk Township then appealed the District Court's order to the United States Court of Appeals for the Thirteenth Circuit, which reversed the judgment below and dismissed the Plaintiffs' complaints with prejudice. A petition for Writ of Certiorari was timely filed in this Court and granted on August 1, 2018. The Jurisdiction of this Court rests on 28 U.S.C. § 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides the following:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. AMEND. I.

The Fourteenth Amendment to the United States Constitution provides the following:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. AMEND. XIV.

OPINIONS BELOW

The United States District Court for the Eastern District of Old York's opinion can be found on page one of the record. The United States Court of Appeals for the Thirteenth Circuit's opinion can be found on page thirteen of the record.

STATEMENT OF THE CASE

In 2014, paying specific attention to this Court's ruling in *Town of Greece v. Galloway*, Central Perk's Town Council supplemented their more than sixty-year-old tradition of reciting the pledge allegiance before council meetings to properly outline the way in which opening invocations should be held. R. at 1-2. The purpose of this opening prayer is to invoke divine guidance for benefit of the Town Council board members. R. at 2. The invocation policy states that one of the seven board members will be selected randomly by name drawing each month to either give an invocation of his or her own choosing, or to select a community minister to offer an invocation. *Id.* Council members can also elect for there to be no invocation on the month they are selected. *Id.* When a clergy member is selected to give the invocation, the Council is forbidden from censoring or providing any input regarding the content of the prayer. *Id.* Additionally, when the legislators conduct their prayers and recite the pledge of allegiance, those in attendance are invited to stand. *Id.*

Chairman Tribbiani's name was drawn twice and he selected a minister from New Life Community Chapel to give both invocations. R. at 3. Council member Hosenstein, also a member of New Life Community Chapel, selected the same New Life minister to give the invocation both times her name was drawn. *Id.* Council members Bing and Geller-Bing's names were drawn a combined nine times, and all nine times they each selected the president of their Church of Jesus Christ of Latter Day Saints to give the invocation. R. at 2-3. Council

member Willick's name was drawn three times, and all three times she offered a Muslim invocation. R. at 3. Council member Green was selected four times. Twice, she declined to give an invocation and the other two times she gave a Baha'i invocation. *Id.* Finally, Council Member Geffroy asked that he never be selected to provide an invocation. R. at 2.

The Christian prayers asked for salvation for those "who do not yet know Jesus," for "blinders to be removed from the eyes of those who deny God," for "every Central Perk citizen's knee to bend before King Jesus," and concluded with "in the name of our Lord and Savior, Jesus Christ." R. at 3. The Islamic prayers asked that "peace and mercy and blessings of Allah be upon you." *Id.* The Mormon prayers included language such as

> [h]eavenly Father, we thank thee for this day and all our many blessings. Thou art our sole provider, and we praise Thy power and mercy. Bless that we can remember Thy teachings and apply them in our daily lives. We thank Thee for Thy presence and guidance in this session. In the name of Jesus Christ, amen

Id. The prayers further asked "[h]eavenly Father, we pray for the literal gathering of Israel and restoration of the ten tribes. We pray that New Jerusalem will be built here and that all will submit to Christ's reign," and that "[n]one in attendance would reject Jesus Christ or commit grievous sins against the Heavenly Father, so that none would be sent to the Telestial Kingdom, away from the fullness of God's light." R. at 3. Finally, the Baha'i prayers acknowledged "Buddha's infinite wisdom" and asked that the meeting be conducted in harmony and peace. *Id.*

Further, Council Member Green is a teacher at Central Perk High School. R. at 4. Green teaches a seminar class in American Government that is only available to Central Perk High School seniors. *Id.* This seminar class is not a required course and the seminar has historically included an optional extracurricular assignment that encourages the students to engage in the

governmental process. *Id.* If a student choses to participate in the extracurricular activity, they may be awarded five extra credit points. *Id.* Before she was elected to the City Council, this optional assignment included either volunteering for a political campaign for fifteen hours or writing a three-page letter to one of the student's elected representatives regarding a current political issue. *Id.* The extra credit points that could be awarded for completing either of these assignments would be added to the student's final test grade. *Id.*

Following her election to the City Council in November 2014, Green altered this volunteer opportunity to allow students to give a short presentation at City Council meetings. R. at 4. To earn these extra credit points, the students who participated only had to attend the City Council meeting for the five minutes during which they made their presentations. *Id*. The City Council meetings occurred outside of normal school hours and students who chose to present could address any current City Council measure. *Id.* Furthermore, the Council only allowed three students to present at each meeting. *Id.*

At this point, Green also reduced the weight that any potential extra credit points could have. *Id.* Instead of counting the points toward the student's final examination, Green applied the points to the student's participation grade, which only accounted for ten percent of that student's overall grade. *Id.* Out of the twelve students who decided to participate in these meetings from December 2014 to May 2015, only two students were able to improve their grades. *Id.* One student increased her grade from a B- to a B+ and another student increased his grade from a B+ to an A-. R. at 4.

Each of the above-named Petitioners represents one of the senior students who gave a five-minute presentation for the opportunity to earn extra credit in Green's seminar course during the 2015-2016 school year. R. at 4-5. Ben Geller, Ross Geller's son, gave a presentation on

October 6, 2015. *Id.* During the same meeting, Green gave the benediction in accordance with the Baha'i faith. R. at 5. Timothy Burke, Petitioner Burke's son, gave his presentation on November 4, 2015. *Id.* On that date, in accordance with the Mormon faith, President Minsk gave the invocation and prayed that "none in attendance would reject the heavenly father." R. at 5. Petitioner Buffay's daughter, Leslie, gave her presentation on February 5 2016. *Id.* Again, in accordance with the Mormon faith, President Minsk prayed for the "restoration of New Jerusalem." *Id.*

SUMMARY OF THE ARGUMENT

Legislative prayer is an exception to the traditional *Lemon* Establishment Clause test. In fact, there is no formalized test for legislative prayer because the tradition is so well ingrained in American society and occurred so near to the founders of the Constitution that the practice as a whole must be considered constitutional. Although the umbrella of constitutional protection is wide, legislative prayer is not protected when used to proselytize or disparage any faith or belief or when the method in which the prayer is given amounts to government censorship or endorsement.

Central Perk has not exploited legislative prayer to proselytize or disparage any faith or belief. Members of many different faiths have opened these meetings, which have included a much more diverse selection of religions than other prayer policies that were found to be constitutionally protected. Furthermore, Central Perk's prayer policy is constitutionally protected because the Council has not used the prayer platform to promote a single faith or to exclude any potential prayer givers. Finally, the fact that the prayers have been exclusively theistic does not exclude Central Perk from constitutional protection, so long as the Council maintains a non-discriminatory policy.

Additionally, there is a long history of both community ministers and legislative members themselves leading legislative prayer. The idea behind legislative prayer is for the benefit of lawmakers themselves, so it follows that they are the best to representatives of their own interests. Community minister led prayer is also permissible so long as the government does not attempt to censor or require the minister to preach certain ideas. This same principle applies to lawmaker led prayer and requires that the legislator act as a "free agent" when giving prayer. Central Perk has not raised any constitutional concerns through the manner in which the prayers are delivered as it has maintained a policy of allowing ministers to give invocations of their choice, without censorship, while also allowing their own board members to act as free agents when delivering their own invocations.

The Central Perk prayer policy also passes the additional coercion test that courts examine when petitioners claim that a governmental practice has compelled them to conform to a religious practice or suffer consequences for failing to conform. This Court has only recently applied the coercion test to all complainants because of the prevailing themes that this Court established in *Marsh v. Chambers*. Even though this Court now applies this test to claims made against legislative prayer policies, there is still a strong presumption that legislative prayers are not coercive and that Americans understand the long held view that government prayers do not violate the Establishment Clause. This presumption may not be as strong when a prayer occurs on school grounds or during a mandatory school event. These weakening factors do not exist here, however, because the students in attendance were not on school grounds and were not materially compelled to attend the town council meeting.

ARGUMENT

I. The Central Perk Town Council's legislative prayer policy does not violate the Establishment Clause of the First Amendment because the content of the

invocations does not proselyte or disparage any faith, nor does the method in which the prayer is given amount to unconstitutional government censorship or endorsement.

The Establishment Clause of the First Amendment of the Constitution states "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." U.S. CONST. AMEND. I. The United States government's history, however, "has not been one of entirely sanitized separation between Church and State," and the Supreme Court recognizes the government may situationally commemorate religion in public life. *Comm. For Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973). Legislative prayer, though religious in nature, has been practiced consistently in the United States since the founding of the country over two hundred years ago. *Marsh v. Chambers*, 463 U.S. 783, 787 (1983). Although the practice is generally categorized as government speech, the Supreme Court has determined legislative prayer is a unique exception to the traditional Establishment Clause three-part test.[1] *Marsh*, 463 U.S. at 796; *Turner v. City Council of Fredericksburg*, 534 F.3d 352, 354 (4th Cir. 2008). In fact, legislative prayer currently has no formalized constitutionality test. Rather, the prayer policy relies on over two hundred years of "unambiguous" and "unbroken" history dating back to the framing of the Constitution. *Marsh*, 463 U.S. at 792.

This precedent, however, does not mean that legislative prayer would be unconstitutional were it not for its history. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014). Instead, it holds that history proves the Establishment Clause was not intended to exclude legislative prayer since the framers of the Constitution themselves participated in legislative prayer. *Sch. Dist. Of Abington Tw. V. Schempp*, 374 U.S. 203, 294 (1963); *Marsh*, 463 U.S. at 790. This Court reasoned it illogical that "in the same week Members of the First Congress voted to appoint and to pay a chaplain for each House and also voted to approve the draft of the First Amendment for

[1] *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (holding a statue must have a secular legislative purpose,

submission to the states, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable." *Marsh*, 436 U.S. at 790. The Supreme Court finds legislative prayer to be a "tolerable acknowledgment of beliefs widely held" rather than a means to and end of establishing a national church. *Id.* at 792; *Town of Greece*, 134 S. Ct. at 1818. If historical precedent was abandoned and a test established, the test would create the very controversy along religious lines the Establishment Clause was intended to prevent. *Town of Greece*, 134 S. Ct. at 1819.

The Founding Fathers' purpose behind allowing legislative prayer was based on the idea that the practice "lends gravity to public business, reminds lawmakers to transcend petty differences in pursuit of a higher purpose, and expresses a common aspiration to a just and peaceful society." *Id.* at 1818. Today's high courts have nearly unanimously concluded that legislative prayer is constitutional and that there is no formalized test for determining the constitutionality of the practice. Dicta in many cases, however, has established that it is possible for legislative prayer to cross a constitutional boundary if the content of the prayer is too proselytizing or if the legislative body has too much control over the content of the prayer. *Marsh*, 463 U.S. at 795; *Town of Greece*, 134 S. Ct. at 1816. The vital inquiry in all legislative prayer cases is whether the case specific facts align with the long tradition of Congressional and State Legislative prayer. *Id.* Thus, this issue turns on whether the Central Perk Town Council's influence on the prayers, or the proselytizing nature of the prayers exceeds the vast constitutional protection over legislative prayer. *Id.* at 1819.

A. Central Perk has not exploited legislative prayer to proselytize or disparage any faith or belief.

The content of legislative prayer is only questioned by courts where the "the prayer opportunity has been exploited to proselytize or advance any one, or disparage any other, faith or

belief." *Marsh*, 463 U.S. at 794-95. The tradition of legislative prayer does not require, nor even suggest, that prayers must be nonsectarian. *Town of Greece*, 134 S. Ct. at 1820; *see Marsh*, 463 U.S. at 786 (finding prayers in the Nebraska State Legislature need not address a generic theism because the history and tradition of the practice, in the limited scope of opening ceremonies could "coexist with the principles of disestablishment and religious freedom."); *see also Lund v. Rowan County*, 837 F.3d 407, 411 (4th Cir. 2016) (holding the content of the prayers was constitutional even though ninety-seven percent of the invocations offered were sectarian Christian prayers referencing "Jesus," "Christ," and "Lord.").

Once a legislative body allows prayer in a public environment, "the government must permit a prayer giver to address his or her own God or gods as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian." *See Town of Greece*, 134 S. Ct. at 1822-23 (finding the town's legislative prayer policy constitutional when the town allowed Jewish, Baha'i, and Wiccan prayers, even though all invocations prior to the complaint were Christian prayers); *see also Wynne v. Town of Great Falls*, 376 F.3d 292, 294-95 (2004) (finding the town's legislative prayer policy unconstitutional, not because it was entirely Christian, but instead because the town board repeatedly refused to let a Wiccan prayer giver participate by giving an invocation at the town meeting and ultimately ostracized her); *see also Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276, 279 (2005) (upholding a county board's decision to deny a "witch" leader's request to be added to the list of ministers allowed to give non-sectarian invocations at town meetings because the town's approved minister list included over two hundred and thirty five ministers from dozens of different religions showing the town did not favor or proselytizing any faith).

Although early Congressional prayer undoubtedly consisted of predominantly Christian themes, "these prayers must not be dismissed as the relic of a time when our Nation was less pluralistic than it is today." *Town of Greece*, 134 S. Ct. at 1820-21. Congress continually allows ministers of many faiths to conduct prayers, and in no way limits the prayers to a specific sectarian content. *But see Id.* at 1820 (holding exclusively Christian prayers at town meetings was not evidence of proselytization or denigration, reasoning that "our tradition assumes that…citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith). Rather, as long as a legislative body's policy is nondiscriminatory, "the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing." *Town of Greece*, 134 S. Ct. at 1824 (holding the town's legislative prayer practice was constitutional even though nearly all of the prayers were Christian because nearly all of the congregations in town were Christian). This Court reasoned

> the 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.

This Court has cautioned, however, that some legislative prayer content may fail to fulfill its ceremonial function of lending "gravity to the occasion and reflecting values long part of the Nation's heritage." *Id.* at 1823. For example, "if the course and practice over time shows that the invocation denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion," then the constitutional protection over legislative prayer may not extend to such proselytizing content. *Id.* This Court qualified this precautionary warning, however, by firmly stating that "a few deviating prayers were of no constitutional consequence." *Id.* at 1824

(holding a town's municipal prayer practice was constitutional even though there were multiple incidents of prayers containing disparaging content because the prayer practice as a whole served the purpose of solemnizing the board meetings).

Unless a strong pattern of numerous prayers exists that proselytize and denigrate the audience, a "challenge based solely on the content of a prayer will not likely establish a constitutional violation." *Town of Greece*, 134 S. Ct. at 1824. Anything below this high threshold, the Supreme Court is strongly disinclined to "embark on a sensitive evaluation or to parse the content of a particular prayer." *Marsh*, 463 U.S. at 795; *Town of Greece*, 134 S. Ct. at 1816 (holding the content of the prayers were not unconstitutional even though they contained salvation language such as "Lord we ask you to bless us all, that everything we do here tonight will move you to welcome us one day into your kingdom as good and faithful servants," and "we acknowledge the saving sacrifice of Jesus Christ on the cross."); *Lund*, 837 F.3d at 422.

Central Perk has not exploited legislative prayer to proselytize or disparage any faith or belief. In *Lund*, the Rowan County Board of Commissioners opened its meetings with an invocation lead by a member of the board, ninety-seven percent of which were Christian in nature. Here, in the twenty Council meetings that occurred from the implementation of the policy until the filing of this lawsuit, twenty percent were Christian, ten percent were Baha'i, fifteen percent were Muslim, forty-five percent were Mormon, and ten percent of the time no invocation was given. If the court in *Lund* found no constitutional problem with legislative prayer that was almost exclusively Christian, it is unlikely that Central Perk's diverse and inclusive history of allowing many different religions should raise much concern. Furthermore, in *Town of Greece,* the legislative body only allowed Jewish, Baha'i, and Wiccan prayers to open their meetings after a complaint was filed. Here, Central Perk was ahead of the curve and

allowed a diverse array of prayer givers to give invocations from the moment they implemented the policy. Central Perk invited prayer into the public arena with their 2014 policy, and thereafter they permitted many different prayer givers to address a wide variety of deities without questioning the sectarian nature of the prayers.

Unlike in *Wynne*, where a Wiccan woman was refused the opportunity to lead an opening invocation because the council wanted to limit the content of the prayers to strictly Christian invocations, here the council members have complete autonomy in determining the faith or non-spiritual aspect of the invocation. This policy of allowing invocations from a diverse spectrum of faiths is consistent with the tradition of legislative prayer that assumes individuals are firm enough in their own beliefs to appreciate, or at least tolerate, a ceremonial prayer delivered by an individual of another faith. In *Simpson,* the Fourth Circuit upheld the constitutionality of a town council's decision to deny a "witch" the opportunity to give an invocation at a town meeting. Here, Central Perk has not denied anyone the opportunity to open a meeting in prayer; the invocations have only coincidentally been exclusively theistic. Like in *Simpson* where the legislative body casted a wide net in the number of faiths allowed to give invocations, here Central Perk has welcomed many different faiths into its meetings, and has never even denied a would-be prayer giver, so any "judicial fine-tuning" of Central Perk's prayer policies is unwarranted.

Moreover, the content of Central Perk's Town Council prayers has not crossed the line suggesting a "practice over time of invocations denigrating non-believers or religious minorities, threatening damnation, or preaching conversion." In *Town of Greece*, a typical Christian prayer included language such as "Lord we ask you to bless us all, that everything we do here tonight will move you to welcome us one day into your kingdom as good and faithful servants," and "we

acknowledge the saving sacrifice of Jesus Christ on the cross." Here, the Christian prayers asked for salvation for those "who do not yet know Jesus" for "blinders to be removed from the eyes of those who deny God," for "every Central Perk citizen's knee to bend before King Jesus," and concluded with "in the name of our Lord and Savior, Jesus Christ." In both cases the language of the invocations preaches the same message of salvation, asking Jesus to save the members of the audience, rather than asking the audience to turn to Jesus. Based on the precedent set forth by this Court in *Town of Greece*, which held there was no Establishment Clause issue with the Christian prayers' message of salvation, this Court must find that the Christian prayers offered at the Central Perk Town Council meetings did not exceed constitutional protection.

With regard to the language in the Mormon invocation which warned against the Telestial Kingdom, Petitioner is likely to focus on the language in *Town of Greece* warning that there may be constitutional issues with prayer that threatens damnation. This comparison is flawed, however, because in the Mormon religion, the Telestial Kingdom is not "Hell," where Satan and his devils will be sent. Rather the Telestial Kingdom is merely a lower sector of Heaven. *See generally* Joseph Smith, *The Book of Mormon*: *Another Testament of Jesus Christ* (1830). Even if the prayers did threaten damnation, this Court in *Town of Greece* firmly established that a few deviating prayers were not sufficient to derail the constitutionality of legislative prayer. The tradition of prayer before government meetings is too established to be defeated by a challenge merely based on the content of a few prayers. Since the beginning of Central Perk's legislative prayer policy, the town has been completely open to prayers from many different religions, and thus the Council did not establish a strong pattern of proselytizing or denigrating.

Petitioners assert that Central Perk's legislative prayer policy is unconstitutional because it consists of only theistic prayers instead of both theistic and non-theistic invocations. This assertion is both factually and legally incorrect. Factually, Council Member Gunther Geffroy asked that he never be selected to give an invocation. Through this decision, Geffroy represented a non-theistic view that excluded any reference to a deity. Furthermore, Council Member Green twice elected to omit an invocation to start the meeting. This means that ten percent of the Central Perk council meetings began with no reference to a deity and proceeded directly to the pledge of allegiance. The law does not require a legislative body to search high and low beyond its borders to find ministers or lay persons to give invocations representing every minority sect in its district. Rather, it need only maintain a policy that if the legislative body decides to invite prayer into the public forum, it cannot deny any group the opportunity to give an invocation representing their faith.

Here, Central Perk decided in 2014 to invite prayer into the public forum of its town council meetings. Since then, it has maintained an open policy of allowing its members to give an invocation of their choosing, select an individual to give a prayer, or omit the invocation. Council member Geffroy's decision to never be selected to make the decision and Council member Green's decision to twice omit the prayer serve as examples of the policy removing religion from that month's meeting. If this Court is not sufficiently persuaded by this factual argument, however, it need only look to its decision in *Town of Greece*, which does not require a legislative body to actively seek out a would-be prayer giver for every religious minority in town so long as it maintains a non-discriminatory policy. If the citizens of Central Perk want non-theistic invocations to occasionally start a Town Council meeting, they may elect

an atheist council member or urge Council Member Geffroy to give such an invocation. The Supreme Court is not the appropriate forum for such a request.

Finally, Petitioners will likely point to the ruling in *Turner* to support their argument for less sectarian prayer. In *Turner*, the City Council of Fredericksburg implemented a policy of requiring invocations at monthly meetings to be non-denominational prayers that addressed a generic deity, only after the ACLU threatened them with litigation. Mr. Turner refused and informed the mayor that he was required by his faith to close his prayer in the "name of Jesus Christ." When the mayor then disallowed Mr. Turner from giving an invocation, Turner brought suit.

Although the case at hand differs from *Turner* in some factual aspects, the court's holding and reasoning is still applicable. Much like in *Turner*, where the court ruled in favor of maintaining the status quo of non-denominational prayers, here this Court should rule in favor of maintaining the status quo of allowing denominational prayers from a wide variety of religions. Legislative prayer common law does not require there to be spiritual invocations at the beginning of every meeting. Rather, it simply protects those legislative bodies that wish to model centuries of tradition. If a municipal board decides to not allow invocations or only non-denominational invocations, there is likely little judicial recourse for anyone attempting to change the status quo. The would-be plaintiff may alternatively seek legislative change by lobbying or urging the electorate to pressure public officials, but they likely will not achieve any progress in court. Because Central Perk's Town Council's status quo is to allow sectarian invocations from a variety of religions, and because tradition only requires that if the council invites religion in the public forum they must permit any prayer giver to address his or her own God or gods as conscience dictates Central Perk's legislative prayer practice is constitutional.

B. Central Perk's policy of allowing its board members to either give an invocation of their choosing, select a minister from the community to give an invocation, or omit an invocation all together does not violate the Establishment Clause.

The "history and tradition" of this Court's holdings on legislative prayer establish the constitutionality of both prayers given by outside ministers and lawmakers. *Lund*, 837 F.3d at 418. These traditions continue today as a majority of state legislatures, and even Congress, have allowed legislatures to give invocations as a ceremonial opening to legislative business. *Id.* at 419; *Turner*, 534 F.3d at 353 (finding the city council's policy did not violate the Establishment Clause even though one of the council's elected members gave an invocation at the beginning of each meeting). In determining if lawmaker-led prayers are constitutional, the court used the same logic by stating, "any test we adopt must acknowledge a practice that was accepted by the framers and has withstood the critical scrutiny of time and political change." *Town of Greece*, 134 S. Ct. at 1819.

Justice Alito's concurrence addressed the question noting "if there is any inconsistency between any [Establishment Clause test] and the historical practice of legislative prayer, the inconsistency calls into question the validity of the test, not the historic practice." *Id.* at 1834. Based on this Court's dicta, the *Lund* court concluded that legislative prayer does not lose its constitutional protection simply because a member of the legislative body delivers the invocation, reasoning that "a legal framework that would result in striking down legislative prayer practices that have long been accepted as part of the fabric of our society cannot be correct." *Lund*, 837 F.3d at 420 (quoting *Town of Greece*, 134 S. Ct. at 1819).

The primary audience for legislative prayer is the law makers themselves, not the public, because it is the lawmakers who derive the benefit from "a moment of prayer or quiet reflection set[ting] the mind to a higher purpose and thereby eas[ing] the task of governing." *Town of*

Greece, 134. S. Ct. at 1825 (Kennedy. J., plurality opinion) (finding lawmaker led prayer constitutional where the town's purpose for opening the meeting with a prayer was to place the board members in a solemn and deliberate state of mind, invoke divine guidance in town affairs, and to follow a Congressional and state legislative tradition by opening meetings with prayer). Justice Kennedy's dicta specifically mentions local town board members and commissions, because they are often volunteers, and the "ceremonial prayer may… reflect the values they hold as private citizens." *Town of Greece*, 134. S. Ct. at 1826. If local legislators are to accurately reflect themselves, and thus the people who elected them, "[i]t stands to reason that they should be able to lead such prayers for the intended audience: themselves." *Lund,* 837 F.3d at 420.

Furthermore, lawmaker-led legislative prayer does not amount to unconstitutional government supervision of prayer. *Id.* (holding a town board's practice of commissioners giving their own prayers without "oversight, input, or direction" by the board as a whole was constitutional because there was not a concern about the government making the ultimate decision on whether the religious speech was permissible or not). In situations where the commissioners alone chose the content of their prayer, the court found them to be "free agents" who are unedited in the content of their speech and thus the government is not unconstitutionally supervising prayer. *Id.* at 421. When private choice of content is accompanied by a neutral government policy simply allowing or enabling private religious acts, "those acts do not necessarily bear the state's imprimatur." *Id.*

Central Perk's policy of allowing its board members to either give an invocation of their choosing, select a minister from the community to give an invocation, or omit an invocation all together does not violate the Establishment Clause. Like in *Turner*, where the town policy was

to rotate among five council members the opportunity to give an invocation themselves, Central Perk's board members are randomly selected each month and given the opportunity to begin the meeting with an invocation of their choice, if they choose to do so. In both situations, the practice is constitutional because the history and tradition of legislative prayer contains a long list of lawmaker-led prayer. The practice was adopted by the framers and withstood the critical scrutiny of time and political change. With historical precedent as the only test, Petitioners' argument that lawmaker-led prayer is unconstitutional is a confusing assertion considering a majority of state legislatures and Congress allow lawmakers to open sessions by giving invocations themselves.

Furthermore, the primary purpose of Central Perk's legislative prayer policy is consistent with the long history and tradition of legislative prayer. In *Town of Greece*, the town's purpose for opening the meeting with a prayer was to place the board members in a solemn and deliberate state of mind, invoke divine guidance in town affairs, and to follow a Congressional and state legislative tradition by opening meetings with a prayer. Likewise, Central Perk's written policy states that its purpose is to invoke divine guidance for its proceedings to help and benefit council members to make decisions that are in the best interest of the town, and that praying is for the primary benefit of the town council members. This purpose is consistent with the tradition and purpose of legislative prayer because, as Justice Kennedy states, town board members and commissioners are especially in need of guidance and solace because they are often volunteers rather than professional public officials. Town council members were elected because of who they are and what they represent, and thus they reflect the wishes of the people they represent. It stands to reason that the Central Perk Town Council Members should be allowed to lead prayers that accurately reflect themselves and the electorate that voted for them.

Finally, Central Perk Town Council's policy of allowing council members to select community ministers does not amount to unconstitutional government supervision of prayer. In *Town of Greece*, the town supervisor selected local clergymen to give invocations before the start of each town board meeting; however, they maintained a policy of neither reviewing the prayers in advance of the meetings or providing guidance as to the tone or content of the invocation. Here, Central Perk Town Council has adopted a nearly identical policy that forbids any council member from reviewing or providing any input into a local minister's invocation. In both situations, the legislative body avoided exercising any control over the prayers and thus avoided censoring or promoting one religion over another.

Furthermore, like in *Lund*, where the court ruled the board members themselves giving the invocations did not amount to government endorsing or disparaging one religion over the other, this Court should rule that the few times Central Perk Town Council members gave invocations were also constitutional. By allowing complete autonomy in the Central Perk Council member's choice of invocation, the council allowed the members to become "free agents," and thus the content of their chosen invocation is free from bearing the board's "imprimatur." Following the precedent in *Town of Greece* and *Lund,* history and tradition should allow the co-mingling of religion and government in Central Perk's Town Council legislative prayer because there is no concern that the council is exerting an unconstitutional amount of "oversight, input, or direction" over the delivery of the prayer.

II. The various invocations given at the City Council meetings were not constitutionally coercive of either the adults or high school seniors in attendance because a reasonable observer would not find these prayers coercive and the students who attended the meetings did so voluntarily.

Respondent's fully support the notion that the Establishment Clause of the First Amendment prescribes, the "government may not coerce its citizens 'to support or participate in

any religion or its exercise.'" *Town of Greece*, 134. S. Ct. at 1825 (quoting *Cty. of Allegheny v. ACLU*, 429 U.S. 573, 659 (1989)). The mere fact that a prayer is given in a public setting, no matter how intimate or formal, does not force courts to find that an unconstitutional coercion occurred. *Town of Greece*, 134. S. Ct. at 1825. In fact, when examining whether or not an individual has been coerced by a legislative prayer policy, courts must again consider the "historical backdrop" of the legislative prayer practice, "a practice that has long endured," a practice that "has become part of our heritage and tradition," a practice that is "part of our expressive idiom, similar to the Pledge of Allegiance, inaugural prayer, or the recitation of 'God save the United States and this honorable Court" at the opening of this Court's sessions.'" *Town of Greece*, 134. S. Ct. at 1825. When considering coercion, *Marsh* must again guide a court from the start of its analysis. *Id*. As this Court recognized in *Marsh,* "the opening of legislative sessions with the recitation of prayer is deeply embedded in the 'unique history' and tradition of this country." In turn, in determining if a legislative body's citizens have been coerced, courts engage in a fact-sensitive inquiry regarding the setting the prayer was given in and the audience that the prayer was directed at. *Id*.[2]

A. The opening invocations that the City Council engaged in did not unconstitutionally coerce any adult citizens in attendance because a reasonable observer recognizes the historical significance of legislative prayer.

When courts consider the specific facts of any invocation at issue, they must do so through the eyes of a reasonable observer. *Town of Greece*, 134. S. Ct. at 1825.[3] In *Town of Greece*, this court affirmed the reasonable observer presumption recognized in *Salazar v. Buono*,

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[2] Justice Kennedy's interpretation of the coercion test was not the only theory suggested by the court in *Town of Greece*. *See Lund*, 837 F.3d at 426 (recognizing the differing tests but applying Kennedy's test "Justices Thomas and Scalia would require coercion to consist of 'the coercive state establishments that existed at the founding,' which essentially equates to religious observance 'by force of law and threat of penalty.").

[3] The coercion test has not always been a cornerstone of Establishment Clause jurisprudence, and this Court only recently concluded that courts must consider coercion in every case where the Petitioners allege the government has acted in a coercive manner. *Id.*

noting, "[i]t is presumed that the reasonable observer is acquainted with this tradition and understands that its purposes are to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens, not to afford government an opportunity to proselytize . . . ." *Id.* at 1825; *Salazar v. Buono*, 599 U.S. 700, 720-21 (2010).

Further, a reasonable observer would not view speech that they merely disagree with as coercive. *Town of Greece*, 134. S. Ct. at 1826. In *Town of Greece*, this court echoed a principle that runs deep in First Amendment jurisprudence, an "[o]ffense . . . does not equate to coercion. Adults often encounter speech they find disagreeable; and an Establishment clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum." *Town of Greece*, 134. S. Ct. at 1825. In that same opinion, this Court went on to reason through a policy that has been relied on by numerous circuits, that the reasonable observer in America recognizes the historical backdrop of legislative prayer that was first espoused in *Marsh*. See e.g., *Id.*; *Lund,* 837 F.3d at 426. Relying on the jurisprudence outlined by this Court in *Marsh* and *Town of Greece*, the 4th Circuit Court of Appeals perfectly synthesized the psyche of the reasonable observer noting "reasonable observers are aware of the multiple traditions acknowledging God in this country, including legislative prayer, the pledge of allegiance, and presidential prayers . . . citizens [can] appreciate the town's prayer practice without being compelled to participate." *Lund*, 837 F.3d at 317.

In turn, a government entity only coerces individuals to participate in a religious exercise when that entity singles out those with opposing religious views or favors those with similar religious views. *Town of Greece*, 134. S. Ct. at 1826. The "red flags" that this Court considered indicative of such coercive practices might exist if "town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions

might be influenced by a person's acquiescence in the prayer opportunity." *Id.*; *Lund*, 837 F.3d at 427.

A town has also not engaged in unconstitutional coercion where the attendees are free to arrive after the prayer occurs or leave while it is being conducted. *See Town of Greece*, 134. S. Ct. at 1825 (holding the town's legislative prayer practice constitutional where "board members and constituents [were] 'free to enter and leave with little comment and for any number of reasons.'"); *see also Lund*, 837 F.3d at 428 (applying the test outlined by *Town of Greece* and holding that a town's practice could not be considered coercive in a "fair and real sense" when "as a practical matter, citizens attending a board meeting who found the prayer unwanted had several options available – they could arrive after the invocation, leave for the duration of the prayer, or remain for the duration of the prayer without participating . . . .").[4]

Additionally, an invocation policy does not unduly coerce citizens by allowing a government official or clergy member to ask the audience to stand. *See Lund*, 837 F.3d at 429-30 (holding that the use of a phrase such as "let us pray' is essentially a mental reflex, which the reasonable observer would view as a pleasantry and not an actual command reasoning that "[n]o case has ever held such a routine courtesy opening a legislative session amounts to coercion of the gallery audience. It would come as quite a shock to the founders if it had.").

The prayer policy employed by the Central Perk City Council was in no way unduly coercive of the citizens in attendance because the reasonable observer of this prayer policy recognizes the historical environment of legislative prayer, their ability to hear such reverent

[4] Interestingly, the Fourth Circuit Court of Appeals decision in Lund was appealed to this Court via a writ of certiorari that was denied. *Rowan Cty. v. Lund*, 138 S. Ct. 2564, 2564 (2018). Although this Court's official stance is that *writ of certiorari* denials have no meaning at all, lower court judges, attorneys and citizens have long been weary of that blind assumption. A Columbia Law Review Article examined this "orthodox view" and concluded that it is "oversimplified, and in some cases, false . . . in a significant number of cases a denial does indicate that most of the Justices were not strongly dissatisfied with the actions below." Peter Lizner, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227, 1229 (1979).

language without being engendered by it, and the simple fact that U.S. citizens come into contact with language with which they do no not agree on a daily basis without implicating constitutional concerns. In turn, without some affirmative showing by the Petitioners, there is an assumption that Central Perk's prayer policy is not coercive. Such a showing was not made in the instant matter. Here, just as in *Town of Greece* and *Lund*, there is nothing in the record that would suggest citizens attending the meeting could not leave the meeting, arrive after the benediction, or simply object to the prayer in some quiet and respectful manner. Further, Petitioners have not alleged any such facts.

Even more telling is the Petitioners' failure to show that any "red flag" facts exist as described by this Court in *Town of Greece*. No petitioner has argued that his or her participation in the prayer or lack thereof caused the board to "single[] out dissidents for opprobrium, or indicate[] that their decisions might be influenced by a person's acquiescence in the prayer opportunity." Petitioners may argue that a red flag exists because they were invited to stand before the pledge of allegiance was recited and the prayer was given. As the *Lund* court noted, however, no case has ever held that such a pleasantry constituted undue coercion under the constitution. This invitation, like the invitations to join in prayer given in *Lund* and numerous other cases, was simply a "mental reflex" not a command.

When the Central Park Town Council amended its more than sixty-year-old tradition of reverently reciting the pledge of allegiance before each meeting to formally allow the council members to offer a religious invocation, they did not create a policy that coerced the Central Perk Citizens in any meaningful way. Absent an additional showing of facts by the Petitioners, this Court must recognize its own rule established in *Marsh* and *Town of Greece*, which "placed the coercion bar so high. . . [that] adults are not presumed susceptible to religious indoctrination

or pressure simply from speech they would rather not hear," and in turn find that the Central Perk Prayer Policy did not coerce any adults in attendance.

B. The prayers given by Green or the clergy members did not unconstitutionally coerce the Central Perk High School students because the Establishment Clause does not entirely bar students from experiencing adverse religious practices and the extra credit assignment at issue was in no way mandatory.

The jurisprudence that this Court has created in reference to students and the Establishment Clause almost exclusively focuses on prayer that school officials induced students to engage in while on school grounds or during mandatory school activities. *See Town of Greece*, 134. S. Ct. at 1825, 1831 (holding legislative prayer was not coercive even where children and young adults were present but the alleged coercion did not occur on school grounds); *see also Lee v. Weisman*, 505 U.S. 577, 581-84 (1992); *see also Engel v. Vitale*, 370 U.S. 421, 422-24 (1962). This Court has focused on school grounds and mandatory school activities because prayer in these situations may have a higher coercive effect than it would on an adult or a youth who is not in the school setting when the prayer is given. *See Town of Greece*, 134. S. Ct. at 1825, 1831; *See Lee*, 505 U.S. at 581-84. It is not the Establishment Clause's purpose, however, to completely bar religious activity from occurring on school grounds or during school activity. [5] *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 102 (2001) (finding the school district violated the Establishment Clause by denying a religious club from using the school grounds after hours).

A public-school board undoubtedly coerces students to comply with a religious practice in violation of the Establishment Clause when they establish a policy that forces students to

[5] *See* Brett A. Geier & Annie Blankenship, *Praying for Touchdowns: Contemporary Law and Legislation for Prayer in Public School Athletics*, 15 FIRST AMEND. L. REV. 381, 384 (2017). finding that the Constitution "'explicitly protects the rights of children to pray in schools in a non-disruptive, non-coercive fashion' . . . students are free to engage in prayer. As individuals, students have "the right to freely articulate their religious beliefs in a public setting which is fundamental to American constitutional entitlements." I*d.* (quoting Robert Boston, *Why the Religious Right is Wrong About Separation of Church and State*, 111 (2003)).

recite a prayer every day before class. *See Engel*, 370 U.S at 422 (finding the school board's policy coerced students in an unconstitutional manner when each student was required to pray "almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."). This Court noted that *Engel* was not primarily concerned with coercion, but "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Id.* at 431. Later, in *Lee*, this court clarified that the coercive pressure doesn't automatically apply in all situations that involve students. *Lee*, 505 U.S. at 484-85

Instead, this Court stated that the normal coercive facts and circumstances of a reasonable individual test still applies, "for the dissenter of high school age . . . What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it." *Id. Lee* merely stands for the idea that when a complainant is a high school student, the court needs to put itself in the place of a reasonable high school aged individual. *See Id.* (holding that a prayer given at a high school graduation was coercive of dissenters when the school district supervised and controlled the graduation ceremony, thereby placing public and peer pressure on the students in attendance to "stand as a group or, at least, maintain respectful silence" while remaining in the ceremony room during the entire invocation).

The *Lee* court is not the only court that has noted graduations are particularly apt to coerce students to act because graduations are not voluntary in a "real and fair" sense. *Id.*; *see Doe v. Elmbrook School District*, 687 F.3d 840, 854-55 (7th Cir. 2012) (finding an Establishment Clause violation when the school district held a high school graduation in a church

because the school board effectively forced some students to submit to religious pressures). The mere fact that students have come into contact with religious activities or have been incentivized to attend an activity in a religious setting does not automatically violate the Establishment Clause.[6] *See Smith v. Jefferson Cty. Bd. Of Sch. Comm'rs*, 788 F.3d 580, 592-93 (6th Cir. 2015) (finding no Establishment Clause violation when high school activities occurred in a chapel and the students were free to leave because even though "it may have been inconvenient for a child to withdraw from the assemblies, attendance was not required and the assemblies did not carry anything like the monumental life importance that makes attendance at a high-school graduation close to mandatory.").[7]

The Central Perk City Council's prayer policy and Green's extra credit assignment did not equate to an unconstitutional coercion of the high school students who voluntarily chose to participate. The facts here are nearly incomparable to the coercive situation that was at issue in *Engel*, which acts as the cornerstone for the heightened public school coercion standard. In Engel, students were forced to recite a prayer every day before they could begin their studies. This Court also focused on the fact that the prayer practice in Engel occurred on school grounds during school hours.

Here, the record clearly state's that Green's course was an optional upper level seminar. Presumably, many students graduated from Central Perk High School without ever taking this

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[6] Justice Goldberg recognized this concept in his concurrence in *Schempp*, stating, "a relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution. *Schempp*, 374 U.S. 306.

[7] In his dissent on separate grounds in *Schempp*, Justice Stewart concisely articulated the subtle differences that the Court would use in future cases. Stewart described the separate lens that the court views students through, "the dangers of coercion involved in the holding of religious exercises in a schoolroom differ qualitatively from those presented by the use of similar exercises or affirmations in ceremonies attended by adults." Stewart went on to remind the Court that a public school's duty "is not that of providing an atmosphere in which children are kept scrupulously insulated from any awareness that some of their fellows may want to open the school day with prayer, or of the fact that there exist in our pluralistic society differences of religious belief." *Schempp*, 374 U.S. 316-17.

course. Additionally, the extra credit presentations occurred outside of school property and were not conducted during school hours. In turn, this situation is entirely unlike *Engel,* where a student could not go to school without being subjected to the unconstitutional prayer policy. Furthermore, not only was the class optional, but the extra credit assignment was also optional. In turn, a student had the option to take Green's course but still not be compelled to complete the extra credit assignment and therefore not encounter the Town Council's prayer policy. With these comparisons in mind, it is apparent that the issue at hand does not compare to the overt coercion which the founders originally considered and which the *Engel* court gave voice to.

For the Petitioners to have any claim that the assignment was coercive, they must be able to prove that the assignment would be considered coercive in the "fair and real" sense considered by this court in *Lee*. Respondents acknowledge that subtle coercive pressures may be more prevalent in some high school settings, such as a graduation. The Petitioners, however, cannot clear this lower hurdle because this case is easily distinguishable from *Lee*. Unlike the Petitioners in *Lee*, who were coerced by a policy implemented by the school board that affected a "monumental" occasion in their academic careers, Green's course is inconsequential by comparison. If the Petitioners in *Lee* wanted to graduate, then they had to submit to the prayer that the school board prescribed and in turn would likely feel pressured to stand or act in reverent observation of the prayer because all of their colleagues were doing the same thing.

Here, as noted above, Green's course and the extra credit assignment were entirely optional. The record shows that, at a maximum, thirteen students participated in the extra credit opportunity. This is undoubtedly less subtle and coercive peer pressure present in the instant matter than in *Lee*. In *Lee*, the entire student body would notice if the individual didn't attend the graduation or didn't stand during the invocation. Oppositely, as discussed above, there is nothing

in the record that suggests students had to be present for the invocation, could not leave while the invocation was given, or even respectfully dissent. In fact, Green's extra credit assignment only required the students to be present at the meetings during their brief five-minute presentation.

Petitioners may argue that the ability to gain academic credit acted as a subtle coercive pressure and that the students were therefore experienced a benefit or detriment based on submitting to the prayer. This argument fails to recognize, however, this extra credit assignment only had a small material effect on two student's grades. Increasing two student's grades by half of a letter grade is in no way a material coercive pressure as described by this Court in *Lee*. Consequentially, there are no facts in the record that support finding the petitioners were unconstitutionally coerced by the Central Perk City Council's prayer policy.

CONCLUSION

The judgment of the United States Court of Appeals for the Thirteenth Circuit must be affirmed.

APPENDIX

Central Perk's town prayer policy read in in relevant part

> Whereas the Supreme Court of the United States has held that legislative prayer for municipal legislative bodies is constitutional; Whereas the Central Perk Town Council agrees that invoking divine guidance for its proceedings would be helpful and beneficial to Council members, all of whom seek to make decisions that are in the best interest of the Town of Central Perk; and, Whereas praying before Town Council meetings is for the primary benefit of the Town Council Members, the following policy is adopted.