

No. 18-1308

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 2018

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

Petitioners,

v.

CENTRAL PERK TOWNSHIP,

Respondents.

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

BRIEF FOR THE PETITIONERS

TEAM G
Counsel for Petitioners

QUESTIONS PRESENTED

1. Are Central Perk Town Council's legislative prayer policy and practices a violation of the Establishment Clause of the First Amendment when council members have the exclusive power to control the content of the invocations and the invocations exclude non-theistic religions?
2. Are Central Perk Town Council's legislative prayer policy and practices unconstitutionally coercive when the Council subjected all attendees to invocations that contained discriminatory messages extolling the supremacy of sectarian dogma, and when high school students were, in a real sense, obligated to participate in the meetings to receive public school credit for a class administered by a member of the Council?

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OPINIONS AND ORDER

The Opinion and Order of the United States Court of Appeals for the Thirteenth Circuit is reproduced in the Record on pages 13-20. The Memorandum Opinion and Order and the Judgment of the United States District Court for the Eastern District of Old York is reproduced in the Record on pages 1-11.

JURISDICTION

The Order of the Thirteenth Circuit was entered on January 21, 2018. The Supreme Court of the United States granted Petitioner's Petition for a Writ of Certiorari on August 1, 2018. This Court's jurisdiction is properly invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

This case implicates the Establishment Clause of the First Amendment and federal statute 42 U.S.C. § 1983. The Establishment Clause protects citizens against the establishment of an official religion by the United States government. It also protects citizens' right to freely exercise the religion of their choice without governmental interference. Federal statute 42 U.S.C. § 1983 gives citizens the right to bring an action against the government when the government has violated their constitutional rights.

STATEMENT OF THE CASE

I. Statement of the Facts

Following the 2014 United States Supreme Court decision *Town of Greece v. Galloway*, the Central Perk Town Council (the Council) adopted a legislative prayer invocation policy. R. at 2. The policy permitted an invocation by council members or selected clergy to begin the Council's meetings, which were open to members of the community to address local concerns. *Id.* The policy

preamble declared the primary purpose of invoking divine guidance before a meeting was to help guide council members to make decisions that were in the best interest of Central Perk. *Id.*

a. *The Council's Legislative Prayer Policy*

Chairman Tribbiani randomly selected a council member's name from an envelope to determine who would provide the invocation for the next meeting. *Id.* Council Member Geffroy asked to be, and was, permanently excluded from the selection process. *Id.* The selected council member could personally give the invocation, choose a clergy member from the community to offer the invocation, or omit the invocation. *Id.* Council members requested citizens stand for all invocations. *Id.*

b. *The Council Members' Religions*

All participating council members exclusively endorsed theistic religions. R. at 2-3. Council Members Bing and Geller are members of the Church of Jesus Christ of Latter Day Saints, a Mormon faith. R. at 2. Combined, they were selected to give the invocation nine out of twenty times. *Id.* Each time, they selected their branch president to deliver the invocation. R. at 2-3. Council Members Hosenstein and Tribbiani belong to the New Life Community Chapel (New Life), and, combined, their names were drawn four times out of twenty. R. at 3. All four times, they asked a New Life pastor to give the invocation. *Id.* Council Member Green, a member of the Baha'i faith, had her name drawn four times. *Id.* She declined to give the invocation twice, and on the other two occasions she prayed to Buddha. *Id.* Council Member Willick, a member of the Muslim faith, had her name drawn three times. She personally gave the invocation all three times and prayed to Allah. *Id.*

Since the Council implemented the policy, not once did a council member invite clergy from outside his or her own faith to give the invocation. R. at 2-3, 8. The District Court pointed

out that it appeared “[n]o Council member seem[ed] to have reflected upon the effect uniformly theistic prayers would have on citizens who do not believe in a deity.” R. at 8.

c. Content of the Prayers

Council members and invited clergy used town council meetings to promote their religions. R. at 2-3. When David Minsk, Branch President for the Church of Jesus Christ of Latter Day Saints, provided the invocation, he prayed to the “Heavenly Father” whom he claimed to be the sole provider and thanked Him for His guidance in the session. R. at 3. He then closed his prayer in the name of Jesus Christ. *Id.* During five of the council meetings, Minsk prayed for the restoration of the ten tribes and for all to submit to Christ’s reign. *Id.* On three occasions, Minsk asked all present to not reject Jesus Christ or “commit grievous sins against the Heavenly Father.” *Id.* Minsk indicated that those who sinned “would be sent to the Telestial Kingdom, away from the fullness of God’s Light.” *Id.*

When New Life pastors gave the invocation, their message extolled Christianity as the one true religion. *Id.* After asking everyone present to bend a knee before King Jesus, the pastors prayed explicitly Christian prayers ending with the phrase, “in the name of our Lord and Savior, Jesus Christ.” *Id.* While their prayers asked for divine guidance for the council members during their meeting, the prayers included requests for salvation for all those “who do not yet know Jesus” and for “blindness to be removed from the eyes of those who deny God.” *Id.*

The two times Council Member Green provided the invocation for the meeting, she acknowledged Buddha’s infinite wisdom before asking that the meeting be conducted in peace and harmony. *Id.* All three times Council Member Willick led the prayer, she prayed that the peace, mercy, and blessings of Allah be upon everyone present. *Id.*

d. Council Member Green's Extra Credit Policy

Council Member Green, a tough and rigorous teacher at Central Perk High School, offered her students extra credit to become engaged in the political process. R. at 4. After Green was elected, the Council adopted a policy that allotted time at the beginning of each meeting for three students from Green's class to give five-minute presentations endorsing or opposing measures currently under consideration by the Council. *Id.* While Green's class was not required, it was very popular. *Id.* Students who partook were awarded five extra points toward their class participation grade. *Id.* The points had the ability to raise a student's grade by half a letter grade. *Id.*

e. Petitioners

Petitioners Geller, Burke, Kudrow, and Buffay each have a child enrolled in Green's class who made a presentation at a council meeting for extra credit. *Id.* Petitioner Geller is a member of New Life. R. at 5. Green gave the invocation on the night Geller's son made a presentation to the Council. R. at 4-5. Geller was upset that his son's teacher prayed "to a fake God" and "made a mockery of the purpose of legislative prayer," after she prayed to Buddha and acknowledged His infinite wisdom. R. at 5. Petitioners Burke, Kudrow, and Buffay (Atheist Petitioners) are members of the Central Perk Freethinkers Society. *Id.* President Minsk provided the invocation when Burke's son presented and when Buffay's daughter presented. *Id.* A New Life pastor provided the invocation on the night Kudrow's son presented. *Id.* Atheist Petitioners felt discriminated against based on the exclusive theistic messages of the invocations. R. at 5-6.

II. Proceedings Below

Geller filed a complaint on July 2, 2016 alleging Green's invocation was a coercive endorsement of religion in violation of the Establishment Clause. R. at 5. Geller alleged Green's role as a public school teacher required her to abstain from offering an invocation that publicly

endorsed a religion and from coercing her students to attend council meetings, where invocations were delivered, for class credit. *Id.* Geller further alleged that his son felt forced to pray to a divinity against his conscience. *Id.*

Atheist Petitioners filed a separate lawsuit on August 30, 2016, in which they alleged the council's invocations coerced their children into religious activity through Green's extra credit policy. R. at 5-6. Atheist Petitioners reasoned the Council's policy violated the Establishment Clause through the council members' practice of selecting members of their personal clergy to give the invocations and through giving the invocations themselves. *Id.* The complaint alleged this constituted an official sanction of the council members' religious views. R. at 5. They alleged the prayers either proselytized or denigrated other faiths and non-faiths, and thus were unconstitutionally coercive of citizens attending the meetings. R. at 6.

All Petitioners sought declaratory relief and permanent injunction of the Council's practice of prayer before its monthly meetings; the District Court consolidated the cases. R. at 1, 6. The District Court held the implemented prayer policy (1) "fell outside the boundaries of permissible legislative prayer established in governing Supreme Court precedents," and (2) "was unconstitutionally coercive as to both adults and children in attendance at the Council meetings where legislative prayer was offered." R. at 13. The Thirteenth Circuit reversed, holding neither the Supreme Court's legislative jurisprudence nor school jurisprudence supported the District Court's conclusions. *Id.*

SUMMARY OF THE ARGUMENT

This Court should affirm the District Court's decision to grant Petitioner's Motion for Summary Judgment. The Establishment Clause of the First Amendment mandates the government "shall make no law respecting an establishment of religion, or prohibiting the free exercise

thereof.” U.S. Const, amend. I. The Council’s prayer policy and practices created an unconstitutional establishment of religion. The Council unconstitutionally sanctioned a governmental preference for theistic religions over non-theistic religions.

Courts must inquire into the historical tradition of legislative prayer to decipher the treatment and pervasiveness of challenged practices. There is no tradition of council member-led prayer to validate the Council’s prayer policy and practices. This Court has upheld legislative prayer policies permitting prayers led by chaplains and invited clergy. However, it has never held a policy allowing council members to both lead their own prayers and hand-select a clergy member to lead a prayer to be constitutional. The council members’ exclusive control over the content of legislative prayer does not comport with the Establishment Clause.

The Council’s policy violated the Establishment Clause principle of restricting governmental composition of prayer when it gave council members the right to select clergy members and personally lead invocations. The Council’s legislative prayers solely represented the theistic faiths held by the council members, which amounted to an unconstitutional government sanction of theistic religions over non-theistic religions. The pattern of consistently theistic prayers, enabled by the Council’s policy, routinely discriminated against non-theistic audience members. The absence of non-theistic prayers, the disparagement of various faiths, and the lack of inclusive prayers violated the constitutional rights of Central Perk citizens who attended the Council’s meetings.

The Council did not uphold its constitutional obligations when it gave invited clergy complete freedom to choose the content of their invocations. The Council must not delegate the task of leading government-sponsored prayer to an audience containing adults and children without providing basic guidance to guest prayer-leaders. Additionally, examination of legislative

invocations is not judicial overreach. The alternative would allow governmental entities to craft abusive policies.

The Council's prayer policy was unconstitutionally coercive of all citizens and students in attendance at council meetings. The Establishment Clause bars the government from using its power and resources to coerce individuals to participate in government sanctioned religious proceedings. However, legislative prayer is exempted from typical analyses of Establishment Clause violations due to the unique history of traditional legislative prayer. Government action becomes unconstitutional when it enables a pattern that coerces citizens to participate in government-sponsored religious prayer. Courts use a fact-sensitive analysis to determine if the coerciveness of legislative prayer has exceeded the constitutional boundaries set forth by this Court.

The Council's prayer policy permitted a pattern of prayer that denigrated, proselytized, and betrayed an impermissible government purpose. The Council's monopoly over the delivery and content of legislative prayer disseminated sectarian dogma to attendees through messages that disparaged those of different faiths. Additionally, the local nature of the Council's meetings created a more coercive environment than that found at the State or Federal level.

Furthermore, the Council's prayer policy was coercive of public high school students scheduled to give presentations for academic credit at council meetings. Establishment Clause protections present in the classroom must extend to the Council's proceedings because the students' presence at council meetings was, in a sense, obligatory and supervised by their teacher. Governments may not force students to choose between becoming unwilling participants or conscientious objectors. The Council's policy violated this principle by enabling a pattern that subjected students to an unconstitutionally coercive environment.

The attendees' right to participate in local government will be unconstitutionally linked to forced participation in theistic prayer if the Council continues to follow its current prayer policy. Therefore, declaratory and injunctive relief for Petitioners are necessary to correct the Council's constitutional violations.

ARGUMENT

I. Central Perk Town Council's Prayer Policy and Practices Created an Unconstitutional Establishment of Religion

The District Court correctly granted Petitioner's Motion for Summary Judgment, because the Central Perk Town Council's prayer policy created an unconstitutional establishment of religion by the town government. The First Amendment of the United States Constitution decrees that the government "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const, amend. I.

The Council's prayer policy and practices amounted to an unconstitutional sanction of the town government's preference for theistic religions over non-theistic religions. The Establishment Clause is meant to protect United States citizens from official government preference of one religion over other religions; the Council's legislative prayers contravened this purpose. While legislative prayers are not per se unconstitutional, prayer must be restricted to uphold the Constitution. The Council's prayer policy and practices lacked the necessary restrictions to avoid violating the Establishment Clause. To protect Petitioners, the citizens of Central Perk, and participants in local government, this Court should reverse the Court of Appeals and affirm the decision of the District Court.

a. The Council's Prayer Policy and Practices Gave Council Members Unconstitutional Power Over the Content of Legislative Prayers

The Establishment Clause forbids government hostility and mandates government accommodation of all religions. *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). Government institutions have no right to force a religion on their citizens. *Van Orden v. Perry*, 545 U.S. 677, 683 (2005). While the First Amendment both prohibits the establishment of religion and guarantees the right to free exercise, neither “supersede[s] the fundamental limitations imposed” by the other. *Lee v. Weisman*, 505 U.S. 577, 587 (1992). Broadly, the Establishment Clause promises governmental neutrality in religion. *Gillette v. United States*, 401 U.S. 437, 449 (1971). It achieves this by protecting religious liberty with the aim of preventing political divides along religious lines. *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971). The Establishment Clause, in barring the government from religious matters, acts as an “instrument of social peace.” *Lund v. Rowan Cty., N. Carolina*, 863 F.3d 268, 275 (4th Cir. 2017), *cert. denied sub nom. Rowan Cty., N.C. v. Lund*, 138 S. Ct. 2564 (2018). The Establishment Clause jurisprudence establishes the basic principle that the government shall not compose official prayers with the goal of promoting a certain belief system or moral code. *Lee*, 505 U.S. at 587 (*citing Engel v. Vitale*, 370 U.S. 421, 425 (1962)); *see also Town of Greece v. Galloway*, 134 S. Ct. 1811, 1822 (2014).

The Council's policy violated the principle of restricting governmental religious composition of prayer when it gave council members the right to select clergy members or personally lead invocations during public town meetings. The policy violated the Establishment Clause when it allowed council members to advance their own religion through personal invocations and exclusively invite clergy members from their own religions to give invocations.

b. The Local Setting, the Exclusively Theistic Prayers, and the Lack of Grounding in Historical Tradition Made the Council’s Prayer Policy and Practices Unconstitutional

Town of Greece v. Galloway and *Marsh v. Chambers* provide doctrinal guidelines to help understand the constitutional violations present in the Council’s legislative prayer policy and practices. *Town of Greece*, 134 S. Ct. at 1822 (2014); *Marsh v. Chambers*, 463 U.S. 783, 791 (1986). This Court, in *Town of Greece*, acknowledged that it has not articulated “the precise boundary of the Establishment Clause.” *Town of Greece*, 134 S. Ct. at 1819. Courts must conduct a “fact-sensitive” analysis of the prayer policy and practices at issue. *Id.* at 1825. This fact-sensitive analysis includes a review of the prayer’s setting and audience, but it does not hinge on the contents of a single prayer. *Id.* at 1824, 1827.

Under *Marsh*, courts must inquire into the historical tradition of legislative prayer to decipher the treatment and pervasiveness of challenged practices; however, there is no tradition of council member-led prayer to validate the Council’s prayer policy and practices. *See Marsh*, 463 U.S. at 791. Based on tradition accepted by the Framers, this Court found that the Establishment Clause does not mandate all legislative prayers be nonsectarian or ecumenical. *Town of Greece*, 134 S. Ct. at 1820. For this reason, a constitutional challenge must be based on the pattern of prayer rather than the content of a single prayer. *Id.* at 1824.

i. A Fact-Sensitive Review Necessitates the Conclusion that the Council’s Prayer Policy is Unconstitutional

The absence of non-theistic prayers, the disparagement of various faiths, and the lack of inclusive prayers violated the constitutional rights of Central Perk citizens who attended the Council’s meetings. In *Town of Greece*, volunteer clergy members led legislative prayers at town board meetings. *Id.* at 1816. Nearly every congregation in the area was Christian, and, as a result,

the prayers were largely sectarian with a Christian message. *Id.* at 1824. However, the board made active efforts to abate the dominance of Christian prayers. *Id.* at 1816. The board invited a Jewish layman and a Baha'i practitioner to deliver prayers and granted a Wiccan priestess's request to give a prayer. *Id.* at 1817.

In the present case, the Council's legislative prayers solely represented the theistic faiths held by the council members, which amounted to an unconstitutional government sanction of theistic religions over non-theistic religions. The prayers given by council-invited clergy members exclusively promoted Mormonism and Christianity. Similarly, council members who personally gave invocations did not deviate from their own theistic religions. The Council's monthly meetings were the setting for every prayer at issue. The sectarian prayers did not represent the wide variety of faiths held by attendees. The pattern of consistently theistic prayers, permitted by the Council's policy, routinely discriminated against non-theistic audience members. The Council sanctioned theistic religions over non-theistic religions in complete disregard of the Establishment Clause and the constitutional rights of the attendees.

ii. The Council's Prayer Policy and Practices Do Not Fit into the Historical Tradition of Legislative Prayer

Central Perk cannot use the historical tradition analysis from *Marsh* to defend its prayer policy, because there is no authority to suggest the First Congress allowed its own members to lead religious invocations. *Marsh*, 463 U.S. at 791; *see Lund*, 863 F.3d at 294. *Marsh* instructs courts to interpret the Establishment Clause by reference to historical practices and understandings. *Marsh*, 463 U.S. at 792. As such, the court in *Lund* found no historical support of legislator-led prayer after scouring the "Journals of the House and Senate from 1789 to 1791, the official contemporaneous records of the proceedings in the First Congress, and the Annals of Congress." *Lund*, 863 F.3d at 294. While the historical tradition analysis upholds chaplain-led prayer and

volunteer clergy member-led prayer, no long-standing tradition of council member-led prayer exists. *Town of Greece*, 134 S. Ct. at 1820; *Marsh*, 463 U.S. at 794; see *Lund*, 863 F.3d at 294. Historically, the government has reserved the privilege to give a legislative invocation for religious leaders. *Lund*, 863 F.3d at 294.

The Council's policy diverged from the historically accepted tradition of legislative prayer. Instead of furthering the historically accepted practice of official chaplain-led or volunteer clergy member-led prayer, the Council enacted a policy that gave complete control over legislative prayer content to government officials. There is no historical support for this unprecedented governmental control over religious invocations. The lack of tradition alone does not necessarily invalidate the practice of council member-led prayer, but it does mean the Council cannot use a historical tradition argument to support the constitutionality of its prayer policy. This Court must look to more factually analogous case law to make a determination.

c. The Council's Prayer Policy and Practices Are Unconstitutional Under the Fourth Circuit's holding in *Lund v. Rowan City*

The constitutionally infirm prayer policy in *Lund v. Rowan City* closely parallels the Council's prayer policy. *Id.* The legislative prayers in *Lund* were led by local county board members who took turns leading the meeting in prayer. *Id.* at 273. The member responsible for the prayer had exclusive control over the prayer's content. *Id.* Additionally, the government refused to let anyone outside the board lead a prayer. *Id.* The identity of the invocation-leader is relevant to the constitutional analysis of an Establishment Clause claim. *Id.* at 283. In *Lund*, the court held the county's prayer practice historically and constitutionally invalid because board members exclusively led the legislative prayers. *Id.* at 272.

The Council's prayer policy and practices impermissibly granted local government officials exclusive control over the content of the meeting's prayers. The Council's prayer policy

allowed the council members, in their capacity as government actors, to deliver religious invocations. Allowing council members to hand-select clergy members invalidly allowed members to promote their own religious beliefs. The Council's practices showed that council members who invited clergy unfailingly selected clergy members from their own religion. It is unreasonable to expect clergy members to give an invocation outside of their religion. Since the inception of the Council's prayer policy, not one clergy member has defied this expectation. By selecting their own clergy members, council members effectively decided the content of the prayer. As the District Court found, "Not once did a Central Perk Council member think to invite clergy from outside his or her own faith. No Council member seems to have reflected upon the effect uniformly theistic prayers would have on citizens who do not believe in a deity." R. at 8.

Governmental entities are barred from permitting practices that sanction a religion, yet the Council's prayer practices sanctioned theistic religions to the detriment of non-theistic religions. Every council member who participated in the prayer policy belonged to a theistic religion; as a result, the prayer practice excluded and discriminated against non-theistic religions. As in *Lund*, the Council was "elbow-deep in the activities banned by the Establishment Clause—selecting and prescribing sectarian prayers." *Lund v. Rowan Cty.*, 837 F.3d 407, 434 (4th Cir.), as amended (Sept. 21, 2016), *reh'g en banc granted*, 670 F. App'x 106 (4th Cir. 2016), *and on reh'g en banc*, 863 F.3d 268 (4th Cir. 2017), *cert. denied sub nom. Rowan Cty. v. Lund*, 138 S. Ct. 2564 (2018). Just as the board in *Lund* impermissibly sanctioned sectarian prayers, the Council impermissibly sanctioned theistic prayers. This Court should use the *Lund* Court's reasoning to conclude the Establishment Clause does not allow the government, through town council members, to compose and lead prayers that promote their own religious beliefs.

d. The Council was Negligent in Monitoring Clergy Member’s Invocations

The delicate task of giving a government-sponsored prayer to an audience containing adults and children should not be “delegated without any guidance.” Cf. Jeremy G. Mallory, Comment, “*An Officer of the House Which Chooses Him, and Nothing More*”: How Should *Marsh v. Chambers* Apply to Rotating Chaplains?, 73 U. Chi. L. Rev. 1421 (2006). When a prayer-leader is a guest at a government meeting, he or she is likely unaware of the views and sensitivities of their audience. *Id.* Religious guests feel less pressure to cater to the audience and, therefore, are free to promote their religious agenda to the detriment of people of other faiths. *Id.*

The Council did not uphold its constitutional obligations when it gave invited clergy complete freedom to choose the content of their invocations. The council members had a responsibility to consider whether the invocations would violate the rights of the citizens in attendance under the Establishment Clause. Broad guidance over invocation content was necessary to prevent a religious guest’s invocation from promoting a singular religion. Because the Council did not rectify its Establishment Clause violations, this Court must step in and protect the constitutional rights of Central Perk citizens.

e. It Does Not Violate the Establishment Clause For a Court to Review Prayer Policies and Practices for Obvious Discrimination

Examination of legislative invocations is not judicial overreach, because the alternative would allow governmental entities to craft abusive policies. *Lund*, 863 F.3d at 283. When a “cursory look” exposes a constitutional violation within a prayer practice, courts must examine the entire record, including invocations. *Id.* Courts are well-equipped to identify obviously sectarian invocations. *Marsh*, 463 U.S. at 793 n.14.

f. The Council Must Reform Its Prayer Policy and Practices to Comport with Constitutional Requirements

The attendees' right to participate in local government will be unconstitutionally linked to forced participation in theistic prayer if the Council continues to follow its current prayer policy. A more thoughtfully developed prayer policy that does not discriminate against theist or non-theist religions would be a more appropriate way to begin legislative meetings. To align its prayer policy with the Constitution, the Council has a duty to ensure both theistic and non-theistic faiths are represented in its legislative prayers. The National Conference of Legislative Prayers directs chaplains "to use common language and shared symbols which are acceptable and understandable and not offensive or unintelligible." Nat'l Conf. of State Leg., *Inside the Legislative Process, Prayer Practices* 5-146 (2002). The Council should adopt this guideline as the foundation of their new prayer policy. To have a religiously neutral legislative prayer practice, the Council should follow the historical tradition of legislative prayer which this Court has held to be constitutional. *See Lund*, 863 F.3d at 294; *see Marsh*, 463 U.S. at 791.

Town of Greece and *Marsh* do not validate legislative prayer delivered by council members in a local government setting with active citizen participation. *See Town of Greece*, 134 S. Ct. at 1820; *see Marsh*, 463 U.S. at 794. The differences between a local town council and State or Federal legislature must be taken into consideration in the fact-sensitive analysis of the constitutionality of a prayer policy. *Town of Greece*, 134 S. Ct. at 1824. The Council's prayers are council member-led, but *Town of Greece* and *Marsh* only cover volunteer clergy-led and official chaplain-led prayer, respectively. Furthermore, the traditional history of legislative prayer does not allow for council member-led prayer. *Lund* provides more factually analogous case law. The reasoning in *Lund* must lead this Court to hold the Council's prayer policy is unconstitutional.

Courts must step in and end unconstitutional practices when a suit is filed after the lines between the government and religion are blurred to an extent that violates the Establishment Clause.

II. Central Perk Town Council’s Prayer Policy is Unconstitutionally Coercive of All Citizens and Students in Attendance

The Establishment Clause of the First Amendment is necessary to prevent the government from wielding its power to coerce individuals to participate in government-sanctioned religious doctrines. *Engel*, 370 U.S. at 431. Typically, courts use a three-part test to determine whether a government policy violates the Establishment Clause. *Lemon*, 403 U.S. at 612-13. Under *Lemon*, a statute or policy must (1) have a secular legislative purpose; (2) have a principal effect that neither advances nor inhibits religion; and (3) not foster an excessive government entanglement with religion. *Id.*

However, this Court exempted legislative prayer from the “*Lemon Test*” due to the “unique history” of traditional legislative prayer. *Marsh*, 463 U.S. at 791, 795. Legislative prayer violates the Establishment Clause if the facts reveal a statute or policy, over time, “denigrate[s], proselytize[s], or betray[s] an impermissible government purpose.” *Town of Greece*, 134 S. Ct. at 1824; accord *Marsh*, 463 U.S. at 794-95. A statute or policy becomes unconstitutionally coercive when the public is asked to join in prayer or shamed for not participating. *Town of Greece*, 134 S. Ct. at 1826.

a. A Policy Becomes Unconstitutional if it Enables a Pattern of Behavior that Coerces Citizens to Participate in Government-Sponsored Prayer.

Legislative prayer is constitutional only if the coercive pressures do not exceed the limitations imposed in *Town of Greece* and *Marsh*. *See id.* at 1824, 1826; *see Marsh*, 463 U.S. at 792. Whether the government endorsed coercive legislative prayer is a fact-sensitive inquiry that takes account of the time, place, and audience to whom prayers are directed. *Town of Greece*, 134

S. Ct. at 1825. Because the prayers given were to help the town board come to a “deliberative frame of mind,” this Court held that the Town of Greece had not engaged in coercive behavior. *Id.* at 1816. Legislative prayer is permissible if it is given to “lend gravity to public business” or to remind “lawmakers to transcend petty differences in pursuit of a higher purpose.” *Id.* at 1818. Respondents pointed to several prayers that singled out and criticized those who did not approve of the town’s prayer policy. *Id.* at 1824. This Court held that, while these prayers included language that was denigrating, proselytizing, or betraying of an impermissible government purpose, they were not sufficient to establish a pattern of coercion. *Id.* at 1824, 1827.

i. Circuit Courts are Split on the Application of the Fact-Sensitive Analysis Established in Town of Greece

1. Fourth Circuit Application

The Fourth Circuit Court of Appeals correctly applied the fact-sensitive analysis from *Town of Greece* to determine the constitutionality of legislative prayer held by a county commissioners board. *Lund*, 863 F.3d at 272. Board meetings began with a prayer delivered by a commissioner. *Id.* To begin the prayer, the chairperson asked those in attendance to stand up and to join in worship. *Id.* The commissioner delivering the prayer frequently asked those in attendance to pray with him. *Id.* The prayers were overwhelmingly Christian in content and ninety-seven percent of the time included the words “Jesus,” “Christ,” or “Savior.” *Id.* at 273. Plaintiffs stated that the prayers caused them to feel “excluded from the community and the local political process.” *Id.* at 274. In addition, Plaintiffs “felt compelled to stand for the invocation to avoid sticking out.” *Id.*

The Fourth Circuit used the fact-sensitive analysis to conclude that the board violated Plaintiff’s First Amendment rights. The board’s power to direct attendees to rise in reverence, the disdain shown towards non-Christian religions, and the intimate setting of the legislative

proceedings were beyond what is allowable under *Town of Greece*. *Id.* at 280-81. The Fourth Circuit held that the board’s policy was impermissibly coercive, stating when a commissioner “leads his constituents in prayer, he is not just another private citizen.” *Id.* at 290.

2. *Sixth Circuit Application*

The Sixth Circuit Court of Appeals reached a conflicting conclusion by incorrectly applying the fact-sensitive analysis. *See Town of Greece*, 134 S. Ct. at 1825. In *Bormuth v. County of Jackson*, the county commissioner’s board typically called for board members and attending public to “rise and assume a revert position.” *Bormuth v. Cty. of Jackson*, 870 F.3d 494, 498 (6th Cir. 2017), *cert. denied sub nom. Bormuth v. Jackson Cty.*, 138 S. Ct. 2708 (2018), *reh’g denied*, No. 17-7220, 2018 WL 4037507 (U.S. Aug. 24, 2018). A commissioner would then deliver a brief invocation; the invocations were not reviewed by any other member of the board. *Id.* The invocations were typically Christian and asked the “Lord,” “God,” or “Heavenly Father” to guide the board in its deliberations. *Id.* Plaintiff filed suit against the board because “the distinctly Christian prayers” of the board made him feel like he was in church and “being forced to worship Jesus Christ in order to participate in the business of County Government.” *Id.* at 498-99. Despite Plaintiff’s authentic feelings of offense, the Sixth Circuit held the board had not exceeded the scope of permissible coercion set forth in *Town of Greece*. *Id.* at 519.

ii. The Central Perk Town Council Prayer Policy is Impermissibly Coercive of all Attendees Because Its Effect Disparaged, Proselytized, and Singled Out Attendees for Criticism

The Council’s policy of allowing prayer before the commencement of each meeting permitted a pattern of prayer that was unconstitutionally coercive. A pattern is “a mode of behavior or series of acts that are recognizably consistent.” *Pattern*, Black’s Law Dictionary (10th ed. 2014). The primary constitutional concern arises from the recognizable selection patterns of the Mormon

and New Life members of the Council. Council Members Bing, Geller-Bing, Hosenstein, and Tribbiani accounted for the majority of prayers delivered. R. at 2-3. As such, attendees could expect Council Members Bing and Geller-Bing to select President Minsk and Council Members Hosenstein and Tribbiani to select pastors from New Life to give the invocation. When Council Members Green and Willick participated, neither deviated from their historical pattern of prayer. R. at 3. The legislative prayer policy enabled a pattern that denigrated, proselytized, or exceeded the purpose of legislative prayer.

1. The Council's Policy Permitted a Pattern of Prayer that Denigrated Attendees

The Mormon and New Life prayers denigrated the beliefs of attendees who were not members of either church. Prayers given by New Life pastors called for “blindness to be removed from the eyes of those who deny God” and proclaimed Christianity as the “one true” religion. *Id.* Calling adherents of different religions blind is not language spoken with the intent to “lend gravity to public business” or to remind “lawmakers to transcend petty differences in pursuit of a higher purpose.” *Town of Greece*, 134 S. Ct. at 1818. Proclamations that one religion is the only true religion is equally insulting to attendees of different faiths. Language of this type, endorsed by a legislative body, denigrates the religions of those who do not share the same view.

While sometimes overt, denigration can be an insidious and surreptitious attack on one’s faith. Branch President Minsk’s prayer that “none in attendance would reject Jesus Christ” was coupled with the condition that those who do reject Jesus “would be sent to the Celestial Kingdom, away from the fullness of God’s Light.” R. at 3. To those not members of the Mormon faith, the prayer is tantamount to a threat that rejection of Jesus would be met with punishment.

2. *The Council's Policy Permitted a Pattern of Prayer that Proselytized to Attendees*

The Council's policy allowed a majority of the Council's prayers to proselytize through commands of submission and acceptance, permitting Mormon and New Life clergy to usurp the Council meetings as a platform to proselytize. Of the nine prayers delivered by Minsk, five called for all to "submit to Christ's reign." *Id.* Three threatened that those who rejected Jesus would be sent away from "the fullness of God's light." *Id.* The pastors from the New Life Chapel requested "every Central Perk Citizen's knee to bend before King Jesus." *Id.* The content of these prayers was emblematic of proselytization.

3. *The Council's Policy Permitted a Pattern of Prayer that Betrayed an Impermissible Government Purpose*

A majority of the prayers allowed by the Council's policy did not serve the purpose of creating a spirit of cooperation and elevating the level of discourse between legislators. The stated purpose of the policy was to help the council members "make decisions that are in the best interest of the Town of Central Perk." R. at 2. The effect, however, did not achieve this purpose. Instead, council members gave a pulpit to clergy members of their faith to advance the ambitions of their own religion. This Court warned against this behavior by explaining the state owes a duty to guard and respect personal conscience and belief "which is the mark of a free people." *Lee*, 505 U.S. at 593. The Council's broad discretion and power did not bring solemnity to a legislative session but rather disparaged attendees of different beliefs. The repeated invitation of self-serving clergy members is emblematic of government behavior violative of the Establishment Clause.

iii. *The Decorum of a Town Council is Fundamentally Different Than a State or Federal Legislature*

The appearance of coercion should be given more scrutiny at the local level compared to higher levels of government. *Lund*, 863 F.3d at 287-88. Citizens attend town council meetings to

voice their concerns and to help shape local policy. *Id.* State and federal legislative sessions do not provide citizens with the same ability to participate in the democratic process; rather, people attend state or federal legislative sessions as spectators, not participants. As participants in local government, where one represents oneself, the pressure to comport with the etiquette of a legislative session is significantly greater. Justice Kagan exposed the disparity between the levels of government, stating “the gap—more like, the chasm—between a legislative floor session involving only elected officials and a town hall revolving around ordinary citizens” is plain. *Town of Greece*, 134 S. Ct. at 1851-852 (Kagan J., dissenting). The Fourth Circuit determined that the board meetings in *Lund* were violative of the Establishment Clause because “[l]ocal governments possess the power to directly influence both individual and community interests.” *Lund*, 863 F.3d at 287.

The Council’s power to influence local citizens in attendance is far greater than the influence found at state and federal level. Therefore, the coercive pressure citizens faced requires a higher degree of scrutiny as discussed in *Lund*. Attendees abstaining from the Council’s prayers would need to do so under the examination of friends and neighbors. Citizens fearing ostracization would join in the legislative prayer not because of sincere belief but due to impermissible government coercion.

iv. The Council’s Policy Created an Impermissible Monopoly Over Legislative Prayer

The dual power to command prayer delivered by both the government and the favored clergy members is beyond the tolerated boundaries of legislative prayer. The legislative prayer policies in both *Bormuth* and *Lund* allowed members of a county board to lead attendees in prayer; the legislative prayer policies in *Marsh* and *Town of Greece* allowed an officially appointed chaplain to lead attendees in prayer and allowed invited clergy members from the local community

to deliver a brief prayer, respectively. These policies explicitly gave legislators the power to either deliver a prayer personally or to select a member of the community to lead the legislative session in prayer, but not both.

The Central Perk Town Council’s policy gave members this unprecedented dual power. The Mormon and New Life members of the Council exercised their power to repeatedly select members of their own faith to deliver prayer. R. at 3. The Muslim and Baha’i members exercised their power to personally lead the Council in prayer. *Id.* The duality of the Council’s monopoly over legislative prayer sanctions coercion beyond what the Establishment Clause tolerates.

Over time, the Council’s policy created an unconstitutionally coercive atmosphere in violation of the Establishment Clause of the First Amendment. Viewed in total, the legislative prayer practice enabled council members to disseminate their religious beliefs. The policy, in contravention of its stated purpose, did not encourage council members to cooperate to best serve their community. The Council’s prayer policy and practice was coercive of all citizens in attendance, and is, therefore, unconstitutional.

b. The Council’s Prayer Policy Coerced High School Students to Participate in Legislative Prayer

i. Establishment Clause Rights are Guaranteed at Non-Compulsory Public School Events

When the link between government and religion is obvious, the constitutionality of school-sanctioned prayer is analyzed through the lens of coercion, not through the “*Lemon Test*.” *Lee*, 505 U.S. at 587. Unconstitutional coercion is a fact-sensitive inquiry that considers the setting of a challenged practice. *See Town of Greece*, 134 S. Ct. at 1825. This Court gives particular scrutiny to prayers given during school-sponsored events. *See Lee*, 505 U.S. at 592.

This Court invalidated the school prayer policy in *Lee*, despite no student obligation to attend and the nonsectarian guidelines for prayers. *Id.* at 594-95, 597. In *Lee*, a student and her family protested a public school’s invitation of a local rabbi to deliver an invocation and benediction for a graduation ceremony. *Id.* at 581. Student attendance at the graduation ceremony was not compulsory and did not affect a student’s ability to graduate. *Id.* at 583. The graduation procedure consisted of students entering in a procession and sitting together at the direction of their teachers. *Id.* The students were directed to stand for the rabbi’s prayer. *Id.*

Governments “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.” *Id.* at 587 (quoting *Lynch*, 465 U.S. at 678 (internal quotations removed)). In *Lee*, this Court focused on two primary facts: (1) state officials induced the prayers at the graduation, and (2) student attendance was “in a fair and real sense obligatory.” *Id.* at 586. The combination of the school district’s control over the graduation proceedings, coupled with the pressure on students to stand and remain silent during prayers, amounted to unconstitutionally coercive government behavior. *Id.* at 593; *see also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 316 (2000) (holding student-led invocations before football games were impermissibly coercive). Students, under the Establishment Clause, are entitled to their constitutional rights at non-compulsory school events. *Lee*, 505 U.S. at 593.

The nexus between the Central Perk High School and the Central Perk Town Council created an unconstitutionally coercive environment for attending students. This nexus impermissibly transposed the state’s supervision and control over classrooms onto the Council’s meetings. The non-compulsory nature of the students’ presentations does not abrogate the school’s duty to oversee the education of students who chose to give a presentation for school credit. Students attended, not as mere spectators, but as scheduled participants at the behest of their

teacher, Council Member Green. The students' attendance was "in a real sense obligatory" and, therefore, students were subjected to government-sanctioned prayer. *See Lee*, 505 U.S. at 586. The combination of the Council Member Green's control over the attending students' participation, coupled with the pressure on students to engage in legislative prayer, amounted to unconstitutionally coercive government behavior.

ii. The District Court Correctly Distinguished the Environment of a School Event from that of a State Legislative Session

School-sponsored events demand students submit to administrative rules, while the opening prayer of a State legislative session is free from the same expectation of submission to authority. *Id.* at 596-97. During state legislative sessions, visitors are free to enter and leave. *Id.* The same freedom to enter and exit is not typical of a school-sponsored event. Public school functions import "subtle and indirect" pressure upon students that "can be as real as any overt compulsion." *Id.* at 593. This creates an uneasy dilemma where students must choose to either participate in religious proceedings or make their protest clear. *Id.* To avoid this dilemma, the Constitution bars public institutions from demanding students choose between being an unwilling participant or a conscientious objector. *Id.*

Green's students attended the Council's meetings with the express purpose of furthering their public education by participating in legislative deliberations. Student presentations, as dictated by Green, were required to touch on "measures currently under consideration by the Council." R. at 4. Because their attendance was in a real sense obligatory, Green's students did not feel free to enter and leave as one would at a State legislative session. As an extension of a school classroom, the same rules of decorum and respect used to conduct class applied at Council meetings. Students who chose to present for extra credit did so under the belief that their conduct in the Council meetings was regulated by the same standards as a classroom. The children in *Town*

of Greece were mere spectators who did not attend the legislative session with the express intent to engage in the deliberative process under the direct supervision of a teacher. *Town of Greece*, 134 S. Ct. at 1827. The attendance of the Green’s students, therefore, is materially distinguishable from the attendance of the children in *Town of Greece*.

The overlap between the Central Perk Town Council and Central Perk High School “bore the imprint of the state” and put students who would object “in an untenable position.” *Lee*, 505 U.S. at 590; *see also Newdow v. U.S. Cong.*, 292 F.3d 597, 606 (9th Cir. 2002). The pressures of these two public institutions placed students in the fraught position against which the Establishment Clause was designed to protect. Because there “are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools,” *Lee*, 505 U.S. at 592, the Council’s policy, which subjected students to prayer in a forum that is an extension of their classroom, violates the Establishment Clause.

CONCLUSION

The Central Perk Town Council must be prohibited from continuing to follow their legislative prayer policy and practices because they unconstitutionally established government-sanctioned religion. Legislative prayer must convey respect for all religious whether they are theistic or non-theistic. The Council failed to follow this practice of respect and instead elevated theistic religions above all others.

The Council’s policy and practices violated the attendees’ constitutional right to participate in local government without being coerced into participating in theistic prayers. The Council’s prayer policy enabled a pattern of prayer that denigrated, proselytized, and betrayed an impermissible government purpose. The Council’s policy and practices, which sanctioned theistic

religions and coerced citizens and students attending town meetings, must be struck down to uphold Central Perk citizens' First Amendment rights.

This Court should affirm the decision of the District Court and grant declaratory and injunctive relief to Petitioners.