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,

Respondent.

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

BRIEF FOR PETITIONERS

Team H

ATTORNEYS FOR PETITIONERS

QUESTIONS PRESENTED

I. When a town council allows council members to retain exclusive control over invocations by delivering the prayers themselves or by designating clergy to speak on behalf of the council members, does the identity of the speaker delivering a legislative prayer differentiate this case from *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), which prohibits government officials from writing or sanctioning theistic, sectarian prayers?

II. Under the Establishment Clause, is a town council's prayer policy and practice unconstitutionally coercive where invocations at the beginning of each meeting implied the supremacy of sectarian dogma and where high school students received academic credit for making presentations at the meetings?

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STATEMENT OF JURISDICTION

The United States Court of Appeals for the Thirteenth Circuit entered judgment on January 21, 2018. R. at 19. This Court granted the petition for the writ of certiorari on August 1, 2018. R. at 20. This Court has jurisdiction to hear this case pursuant to 28 U.S.C. § 1254(1) (2012). The district court had subject matter jurisdiction to hear this case pursuant to 28 U.S.C. § 1331 (2012).

CONSTITUTIONAL PROVISIONS INVOLVED

This case concerns the First Amendment to the United States Constitution, which in pertinent part provides: "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.

STATEMENT OF THE CASE

I. STATEMENT OF THE FACTS

Central Perk Township is a rural area in Old York with a population of 12,645. R. at 1. Governed by a Town Council that holds monthly meetings to address issues of local concern, the Council consists of seven members elected twice a year. R. at 1.[1]

The Prayer Policy. In September 2014, the Board adopted a policy to allow prayer invocations at the beginning of each monthly meeting. R. at 2. The policy contains this preamble:

> 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 prayer before Town Council meetings is for the primary benefit of the Town Council Members, the following policy is adopted.

R. at 2. The policy provided that council members would be randomly selected to deliver the invocation or prayer. R. at 2. Once selected, the council member could choose to personally offer the prayer or they could select a minister from the community to speak on their behalf. R. at 2. The policy allowed each council member exclusive control over the selection of a minister from the community, but the member could not review or otherwise provide input into the minister's choice of invocation. R. at 2. The council member could elect to skip their opportunity to deliver a prayer and could proceed directly to the Pledge of Allegiance. R. at 2. At the beginning of each meeting, before the invocation and Pledge of Allegiance is given, the council Member opening the meeting requests all of the citizens present to stand. R. at 2.

[1] During the relevant time period, the Council members were Joey Tribbiani, Rachel Green, Monica Geller-Bing, Chandler Bing, Gunther Geffroy, Janice Hosenstein, and Carol Willick. R. at 1. Tribbiani was the Chairman of the Council. R. at 1.

The Prayer Policy Implementation. At each meeting, Chairman Tribbiani selected the council member that would deliver the invocation and lead the Pledge of Allegiance at the following month's meeting. R. at 2. The Chairman randomly selected each member by drawing names out of an envelope. R. at 2. All of the council members participated in the drawing except for Geffroy, who asked that he never be selected. R. at 2.

Council member Willick, a member of the Muslim faith, was drawn three times. R. at 3. Willick elected to deliver her prayers herself. R. at 3. All three times she prayed: "As salamu aleiykum wa ragmatullahi wa barakatuh," which translates "Peace and mercy and blessings of Allah be upon you."

Council member Green, a member of the Baha'i faith, was drawn four times. R. at 3. She declined the opportunity twice, but delivered the invocation herself the other two times she was selected. R. at 3. Green prayed to Buddha, acknowledged his infinite wisdom, and asked that the council meeting be conducted in harmony and peace. R. at 3.

Council member Bing was drawn four times and Council member Geller-Bing was drawn five times. R. at 2. Both Bing and Geller-Bing were members of the Church of Jesus Christ of Latter Day Saints. R. at 2. Each time these members were selected, they picked their Branch President, David Minsk, to deliver the invocation. R. at 3. Collectively, President Minsk spoke nine times. R. at 3. Once, he prayed:

> Heavenly 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.

R. at 3. Five times, President Minsk prayed: "Heavenly 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." R. at 3. Three times, President Minsk prayed and asked that

those 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.

Council member Hosenstein and Chairman Tribbiani were each drawn two times. R. at 3. Both Hosenstein and Tribbiani were members of New Life Community Chapel (New Life), which was an evangelical Christian church with a membership of 2,100 parishioners and four full-time clergies on staff. R. at 3. Each time these members were selected, they asked a New Life pastor to give the invocation. R. at 3. The pastors prayed explicitly Christian prayers ending with the phrase, "in the name of our Lord and Savior, Jesus Christ." R. at 3. Although the New Life pastors' prayers typically asked for divine guidance for the Council members, their prayers sometimes incorporated divergent themes, including requests for salvation for all those "who do not know Jesus," for "blinders to be removed from the eyes of those who deny God," and for "every Central Perk citizen's knee to bend before King Jesus." R. at 3. Thus, all four invocations extolled Christianity as the one true religion. R. at 3.

The Student Presentation Opportunity. At each monthly meeting, three students from Central Perk High School are invited to make five-minute presentations endorsing or opposing measures under consideration by the Council. R. at 4. This opportunity was set up by Council Member Green, who is a teacher at the local high school. R. at 4. Green teaches American history classes and a seminar in American Government for high school seniors. R. at 4. Green's class is popular because she is an excellent, though rigorous, teacher. R. at 4. Besides required papers and tests, Green encouraged her students to become engaged in the political process. R. at 4. One way that Green encouraged her students was through extra credit opportunities. R. at 4.

In November 2014, Green, with unanimous approval from the Council, offered her students the opportunity to present at the monthly meetings for five extra credit points to be added to their class participation grade, which constituted ten percent of their final grade in the class. R. at 4. Green's students did not have to make these presentations. R. at 4.

After allowing this opportunity, the average final grade in Green's American Government class went from an 89 to a 90, which is a B+ to an A- according to the school's grade scale. R. at 4. Twelve students in Green's class earned the five extra credit points from participation in Council meetings held from December 2014 through March 2014. R. at 4. One student raised her letter grade from a B- to a B. R. at 4. Another student raised his grade from a B+ to an A-. R. at 4. The other ten students' participation in the Council meetings did not affect their final letter grade in the class. R. at 4.

Presentations Made by Students. During the 2015–2016 academic year, four of the thirteen students from Green's class who made presentations to the Council were the children of the individual Plaintiffs. R. at 4. Ben Geller, son of Plaintiff Ross Geller, presented at the October 6, 2015 Council meeting. R. at 4. Green was the chosen speaker that day and prayed to Buddha and acknowledged his "infinite wisdom." R. at 5. Plaintiff Geller, who was a member of New Life, was upset that his son's teacher prayed to "a fake God, and made a mockery of the purpose of legislative prayer." R. at 5.

The other three Plaintiffs, Dr. Burke, Lisa Kudrow, and Phoebe Buffay, are all parents with children that presented at the meetings. R. at 5. All three Plaintiffs are atheist and members of the Central Perk Freethinkers Society. R. at 5. Dr. Burke's son presented at a meeting where President Minsk gave the invocation and prayed that those in attendance would reject the Heavenly Father. R. at 5. Buffay's daughter presented at a meeting where President Minsk

prayed and asked for the restoration of New Jerusalem. R. at 5. Kudrow's son gave a presentation at a meeting where a New Life pastor gave the invocation, extolling Christianity as the one true religion. R. at 3, 5.

II. PROCEDURAL HISTORY

On July 3, 2016, Geller filed a complaint alleging that Green's invocation violated the Establishment Clause as a coercive endorsement of religion. R. at 5. Geller alleged his son felt forced to pray to a Baha'i divinity against his conscience and that Green's role as a teacher in Central Perk's high school required her to abstain from either coercing the students in her American Government class to attend Council meetings, or offering an invocation that publicly endorsed the Baha'i religion. R. at 5.

Burke, Kudrow, and Buffay ("Atheist Plaintiffs") filed a separate lawsuit on August 30, 2016, alleging that the Council's legislative prayer policy violated the Establishment Clause because the Council Members' practice of giving the invocation themselves or selecting their own personal clergy to give the invocation constituted "official sanction" of the religious views expressed in the invocations. R. at 5. Atheist Plaintiffs alleged further that the Council members' exclusive control over the invocations resulted in discrimination against non-theistic faiths, that the prayers were unconstitutionally coercive because many prayers were proselytizing or denigrating to other faiths and to non-faith, and that the prayers coerced their children into religious activity because Green required their attendance as part of her American Government class curriculum R. at 6.

All Plaintiffs sought injunctive and declaratory relief on their respective claims. R. at 6. The Township moved for summary judgment and the Plaintiffs' filed a cross-motion for summary judgment. R. at 1. On February 17, 2017, the district court granted the Plaintiffs'

motions and permanently enjoined the Township from continuing its current policy permitting legislative prayer before Central Perk Town Council meetings. R. at 11.

On March 15, 2017, the Township appealed the district court's judgment. R. at 12. On January 21, 2018, the Thirteenth Circuit reversed, holding that neither this Court's legislative prayer cases nor school prayer cases support the district court's conclusions, and dismissed the Plaintiffs' complaints with prejudice. R. at 19. The Plaintiffs appealed the circuit court's judgment, which this Court decided to hear on August 1, 2018. R. at 20.

SUMMARY OF THE ARGUMENT

In this case, the Thirteenth Circuit Court of Appeals committed two fatal errors. Both require reversal.

The first error concerns the court of appeals' misguided notion that this case fits within the narrow confines of what was permitted in *Town of Greece v. Galloway*. Prayers are not constitutional simply because this Court upheld different prayers in *Marsh* and *Galloway*. The specific prayers are distinct and those distinctions make a constitutional difference here. Invocations led by elected officials cannot be equated to ones led by clergy members. Nor can exclusive control of the content of these, not surprisingly, religious messages be ignored. The constitutionality of the Township's practice of opening council meetings with theistic prayers is contradicted by various warnings throughout not only *Galloway*'s plurality opinion but also specific statements in dissenting opinions.

The second error concerns the court of appeals' use of the wrong legal standard for coercion. Although this Court has used a variety of standards to determine an Establishment Clause violation, the recent ones have been some form of the coercion standard adopted in *Lee v. Weisman*. That is precisely what Justice Kennedy applied in his plurality opinion in *Galloway*.

But not the court of appeals. It chose to use a new standard Justice Thomas first suggested in a concurrence to *Galloway*, which only one other Justice joined. While this Court may reverse and remand on that basis alone, the flaw in the court of appeals' logic is readily apparent from the record. The totality of the circumstances indicate that citizens facing invocations at town council meetings are being unconstitutionally coerced. The Establishment Clause requires the Township to treat every citizen—regardless of how or if that person worships—as an equal participant in government.

This Court should reverse the judgment of the United States Court of Appeals for the Thirteenth Circuit and reinstate the judgment of the United States District Court for the Eastern District of Old York.

STANDARD OF REVIEW

The district court resolved this case by granting one of competing summary judgment motions. R. at 1. Summary judgment is proper only when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A genuine dispute of material fact exists when the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). A fact is "material" if its resolution in favor of one party might affect the outcome of the lawsuit under governing law. *Id.* A reviewing court applies the same standard as the district court. *Morse v. Frederick*, 551 U.S. 393, 400–01 (2007).

ARGUMENT AND AUTHORITIES

I. *GALLOWAY*'S NARROW INTERPRETATION OF THE ESTABLISHMENT CLAUSE PROHIBITS THE CENTRAL PERK TOWNSHIP FROM OPENING COUNCIL MEETINGS WITH ELECTED MEMBER-LED PRAYER.

Four years ago, this Court narrowly upheld a town's practice of opening its town board meetings with a prayer offered by members of the clergy. *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014). The fractured holding[2] found no Establishment Clause violation because the practice was consistent with the tradition long followed by Congress and state legislatures, the town did not discriminate against minority faiths in determining who may offer a prayer, and the prayer did not coerce participation with non-adherents. *Id.* at 1828 (citing *Marsh v. Chambers*, 463 U.S. 783, 787–89 (1983)). But the unique circumstances used to uphold the practice of opening the Town of Greece's council meetings with a prayer have been distorted to cross the Establishment Clause's line of remaining religiously neutral.

The First Amendment's Religion Clauses protect a person's freedom to choose when and how to worship God. *See* U.S. Const. amend. I. These constitutional guarantees grew out of the Framers' understanding of religious worship as a voluntary expression of individual conscience.

[2] *Galloway* was a plurality opinion. Justice Kennedy wrote the plurality opinion, joined by Chief Justice Roberts and Justice Alito, upholding the prayers before the monthly meetings of the Town of Greece despite the fact that they were almost always delivered by Christian clergy and were usually explicitly Christian in their content. *Id.* at 1828 (Kennedy, J., plurality op.). Justice Kennedy emphasized the long history of clergy-delivered prayers before legislative sessions. *Id.* at 1819–20. Even though the Court had approved prayers where there was no reference to Jesus Christ in *Marsh*, Justice Kennedy believed that legislatures were not limited to such non-sectarian prayers. *Id.* Justices Scalia and Thomas would have gone much further in allowing religious involvement in government. *Id.* at 1837 (Thomas, J., concurring); *see also id.* at 1835 (Scalia, J., concurring) (joining Justice Thomas's opinion). In an opinion concurring in part and concurring in the judgment, Justice Thomas, writing only for himself, reiterated his view that the Establishment Clause should not apply to state and local government at all. *Id.* at 1835 (Thomas, J., concurring). In a part of the opinion joined by Justice Scalia, Justice Thomas argued that an Establishment Clause violation would require "actual legal coercion . . ." not the "'subtle coercive pressures' allegedly felt by respondents in this case." *Id.* at 1838.

The Framers sought to protect religious freedom and the voluntary nature of religious devotion by "preventing a fusion of governmental and religious functions." *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126 (1982). As this Court has explained, "religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State," and therefore "preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission." *Lee v. Weisman*, 505 U.S. 577, 589 (1992).

The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. It embodies the idea that, at a minimum, a state or federal government cannot establish or endorse religious belief or activity or engage in activity the principal effect of which is to endorse or advance religion. *See County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 593–94 (1989). "The Establishment Clause, at the very least, prohibits governments from appearing to take a position on questions of religious beliefs or from making adherence to a religion relevant in any way to a person's standing in the political community." *Id.*

The Township has undoubtedly taken a position on what religious messages those attending council meetings will encounter. The practice of beginning a council meeting with a legislator-led prayer improperly infuses the work of government with religion. It impermissibly forces attendees wishing to persuade elected representatives to submit to the proselytizing or to publicly declare themselves as non-adherents. This is a far cry from what a plurality of this Court sanctioned in *Galloway*. This is an Establishment Clause violation under the *Marsh* rationale.

A. Unlike the Legislative Prayers in *Galloway*, Council Members Retained Exclusive Control over the Content of Invocations.

Galloway's principle basis was the recognition of the historical foundation of legislative prayer. *Id.* at 1818 (plurality op.). The plurality opinion documented the history of congressional and legislative prayer delivered by religious figures for the benefit of elected officials. Rev. Jacob Duch first delivered a prayer to the Continental Congress on September 7, 1774. *Id.* at 1823. And "[t]he First Congress made it an early item of business to appoint and pay official chaplains, and both the House and Senate have maintained the office virtually uninterrupted since that time." *Id.* at 1818. In that way, the legislative prayers were similar to the facts in *Marsh*, which for more than a century had paid a chaplain to open legislative session. *See Marsh*, 463 U.S. at 789–90; *see also Lund v. Rowan County*, 863 F.3d 268, 277 (4th Cir. 2017) (noting that while this Court has generally supported legislative prayer, it has cautioned that the prayer opportunity must not get out of hand), *cert. denied*, 138 S. Ct. 2564 (2018).

The history of legislative prayers in general does not speak to the constitutionality of all legislative prayer practices. Instead, judicial review must focus on whether "the specific [prayer] practice is permitted." *Galloway*, 134 S. Ct. at 1819 (plurality op.). This Court first addressed the broader issue of legislative prayer in *Marsh* and addressed it again in *Galloway*. But throughout these opinions—while consistently discussing the legislative prayer practices in terms of invited ministers, clergy, or volunteers providing the prayer—this Court never described a situation in which the elected officials themselves gave the invocation.

1. Council members personally crafted and delivered invocations before meetings.

Marsh and *Galloway* did not concern elected official-led prayer, nor did the decisions involve the other aspects of Central Perk's prayer practice. Unlike what happened in those cases,

Council members here could offer the prayer themselves or have complete discretion to select a minister from the community to speak on their behalf. R. at 2.

In *Marsh*, the Court addressed the Nebraska Legislature's practice of opening its sessions with a prayer delivered by a chaplain. 463 U.S. at 784. There, the Nebraska Legislature had the same chaplain, a Presbyterian minister, give the prayer for sixteen years. *Id.* at 784–85. While this Court did not provide great detail on the Nebraska Legislature's practice, it observed that "[t]he opening of sessions of legislative and other deliberate public bodies with prayer is deeply embedded in the history and tradition of this country." *Id.* at 786. This Court concluded the practice fell within the scope of historically tolerated legislative prayer and that no features of the practice violated the Establishment Clause. *Id.* at 792–95.

Thirty-one years later in *Galloway*, this Court addressed the issue of legislative prayer again. 134 S. Ct. at 1811. Similar to *Marsh*, the Town of Greece held monthly town board meetings with prayers delivered by local clergy. *Id.* at 1816. The clergy were volunteers from local congregations. *Id.* The town recruited exclusively Christian clergy for eight years, but later invited a Jewish laymen and chairman of the local Baha'i temple and a Wiccan priestess. *Id.* at 1816–17. This Court concluded that the sectarian prayers offered by guest ministers fell within the historical tradition outlined in *Marsh*. *Id.* at 1824.

But, here, the lower court viewed similar facts as "irrelevant." R. at 16. Even though council members had complete control over the content of the invocations, the court stated that the invocations were for the benefit of the Council members and constituted government speech by relying on *Turner v. City Council of Fredericksburg*. 534 F.3d 352, 354 (4th Cir. 2008). Though legislative prayer is government speech touching on religion, this Court has not relied on traditional Establishment Clause analysis to assess its constitutionality. *See Marsh*, 463 U.S. at

792. Legislative prayer is its own genre of Establishment Clause jurisprudence, assessed under a different framework that takes the unique circumstances of its historical practice and acceptance into account. *See Galloway*, 134 S. Ct. at 1818 (plurality op.) ("*Marsh* is sometimes described as 'carving out an exception' to the Court's Establishment Clause jurisprudence, because it sustained legislative prayer without subjecting the practice to any of the formal tests that have traditionally structured this inquiry.").

The issue of official-led prayer has been found unconstitutional by the Fourth Circuit. *See Lund*, 863 F.3d at 268. In *Lund v. Rowan County*, the elected members of the county's Board of Commissioners, not guest ministers, led the community in prayer, and the Board composed each invocation "according to their personal faiths." *Id.* at 278. As the court of appeals explained:

> *Marsh* and *Town of Greece*, while supportive of legislative prayer, were measured and balanced decisions. As *Town of Greece* makes plain, the Court has never approved anything like what has transpired here or anything resembling the dissents' invitation to local government to work sectarian practices into public meetings in whatever manner it wishes. Rather Town of Greece told the inferior federal courts to do exactly what the majority has done here—that is to grant local governments leeway in designing a prayer practice that brings the values of religious solemnity and higher meaning to public meetings, but at the same time to recognize that there remain situations that in their totality exceed what Town of Greece identified as permissible bounds. It is the dissents' unwillingness to identify any meaningful limit to any sort of sectarian prayer practice in local governmental functions that draws their fidelity to Town of Greece into serious question.

Lund, 863 F.3d at 278–79 (citations omitted).

Central Perk has that same unwillingness. The speaker's identity contributes to the risk of coercion. *See Galloway*, 134 S. Ct. at 1826 (plurality op.) (distinguishing solicitations to pray by guest ministers from those by town leaders, noting that "[t]he analysis would be different if town board members" themselves engaged in the same actions.). Over the course of 21 months, almost half of the meetings began with a prayer given by one of the council members. R. at 2–3. The other monthly meetings began with a prayer given by a guest chosen by a council member. R. at

2–3. This also differs from the facts in *Marsh* and *Galloway* because those cases dealt with guest speakers being chosen from a complied list of local community members, whereas in the current case the council members themselves chose the guest speaker that would speak on their behalf. R. at 2.

The absence of case law on elected official-led prayer is likely no accident. This type of prayer both identifies the government with religion more strongly than ordinary invocations and heightens the constitutional risks posed by requests to participate. It is also important to note that cases that support the proposition of elected official-led prayers did not endorse elected officials directing the public to participate in its prayers. *See Turner*, 534 F.3d at 355–56 (holding that prayers delivered by members of City Council were government speech and that Establishment Clause permitted the City Council to require prayers be non-sectarian); *Simpson v. Chesterfield Cty. Bd. of Supervisors*, 404 F.3d 276, 284 (4th Cir. 2005) (finding no Establishment Clause violation, in part, due to fact that "Chesterfield, unlike Great Falls, did not *invite* the citizenry at large to participate during its invocations"); *Wynne v. Town of Great Falls*, 376 F.3d 292, 307 n.7 (4th Cir. 2004) (finding Establishment Clause violation, in part, based on evidence Council members prayers were directed at "the citizens in attendance at its meetings and the citizenry at large"); *cf. Hudson v. Pittsylvania County*, No. 4:11cv043, 2015 WL 3447776, at *12 (W.D. Va. May 28, 2015) ("The Court, therefore, finds that Defendant's prayer practice, in directing the public to stand and pray violates the bedrock principle of the Establishment Clause in that it serves as an unconstitutionally coercive practice.").

The implication of allowing elected officials to lead prayers should not be overlooked. Central Perk's prayer practice allows the people of Central Perk to diversify the Town Council by electing council members of different faiths, or no faith. This creates the worst case scenario.

Voting for representatives based on what prayers they say is precisely what the First Amendment's Religion Clauses seek to prevent. *See Lund*, 863 F.3d at 282 ("For any Buddhists, Hindus, Jews, Muslims, Sikhs, or others who sought some modest place for their own faith or at least some less insistent invocation of the majority faith, the only recourse available was to elect a commissioner with similar religious views. . . . Failure to pray in the name of the prevailing faith risks becoming a campaign issue or a tact political debit, which in turn deters those of minority faiths from seeking office. . . . Our Constitution safeguards religious pluralism; it does not sanction activity which would take us one step closer to a de facto religious litmus test for public office.") (internal quotation marks and citations omitted) (alteration in original).

This Court should find, as the Fourth Circuit did, that the identity of the prayer-giver is critical to the constitutional inquiry. Establishment Clause questions are by their nature "matter[s] of degree," presuming some acceptable practices and others that cross the line. *Van Orden v. Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring in the judgment); *see also Lynch v. Donnelly*, 465 U.S. 668, 678–79 (1984) ("In each case, the inquiry calls for line drawing; no fixed, *per se* rule can be framed. . . . The line between permissible relationships and those barred by the [Establishment] Clause can no more be straight and unwavering than due process can be defined in a single stroke or phase or test."). Given that elected officials are permitted to personally give invocations or designate those who will, the Township's prayer policy cannot be favorably compared to those ones at issue in *Marsh* and *Galloway*.

2. Council members had authority to delegate invocations to clergy from their own house of worship.

Even if elected officials did not personally give the invocations, their chosen representatives did. In this manner, the Town Council members continued to retain control over the prayers by determining who would speak. R. at 2–3. This is also a critical distinction from

Marsh and *Galloway* because those cases dealt with guest speakers being chosen from a complied list of local community members, whereas in the current case the council members themselves chose the guest speaker that would speak on their behalf. R. at 2.

Leading a captive audience of adults and children in government-sponsored prayer is a sensitive task. It cannot be casually 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) (noting guest chaplains need oversight because, unlike in-house chaplains, they are unfamiliar with the audience and lack structural incentives to minister in a pluralistic way). Here, the proselytizing content did not result from the chaplains' bad intentions; they followed from Central Perk Town Council's neglect of its constitutional obligations. The prayer policy prohibited Council Members from guiding their selected clergy members in their choice of invocation, but these Members gave repeated invitations to the same prayer-giver who delivered the proselytizing prayers and effectively approved the improper message. R. at 2.

Individual prayer givers may occasionally deliver improper prayers, but the Town Council members could have easily dealt with these breaches by, for example, admonishing repeat offenders and, if need be, eliminating them from eligible prayer givers. Here, the Town Council failed to take any action and failed to fulfill its constitutional obligation. Therefore, the prayer policy falls outside the scope of *Marsh* and *Galloway* and does not reflect what has been traditionally allowed by the Founding Fathers.

B. Unlike the Legislative Prayers in *Galloway*, the Prayers Did Not Solemnize Universal Themes to Benefit Council Members.

Another critical aspect of Galloway was the finding the prayers were constitutional because they were "an internal act" that was done for the benefit of the town board. 134 S. Ct. at 1825

(plurality op.) (quoting *Chambers v. Marsh*, 504 F. Supp. 585, 588 (D. Neb. 1980)); *see also Lee*, 505 U.S. at 630 n.8 (Souter, J., concurring) (describing *Marsh* as a case "in which government officials invoke[d] spiritual inspiration entirely for their own benefit"); *Hudson*, 2015 WL 3447776, at *13 (denying defendant's motion to dissolve injunction against legislative prayer practice post-*Town of Greece* decision, explaining that, "[w]hile the majority and principal dissenting opinions in *Town of Greece* disagreed on the proper interpretation of the facts of that case, both Justices Kennedy and Kagan deemed the intended audience of the prayers to be significant. . . . In each of their minds, there is a more significant Establishment Clause concern where, as here, the prayers are delivered to the public by the governing body, as opposed to prayers directed to the governing body." (internal citations omitted)).

This internal focus was what alleviated the concerns that Greece forced religious observances upon its citizens by calling attention to this internal focus: "The principal audience for these invocations is not, indeed, the public but lawmakers themselves, who may find that a moment of prayer or quiet reflection sets the mind to a higher purpose[.]" *Galloway*, 134 S. Ct. at 1825 (plurality op.); *see also Simpson*, 404 F.3d at 284 ("Board members made clear . . . that the invocation 'is a blessing . . . for the benefit of the board,' rather than . . . for those who might also be present"); *Wynne*, 376 F.3d at 301 n.7 (dismissing Town Council contention that prayers were "'only . . . for the benefit of Council members' based on evidence the prayers were directed at "the citizens in attendance at its meetings and the citizenry at large") (internal citation omitted); *N.C. Civil Liberties Union Legal Found. v. Constangy*, 947 F.2d 1145, 1149 (4th Cir. 1991) (deeming judicial prayer impermissible, in part, because "judge's prayer in the courtroom is not to fellow consenting judges but to the litigants and their attorneys"); *Hudson*, 2015 WL 3447776, at *14 ("[W]hen a governmental body engages in prayers for itself and does not

impose that prayer on the people, the governmental body is given greater latitude than when the government imposes prayer on the people.") (quoting *Simpson*, 404 F.3d at 289 (Neimeyer, J., concurring)).

While the court of appeals compared the current case to *Galloway*, it ignored this integral component of the analysis. In place of "guest ministers" praying for the town board in *Galloway*, Council members selected and delivered prayers before meetings. R. at 7; *see also Galloway*, 134 S. Ct. at 1822 (criticizing practices that "would involve government in religious matters" by "editing or approving the prayers in advance"); *Hudson*, 2015 WL 3447776, at *12 ("In Pittsylvania County, the Supervisors led the prayers and asked the audience to stand while doing so, rendering the prayer practice far less of 'an internal act' directed at the Board than was the case in both *Marsh* and *Town of Greece*.") (citation omitted).

This Court was clear in *Galloway* that while legislative prayer is allowed, it does not exist without constraints. 134 S. Ct. at 1823. These constraints came from the prayer's internal purpose, which is to solemnize the legislative session. *Id.* Specifically this Court stated:

> Prayer that is solemn and respectful in tone, that invites lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing, serves that legitimate function. If the course and practices over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion, many present may consider the prayer to fall short of the desire to elevate the purpose of the occasion and to unite lawmakers in their common effort. That circumstance would present a different case than the one presently before the Court.

Id. at 1823. If the prayer's content strayed from this internal purpose, the prayer would no longer be consistent with the First Amendment.

Here, the Central Perk Town Council prayers did not follow that universal theme. The Council members repeatedly disavowed the idea that these prayers were solely for their benefit. On five separate occasions, President David Minsk of the Church of Jesus Christ of Latter Day

Saints, chosen by Council members Bing and Geller-Bing, prayed: "Heavenly 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." R. at 2–3. Additionally, President Minsk prayed at three other meetings and asked that "none 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."

On four occasions, Council members Hosenstein and Tribbiani picked a pastor from the New Life Community Chapel, an evangelical Christian church, to speak on their behalf. R. at 3. These prayers included requests for salvation for all those "who do not yet know Jesus," for "blinders to be removed from the eyes of those who deny God," and for "every Central Perk citizen's knee to bend before King Jesus." R. at 3. All four invocations extolled Christianity as the one true religion. R. at 3.

The structure of the prayer practice as well as the Council member's repeated use of these externally focused prayers demonstrated that these prayers of the Council members were not an internal act directed at one another. Instead, the prayers were directed toward Central Perk citizens and were for the benefit of all the citizens of Central Perk. This external focus of Central Perk's prayer practice had a type of coercive power that the internally directed practice in *Town of Greece* did not have. *See Galloway*, 134 S. Ct. at 1826 (plurality op.). Additionally, the timing of the prayers emphasized this external purpose. The decision of the Town Council to pray only when members of the public were present indicated that the prayer was not directed at the town council members themselves, and that the purpose of the prayer was not to solemnize the proceedings for the Town Council members, but that the prayer was meant "to afford government an opportunity to proselytize or force truant constituents into the pews." *Id.* at 1825.

Ultimately, the prayers given at the Central Perk meetings did not reflect the same universal themes of peace, justice, and freedom that were reflected in *Marsh* and *Galloway*. Instead the prayers denigrated nonbelievers and religious minorities, threatened damnation, and preached conversion to the attendees of the monthly meetings. The prayers did not invite lawmakers to reflect upon shared ideals and common ends before participating in the meeting.

C. The Content of the Prayers Creates a Pattern of Government Action That Overtime Denigrates, Proselytizes, and Betrays an Impermissible Government Purpose.

This Court recognized that individual instances of unconstitutional conduct would not qualify as a constitutional violation. Rather, it took "a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a prayer will not likely establish a constitutional violation." *Id.* at 1824. This approach followed *Marsh*, which required an inquiry into the prayer opportunity as a whole, rather than into the contents of a single prayer. 463 U.S. at 794–95.

Here, the Central Perk Town Council prayer policy has created a pattern of prayers that violate the Establishment Clause. *Galloway* involved two instances where the prayers disparaged others and did not fall into the category of universal values. 134 S. Ct. at 1824 (plurality op.). This Court found that while the two remarks strayed from the rationale set out in *Marsh*, they did not ruin the prayer practice that on the whole reflected and embraced the tradition. *Id.* But in the present case, over half of the prayers given since the Board adopted the prayer policy denigrated nonbelievers and religious minorities, threatened damnation, and preached conversion. The prayers focused on bending the knee to "King Jesus," asking audience members not "to be sent to the Telestial Kingdom," and requested salvation for those in the audience "who do not yet know Jesus." R. at 3. Instead of putting a stop to these types of improper prayers, the Council

members repeatedly extended invitations to these improper prayer givers to continue spreading these types of messages at the monthly meetings. Therefore, this pattern points to the prayer opportunity as a whole as being unconstitutional.

The court of appeals errs by seeking to analyze each feature of Central Perk's prayer practice separately. This Court has rejected this "divide-and-conquer" approach to analyzing the constitutionality of multi-faceted practices, *United States v. Arvizu*, 534 U.S. 266, 274 (2002), and specifically has held that legislative prayer practices must be evaluated based on a totality of the circumstances. *Galloway*, 134 S. Ct. at 1823; *see also Lund*, 863 F.3d at 289 (recognizing individuals "are not experiencing the prayer practice piece by piece by piece. It comes at them whole. It would seem elementary that a thing may be innocuous in isolation and impermissible in combination") (citing *Arvizu*, 534 U.S. at 274). Even if each piece of Central Perk's prayer practice is constitutionally permissible, that does not mean that the prayer practice as a whole is constitutional. Given the totality of the circumstances, this Court should find the Central Perk Town Council prayer policy and practice as unconstitutional because it violates the Establishment Clause.

II. THE ESTABLISHMENT CLAUSE PROHIBITS CENTRAL PERK TOWNSHIP'S PRACTICE OF OPENING COUNCIL MEETINGS WITH ELECTED MEMBER-LED PRAYERS.

Even under the more traditional approach to the Establishment Clause which finds a violation only when there is government coercion, the Township acted unconstitutionally. *See Lee*, 505 U.S. at 587 ("It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise . . . ."). As the district court concluded, the practice of having overtly religious invocations at the beginning of each council meeting was unconstitutionally coercive. R. at 8. The Establishment Clause does not permit such a symbiotic link between government and religion.

A. The Prayer Policies and Practices Were Unconstitutionally Coercive Under the Analysis Justice Kennedy Employed in *Galloway*.

The prayers violate the Establishment Clause under the prevailing coercion standard, as articulated by Justice Kennedy's plurality opinion. 134 S. Ct. at 1825 (plurality op.). The coercion test examines to what extent government action has applied pressure on unwilling individuals to coerce them to "support or participate in religion." *Lee*, 505 U.S. at 577. This Court has held that government may accommodate free exercise of religion but that right does not "supersede the fundamental limitations imposed by the Establishment Clause." *Id.* at 587. The Establishment Clause prohibits governments from coercing citizens to support or participate in religion or its exercise in a way that "establishes a [state] religion or religious faith." *Id.* Central Perk's prayers do that.

1. This Court may remand the coercion issue to the court of appeals so it may address the issue under the proper coercion standard.

The court of appeals used the coercion test to resolve this case. R. at 16. But it did not use the coercion analysis that garnered five votes in *Galloway*. Instead, the court of appeals relied on a test Justice Thomas created in his concurring opinion. R. at 16. By doing so, the appellate court bypassed the proper analysis altogether. If this Court wished for the lower court to address the legal issue in the first instance, it could do so.

2. On the merits, the Township's prayers are coercive.

But the error is readily apparent. The court of appeals used the wrong standard. It relied on Justice Thomas' "legal coercion" standard, when the prevailing one was the more relaxed coercion standard first adopted in *Lee v. Weisman*, which supported Justice Kennedy's plurality opinion.

Applying Justice Kennedy's opinion, the test for determining whether citizens were compelled to engage in a religious observance is fact-sensitive and considers both the setting in which the prayer arises and the audience to whom it is directed. *Galloway*, 134 S. Ct. at 1825. While no evidence of coercion was present, this Court warned that "[t]he analysis would be different if town board members directed the public to participate in the prayers . . . ." *Id.* at 1826. Faced with those precise facts, the district court correctly reasoned that the legislative prayer became coercive when the legislators directed the public to participate in the prayers and the prayers reflected a pattern of proselytization and denigration of other faiths. R. at 8. *Galloway* instructs that cases involving legislative prayer practices should be evaluated based on the totality of the circumstances. 134 S. Ct. at 1823 (plurality op.). Under that proper analysis, an unconstitutionally coercive environment was created.

a. A coercive setting is created by forcing audience members to participate in, or to refuse to participate in, prayers before monthly town council meetings.

Galloway directed courts to examine the setting in which the prayer arises and the audience to whom the prayers were directed. 134 S. Ct. at 1825 (plurality op.). Here, the Town Council directed the public to participate in the prayers at every monthly meeting. R. at 2; *cf. Galloway*, 134 S. Ct. at 1826 (plurality op.) ("[B]oard members themselves stood, bowed their heads, or made the sign of the cross during the prayer," but "*they at no point solicited similar gestures by the public*." *Galloway*, 134 S. Ct. at 1826 (emphasis added). In contrast to *Galloway*, a member of the town council, and the town council only, directed the public to join in the prayer. R. at 2. The effect of a town council member commanding the audience to stand during the meeting's prayer coerced the public to participate in exercising religion. While direction to stand during a prayer by a member of the government may not be unconstitutionally coercive by itself, this

prayer practice took place at a monthly town council meeting. R. at 1. The intimacy of a town council meeting may push attendees to participate in the prayer practice to avoid the community's disapproval.

The court of appeals recognized that citizens could arrive after the meeting's opening prayer. R. at 16. This is not a new suggestion. In comparing *Galloway* to *Lee v. Weisman*, where this Court found a religious invocation at a high school graduation coercive, this Court noted the facts in *Galloway* did not suggest citizens were discouraged from leaving the meeting room during the prayer, arriving late, or making a later protest. *Galloway*, 134 S. Ct. at 1828 (plurality op.). The citizens in Central Perk could time their arrival at the meeting to come after the prayer, leave the room before the prayer, or simply stay seated. But these options serve only to marginalize them. The issue was not that these citizens felt the prayers were offensive and made them feel excluded and disrespected, which this Court has noted does not rise to the level of coercion, *id.* at 1827, but rather that the Plaintiffs were placed in a situation that required them to decide between staying seated and unobservant, or complying to the prayer practice.

The distinction between an instruction to participate in the prayer coming from a member of the Town Council, rather than a member of the clergy, is important because it was meant as a deliberate attempt to seek audience involvement, not merely to address those in attendance. From the perspective of the reasonable observer, individuals are most likely aware that phrases like "Let us pray" may be "for many clergy . . . almost reflexive." *Id.* at 1832 (Alito., J., concurring). But when the direction to participate in the prayers comes from an elected representative acting in their official capacity, it becomes a direction on behalf of the council.

This practice "sends the . . . message to members of the audience who are non-adherents 'that they are outsiders, not full members of the political community, and an accompanying

message to adherents that they are insiders, favored members of the political community.'" *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309–10 (2000) (quoting *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring)). The Council's practice violates the Establishment Clause by dividing along religious lines and exacting coercive pressure on non-adherents to conform to the represented faith. *Id.* Non-adherents, such as Plaintiffs, would feel pressured to conform so as not to diminish their political clout or social standing. "When 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." *Engel v. Vitale*, 370 U.S. 421, 430–431 (1962).

b. The pattern of prayers that attempted to either advance or disparage another belief further illustrates that the Central Perk Town Council's prayer policy and practices were unconstitutionally coercive of all citizens.

Courts can review the pattern of prayers over time to determine "whether they comport with the tradition of solemn, respectful prayer approved in *Marsh* or whether coercion is a real and substantial likelihood." *Galloway*, 134 S. Ct. at 1827. By allowing prayers that reflected a pattern of proselytization and denigrated other faiths, the Central Perk prayer policy and practice did not comport with *Marsh* and, thus, created the coercive environment.

The decision of the Town Council to pray only when members of the public were present indicated that the prayer was not directed at the town council members themselves, and that the purpose of the prayer was not to solemnize the proceedings for the Town Council members, but that the prayer was meant "to afford government an opportunity to proselytize or force truant constituents into the pews." *Id.* at 1825. This also points to how coercion was a real and substantial likelihood because this purposeful decision to involve the audience in the prayers falls outside the tradition approved in *Marsh*.

Some prayers offered by President Minsk were both proselytizing and denigrating of non-Mormon faiths. R. at 8. Asking that "all submit to Christ's reign" and that no one commit grievous sins so as not "to be sent to the Telestial Kingdom" explicitly called for salvation for those in attendance and was a blatant attempt at conversion. R. at 3. Similarly, a few of the New Life Pastor's prayers also strayed from the permissible bounds of legislative prayer. Praying for "salvation" for all those "who do not yet know Jesus" was an attempt to proselytize. Pleading for divine assistance to remove "blinders from the eyes of those who deny God," with bending the knees of every Central Perk citizen "before King Jesus," denigrated those of non-Christian faiths and clearly asserted Christian supremacy. Four times, all the invocations delivered on behalf of Council members Hosenstein and Tribbiani included a theme of Christian superiority. R. at 3.

The prayers are strikingly different from those that were approved in *Galloway*. One such example of the common prayer involved there was:

> Gracious God, you have richly blessed our nation and this community. Help us to remember your generosity and give thanks for your goodness. Bless the elected leaders of the Greece Town Board as they conduct the business of our town this evening. Give them wisdom, courage, discernment and a single-minded desire to serve the common good.

Galloway, 134 S. Ct. at 1824. The universal elements present in the prayers from *Galloway* are nonexistent in half of the prayers from Central Perk's Town Council meetings. Instead, the prayers focused on bending the knee to "King Jesus," asking audience members not "to be sent to the Telestial Kingdom," and requesting salvation, not for the board members, but for those in the audience "who do not yet know Jesus." R. at 3.

The court of appeals admitted that the invocations by representatives of the Church of Latter Day Saints and New Life Church may have bordered on proselytizing. R. at 17. But the court suggested it could not conclude there was a *pattern* of proselytizing. R. at 17. Collectively,

the representatives of the Church of Latter Day Saints and New Life Church spoke 13 times. R. at 3. Therefore, over half of the meetings since the prayer practice was enacted began with an invocation that proselytized. The court of appeals also noted that while the prayer may have been proselytizing, the prayer policy and practice was facially nondiscriminatory. R. at 17. Whether the prayer policy was inclusive does not affect whether the prayers themselves were attempting to advance or disparage another belief.

Ultimately, the court of appeals ignores the toxic and coercive atmosphere created by the Central Perk Town Council. Nearly half of the monthly prayers violated the rules set out in *Galloway* by attempting to either advance or disparage another belief. While this is unconstitutionally coercive by itself, the issue is worsened by the intimate location of the meeting, the direction by council members to participate, and the vulnerable corner the audience members were backed into. Under the totality of the circumstances, the Central Perk Town Council's prayer policy and practices were unconstitutionally coercive of all citizens in attendance.

c. The prayer policy and practices were unconstitutionally coercive of the high school students attending the council meetings.

Not only was the Central Perk Town Council prayer policy and practices coercive towards the citizens in attendance, but it was especially coercive towards the students who attended the meetings to receive class credit. The Council allowed part of the monthly meetings to take on the role of a school function by adopting a policy that permitted Council Member Green's students to present for class credit. R. at 4. High school students Ben Geller, Timothy Burke, Leslie Buffay, and Frank Kudrow were induced by their teacher, Green, to present to the Council for academic credit. R. at 4–5.

Establishment Clause jurisprudence has proscribed prayers in school settings. *See, e.g.*, *Engel*, 370 U.S. at 421 (holding the recitation in school of a prayer composed by state officials a religious exercise in violation of the Establishment Clause); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223 (1963) (holding that recitation of the Lord's Prayer or Bible readings at the start of the school day violated the Establishment Clause); *Wallace v. Jaffree*, 472 U.S. 38, 38 (1985) (holding a state statute authorizing silence at the start of the school day for meditation or prayer in violation of the Establishment Clause); *Lee*, 505 U.S. at 577 (holding that a prayer incorporated into a high-school graduation ceremony violated the Establishment Clause); *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 290 (same, for prayer prior to a high-school football game).

This Court has distinguished the atmosphere in which legislative prayer occurs from that of a school function in which district personnel "retain a high degree of control over" the event. *Lee*, 505 U.S. at 597; *see also Galloway*, 134 S. Ct. at 1827 (distinguishing *Lee*, 505 U.S. at 592–94, 112 S. Ct. 2649, which held prayer at a high school graduation in violation of the Establishment Clause, as involving an event in which "school authorities maintained close supervision over the conduct of the students and the substance of the ceremony"). The Council adopted this academic policy from the suggestion of Council Member Green. The Council retained high control over the issues discussed at each monthly meeting. Council Member Green controlled the extra credit each participating student would receive from their presentation. R. at 4.

The Council adopting a policy that allowed local students to make presentations endorsing or opposing measures under consideration by the Council at each monthly meeting, compounded by Council Member Green awarding extra class credit to those who participated in the

opportunity, created an exceedingly coercive atmosphere for the students. R. at 4. The Town Council meetings no longer functioned solely as a venue for policymaking, but also as a site of academic and extracurricular activity for the students. The student's attendance at the meetings were not truly voluntary and their relationship with the Board was unequal.

This Court's school prayer cases teach that a low bar for coercion exists where public-school students are exposed to religious expression. R. at 9. *Lee* clarifies that courts draw a distinction when children are involved because courts recognize that minors' beliefs and actions are often more vulnerable to outside influence. 505 U.S. at 593–94. *Marsh* contrasted the adult plaintiff's relative lack of vulnerability to potential coercion with children's susceptibility to indoctrination and peer pressure. 463 U.S. at 792 (relying on Establishment Clause analysis, in prior cases, predicated on children's vulnerability to coercion). Because children's "experience is limited," their "beliefs consequently are the function of environment as much as of free and voluntary choice." *Sch. Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985), *overruled on other grounds by Agostini v. Felton*, 521 U.S. 203 (1997).

Even though the children here were high-school seniors, "our history is replete with laws and judicial recognition that children cannot be viewed simply as miniature adults." *J.D.V. v. North Carolina*, 564 U.S. 261, 274 (2011). Courts recognize, in many legal contexts, children's and adolescents' greater susceptibility to peer pressure and other pressures to conform to social norms and adult expectations. *See, e.g.*, *id.* at 271–72; *Roper v. Simmons*, 543 U.S. 551, 569 (2005).

Applying the same test as earlier for determining whether citizens were compelled to engage in a religious observance, the setting in which these prayers arise and the audience creates a coercive environment. Those students were not simply attending intimate town council

meetings, but they were doing so under the direction of their teacher, who also served as a member of the council. As the district court here noted, just as Council Member Green would violate the Establishment Clause by leading her students in prayer on a field trip to Washington D.C., she cannot open the Council meeting with an invocation when her students were present to receive extra credit in her class. R. at 10; *see also Borden v. Sch. Dist. of Twp. of E. Brunswick*, 523 F.3d 153, 176, 179 (3d Cir. 2008) (holding football coach who participated in pre-game locker room prayers before football games unconstitutionally endorsed religion). The academic incentive this created constituted even greater coercive pressure to attend than there was at the high school graduation in *Lee* and the morning prayers in *Engel*. Passing up the opportunity to present at Council meetings meant forfeiting a means of improving the student's grade in Green's class. This combined with the impressionable nature of high school students resulted where these students were compelled to engage in a religious observance.

Academic and social pressures make these students' presence at the town council meetings not meaningfully voluntary. These students attended the Central Perk Town Council meetings under academic obligations. Combining academic obligations with elected official-led prayers caused coercion to become a real and substantial likelihood. "If circumstances arise in which the pattern and practice of ceremonial, legislative prayer is alleged to be a means to coerce or intimidate others, the objection can be addressed in the regular course." *Galloway*, 134 S. Ct. at 1826; *see also Marsh*, 463 U.S. at 795. Central Perk's prayer practice caused precisely those circumstances. By examining the totality of the circumstances, this Court should find, as the district court correctly did, that the Central Perk Town Council prayer policy and practice was unconstitutionally coercive of the high school students awarded academic credit for presenting at meetings where their teacher, a Council member, gave an invocation.

B. The Legal Coercion Standard from Justice Thomas's Concurring Opinion in *Galloway* Is Not Controlling Under the Narrowest Grounds Doctrine.

To reach its holding that *Marsh* and *Galloway* did not apply to the Township's prayer policy, the Thirteenth Circuit necessarily found the legal standard suggested in Justice Thomas's concurrence in *Galloway* to be binding precedent. R. at 16. Specifically, the court of appeals found no Establishment Clause violation because

> we do not think [the word 'direct'] encompasses mere invitation to stand for the invitation and the Pledge. Nothing in the record suggests that citizens were not free to arrive at the meeting after the invocation and Pledge. Nothing in the record suggests that citizens were not free to arrive after the invocation and the Pledge. There is no evidence that anyone was forced to stand or even remain in room. There is no evidence that any citizen's refusal to stand was met with opprobrium or consequences of any kind. The Council's invitation to stand does not equate to coerced participation in prayer.

R. at 16.

In extending this invitation, the Township ignored the fact that it had no right to impose any of these requirements. Justice Thomas wrote that an Establishment Clause violation requires "actual legal coercion . . . not the 'subtle coercive pressures' allegedly felt." *Galloway*, 134 S. Ct. at 1838 (Thomas, J., concurring). Only Justice Scalia joined this view. *Id.* at 1835 (Scalia, J., concurring). Apparently, the lower court misapplied the "narrowest grounds doctrine" set forth by this Court in *Marks v. United States*. 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.5 (1976)).

The narrowest grounds doctrine applies to plurality opinions. *See Marks*, 430 U.S. at 193. That is, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Id.* To be sure "a plurality opinion occurs when there is no majority opinion signed onto by five or more Justices."

Linas E. Ledebur, *Plurality Rule: Concurring Opinions and a Divided Supreme Court*, 113 Penn. St. L. Rev. 899, 904 (2009). In such situations, although five Justices may join in the overall decision of the case, they do not join in the majority opinion. *Id.* But when there is a five Justice majority—five justices "sign on" to the majority opinion—the narrowest grounds doctrine does not apply. *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist.*, 523 F.3d 668, 673 (7th Cir. 2008). Rather, the controlling opinion is the majority opinion of the case. *Id.*

Five Justices agreed that the Town of Greece did not engage in an unconstitutionally coercive practice in how it implemented its opening prayer practice. Those five Justices likewise agreed that offense or a sense of affront due to exposure to "contrary religious views in a legislative forum" does not constitute coercion. *Galloway*, 134 S. Ct. at 1838; *id.* at 1826 (plurality op.). But that is the extent of the agreement.[3]

The plurality opinion's fact-dependent inquiry and its examples of when "the analysis would be different" together with Justice Thomas's concurrence's legal coercion standard

[3] There has been considerable disagreement on the "narrowest grounds" from *Galloway*. *See, e.g.*, *Bormuth v. County of Jackson*, 870 F.3d 494, 515 & n.10 (6th Cir. 2017) (en banc) (finding it unnecessary to resolve the issue but noting division among Sixth Circuit judges about which opinion is narrowest, with at least three judges viewing Judge Thomas's opinion as narrowest); *id.* at 515 (Rogers, J., concurring) (discussing the issue and concluding that Justice Thomas's opinion is not controlling); *Smith v. Jefferson Cty. Bd. of Sch. Comm'rs*, 788 F.3d 580, 602 n.9 (6th Cir. 2015) (Batchelder, J., concurring in part) (concluding that Justice's Kennedy's plurality opinion "is controlling on the lower courts, as it is narrower than the accompanying two-justice concurring opinion); *Lund v. Rowan County*, 837 F.3d 407, 426–28 (4th Cir. 2016) (panel opinion) (mentioning the different rationales of the *Town of Greece* coercion opinions and then applying Justice Kennedy's opinion without mentioning "narrowest grounds" analysis), *rev'd on other grounds on reh'g en banc*, 863 F.3d 268 (2017); *Fields v. Speaker of the Pa. House of Representatives*, 251 F. Supp. 3d 772, 790 (M.D. Pa. 2017) (concluding that Justice Kennedy's "three-Justice plurality represents the narrowest grounds to" the coercion ruling); *see also Elmbrook Sch. Dist. v. Doe*, 134 S. Ct. 2283, 2285 (2014) (Scalia, J., dissenting from denial of certiorari petition) ("It bears emphasis that the original understanding of the kind of coercion that the Establishment Clause condemns was far narrower than the sort of peer-pressure coercion that this Court has recently held unconstitutional . . . ." (citing Justice Thomas's *Town of Greece* concurrence)).

provide suggestions of when coercion might occur, but neither can be said to constitute a definitive holding. In other words, "the narrowest holding that garnered five votes" is that the specific circumstances of Galloway's offense at the prayer practice, did not rise to the level of unconstitutional coercion. *Galloway* simply gives one situation that does not constitute coercion, but does not conclusively declare—as Justice Thomas wished—that the Establishment Clause was only violated by legal compulsion.

Justice Thomas' legal coercion represented the views of only two Justices. The Court considers his concurrence persuasive to the extent it provides some possible guiding principles for applying the coercion doctrine in the context of legislative prayer. *See Myers v. Loudoun Cty. Pub. Sch.*, 418 F.3d 395, 406 (4th Cir. 2005) ("Although we are not bound by dicta or separate opinions of the Supreme Court, 'observations by the Court, interpreting the First Amendment and clarifying the application of its Establishment Clause jurisprudence, constitute the sort of dicta that has considerable persuasive value in the inferior courts.'"). Until others join him, however, it is persuasive authority, not binding precedent. The court of appeals erred in basing its holding on this legal standard rather than the coercion analysis found in Justice Kennedy's plurality opinion.

CONCLUSION

This Court should reverse the judgment of the United States Court of Appeals for the Thirteenth Circuit and reinstate the judgment of the United States District Court for Eastern District of Old York.

Respectfully submitted,

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ATTORNEYS FOR PETITIONERS