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

TABLE OF CONTENTS

QUESTIONS PRESENTED.....**Error! Bookmark not defined.**
TABLE OF CONTENTS..... 2
TABLE OF CITED AUTHORITIES 2
STATEMENT OF JURISDICTION..... 2
STATEMENT OF THE CASE..... 3
SUMMARY OF THE ARGUMENT 5
ARGUMENT..... 7
I. THE CENTRAL PERK TOWN COUNCIL'S LEGISLATIVE PRAYER POLICY IS UNCONSTITUTIONAL UNDER THE REGIME SET OUT IN *TOWN OF GREECE V. GALLOWAY*.....7
II. THE CENTRAL PERK TOWN COUNCIL'S LEGISLATIVE PRAYER PRACTICES ARE UNCONSTITUTIONALLY COERCIVE OF CITIZENS IN ATTENDANCE.....14
III. THE CENTRAL PERK TOWN COUNCIL'S LEGISLATIVE PRAYER PRACTICES ARE UNCONSTITUTIONALLY COERCIVE OF STUDENTSIN ATTENDANCE 20
CONCLUSION.....25

TABLE OF CITED AUTHORITIES

Cases

Engel v. Vitale, 82 S.Ct. 1261, 1267, 370 U.S. 412, 431 (1962) 14, 19, 20
Lee v. Weisman, 112 S.Ct. 2649, 2655, 505 U.S. 577, 587, 590-91, 592 640 (1992)..... ... 15, 19, 20, 22, 25
Mark v. United States, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977)..... 13
Marsh v. Chambers, 463 U.S. 783 (1983)..... 6, 7, 11, 21, 23
School Dist. Abington v. Schempp, 374 U.S. 203, 83 (1963) 18
Town of Greece v. Galloway, 134 S. Ct. 1811, 1821-24, 1826 (2014)..... 6, 8, 13, 14
ACLU of New Jersey v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471, 1480 (3rd Cir. 1996) 18
Bormuth v. Cty. of Jackson, 870 F.3d 266, 279, 494 (6th Cir. 2017)..... 11, 13
Lund v. Rowan County, North Carolina, 863 F.3d 268, 287–88 (4th Cir. 2017)..... 15
Geller et. al. v. Central Perk Township, No. 16-cv-347, 1..... 9, 11

Other Authorities

Direct, *Black's Law Dictionary*, (10th ed. 2014)..... 16

STATEMENT OF JURISDICTION

The jurisdiction of the District Court rests on 28 U.S.C. § 1331 (West) and 18 U.S.C. § 1964(c) (West). The jurisdiction of the Circuit Court rests on 28 U.S.C § 1291 (West). Jurisdiction of this Court rest on 28 U.S.C.A. § 1254 (West).

STATEMENT OF THE CASE

The facts are not in dispute. Central Perk Township, a rural area in Old York with a population of 122,645, is governed by a Town Council (Council) composed of seven biennially elected members. R. at 1. The Council holds monthly meetings, open to the public, to address issues of local concern. *Id.* At the time these actions arose, the Council consisted of Joey Tribbiani (Tribbiani), Rachel Green (Green), Monical Geller-Bing (Geller-Bing), Chandler Bing (Bing), Gunther Geffroy (Geffroy), Janice Hosenstein (Hosenstein), and Carol Willick (Willick). Tribbiani was the Chairman. In September 2014, the Council adopted a policy to allow prayer invocations before the commencement of business at each meeting. *Id.* The policy contains the following 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 praying 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 give the invocation, and when selected, may give it personally or select a minister of their choice to give it in his or her stead. *Id.* Alternatively, they may choose not to give it at all. *Id.* The policy further provides that if a minister is chosen, the Council member may not review or otherwise provide

input into the minister's choice of invocation. *Id.* Whether or not an invocation is given, the Pledge of Allegiance follows, and the chosen Council member requests citizens present to stand for both. *Id.*

From October 2014 through July 2016, invocations were given eighteen times. R. at 2-6. Bing and Gellar Bing, members of the Church of Jesus Christ of Latter-Day Saints, were selected a combined nine times. R. at 2. They chose David Minsk, their Branch President, to deliver the invocation. *Id.* On one occasion 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. On five occasions, he 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." *Id.* The other three times, he 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. *Id.* Willick, a Muslim, was selected three times. *Id.* All three she prayed in Arabic what translates as "Peace and mercy and blessings of Allah be upon you." *Id.* Green, a Baha'i, was selected four times. Twice she declined, and twice she prayed to Buddha acknowledging his infinite wisdom and asking that the Council meeting would be conducted in harmony and prayer. *Id*. Hosenstein and Tribbiani, evangelical Christians, were each selected twice. *Id.* All four times, they chose pastors from their church, New Life Community Chapel. *Id.* All four prayers given were explicitly Christian prayers, and included requests for divine guidance and 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." *Id.*

Green also teaches history and government at Central Perk High School, and offers her students extra credit for attending Council meetings and presenting on issues discussed there. R. at 4. The Council adopted a policy that at each meeting, three students could each make five-minute presentations about issues currently under consideration. *Id.* Twelve students earned five extra credit points each throughout the time at issue. *Id.* Two of those students were able to raise their grade by one step with this extra credit. *Id*. Students gave presentations at meetings where Green gave a Buddhist invocation, where David Minsk gave a Mormon invocation asking for the restoration of New Jerusalem, and where a New Life pastor gave an invocation. R. at 5. Parents of these students took issue with the prayers, and they filed suit to stop the prayer sessions as coercive of the students. *Id.* Several Atheist citizens also filed suit, claiming the policy violated the Establishment Clause on its face, and that it unconstitutionally coerced citizens in attendance. R. at 6.

SUMMARY OF THE ARGUMENT

The Circuit Court erred when it held that Central Perk Town Council's legislative prayer policy was constitutional. First, the policy violated the Establishment Clause of the First Amendment. To pass constitutional muster, legislative prayer must neither discriminate against any faith group, not allow government actors significant control over the content of legislative invocations or prayers. The Central Perk Town Council Policy did both. A majority of the invocations implicitly degraded and discriminated against other religions, especially non-theistic faiths. Some of the invocations explicitly called for people of other faiths to have the "blinders. . . removed from [their] eyes," for their "knee[s] to bend before King Jesus," and for them to

"submit to Christ's reign." These prayers contributed to a pattern that went beyond merely asserting the truth of any individual faith to degrading non-believers. Furthermore, all of the invocations referenced theistic faiths, clearly discriminating against people with non-theistic beliefs. Councilmembers retained the option to give the prayers themselves, or were able to choose a minister of their liking. Therefore, government actors retained significant control over the content of the prayers, either explicitly by crafting the prayer themselves, or implicitly by choosing a minister whose prayers they were familiar with and approved of. This combination of facts places the Council's legislative prayer policies clearly outside of the allowed boundaries the Supreme Court has outlined.

Second, the policy was unconstitutionally coercive of both citizens and students in attendance. It is an elemental First Amendment principle that the Government may not coerce its citizens to support or participate in any religion or its exercise. A town council meeting is especially at risk, because of the intimacy of the setting, and that those in attendance might feel pressured to participate to ensure more favorable outcomes on matters of serious local importance. The councilmembers directed those in attendance to participate in the prayers, and the pattern of prayers were denigrating to other faiths and focused on proselytizing. This combination of facts produced unconstitutional coercion upon all the citizens in attendance, but the coercive influence of the impermissible policy is even more egregious as it relates to the students in Ms. Green's American Government class. The coercive pressure felt by those students was intensified by the fact that they were baited by their teacher, with academic credit, to attend the meetings and give presentations. They were subjected to prayers that cut contrary to the dictates of their own conscience and compelled to participate by standing and remaining silent for the prayers. This Court has long recognized that the particular susceptibility to coercion

that attends adolescence requires that school aged children be afforded heightened protection against government coercion, especially when it creeps into the realm of religion.

The Central Perk Town Council's prayer practice and policy fails to protect those vulnerable students, and all other citizens who attend Council meetings, from the evils born of the state sanctioned establishment of religion. For these reasons we respectfully request this Court uphold the sacrosanct separation of church and state by overruling the lower court decision and permanently enjoin the Central Perk Township from continuing its constitutionally proscribed prayer practice.

ARGUMENT

I. THE CENTRAL PERK TOWN COUNCIL'S LEGISLATIVE PRAYER POLICY IS UNCONSTITUTIONAL UNDER THE REGIME SET OUT IN *TOWN OF GREECE V. GALLOWAY*.

This court should reverse the decision of the lower court because the Central Perk Town Council's legislative prayer policy and practice is unconstitutional. Some legislative prayer practices can be constitutional, as seen in *Marsh v. Chambers*, 463 U.S. 783 (1983), and *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014). In this case, The Central Perk Town Council's policy and practice fails the Establishment Clause standards. "The inquiry remains a fact-sensitive one. . ." *Town of Greece*, 134 S. Ct. at 1825. The standard set forth in *Town of Greece* is controlling, and Central Perk's Town Council fails to meet the standard when its council members are randomly selected to invite clergy of their choice to give invocations. The Town Council similarly fails the standard when council members chose to give the invocations themselves. Central Perk's legislative prayer policy, as evidenced in practice, ensures that all invocations prior to Town Council meetings are theistic, violating the controlling precedent in *Town of Greece*.

A. *Town of Greece v. Galloway*, not *Marsh v. Chambers*, provides the controlling standard for evaluating the case at bar.

This Court should not use *Marsh v. Chambers* as the controlling precedential standard in this case. In *Marsh*, the U.S. Supreme Court considered whether the Nebraska legislature's practice of opening each legislative session with a prayer by a paid clergyman violated the Establishment Clause of the First Amendment. 463 U.S. at 784. The Court considered the "deeply embedded" practice of opening legislative sessions with prayer, noting that this "practice. . . has coexisted with the principles of disestablishment and religious freedom" since the founding of the Republic. *Id.* at 786. This idea of legislative prayer provided by a paid chaplain as a historical and traditional practice of our nation convinced the Court that the Nebraska legislature did not violate the Establishment Clause. Furthermore, the Court determined that history and tradition was enough to support the 16-year employment of a chaplain, who solely offered prayers in the Judeo-Christian tradition. *Id.* at 783.

The case at bar is easily distinguished from *Marsh*. The Central Perk Town Council is not concerned with the employment of a paid chaplain of one faith over an extended period of time. Rather, the practice in question considers invocations given by Council Members themselves, as well as prayers by clergymen of Council Members' own choosing. Simply because the Supreme Court held the Nebraska legislative prayer practice was constitutional, does not in fact mean every prayer policy enacted by local legislative bodies is constitutional. If this were the case, the Court would be ignoring the fact-sensitive nature of Establishment Clause inquiries. Given *Marsh* is not the appropriate controlling precedent, this Court should not rely on the "history and tradition" standard in deciding this case.

Town of Greece v. Galloway is the appropriate controlling standard by which to evaluate this case. In *Town of Greece*, citizens who attended monthly town board meetings alleged the town's prayer policy violated the Establishment Clause because the prayers and prayer-givers were predominantly Christian. 134 S. Ct. at 1813. The policy was for the town supervisor to randomly chose a clergy member from those listed in a local directory to give the prayer prior to board meetings. *Id.* at 1816. Town board members did not review the prayers nor provide any input on their context, but almost all of the selected clergy were Christian. *Id.* The Supreme Court held this practice was constitutional because "so long as the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing." *Id.* at 1824.

The facts in the case at bar mirror those in *Town of Greece* much more so than in *Marsh*. In the present case, petitioners feel the policy enacted by Central Perk Township discriminates against their faith practice, solely inviting clergy of theistic faiths when others are present and available in the township. In *Town of Greece*, the Supreme Court took the established precedent in *Marsh* and focused its inquiry to provide more answers as to what an appropriate legislative prayer policy looks like. Therefore, *Town of Greece* provides the appropriate parameters by which to judge the constitutionality of Central Perk Township's prayer policy and practice.

B. Central Perk Township's legislative prayer policy and practice violates the controlling standard in *Town of Greece*.

As stated above, *Town of Greece* necessitates a legislative prayer policy that neither discriminates against faith groups, nor allows government actors significant control over the

content of legislative invocations or prayers. The Central Perk Township legislative prayer policy was established after the Supreme Court decided *Town of Greece v. Galloway*. The policy provides for the following:

> "Council members will be randomly selected to give the invocation or prayer. When selected, a Council member may either offer the prayer or invocation personally or select a minister from the community to offer the invocation in his or her stead. Alternatively, Council members may choose to omit any invocation."

Geller et. al. v. Central Perk Township, No. 16-cv-347 at 1. Likewise, the council members will have no ability to review a minister's prayer, nor provide any input on its content. *Id.* This policy is unconstitutional under the *Town of Greece* standard because it allows for the prayers to reflect the religious preferences of the individual board members rather than those of the Township at large. It is likewise unconstitutional because it provides for a level of government control over the prayers outside the acceptable parameters in *Town of Greece*.

i. The Central Perk prayer practice reflects the faiths and beliefs of individual board members rather than the faiths and beliefs of the community at large.

Town of Greece established that a town is not required to "search beyond its borders" in order to achieve a variety of legislative prayer givers. 134 S. Ct. at 1814. In that case, the town's procedure provided for a random selection of a religious leader from the community to give each prayer. *Id.* The fact that the predominant faith in Greece was Christianity meant that even through a random selection, one would expect the majority of the prayer givers to be Christian. The

Supreme Court held this as constitutional, since it provided a realistic sampling of faith leaders in Greece. *Id.*

In the case at bar, the written prayer policy provides for the requisite neutrality and a similar "random selection" of a prayer giver. Yet in practice, the selection of particular invocations and religious ministers is far from random and does not adequately reflect the wide variety of religious beliefs present in Central Perk Township. The policy provides that one of the seven council members is to be randomly selected by the Chairman. It is then up to that individual to either give an invocation themselves, or to select a prayer-giver of their choice from the community. One of the Council members chose to eliminate himself from the pool, creating an even smaller pool of only six individuals. This meant that when the Chairman made his "random selection, it was a selection of one out of six council members, not one out of the many possible faith leaders extant in the community. This "random selection" in Central Perk Township is counter to the *Town of Greece* precedent in that it results in the expressed preferences of six Council members as opposed to the wider variety of preferences available in the community, including a number of Christian sects, Islam, Baha'i, and Atheists.

ii. The level of control exercised by the council members is outside the acceptable boundaries established in Town of Greece.

The Court in *Town of Greece* stressed the importance of the random selection of religious leaders by removing the individual council members from the selection process. 134 S. Ct. at 1828. Unlike the controlling precedent in this case, the Central Perk Council members retain exclusive control over the content of the invocations. *Geller et. al. v. Central Perk Township,* at 7. By

selecting prayer givers as well as allowing individual members to select and deliver their own prayers, members inherently endorse certain religions-all theistic- while working in their roles as official representatives. In *Town of Greece*, clergy selections and particular invocations were not linked in any way to individual town council members. Here, the council members were randomly selected, and the clergy members who gave the invocations were their personal choices.

Even if this Court chooses to only follow the precedent set in *Marsh*, this level of Council member involvement is against the history and tradition of legislative prayer practice in the United States. 463 U.S. at 784. While some courts have established that Council member invocations can be constitutional, the level of control in Central Perk Township, coupled with the strength of Christian proselytization is well outside the acceptable boundaries of the Supreme Court precedent controlling in this case. *See Bormuth v. Cty. of Jackson*, 870 F.3d 494 (6th Cir. 2017). It is well beyond acceptable for government officials acting in their official capacity to control religious messages received in legislative sessions.

iii. Council members exclusive control over the invocations resulted in discrimination against non-theistic faiths.

By playing such a central role in the selection of prayer givers, the council members exercise an unconstitutional control over the content of the prayers, allowing for discrimination against non-theistic faith groups. These invocations promote the council member's religious views, none of which are Atheist. Given that Petitioners are members of an Atheist faith group, there are certainly Atheist faith leaders present in the Central Perk Township community. Under the *Town of Greece* policy, these leaders would have an equal opportunity to lead an invocation at

a Council meeting through the random selection process. The Central Perk Township policy clearly fails the *Town of Greece* test for constitutionality, given that an Atheist leader has not once been invited to give an invocation. The Central Perk Township policy ensures the Council would never invite nor hear an invocation from a member of that faith group, because none of its Council members adhere to that faith. The invocations prior to council meetings are therefore not fair to all faith groups, and are solely preferential to theistic groups.

II. THE CENTRAL PERK TOWN COUNCIL'S LEGISLATIVE PRAYER PRACTICES ARE UNCONSTITUTIONALLY COERCIVE OF CITIZENS IN ATTENDANCE.

Justice Kennedy's plurality opinion in *Town of Greece* states that the coercion "inquiry remains a fact-specific one that considers both the setting in which the prayer arises and the audience to whom it is directed. 134 S.Ct at 1825. A court should analyze whether ". . . a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose. . . " exists. *Id.* The analysis presumes a "reasonable observer" acquainted with tradition of legislative prayer, who "understands that its purposes are to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens." *Id*. Though Justice Kennedy held that the facts in *Town of Greece* did not amount to coercion, he stated that "[t]he analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents of opprobrium, or indicated that their decisions might be influences by a person's acquiescence in the prayer opportunity." *Id.* Central Perk's council directs the public to participate in the prayer, and the prayer constitutes a pattern of proselytization and denigration of other faiths, and therefore is unconstitutionally coercive.

A. Justice Kennedy's Coercion standard in his Town of Greece opinion is controlling

In *Town of Greece v. Galloway*, the Supreme Court did not definitively say by what standard legislative prayer could be considered coercive of citizens in attendance. The majority opinion split on this question. Writing for the three Justice plurality, Justice Kennedy argued that "legislative prayer becomes coercive when legislators direct the public to participate in the prayers, the prayers reflect a pattern of proselytization, or the prayers denigrate other faiths. 134 S. Ct. at 1821-24, 1826 (2014). Justice Thomas, joined by Justice Alito, argued that "actual legal coercion" was required. *Id* at 1838 (Thomas, J. concurring in part and in the judgement). In cases like this, *Marks v. United States* provides that "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. ..." 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) (citation omitted). Though the Supreme Court has never defined "narrowest grounds", the Sixth Circuit recently did as the opinion "which relies on the least doctrinally far-reaching-common ground among the Justices in the majority: it is the concurring opinion that offers the least change to the law." Bormuth v. County of Jackson, 849 F.3d 266, 279 (6th Cir. 2017)(overruled on other grounds)(citations omitted).

Justice Kennedy's opinion is less "doctrinally far-reaching" than Justice Thomas's, though Thomas's is more restrictive. Kennedy writes that "[i]t is an elemental First Amendment Principle that government may not coerce its citizens to support or participate in any religion or its exercise." *Town of Greece*, 134 S. Ct. at 1825. He also writes that though the facts in *Greece* did not show coercion, "[t]he analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity." *Id*. at 1826. This

squares with previous Supreme Court precedent that allows for the possibility of Establishment Clause violations due to social but not legal coercion. *See Lee v. Weisman*, 112 S.Ct. 2649, 2655, 505 U.S. 577, 587 (1992)(prayer ceremony before a public school graduation ceremony was coercive even though student attendance was not required, because attendance and participation were "in a fair and real sense obligatory"); *Engel v. Vitale*, 82 S.Ct. 1261, 1267, 370 U.S. 412, 431 (1962)(State directed school prayer unconstitutional because "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the *indirect* coercive pressure upon religious minorities to conform. . . is plain).

Conversely, Justice Thomas's opinion that establishment clause coercion must be "by force of law and threat of penalty." *Town of Greece*, 134 S.Ct at 1837. This is a quote from Justice Scalia's dissent in *Lee v. Weisman*, and has no support in Supreme Court precedent. U.S. 577, 640 (1992)(Scalia, J. dissenting). Justice Thomas spends the rest of his opinion citing his own non-controlling concurrences in other cases. *Id.* at 1837-38. Justice Thomas's Establishment Clause test requires the Supreme Court to break from its established precedent, and Kennedy's does not. Therefore, Kennedy's is "narrower" according to the correct interpretation of the term and his plurality opinion controls according to *Marks*.

B. Central Perk's prayer policy is coercive

i. The Intimacy of the Town Council Meeting heightens the risk of coercion.

The Fourth Circuit has recognized that local municipal board meetings pose a higher risk of coercion due to the intimate nature of the setting.

> Relative to sessions of Congress and state legislatures, the intimate setting of a municipal board meeting presents a heightened potential for coercion. Local governments possess the power to directly influence both individual and community interests. As a result, citizens attend meetings to petition for valuable rights and benefits, to advocate on behalf of cherished causes, and to keep tabs on their elected representatives—in short, to participate in democracy. The decision to attend local government meetings may not be wholly voluntary in the same way as the choice to participate in other civic or community functions. Going to one's seat of government and going to one's place of worship are very different forms of attendance.

Lund v. Rowan County, North Carolina, 863 F.3d 268, 287–88 (4th Cir. 2017). Central Perk Township's Town Council, as the governing body of the 12,645 people Central Perk, is exactly the kind of intimate setting where coercion is more likely to arise. They consider community interests such as establishing statutes in the Town's main park, mandating more stringent recycling efforts, humane control of the Town's Geese, and whether to include GLBTRQ advocacy groups in the Town's bicentennial parade. R. at 4-5. Concerned citizens who wished to participate in civic decisions affecting their legal responsibilities presumably had to attend these meetings: the record contains no alternative.

ii. The Councilmember's "directed" the audience to participate in the prayer.

At the beginning of the meeting, whenever the Council members prayed, they requested the audience to stand for the invocation. R. at 2. Black's Law Dictionary provides that "direct"

means “1. To aim 2. To cause someone to move on a particular course 3. to guide someone; to govern 4.to instruct with authority; to address.” *Direct*, *Black’s Law Dictionary*, (10th ed. 2014). Accordingly, a councilmember “directs” the audience to stand when they request it, much like a pastor asking his congregation to “please rise” or a PA announcer asking the crowd at a sporting even to “please stand”. Though these directions take the form of a mere request, clearly the speaker truly intends to “cause” the audience to stand, “to move on a particular course”, to “guide” and “instruct” that course, and to do so with the “authority” of their position. Standing for the prayer is indistinguishable from participation, which Black defines as “the act of taking part in something.” *Participation*, *Black’s Law Dictionary* (10th ed. 2014). By standing, the audience takes part in the ceremony, even though their part may merely consist of showing respect for the prayer leader. This alone does not equate to coercion, but clearly starts the ceremony down that path.

iii. The pattern of prayers over time denigrate other faiths and proselytizes certain religions.

The record shows that councilmembers or their selected clergy gave a total of eighteen prayers. Of these eighteen, at least twelve were proselytizing or denigrating. Council Members Bing and Gellar-Bing, members of the Church of Jesus Christ of Latter Day Saints, picked their Brach President David Minsk to deliver nine invocations. On five of these, his prayer included “We pray that New Jerusalem will be built here and that all will submit to Christ’s reign.” (R. at 3. On another three, he 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. (*Id.*). The repeated prayers that "all will submit to Christ's reign" and that "none would reject Jesus Christ" upon pain of being sent "away from the fullness of God's light" clearly proselytize the Mormon faith and assert its dominance over other non-Christian faiths, implicitly denigrating them as false. Four other prayers were given by Hosenstein and Tribbiani's pastors from the New Life Community Church, and all four extolled Christianity as the one true religion, requested 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." (*Id.*). These prayers also clearly proselytize Christianity as the only path to salvation and denigrate non-Christian faiths as false and blind.

Twelve out of the eighteen prayers, two-thirds, blatantly proselytized or denigrated other faiths. Clearly, this establishes the very pattern Justice Kennedy warned was unconstitutional in *Town of Greece.*

III. THE CENTRAL PERK TOWN COUNCIL'S LEGISLATIVE PRAYER PRACTICES ARE UNCONSTITUTIONALLY COERCIVE OF HIGH SCHOOL STUDENTS IN ATTENDANCE.

A. The Coercion Test in *Lee v. Weisman* is the controlling standard of review.

The Court of Appeals erred in analyzing the constitutionality of Central Perk City Council's prayer policy under the lens of legislative prayer jurisprudence, rather school prayer *stare decisis.* This Court long has recognized that high school students are peculiarly susceptible to the potentially pernicious influences of social pressure, and on account of that adolescent sensitivity, are owed greater protection against the threat of religious coercion by public officials and institutions. *See Lee v. Weisman,* 505 U.S. 577, 578 (1992); *School Dist. Abington v. Schempp,* 374 U.S. 203, 83 (1963); *Engel v. Vitale,* 370 U.S. 421, 82 (1962) . As the Court noted in *Lee v. Wiesman,* "The Establishment Clause was inspired by the lesson that in the hands of government

what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce. Prayer exercises in elementary and public schools carry a particular risk of indirect coercion." 505 U.S. 577, 578 (1992). The test for determining whether a public prayer policy violates the Establishment Clause is therefore different when the prayer is imposed upon an audience of high school students versus when it is delivered to a legislative body. *See Lee v. Weisman*, 505 U.S. 577 at 578, 590-91; *Town of Greece v. Galloway*, 134 S.Ct. 1811, 1827 (2014). Prayer at a public school sponsored event is unconstitutionally coercive if it violates the guarantee that "government may not coerce anyone to support or participate in religion or its exercise." *Lee*, 505 U.S. 577, 578; *See also ACLU of New Jersey v. Black Horse Pike Reg'l Bd. of Educ*., 84 F.3d 1471, 1480 (3rd Cir. 1996). In this case, the invocations at issue are being foisted upon high school seniors who are enrolled in Councilwoman Green's American Government class and are induced, by academic credit, to attend Town Council meetings, making the meetings school sponsored events. R. at 4. At these meetings students are put in the disquieting position of being forced to choose whether to participate in prayers that endorse uncompromising religious views contrary to their own personal beliefs or refuse to participate and risk being adjudged as an outsider and alienated by their peers and venerated authority figures. The coercive nature of the religious invocations issued at these meetings is especially egregious, and the concerns surrounding the particular susceptibility of high school students to the pressures of social convention are especially pronounced in this setting, where Ms. Green is acting in a dual capacity as both the student's teacher and their city councilwoman. R. at 4. To sustain the guarantees of the Establishment Clause under such conditions requires that the prayer practices and policy at bar pass muster under the standard of review set forth by this Court in the line of school prayer precedents. Considered in light of the coercion test this Court employed in

Lee v. Weisman, 505 U.S. at 578, the Central Perk Town Council's prayer practices run afoul of the Establishment Clause because they subject the assailable young minds of high school students to the liberty-usurping influence of impermissible religious coercion.

As noted by the district court, "a low bar for coercion exists where public school students are exposed to religious expression." R. at 9. This bar has been set by a line of Supreme Court cases stretching back to 1962 with *Engel v. Vitale*, 370 U.S. 421. In that case, the Court struck down a law requiring public school officials to recite a succinct, nondenominational prayer each morning. *Engel*, at 424. Students were not compelled to perform the prayer, and those who wished to abstain from participating were permitted to remain silent or leave the room. *Id.* at 430. Even so, ruled the Court, "[n]either the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause." *Id.* The irreconcilable constitutional defect of that prayer practice was rooted in the recognition that the framers constructed the First Amendment to "stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say – that the people's religions must not be subjected to the pressures of government for change each time a new political administration is elected to office." *Id.* at 430-31. Even a brief, general, nondenominational prayer, offered to students who could voluntarily leave the room where it was recited without consequence carried with it too great a risk of corroding the religious liberty so venerated by the authors of our constitution. Prayer in public school, held the Court, is constitutionally impermissible. *Id.*

This Court, in *Lee v. Weisman*, extended the ban on prayer in public school to include prayer at graduation ceremonies conducted outside of the normal classroom setting. In that case, the

Court found that a policy permitting school principals to invite clergy to give nonsectarian invocations at middle school and high school graduation ceremonies violated the Establishment Clause. *Lee*, 505 U.S. 577. Mr. Lee was a middle school principal who, under the policy at issue, invited a rabbi to give an invocation during a graduation ceremony. *Id.* Lee gave the rabbi a pamphlet containing guidelines for delivering public prayers at civic ceremonies and instructed him to make the prayer nonsectarian. *Id.* at 578. In so doing, said the Court, Lee, a state official, was essentially directing and controlling the content of the prayer, thus implicating First Amendment concerns surrounding the separation of church and state. *Id.* Acknowledging the "fundamental limitations imposed by the Establishment Clause, which guarantees at a minimum that a government may not coerce anyone to support or participate in religion or its exercise" the Court then explained why the prayer policy at issue was unconstitutionally coercive. *Id.* at 577-78.

> "The school district's supervision and control of a high school graduation ceremony places subtle and indirect public and peer pressure on attending students to stand as a group or maintain respectful silence during the invocation and benediction. A reasonable dissenter of high school age could believe that standing or remaining silent signified her own participation in, or approval of, the group exercise, rather than her respect for it. And the state may not place the student dissenter in the dilemma of participating or protesting. Since adolescents are often susceptible to peer pressure, especially in matters of social convention, the State may no more use social pressure to enforce orthodoxy as it may use direct means. The embarrassment and intrusion of the religious exercise cannot be refuted by arguing that the prayers are of a de minimis character, since that is an affront to the rabbi and those for whom the prayers have meaning, and since any intrusion was both real and a violation of the objector's rights."

Id. at 578. The petitioners argued that, because attendance at the graduation ceremony was voluntary and students were not punished for choosing not to attend, the prayer could not be considered coercive. *Id.* at 579. The Court rejected that argument on the grounds that it ignored "the real conflict of conscience faced by a student who would have to choose whether to miss

graduation or conform to the state-sponsored practice, in an environment where the risk of compulsion is especially high." *Id.*

Citing "inherent difference between the public school system and a session of a state legislature" the Court went on to distinguish the facts of *Lee* from *Marsh v. Chambers*, the seminal case dealing with the constitutionality of legislative prayer. *See id.* The atmosphere of a legislative meeting, it reasoned, is significantly different from a school-sponsored event setting. Legislative meetings are attended primarily by adults, who are free to enter or leave the meeting with little or no comment or explanation, and who are generally free from the same constraints and obligations imposed on a school-aged student attending an official school sponsored event, such as a graduation ceremony. *Id.* at 579.'Thus, the subtle coercive pressures at work on malleably minded adolescents in school sponsored settings, which necessitate heightened protections against state encroachment into the religious realm, are generally absent from legislative meetings. *Id.*

The fundamental differences between those two scenarios, explained the Court, require different tests be applied in analyzing whether prayer in either instance is constitutionally permissible. *Id.* The facts of the case at bar demonstrate that the Council meetings, though technically legislative meetings, should be considered under the coercion test articulated in *Lee*, rather than the legislative prayer test used in *Marsh* and *Galloway.* Here, as in *Lee*, the prayers are delivered before an audience of captive high school students. Unlike the minors present at legislative meetings in *Galloway*, the students in this case were not free to enter and leave at will, nor were they there entirely of their own volition. Like the graduation ceremony in *Lee,* the Council meetings are school sponsored events because the students are attending the meetings for school credit. Moreover, Ms. Green is there in her capacity as their teacher to instruct them in

civic engagement, supervise their behavior, and evaluate their presentation - the merits of which she must also consider in her capacity as a Council member when she votes on policy measures. The presence of high school aged children at Council meetings, which function to them as school sponsored events, implicates the same concerns about the impermissible establishment of religion expressed by this Court in its school prayer line of cases. Given those concerns, the Council's prayer policy should be analyzed under the coercion test applied in *Lee* rather than the *Marsh* standard for prayer in legislative meetings.

B. The Council's prayer policy fails to pass muster under the coercion test.

Though Ms. Green did not require her students to make such presentations, *per se*, she baited them into attending with the lure of five extra credit points, which was enough, in some cases, to improve a student's final academic score by a third of a letter grade. R. at 4. As in *Lee*, the fact that attendance is technically voluntary - students may choose to forgo the meetings and surrender the extra credit points – does not neutralize the impermissible religious coercion. Additionally, though Ms. Green's students are not forced to stand for the prayer – just as students in *Lee* were not forced to stand or remain silent – the policy is impermissibly coercive nonetheless.

In *Lee* the Court found that the State's supervision and control of the graduation ceremony placed, "public pressure as real as peer pressure on attending students to stand as a group or, at least, remain respectful silence during the invocation and benediction." *Lee*, 505 U.S. at 592. The very real threat of losing academic credit, and thus enduring a drop in relative academic standing visa-vis classmates who give presentations, places just as much of an

obligation on students to attend the event as does the perceived social pressure that compels students to attend graduation ceremonies. If anything, the incentive created by offering academic credit for attending Council meetings is more compelling than the social pressure to attend graduation because of the tremendous influence that a high school student's GPA will have on their prospects for college, and thus future employment. As noted by the district court, the fact that students in this case are being forced to forfeit academic credit to avoid a state sanctioned religious invocation adds a penal element to the coercion analysis that was absent in *Engel* and *Lee*. R. at 10. For these reasons, the Council's prayer policy is unconstitutionally coercive of Ms. Green's high school students who are compelled to attend Council meetings.

CONCLUSION

For the aforementioned reasons, this Court should reverse the Thirteenth Circuit's decision and find for the Petitioners, Ross Geller, Dr. Richard Burke, Lisa Kudrow, and Phoebe Buffay.