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 L

Counsel for Petitioners

STATEMENT OF THE ISSUES

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

II. Whether the Central Perk Town Council's prayer policy and practices are unconstitutionally coercive of: (a) all citizens in attendance when several invocations included language implying the supremacy of sectarian dogma; or (b) high school students who were awarded academic credit for presenting at meetings where their teacher also was a Council Member who gave an invocation?

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The opinion of the United States District Court for the Eastern District of Old York appears on the record at pages 1–10. The opinion for the United States Court of Appeals for the Thirteenth Circuit appears on the record at pages 13–19.

STATEMENT OF JURISDICTION

This Court granted the petition for the writ of certiorari on August 1, 2018. This Court has jurisdiction to hear this case pursuant to 28 U.S.C. § 1257 (2012).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case concerns the First Amendment to the United States Constitution. U.S. Const. amend I. *See* App. "A." This case also involves the Central Perk Township, Old York, Prayer Policy preamble as stated on the record at page 2. *See* App. "B".

STATEMENT OF THE CASE

STATEMENT OF THE FACTS

Central Perk Township (the "Town") is a small town in the Old York area with a population of 12,645 citizens. R. at 1. The Town council governs the citizens and includes seven members (the "Council Members") who are elected every two years. R. at 1. Each month, the council holds a monthly town meeting (the "Council Meeting") to address local issues. In September 2014, the council elected to ratify a legislative prayer policy (the "Prayer Policy") allowing invocations before the beginning of business at each meeting. R. at 2. The Prayer Policy states that Council Members would be randomly selected to give an invocation, to elect a clergy person from the community to give the invocation, or to not give an invocation. *Id.* The Prayer Policy explicitly prohibited Council Members to review any of the invocations given by clergy

persons. However, the Council Members were free to choose a clergy member to give the invocation on their behalf. *Id.* Additionally, all persons in attendence at the Council Meetings were requested to stand for the Prayer and the Pledge of Allegiance. *Id.*

Formation of the invocation lottery system:

Six of the seven elected Council Members chose to participate and give invocations. R. at 1. Council Members Bing and Geller-Bing are both members of the Jesus Christ of Latter Day Saints and were drawn a total of nine times, and both chose to have the church president David Minsk give the invocation. R. at 2–3. Council Member Willick is a member of the muslim faith and chose to give the invocation herself all three times that she was selected. R. at 3. Council Member Green is a member of the Baha'i faith. She was selected four times but chose to give the invocation only twice. *Id.* Council Members Hosenstein and Tribbiani are members of the New Life Community Chapel and together were drawn four times. All four times they elected to have New Life pastors give the invocation. R. at 3.

Religious refernces during the invocations:

In his invocations, David Minsk referenced "Heavenly Father", "Jesus Christ", the literal gathering of Israel, the building of New Jerusalem, and submitting to Christ's reign. *Id.* Additionally, he asked that no one in attendance during his invocation would reject Jesus Christ, or commit sins against the Heavenly Father. *Id.* In Council Member Willick's invocation, she asked for blessings of Allah to be upon all in attendance. *Id.* The New Life pastors made numerous references to Jesus Chirst and asked that "those who do not yet know Jesus" be saved. *Id.* Additionally, they went so far as to say that every citizen's knee should bend before King Jesus and that for those who deny God to start to open their eyes to his light as Christianity is the one true religion. *Id.*

<u>Ms. Green's dual role as Council Member and educator:</u>

Rachel Green was elected as a Council Member for the Town but was also the American History class teacher at Central Perk High School. R. at 1,4. Her reputation in the community was excellent, as she was known to be a rigorous teacher. R. at 4. On October 6, 2015, Ms. Green recited an invocation in accordance with her Baha'i faith. R. at 5. She gave another invocation at another time as well. R. at 3.

<u>Enticement of high school students to participate in the Council Meetings:</u>

In the past, Ms. Green had given her American History students the option to help out in the local election in exchange for extra credit towards their final test grade. R. at 4. However, when it was not an election year, as in this academic year, Ms.Green had allowed her students to write an essay in the past. *Id.* For this academic year, she allowed her students to attend the Council Meetings and participate by giving a presentation, in exchange for five extra points towards their participation grade. *Id.* In the 2014–2015 academic year, from these extra credit opportunities, two students had their final grades bumped up an entire point. *Id.*

<u>Complaints raised by the Town citizens:</u>

Due to the language recited in the invocations from 2014 to 2016, several Town citizens filed complaints alleging that the invocations, including that of Ms. Green, amounted to coercive endorsement of religion. R. at 5. Specifically, Geller alleged that his son felt forced to pray to Buddha against his conscience when Ms. Green was leading the invocation. *Id.* Further, several citizens felt that the invocations discriminated against atheists. R. at 6. More importantly, Kudrow aknowledged the difficulty in having her son present on an LGBTQ issue after a New Life invocation. R. at 5.

PROCEDURAL HISTORY

Town residents Geller, Burke, Kudrow and Buffay (the "Petitioners") initiated this action under 42 U.S.C. §1983 seeking a permanent injuction againt the Town (the "Respondent"). R. at 1. The United States District Court for the Eastern District of Old York granted the Petitioner's motion for summary judgment and denied the Respondent's motion for summary judgment. Consequently, that court permanently enjoined the Respondent from continuing the Prayer Policy on February 17, 2017. R. at 10. However, the United States Court of Appeals for the Thirteenth Circuit reversed the decision of the district court and dismissed the Petitioner's complaints with prejudice. R. at 19. The Petitioners appealed, and on August 1, 2018, this Court granted the petition for the writ of certiorari to hear this case. R. at 20.

SUMMARY OF THE ARGUMENT

Under the three Establishment Clause tests created to date, the Prayer Policy does not muster constitutionality. The Prayer Policy fails the Lemon test because the purpose of the invocations, as stated, was religious, the type of references made amounted to proselytization and disparagement of religion, and the invocation holistically fostered excessive government entwinement since the Council Members were in control of the invocations. Additionally, the Prayer Policy fails the Endorsement test because the invocations support the practice of religion over non-religion. Lastly, the Prayer Policy fails the Coercion test because the invocations had a coercive effect on all citizens in attendance because they were requested to stand which amounted to compulsion. Additionally, the coercive effect on the high school students related to the enticement of extra credit that was awarded in exchange for their participation at the Council Meetings during which these invocations occurred. Because the presence of the high school students makes the line of school prayer jurisprudence applicable, under that standard, the

students were coerced and the Prayer Policy should be found to be unconstitutional.

STANDARD OF REVIEW

When a question of law[1] implicates the First Amendment, including a question under the Establishment Clause, the appropriate standard of review is de novo. *Weinbaum v. City of Las Cruces, N.M.,* 541 F.3d 1017, 1029 (10th Cir. 2008).

ARGUMENT

In the words of Jefferson, the "clause against establishment of religion by law was intended to erect a wall of separation between church and state". *Reynolds v. United States*, 98 U.S. 145, 164, (1879). Additionally, the clause meant that neither a state nor the Federal Government can set up a church, pass laws to aid or prefer one religion, nor could they influence or force a person to profess a belief or disbelief in any religion. *Everson v. Bd. of Ed. of Ewing Twp.,* 330 U.S. 1, 15–16 (1947). In essence, the Establishment Clause jurisprudence to date has balanced two guiding principles: the separation of church and state, and the protection of individual religious liberty. *Steven G. Gey, Religious Coercion and the Establishment Clause*, U. Ill. L. Rev. 463 (1994).

With so much significance and meaning embedded into the one sentence that comprises the First Amendment, it is no wonder that in the last 50 years, so much is still unresolved when it comes to the issue at bar. In fact, the bench is split, and for those that disfavor the bright line tests established to date, a newer standard applies. In this case, the Prayer Policy does not muster constitutionality because it fails all established tests that have been used to date to evaluate Establishment Clause challenges.

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[1] The facts of the case are not in dispute. R. at 1.

[2] The record is ambiguous as to whether the practice of writing an essay was available past 2014. R. at 4.

I. THE PRAYER POLICY VIOLATES BOTH THE LEMON TEST AND ENDORSEMENT TEST BECAUSE IT IS NON-SECULAR, ENDORSES RELIGION, DISPARAGES RELIGION, AND FOSTERS GOVERNMENT ENTANGLEMENT WITH RELIGION.

Two of the established standards to assess Establishment Clause challenges include the Lemon test and the Endorsement test. The Lemon test established in *Lemon v. Kurtzman,* states that a policy must be secular, must not inhibit or advance any one religion, and the government must not be excessively entangled with religion to comply with the Establishment Clause. The Endorsement test established in *Lynch v. Donnelly,* states that a policy must not enforce religion through government expression itself or discrimination in favor of religion to comply with the Establishment Clause. If this Court chooses to use either one of these tests, it should find that the Prayer Policy does not muster constitutionality because the purpose of the Prayer Policy is inherently secular, in practice it both endorses and disparages religion, and in effect it leads to excessive entanglement between religion and the government.

A. The Prayer Policy fails the Lemon test because the Policy is non-secular, endorses religion, disparages religion, and fosters excessive government entanglement with religion.

In *Lemon*, this Court established the Lemon test in order to determine when a prayer policy violates the Establishment Clause under the First Amendment. *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971). The Lemon test holds three prongs. First, the policy must be secular. *Id*. at 612. Second, the policy must not inhibit or advance any one religion over another. *Id.* Third, the policy must not create excessive government entanglement with religion. *Id.* at 613. If any one prong is failed, the policy fails the Lemon test and violates the Establishment Clause. *Id.* at 612.

This Court defined a set standard for when a policy violates the Establishment Clause in the case of *Lemon*. *Id.* In this case, this Court analyzed whether the practice of lending state financial aid to private religious schools was unconstitutional. *Id.* at 602. This Court held that

this policy was not secular as it endorsed religion in lending aid to schools known to be religious. *Id.* at 613. It was found to have advanced one religion over another as the school was strictly Christian. *Id.* at 618. Further, this Court held that the policy fostered government entanglement with religion given the direct financial benefits the school was receiving and therefore upheld the injunction to stop the funding of private religious schools. *Id.* at 620.

In the instant case, the primary purpose of the policy was to "invoke divine guidance" in the council meetings, which suggests the purpose is religious and therefore not secular. R. at 3. The record shows a total of thirteen disparaging and proselytizing comments made during the invocations, which demonstrates a pattern of such instances that accompanied the ratification of this policy. *Id.* The Policy also highly suggested government entanglement with religion, as all of the invocations given were religious and clergy people known to give disparaging or proselytizing invocations were continuously invited back. R. at 2-3.

This Court should conclude that the Prayer Policy fails not just the minimum one prong of the Lemon test as required, but all three prongs, and violates the Establishment Clause.

i. The legislative prayer policies of Central Perk Township are not secular as the stated purpose of the policy is to foster religious guidance in legislative policymaking.

The Prayer Policy fails the first prong of the Lemon test by not being secular. Black's Law dictionary defines secular as being "worldly," distinguished from spiritual, or non-religious. *Secular*, *Black's Law Dictionary* (10th ed. 2014).

In *Marsh*, the legislative prayer practices of the Nebraska state legislature were upheld. *Marsh v. Chambers*, 103 S. Ct. 3330, 3332 (1983). This Court found that the historical past practice of such policies demonstrated that the meaning of the Establishment Clause was interpreted as to allow legislative prayer. *Id*. at 3335. Specifically, this Court referred to the

founding fathers' ratification of the constitution and almost immediate appointment of a paid chaplain. *Id*.

In *Wallace*, this Court held that an Alabama statute which required a moment of silence for meditation or voluntary prayer at the beginning of the school day was unconstitutional. *Wallace v. Jaffree*, 105 S. Ct. 2479, 2485 (1985). This Court employed the Lemon test analysis and determined that the policy endorsed religion and was not secular. *Id.* at 2492. Thus, the statute violated the Establishment Clause. *Id.* In its analysis, this Court determined that the addition of the phrase "voluntary prayer" to the statute was clearly non-secular as its only purpose was to promote religion. *Id.* at 2491. Further, this Court held that this religious purpose facilitated government endorsement of religion and therefore the policy failed the secular, and endorsement prongs of the Lemon test. *Id.* at 2492.

In the instant case, the purpose of the Prayer Policy was explicitly stated as to "invoke divine guidance" which the Council Members felt would be "helpful and beneficial" in the legislative policymaking. R. at 2. This statement strongly eludes to the conclusion that the purpose of the policy was religious and therefore not secular, especially with regards to the court determining the addition of the phrase "voluntary prayer" was non-secular in the previously mentioned case. The instant case is distinguishable from *Marsh* as the prayer that was upheld in *Marsh* was secular, explicitly not referencing Jesus Christ despite the chaplain being Christian. Further, the Nebraska state legislatives did not hold the meetings open to the public. This did not facilitate the coercion of any citizens or cause them to feel left out despite their difference in religion or lack thereof.

While this Court has stated that policy need not expressly be secular to be upheld under the Establishment Clause, the determination that a policy is non-secular is highly persuasive and

necessary in Establishment Clause analysis. In determining that the purpose of a policy is non-secular opens the door to discussion of whether a policy musters constitutionality under the Establishment Clause. The purpose of the Prayer Policy is noticeably religious, and this assumption suggests that it violates the guiding principle of separation of church and state.

Therefore, because the Prayer Policy in its purpose is non-secular, it fails the first prong of the Lemon test.

ii. The Prayer Policy facilitates government endorsement of religion because the random selection of who is giving the invocation comes from a "closed universe."

The Prayer Policy fails the second prong of the Lemon test, because it endorses the practice of religion over non-religion. This Court described endorsement as "the sense of promoting someone else's message." *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 109 S. Ct. 3086, 3093 (1989). "[T]he government's lending its support to the communication of a religious organizations religious message" demonstrates this premise further. *Id.*

In the case of *Allegheny*, this Court held that any government endorsement of religion is "invalid" as it promotes the premise of religion over non-religion and therefore makes those who are non-theistic feel excluded from the community. *Id.* In analyzing whether a creche placed on a county staircase and a menorah placed outside the city council building amongst other holiday decor constituted endorsement of religion, this Court found the creche placed by itself and directly out in front of the county staircase to be government endorsement of religion. *Id.* The menorah placed amongst other holiday decor however, held a largely secular purpose and therefore did not constitute government endorsement of religion. *Id.*

In the case of *Lund*, the court upheld an injunction against council led legislative prayer

at the beginning of public meetings. *Lund v. Rowan County North Carolina*, 863 F. 3d 268, 272 (4th Cir. 2017). The court employed the analysis used in *Greece* in comparing the practice of randomly selected clergy upheld in this Court, to the practice of council member given invocation. *Id.* at 274. This led to the determination that the council members leading the prayer restricted the opportunity to a certain set of people, which "closed the universe" and made the prayer exceptionally exclusive. *Id.* Further the court employed the analysis in *Marsh* through its examination of the historical past practice of legislative prayer. However, the court determined that no historical past practice of council member led prayer existed. *Id.* at 277. As such the policy failed to muster constitutionality under the Establishment Clause. *Id.* at 291.

In the instant case, the Prayer Policy amounts to government endorsement of religion due to the random selection of Council Members to give the invocation, as opposed to random selection of a clergy person. This is substantially similar to the counselor led invocations the court ruled against in *Lund* as the prayer opportunity itself was restricted to certain individuals. Random selection of Council Members to direct the invocation essentially negates the clause in the Policy that does not allow the Council Members to review the invocation before it is delivered by the clergymen. This is demonstrated through every Council Member chosen deciding to invite either a clergy person from their own religion, and specifically church, or to give an invocation representing their own religion. The effect of such a policy is that the six religious Council Members who chose to participate in the invocation lottery are left to represent the beliefs of all 12,645 citizens of Central Perk.

While this Court has recognized the importance of historical past practice in upholding the practice of legislative prayer, as stated in *Lund* there is no historical past practice of council member led prayer. In the instant case, the Council Members were given the option to give the

invocation themselves or to select a clergy person to give the invocation. While only two Council Members chose to give the invocations themselves, in giving the Council Members the power to select the clergy person giving the invocation, this is substantially similar to them giving the prayer themselves as they knew or should have known the message that was being conveyed.

It is also important to note early America's original historical past practice, which included the early settlers fleeing England in pursuit of religious freedom, the freedom to choose whatever religion or to choose not to have a religion. V. James Santaniello, *School Law: A Legacy of the 20th Century*, 46-May R.I. B.J. 5, 6–7 (1998). Further, as this Court stated in *Allegheny,* "history can't legitimize practices that demonstrate government's allegiance to a particular sect or creed." *Id.*

Therefore because the Prayer Policy successfully endorses the practice of religion it fails the second prong of the Lemon test.

iii. The Prayer Policy exhibits a pattern of disparaging one religion over another, or religion in general over being non-theistic.

The Prayer Policy violates the third prong of the Lemon test, disparagement. As it not only promotes certain religions over others, but promotes the practice of religion in general over being non-religions. To disparage is to "speak slightly of someone or something" which demonstrates the opinion that the subject is "neither good nor important." *Disparage*, *Black's Law Dictionary* (10th ed. 2014).

In *Greece,* this Court found that legislative prayer does not violate the Establishment Clause as long as the speech does not show a pattern of proselytizing or disparaging of any one religion. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1823 (2014). This Court did not ignore disparaging comments made such as the characterization of objectors as "minorities . . . ignorant

of the history of our country" but as only two disparaging comments were made in the town's invocations, this Court determined a pattern did not exist. *Id.* at 1824. Conversely, had this Court found a pattern of proselytizing and disparaging comments, the policy would be found unconstitutional. *Id.*

In the instant case, the record shows a total of thirteen disparaging comments made from various clergy people since the Prayer Policy took effect in October of 2014. R. at 3. For example, the Jesus Christ of Latter Day Saints pastor asked that "none would reject Jesus" and be sent to the "Telestial Kingdom away from the fullness of God's light" three times while giving the invocation. *Id.* The Town has held twenty-one meetings since the invocation of the policy. 62% of the time Council Members or their selected clergy gave an invocation, they made comments disparaging all those who did not believe in a particular religion. *Id.* This statistic strongly suggests a pattern of both proselytizing and disparagement with regards to the council member led Prayer Policy.

This Court's decision in *Greece* should lead to the finding that the legislative prayer policies are unconstitutional. However, there are key distinguishing factors between *Greece* and the instant case. The most important factor being the pattern of both proselytizing comments and disparagement that *Greece* did not contain, but is highly evident in the instant case. Only two statements of disparagement are evident in the record of *Greece*, compared to thirteen disparaging comments in the case at bar. This fact is highly suggestive of a pattern proselytization. Also, call attention to the exclusively theistic nature of said comments, especially concerning those citizens who exercise their freedom of religion by not partaking in religion, which contributes to a finding of a pattern of proselytization.

Therefore this Court should conclude that the Prayer Policy shows a pattern of

disparagement and fails the second prong of the Lemon test.

iv. The Prayer Policy fosters government entanglement with religion as the purpose of the institution and the nature of the aid lead to a relationship between government and religious activity.

The Prayer Policy fosters excessive government entanglement with religion given the religious purpose of the policy and the governmental nature of the aid provided. Government entanglement with religion can be established through examining the purpose of the institutions benefitted, the nature of the aid provided, and the resulting relationship. *Lemon*, 403 U.S. at 620. State aid is either financial aid given directly to the facility or "comprehensive, discriminating, and continuing state surveillance." *Id.*

This Court set the standard for when a policy as a whole violates the Establishment Clause, but specifically what government entanglement with religion looks like in *Lemon. Id.* at 612–13. In this case, this Court examined whether state aid given to religious private schools violated the long standing expectation of separation of church and state. *Id*. at 606. This Court, while finding the policy to be non-secular and endorsing religion, specifically found that government entanglement occurred because the financial aid was directly given to the religious institution. *Id.* at 619. Further, giving financial aid required governmental surveillance of a religious institution, to ensure the funds were being used correctly. *Id.* at 620. Through its analysis, this Court further established governmental entanglement with religion and set the standard for excessive entanglement when no financial aid is directly given to a religious institution. *Id.*

The *Lambeth* court elaborated on the above referenced premise, where it court employed the Lemon test to determine if "in God we trust" being inscribed on a government center violated

the Establishment Clause. *Lambeth v. Board of Commissioners of Davidson County*, 407 F.3d 266, 268 (4th Cir. 2005). The court determined that the purpose was secular as the entire motivation was not to advance religion and that it did not endorse religion as a reasonable observer would conclude the message to be patriotic given the historical past practice of the words. *Id.* at 270. Further the court found no government entanglement as the display did not require any surveillance. *Id.* at 273.

In the instant case, the purpose of the policy is strongly assumed to be religious as the hope was to “invoke divine guidance” in the legislative policymaking. R. at 2. While there is no direct financial support between the clergy and the council, there is continuous surveillance through the Council Members electing clergy or choosing to give themselves the invocation. Further, as the council meetings themselves are where the invocation occurred, government surveillance is assumed. This highly suggests that the relationship between the clergy and the government has become excessively entangled with regards to the Prayer Policy.

Some would suggest that the purpose of the Prayer Policy is secular in being for the Council Members themselves and not the citizens as a whole. However, the effect of giving the invocation before all citizens present at the Council Meeting as well as the expressly religious purpose stated in the Prayer Policy implies a religious purpose. It may also be suggested that there is no surveillance as the Council Members are not allowed to review the invocations ahead of time. However, when the Council Members give the invocations themselves they have exclusive control over the message. Further, the fact that the selected Council Member has control over who makes the invocation leads at minimum to the assumption of surveillance, as they either know or reasonably should know the message that the clergy person will relay.

Religion has long been intertwined with government, such as having “in God we trust”

on American currency, or the phrase "one nation under God" as part of the Pledge of Allegiance. However, a reasonable person would amount the history and tradition of these phrases to be patriotic rather than religious, and therefore would not find any entanglement or endorsement of religion. In an instance such as Council Member selected or led legislative prayer, a reasonable observer would conclude the purpose to be an endorsement of religion and therefore discrimination in favor of religion.

Thus, this Court should conclude that the Prayer Policy creates excessive entanglement between government and religion and therefore fail the third prong of the Lemon test.

B. The Prayer Policy fails the Endorsement test as it supports the practice of religion over non-religion and fosters government expression of religion.

The Endorsement test established in *Lynch v. Donnelly* defined endorsement and set the standard for when the government is advancing one religion over another or religion in general over non-theism. It has further been expanded in *Capitol Square v. Pinette* to include government expression itself, or discrimination in favor of religion. The Prayer Policy advances theism over non-theism and further is government expression in favor of the practice of religion.

i. The Prayer Policy fails the endorsement test in being exclusively theistic, therefore leading to the conclusion that the government itself endorses religion.

The Prayer Policy endorses religion in general over secularism and therefore violates the Establishment Clause. This Court has defined endorsement as what "precludes the government from conveying or attempting to convey a message that religion or particular beliefs are preferred." *Lynch v. Donnelly*, 104 S. Ct. 1355, 1369 (1984). Endorsement is determined by "what viewers may fairly understand to be the purpose." *Id.*

In the case of *Lynch v. Donnelly,* this Court established the Endorsement test, used to

determine when the government endorses a specific religion or religion over secularism, and therefore violates the Establishment Clause. *Id.* This Court analyzed whether a nativity scene which accompanied a plethora of Christmas decorations located in a park at the heart of the city's shopping district successfully endorsed religion. *Id.* at 1358. Although this Court does not limit itself to one test, it chose to implement the Lemon test in this instance and the creche successfully passed all three prongs. *Id.* at 1365. This Court held that the placement within the Christmas decor deemed the nativity scene as secular rather than religious, and no religion was advanced or inhibited as it was a Christmas scene, and as a country, America has long recognized the tradition and origin of Christmas. *Id.* Further, this Court held that there was *de minimis*, if any, government entanglement. *Id.*

In *Greece* this Court found that legislative prayer at the beginning of monthly town meetings did not violate the Establishment Clause as long as the speech did not show a pattern of proselytizing or disparaging of any one religion. *Greece*, 134 S. Ct. at 1824. Further, this Court held that the town did not have to "go outside their borders" to equalize the largely Christian invocations that the randomly selected clergy gave with the other religions that may have been present, as the clergy people themselves were chosen at random. *Id.*

In the case at bar, the Prayer Policy involved a Council Member chosen at random to either give the invocation, elect a clergy person to give the invocation, or not have an invocation. As all six of the seven Council Members who chose to participate in the invocation are theistic, all of the invocations were theistic. Further, many of the clergy people chose to make proselytizing comments during their invocations. R. at 3. This is demonstrated through the New Life Christian pastor asking all present to "bend a knee before Christ" three times while giving the invocation, and the Jesus Christ of Latter Day Saints pastor asking that "all submit to Christ"

five times while giving the invocation. *Id.* Therefore, in adopting the *Lynch* standard, any reasonable viewer would believe the purpose of the invocation is that the policy makers prefer religion over secularism.

As this Court stated in *Greece,* the Town is not required to go outside if its borders to equalize the invocation for all. However, in the instant case, no effort was made to equalize. The lack of effort is demonstrated through the Council Members choosing to either give the invocations themselves or elect a clergy person of their choosing to give the invocation. The result is that the six participating Council Members were left to "represent" the beliefs of the entire town of Central Perk.

Therefore, the Town's Prayer Policy is unconstitutional in their endorsement of theism over non-theism.

ii. The Prayer Policy fails the endorsement test as the practice is government expression and appears to be government action to discriminate in favor of religion.

The Prayer Policy constitutes government endorsement of religious practices through discrimination against those who are non-religious. Endorsement in its expansion includes "expression by the government" and "government action, which discriminates in favor of religion." *Capitol Square v. Pinette*, 115 S. Ct. 2440, 2447 (1995).

In the case of *Capitol Square v. Pinette* this Court expanded the Endorsement test established in *Lynch v. Donnelly* to include expression by the government itself, and government action to discriminate in favor of religious activity. *Id.* This Court examined whether a cross the KKK was attempting to put on display in the town square violated the Establishment Clause and was therefore unconstitutional. *Id.* at 2445. This Court found that the government was not itself expressing the religious message, and was instead a private expression by the KKK, which the

First Amendment free speech clause protects. *Id.* Further, the symbol was merely a private belief displayed in a public forum and did not constitute government discrimination in favor of religion in general. *Id.*

In the instant case, the invocations at the beginning of the monthly meetings were more often than not conducted by clergy persons, all of which were selected by the randomly chosen Council Member, and always reflected the denomination of that Council Member. This effectually achieved expression by the government itself as the Council Members, acting in their position as community leaders, used this platform to spread the message of their chosen religion. This was not simply private expression in a public forum as in *Lambeth.* Further, the fact that Council Members consistently invited back clergy persons who continuously made disparaging and proselytizing comments demonstrates the government discrimination in favor of religious activity. For example, the Jesus Christ of Latter Day Saints, whose pastor gave the invocation nine of the twenty-one times since the ratification of the Prayer Policy, is responsible for eight of the disparaging comments made during the invocations.

Respondent will likely argue that the council chairman selected the Council Member to give the next invocation at random and further they could not review the invocation before the chosen clergy spoke. R. at 1. However, the Council Members reasonably knew or at least should have known, the message that selected clergy was to give at the invocation, including the knowledge that disparaging and proselytizing comments could be made both from knowing the pastors personally and from hearing their invocations multiple times. The random selection of Council Member rather than clergy also successfully discriminated against those who are non-theistic as leaving the six Council Members who participated in the invocation lottery to represent every citizen of the Town.

For these reasons this Court should conclude that the government endorsed religion, through its personal expression, as well as the discrimination in favor of religious beliefs.

II. THE PRAYER POLICY IS UNCONSTITUTIONALLY COERCIVE OF ALL CITIZENS, AS WELL AS THE HIGH SCHOOL STUDENTS IN ATTENDANCE BECAUSE THE INVOCATIONS AMOUNT TO GOVERNMENTAL PRESSURE TOWARDS THE ESTABLISHMENT OF RELIGION.

Other than the Lemon test and Endorsement test, this Court has also created the Coercion test to review constitutional challenges pertaining to the Establishment Clause. The Coercion test focuses on whether there is a "coercive effect" of the government's action. Gey, *supra*. Phrased another way, coercion occurs when an individual is influenced to believe or act in accordance with a certain religion because the government is either endorsing or advancing religion, or the establishment of the same. In fact, Justice Kennedy, the founder of the Coercion test, has gone so far as to liken coercion with "direct compulsion to observance, or governmental exhortation to religiosity that amounts in fact to proselytizing."*Allegheny,* 492 U.S. at 660. Under this current definition of coercion, the Prayer Policy is unconstitutional because directing all citizens to stand amounts to compulsion and indirect coercion, and enticing the high school students to attend by awarding extra credit towards their American History class amounts to exhortation to participate.

A. <u>The Prayer Policy is unconstitutionally coercive of all citizens because the public can attend the council meetings and is directed to stand during the prayer, which amounts to indirect coercion.</u>

Justice Kennedy, in his concurring opinion in *Allegheny* stated that absent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal. *Id.* at 657. In the line of jurisprudence that flowed from *Allegheny*, coercion has been identified as being either direct or indirect. *Id.* Indirect coercion is defined as involving coercive state actions

that impinge religious liberties, even though the coercion need not be intentional or directed. *Id.* at 628. In essence, having subtle and indirect public and peer pressure on the public at large quickly amounts to acquiescence and compulsion and violates the Establishment Clause. *Greece*, 572 U.S. at 1826.

i. Having the meetings open to the public, and requesting that the public stand during the Prayer and Pledge, amounts to indirect coercion through compulsion that does not fall within the legislative prayer exception established in *Marsh*.

Coercion is present if a person is "forced by some action of the government to support or participate in any religion or its exercise." *Allegheny,* 492 U.S. at 659. The Prayer Policy is unconstitutional because it forced all the citizens in attendance to stand and be witness to proselytizing language.

In *Greece*, the citizens attending the board meetings argued that they were coerced during the opening prayer because they felt pressured to participate in order to obtain favorable rulings from fellow board members. *Greece*, 134 S. Ct at 1838. While this Court found there to be no coercion present in their fact-specific inquiry, it noted the "reasonable observer standard" where a reasonable person would understand that the history and purpose of prayers are not "to afford government an opportunity to proselytize or force truant constituents into the pews." *Id.* at 1825. While "[a]dults often encounter speech they find disagreeable" that is not to say that an Establishment Clause violation occurs when that adult experiences "a sense of affront from the expression of contrary religious views." *Id.* at 1838. Rather, a pattern of proselytization or denigrating language is needed. Thus in *Greece*, while the invocations did contain references to "Jesus Christ" they did not contain a pattern of denigrating language. Further, the Court noted that "[t]he 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 and thereby eases the task of governing." *Id.* at 1825. In fact, the Court opined "[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." Because no such activity was found in *Greece*, the Court upheld the practice. *Id.* at 1826.

In *Marsh*, the practice of the Nebraska state legislature opening its sessions with a Presbyterian minister's invocation was upheld based on the history and tradition of having prayer entwined with state legislative sessions and deliberative public bodies. *Marsh*, 463 U.S. at 786. However, as Justice Brennan dissented, the "right to conscience, in the religious sphere, is not only implicated when the government engages in direct or indirect coercion. It is also implicated when the government requires individuals to support the practices of a faith with which they do not agree." *Id.* at 803. While this Court protects legislative prayer, the prayers here were held at state legislative meetings, and the audience, namely legislators and senators, were present by choice in fulfillment of their public service duties.

Here, while the Town enacted the Prayer Policy for the primary benefit of the Council Members as in *Greece*, these Council Meetings were open to the public and all citizens were requested to stand for the invocation. R. at 1,2. In *Greece* and *Marsh*, the prayer practices were reserved as internal acts between the legislators. Here, that boundary is surpassed and all citizens were subjected to the invocations. This is precisely the type of practice that this Court feared in *Greece* and stated would violate the Establishment Clause as it would be coercive.

This case can also be distinguished from *Marsh* in that the invocations occur at a local town council meeting, in a township with a population of 12,645, is open to the public, rather

than a state legislative meeting with senators present, that are not open to the public. R. at 1. So while the *Marsh* Court carved a general exception to the Establishment Clause for legislative prayers, this exception would be tremendously expanded with a ruling that it applies to local municipal meetings, where the public is welcome to attend. Given the dangers that are inherent in allowing prayers of this nature to be entwined with local decision makers and municipal government, this Court should consider the dispositive differences between the two landmark cases *Marsh* and *Greece*, and distinguish them from the case at bar. Thus, because the public was present, and was directed to stand during the invocations, the Prayer Policy was unconstitutional because it amounted to indirect coercion that does not fall within the purview of the legislative prayer exception in *Marsh*.

B. The Prayer Policy is constitutionally coercive of the high school students in attendance because in considering the Council Meetings as an extension of the classroom, their attendance is involuntary and they are subjected to unacceptable social pressures.

While the state must not be too heavy-handed in exercising religious control, that is not to say that prayers, in general, cannot be conducted. In fact, it is part of the history and tradition of this great country to seek wisdom and strength through prayer. *Marsh*, 463 U.S. at 783. However, one crucial fact differentiates this case from the line of legislative prayer cases that have been heard by this Court: students were present and their attendance was enticed by extra credit towards their participation grade, and consequently, their final grade for American History. R. at 4. As such, the line of school prayer cases becomes applicable, and under that precedent, the Prayer Policy becomes unconstitutional.

i. The Council Meetings are in effect an extension of the classroom, and by being incentivized to be present at the Council Meetings in exchange for academic credit, the students' attendance should be considered involuntary.

The Prayer Policy is unconstitutional because it amounts to coercion when, in being given the option to earn extra credit in exchange for attendance and participation at the Council Meetings, the high school students, in effect, have no choice but to attend. This Court recognized such lack of choice or occurrence of a mandatory event as meriting heightened constitutional protection. Additionally, because their attendance contributed towards the greater educational experience that started in the classroom, this Court should consider the Council Meetings as an extension of the American History class taught by Ms. Greene.

In *Santa Fe*, while attendance at a high school game was not a precursor to graduation, this Court recognized and deemed attendance to be involuntary because it contributed towards the greater educational experience. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000). Further, because the event is still "meaningful" for many students, "the choice between attending these games and avoiding personally offensive religious rituals is in no practical sense an easy one" and thus, the prayer policy was coercive. *Id.*

In *Lee*, the school district's control of a high school graduation ceremony amounted to "subtle and indirect public and peer pressure" on the high school students that were graduating. *Lee v. Weisman*, 505 U.S. 577, 588 (1992). Requiring the students to stand as a group and remain silent was equivalent to participation in the prayer, which this Court found to be unconstitutionally coercive. *Id*. at 593.

Additionally, the *Indian River* court acknowledged that while in that case it may have been largely voluntary for the students to attend the school board meetings, for some students "attendance at the Board meetings is more formally part of their extracurricular activities, and

thus is closer to compulsory." *Doe v. Indian River Sch. Dist.,* 653 F.3d 256, 277 (3d Cir. 2011). The lack of choice and susceptibility to social peer pressures made the practice unconstitutional because some students were attending the school board meetings to receive awards or to play music for the board's benefit. Because every aspect of the school board was intended to promote and support the public school system and because attendance by students, while not "required by decree" was anticipated, the practice was found to be coercive. *Id*. at 275.

Even though attendance at the Council Meetings could be categorized as an extracurricular event, similar to Santa Fe, these legislative meetings go one step further. By rewarding the students with extra credit in exchange for their attendance, the legislative sessions transformed into a classroom, and the students had no choice but to attend. First, in the 2014 to 2015 academic year alone, twelve students earned extra credit and for 17% of the students the extra credit bumped their grade up a point. R. at 4. Second, because there was no election underway, this was the only[2] method available for students to earn extra credit. R. at 4. Therefore, tantalizing students with the option of extra credit left the students with no option but to attend and participate fully in the Council Meeting practices including the invocations. Thus, unlike in *Lee*, here, the students' academic status would be affected by not attending. Additionally, here, Ms. Green acted in her role as a public school educator as well as an elected Council Member when she attended the Council Meetings with her class of students. R. at 4. This Court has found there to be government coercion of religion when high school students were attending football games and graduation ceremonies. These Council Meetings can be likened to both situations because they too are open to the public, and are places where student attendance is anticipated and encouraged.

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[2] The record is ambiguous as to whether the practice of writing an essay was available past 2014. R. at 4.

Further, not only was attending the Council Meetings as a whole involuntary, but there was also no option to opt out of the Prayer and Pledge. R. at 2. In fact, the Prayer Practice subjected the students to stand in silence and listen to proselytizing language. Because there is nothing in the record to indicate that the students were given the opportunity to leave during this prayer, their stature and silence are akin to the practices in *Indian River* where it would be unreasonable to assume that the high school students could opt out of the invocations.

ii. This Court has protected minors, such as high school students, from social pressures and religious coercion specifically because of their delicate age.

Because high school students are still minors, and considered as being 'of a tender age,' additional considerations are needed in the coercion analysis.

In *Indian River*, the Third Circuit recognized the delicate nature of children and highlighted that students are particularly susceptible to peer pressure. There, the court acknowledged that it is unreasonable to expect a student to feel free to choose not to attend the meeting in order to avoid participating in the prayer. *Indian River,* 653 F.3d at 277. As such, the court disallowed the practice of opening the school board meetings with a largely Christian prayer. Further, the presence of children in these legislative prayer cases is what changes the analysis because as stated in *Marsh*, the "individual claiming injury by the practice is an adult, presumably not readily susceptible to religious indoctrination." *Marsh*, 463 U.S. at 792.

In *Wallace*, this Court recognized a "distinction when government-sponsored religious exercises are directed at impressionable children who are required to attend school, for then government endorsement is much more likely to result in coerced religious beliefs." *Wallace,* 472 U.S. at 81. There, reserving moments of silence for prayer or meditation during elementary

school programming was declared unconstitutional because of the likelihood of coercion stemming from government endorsement towards "impressionable children." *Id.*

Additionally, while not analyzed under the Establishment Clause, this Court also recognized the significance of impressionable young minds when it came to requiring students to salute the American flag and recite the Pledge at public schools, with no distinction made between elementary and secondary schools. *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 662 (1943). This Court articulated that educational environments such as Boards of Education "are educating the young….[which] is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Id.* at 637.

While this case could fall within the purview of *Marsh*, the presence of children, whose ripe, young minds are unable to handle the social pressures that adults, can withstand, and whose attendance, when conditioned with the reward of extra credit, has any aspect of voluntariness removed. Moreover, while it can be a slippery slope to argue that the arbitrary presence of a child at a legislative meeting, could change the analysis, it is different when a teacher and Council Member, acting in both capacities, entices her students to be present and participate in the same. The students' presence at Council Meetings is planned and their learning environment should be protected as if they were in their classroom.

Therefore, the high school students, incentivized with the lure of extra credit, in effect had no choice but to attend the Council Meetings, during which time invocations that rise to the level of permitting coercion occurred. As such, the practice is unconstitutional. In essence, the tender age of high school students predisposes them to the dangers of social pressures, which is exactly why this Court has protected these types of students from dangerous social pressures.

CONCLUSION

There are three established tests for analyzing a constitutional challenge of a prayer under the Establishment Clause. Under all three, the Prayer Policy established by the Town does not muster constitutionality. First, under the Lemon test the purpose of the policy, in being secular, inhibits and advances religion, which leads to excessive government entanglement with religion. Through an Endorsement test analysis, the result is the same. The Prayer Policy, as an expression of the government itself encourages discrimination in favour of religion rather than non-religion. Lastly, even if this Court uses the Coercion test, again, the Prayer Policy would be unconstitutional since it coerces the citizens in attendance by requesting them to stand during the invocation as they stay witness to proselytizing and denigrating statements. The Prayer Policy coerces the high school students in attendance by awarding extra credit to those that attend and are consequently subjected to unacceptable social pressures, as already established by this Court.

Even if this Court decides that the Coercion test is no longer an appropriate analysis, or the other two established tests are inapplicable, in order to preserve the objective of separating church and state and to stay true to long-stemming protections of religious freedoms, this Court must establish a new framework that embeds the concepts of endorsement and coercion in some fashion. Thus, while this Court may choose to adopt a new framework to handle these issues, the underlying principles of endorsement and coercion will be inextricably entwined. Because the primitive factors of a potential new test would be met, even under a new test, the Prayer Policy should still be found to be unconstitutional.

For these reasons, Petitioner respectfully requests that this Court REVERSE the decision of Court of Appeals and REINSTATE the judgment to permanently enjoin the Respondents from continuing the Prayer Policy.

CERTIFICATE OF SERVICE

Counsel for Petitioner hereby certifies that the foregoing brief was served to the Director at alexang@mail.regent.edu on this 14th day of September 2018.

Respectfully submitted,

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/s/ COUNSEL FOR PETITIONER

CERTIFICATE OF COMPLAINCE

Counsel for Petitioner hereby certifies that the foregoing brief complies with Rules of the United States Supreme Court, and with the most recent edition of *The Bluebook: A Uniform System of Citation*. This brief has been prepared in accordance with the Rules of the 18th Annual Leroy R. Hassell, Sr. National Constitutional Law Moot Court Competition, particularly Rule 8 regarding assistance.

Respectfully submitted,

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/s/ COUNSEL FOR PETITIONER

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APPENDIX “A”

United States Constitutional Provision

U.S. Const. amend. I

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.

APPENDIX "B"

CENTRAL PERK TOWNSHIP, OLD YORK, PRAYER POLICY

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.