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 THE RESPONDENT

COUNSEL FOR RESPONDENT
TEAM O
DATED SEPTEMBER 14, 2018

QUESTIONS PRESENTED

I. Whether Central Perk Town Council's legislative pray 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 Central Perk Town Council's prayer policy and practices are unconstitutional 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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STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Thirteenth Circuit was entered on January 21, 2018. A petition for a Writ of Certiorari was timely filed and granted on August 1, 2018. The jurisdiction of this Court is invoked under 42 U.S.C. § 1983.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves questions relating to the Establishment Clause of the First Amendment of the United States Constitution, and the Fourteenth Amendment of the United States Constitution.

STATEMENT OF THE CASE

I. Statement of Facts

This case concerns the constitutionality of the legislative prayer policy and practices of Central Perk Township Town Council. R. at 20.

Central Perk Township is a rural area in Old York, with a small population of 12,645. R. at 1. Central Perk Township is governed by a Town Council (Council) comprised of seven members, which are elected biennially. R. at 1. At the commencement of this action the Council members included Joey Tribbiani (Tribbiani), who is Chairman of the Council, Rachel Green

(Green), Monica Geller-Bing, Chandler Bing (Bing), Gunther Geffroy (Geffroy), Janice Hosenstein (Hosenstein), and Carol Willick (Willick). R. at 1.

Following the Supreme Court's decision in *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) the Board adopted the policy of allowing prayer invocations before the commencement of business at each meeting. R. at 2. The preamble of the policy states in pertinent part:

> Whereas the Supreme Court of the Unites States has held that legislative prayer for municipal legislative bodies is constitutional; Whereas the *Central Perk Town Council agrees that invoking divine guidance for its proceedings would be helpful and beneficial to Council members*, all of whom seek to make decisions that are in the best interest of the Town of Central Perk; and, *Whereas prayer before Town Council meetings is for the primary benefit of the Town Council Members*, the following policy it adopted [emphasis added]. R. at 2.

The policy provides for the random selection of Council Members. R. at 2. Upon selection, the Members could either give the invocations themselves or select a minister from the community to give the invocation. R. at 2. Alternatively, the Members had the option to direct the Pledge of Allegiance instead of giving an invocation. R. at 2. Whether there is an invocation and the Pledge of Allegiance, or just the Pledge, the Council Member who opens the meeting invites citizens present to stand for both. R. at 2.

Following the policy implemented by the Board Council Members names were written on a sheet of paper, placed in an envelope, and then randomly selected prior to monthly meetings. R. at 2. Under this process Council members Bing and Geller-Bing cumulatively had had their names drawn nine times. Council Member Willick has had her name drawn three times. Council member Green had her name draw four times. Collectively, Hosenstein and Tribbiani had their names drawn four times. In sum, eighteen invocation have been given since the practice began in 2014. Of the eighteen invocations given only five invocations were personally led by a council member.

The record indicates that the invocations have been nondiscriminatory and theologically varied. R. at 20. Bing and Geller-Bing are members of the Church of Latter-Day Saints and all nine times that their names were selected they picked David Minsk, their Branch President, to deliver the invocation. R. at 3. Willick is a member of the Muslim Faith and on the three occasions her name was drawn she made the decision to personally give the invocation. R. at. 3. Green, a member of Baha'i faith, had her name drawn four times. R. at 3. Twice she declined to give an invocation and on two occasions she decided to personally give the invocation. R. at 3.

Council Member Hosenstein and Tribbiani belong to an evangelical Christian Church called New Life Community Chapel (New Life). R. at 3. Hosenstein and Tribbiani names were called a combined number of four times. R. at 3. Each time the Council members selected New Life pastors to give the invocations. In total, nine invocations were given by the Church Jesus Christ of Latter-Day Saints, four invocations were given by New Life, three times by Muslim Faith, and two times by the Baha'i faith. R. at 2-3.

In addition to holding her position as a Council member, Green is a teacher at Central Perk High School. R. at 4. Green teaches an optional seminar in American Government for high school seniors. Green offers students several opportunities to earn five extra credit points towards their final grade. R. at 4. Students may volunteer for a political campaign for a minimum of fifteen hours, write a three-page letter to their federal or state elected representative addressing a current political issue, or make a presentation at a Council monthly meeting on a matter currently under consideration. R. at 4.

Although, Green offers five extra credit points it only constitutes ten percent of a student's final grade. R. at 4. Between the 2013-2014 and 2015-2016 academic year, the average class grade was only raised one percent from an 89 B+ average to a 90 A- average. Out of twelve

students only two students raised their final grades a single letter grade because of the extra credit. R. at 4.

During the 2015-2016 academic year, four of the thirteen students from Green's class who chose to make presentations to the Council were the sons or daughters of individual Plaintiffs. R. at 4. On October 6, 2015 Ben Geller, a member of New Life Church, made a presentation and heard an invocation from Green, Baha'i Faith. R. at 4-5. On November Timothy Burke, an atheist, made a presentation and heard an invocation from President Minsk Church of Jesus Christ of Latter-Day Saints. R. at 5. On February 5, 2016 Lesli Buffay, an atheist, made a presentation and also heard an invocation from President Minsk Church of Jesus Christ of Latter-Day Saints. R. at 5. On May 8, 2016 Frank Kudrow Jr., an atheist, made a presentation and heard an invocation from a New Life pastor. R. at 5.

II. Procedural History

This action was brought by Ross Geller, Richard Burke, Lisa Kudrow, and Phoebe Buffay (collectively Plaintiffs) and arises under 42 U.S.C § 1983. R. at 1. The Plaintiff's claim stems from the contention that the legislative prayer policy and practices of the Council are unconstitutional and violate the Establishment clause of the First Amendment to the United States Constitution. R. at 1.

On July 2, 2016 Geller filed a complaint alleging that Green's invocation violated the Establishment Clauses as a coercive endorsement of religion. R. at 5. On August 30, 2016, Burke, Kudrow, and Buffay filed a separate lawsuit alleging that the Council's legislative prayer policy violated the Establishment Clause. R. at 5. On February 17, 2017 the United States District Court for the Eastern District of Old York issued a judgment granting the Plaintiff's

Motion for Summary Judgment. R. at 11. The Judgment permanently enjoined the Council from continuing its current legislative prayer policy. R. at 11.

On March 15, 2017 the Council filed a timely notice of appeal. On January 21, 2018 the United States Court of Appeals for the Thirteenth Circuit reversed the district court's decision, granted the Councils Motion for Summary Judgment, and dismissed the Plaintiff's complaint with prejudice.

On August 1, 2018 the Supreme Court of the United States granted the petition for a Writ of Certiorari to the United States Court of Appeals for the Thirteenth Circuit.

SUMMARY OF THE ARGUMENT

This Court should affirm the judgment of the United States Court of Appeals for the Thirteenth Circuit because the prayer practice and policies of Central Perk Town Council are constitutionally permissible. To determine the constitutionality of Central Perk Town Council's legislative prayer policies the practice must be considered in comparison to historically accepted practices. Historical precedent provides validation for the policy of the Town Council personally delivering invocations and selecting ministers of their choosing to deliver invocations. Additionally, since the language included in all invocations does not demonstrate a pattern of denigration or proselytizing anyone in attendance the practice of the council as a whole is constitutional. Finally, the constitutionality of Central Perk Town Council's prayer policy and practices should be assessed according to legislative prayer jurisprudence. Consequently, the Board's practice is not unconstitutionally coercive of students. Based on the reasons stated below, the Respondent respectfully request that this Court affirm the decision by the Appeals Court for the Thirteenth Circuit.

ARGUMENT AND AUTHORITIES

I. CENTRAL PERK TOWN COUNCIL'S LEGISLATIVE PRAYER POLICY AND PRACTICES ARE CONSITITIONAL BECAUSE THE PRACTICE FALLS WITHIN THE CONSITITUTIONALLY PROTECTED HISTORICAL PRACTICE OF LEGISLATIVE PRAYER OUTLINED BY THE SUPREME COURT IN *MARSH* AND *GALLOWAY*.

A. The First Amendment, through the Fourteenth Amendment, makes the Establishment Clause applicable to States. Historically, strict separation, neutrality, and accommodation theories, as well as, the *Lemon* test have been used to evaluate the constitutionality of legislative prayer practices.

1. Previous approaches used by the Supreme Court included; the theory of strict separation, the neutrality theory, the accommodation theory and the *Lemon* test.

The First Amendment of the United States Constitution is applicable to states through the Due Process Clause. As a result, the Establishment Clause, which prohibits Congress from endorsing religion is also applicable to states. The Supreme Court held, in *Everson v. Board of Education*, that "the First Amendment, as made applicable to the states by the Fourteenth Amendment, commands that a state shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947). To ensure compliance with this constitutional limitation the Supreme Court provides guides, through prior decisions, for determining adherence. These guides include; strict separation, neutrality, and accommodation theories, in addition, to the three-part test established in *Lemon v. Kurtzman*. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

The Supreme Court has not constructed a comprehensive list of rules to be applied in legislative prayer cases, however, prior holdings of the Court do serve as a guidepost for analyzing whether a particular practice goes beyond constitutional bounds. *Lund v. Rowan Cty.*, 837 F.3d 407 (2016). For this reason, understanding the various approaches used by the Supreme Court in legislative prayer cases is beneficial.

The theory of strict separation can be understood through the phrase "separation of church and state". The Supreme Court, in *Everson*, succinctly explained this phrase to mean that "the First Amendment has erected a wall between church and state and "that wall must be kept high and impregnatable." *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947). The neutrality theory, also explained by the Court in *Everson*, described neutrality to mean that the Establishment Clause "requires the state to be neutral in its relations with groups of religious believers and non-believers." *Id.* at 725. The accommodation theory provides that the government should accommodate religion by treating it the same as nonreligious beliefs and groups. (Erwin Chemerinsky, Constitutional Law: Principles and Policies, 1263 (2015). Under this approach a constitutional violation only occurs if the government establishes a church, coerces religious participation, or favors some religion over others. (Chemerinsky, p. 1263).

The Supreme Court, in *Lemon v. Kurtzman,* established a test for determining the constitutionality of legislative prayer. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The test is threefold and in order for a practice to be constitutional all three prongs of the test must be satisfied. Therefore, to satisfy the Establishment Clause a governmental practice must reflect a clearly secular purpose; have a primary effect that neither advances nor inhibits religion; and must not foster excessive government entanglement. *Id.* at 613.

In 1983, the Supreme Court held in, *Marsh* v. *Chambers*, that Nebraska legislatures practice of opening sessions with prayers by a state employed clergyman was constitutional. *Marsh* v. *Chambers*, 463 U.S. 783, 786 (1983). This decision was based on the Courts understanding that legislative prayer posed no real threat to the Establishment Clause based on the intent and actions of the Framers of the Constitution. *Id.* at 791. *Marsh* is sometimes described as "carving out an exception" to the Court's Establishment Clause jurisprudence, because it sustained legislative

prayer without subjecting the practice to "any of the formal "test" that have been traditionally structured for this inquiry. *Town of Greece* v. *Galloway*, 134 S. Ct. 1811, 1815 (2014).

This view was further solidified by the Supreme Court's decision in *Town of Greece* v. *Galloway* where the Court found the town board did not impose an impermissible establishment of religion by opening its board meetings with prayer. *Town of Greece* v. *Galloway*, 134 S. Ct. 1818 (2014). This conclusion was based on the reasoning of the Court that the town does not violate the First Amendment by opening its meetings with prayer that comports with our tradition and does not coerce participation by nonadherents. *Id*. at 1828. Hence, "any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change." *County of Allegheny v*. ALCU, 492 U.S. 573 (1989) (opinion of Kennedy, J.). This Court should determine the constitutionality of Central Perk Town Council's prayer policy and practice based on the reasoning applied in *Marsh* and *Galloway* and find the practice and policies constitutional.

B. Central Perk Town Council's legislative prayer practice and policies survive constitutional muster because allowing council members to personally deliver invocations, personally select ministers, and the content of the invocations, evaluated as a whole, does not exceed the constitutional boundaries established in *Marsh* and *Galloway*.

The Court of Appeals for the Eighth Circuit held, in *Marsh v*. *Chambers*, that Nebraska Legislature's practice of opening each legislative day with a prayer by a chaplain paid by the State violates the Establishment Clause of the First Amendment. *Marsh v*. *Chambers*, 463 U.S. 783 (1983). In reaching this conclusion the court of appeals applied the *Lemon* test and found that the practice violated all three prongs of the test. However, in reversing the court of appeals decision, the Supreme Court did not apply the *Lemon* test, or any other test previously used by

the Court. Instead, the Supreme Court examined the history of legislative prayer in this country and used legislative intent as a guide for determining constitutionality.

From this perspective the Court held that the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom. *Marsh v. Chambers*, 463 U.S. 783 (1983). Moreover, the plurality in *Marsh* also found that absent proof that the chaplains reappointment stemmed from an impermissible motive his long tenure does not in itself conflict with the Establishment Clause. *Id.* at 794. This analysis by the Court provides key factors that should be considered in examining the constitutionality of legislative prayer.

The key factors considered by the Supreme Court, in *Marsh*, included the knowledge that the opening session of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. *Id.* at 787. The Court further considered that the "men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress." *Id.* at 788. Additionally, the Supreme Court reached the conclusion that the unbroken practice for two centuries in the National Congress…gives abundant assurance that there is no real threat. *Id.* at 795. Accordingly, the constitutionality of Central Perk Town Council's pray policy and practices must be assessed based on the key factors analyzed by the Court which led to the holding in *Marsh*.

First, the invocations delivered at Central Perk Town Council meetings are precisely the type of prayer that the Supreme Court has found to be deeply embedded in our history and apart of the fabric of our society. In fact, the council implemented the prayer policy with the understanding that the Supreme Court of the United States has held legislative prayer for municipal legislative

bodies to be constitutional. R. at 2. Based on this understanding the council has delivered invocations at the opening of town meetings much like other legislative bodies have done for decades.

Second, legislative prayer jurisprudence assesses constitutionality based on historically accepted practices. Under this approach the Supreme Court, determined that the legislative intent and conduct of the framers indicates that selecting a chaplain, paying a chaplain, and allowing a chaplain to deliver an invocation does not conflict with the establishment clause. 463 U.S. 783 (1983). A closer examination of *Marsh* shows that the personal selection of the same clergyman of only one faith and the paying of that chaplain was viewed by the Court to align with historically acceptable practices. Applying this reasoning to the present case an analogous conclusion must be reached. For that reason, the Council delivering invocations or selecting ministers to deliver prayers coincides with the conduct that the framers deemed to be constitutionally permissible.

Third, *Marsh* expressed that the continuous practice of legislative prayer gives rise to the inference that there is no true threat to the establishment clause. The record reflects that Central Perk Town Council's invocations have consisted of varied theologies. R. at 2-3. These invocations invoke language directly attributable to the varied faiths, however, the language does not demonstrate a pattern which proselytizes or denigrates other faiths or beliefs. To the contrary, the prayer practice of the Town Council is nondiscriminatory and includes; Muslim, evangelical Christian, Baha'i, and Latter-Day Saint faiths. The inclusion of several faiths lends gravity to an interpretation that the Council does not endorse a single religion or faith. The manner in which invocations have been delivered at Council meetings exhibits conduct that serves to harmonize with tents of some or all religions. *Marsh v. Chambers*, 463 U.S., 783, 792 (1983).

Consequently, contra to contentions of the petitioners, the legislative prayer practice and policies of Central Perk Town Council, viewed as a whole, do not amount to an establishment of religion.

In 2014, the Supreme Court, in *Town of Greece v. Galloway*, expounded upon the earlier decision in *Marsh*. Similarly finding validation in the practice of legislative prayer the Court held that legislative prayer, while religious in nature, has long been understood as compatible with the establishment clause. *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014). Additionally, the Court found historical precedent for the practice of opening local legislative meetings with prayer. *Id*. at. 1813.

In *Greece*, the Court was called upon to determine whether the legislative prayer practice of the Board was constitutional. *Id*. at 1815. In that case, the plaintiffs contended that the language included in many of the invocations and the predominantly Christian theology caused the practice of the Board to be an impermissible conflict with the establishment clause. *Id*. at 1817. However, in evaluating the prayer practice of the Board as whole the Court held the prayer practice to be constitutional. *Id*. at 1815.

The Supreme Court based its holding on an understanding of the purpose of legislative prayer and of the limitations set for the practice. The Court gathered the purpose of legislative prayer from a contextual understanding of history. Articulating that "as practiced by Congress since the framing of the Constitution, legislative prayer lends gravity to public business, reminds law makers to transcend petty differences in pursuit of a higher purpose, and expresses a common aspiration to a just and peaceful society." *Id*. at 1818.

Applying this understanding to the policy of the Board the Court found the practice of inviting a local minister to deliver an invocation at the opening of town meetings to be constitutional. *Id*. at. This conclusion was based on the intent of the Board's practice which was

to "place town board members in a solemn and deliberative frame of mind, invoke divine guidance in town affairs, and follow a tradition practiced by Congress and dozens of state legislature." *Id*. at 1816. Thus, the holding in *Greece* was that the Board's legislative prayer practice fell within the permissible boundaries envisioned by the Framers and was therefore constitutional. *Id*. at 1820.

Similarly, the prayer practice of Central Perk Town Council fits within the tradition long followed in Congress and state legislatures. As a result, the practice exhibited by Central Perk Town Council adheres to the intended purpose for which the practice was designed. The Council adopted the practice with the goal of invoking divine guidance for its proceedings which the Council viewed as being helpful and beneficial to members who seek to make decisions in the best interest of the Town of Central Perk. R. at. 2. The ultimate purpose of the Council's legislative prayer practice finds validation in the holding in *Galloway* and is therefore constitutional.

In order for legislative prayer to remain within constitutional boundaries the practice may not coerce participation from nonadherents, attempt to convert non-believers, or preach damnation. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1825 (2014). Additionally, the invocation must be delivered at the opening of legislative meetings, must be delivered in a respectful tone, and the scope of the invocations must remain narrowly tailored to the intended audience of the prayer-the council members. *Id*. at 1825, 1826, 1827. The Supreme Court, in *Greece*, determined that the prayer practice of the Board adhered to all of those requirements.

Likewise, the invocations delivered at Central Perk Town Council meetings satisfactorily meet the same requirements and do not exceed constitutional limits. All of the prayers were delivered at the opening of town meetings, the tone of all invocations was respectful, and none of

the invocations preached damnation or attempted to convert anyone present. Lastly, the practice was initiated and continued to be implemented with the sole intention of solemnizing and uniting the Council members. The prayer practice and policies of Central Perk Town Council do not exceed limitations laid out by the Court in *Greece*. As a result, the Council's legislative prayer practice falls within the constitutionally protected historical practice of legislative prayer.

1. Central Perk Town Council's practice and policy of allowing Council Members to personally deliver invocations is constitutional because the practice does not exceed constitutional limits.

Central Perk Town Council's pray practice of allowing council members to personally lead invocations is permitted because the policy aligns with the practices historically deemed permissible and does not exceed constitutional boundaries. Further, the invocations personally delivered by council members does not show a pattern of espousing religious beliefs, proselytizing, or denigrating other faiths.

The Supreme Court, in *Marsh* and *Galloway*, did not include the identity of the prayer giver as a component to be considered in an evaluation of constitutionality. Furthermore, neither *Marsh* nor *Town of Greece* restricts who may give prayers in order to be consistent with historical practice. *Bormuth v. Cty. Of Jackson,* 87F.3d 494, 509 (2017). The Court focused on the prayer practice specifically and assessed constitutionality based on whether the practice as a whole reflected historically acceptable prayer practices. The Supreme Court has not specifically determined whether lawmaker led legislative prayer constitutes an impermissible practice. Consequently, there is a spilt of authority among jurisdictions as to whether or not this specific action results in a constitutional violation.

Although the Supreme Court has not specifically identified lawmaker led invocations to exceed constitutional boundaries, the Court has provided clear examples of what is and is not

permissible. The holdings of the Court, in *Marsh* and *Galloway*, provide two excellent examples of the type of legislative prayer practice that the Court views as correctly aligning with historical practices. According to the Supreme Court, legislative prayer is constitutional if the practice; 1) aligns with historically accepted practices; 2) and does not demonstrate a pattern of exploiting, proselytizing, or denigrating other faiths or beliefs. *Marsh v. Chambers*, 463 U.S. 783 (1983).

The Sixth Circuit, in *Bormuth v. County of Jackson*, upheld the constitutionality of a prayer practice factually similar to the one in this case. In *Bormuth*, the central issue was whether Jackson County's prayer practice falls outside our historically accepted traditions because the Commissioners themselves, not chaplains, or invited community members, lead the invocation. *Id*. at 508. In response to the question the court held that the County's invocation practice is consistent with *Marsh v. Chamber* and *Town of Greece v. Galloway* and does not violate the Establishment Clause. *Id*. at 519.

The board in *Bormuth* had a practice of allowing commissioners to personally lead invocations. The commissioners asked attendees to rise and the invocations were exclusively Christian. Based on these facts the plaintiff brought a claim alleging that this practice ran afoul with the establishment clause. However, the Sixth Circuit, sitting en banc, held that the historical breadth of legislator-led prayer in the state capitals for over one hundred fifty years more than confirms that our history embraces prayers by legislators as part of the "benign acknowledgment of religion's role in society." *Id*. at 510.

The Sixth Circuit reached this conclusion based on an application of the guide established in *Marsh and* Galloway. Based on this application the court found that history shows that legislator led prayer is a long-standing tradition. *Id*. at 509. Additionally, the court found validation for the permissibility of legislator-led prayer is based on the persistent practice of various state capitals

since 1849. *Id*. at 509. The court found further support for lawmaker led prayer based on the intended purpose of the practice. The court articulated that "the tradition of legislator-led prayer makes sense in light of legislative prayer's purpose- it "invited lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing." *Town of Greece*, 134. S. Ct. at 1832. Moreover, legislative prayer exists "largely to accommodate the spiritual needs of law makers and connect then to a tradition dating to the time of the framers. *Id*. at 1826 (Kennedy, J.).

Confining the determination of constitutionality simply to Central Perk Town Council's prayer practice and policies, the practice is permissible since it does not exceed constitutional limits. Furthermore, in applying the facts of our case to the facts in *Bormuth* a similar finding of constitutionality must be reach.

In analyzing the five invocations given by board members the facts indicate that three were given by council member Willick, a member of the Muslim faith. R. at 3. On each occasion she prayed the same prayer in Arabic which translates to "Peace and mercy and blessings of Allah be upon you." R. at 3. The remaining two invocations were delivered by council member Green who is a member of the Baha'i faith. R. at 3. Green prayed to Buddha, acknowledging his infinite wisdom and asking that the Council meeting could be conducted in harmony and peace. R. at 3. Although citizens were requested to stand, R. at 2., attendees were not asked to participate in the prayers.

The content of the prayers offered by Green and Willick were respectful. The prayers did not preach damnation or seek to convert anyone in attendance. Instead, the invocations were delivered at the proper time- at the beginning of the town meetings, in the correct tone- respectful, and directed to the intended audience- the council members. Based on these factors

the practice as a whole fall within constitutional boundaries. Moreover, the practice of the council is similar to the conduct found to be constitutional in *Bormuth*. An additional consideration in this case is that the invocation personally given by the council members here were not exclusively Christian. The invocations given were from Muslim and Baha'i faith. This fact lends to the lack of discrimination and constitutionality of the practice.

However, recently the Fourth Circuit, sitting en banc, found the very conduct that the Sixth Circuit found constitutional to be unconstitutional. This decision of the court conflicted with an earlier decision by the Fourth Circuit Court of Appeals which found the practice to be constitutional. The Sixth Circuit held that the practice as conducted by the board in *Rowan County* to be an impermissible practice which ran afoul with the establishment clause. *Lund v. Rowan County,* 863. F.3d 268 (2017).

Although the found the specific practice in that case to be unconstitutional, the court did state that "in concluding that Rowan County's prayer practice is constitutionally infirm, we reiterate that legislator-led prayer can operate meaningfully within constitutional bounds." *Id*. at 290. This statement suggest that the court does not perceive lawmakers led prayer to be wholly unconstitutional. The court identified four factors which led to their conclusion; the prayers were given exclusively by commissioners, the invocation invoked Christianity, the attendees were asked to rise and were invited to pray, and the board exhibits quasi-adjudicatory power. *Lund v. Rowan County,* 863. F.3d 268 (2017).

However, in disagreeing with this decision Justice Thomas cites the recent decision by the Sixth Circuit upholding a nearly identical practice. Further Justice Thomas found that all of the factors which led to the Fourth Circuits decision were elements present in *Galloway*. And lastly, Justice Thomas explained that the proper question to ask was whether "history shows that the

specific practice of legislator led prayer is permitted." *Town of Greece*, at 1819. *Rowan County v. Lund, et al,* 138 S. Ct. 2564 (2018) (Thomas, J., dissenting).

Similarly disagreeing with the holding in *Lund* Justice Sutton articulated that "in addition to having little basis in history, the Fourth Circuits' decision has little basis in logic. It is hard to see how prayers led by sectarian chaplains whose salaries are paid by taxpayer- a practice this Court has upheld- could be *less* of a government establishment than prayers voluntarily given by legislators. *Bormuth v. County of Jackson*, 870 F.3d 494, 532 (en banc) (Sutton, J., concurring).

Despite the holding in Lund Central Perk Town Council's practice of allowing council members to led invocations is constitutional. Since it is the prayer practice as a whole that ought to be evaluated, the five invocations personally given by members is insignificant. Further, in assessing the whole practice of the council it is clear that it aligns with historical precedent, thus the practice is constitutional.

2. Central Perk Town Council's practice and policy of allowing council members to personally select ministers is constitutional because the practice does not exceed constitutional boundaries.

The practice of allowing council members to personally select ministers to deliver invocations falls within historically acceptable practices. This conclusion is supported by the holding in *Marsh* where it was determined that the selection of the same chaplain for sixteen years from a specific denomination in and off itself was not unconstitutional. *Marsh v. Chambers,* at. To this point the Supreme Court, in *Marsh*, explained that concerns arise only if there is evidence of "an aversion or bias on the part of town leaders against minority faiths" in choosing the prayer giver. *Marsh v. Chambers*, 463 U.S. 783 (1983). Further, since it is that the legislators themselves who are the intended "congregation" for legislative prayer, it is reasonable

to permit council members to select which minister delivers the invocation. *Town of Greece v. Galloway*, at 1825 (2014).

In this case, the seven Council Members are the primary audience for the invocations delivered by personally selected ministers. The practice of allowing Members to personally choose ministers was implemented by the Council in 2014 with the intent that members invoke divine guidance which they viewed as helpful and beneficial to the decision-making process. R. at 2. Thus, it logically flows that council members would be permitted to personally select the ministers that would provide them divine guidance.

Moreover, the Council members have varied theological views and so it is inclusive and well-reasoned that each council members would have the opportunity to share with the other members a prayer based on their faith. This inclusive act allows the members to receive divine guidance in a way that is beneficial to them individually and collectively. Additionally, this practice follows the main idea articulated in *Galloway* that people of many faiths may be united in a community of tolerance and devotion, even if they disagree as to religious doctrine. *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014). Therefore, the council members personally selecting minister to deliver invocations, for the intended audience; themselves, is constitutional.

3. Even considering the exclusively theistic theology of the invocations the Council's prayer practice and policies are constitutional because the prayers do not demonstrate a pattern of proselytizing or denigrating other faiths or beliefs.

The theologically varied invocations delivered at Central Perk Town Council meetings demonstrates a high level of inclusivity of all faiths and beliefs and provides a clear indication of a lack of discrimination. This inclusive practice utilized by the town council lends to the constitutionality of the policy and practice as a whole. Even though the theological make-up of

the council is comprised of more theistic members, this fact in itself does not support an endorsement of religion theory.

This conclusion is based on the findings in *Marsh* where the Court held that they cannot, any more than the Members of the Congresses of this century, perceive any suggestion that choosing a clergyman of one denomination advances the beliefs of a particular church. *Marsh v. Chambers*, 103 S. Ct. 3330 (1983). Expounding upon this notion the Supreme Court in *Galloway* found that the theological make up of invocations given did not determine the constitutionality of the practice. *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014). The Court further held that allowing local clergy members to open town board meetings with prayer did not violate the establishment clause even though, although the prayer program was open to all creeds, nearly all local congregations, and thus nearly all participating prayer givers, were Christian. *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014).

In applying these principles to this case, the fact that more invocations have been given by Christians does not alter the constitutionality of the practice. This conclusion is based on the evidence that the prayers of the council were open to all faiths. In fact, the council itself is comprised of Muslim, Latter Day Saints, Baha'i, Evangelical Christians, in addition to, a board member who chooses not to participate. Although Central Perk Town council prayers have been incredibly diverse this is inconsequential because diversity among the beliefs represented in a legislature has never been the measure of constitutionality. *Lund v. Rowan County*, 837 F. 3d 406 (2016). Therefore, when analyzed as a whole the theologically varied nature of the town council prayers is irrelevant and does not alter the constitutionality of the practice when viewed as a whole.

The main limitation laid out by the court in *Marsh* is that legislative prayer may not display a pattern that proselytize or disparage one faith or belief over another. *Marsh v. Chambers*, 463 U.S. 783 (1983). The Supreme Court articulated that absent this type of pattern a challenge based solely on the content of a particular prayer will not likely establish a constitutional violation. *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014). The content of the invocations delivered at Central Perk Town Council meetings do not exceed that constitutional limit established by the Supreme Court since none of the invocations have included language intended to convert persons present to a particular faith. Further, none of the invocations have displayed a pattern which put down another faith or belief or which preached damnation.

Galloway provides an excellent example of the content included in a prayer which the Court found to be permissible. In *Galloway,* the Court concluded that reference to Jesus and the occasional request that the audience stand for the prayer, did not amount to impermissible proselytizing. *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014). In our case, there have been eighteen invocations delivered at Central Perk Town meetings since the practice began in 2014. R. at.

In applying the rationale used in *Galloway* to the practice and policies of the Council members, a similar finding of constitutionality must be rendered. This is due to the fact that the record indicates that each invocation has been given at the opening of business, the tone of all the invocations has been respectful, and there has been no attempt during the invocations to convert nonadherent or to coerce participation from the audience.

Therefore, it is unlikely that the content of the prayers delivered at Central Perk Town Council meetings would be viewed as anything other than respectful. However, even if the language used in invocations delivered by David Minsk, or New Life Church Pastors may be

viewed as crossing boundaries the Court has been clear in instructing that, in determining constitutionality, the practice as a whole ought to be evaluated. *Marsh v. Chambers*, 463 U.S. 783 (1983). As the Supreme Court explained previously, when evaluating the content of legislative prayer disparaging remarks in a couple prayers does not establish a constitutional violation when the town's practice as a whole reflects and embraces the tradition of legislative prayers. *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014). By looking at the invocations delivered in this case over an eighteen-month time span the practice as a whole does not display an impermissible pattern.

Based on the overall tone and content of the invocations given at town council meetings there is no pattern which that may be construed as unconstitutional. Absent a showing that there is a pattern that exploited to proselytize or advance any one, or to disparage any other, faith or belief then a practice falls within the constitutional boundaries established in *Marsh*. *Marsh v. Chambers*, 463 U.S. 783 (1983). Consequently, the invocations delivered by council members personally or by ministers of their choosing are constitutional.

II. CENTRAL PERK TOWN COUNCIL'S PRAYER POLICY AND PRACTICES ARE NOT COERCIVE OF ALL CITIZENS IN ATTENDANCE, INCLUDING STUDENTS, BECAUSE THE LANGUAGE, WHEN EVALUATED AS A WHOLE DOES NOT INDICATE A PATTERN OF ESPOUSING RELIGIOUS BELIEFS, PROSELYTIZING, OR DENIGRATE OTHER FAITHS.

A. Central Perk Town Council's prayer policy and practices are not coercive of all citizens in attendance because there is no pattern of denigration or proselytizing, mere offense is not coercion, and because adults are not susceptible to peer pressure.

1. Central Perk Town Council's prayer practice and policies are not unconstitutionally coercive of all citizens in attendance because mere offense does not equate to coercion.

The element of coercion cannot be established absent a showing that Central Perk Town Council's legislative prayer policy and practices exceed constitutional limitations. Under Marsh,

the Supreme Court explained that absent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a prayer will not likely establish a constitutional violation. *Marsh v. Chambers, 463 U.S 783 (1983)*. The constitutional limitation established by the Court will find coercion where proselyting and denigrating exist. Proselytizing is defined as disparagement, to criticize something or someone in a way showing that one considers the subject of the discussion neither good or important. Black Law Dictionary (10th ed. 2014). Also denigrate is defined as attacking or showing hostility, actual statements that defame, disparage or belittle. Black Law Dictionary (10th ed. 2014). Therefore, petitioners must show that the language of the invocations go beyond simply offending them and actually criticized or belittled, or exhibited hostility.

When viewed as a whole, there are no facts to suggest that the Council's prayer practice espouse a pattern that denigrates or proselytize all citizens who attended the monthly meetings. Furthermore, there is no evidence that suggest any citizens were attacked or compelled to assimilate based on the language in the invocations. Nor is there evidence that any citizen in attendance who did not share the same faith would be met with repercussions. On the other hand, the varied faiths of the council members, including a council member who chooses not to participate, demonstrates that all people present regardless of faith or lack thereof are welcome and not singled out. (R. at 2-4).

In *Town of Greece v. Galloway*, the plaintiffs who attended a town board meeting and heard invocations delivered mostly by Christian clergymen objected to the opening prayers finding them "offensive", "intolerable", and an "affront" to a "diverse community, *"Town of Greece v. Galloway, 134 S Ct. 1811,1816 (2014)*. However, *Galloway* states that offensive language does not equate to coercion. *Town of Greece v. Galloway*. Additionally, the Supreme Court held that

that language included in the invocation, which the plaintiffs found offensive, did not amount impermissible proselytizing.

Similarly, Plaintiffs contend they were offended by the language used in the invocations. Specifically, Plaintiff Geller, asserts that he became upset that his son heard, and invocation delivered by Council Member Green. Green's invocation was constitutionally permissible; however, Geller contends that he was offended by her prayer to a "fake God" that in his eyes, "made a mockery of the purpose of legislative prayer." R. at 5. The fact that Greens invocation exposed Geller to a faith that he does not share is not tantamount to coercion.

Although the petitioners were exposed to content that they would prefer not to hear, this is a common aspect of everyday life *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014). Simply put, it is always possible that members of one religious group will find that prayers of other groups… are not compatible with their faith. *Id.* at 1811,1816. However, Geller's statement that Green was praying to a "fake God" is highly offensive especially since her faith is matter of the deepest personal conviction, arising from her effort to define her own concept of existence, of meaning, of the universe, and of the mystery of human life. *Planned Parenthood of Southeastern Pa v. Casey,* 505 U.S 833, 851(1992). Furthermore, once the government has welcomed prayer into the public sphere, "it must permit a prayer giver to address his or her own God or gods as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian." *Id.at 1822-23.*

Since the language of the prayers does not proselytize or denigrate, the plaintiff's claim of offense to the prayers to Gods of other faiths will not sustain a claim of coercion. The Supreme Court has held that the content of legislative prayers remains constitutional even if it contains references to various gods. (Greece). *Greece* states "...To hold that invocation must be

nonsectarian would force the legislatures that sponsor prayers and the courts that... decide these cases to act as supervisors and censors of religious speech." *Id. at 1811, 1814*. Consequently, it is impermissible for any restrictions to be imposed that would dictate permissible faiths or languages. Imposing such limitations would be equivalent to religious entanglement, thus a constitutional infringement.

An alternative view of coercion has been explained by Justice Thomas to mean "by force of law and threat of penalty". *Id. at 1837*. To establish coercion under this view, Plaintiffs would need to demonstrate that Central Perk Town Council induced their cooperation through force of law and threat of penalty. However, there are no facts that suggest the Council's prayer policy or practices legally forced those in attendance to participate. Therefore, although Plaintiffs may have been offended by the invocations offered during council meetings, this is not sufficient to demonstrate the Central Perk Town Council's prayers practice is unconstitutionally coercive of all citizens.

2. **Central Perk Town Council's legislative prayer policy and practices are not coercive to all citizens in attendance because adults are presumably not susceptible to the same peer pressure that adolescents may face.**

An assumption of coercion is not applicable to adults because they are presumably not easily affected by the content they are exposed to. As result, the potential for undue influence is less significant when dealing with prayer involving adults, and this distinction warrants a difference in constitutional analysis. *Lund v. Rowan County*, 837 F.3d, (2016). Therefore, Central Perk Town Council's prayer policy and practices are not unconstitutionally coercive of all adult citizens present because there is an assumption that they are firm in their beliefs and thus not easily susceptible to coercion. Furthermore, the initiation of this lawsuit by a New Life Church member and Atheist Plaintiffs indicates that the petitioners are firmly rooted in their religious

beliefs. Moreover, our tradition assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith." *Id*. at 1823.

Generally speaking town board meetings are sessions open to the public and most attendees are adults. This open policy means that attendees are free to enter and leave at any time. Applying this logic to the present case it is clear that the adults who attended Central Perk Town meetings had the option to arrive after the invocation or remove themselves during the invocations. American Humanist Association v. McCarty, 851 F. 3d 521, 524 (C.A (Tex.),2017). The ability that adult attendees have to freely enter and leave town meetings makes them less exposed to any potential coercion.

The Supreme Court in Town of Greece articulated that citizens who attend town meetings are mature and "presumably" are not readily susceptible to religious indoctrination or peer pressure" *Town of Greece v. Galloway, Freedom From Religion Foundation, Inc v. Chino Valley Unified School District Board of Education, 896 F.3d 1132 (C.A.9 (Cal.), 2018)*. Furthermore, the Court in Greece held the boards legislative prayer practices to be constitutional even though there were children in attendance. *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014). In that case boy scouts who recited the Pledge of Allegiance were present during the invocation and this did not diminish the constitutionality of the practice as a whole. *Id*. 1811. Following the decision in Greece, it would be inconsistent to hold that Central Perk Town Council's prayer policy and practices are unconstitutionally coercive of all citizens in attendance when they are adults and high school student much older and firmer in their beliefs than young boy scouts.

The Court did hold in *Lee* that children are especially susceptible to peer pressure and other forms of coercion. *Lee,* 505 U.S at 592, 112 S. Ct. 2649. However, high school seniors attending

a council meeting accompanied by adults are not susceptible to the same pressures involved in a school setting. Also, similar to the holding in Greece, the presence of senior high school students at Central Perk Town meetings does not transform this case into a school-prayer issue. *Town of Greece*, 134 S. Ct. at 1827 (2014). In sum, for the reasons stated above, Central Perk Town Council's prayer policy and practices are not unconstitutionally coercive of all citizens in attendance.

3. Viewed as a whole, Central Perk Town Council's prayer policy and practices are not unconstitutionally coercive of all citizens in attendance because the language used in the invocations does not exhibit a pattern of exploiting to proselytize or denigrate any one, or any other, faith or belief.

The Council's prayer policy does not portray an impermissible government purpose because the language used in the invocations does not exhibit a pattern of exploiting, or proselytize or denigrate any one, or any other, faith or belief. The principal audience for these invocations is not, indeed, the public but lawmakers themselves, who may find that a moment of prayer or quiet reflection sets the mind to a higher purpose and thereby eases the task of governing. *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014). The intention of the Council's invocation is to place town board members in a solemn and deliberative frame of mind and invoke divine guidance in town affairs which allows the council members to successfully conduct community transactions. *Id*. at 1816. Acknowledgement of religion by legislative bodies "strives for the idea that people of many faiths may be united in a community of tolerance and devotion." *Id*. at 1823. This central idea is consistent with the Council's goal of unifying its members. This is necessary because there are various topics that must be discussed, argued, and voted upon thus members should be in a solemn and unified state of mind.

Furthermore, the practice of legislative prayer finds validation in history and has been examined by the Court in *Greece and Marsh*. The holding from those cases indicate that

legislative prayer practices similar to one here are generally constitutional. *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014). The Supreme Court has established limits to the constitutionality of prayer practices and those limits examine a prayer practice as a whole. The Court instructed that the "content of the prayer is not of concern to judges," provided "there is no indication that the prayer opportunity has been exploited to proselytize or advance anyone, or to disparage any other, faith. *Id.* at 1814.

Even if the specific content of the prayers is examined as Petitioners erroneously suggest, the language included in the prayers offered by David Minsk, New Life Pastors, Green, and Willick as whole fall within constitutional limitations. Green simply acknowledged the wisdom of her God and asked that the Council meeting would be conducted in harmony and peace. And Willick prayed "As salamu aleiykum wa rahmatullahi wa barakatuh", which translates to "Peace and mercy and blessing of Allah be upon you. R. at 3. These prayers reflect the historical intent for which legislative prayer was created.

On several occasions the invocations offered referred to themes specifically tied to varied faiths. Although the petitioners contend that this sectarian dogma was impermissibly coercive the Supreme Court has found similar prayers to be constitutional. The Court held in *Greece* that prayers that reflect beliefs specific to only some creeds can still serve to solemnize the occasion, so long as the practice over time is not "exploited to proselytize or advance any one, or to disparage any other, faith or belief. *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014).

Prayers that included language such as "the literal gathering of Israel", "non in attendance would reject Jesus Christ", "blinders to be removed from the eyes of those who deny God" and for "every Central Perks Citizens knee to bend before Jesus Christ" (R. at 3) is directly tied to the faith and literal quotes from the Bible. The prayers come specifically from the book of Romans

and Philippines which indicate that the prayers stem from deeply held beliefs and are not intended to preach damnation.

Moreover, once the government has "invited prayer into the public sphere", it "must permit a prayer giver to address his or her own God or gods as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian." *Id* .at 1822-23. However, even if the language included in some of the invocations is viewed as exceeding constitutional boundaries, all the language used in the invocations since 2014 do not display an impermissible pattern. *Marsh,* requires an inquiry into the prayer opportunity as a whole, rather than into the contents of a single prayer. 134 S. Ct. 1811 (2014).

When confronted with language similar to the language used by Minsk and New Life Pastors, the Supreme Court and several District Courts have upheld the constitutionality of the prayer practices. The Supreme Court succinctly explained that although some remarks may stray from the rationale set out in *Marsh,* they do not despoil a practice that on the whole reflects and embraces our tradition. *Id*.

Although the ministers, who were indiscriminately chosen, may have delivered the invocation which could be implied as eliciting participation from the audience this practice is imbedded within faith, personal choices, beliefs and is ceremonial and not a means to coerce or intimidate others. *Marsh, Greece, Obergefell*. Legislative prayer lends gravity to public business, reminds lawmaker to transcend petty differences in pursuit of a higher purpose, and expresses a common aspiration to a just and peaceful society. *See Lynch v. Donnelly,* 465 U.S 668, 693 (1984).Thus, legislative prayer practices and policies as implemented by Central Perk Town Council constitutes a legitimate or permissible government purpose.

A. Central Perk Town Council's prayer policy and practices are not unconstitutionally coercive of high school students present because the practice falls under legislative prayer jurisprudence, Green was acting in her official capacity as a council member, and Green did not force participation.

1. Central Perk Town Council's legislative prayer practice and policies survive constitutional muster, even though high school students were present, because legislative prayer jurisprudence is the standard to be applied in determining constitutionality.

The Town Council's legislative prayer practices are not coercive of students, even though they were awarded extra credit for their participation, because the practice falls within the permissible parameters established for legislative prayer. Green offering extra credit to students who made presentations at the council meetings was not an act of coercion because school prayer jurisprudence is not controlling. The Supreme Court has held that coercion exists in several circumstances not present here. In *Lee*, under the non-coercion view, the Court held that prayer given at a middle school graduation by a rabbi when the school wrote instructions on how to pray was unconstitutionally coercive because there is great social pressure on students to attend their graduation ceremonies and not leave during the prayers. *Lee v. Weisman*, 505 U.S. 577, 122 S. Ct. 2649 (1992). In *Engel*, the Court found that permitting students at public schools to remain silent or be excused from the room represents indirect or passive coercive pressure. *Engel v. Vitale*, 370 U.S. 421, 82 S. Ct. 1261 (1962). Furthermore, the Court determined in *Schempp* that requiring prayer as a curricular activity represents direct coercive pressure. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 83 S. Ct. 1560 (1963). Finally, the Supreme Court in Wallace held that the statute's clear purpose was to reintroduce prayer into public schools which represents a facially neutral statute but was coercive in its intent. (insert citation).

Unlike *Lee, Engle, Schempp* and *Wallace* which occurred during school hours, or on school grounds, or during a school sponsored activity, Green's invocation occurred outside of campus,

outside of school hours, and was not related to a mandatory school activity. The location, the time, and the capacity under which Green delivered the prayer distinguishes this case from the dangers of social pressure or coercion often found in classroom settings, locker rooms and school graduations. Since Green was acting in her official capacity as a Council member, and the facts of this case fall outside the gambit of *Lee, Engle, Schempp* and *Wallace* school prayer jurisprudence is not applicable.

Legislative prayer jurisprudence is applicable here because the facts are more closely associated to those of *Marsh* and *Greece*. Central Perk Town Council is a deliberative legislative body identical to the legislative bodies in Greece and Marsh. Central Perk Town Council is a deliberative body, charged with overseeing the town of Central Perk, conducting elections, adopting budgets, policy making, reviewing the town's goal infrastructure improvements, land use, community growth and strategic planning. R. at 5. Due to the fact that Green was acting in her official capacity as a council member of a deliberative body, legislative prayer jurisprudence controls. Therefore, the practice of Green awarding optional extra credit is not unconstitutionally coercive of high school students.

2. Central Perk Town Council's prayer practice and policies are not unconstitutionally coercive of high school students in attendance because Council Member Green was acting within her official capacity as a Council Member at the time she personally delivered the invocation on October 6, 2015.

When a commissioner leads his constituents in prayer, he is not just another private citizen. He is a representative of the state, and he gives the invocation in his official capacity as a commissioner. *Lund v. Rowan Cty.,* N.C., 863 F.3d 268, 290 (4th Cir. 2017). Furthermore, teachers are free to express their beliefs and take part in religious activities when it is clear they are not acting in their official capacities as school employees. *Doe v. Duncanville Indep. Sch. Dist.,* 70 F.3d 402 (5th Cir. 1995). A teacher is not acting as a school employee outside of

campus or as part of a community group that meets outside of school hours. *Bishop v. Aronov*, 926 F.2d 1066, 1073 (11th Cir. 1991); *Peloza v. Capistrano Unif. Sch. Dist.*, 37 F.3d 517, 522 (9th Cir. 1999). An application of these rules indicates that Green delivering an invocation outside of school, at a council meeting, while sitting as a council member, proves that she was not acting as a school employee. As a result, Green praying to Buddha acknowledging his infinite wisdom and asking that the council meeting would be conducted in harmony and peace was constitutionally permissible.

Although the Supreme Court has held that teacher led prayer in locker rooms, prayer at graduations, and prayer before class is a violation of establishment clause, those circumstances are dissimilar to the invocation delivered by Green. *Lee v. Weisman*, 505 U.S. 577, 112 S. Ct. 2649 (1992); *Borden v. La. State Bd. of Educ.*, 168 La. 1005, 123 So. 655 (1929); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 83 S. Ct. 1560 (1963).

Moreover, unlike the prayer practices in *Lee, Engel, Borden,* at the time Green delivered her invocation she acting as a council member preparing to deliberate measures concerning official town business. Also, at no point do the facts suggest that Green was conducting herself as a teacher during the town meeting. Council Member Green did not lecture students or other citizens, she did not read from the class textbooks or call students to answer American Government class related questions. Therefore, delivering an invocation was not unconstitutionally coercive of high school student present because Green was simply acting in her official capacity as a council member.

3. Council member Green awarding academic credit to students for presenting at council meetings is not unconstitutionally coercive because the practice as whole was optional.

Central Perk Town Councils prayer policy and practices are not unconstitutionally coercive of high school students who were awarded extra credit for presenting at meetings because the class is optional, the extra credit is optional, and presenting at the meeting is only one of three available options to receive credit.

Atheist Plaintiffs allege that the legislative prayer offered at Central Perk Town meetings unconstitutionally coerced their children into religious activity because Green required their attendance as a part of her American Government class curriculum. However, this contention is not well founded and is wholly inaccurate. First, the seminar in American Government taught by Green and offered to high school students is not a required class. R. at 4. However, because Council member Green is known as an excellent teacher, students freely choose to take this class, R. at 4., which a suggest a lack of coercion.

Furthermore, attending Town Council meetings is not a requirement for students to successfully pass Green's American Government seminar. Presenting at the meeting is one of three available options for students to receive extra credit. Green provides several options outside of attending a board meeting. For example, if students wish to receive extra credit they have three options: high school seniors may volunteer for the political candidate of their choice, they may write a three-page paper or letter to their federal or state elected representative setting forth the student's position on a current political issue, or they may make a presentation endorsing or opposing measures currently under consideration by the Council. Therefore, any high school student who attended a council meeting to receive extra credit did so willingly.

Additionally, that facts indicate that the overall impact of the extra credit offered by Green has a de minimus effect on the student's overall grade. In the 2013- 2014 academic year, the average final grade in Green's American Government class was 89, B+ according to the school's

grade scale. R. at 4. And in the 2014-2015 academic year, the average final grade was 90, A-. R. at 4.

The minimal impact of the extra credit offered is clear from an evaluation of the overall academic change that occurred in the school years it was offered. R. at 4. Specifically looking at student's overall grades, of the twelve students in Green's class who earned extra credit, only two students experienced a change in grade. R. at 4. However, the remaining ten students experience no change on their final later grade based on their participation. R. at 4.

Consequently, the optional nature of Green's class, the availability of extra credit options, and the de minimus effect of the extra credit lend to the conclusion that there is an absence of any possibility of unconstitutionally coercive pressure exhibited by Green.

CONCLUSION

For the reasons stated in this brief, the Respondent respectfully request that this Court affirm the Appellate Court's decision.

Respectfully submitted,

Attorneys for Respondent