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

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Brief for Respondents

Team Q
Counsel for Respondents
September 14, 2018

Questions Presented

1. Central Perk adopted a policy permitting invocations at the opening of its monthly Town Council meetings pursuant to the United States Supreme Court's ruling in *Town of Greece, N.Y. v. Galloway*. The policy permits legislators and/or invited clergy to offer the invocations which serve to better the legislators' task of governing and recognize this Nation's bountiful religious history. Is Central Perk's practice consistent with Supreme Court precedent upholding legislative prayer under the Establishment Clause?
2. Central Perk Town Council's prayer policy and Town Council member Green shared the objective of fostering a sense of community and civic mindedness while maintaining the solemnness of the Town Council meetings. The invocations occurred during the informal pre-meeting period when no substantive work was performed. Was the prayer policy coercive to the general public and the students in attendance for the pre-meeting invocation?

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Constitutional and Statutory Provisions

The First Amendment to the United States Constitution provides, in pertinent part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. Const. amend. I.

Statement of the Case

Adopting Invocations. Central Perk Township (Central Perk) is a small town in Old York with a population of 12,645. R. at 1. The Town Council (Council) is Central Perk's governing body. R. at 1. It consists of seven members who meet monthly to address issues of concern for the town's citizens. R. at 1. The Council members at the time of this action were Joey Tribbiani (Tribbiani), Rachel Green (Green), Monica Geller-Bing (Geller-Bing), Chandler Bing (Bing), Gunther Geffroy (Geffroy), Janice Hosenstein (Hosenstein), and Carol Willick (Willick). R. at 1. Tribbiani was the Council's chairman. R. at 1. In September 2014, the Council adopted a policy permitting invocations at the opening of town meetings following the Supreme Court's decision in *Town of Greece, N.Y. v. Galloway*, 134 S.Ct. 1811 (2014). R. at 2. The Council adopted its policy with the following preamble:

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

Council members were given the opportunity to offer an invocation personally or invite a community member to offer it in their place. R. at 2. Council members can choose to skip the invocation and proceed directly to the Pledge of Allegiance or they can also choose to abstain from participating in the invocation process entirely. R. at 2. The Council member who offers or

passes the invocation is chosen randomly and anonymously. R. at 2. If a Council member chooses to invite someone to give the invocation in their place, the policy dictates that the inviting Council member cannot control the content of the invocation. R. at 2

Invocations in Motion. Council member Geffroy asked to never be drawn to provide an invocation. R. at 2. Council members Bing and Geller-Bing belong to the Church of Jesus Christ of Latter-Day Saints. R. at 2. Bing's name was drawn four times and Geller-Bing's name was drawn five times. R. at 2. They both asked Branch President David Minsk to offer the invocation each time their names were drawn. R. at 2-3. Minsk once asked that God allow the Council to remember his/her teachings and apply them, then he closed the prayer in Christ's name. R. at 3. Five times, Minsk asked that God bring his/her kingdom to him. R. at 3. The remaining three times, Minsk asked that the Council follow God. R. at 3. Council member Willick practices Islam. R. at 3. Her name was drawn three times. R. at 3. All three times, she prayed in Arabic, asking Allah to bless the Council with peace and mercy. R. at 3. Council member Green is a member of the Baha'i faith. R. at 3. Her name was drawn four times. R. at 3. She declined twice, but on the other two occasions, she acknowledged Buddha's infinite wisdom and asked that the Council meeting be conducted in harmony and peace. R. at 3. Council members Hosenstein and Tribbiani belong to a Christian denomination called the New Life Community Chapel (New Life). R. at 3. Each of their names was drawn twice. R. at 3. They asked different New Life pastors to give the invocation each time their names were drawn. R. at 3. The New Life pastors offered Christian invocations that asked God to guide the Council and to help the Council acknowledge him/her. R. at 3.

Ms. Green's Hats. In addition to her position on the Council, Ms. Green also teaches at the local high school. R. at 4. She teaches American History and American Government to high

school seniors. R. at 4. Many students take her American Government class, but the course is not required. R. at 4. In an attempt to foster political involvement, Ms. Green offers her students numerous extra credit opportunities. R. at 4. After her election to the Council, Ms. Green began to offer her American Government students the opportunity to give short presentations to the Council for extra credit with the goal of fostering a sense of civic mindedness. R. at 4. The students were not required to attend Council meetings or make presentations but students who chose to do so were rewarded up to five extra credit points on their final exam, which is worth only ten percent of their final grade. R. at 4. In the 2014-2015 academic year, twelve students took advantage of the extra credit offered through student presentations. R. at 4. Of those twelve, only two student's grades were improved a fraction of a letter grade by the extra credit points. R. at 4. Four of the Plaintiffs in this case had children who were students in Ms. Green's class and who chose to give presentations at the Council. R. at 4-5.

Statement of Jurisdiction

The judgment of the court of appeals was entered on January 21, 2018. This Court granted the petition for Writ of Certiorari to the United States Court of Appeals for the Thirteenth Circuit on August 1, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Summary of the Argument

I. This Court's precedents provide that the first question must be answered affirmatively. In *Marsh v. Chambers*, 463 U.S. 783 (1983), this Court determined that legislative prayer is consistent with the Establishment Clause and this Nation's history. *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811 (2014) upheld *Marsh* and applied its holding to local legislative bodies. *Galloway* did not yield a clear answer for when a practice violated the Establishment

Clause, but did provide two tests relevant to that inquiry. Central Perk's practice fits squarely within this Court's holdings in *Marsh* and *Galloway*, where it does not violate either test offered in *Galloway*. Both historical tradition and case-specific circumstances demonstrate that Central Perk does not violate the Establishment Clause.

This Court has used two tests, the *Lemon* test and the endorsement test, in Establishment Clause cases that do not involve legislative prayer. These tests have helped guide this Court in those decisions, but do not have any bearing on a claim involving legislative prayer. Should this Court believe this case departs from *Marsh* and *Galloway*, those tests would still point toward the constitutionality of Central Perk's practice.

Prior cases discuss this Court's reluctance to examine specific prayers and interfere with a legislature's judgment. These reservations apply in this case where the practice stems from an informed legislative enactment specifically guided by *Galloway*. Further, this Court should not wade through particular prayers in order to find an Establishment Clause violation where the surrounding context does not. This Court's precedent is consistent with the Thirteenth Circuit's determination in this case.

II. The First Amendment protects citizens of the United States from the considerable power and influence of the Federal government. Specifically, it serves to protect citizens' rights to the free exercise of the religion of their choosing to note practice any religion. It protects citizens from the establishment of a Federally-endorsed religion that they then must practice. Due to the significant power of the Federal government, many of the tests outlined by this Court to assess Establishment Clause claims involve an analysis of whether the government acted in a way to coerce those affected to practice a religion. *See Cty. of Allegheny v. Am. C. L. Union, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989); *Town of Greece, N.Y. v. Galloway*, 134 S. Ct.

1811 (2014); *Marsh v. Chambers*, 463 U.S. 783 (1983); *Lee v. Weisman*, 505 U.S. 577 (1992). *Galloway* examined legislative invocations and applies in this case to show that the Council's prayers were meant to be a unifying exercise to help remind those in attendance, particularly the Council members, that they are tasked with the important duty of governing. *Weisman* outlines a three-part test that calls for a more stringent coercion analysis for students due to their young age. When this test is applied in this case, the Council did not act in a way that forced participation from students or anyone else in attendance.

Argument

I. Central Perk's practice of permitting invocations before Town Council meetings is constitutional under the standards established in *Marsh* and *Galloway*.

This Court's opinions in *Marsh* and *Galloway* established that legislative prayer is generally constitutional absent specific circumstances that violate the Establishment Clause. *Marsh v. Chambers*, 463 U.S. at 784-95; *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. at 1818-28. *Galloway* reaffirmed *Marsh*'s reliance on history demonstrating that legislative prayer has been accepted and practiced since this Nation's founding. *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. at 1818-20. These cases are this Court's sole guide for evaluating legislative prayer. This Court has used tests to evaluate Establishment Clause claims in other cases. One test is the "*Lemon* test," contained in this Court's opinion in *Lemon v. Kurtzman*. *See Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The second test, called the "endorsement test," was developed to expand the *Lemon* test. *See Lynch v. Donnelly*, 465 U.S. 668, 690-94 (1984). Neither of these tests have been used to examine legislative prayer. This Court has been reluctant to examine individual prayers. *See Town of Greece, N.Y. v. Galloway*, 134 S. Ct. at 1821-22. Further reluctance exists when overruling a legislative decision in a sensitive area such as religion. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 647-670 (1943) (Frankfurter, J., dissenting).

Central Perk's practice of permitting religious invocations before its monthly meetings does not violate the Establishment Clause. First, Central Perk's practice is consistent with this Court's decisions in *Marsh* and *Galloway* that permit legislative prayer. Second, the tests gleaned from other Establishment Clause cases are inapplicable to legislative prayer and do not create an Establishment Clause violation. Third, this Court should be reluctant to supplant its judgment regarding a specific prayer or legislative action.

A. *Marsh* and *Galloway* established that legislative prayer is a deeply-rooted historical tradition that is only disturbed by coercion.

1. This Court's precedents demonstrate that legislative prayer has substantial historical support that is limited secondarily by coercion.

Just four years ago, this Court reaffirmed the constitutionality of a municipal legislature offering an invocation during the opening of its sessions. A principal component of this Court's analysis in that case and the one it upheld involved this Country's extensive practice of legislative prayer. *See Marsh v. Chambers*, 463 U.S. at 786-92; *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. at 1818-23. This Court repeatedly relied on historical practices when evaluating Establishment Clause claims. *See also McGowan v. State of Md.*, 366 U.S. 420, 431-45 (1961); *Engel v. Vitale*, 370 U.S. 421, 425-30 (1962); *Sch. Dist. Of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 212-14 (1963); *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 676-80 (1970); *Larson v. Valente*, 456 U.S. 228, 244-45 (1982); *Lynch v. Donnelly*, 465 U.S. at 673-78; *Cty. of Allegheny v. Am. C.L. Union, Greater Pittsburgh Chapter*, 492 U.S. at 630-31 (O'Connor, J., concurring); *Van Orden v. Perry*, 545 U.S. 677, 683-88 (2005). Great credence is lent to practices consistent with this Nation's history since its founding.

Prior cases establish the infusion of American history with religious practices. This Court cannot separate all aspects of religion from American life because "[w]e are a religious people

whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952); *see also Engel v. Vitale*, 370 U.S. at 434 ("The history of man is inseparable from the history of religion."). Religious notions existed in the United States government before and during the Establishment Clause's enactment. *Sch. Dist. Of Abington Twp., Pa. v. Schempp*, 374 U.S. at 213 ("The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself."). These notions persist today where "[i]t can truly be said, therefore, that today, as in the beginning, our national life reflects a religious people . . ." *Id.*; *see also Id.* at 306 (Goldberg, J., concurring) ("Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from our religious teachings."). Religious practices have been recognized by all parts of the Federal government since this Nation's founding. *Lynch v. Donnelly*, 465 U.S. at 674. This Court's precedents establish that American government and religion have been deeply intertwined for over 200 years.

History is especially relevant when evaluating invocations given before legislative sessions. The tradition of permitting invocations before a legislative session is a specific instance of religious involvement in government activities. This Court first found legislative prayer constitutional 35 years ago in *Marsh v. Chambers*, where it found that the Nebraska State Legislature's practice of opening its sessions with an invocation by a chaplain paid with state funds did not violate the Establishment Clause. *Marsh v. Chambers*, 463 U.S. at 792-95. In relying on historical practice, this Court found:

> The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From

> colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom. *Id.* at 786.

History is clear that legislative prayer has persisted throughout this Country's existence.

The Founding Fathers implemented and relied on invocations before legislative sessions. The First Congress adopted a policy of opening its sessions with prayer as one of its first tasks. *Id.* at 787-88. Legislative prayer was accepted by the Founding Fathers and fomented by its continued use. *Id.* at 788. While the Court was reluctant to support a practice solely based on history, it instructed that great weight should be given to consistent and continual practices implemented by the Framers and remaining relatively unchanged. *Id.* at 789. Even though some of the Framers opposed legislative prayer, this fact demonstrates "that the subject was considered carefully and the action not taken thoughtlessly, by force of long tradition and without regard to the problems posed by a pluralistic society." *Id.* at 791. With awareness of the pluralistic society in mind, the Founding Fathers still did not consider legislative prayer as a "proselytizing activity" or establishing one religion. *Id.* at 792. This Court ultimately concluded that "[i]n light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society." *Id.* This Nation's history of legislative prayer comports with the beliefs of the Framers and the American people who have practiced countless religions over time.

This Court reaffirmed the constitutionality of legislative prayer in *Town of Greece, N.Y. v. Galloway*. Deferring to its precedent, the Court declared that *Marsh* "concluded that legislative prayer, while religious in nature, has long been understood as compatible with the Establishment Clause." *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. at 1818. This Court again retraced the historical background that weighed so heavily in its original decision in *Marsh*. *See Id.* at 1818-

19. The Court found that *Marsh* instructs "that the Establishment Clause *must be* interpreted by reference to historical practices and understandings." *Id.* at 1819 (emphasis added) (internal quotations omitted). In looking at legislative prayer, "*Marsh* stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted." *Id.* Further, the historical traditions extend to local legislative bodies as well. *Id.* History is absolutely essential when evaluating an Establishment Clause issue. *Marsh* and *Galloway* both demonstrate that legislative prayer has a deep historical tradition that is also consistent with this Country's religious backdrop discussed in other Establishment Clause cases.

However, this Country's rich historical tradition of legislative prayer does not mean that all legislative invocations pass constitutional muster. For legislative prayer, "[t]he relevant constraint derives from its place at the opening of legislative sessions, where it is meant to lend gravity to the occasion and reflect values long part of the Nation's heritage." *Id.* at 1823 (plurality opinion). This purpose is not served if "the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion . . ." *Id.* When looking at the content of a prayer, "[a]bsent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a prayer will not likely establish a constitutional violation." *Id.* at 1824. Legislative prayer must conform to these boundaries to avoid verging on a constitutional violation.

This Court has also considered coercion when evaluating the constitutionality of legislative prayer, although there is not a clear analysis to perform. Courts consider the coercive effect of a practice because "it is an elemental First Amendment principle that government may

not coerce its citizens to support or participate in any religion or its exercise." *Id.* at 1825. One view, proffered by Justice Kennedy with the support of two other justices, used the context-specific standard where "the inquiry remains a fact-sensitive one that considers both the setting in which the prayer arises and the audience to whom it is directed." *Id.* Courts must still consider the prayer with regard to the historical background, but also look at practices through the lens of a "reasonable observer." *Id.* Courts assume that this reasonable observer is aware of the historical tradition underlying legislative prayer and religion in this Nation, with understanding that the government does not intend to create a religious setting. *Id.* The reasonable observer is also aware that legislative prayer serves a spiritual purpose for the lawmakers to reflect on a higher purpose to ease their task of governing. *Id.* Lawmakers still must not "direct[] the public to participate in the prayers, single[] out dissidents for opprobrium, or indicate[] that their decisions might be influenced by a person's acquiescence in the prayer opportunity." *Id.* at 1826. This view relies on looking at the circumstances surrounding a legislative invocation.

Justice Thomas provided the other view in his *Galloway* concurrence. He reasoned that "[t]he coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*." *Id.* at 1837 (Thomas, J., concurring) (internal quotations and citations omitted). This hardline approach is due to the notion that State constitutional provisions at the time of the Fourteenth Amendment's adoption did not include "concern for the finer sensibilities of the 'reasonable observer.'" *Id.* at 1838. This led Justice Thomas to conclude that "to the extent coercion is relevant to the Establishment Clause analysis, it is *actual legal coercion* that counts . . ." *Id.* (emphasis added). This view on coercion requires actual legal ramifications for an individual.

The coercion tests provided in *Galloway* add to the analysis originally presented in *Marsh*. This Court in *Marsh* looked to the chaplain's tenure, the chaplain's pay, and the effect of the prayers on the citizens. *See Marsh v. Chambers*, 463 U.S. at 793-95. This examination more closely resembles the contextual approach advanced by Justice Kennedy. *See Town of Greece, N.Y. v. Galloway*, 134 S.Ct. at 1824-28. However, resemblance does not instruct this Court or lower courts on which coercion standard to apply. Where two pluralities each provide a test, this Court has stated that "the holding of the Court may be viewed as the position taken by those Members who concurred in the judgments on the narrowest grounds . . ." *Marks v. United States*, 430 U.S. 188, 193 (1977). Circuit Courts of Appeals have applied Justice Kennedy's contextual approach, but acknowledged the difficulty in ascertaining which coercion test meets *Marks*. *See Smith v. Jefferson Cty. Bd. of Sch. Comm'nrs*, 788 F.3d 580, 602-605 (6th Cir. 2015) (Bactchelder, J., concurring in part and concurring in the judgment) (relying on Justice Kennedy's approach); *Am. Humanist Ass'n v. McCarty*, 851 F.3d 521, 527 (5th Cir. 2017) (relying on Justice Kennedy's approach); *Lund v. Rowan Cty., N.C.*, 863 F.3d 268, 277 (4th Cir. 2017) (citing Justice Kennedy's approach while acknowledging that it did not have majority support); *Lund v. Rowan Cty., N.C.*, 863 F.3d at 305 (Agee, J., dissenting) (acknowledging both coercion tests); *Bormuth v. Cty. of Jackson*, 870 F.3d 494, 515 (6th Cir. 2017) (discussing the difficulty in determining which coercion test applies); *Bormuth v. Cty. of Jackson*, 870 F.3d at 519-21 (Rogers, J., concurring) (explaining why Justice Kennedy's approach should govern). This Court should apply Justice Kennedy's contextual approach, but that determination will not affect the outcome of this case.

Coercion only exists in the background of this Nation's extensive history of legislative prayer. History still provides the primary lens to view Establishment Clause cases through.

Consequently, "[a]ny 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." *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. at 1819. *Marsh* and *Galloway* both instruct that history provides the primary support for legislative prayer. In wake of this robust history, this Court has found that legislative prayer is constitutional barring coercion, which is seen as a break from the historical tradition.

2. Central Perk's practice does not violate the Establishment Clause as it conforms to the standards set forth in *Marsh* and *Galloway*.

Central Perk's practice of permitting invocations by Council members or invited clergy does not violate the Establishment Clause. This Court must begin with, and only in few circumstances cast aside, the historical backdrop of legislative prayer. *See Id.* Even though Central Perk's practice existed for less than two years before this action was filed, the location's specific history is not the constitutional standard. Neither *Marsh* nor *Galloway* state that the individual jurisdiction's historical practice provides the proper benchmark. Instead, both cases look to the historical practices of this country as a whole, beginning with the first Congress up to present day. *See Marsh v. Chambers*, 463 U.S. at 786-792; *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. at 1818-20. Although *Marsh* does at times reference the historical underpinnings of the Nebraska legislative prayer practices, the Court did not describe that as a necessary consideration. Further, that there is a complete omission of such a discussion in *Galloway* suggests this Court did not view a specific legislature's tenure as controlling or even relevant. Instead, by focusing on the First Congress and the scene at the birth of the Establishment Clause, this Court demonstrated reliance on legislative prayer in itself as the proper foundation. Given the extensive history of legislative prayer repeatedly recounted by this Court, Central Perk's practice comports with history by virtue of its existence. Including Central Perk, "there can be no

doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society." *Marsh v. Chambers*, 463 U.S. at 792.

Central's Perks practice is not coercive under either test presented in *Galloway*. For numerous reasons, the circumstances surrounding the invocations in this case do not create the circumstantial coercion discussed by Justice Kennedy. First, there is not coercion as a result of a Council member or invited clergy offering the invocation. In *Marsh*, the Court noted that the first chaplain was appointed by the First Congress where both Houses established committees for selecting chaplains. *Marsh v. Chambers*, 463 U.S. at 787-88. Hence, the first legislative chaplains were picked directly by legislators. Lower courts have considered the relationship between who offers and selects to offer invocations. These courts found that simply inviting clergy does not create a constitutional violation. *See Pelphrey v. Cobb Cty., Ga.*, 547 F.3d 1263, 1281-82 (11th Cir. 2008) (finding the constitutional violation to stem from the exclusion of certain faiths rather than only inviting clergy); *Atheists of Fla. v. City of Lakeland, Fla.*, 713 F.3d 577, 592-93 (11th Cir. 2013); *Simpson v. Chesterfield Cty. Bd. of Supervisors*, 404 F.3d 276, 285-87 (4th Cir. 2005). While legislators did not directly choose the invited clergy in these cases, it is relevant that inviting clergy in itself does not present a constitutional issue.

Two Circuits have explicitly addressed the issue of legislators offering invocations and reached different conclusions. In *Lund*, the Fourth Circuit found that county commissioners exclusively offering prayers created a "closed-universe" of prayer-givers where commissioners chose and implemented the practice themselves in order to have exclusive control over the invocations, which made the nature of the invocations a political issue. *Lund v. Rowan Cty., N.C.*, 863 F.3d at 281-82. However, the Fourth Circuit noted that *Lund* was in instance where legislators providing the invocations ran afoul of the Establishment Clause. The court considered

the identity of the prayer-giver as relevant to the inquiry that accounts for surrounding circumstances. *Id.* at 280. Still, "the Establishment Clause indeed allows lawmakers to deliver invocations in appropriate circumstances. Legislator-led prayer is not inherently unconstitutional." *Id.* In *Bormuth*, the Sixth Circuit concluded that the historical tradition of legislative prayer generally applies equally to legislator-led prayers. *Bormuth v. Cty. of Jackson*, 870 F.3d at 509-12. Further, the court looked to empirical research, where it found that 31 states permit legislator-led prayer, and that Rhode Island only allowed that practice. *Id.* at 511. The Sixth Circuit found that permitting legislators to offer the invocation contributed to the underlying purpose of reflecting upon ideals to effectively govern. *Id.* Both cases illustrate that legislator-led prayer does not per se violate the Establishment Clause, while *Bormuth* demonstrates empirical support for this proposition.

Central Perk's practice comports with the prior law in this Court and lower courts. Legislators and invited clergy provide the invocations, where the legislators directly choose the clergy. *Marsh* was clear that legislators choosing clergy dates back to the First Congress and has continued to present day. Legislator-led prayer must be put into context with the other circumstances in this case, where those too counsel against a constitutional violation. Still, it is necessary to establish that there is not an automatic constitutional violation due to legislators offering the invocation or choosing who does, where Council members cannot review or influence the invited clergy person's invocations. Central Perk's practice fits into the practices of most states and this Nation's historical traditions. Legislator-led prayer bolsters the rationale behind legislative prayer as a whole, which is to aid to legislators in governing. Central Perk does not verge on violating the Establishment Clause.

Second, there is no coercion to follow religion generally or a particular. Although diversity is valuable for representing the citizens in a given area, legislative prayer does not require diverse religious proclamations. This Court noted in *Galloway* that earlier prayers in Congress were almost entirely Christian, while clarifying that *Marsh* did not "imply the rule that prayer violates the Establishment Clause any time it is given in the name of a figure deified by only one faith or creed." *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. at 1820-21. Lower courts have agreed that prayers from a limited number of religions do not violate the Establishment Clause. *See Simpson v. Chesterfield Cty. Bd. of Supervisors*, 404 F.3d at 284-85 ("A party challenging a legislative invocation practice cannot, therefore, rely on the mere fact that the selecting authority chose a representative of a particular faith, because some adherent or representative of some faith will invariably give the invocation."); *Pelphrey v. Cobb Cty., Ga.*, 547 F.3d at 1269-74; *Bormuth v. Cty. of Jackson*, 870 F.3d at 512-14. Still, prayers should not be used to "proselytize or advance any one, or to disparage any other, faith or belief." *Marsh v. Chambers*, 463 U.S. at 794-95. Central Perk's practice does not create such an issue.

The invocations in the instant case do not affiliate Central Perk with any one religious denomination. Invocations were offered that include four different religious beliefs. Consequently, "the practice here is in many ways more inclusive than that approved by the *Marsh* Court." *Simpson v. Chesterfield Cty. Bd. of Supervisors*, 404 F.3d at 285. Central Perk "acknowledges our growing diversity not by proscribing sectarian content but by welcoming ministers of many creeds." *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. at 1820-21. The various denominations that offered invocations are representative of Central Perk's citizens and officials, who do not advance any one religion or disparage another, but simply reflect the beliefs of the legislators who use the invocations for their own benefit.

Third, Central Perk's practice is not coercive given the audience and participation in the invocations. The invocations at issue were offered when both adults and children were present. The presence of adult citizens presents no issue regarding coercion because "[o]ur 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 (plurality opinion). However, children are treated differently due to a heightened possibility that they are more susceptible to feeling social and peer pressure to comply with a religious act. *Lee v. Weisman*, 505 U.S. at 593-94. Legislators should not coax participation in the invocation either, such as directing the public to participate, singling out dissidents, or indicating that participation has political ramifications. *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. at 1826. Clergy, on the other hand, may request participation to make the invocation more inclusive, rather than with coercive animus. *Id.* Central Perk's practice is not coercive due to age or participation.

Central Perk does not coerce involvement in legislative prayer simply because some audience members may not be adults and because some invocations request participation. It is worth noting that children were present in the sessions at issue in *Galloway*, but the Court chose not to address that issue. *Id.* at 1831 (Alito, J., concurring) . Also, like *Galloway*, individuals were free to leave or not participate in the invocation at all. *See Id.* at 1827 (plurality opinion). The "children" present at these invocations are anything but. They are upper classmen and women, who are preparing for their adult lives. Further, they are enrolled in a course that titled "American Government," where there a rich religious tradition has persisted throughout. If the age of the students were an issue, anyone under 18 would be barred from city council meetings, which is wholly unfounded given the role of the legislature in governing its citizens. Even if age

were to factor against Respondent, the other circumstances weigh against an Establishment Clause violation.

Fourth, Central Perk's practice is not coercive because it comports with the underlying rationale for legislative prayer. Ultimately, "legislative prayer lends gravity to public business, reminds lawmakers to transcend petty differences in pursuit of a high purpose, and expresses a common aspiration to a just and peaceful society." *Id.* at 1818 (majority opinion). Legislative prayer is for the lawmakers themselves, not to implicate the public in a religious ideal. *Id.* at 1825-26 (plurality opinion). Legislative prayer is confined to its place at the beginning of legislative sessions "where it is meant to lend gravity to the occasion and reflect values long part of the Nation's heritage." *Id.* at 1823 (majority opinion). Central Perk complies with these constitutional mandates.

Central Perk's invocations serve the legislators in their governance and take place at the beginning of legislative sessions. The Council explicitly stated that the invocations are "for the primary benefit of the Town Council Members . . ." R. at 2. Moreover, it is undisputed that the invocations occur at the opening of the meetings. Central Perk's practice perfectly fits within constitutional guidelines.

The context surrounding Central Perk's legislative prayer practice demonstrates that no Establishment Clause violation exists. The invocations are offered by invited clergy and Council members themselves, who also choose which clergy to invite. This practice is consistent with a majority of states and the Establishment Clause itself. Additionally, the invocations are rich in religious diversity, which reflect an understanding of the various faiths present in this Nation. Central Perk reserves its invocations for the beginning of legislative sessions and includes prayer so the lawmakers can effectively govern. The only feasible issue relates to the age of some

audience members. However, the case turning on this point would be inconsistent with legislative bodies and invocations themselves. Besides barring anyone under the age of 18, the only other option is dissolve the practice all together, which is contrary to over 200 years of history and this Court's precedent. While some of the public may not agree with the practice, "offense, however, does not equate to coercion." *Town of Greece, N.Y. v. Galloway*, 134 S.Ct. at 1826 (plurality opinion). The circumstances surrounding the invocations offered in this case counsel in favor of permitting Central Perk's legislative prayer practice.

Turning to Justice Thomas' coercion test, the practice in this case is a farcry from an Establishment Clause violation. Justice Thomas looked to "actual legal compulsion" that carried a threat of penalty by force of law. *Id.* at 1837 (Thomas, J., concurring). There is no suggestion that Central Perk exhibited this type of compulsion. As such, "the municipal prayers at issue in this case bear no resemblance to the coercive state establishments that existed at the founding." *Id.* Under either coercion test, Central Perk does not violate the Establishment Clause.

B. Tests used in Establishment Clause cases not involving legislative prayer do not affect this case.

1. Legislative prayer is not examined in the same manner as other Establishment Clause claims and should not be evaluated by unrelated standards.

Legislative prayer lies in a separate category of Establishment Clause jurisprudence. Justice Brennan described legislative prayer as "carving out an exception to the Establishment Clause . . ." because legislative prayer was not subject "to any of the 'formal tests' that have traditionally structured our inquiry under the Establishment Clause." *Marsh v. Chambers*, 763 U.S. at 796 (Brennan, J., dissenting); *see also Pelphrey v. Cobb Cty., Ga.*, 547 F.3d at 1282 (Middlebrooks, J., dissenting). Addressing this notion, this Court in *Galloway* stated that "*Marsh* found those tests unnecessary because history supported the conclusion that legislative

invocations are compatible with the Establishment Clause." *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. at 1811. Moreover, these tests are insufficient as this Court has "repeatedly emphasized [its] unwillingness to be confined to any single test or criterion in this sensitive area." *Lynch v. Donnelly*, 465 U.S. at 679. *Marsh* and *Galloway* should guide the Court as clear precedent rather than reference other tests gleaned from unrelated Establishment Clause cases.

It is still useful to have an understanding of those other tests to see how legislative prayer is unique. Two prominent tests used in Establishment Clause analysis are the *Lemon* test and the endorsement test. The *Lemon* test has three requirements: "[1] the statute must have a secular legislative purpose, [2] its principal or primary effect must be one that neither advances nor inhibits religion, and [3] the statute must not foster an excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. at 612-13 (internal citations and quotations omitted). Since its inception, the *Lemon* test has been used sporadically in Establishment Clause cases. *See Van Orden v. Perry*, 545 U.S. at 685-86. Consequently, "the factors identified in *Lemon* serve as no more than helpful signposts." *Id.* at 686 (internal citations and quotations omitted). Also, it is noteworthy that Chief Justice Burger authored both *Lemon* and *Marsh*, and chose to decide *Marsh* without applying the *Lemon* test. The *Lemon* test is thus unclear in Establishment Clause jurisprudence.

The endorsement test does not have precedential weight either. This test, advanced by Justice O'Connor, was originally directed toward revising and clarifying the *Lemon* test. *Lynch v. Donnelly*, 465 U.S. at 690-92 (O'Connor, J., concurring). Justice O'Connor believed that "[t]he proper inquiry under the purpose prong of *Lemon* . . . is whether the government intends to convey a message of endorsement or disapproval of religion." *Id.* at 691. This comports with the aim of the Establishment Clause to prevent "government from making adherence to a religion

relevant in any way to a person's standing in the political community." *Id.* at 687. In other words, the endorsement test precludes "government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring). Ultimately:

> The question under endorsement analysis, in short, is whether a reasonable observer would view such longstanding practices as a disapproval of his or her particular religious choices, in light of the fact that they serve a secular purpose rather than a sectarian one and have largely lost their religious significance over time. *Cty. of Allegheny v. Am. C.L. Union, Greater Pittsburgh Chapter*, 492 U.S. at 631 (O'Connor, J., concurring).

The endorsement test has never been the sole gauge of constitutionality in any Establishment Clause case.

2. Central Perk's practice still does not violate the Establishment Clause under these ill-fitting tests.

Even though these prior tests are inapplicable in the legislative prayer context, Central Perk's practice is still constitutional under the *Lemon* and endorsement tests. The *Lemon* test would not bar Central Perk's practice. First, the secular purpose is clear from the policy itself, where the Council declared that it "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 . . ." R. at 2. The invocations allow the Council to better address municipal concerns. This is permissible as "not every governmental act which coincides with or conflicts with a particular religious belief is for that reason an establishment of religion." *Marsh v. Chambers*, 483 U.S. at 809 (Brennan, J., dissenting). Given that the invocations are for the legislators themselves, "whatever benefit to one faith or religion or to all religions, is indirect, remote and incidental." *Lynch v. Donnelly*, 465 U.S. at 683. Second, the primary effect of Central Perk's practice is not to advance or inhibit religion. Association with religion does not equate to government approval of religion. *See Id.* at

693-94 (O'Connor, J., concurring). Similarly, the effect of an action relates closely to its setting. *See Id.* at 680 (majority opinion). As the coercion analysis makes clear, the context of the prayers at the opening of a session and before engagement in any activity resembling governing are strong indicia that the setting does not promote or reject religion. Third, Central Perk's practice does not excessively entangle the city government with religion. This case demonstrates that "some involvement and entanglement are inevitable…" *Lemon v. Kurtzman*, 403 U.S. at 625. However, "[e]ntanglement is a question of kind and degree." *Lynch v. Donnelly*, 465 U.S. at 684. Like *Lynch*, this case does not involve government funding for church-sponsored events, daily government maintenance of religious items, or political friction due to the religious references. *See Id.* Central Perk's practice would not be barred by the *Lemon* test should this Court apply that analysis.

Nor would Central Perk fail the endorsement test. There is no showing that Central Perk's practice has implicated anyone's political standing. This is further emphasized because one Council member chose to never offer an invocation. R. at 2. This fact also demonstrates that religion is not favored or preferred because even the Council members themselves may choose not to partake in the prayer. It is hard to conceive that a reasonable observer would view this abstinence as approval or disapproval of one's religious practices as he/she could do the same. Council member Geffroy shows that Central Perk does not seek to endorse religion or any particular religion because he demonstrates that the invocations are wholly separate from governing. Although this Court has never specifically relied on the endorsement test, Central Perk does not run contra to its principles. This case should be analyzed according to *Marsh* and *Galloway*, but Central Perk passes other Establishment Clause tests regardless.

C. This Court should exercise judicial restraint when evaluating legislative prayer beyond the confines of *Marsh* and *Galloway*.

This case presents an area where the Court should be reluctant to examine individual prayers and overrule a legislative decision. When evaluating prayers, this Court stated that it is not the Court's duty to "embark on a sensitive evaluation or to parse the content of a particular prayer." *Marsh v. Chambers*, 463 U.S. at 795. This is because "the content of the prayer is not of concern to judges" where there is no indication that the invocation has been exploited to support or condemn a faith or belief. *Id.* at 794-95. Carefully scrutinizing prayers "would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech . . ." *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. at 1822. This case demonstrates that once government "invites prayer into the public sphere, government must permit a prayer give to address his or her own God or gods as conscience dictates . . ." *Id.* This Court has repeatedly instructed that it should refrain from careful examination of prayers.

The same restraint exists when overruling a clear and informed choice made by a legislative body. Removal of publicly-enacted laws "from the statute books appeal lies, not to the courts, but to the ballot and to the processes of democratic government." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. at 647 (Frankfurter, J., dissenting). Judicial restraint is "necessary whenever an exercise of political or legislative power is challenged." *Id.* at 648. Such restraint is necessary because legislatures protect the liberties and welfare of the people they serve. *Id.* at 649. Again looking at history, "the framers of the Constitution denied such legislative powers to the federal judiciary. They chose instead to insulate the judiciary from the legislative function. They did not grant to this Court supervision over legislation." *Id.* at 650. The legislature reflects the civil concerns of society where it determines what to do in its constituents' best interests. *Id.*

at 651. This Court should not supplant the decisions of the legislature whose job is to govern and serve its constituents.

This case provides a strong example of when this Court should exercise judicial restraint. Petitioners are concerned with the specific prayers and with altering actions made by a concerned legislature. The Council specifically stated that the invocations are for the purpose of governing and serving citizens of Central Perk. The prayers absolutely serve this purpose and should not be parsed to hunt for an ulterior motive. This Court should be weary of intruding into the decisions of public officials because they consider the citizens in making their judgments. Central Perk's invocations are permissible under the Establishment Clause and this Court should not go further to overturn the decisions of those directly elected by its citizens.

II. The Central Perk Town Council's policy and practice of allowing prayer before meetings was not coercive to the general citizenry or the students in attendance.

The Founding Fathers were so concerned with protecting citizens from tyranny of a government-sponsored religion that they refused to ratify the Constitution until it was amended to included specific protections against that power. The First Amendment limits the power of the federal government to interfere with citizens' free exercise of religion. It also prohibits the government from establishing or endorsing a State-sponsored religion. Over time, the Establishment Clause has grown past its historical roots of religious oppression and compulsory support for the local parish. There now exists a series of tests carved out by this Court that analyze claims asserting that the government has violated the Establishment Clause. While coercion is not dispositive, it is a strong indication that the government wants to enforce compliance with an inappropriate endorsement of a state sponsored religion. In his concurrence in *Cty. of Allegheny v. Am. C.L. Union, Greater Pittsburgh Chapter*, Justice Kennedy asserted the proposition that government coercion is difficult to establish without some sort of

consequence to the citizenry. *Cty. of Allegheny v. Am. C.L. Union, Greater Pittsburgh Chapter*, 492 U.S. at 659-60 (Kennedy, J., concurring in part and dissenting in part). Without some sort of incentive to adhere to religious expression, an action or statute is not coercive. This case contains no coercion for either the general population or the students who presented at Council meetings.

The Court has defined coercion in an Establishment Clause context by the amount of pressure that an individual might feel to participate in the action in question. *Id.* Should a person feel as though he/she might suffer negative effects by not engaging in a process, then there could reasonably be coercion. *Id.* The amount of perceived pressure that rises to coercion in a case is difficult to quantify and often requires examination on an individual basis.

The analysis in this case consists of two parts. First an analysis of whether the Council's prayer policy was coercive toward the general population. An application of the reasoning in *Galloway* illustrates that the historical practice and significance of legislative invocations is not coercive. Second, Central Perk was not coercive to the students in attendance under the three-part test formulated in *Lee v. Weisman*.

A. The Town Council's policy to say a prayer before the beginning of a meeting is not coercive to the general population because there is no pressure for anyone in attendance to participate.

The prayers that commenced prior to the Council meetings were not coercive to the general population of Central Perk. In *Galloway*, Justice Kennedy describes the role of ceremonial prayer throughout American history as a means for uniting all people regardless of belief system. *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. at 1818. Prayers exist so "people of many faiths may be united in a community of tolerance and devotion. Even those who disagree as to religious doctrine may find common ground in the desire to show respect for the divine in all aspects of their lives and being." *Id.* at 1823.

In *Galloway*, this Court faced a similar factual scenario. In Greece, New York, the town board opened its meetings with a prayer. *Id.* at 1815. The Petitioners in *Galloway* claimed that the inclusion of a prayer at the outset of a town meeting left them feeling, not only offended, but also excluded and disrespected. *Id.* at 1817. Plaintiffs in *Galloway* claimed that the intimate nature of the town council meetings makes it more difficult to abstain from participation than is possible in a larger legislative setting. *Id.* at 1824-25. Citizens attended meetings in order to participate, not just observe. *Id.* The Court found that this does not rise to the level of coercion for two reasons. One, adults frequently have to encounter viewpoints and ideologies that they find disagreeable. *Id.* at 1826-27. These instances do not rise to the level of a violation of constitutional rights. *Id.* Two, the Petitioners were not excluded from participating in the meeting due to abstaining from the prayer. *Id.* at 1827. Similar to the Central Perk Town Council meeting, the format and procedure for Greece Town Council meetings acknowledged participants coming and going. *Id.* Attendees were not required to offer an explanation for entering and leaving the area and it occurred frequently enough that it was unremarkable. *Id.* Additionally, as in the present case, the prayer occurred at the opening of the meeting, where no substantive governing occurred. *Id.*

This Court noted in *Galloway* that the nature of the offered prayer is not relevant to a prayer's constitutionality. *Id.* at 1825. As a result, the analysis of the coercive nature of a legislative prayer is not immediately affected by the specific nature of the prayer. In fact, a reasonable observer is aware that legislative prayers serve not to discriminate against nonbelievers but instead to encourage lawmakers to take seriously their responsibilities to govern. *Id.* The prayer's sectarian nature is not as relevant to the analysis as the amount of perceived pressure to participate or the negative effects suffered by failing to participate.

Further, legal force does not exist from the substantive content of the prayers at issue. In his concurrence in *Galloway*, Justice Thomas maintained that the Establishment Clause has not been incorporated to the states and, even further, to municipalities. *Id.* at 1837 (Thomas, J., concurring). Having conceded that the analysis must continue regardless of incorporation, Justice Thomas argued that there is no real consequence that can be levied against those who fail to conform to the prayer. *Id.* The Establishment Clause was enacted to protect citizens from serious retribution by the Federal government for failure to conform to a government-sponsored religion. *Id.* In this case, there is not an actual legal penalty. There are no ramifications for participating in the prayer or choosing not to participate. Justice Thomas maintains that the standard for coercion is "actual legal coercion" not "subtle coercive pressure." *Id.* at 1838. There is no coercion because there is no actual legal consequence for failing to comply with an invocation.

B. The invitation to present at for extra credit at a Town Council meeting where a legislative prayer occurs is not coercion under the three-part test in *Weisman*.

For a proper examination of the potential coercive effects felt by students, this Court should look to a deeper analysis than in *Galloway*. This Court must apply a test that is equal parts an assessment of legislative prayer and equal parts an assessment of school prayer due to of the unique fact pattern. The facts of this case require a unique approach. The standard for analyzing coercion is higher for students than it is for other the general population. *Lee v. Weisman*, 505 U.S. at 592. Students are generally considered to be more susceptible to peer pressure and therefore more susceptible to coercion in a public setting due to their age. *Id.* As such, the examination of Establishment Clause violations related to students must make special allowances for their increased vulnerability. The government must prohibit officials from

compelling students in a "fair and real sense" by "subtle and indirect public and peer pressure." *Id.* at 578. Even with this heightened standard, the Central Perk's did not coerce the students.

This Court addressed student coercion most directly in *Lee v. Weisman*. In *Weisman*, this Court found that prayer at a secondary school graduation was coercive because it created an environment in which students did not feel comfortable abstaining from participation. The analysis focused on the voluntary nature of the event in question. *Id.* at 592-96. The parties stipulated that the graduation was a voluntary event. *Id.* at 594. Despite that, the Court concluded that while the school claimed that the graduation was a voluntary event, it was constructively mandatory based on the importance placed on the event and the social repercussions to the students. *Id*. at 595. Specifically, the Court believed that no student could reasonably assume that a high school graduation was an entirely voluntary event. *Id.* While the event itself did not require attendance, the social pressure to attend created the coercive effect of making attendance a requirement. *Id.*

The lower courts have subsequently interpreted the decision in *Weisman* as having created a three-part test to assess coercion. *See Doe v. Santa Fe Indep. Sch. Dist*., 168 F.3d 806, 830-31 (5th Cir. 1999); *Bd. Of Educ. of Westside Cmty. Sch. v. Mergens By & Through Mergens*, 496 U.S. 226, 261 (1990) (Kennedy, J., concurring) ("The inquiry with respect to coercion must be whether the government imposes pressure upon a student to participate in a religious activity."). This test identifies unconstitutional coercion as actions (1) the government directs (2) that are a formal religious exercise (3) that obligate the participation of objectors. *Doe v. Santa Fe Indep. Sch. Dist*., 168 F.3d at 814. Central Perk does not coerce students under this approach.

1. It is unclear that the Central Perk Town Council is a government agency for the purpose of Establishment Clause claims.

For the first portion of the test, there is government action. The Council is a government agency. However, as a small town both Justice Thomas and Justice Scalia would argue that the Establishment Clause does not apply to Central Perk as it has not been incorporated to municipalities. *See Town of Greece, N.Y. v. Galloway*, 134 S. Ct. at 1834 (Thomas, J., concurring); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45-6 (2004) (Thomas, J., dissenting); *Van Orden* v. *Perry*, 545 U.S. at 692-93 (Thomas, J., concurring); *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 677-80 (2002).

Justice Thomas argued that the historical context of the Establishment Clause makes it a pure Federalism provision of the Constitution and, therefore, not applicable to the individual States' governments. *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. at 1835 (Thomas, J., concurring). In *Galloway*, Justice Thomas specifically stated that there is no legal basis to apply an Establishment Clause to a municipality because it has never been incorporated to the smaller levels of government. *Id.* Justice Thomas further argues that to further incorporate the Establishment Clause to local government would not make sense from a historical understanding of the First Amendment. At the time of ratification, the First Amendment was essentially a bar to the Federal government imposing religion on citizens, which would infringe on States' rights to determine if they would like to endorse a religion. *Id.* At that time, at least six States had established churches. *Id.* Even if this Court were to find that the Establishment Clause has been properly incorporated against the States, the municipality in question does not bear the same force of power as the Federal government did at the founding of the country. *Id.* at 1837. The pressure that a local legislature could potentially exert over its citizens does not equate to the

power of Federal or State governments could apply. *Id.* Therefore, it is inappropriate to analogize the coercive power of the Federal and Municipal governments as though they are the same.

If this Court chooses to engage in further analysis of the Establishment Clause, it is important to remember that the purpose of the First Amendment is to protect citizens from the government forcing individuals to adhere to religious practices. The purpose of the First Amendment is not to purge all traces of religions from the public sphere. *Van Orden v. Perry*, 545 U.S. at 699 (Breyer, J., concurring). Because of these protections, the Court has been careful to weigh Establishment Clause claims against the rights of government agents to engage in the free exercise of their religion.

Teachers do not surrender their First Amendment rights because they are public employees. This Court said that "citizens do not surrender their First Amendment rights by accepting public employment." *Lane v. Franks*, 134 S. Ct. 2369, 2374 (2014). Regardless of whether they are at school or in the public, teachers have the right to exercise their religion, so long as they do not require their students do the same. Any noncurricular speech a teacher might engage in are definitely by the First Amendment. *Boring v. Buncombe Cty. Bd. of Educ*., 136 F.3d 364, 373 (4th Cir. 1998) (Luttig, J., concurring).

The presence of Council member Green does not make the legislative prayer more likely to be viewed as a government endorsement of a religion. In this case, Ms. Green does not require her students participate in the prayers when she chooses them. She merely exercises her constitutional right to free exercise of her religion. This right must not be infringed but balanced against her students' rights.

2. The nature of the invocations offered did not rise to the level of a formal religious exercise.

The second portion of the test laid out in *Weisman* looks to whether the action in question is a formal religious exercise. An examination of whether the government has appeared to take a position on questions of religious belief or has conveyed a message that religion is favored, preferred, or promoted over other beliefs. *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d at 818, citing *Ingebretsen v. Jackson Public School Dist.*, 88 F.3d 274, 280 (1996). In a Fifth Circuit opinion, the court determined that a school's prayer policy did not constitute a "formal religious exercise" because (1) the prayers were not delivered by a member of the clergy, and (2) the prayers were nonsectarian and nonproselytizing, despite a prayer being a "quintessential religious practice." *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F. 3d at 818. Applying that test to the facts in this case, the Council's prayer policy is not a formal religious exercise. The choice to represent multiple religions definite supports the conclusion that the government agency was not favoring any religion. Additionally, while the Council members had the opportunity to invite clergy members, it was not a requirement or essential element of the legislative prayer process. The individual members of the Council, as government agents, did not have any direct control over the content of the prayers. There was no clear intent to support or endorse any specific religion. In fact, Ms. Green did not even offer an actual prayer but an acknowledgment of the wisdom of Buddha. Other Council members offered prayers from multiple faiths. There was no formal religious exercise in the Council meeting.

3. Central Perk's prayer policy did not obligate the participation of objectors.

Lastly, the Court must look to whether the action obligates objectors to participate. Per the Court's analysis in *Weisman*, it is clear that objectors were not required to participate in the

Town Council prayers. In his opinion in *Weisman,* Justice Kennedy specifically stated that the importance of the event in question, a graduation, is why the State's argument was destined to fail. *Lee v. Weisman,* 505 U.S. at 595. In contrast to the graduation in *Weisman,* Council meetings are completely voluntary. Attendance at a Council meeting does not bear the same ramifications as attendance at a school graduation. *Id.* Additionally, the American Government class the students were taking was also completely voluntary. R. at 4. The students in this case received no outside pressure to attend the Council meeting. Instead, there was a voluntary assignment available for extra credit. There were no negative consequences for failure to attend the Council meeting or not participate in the extra credit assignment. For the majority of the students who decided to complete the extra credit work, their grades were virtually unaffected. The possible perceived pressure to attend a meeting for extra credit is not comparable to the pressure that accompanies a high school graduation. A graduation is a major life event, celebrated by parties and formal announcements mailed out to distant relatives. There most certainly were not parties associated with extra credit homework. A student might conclude that it would be beneficial to attend a meeting and complete their assignment, but there was not external pressure to do so. Attendance at the Council meeting was voluntary in the truest sense of the word.

Additionally, there is nothing in the record that addresses accommodations that might have been made for students who do not wish to participate in the Council meeting due to the prayer offered at the beginning. There is no mention of students attempting to negotiate for an alternative presentation site should they be offended by the prayer at the town hall meeting. There were other extra credit opportunities available to all of the students. They had the ability to attempt to alternative extra credit work for their teacher. While students might feel some

academic pressure to pursue extra credit there were sufficient alternatives available to them. Additionally, Ms. Green, as a practitioner of Baha'i, would believe in the inherent equality of all individuals and would be understanding of any dissent that the students might have expressed. *See* The Bahá'í Faith – The Website of the Worldwide Bahá'í Community, https://www.bahai.org (last visited Sept. 11, 2018). The students would have experienced no additional pressure from her to comply with the prayers.

Finally, much like in the analysis for the general citizenry, the format of the meetings made the meetings themselves less coercive than the format of a school-sponsored event. Had the Council meeting been limited to adults only, the attendance of students might have warranted special consideration, but Town Council meetings were open to all ages. There was no special pressure exerted upon student. The students in this class were high school seniors, many of whom could have been legal adults at the time of their presentations and not susceptible to the same pressure a child might feel in a similar situation. The ability to arrive after the prayer without comment or explanation eliminates some of the pressure students might feel to conform their actions to comply with the prayer taking place, even on weeks when their teacher was the one responsible for choosing the prayer. The general nature of the assembly allows for individuals to come late and go as they please. They are open to the public and as such are meant to foster a sense of community.

The tests used to analyze coercion of students in an Establishment Clause setting indicate that there was no coercion in this situation. It is unclear if the invocation in this situation was in fact a government action given the nature of municipal government proceedings. Additionally, it invocations were not fundamentally formal religions actions. They were performed to encourage a sense of solemnity amongst the Council members, not to invoke a specific religion. The

students would not have felt undo pressure to participate in the prayers being said at the student therefore there was no coercion.

Conclusion

Respondents respectfully request this Court to affirm the decision of the United States Court of Appeals for the Thirteenth Circuit in this case.

Respectfully submitted,

Team Q
Counsel for Respondents
September 14, 2018