Brief on the Merits

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 RESPONDENT

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QUESTIONS PRESENTED

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

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

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STATEMENT OF THE CASE

I. FACTS

Plaintiffs brought the current action under 42 U.S.C. § 1983 seeking permanent injunction against Central Perk Township's theistic prayers performed at the beginning of town meetings. R. at 1. Central Perk is a small town, and so to keep all of its residents informed the town council holds monthly meetings. R. at 1. Seven town council members are elected every two years by the Central Perk residents. R. at 1. The seven town council members at the time of this dispute were Joey Tribbiani, Rachel Green, Monica Geller-Bing, Chandler Bing, Gunther Geffroy, Janice Hosenstein, and Carol Willick. R. at 1. Attendants of the meeting are asked to stand as a prayer or invocation is given at the beginning of the meetings, followed by the Pledge of Allegiance. R. at 2.

After the Supreme Court's decision of *Greece v. Galloway* in 2014, the town council created a policy allowing the town council meetings to open in prayer. R. at 2. The policy states that council members will be selected at random to give the invocation at the beginning of the month's meeting. R. at 2. When a council member is selected they may offer the prayer themselves or select a minister from the community. R. at 2. If the council member elects a minister to give the invocation, the council member may not review or give advice as to the content of the invocation. R. at 2. Council members may also choose not to have an invocation at all. In that case, the meeting proceeds directly to the Pledge of Allegiance. R. at 2.

In deciding which council member will give the monthly invocation, every member put their name on a slip of paper which was placed inside an envelope. R. at 2. Geoffrey Gunther was excluded from the process as he asked to never be selected. R. at 2. Therefore, the six other members placed their names in the envelope. Tribbiani, as chairman, pulled a name out of the

envelope every meeting indicating which Counselor would lead the following month's invocation. R. at 2. Geller-Bing and Bing are members of the Church of Jesus Christ of Latter Day Saints. R. at 2. When their names were called, they both chose their Branch President, David Minsk, to give the invocation. R. at 3. On one occasion Minsk prayed the following prayer: "Heavenly Father, we thank thee for this day and all our many blessings. Thou art our sole provider, and we praise Thy power and mercy. Bless that we can remember Thy teachings and apply them in our daily lives. We thank Thee for Thy presence and guidance in this session. In the name of Jesus Christ, amen." R. at 3. On five occasions that President Minsk was brought in to pray, he prayed the following: "Heavenly Father, we pray for the literal gathering of Israel and restoration of the ten tribes. We pray that New Jerusalem will be built here and that all will submit to Christ's reign." R. at 3. The other three times President Minsk prayed, he asked that none in attendance would reject Jesus Christ or commit grievous sins against the Heavenly Father, so that none would be sent to the Telestial Kingdom, away from the fullness of God's light. R. at 3.

Willick is a member of Muslim faith, and each of the three times her name was drawn she gave the following invocation herself: "As salamu aleiykum wa rahmatullahi wa barakatuh," which translates "Peace and mercy and blessings of Allah be upon you." R. at 3. Green is a member of the Baha'i faith. R. at 3. Of the four times her name was drawn, she declined to give an invocation twice. R. at 3. The other two times Green's name was chosen, she prayed to Buddha acknowledging acknowledging his infinite wisdom and asking that the Council meeting would be conducted in harmony and peace. R. at 3. Hosenstein and Tribbiani are members of the New Life evangelical Christian church. R. at 3. Their names were chosen twice each. R. at 3. They both asked pastors from their church to give the invocation whenever their name was

drawn. R. at 3. All four times the pastors prayed explicitly Christian prayers ending with the phrase, "in the name of our Lord and Savior, Jesus Christ." R. at 3. Although the New Life pastors' prayers typically asked for divine guidance for the Council members, their prayers sometimes incorporated themes including requests for salvation for all those "who do not yet know Jesus," for "blinders to be removed from the eyes of those who deny God," and for "every Central Perk citizen's knee to bend before King Jesus." R. at 3.

Council member Green is also a high school teacher at Central Perk High School. R. at 4. She teaches American History and American Government. R. at 4. The government class is reserved for high school seniors. R. at 4. Green offered several opportunities for extra credit for her students rewarding acts of civic engagement. R. at 4. After her election, Green allowed her seniors to come to council meetings and present on a topic that is currently being discussed by the council members. R. at 4. If the students opt to present they are awarded five extra credit points to their class participation grade. Participation is worth ten percent of their final grade. R. at 4. There were only four out of thirteen students in 2015-2016 to give presentations, all of whom are children of the plaintiffs here. R. at 4. Geller's son gave his presentation on a day where Green opened the meeting by praying to Buddha. R. at 4-5. Burke's son gave his presentation on a day where President Minsk delivered the prayer. R. at 5. Buffay's daughter also gave a presentation on a day where President Minsk gave the opening prayer. R. at 5. A Christian pastor gave the invocation on the day that Kudrow's son presented his topic. R. at 5

II. PROCEDURAL HISTORY

Geller filed a complaint on July 2, 2016 alleging Green's Buddhist prayer violated the Establishment Clause. R. at 5. He claims it was a coercive endorsement of religion. R. at 5. Burke, Kudrow, and Buffay filed their own lawsuit on August 30, 2016 stating that the

legislative prayer policy violated the Establishment Clause. R. at 5. They believed that by giving invocations themselves (council members) or by clergy men selected by council members it was an "official sanction" and that the council had exclusive control over what prayers were given, creating discrimination amongst faiths that are non-theistic. R. at 5-6. These plaintiffs also claimed that the invocations and prayers were unconstitutionally coercive of attendees of the meetings since the prayers denigrated other faiths or gods or non-faiths. R. at 6. They also claimed that since Green required the children to give presentations at these meetings for extra credit they were also coerced. R. at 6.

The District Court for the Eastern District of Old York granted Summary Judgment for Gellar, Burke, Kudrow, and Buffay on February 17, 2017, permanently enjoining the Central Perk Town Council's prayer practices and policies. R. at 11. Following the District Court's decision, the Central Perk Township timely filed notice of appeal to the Thirteenth Circuit Court of Appeals. R. at 12. The Court of Appeals granted review of Central Perk's case and heard oral argument on the issues appealed. R. at 13-19. The Court of Appeals for the Thirteenth Circuit rendered its decision on January 21, 2018, and reversed the decision of the District Court. R. at 19. Following the Thirteenth Circuit's decision, Gellar, Burke, Kudrow, and Buffay timely filed notice of appeal to the Supreme Court of the United States. The Supreme Court granted the petition for certiorari on the issues appealed on August 1, 2018, and oral argument is scheduled to take place on October 3, 2018. R. at 20.

ARGUMENT

I. THE PRACTICE AND PRAYER POLICY THAT CENTRAL PERK'S TOWN COUNCIL HAS IMPLEMENTED IS CONSTITUTIONAL DUE TO THE TRADITION OF LEGISLATOR-LED PRAYER WITHIN OUR COUNTRY'S HISTORY ADDRESSED IN BOTH *MARSH* AND *GALLOWAY*.

Throughout our nation's history, religion's intersection with government has been a heavily debated issue. While there is the notion of the separation of church and state, it would behoove people to forget that our nation was built upon the morals and guidance of religion. Because of religion's roots in the United States' history, legislative prayer has become protected by the First Amendment as government speech.

In *Marsh v. Chambers*, the Nebraska legislature opened each of their legislative meetings with a prayer led by a chaplain who was compensated by state funding. 463 U.S. 783, 785, 103 S.Ct. 3330, 3332 (1983). Chambers challenged the "chaplaincy practice" claiming a violation of the Establishment Clause. *Id.* at 785, 103 S.Ct. at 3332-33. The Court held, "that legislative prayer presents nor more potential for establishment than the provision of school transportation, beneficial grants for higher education, or tax exemptions for religious organizations." *Id.* at 791, 103 S.Ct. at 3335-36. Thus, *Marsh* ended the debate of the constitutionality of legislative chaplain-led prayer.

A few decades later, *Town of Greece v. Galloway*, brought a similar issue to the Supreme Court. 134 S.Ct. 1811 (2014). In *Galloway*, town board meetings opened each month with roll call, the Pledge of Allegiance, and a prayer delivered by a local clergyman chosen from a list of the congregations in the community. *Id.* at 1816. The town board members made it known that other leaders in the community who were not religious or were of other religious backgrounds that they too were welcome to deliver the invocation; however, the majority of the congregations in Greece were Christian. *Id.* Bothered by the repetition of Christian prayers every month,

Galloway filed suit alleging "the town violated the First Amendment's Establishment Clause by preferring Christians over other prayer givers and sponsoring sectarian prayers, such as those given 'in Jesus' name.'" *Id.* The court in *Galloway* held that the town's practice of calling random leaders of congregations in their town and the sectarian content was allowed and constitutional under the holding in *Marsh*.

Both of these cases have addressed legislative prayers and their sectarian content; however, the issue of legislator-led prayer, or the process of having a clergyman selected exclusively by legislators, has yet to be an issue addressed by the Supreme Court.

A. Legislator-led prayer is constitutional as legislators have led prayers before meetings since the beginning of this country, and there is no precedent that places emphasis on requirements of the person giving the prayer or invocation.

Only two federal courts have addressed the issue of the constitutionality of legislator-led prayer. Neither of these opinions are binding on this court, but rather are approached as persuasive authority. The 4th Circuit and the 6th Circuit have drafted decisions on this issue, but the two circuits' outcomes are not in agreement; therefore creating a circuit split.

i. *The 4th Circuit's view of legislator-led prayer in Lund v. Rowan County, North Carolina, is one that follows neither history or precedent, and therefore should not be used as persuasive authority for this case.*

Lund v. Rowan County, North Carolina, was decided by the United States Court of Appeals, Fourth Circuit on July 14, 2017. 863 F. 3d 268 (2017). In *Lund*, the Board of Commissioners for Rowan County, NC opened every meeting with a prayer delivered by one of the commissioners followed by the Pledge of Allegiance. *Id.* at 272. No one outside of the Board of Commissioners was allowed to give the prayer, and the duty was rotated amongst those on the Board. *Id.* at 273. "The prayers are invariably and unmistakably Christian in content." *Id.* Several members of the community spoke out about the lack of diversity, but even when faced with a

lawsuit by the American Civil Liberties Union, one board member stated "[A]sking for guidance for my decisions from Jesus…is the best I, and Rowan County, can ever hope for." *Id.* (quoting *Lund v. Rowan County, North Carolina*, 103 F.Supp.3d 712, 715 (M.D.N.C. 2015)) (alterations in original). The court in *Lund* acknowledges that both *Marsh* and *Galloway* are supportive of legislative prayer and that the prayers can be sectarian, but that neither explicitly talks about legislator-led or lawmaker-led prayer. The court based its analysis on four reasons: the commissioners were the only ones to deliver the invocations, the prayers offered were mostly of Christian faith and attempted to further the motives of that faith, those in attendance of the meetings were told to rise and join the commissioners in prayer, and finally that all of the prayers were part of a governmental or municipal kind of meeting. *Id.* at 281. After looking at these reasons, the 4th Circuit held that "[t]he Establishment Clause does not permit a seat of government to wrap itself in a single faith" and also that government officials or legislators had no place offering prayer in a place of nonsectarian business. *Id.* at 290. Therefore, the court determined that legislators should not be able to deliver invocations or prayers of any kind at legislative meetings.

Rowan County, NC appealed this disposition to the United States Supreme Court, who ultimately denied certiorari. *Rowan County, NC v. Lund*, 138 S.Ct. 2564 (Mem) (2018). Justices Thomas and Gorsuch wrote a dissenting opinion explaining why they believed the case not only should have been granted certiorari, but that it also should have been reversed. The two justices were unpleased with the anti-historical approach that the 4th Circuit portrayed in *Lund*. *Id.* at 2565. Specifically Thomas pointed out that all four reasons that the 4th Circuit used to make their argument against legislator-led prayer are all present in *Galloway*. *Id.* at 2566. The only difference in between the two were the people leading or giving the prayer. *Id.* The two judges

then turned to historical precedent which heavily showed that legislators have been giving prayers at legislative meetings for centuries.

In this particular case, there is a town council comprised of seven elected officials who run the monthly meetings. A prayer is delivered at the opening of these meetings much like in *Lund* by town council members. A member's name is chosen at random out of an envelope, and from there they choose to give the invocation themselves or to reach out to a clergyman to deliver the message. Of the seven members of the town council there are four different faiths represented: Mormonism, Muslim, Baha'i, and Christian. The policy set forth in Central Perk makes this case vastly different from the cases discussed above. The main issue in those cases is that the repetition or pattern of Christian prayers before municipal meetings did not allow for diversity of religions or non-religions. Of the four reasons against legislator-led prayer as stated in *Lund*, a facial difference is that Central Perk's prayers are not solely comprised of Christian faith. The fact that there were other faiths represented in the monthly legislative prayers makes this case different from any other case that has come before the Supreme Court on this issue. There is a diversity of faith. Other cases have proposed issues of establishing a religion where there has been a single faith represented; however, this is not the case here and therefore, the practice is not in violation of the Establishment Clause.

The petitioners will argue that there was repetition in the way in which the names were pulled out of the envelope with those of Mormon faith being pulled nine times total. While the two Mormon members' names were called nine times, the process by which they were called was completely random. There is a lack of control in the process the town council chose, hence the "random" drawing. Even though the right to give the invocation is still exclusively reserved for a certain set of people, it cannot be said that the town council members manipulated or took

advantage of the system due to the process's arbitrary nature. Chaplains in the past that have been allowed to only preach one denomination of Christianity and have been employed by legislatures to give prayers for decades. *See Marsh v. Chambers*, 463 U.S. 783, 785 (1983) (stating that Robert E. Palmer, a Presbyterian minister served as chaplain for the Nebraska legislature for over 16 years). The minister in *Marsh* presents a picture-perfect argument of repetition or pattern. Over 16 years of monthly prayers given by the same minister abiding by a single faith is enough to create a pattern, yet the Supreme Court did not strike down this practice as government establishing religion

The 4th Circuit's approach to this issue goes against not only history, but precedent that the courts of this country have put forth. Nowhere in *Marsh* or *Galloway* does the court state that legislator-led prayer is unconstitutional or wrongful, and to make that leap would be a disservice to the people to whom the new law would affect. The Petitioners will say that *Marsh* and *Galloway* do not say anything about legislator led prayer at all, and to that effect it is up to this court to interpret what those courts have stated surrounding this topic. However, to analyze the law in a way that disputes earlier precedent would be a terrible idea. "It is of course true that great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow." *Abington School Dist. v. Schempp*, 374 U.S. 203, 308, 83 S.Ct. 1560, 1616 (1963) (Goldberg, J., concurring). The real threat here is not following precedent, or history for that matter. Legislator-led prayer is but a mere shadow, which over time will diminish as courts decide that is a non-issue already decided by the country's traditions.

The 4th Circuit's opinion is appealing to the argument of the Petitioners, but they should be cautious to use it given the dissent. Justices Thomas and Gorsuch were not impressed with the

outcome of *Lund* and found it to be ignorant of national history and precedent. This is not to be taken lightly, even if it is only persuasive. The two justices dive into the analysis of both *Marsh* and *Galloway* to find, "the Founders simply 'did not intend to prohibit a just expression of religious devotion by the legislators of the nation, even in their public character as legislators.'" *Rowan County, N.C. v. Lund*, 138 S.Ct. at 2566 (quoting S.Rep. No. 376, 32d Cong., 2d Sess., 4 (1853)). Time and time again throughout the history of law, many have seen concurrences and dissents become the controlling law. Thomas and Gorsuch believed the 4th Circuit's argument to be so outrageous that they took it upon themselves to tell the circuit judges how the case should have been decided. Of course, this is all in the opinion of two of the nine justices on the Supreme Court, but if the 4th Circuit had interpreted the law and analyzed it according to history and precedent, would we have a dissent to turn to? Probably not.

Turning away from history and precedent only leads to more trouble and turmoil, which is why the 4th Circuit's case of *Lund v. Rowan County, North Carolina* is not the persuasive authority that the court choose to mimic in deciding the case at hand.

ii. *Historical tradition and precedent are both preserved in the 6th Circuit's determination of Bormuth v. County of Jackson, making the persuasive authority of this circuit much stronger in value to the United States Supreme Court.*

The United States Court of Appeals for the 6th Circuit has also addressed this issue in its case of *Bormuth v. County of Jackson*, 870 F.3d 494 (2017). In *Bormuth*, the county's Board of Commissioners started every meeting with a prayer led by one of the commissioners which rotated weekly. *Id.* at 498. Most of these prayers were following the Christian faith. *Id.* Bormuth, a Pagan in the community brought suit because he felt like the prayers were intended to make him feel like he was in church or that "'he [i]s being forced to worship Jesus Christ in order to participate in the business of County Government.'" *Id.* at 498-99. The court then went into a

lengthy analysis based on both *Marsh* and *Galloway* and acknowledged much like the 4th Circuit that neither of those cases address who may lead the legislative prayer. *Id.* at 509. However, the 6th Circuit framed the lack of law on this topic in a different light. The court stated, "neither *Marsh* nor [*Galloway*] restricts *who* may give prayers in order to be consistent with historical practice." *Id.* The court also states that legislator-led prayer has gone on in some states since 1849. *Id.* at 510. The 6th Circuit ultimately held that the county's prayer policy and procedure was within the frameworks of both *Marsh* and *Galloway*.

This court should use the 6th Circuit's opinion in *Bormuth* as an example and as persuasive authority for the decision in Central Perk's case. While many say that history is meant to be changed and that new traditions can form, there is something about the firm foundation that our country has been built upon that makes people want to continue the patterns that have become ingrained in society. Courts refer to history to understand how to interpret law or even how to change the law. History plays a huge role in the legal profession, and that should be emphasized here. To interpret both *Marsh* and *Galloway* as being anti-legislator-led prayer is to add words into the mouth of the Supreme Court. It was not addressed in those cases because the Supreme Court did not find the mouthpiece of the prayer to be of vast importance, rather they focused on whether the act of praying sectarian prayers violated the Establishment Clause.

Whether the prayer is legislator-led or led by a clergyman chosen by a legislator, it does not matter. The court in *Bormuth* stated, "[i]n our view and consistent with our Nation's historical tradition, prayers by agents (like in *Marsh* and [*Galloway*]) are not constitutionally different from prayers offered by principals." 870 F.3d at 512 (citing *Turner v. City Council of City of Fredericksburg*, 534 F.3d 352, 355-56 (4th Cir. 2008)). The 6th Circuit also strengthens their decision to support legislator-led prayer as constitutional with the following:

> The [National Conference of State Legislatures] expressly disclaimed the notion that chaplain-only prayers are the norm: "The opening legislative prayer may be given by various classes of individuals. They include chaplains, guest clergymen, *legislators*, and legislative staff members…. All bodies, including those with regular chaplains, honor requests from individual legislators either to give the opening prayer or to invite a constituent minister to conduct the prayer."

Id. (quoting Brief of NCSL as Amicus Curiae, *Marsh v. Chambers*, 463 U.S. 783 (1983) (No. 82-83), 1982 WL 1034560, at *2, *3 (emphasis added)). The brief of NCSL addresses specifically and accurately the issue before this court. "Various classes of individuals" have been brought before municipal meetings since the beginning of our country's government. To ignore this history or tradition, would be to erase a fundamental reverent feature of legislative meetings.

Central Perk's situation is also different from *Bormuth* or *Lund* because many different faiths are represented on the town council. It is not solely one religion. This helps the Establishment Clause argument because in the other cases there have been prayers given based on one faith, whereas here there have been four different religions exposed to the people and legislative meetings of Central Perk. If the courts can find no violation of the Establishment Clause in cases where a Presbyterian chaplain or an all Christian town council lead all of the prayers, then surely they will find no violation of the Establishment Clause here.

Between the 6th Circuit's emphasis on both Supreme Court opinions and on the legislative ritualistic history within the United States, *Bormuth v. County of Jackson* presents itself as a much better guide of persuasive authority on the topic of legislator-led prayer for this court to follow.

B. Because the Supreme Court in Galloway determined that legislative prayer need not be non-sectarian, there is no issue with the fact that the prayers offered thus far under the present town council have been exclusively theistic since theistic prayers are considered part of a "sect" of religion.

Arguing that the prayers are unconstitutional because they have been offered by legislators or their clergymen who are all of theistic faith is an incredibly weak argument given the case law that has been established in this area. "An insistence on nonsectarian or ecumenical prayer as a single, fixed standard is not consistent with the tradition of legislative prayer outlined in the Court's cases." *Town of Greece v. Galloway*, 134 S.Ct. at 1820. The court in *Galloway* profusely returns back to the language within *Marsh* to make their argument that requiring a nonsectarian component for the legislative prayers was never the intent or even suggested in the opinion. *Id.* at 1821.

> To hold that invocations must be nonsectarian 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, a rule that would involve government in religious matters to a far greater degree than is the case under the town's current practice of neither editing or approving prayers in advance nor criticizing their content after the fact.

Id. at 1822.

The issue here is in regard to theistic religions, or those containing a god for worship. While neither *Marsh* nor *Galloway* speak specifically to theistic religions, *Galloway* does address the sectarian versus nonsectarian content argument. Sectarian encompasses theistic religions within it as theistic religions are a sect of religion. Because it can be seen as a separate and particular group, the court should infer that the Supreme Court has already addressed the issue of exclusively theistic prayers implicitly in their brief discussion of the content of legislative prayers. As the court stated above, to "censor" or "supervise" the speech of the theistic or sectarian groups would ultimately to involve the government in such a way that it could lead to a violation of the Free Exercise Clause. More government interference within the realm of religion, even if it is during a municipal meeting, brings more issues, problems, and

unnecessary case law. The courts have addressed this issue by stating that "constitutionality of legislative prayer [does not] turn[] on the neutrality of its content." *Id.* at 1821. Religious invocations or prayers are not expected to be neutral, for many people understand the basis of religion. "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.

Not only are theistic religions considered a sect within the sectarian versus nonsectarian argument, but the people of Central Perk have a role to play in this debacle as well. This has been a practice that has gone on for many years in Central Perk and knowing that, the residents should take better consideration into who they are electing for those positions. The court in *Bormuth* makes the same argument stating, "we do know that Commissioners of different faiths, or no faith, may be selected. With each election the people…may elect…a [person] who is Muslim, Buddhist, Hindu, Jewish, Mormon, Roman Catholic…Pagan, Atheist, or Agnostic (and so on)." *Id.* at 513. The positions for the town council members are up for election every two years. It is mere coincidence that the prayers have been entirely theistic due to the various faiths of those who were elected to the Town Council. If the residents really wanted to implement change, the control is completely within their own hands. The facts of this case also never lend themselves to say that the Town Council was against implementing change in their prayer policy. To create a rule of law stating that legislative prayer cannot be entirely theistic would create mass chaos within the court system. Drawing the line at solely theistic prayers is almost impossible given the number of religions based around a god or gods. It is simply overreaching by the government into the practice of religious prayer to try an implement a rule like this.

The possibilities of change lie within the hands of the local residents of Central Perk and are not outrageously out of grasp of those citizens to attempt. The prayers also have no neutrality

requirement. Therefore, the fact that the prayers have been solely theistic up to this point is a non-issue for Central Perk.

Central Perk's policy and practice of legislator-led prayer is not an issue in accordance with *Marsh*, *Galloway*, and *Bormuth*. The Court here would be wise to use those three in evaluating their decision and analysis of the law up to this point on those three cases. The presence of only theistic prayers by the town council members is also not an issue as it is protected by law as a "sect" of religion. Also, it is the job of the town residents to implement the change they wish to see in the Central Perk Township. It is not the job of the government.

II. THE CENTRAL PERK TOWNSHIP'S PRAYER POLICY AND PRACTICES ARE NOT UNCONSTITUTIONALLY COERCIVE OF THE CITIZENS IN ATTENDANCE, INCLUDING THE HIGH SCHOOL STUDENTS, AS THE INVOCATIONS FELL SHORT OF THE FORCED ADHERENCE TO PROSELYTIZING OR DENIGRATION.

Beginning a legislative meeting or session with a brief moment of prayer or meditation is a normative practice woven into the fabric of American lawmaking. In order to avoid the trappings of governmental promotion of a specific faith or coercion into the exercise of a particular religion, the Establishment Clause precludes a governing body from espousing any one particular faith base while denouncing others. Simply put, "It is an elemental First Amendment principle that government may not coerce its citizens 'to support or participate in any religion or its exercise.'" *Town of Greece, N.Y. v. Galloway*, 134 S.Ct. 1811, 1825 (2014) (quoting *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 659, 109 S.Ct. 3086 (1989)). Determining whether or not the prayer offerings qualify as coercive requires an in-depth, fact sensitive analysis into the language used by the council members or clergy offering the speech as well as the surrounding circumstances under which the prayers are given. *Galloway*, 134 S.Ct. at 1825.

A. The language of certain invocations containing implications of the supremacy of sectarian dogma do not arise to the level of coercion of all citizens in attendance.

As previously stated, a fact-intensive analysis against the backdrop of both legal precedent and circumstances specific to the case at hand is required to determine if the prayer practice of Central Perk is inherently coercive of its citizens. One factor heavily considered in the analysis is the content of the prayer itself, and whether or not the prayer amounts to regular proselytizing or denigration of other faiths. The Supreme Court has repeatedly emphasized that the ceremonial prayer offered before legislative meetings must not cross into proselytizing in order to avoid offending the Establishment Clause and amount to coercion of the citizenry in attendance. *See Galloway,* 134 S.Ct. at 1826; *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330 (1983). However, isolated or infrequent incidents of proselytizing do not automatically trigger offense to the Establishment Clause. There must also exist a pattern of prayers that assert the dominance of one faith over another and admonish non-believers for lack of faith. *Galloway*, 134 S.Ct. at 1826-27. "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." *Id.* at 1824. Further, "*Marsh*, indeed, requires an inquiry into the prayer opportunity as a whole, rather than into the contents of a single prayer." *Id.* (See *Marsh v. Chambers*, 463 U.S. 783, 794-95, 103 S.Ct. 3330 (1983)).

The Court in *Galloway*, however, did not define a definite time period that constitutes 'over time', nor did it provide for what may constitute proselytizing or denigration. In terms of the time issue, it is worthy to note that *Galloway* considered a time period spanning roughly fifteen years in analyzing the Town of Greece's prayer practices. *Id.* at 1816. Additionally, *Marsh* considered a time period spanning sixteen years. *Marsh*, 463 U.S. at 793, 103 S.Ct. at 3337. While neither decision explicitly prescribes a definite time frame for consideration, it is

logical to assume based on the facts of the cases themselves, that 'over time' must relate to a significant period of time sufficient to establish a pattern.

As neither *Galloway* nor *Marsh* explicitly state what constitutes proselytizing or denigration, it is necessary to turn to other mediums for context that mirrors the decisions. Proselytizing is defined as the act of inducing another to join or ascribe to one's own faith. *Proselytize*, Merriam-Webster Dictionary (2018). Denigration is defined as the act of attacking the reputation of or defaming another. *Denigrate*, Merriam-Webster Dictionary (2018). Both of these definitions appear to comport with the context of analysis used in *Galloway* and *Marsh*, and are appropriate to use in the instant case.

In the instant case, the prayers offered before the Central Perk Town Council meetings do not represent a pattern of proselytization or denigration that run afoul with *Galloway* and *Marsh*. The overall time period of concern in this case is just under two years, from October 2014 through July 2016. In that time period, a total of eighteen invocations occurred, with two months of no invocations. This time period falls drastically short of the time period analyzed in *Galloway* and *Marsh*, casting doubt as to whether enough time has effectively passed in order to truly consider the content of the invocations as a pattern. Further, roughly ten of the invocations included language implying the supremacy of sectarian dogma. While it is noteworthy that this represents greater than half of the invocations given, there still exists balancing factors that diminish the import of this fact.

First, while ten of the invocations given implied the supremacy of sectarian dogma, eight of the invocations did no such thing. The invocations were either sectarian in nature but devoid of any assertion of supremacy, or of completely non-sectarian nature. There is no evidence to suggest that the language of the sectarian invocations were given any form of preferential

treatment over the others, nor any indication that the adherence to the invocations by the citizenry created preferential treatment towards issues. Because there occurred no regular invocation designed to assert the supremacy of sectarian beliefs, and non-sectarian invocations were given intermittently, there exists no pattern that would be rise to the level of coercion.

Second, the invocations in question did not amount to proselytizing or denigration. Taken literally, proselytizing requires an individual to induce another to ascribe to his or her own faith. In none of the language from the selected invocations on record is one particular faith base named as the superior dogma, and no form of advertisement or inducement existed. In short, the pastor from the Church of the Latter Day Saints did not include in the invocation, "all here should convert to Mormonism". Proselytizing requires more than ardent or impassioned preaching on behalf of the speaker's faith. The language included in the invocations at times clearly favors a particular belief structure, but just barely falls short of the actions that amount to proselytizing. Similarly, there exists no language in the record where an invocation denounced another faith or followers to the level of denigration. Not once did any sectarian pastor decree that the followers of Islam or Baha'i faith were in some way heretics or otherwise cast aspersions on those who do not follow sectarian dogma. Again, the invocation that favors one religion does not automatically denigrate another. Denigration is a conscious act of defaming another and no invocation rose to that level.

The content of the invocations given at the Central Perk Town Council meetings do not qualify as coercion. While the language of certain invocations may border on proselytizing, there is insufficient evidence in the record to truly meet the 'pattern', time, and denigration requirement set forth in *Galloway* and *Marsh*. Accordingly, the Town Council's prayer policy and practices do not run afoul with the Establishment Clause or First Amendment principals.

B. Central Perk Town Counsel prayer practices are not unconstitutionally coercive of the High School students present

The lower court is correct in asserting the replacement of legislative prayer jurisprudence for school prayer jurisprudence is incorrect. Doing so would inappropriately intermingle doctrines that necessarily exist on two different planes. Councilwoman Green's actions do not create an existence where the legislative body is turned into a de facto classroom warranting analysis from a school prayer standpoint.

The record is clear that Green in her capacity as a teacher in the local high school has encouraged civic engagement in her students prior to her election to the Town Counsel. Green rewards the civic engagement of her students with the granting of extra credit, which may have the natural and probable result of changing the student's grade for the better. The record is explicit in stating that Green did not require these activities as a part of her normal curriculum, and were strictly done by the students on a voluntary basis. Green offered extra credit to students who participated in local campaign elections, or wrote to elected representatives in support of a particular issue. Once Green was elected to Town Counsel, she offered the additional avenue for extra credit in the giving of presentations at Town Counsel meetings. Again, it is emphasized that the presentations were not required in Green's curriculum, and followed the already established pattern of awarding students for extracurricular civic engagement. It is also worthy to note that non-participation in extra credit activities did not negatively affect any students grade thereby making participation compulsory.

Further, there is no evidence in the record to suggest that after Green's election to Town Council that either of the two above outlets for extra credit were no longer available for students who did not wish to participate in the Town Council presentations. Because Green did not force her students as part of the regular curriculum to attend council meetings, and only offered extra

credit for those who chose to make a presentation instead of the other two options available, there is no argument that the student's presence at the town council meetings were in fact coerced. Similarly no argument supports the creation of a classroom setting for the town council meetings and affords school prayer analysis.

This is markedly different from the facts of *Lee v. Weisman*, as the District Court asserted. *Lee* considered the constitutionality of invocations given during graduation ceremonies – inherently scholastic and required events. *Lee v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649 (1992). It is impossible to divorce a graduation ceremony from the scholastic environment, so it is only logical to afford graduation ceremonies the protection of school prayer jurisprudence. However, the facts of this case clearly create a significant amount of distance from the scholastic environment and maintain the status of legislative gathering. Further, a ruling that school prayer jurisprudence supplants legislative prayer jurisprudence carves out an arbitrary exception that only affects jurisdictions where Counsel members are also teachers. This would frustrate the equal application of legislative prayer precedence to a degree not required, nor warranted.

Having established that legislative prayer jurisprudence is the appropriate standard to analyze the presence of students at the Town Council Meetings, the analysis remains similar to that of all citizens present at the Town Council meetings. The students present at the Town Council meetings did not hear any form of proselytizing or denigration consistent with precedent decisions regarding coercion. The record also indicates that it is a required element to remain present for the invocation in order to receive extra credit. It is apparent from the record that the extra-credit was received merely from the presentation with no emphasis placed on any other participation in the town council meeting.

The lower court is correct in drawing the correlation between the instant case and *Galloway*. The Second Circuit Court in *Galloway* noted the presence of high school aged individuals at the Town Council meetings and did not change the analysis based on that fact, even in light of the fact that for some High School students attendance was *required for graduation* and not mere extra credit. *Galloway v. Town of Greece*, 681 F.3d 20, 23 (2d Cir. 2012). Just as the presence of high school aged students did not affect the analysis in *Galloway*, the analysis should not be affected in the instant case.

Because Councilwoman Green did not force the high school student into attending Town Council meetings as a part of standard curriculum to the direct detriment of those who did not attend, Green's actions do not amount to coercion. Further, based on the precedent set forth in *Galloway*, the presence of high school students does not change the analysis of whether the invocations given before Town Council meetings were unconstitutionally coercive. As such, the conclusion that the invocations given were constitutionally permissible for all citizens remains the same for high school students present.

Central Perk's prayer policy and practices in totality do not amount to coercion running afoul with the principals of the Establishment Clause. The language utilized by various ministers did not amount to the evils of a pattern of proselytization or denigration specifically mentioned in *Galloway*. The Thirteenth Circuit specifically noted this distinction in it's learned opinion, and the Respondents pray this court comes to the same conclusion from its own precedent. The current Central Perk prayer policy should be upheld as constitutional and permitted to continue on as established.

CONCLUSION

For the foregoing reasons, Respondents respectfully request this Court to sustain the decision of the United States Court of Appeals for the Thirteenth Circuit, declare the Central Perk prayer policies and practices to not have run afoul with First Amendment principals as Petitioner claims, and not grant an injunction based on the claims arising from the instant case.

Respectfully Submitted,

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Counsel for Respondent

(names omitted pursuant to Rule B(3))