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

Team S
Attorneys for Petitioner

Questions Presented

1. Whether 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?

2. Whether the Central Perk Town Council's practice of legislative prayer is rendered unconstitutionally coercive because 1.) preachers utilized honorific, superlative language while addressing the community and 2.) Town Council Member Green is also a high school teacher who offered extra credit to students who gave presentations to the Town Council?

Table of Contents

Questions Presented 1

Table of Contents.. 2

Table of Authorities... 3

Statement of the Case... 4

Statement of the Facts.. 7

Statement of Jurisdiction.. 10

Summary of Argument.. 11

Argument.. 13

I. The Circuit Court Was Correct In Ruling Central Perk's Prayer Practice Conforms to *Marsh* and *Galloway* When Council Members or Their Chosen Clergy Offer Theologically Varied But Exclusively Theistic Invocations.. 13

A. Central Perk's Option of Legislator-Led Invocations is Permissible Under *Marsh* and *Galloway*.. 14

B. Central Perk's Method of Choosing Persons to Give Invocations is Permissible Under *Marsh* and *Galloway*.. 17

C. The Theologically Varied, But Exclusively Theistic Invocations Thus Given Reflect Non-Discriminatory Tradition Protected by *Marsh* and *Galloway*.. 20

II. The Circuit Court Was Correct In Ruling that Under *Marsh* and *Galloway*, Central Perk's Practice is Non-Coercive to Either Children or Adults.. 22

A. Coercion Analysis for Legislative Prayer is Governed by *Marsh* and *Galloway*.............. 22

B. The Township's Legislative Prayer Practice is Not Coercive Under Either Test Articulated in *Galloway*.. 24

C. The Township's Legislative Prayer Practice is Not Coercive to Children...................... 29

Conclusion.. 32

Appendix I: Certification..33

Table of Authorities

United States Supreme Court Cases

Engel v. Vitale, 370 U.S. 421 (1962)....................................30, 32

Lee v. Weisman, 505 U.S. 577 (1991)....................................30, 32

Lemon v. Kurtzman, 403 U.S. 602 (1971)....................................24

Marsh v. Chambers, 463 U.S. 783 (1983)....................................14, 15, 16, 18, 19, 28

Town of Greece v. Galloway, 134 S.Ct. 1811 (2014)...14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27, 29, 31

United States Court of Appeals Cases

Borden v. Sch. Dist., 523 F. 3d 153 (3rd Cir. 2008)....................................30, 32

Bormuth v. County of Jackson, 870 F.3d 494 (6th Cir. 2017).....15, 16, 17, 18, 20, 21, 22, 23, 24

Lund v. Rowan Co., N.C., 863 F. 3d 268 (4th Cir. 2017)....................................15, 17, 21, 24

United States District Court Cases

Hudson v. Pittsylvania County, Va., 107 F. Supp. 3d 524 (W.D. Va. 2015)....................21,22

Williamson v. Brevard County, 276 F. Supp. 3d 1260 (M.D. Fl. 2017)....................20, 21

Federal Statues and Regulations

U.S. Const. amend. I, §2....................................14

Miscellaneous Authority

Joint Appendix at 66a-67a, *Town of Greece v. Galloway*, 134 S.Ct. 1811 (2014)....................16

POPE PAUL VI, NOSTRA AETATE: DECLARATION ON THE RELATION OF THE CHURCH TO NON-CHRISTIAN RELIGIONS (October 28, 1965)....................................28

Rowan County, N.C. v. Lund, No. 17-565, 585 U.S. __, at 3 (Thomas, J., statement)............18

Statement of The Case

Plaintiff's Claims and Defendant's Response

This case is a consolidation of two §1983 claims filed by Plaintiff Ross Geller and Plaintiff's Dr. Richard Burke, Lisa Kudrow, and Phoeboe Buffay. R. at 1. The Plaintiff's are seeking a permanent injunction against the Township's practice of legislative prayer. R. at 1.

Plaintiff Geller filed suit on July 2, 2016 following the October 2015 Town Council Meeting at which Ms. Green gave the invocation. R. at 5. Plaintiff Geller took umbrage with Ms. Green delivery her invocation in the Baha'i tradition. R. at 5. Specifically, Plaintiff Geller was upset his daughter's teacher prayed to a "fake God, and made a mockery of the purpose of legislative prayer". R. at 5.

The remaining Plaintiffs filed suit on August 30, 2016. The Atheist Plaintiffs argued their children felt forced to pray against their conscience. R. at 5. Additionally, they felt that as atheists the practice of legislative prayer discriminated against their system of non-belief. R. at 5.

Due to the similarity of the claims of the two lawsuits, the District Court for the Eastern District of Old York agreed to consolidate the claims. R. at 5.

Central Perk Township responded to the claims by filing for summary judgement. Plaintiffs in turn responded with a cross-motion for summary judgement. R. at 1.

The District Court

On February 17, 2017, the District Court for the Eastern District of Old York issued its decision and entered its judgement in the case. R. at 11. The court granted the Plaintiff's motion for summary judgement as well as their injunction R. at 10.

The District Court argued the Town's Policy fell outside of the practices which were allowed under *Galloway*. R. at 6. Specifically, the court felt that despite the random selection of Council Members, the fact that the persons who delivered the invocation were not randomly selected from the community distinguished this case from Galloway. R. at 7. Additionally, the court found the fact that all the offered invocations were arguably theistic in nature was an issue. R. at 7.

Additionally, the District Court found the practice to be unconstitutionally coercive. To do so, the District Court argued that the language utilized by some of the ministers amounted to proselytizing and denigrating to other faiths. R. at 8. The District Court further argued the practice was coercive to children and analogized the practice to school prayer. R. at 9.

Upon the issuance of the District Court's decision and judgement the Township appealed to the Thirteenth Circuit. R. at 12.

The 13th Circuit

Following the decision by the District Court, the Township filed an appeal to the Thirteenth Circuit on March 15, 2017. R. at 12. The Thirteenth Circuit agreed to hear the case and issued is decision on January 21, 2018. R. at 19. The Thirteenth Circuit reversed the District Courts decision and granted the Township's Motion for Summary Judgement. R. at 19.

In finding for the Township the Thirteenth Circuit found that the Township's practice of legislative prayer was entirely consistent with Supreme Court precedent of *Marsh* and *Galloway*. R. at 13. The Court articulated that *Galloway* set the parameters for the validity of legislative prayer. R. at 14. The Court further pointed out that the District Court's decision was inconsistent with *Galloway* and applied restrictions not contemplated under *Galloway*. R. at 14.

Additionally, the Thirteenth Circuit articulated the District Court was incorrect in its analysis of coercion. R. at 16. The Court made it clear that view in light of *Galloway*, the mere use of honorifics is not the equivalent of proselytizing or denigration. R. at 16. Nor did the presence of children require the application of school prayer analysis. R. at 17.

Following the decision by the Thirteenth Circuit the Plaintiffs appealed to the Supreme Court of the United States. R. at 20.

The Supreme Court

On August 1, 2018, the Supreme Court of the United States granted Certiorari in this case. R. at 20. The Court certified two questions which will be considered in the October term of 2018. R. at 20.

Statement of Facts

The History of Legislative Prayer in Central Perk

Central Perk Township is a small, rural township in the State of Old York. R. at 1. The Township's governance structure consists of a seven-member Town Council who are elected every two years. R. at 1.The Town Council meets once a month to discuss the issues confronting the Township. R. at 1.

In September 2014, the Town Council adopted a policy which would allow for ceremonial legislative prayer. R. at 2. The policy would allow for a ceremonial prayer to occur at the outset of each monthly meeting, prior to taking up the town business. R. at 2.The policy was explicitly enacted for the benefit of the Council Members. R. at 2.

The policy specifically provided that for each meeting a Council Member will be randomly selected to lead the invocation. R. at 2. The selected member could then proceed to lead the invocation themselves or invite a minister from the community to offer the invocation. R. at 2. Additionally, the Member could choose to forgo the invocation, at which point the Member would proceed directly into reciting the Pledge of Allegiance. R. at 2. All but one Council Member participated in the policy. R. at 2. Practically, the policy operated in the following manner: at the beginning of each meeting the Chairman picked a name out of an envelope and whomever was selected was allowed to lead the invocation at the following months meeting. R. at 2.

Since the institution of the policy the invocations offered reflected a diversity of faith traditions. From October 2014 to 'July 2016, invocations were offered in the Muslim, Mormon,

Baha'i, and Evangelical traditions. R. at 3. Additionally, on occasion the Members declined to give an invocation. R. at 3.

Council Member Green's Extra Credit Assignment

In addition to serving on the Town Council for Central Perk Township, Rachel Green is a beloved teacher at Central Perk High School. R. at 4. Green teaches American History and American Government. R. at 4.

Green's American Government class is an elective which is reserved for seniors. Despite the exclusivity of the class, it remains popular. R. at 4. The popularity is due in large part to Green's reputation as a superb teacher. R. at 4. As a part of this class, Green encourages her students to become civically involved. R. at 4. Namely, she encourages her students to participate in the political process. R. at 4. To incentivize this participation, Green has historically offered extra credit for student's involvement in the political process. R. at 4.

Green's practice of offering extra credit to get her students involved has involved several opportunities for extra credit. In the event there is an election underway, Green would offer her students 5 extra credit points on their final exam if they volunteered for a political candidate of their choice. R. at 4. If there was no election going on the students were awarded the same 5 points on their final exam if they wrote to an elected official advocating for a current political cause. R. at 4. Once Green was elected she added a third opportunity for extra credit.

Green was elected to the Town Council in November 2014, two months after the legislative prayer policy was enacted. R. at 4. Upon joining the Council, as a way to get her students further involved, she (along with her fellow Council Members) agreed to allow her

students to make presentations to the Council. R. at 4. At each meeting, the Council would allow three such presentations. R. at 4. The students who took advantage of this opportunity would be awarded 5 extra credit points to their class participation grade. R. at 4. The class participation grade accounted for 10% of the student's final grades. R. at 4.

Despite Green's efforts, her students rarely took advantage of the chance for extra credit. Between the 2013-2014 and 2014-2015 school years only 12 students took advantage of the opportunity. R. at 4. In 2015-2016 a total of 13 students were slated to participate. R. at 4. Four of the students from the 2015-2016 slate are the Plaintiff's children. R. at 4. The lack of participation may have been due to the lack of effects the extra credit points had on the student's grades. Of the 12 students to take advantage of the opportunity in 2013-2014 and 2014-2015 school years, only 2 students saw their grade changed. R. at 4.

Statement of Jurisdiction

This case arises as an appeal to a final decision of the Circuit Court for the 13th Circuit. Judgment was entered by the Circuit Court on January 21, 2018. Certioari to the Supreme Court was granted on August 1, 2018. Therefore, this Court has jurisdiction under 28 U.S.C. § 1254(1).

SUMMARY OF ARGUMENT

The Circuit Court was correct in ruling that Central Perk Township's practice of opening Council meetings with prayer given by either legislators or chosen representatives is constitutional, even when the prayers given have been religiously diverse, but uniformly theistic. Legislative prayer analysis is governed by this Court's rulings in *Marsh* and *Galloway*, in which the Court ruled that such cases could only be analyzed in reference to the enduring and ubiquitous historical practice of legislative prayer in this country, a practice contemplated and exempt from traditional Establishment clause analysis, with certain limitations. In analyzing the practice of Central Perk Township, however, three issues arise due to facts not considered in the *Marsh* and *Galloway* cases: the role and impact of legislator-led prayer, the control over which the Township selected clergy to give prayers, and whether the absence of nontheistic prayers impacts the analysis. Legislator-led prayer is an enduring and ubiquitous historical practice of legislative prayer and is approved by *Marsh* and *Galloway*. The control over the selection of the clergy is supported by *Marsh* and *Galloway* because, as the Circuit Court noted, "he who pays the piper calls the tune." R. at X. Finally, the absence of nontheistic prayers does not cause the Township's practice to fail *Marsh* and *Galloway*; the Township has no requirement to regulate the offered prayers in such a way as to ensure the proffering of nontheistic prayers. For these reasons, the Township's practice comports with the historical analysis requirements demanded by *Marsh* and *Galloway*, and the Circuit Court's ruling must be affirmed.

The Circuit Court was also correct in ruling that Central Perk Township's legislative practice was not coercive, either to adults or to the schoolchildren that attended Council meetings. Due to the historical precedent of legislative prayer, such cases are not governed under

traditional Establishment clause analysis schemes, such as under *Lemon*. As discussed above, *Marsh* and *Galloway* dictate the coercion discussion in this case. In *Galloway*, the court described two different methods of analysis in the majority and dissent opinions; under either test, the Township's practice is non-coercive and constitutional because at no point were any non-participants threatened with the force of law, nor were the actual prayers offered impermissibly proselytizing or denigrating. Additionally, the presence of schoolchildren in Council meetings does not change the coercion analysis due to the nature of the Council meeting. However, if it does, the distinctiveness of the facts in this case precludes analogy to the traditional line of school prayer cases and evidences a non-coercive environment, even as it pertains to schoolchildren. For these reasons this Court must affirm the ruling of the Circuit Court holding that Central Perk Township's legislative prayer practice is non-coercive.

Argument

I. The Circuit Court Was Correct In Ruling Central Perk's Invocation Practice Conforms to *Marsh* and *Galloway* When Council Members or Chosen Clergy Offer Theologically Varied But Exclusively Theistic Invocations.

Central Perk Township's practice of opening board meetings with religious invocations is consistent with this country's historical tradition of opening legislative sessions with prayer. Certainly, the Constitution is sensitive to the dangers posed by religious overreach. *See* U.S. CONST. amend. I, §2. However, even prior to our Constitution, "the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom." *Marsh v. Chambers*, 463 U.S. 783, 786 (1983). *Marsh* declared that such practice of opening legislative sessions with invocations given by paid chaplains, does not violate the Establishment Clause so long as those invocations do not "proselytize or advance any one, or to disparage any other, faith or belief." *Id.* at 794-795. The Court in *Galloway* reiterated *Marsh*, adding that invocations need not be non-sectarian so long as the practice meets the non-discriminatory requirements from *Marsh*. *Town of Greece, N.Y. v. Galloway*, 134 S.Ct. 1811, 1821 (2014). The Court also reaffirms in *Galloway* the primacy of historical analysis over any other Establishment Clause caselaw tests: "Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change." *Id.* at 1819. In this case, the facts present three particular issues relevant to analyzing Central Perk Township's invocation practice against historical tradition: Central Perk allowed legislators to lead prayer, allowed legislators to choose whomever they wished to give invocations, including their own religious representatives, and exhibited a diverse array of religious invocations, albeit all theistic. The Thirteenth Circuit was correct in ruling that Central Perk Township's invocation practice,

one in which legislators gave invocations or chose their personal religious representatives, did not run afoul of limitations imposed by *Marsh* and *Galloway*. R. 16.

A. Central Perk's Option of Legislator-Led Invocations is Permissible Under *Marsh* and *Galloway*.

The greatest effect of *Marsh* was in confining any analysis of legislative prayer to an examination of a historical tradition that "has continued without interruption ever since that early session of Congress." *Marsh v. Chambers*, 463 U.S. at 788. The Court recognized that history can only justify so much, "but there is far more here than simply historical patterns." *Id.* at 790. The Court then resolved the case without reference to any previously used analytical test under the Establishment Clause on the strength of that historical tradition. *Town of Greece, N.Y. v. Galloway*, 134 S.Ct. at 1818. The Court also reaffirms in *Galloway* the primacy of historical analysis over any other Establishment Clause caselaw tests: "Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change." *Id.* at 1819. However, neither of those cases addressed the context of legislator-led prayer, which has led to circuit courts reaching diametrically opposite conclusions on the issue. *See Bormuth v. County of Jackson*, 870 F.3d 494 (6th Cir. 2017) (holding legislator-led practice is consistent with *Galloway*); *but see Lund v. Rowan Co., N.C.*, 863 F.3d 268 (4th Cir. 2017) (holding legislator-led practice is inconsistent with *Galloway*). Due to the rich historical tradition of legislator-led prayer in legislative sessions and its comportment with the aims and purposes of legislative prayer as a practice, legislator-led prayer is permissible under *Marsh and Galloway*, and Central Perk Township's invocation practice is constitutionally appropriate insofar as it may be legislator-led.

The District Court, in its opinion, held that while the Supreme Court did not dictate an answer to legislator-led prayer, nevertheless Central Perk Township's practice of legislator-led prayer was outside the practice in *Galloway*. R. at 7. The Circuit Court did not rule on this issue in its opinion. The District Court believed that legislator-led prayer led to impermissible endorsement. R. at 7. But endorsement as a concept "is a thread woven by the *Lemon* test;" it belongs to those analytical tests supplanted by historical reference by virtue of *Marsh* and *Galloway*. *Bormuth v. County of Jackson*, 870 F.3d at 514-515. Endorsement is not the measure by which we examine legislative prayer, reference to historical tradition is. *Id.* Furthermore, history offers so many examples of legislator-led prayer that one can even be found in the record for *Galloway*, given by one of the councilmembers in the name of the "Heavenly Father." Joint Appendix at 66a-67a, *Town of Greece v. Galloway*, 134 S.Ct. 1811 (2014), 2013 WL 3935056.

The Sixth Circuit spoke clearly on the issue of legislator-led prayer when they ruled on a case between a legislative board with such an invocation practice and a "self-professed Pagan and Animist" who objected to the sectarian nature of the practice. *Bormuth*, 870 F.3d at 498-499. The court began with the researched claim that history of this country, even before the Constitution, supports the practice of legislator-led prayer: "Before the founding of our Republic, legislators offered prayers to commence legislative sessions." *Id.* at 509. Since the second half of the nineteenth century, the existence of legislator-led prayer in various state bodies "confirms to us that our history embraces prayers by legislators as part of the "benign acknowledgement of religion's role in society."" *Id.* at 510 (quoting *Galloway*, 134 S.Ct. at 1819). This practice is unbroken and continues today. *Id.* The very amicus brief that informed the *Marsh* Court's understanding of state legislative prayer in practice stipulated that legislative prayer is given by all manner of individuals, including legislators, and that all state 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.* (citing Brief of NCSL as Amicus Curiae, *Marsh v. Chambers*, 463 U.S. 783 (1983) (No. 82-83), 1982 WL 1034560, at *2, *3.

As the Sixth Circuit noted, the tradition of legislator-led prayer and its widespread use in history and the present comports with the purpose of legislative prayer contemplated by *Galloway*. *Id.* at 511. The Court in *Galloway* explained the audience of legislative prayer is the "lawmakers themselves, who may find that a moment of prayer or quiet reflection sets the mind to a higher purpose and thereby eases the task of governing," and the purpose is "to accommodate the spiritual needs of lawmakers and connect them to a tradition." *Galloway*, 134 S.Ct. at 1825-1826. *See also Lund,* 863 F.3d at 275. That Court also mandated that "government must permit a prayer giver to address his or her own God or gods as conscience dictates." *Galloway*, 134 S.Ct. at 1822. Combining the two, the Sixth Circuit held that there was no difference between legislator-led prayer and prayer given by chaplains for constitutional purposes. *Bormuth*, 870 F.3d at 512.

The other circuit case that spoke on legislator-led prayer reached an opposite conclusion, holding that legislator-led prayer was not supported by the historical tradition pondered by *Marsh* and *Galloway*. *Lund,* 863 F.3d at 279. That court believed that while legislators "may occasionally lead an invocation, this phenomenon appears to be the exception to the rule..." *Id.* This difference of opinion did not surprise the Sixth Circuit, however, as they explained that the court in *Lund* merely lacked the benefit of more complete research: "we give no credence to... the Fourth Circuit's conclusion in *Lund* that legislator-led prayer is a "phenomenon [that] appears to be the exception to the rule," especially because that court apparently did not consider the numerous examples of such prayers presented to us." *Bormuth*, 870 F.3d at 510 (*quoting*

Lund, 863 F.3d at 279). Justice Thomas recognized the same deficiency when he dissented to the denial of certiorari for *Lund*: "The Fourth Circuit's decision is both unfaithful to our precedents and ahistorical." *Rowan County, N.C. v. Lund*, No. 17-565, 585 U.S. ___ , at 3 (2018) (Thomas, J., statement). Justice Thomas reiterates the rich tradition of legislator-led prayer, stretching "for as long as this country has had legislative prayer." *Id.* at 4. Accordingly, the Sixth Circuit, and not the Fourth Circuit, has the correct interpretation: that legislator-led prayer is a practice supported by historical tradition and that who gives the prayer, chaplain or legislator, is not meaningful to the analysis.

Central Perk Township allows Council members, when selected, to offer a prayer or invocation personally. R. at 2. Legislative prayer analysis requires reference to the historical, traditional concept of legislative prayer in this country. *Galloway*, 134 S.Ct. at 1819. Legislator-led prayer falls within the historical tradition of legislative prayer in this country. *Bormuth*, 870 F.3d at 510. Therefore, that Central Perk Township allows legislators to give their own prayers or invocations instead of a member of clergy is a historical tradition of legislative prayer under *Marsh* and *Galloway* and, alone, is not meaningful to the analysis of whether Central Perk Township's practice is permissible under the Constitution.

B. Central Perk's Method of Choosing Persons to Give Invocations is Permissible Under *Marsh* and *Galloway*.

The Circuit Court was correct in ruling that the control over which Council members selected members of clergy was irrelevant and no different than paying the same Presbyterian chaplain to offer invocations for a period of almost two decades, like *Marsh*. R. at 16. While Council members could, and consistently did, select their own personal clergy to deliver prayers or invocations, nothing about this practice violates the concerns of the Court in *Galloway*.

In *Marsh*, the same paid Presbyterian minister would offer invocations at the start of Nebraska Legislature sessions for sixteen years. *Marsh*, 463 U.S. at 784-785. That minister was continually reelected for his position due to the acceptability of his personal qualities and performance, a permissible motive for the Court. *Id.* at 793. In *Galloway*, the Council used a local directory to compile a list of willing ministers for invocations, where an employee would go down the list until an available person of the clergy answered. *Galloway*, 134 S.Ct. at 1816. However, no one was excluded from eligibility, and any minister or any layperson of any variety, including atheist, could give an invocation. *Id.*

While the Court has not specifically described an acceptable selection process, it has offered guidance on where the limits lie. In *Marsh*, the Court said the retention of the minister for sixteen years did not conflict with the Establishment Clause, "absent proof that the chaplain's reappointment stemmed from an impermissible motive." *Marsh*, 463 U.S. at 793. Of the selection process in *Galloway*, the Court noted that the selection process led to a predominance of Christian ministers. *Galloway,* 134 S.Ct. at 1824. However, the town made "reasonable efforts" to be representative of the diversity of faith in the community and welcomed a prayer or invocation from anyone who would give one. *Id.* Therefore, the only requirement the court left on Greece's selection process is that it "maintains a policy of nondiscrimination." *Id.*

Central Perk Township's invocation practice shows no evidence of discrimination in the selection process. Council members are elected biennially. R. at 1. At the beginning of each Council meeting, a Council member is randomly selected; that member may then personally give an invocation or select a "minister from the community." R. at 2. The record discloses no evidence of any other limitation on the selection of a person to give the invocation or what is meant by "minister." The record does disclose invocations given by representatives of many

different faiths: Mormon, Islam, Baha'I, and Christianity. R. at 2-5. Central Perk Township's practice looks nothing like the practice in *Hudson*, where the Pittsylvania County Supervisors completely dominated the selection process, only giving the invocations themselves, only giving invocations in one faith, excluding any other persons of faith from giving invocations, and going so far as to say "If you don't want to hear this prayer, you can leave." *Hudson v. Pittsylvania County, Va.,* 107 F.Supp.3d 524, 534-535 (W.D. Va. 2015) (invocation practice ruled outside the bounds of *Galloway*). Central Perk's practice does not even look like that in *Williamson*, where the County Board of Commissioners refused the request of a secular humanist to give an invocation. *Williamson v. Brevard County,* 276 F.Supp.3d 1260, 1266-1268 (M.D. Fl. 2017). Nowhere does the record in this case show Central Perk excluding any legislator's choice of minister, be they of theistic or nontheistic faiths. The fact that ministers often matched their invoking legislator's religion is insignificant: "that the prayers reflect the individual Commissioners' religious beliefs does not mean the Jackson County Board of Commissioners is "endorsing" a particular religion, Christianity or otherwise." *Bormuth*, 870 F.3d at 513.

Central Perk Township's selection process for persons to give invocations more closely resembles the selection process in *Galloway* in that it offers no barriers to any expressions of faith, fulfilling the Court's non-discrimination requirement. *Galloway*, 134 S.Ct. at 1824. In actuality, Central Perk's process allows for even more diverse presentation of faith and ideas than *Galloway*: Greece would proceed down a list of available ministers and accept the first one willing, relegating the ministers at the bottom of that list as remote possibilities, if not moot. *Id.* at 1816. As a result, Central Perk has had a broader exhibition of faith in its invocations, including invocations in the Islamic, Baha'i, and Mormon faiths. R. 2-5. Additionally, Central Perk has the additional benefit of legislator-led prayer, allowing the legislative body to enjoy the

added diversity of the personal faiths of the Council members, themselves an elected cross-section of their community at large. R. 1-5. For these reasons, Central Perk Township's selection process for invocators is not only within the bounds of *Marsh* and *Galloway*, it exceeds the selection processes in those cases in terms of its inclusiveness.

C. The Theologically Varied, But Exclusively Theistic Invocations Thus Given Reflect Non-Discriminatory Tradition Protected by *Marsh* and *Galloway*.

The Circuit Court, in finding that Central Perk was free in selection of prayer content, subject to limitations imposed by *Galloway*, reiterated a foundation of law under *Galloway*: "Mandated non-endorsement of theistic belief is not one of those limitations." R. at 16. The District Court had incorrectly pointed to the fact that all prayers were theistic in explaining why Central Perk's practice fell outside of *Galloway*. R. at 8. In *Marsh*, when the long-tenured minister received a complaint about the inclusion of references that were Christian in nature, he removed those references to make the invocation more non-sectarian; however, this was never a requirement. *Galloway*, 134 S.Ct. at 1821. The Court in *Galloway* noted this fundamental principle: that legislative prayer could not be required to be non-sectarian as that would impermissibly invade upon the content of the prayer. *Id.* at 1821, 1822. This principle has been recognized nearly uniformly in the lower courts. *See Bormuth*, 870 F.3d at 506; *Lund*, 863 F.3d at 274; *Williamson*, 276 F.Supp.3d at 1281; *Hudson*, 107 F.Supp.3d at 533. The only limitation on legislative bodies is ensuring that over the course of practice, invocations do not tend to "denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion." *Galloway*, 134 S.Ct. at 1823.

In this case, the invocations given in the Muslim and Baha'i faiths pose no legitimate concern. All three instances, a Muslim Council member gave generic blessings of peace from

Allah. R. at 3. The invocations given in the Baha'i faith acknowledged the "infinite wisdom" of Buddha and wished for harmony and peace in the Council meetings. *Id.* Neither of these groups of invocations could be said to threaten damnation, denigrate other religions, or preach conversion. *Galloway*, 134 S.Ct. at 1823. The nine invocations offered in the Mormon faith are similarly acceptable under *Galloway*. R. at 2-3. While President Minsk did pray that all should "submit to Christ's reign... so that none would be sent to the Telestial Kingdom," this language is, in itself, non-sectarian sufficient to render it harmless. Asking for submission to Christ cannot be thought to be preaching conversion to Mormonism, the religious identity of the speaker, as Christ is a figure included in many different faiths. Whether the "Telestial Kingdom" qualifies as damnation to non-Mormons for the purposes of *Galloway* is the kind of question the law is incapable of answering: "Honorifics like "Lord of Lords" or "King of Kings" might strike a Christian audience as ecumenical, yet these titles may have no place in the vocabulary of other faith traditions." *Galloway*, 134 S.Ct. at 1822.

The invocations offered by the Christian church offer the most difficulty, as they are the most reaching in their language. The Christian ministers asked for divine guidance for the Council members, but also made reference to those "who do not know Jesus," to the "blinders to be removed from the eyes of those who deny God," and to "every Central Perk citizen's knee to bend before King Jesus." R. at 3. While, again, Christ is a figure associated with more than one religion, this language does stray closer to the prohibition against proselytizing, or preaching conversion. *Galloway*, 134 S.Ct. at 1824. In *Bormuth*, the plaintiff claimed a single remark by a Christian minister blessed Christians at the exclusion of other faiths, constituting denigration. *Bormuth*, 870 F.3d at 512. The court reasoned that even if it counted as a denigration, "this stray remark does "not despoil a practice that on the whole reflects and embraces our tradition."" *Id*

(*quoting Galloway*, 134 S.Ct. at 1824). The stray remarks of one minister should not invalidate an otherwise historically-consistent practice, just as the prayers in *Galloway* that declared opponents of prayer as "ignorant of the history of our country" and lamented the lack of "God-fearing leaders" were not sufficient to overcome the rich tradition of inclusion that legislative prayer had otherwise served. *Galloway,* 134 S.Ct. at 1824.

Marsh and *Galloway* refute requirements of nonsectarian prayers and limit the oversight government may have over the prayers, subject to the limitation that those prayers not preach conversion, denigrate, proselytize, or threaten damnation. *Galloway*, 134 S.Ct. at 1823. That all of the prayers offered in Central Perk have been theistic is of no concern to the Establishment Clause. *Bormuth*, 870 F.3d at 514 (holding that *Marsh* and *Galloway* do not require the county to provide opportunities for other faiths to offer invocations). The practice over time in Central Perk Township shows zero pattern or consistency of prayers offered to "denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion." *Galloway*, 134 S.Ct. at 1823. Therefore, the Circuit Court was correct in ruling that "the invocations at the Council's meetings did not reflect a pattern of proselytization, nor did they denigrate other faiths." R. at 17.

II.) The Circuit Court Was Correct In Ruling That Under Marsh and Galloway, Central Perk's Practice is Non-Coercive to Either Adults or Children

A. Coercion Analysis as it pertains to Legislative Prayer is Governed by *Marsh* and *Galloway*.

On the questions of coercion, the primary issue is establishing what analytical test governs the matter at hand. The question remains whether coercion is to be measured by the three-part test set forth in *Lemon*? This question was let untouched by the lower courts, which may say a great deal, but remains instrumental in the analysis. Plainly, the answer is no. The

matter at hand, as with all legislative prayer cases is governed not by *Lemon* but by *Marsh* and *Galloway*, and as such should be analyzed by one of the tests articulated in Galloway.

In *Lemon,* the Court articulated the three-part *Lemon* test which, were it applied here may change the outcome. *See Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). However, applying the *Lemon* test in the instant case would be out of step with the Court's jurisprudence. The lower courts did not address the question and that silence speaks loudly. R. It can be gleaned from the lower courts silence that they regard the matter as settled; when considering a practice of legislative prayer courts should look to *Marsh* and *Galloway* not *Lemon*. Such an understanding is echoed by both the 4th and 6th circuit. *See generally Lund v. Rowan Cty., N.C.*, 863 F.3d 268 (4th Cir. 2017); *see also Bormuth v. Cty. of Jackson*, 870 F.3d 494 (6th Cir. 2017). More to the point, in *Bormuth*, the 6th Circuit noted, that were it to apply Lemon in a legislative prayer case it would be undoing 30 years of Supreme Court analysis. *See Bormuth v. Cty of Jackson*, 870 F.3d 494, 514 (6th Cir. 2017). In *Lund*, the court seemingly implicitly acknowledged that Marsh and its progeny Galloway created a carve out for legislative prayer. *See generally Lund v. Rowan Cty., N.C.*, 863 F.3d 268 (4th Cir. 2017). This point of agreement between the two circuits is of note. Despite the disparate decisions on the validity of the legislative prayer practices before the 4th and 6th Circuits, both identified *Marsh* and *Galloway* as controlling. . *See generally Lund v. Rowan Cty., N.C.*, 863 F.3d 268 (4th Cir. 2017); *see also Bormuth v. Cty. of Jackson*, 870 F.3d 494 (6th Cir. 2017).

Given the above it seems fair to say there exists consensus that *Marsh* and *Galloway* govern the analysis of legislative prayer cases. This case is no different, as the Court considers the matter at hand it should do so through the lenses provided by *Marsh* and *Galloway*. The more important question is perhaps not whether *Marsh* and *Galloway* apply instead of *Lemon*, but rather which *Galloway* test to apply? Ultimately, regardless of which test the Court analyzes the existence of coercion under, the Townships legislative prayer practice will not qualify.

B. The Township's Legislative Prayer Practice is not Coercive Under Either Test Articulated in *Galloway*.

Having established that the proper analysis of the matter at hand comes through *Galloway* the question becomes is the Township's legislative prayer practice coercive when viewed in that light. Evaluated under any test, the Township's practice is not coercive because at no point where any non-participants threated with the force of law nor was the practice one of proselytizing or denigrating.

As articulated above, evaluating coercion is easier said than done, because though the majority in *Galloway* agreed there was no coercion in that case the Court failed to form a majority in terms of the proper test. *See generally Town of Greece, N.Y v. Galloway*, 134 S.Ct. 1811 (2014). Justice Kennedy, writing for the plurality, articulated the analysis is properly a "fact-sensitive inquiry". *See Town of Greece, N.Y v. Galloway*, 134 S.Ct. 1811, 1825 (2014) (Kennedy Plurality). However, Justice Thomas, joined by Justice Scalia, wrote coercion could not exist unless religious orthodoxy or financial support was forced by law or procured by threat of penalty. *See Id.* at 1837 (Thomas Concurring). Certainly, the failure of the Court to sufficiently articulate a definite test of coercion has created some confusion for lower courts. To

that end, articulating which test will definitively serve the Court in assessing coercion is admittedly desirable. However, in the instant case such an articulation is not necessary and regardless of which test the Court follows, the Township's practice does not qualify as coercion.

Justice Thomas, in his concurrence in *Galloway* articulated that the historical hallmark of coercion was compelled support under the force of law or by threat of penalty. *Id.* Thus, the relevant question, to Justice Thomas is whether there exists actual "legal coercion" not "subtle coercive pressures". *Id.* at 1838. By this standard, there can be no question that the Township's practice of legislative prayer fails to qualify as coercion. The practice at hand merely involves a tradition of legislators, for their own benefit, taking time before the legislative session to reflect. At no point were citizens of the Township required to financially contribute to religious practices, nor were attendees of the meetings under any threat of penalty should they not participate in the legislative prayer. Stated plainly, the Township's practice does not approach the levels required to qualify as coercion by Justice Thomas. Admittedly, Justice Thomas's test is the more permissive test articulated in *Galloway* vis a vis Central Perk's practice of Legislative Prayer. If the Township's practices stand any chance of being deemed coercive, it is under the standard articulated by Justice Kennedy and the plurality.

Unlike the test of Justice Thomas, the inquiry endorsed by Justice Kennedy and the plurality takes a far broader view of coercion. Specifically, the plurality articulated that the analysis is a "fact-sensitive" inquiry which "considers both the setting in which the prayer arises and the audience to whom it is directed". *See Town of Greece, N.Y v. Galloway*, 134 S.Ct. 1811, 1825 (2014) (Kennedy Plurality). The inquiry remains somewhat nebulous however as Justice Kennedy failed to illuminate exactly what renders a legislative prayer practice coercive. However, Justice Kennedy did articulate that a practice may be coercive if the practice reflects a

pattern which over time results is denigrating to other faiths; mere proselytizing; or directing the public to participate and singling out dissidents. *Id.* at 1826. Taking these guideposts from Justice Kennedy, the truth remains that the Township's practice is not coercive.

Justice Kennedy recognized in his opinion that the intended audience of the prayer is important. To that end, he acknowledged the history of legislative prayer reflects the intended audience must be the legislators themselves, and that a practice may become coercive if it amounts to directing the public to participate in prayer. *Id.* Here, the stated intended audience of the legislative prayer is the legislators themselves. The policy adopted by the Council specifically states "praying before Town Council meetings is for the primary benefit of the Town Council Members". R. at 2. Additionally, there are no facts in the record which indicate the Council directed the citizens to participate in prayer, rather the record indicates they were invited to stand for the Pledge of Allegiance. R. at 2. Such an invitation is a far cry from "directing" as envisioned by Justice Kennedy. Moreover, in *Galloway*, the court specifically rejected the argument that the preacher's invitations to stand for prayer would render the practice coercive. *See Town of Greece, N.Y v. Galloway*, 134 S.Ct. 1811, 1826 (2014) (Kennedy Plurality)

Certainly, the practice of the Township cannot be classified as directing members of the public to participate in religious activity. Nor did the practice merely form a pattern of denigration. It is inarguable that some of the language utilized by the preachers selected by members of the Town Council utilized religious language which exalted the virtues of their own chosen faith. R. at 3. Moreover, it may be true that some of those present, including the Plaintiffs, found such honorific language offensive. R. at 4. But, as the Justice Kennedy stated, "offense however, does not equate to coercion". *See Town of Greece, N.Y v. Galloway*, 134 S.Ct. 1811, 1826 (2014) (Kennedy Plurality). Nor does the use of honorific or superlative language

necessarily equate to denigration. By way of analogy, Papa Johns may proclaim (albeit laughably) "Better ingredients. Better Pizza. Papa Johns" and such a statement rightly would not be interpreted as denigrating Dominos. As with Papa John's, the clergymen and women who spoke at Town Council meetings may have exalted the benefits of their own faith, and claimed to be the sole possessors of the Truth. But just because the clergymen and women claimed better ingredients, does not mean coercion exists. Moreover, it is perhaps worth mentioning that religious institutions may claim to be the sole possessors of the whole Truth and being the true Way and still hold other religions in high esteem. By way of example, Pope Paul VI in *Nostra Aetate* stated that the Catholic church recognized that the teachings of other faiths "often reflect a ray of that Truth which enlightens all men". *See* POPE PAUL VI, NOSTRA AETATE: DECLARATION ON THE RELATION OF THE CHURCH TO NON-CHRISTIAN RELIGIONS (October 28, 1965) The use of language which proclaims the truth of one's faith, and the hope that others join in that faith thus does equate to denigration. It is perhaps worth mentioning, the only true example of denigration in the facts, came from Plaintiff Geller. R. at 4. Plaintiff Geller, who is not a member of the Town Council, proclaimed Council Member Green's worshiped a "fake god". R. at 4. Such an attack certainly amounts to denigration, and is notably distinct from the superlative language used by the clergymen and women who performed the prayers before the Town Council meetings.

The more difficult question here is whether the legislative prayer practice of the Town Council amounted to proselytizing and thus coercion. Again, here the facts fail to establish evidence of proselytizing. The appellate court recognized that there is a thin line between "strongly espousing religious beliefs and proselytizing". R. at 17. Moreover, the prayers offered by the clergy of the Church of the Latter-Day Saints and the New Life Church are admittedly

close to the line. However, despite this, the practice still does not rise to the level of coercion. It bears mentioning that the Court explicitly rejected the notion that legislative prayer must be non-sectarian in *Marsh*. *See generally Marsh v. Chambers*, 463 U.S. 783 (1983). As a result of that, legislative prayer will necessarily at times involve language which may not be acceptable to all faith traditions. Justice Alito, in his concurrence in *Galloway*, recognized that as faith traditions grow more diverse it becomes more difficult to draft prayers which are acceptable to all. *See Town of Greece, N.Y v. Galloway*, 134 S.Ct. 1830, 1826 (2014) (Alito Concurring). All of this is to say, the mere presence of the espousal of religious belief is not understood to equate proselytizing. The facts here, indicate not a pattern of proselytizing, but rather a pattern of diverse prayer. After the practice was enacted, chosen council members often chose to forego the opportunity to pray, other times there was prayer to Buddha, other times prayers were offered in the Muslim Tradition, and yet other times still prayers were offered in Christian traditions. Some of these prayers extolled the virtues and truths of the selected faith tradition and others were more modest. Ultimately, the truth is not that there was the pattern of proselytizing required by Justice Kennedy, but rather the pattern was to welcome a diversity of Faith traditions. It may be difficult to draw a line between what merely amounts to strongly espousing belief and a pattern of proselytizing; however, in the instant case the prayers offered do not rise to the occasion. As such, the legislative prayer practice is not coercive.

As articulated above, though *Galloway* and *Marsh* frame the analysis here there is a question as to how the Court should analyze whether the practice was coercive. In Galloway, the court failed to reach a majority as to the proper test. However, whether the Court applies Justice Thomas's stricter test or Justice Kennedy's more flexible analysis, the Township's practice of

legislative prayer was not coercive as it relates to the general public to the general public. Nor is the Township's policy coercive in relation to the high school students in attendance.

C. The Township's Legislative Prayer Practice is not Coercive to Children.

As articulated above, the Township's practice of legislative prayer is not coercive towards the general population. However, the final question before the Court is whether the practice was coercive in regard to the high school children present at the meetings. The courts below disagreed on this issue. The District Court found the presence of the high schoolers was impermissibly coercive under the umbrella of *Engel*. R. at 9. The Thirteenth Circuit disagreed, finding that the mere presence of the students at the meetings did require the courts to change their analysis under *Galloway*. R. at 18. The Thirteenth Circuit is correct in their analysis. The presence of the high schoolers at the Town Council meetings does not require the court to apply a different test than is applied to the general public. Moreover, even in the event the court were to apply a different test the matter at hand is not analogous to cases involving school prayer.

The lower courts agree on the fact that when children are involved, courts have a heightened sensitivity to coercion. However, the District Court looked to a series of cases, headlined by *Engel* and *Lee* which ought not be applied in the case at hand. R. at 9. In those cases the court was considering school prayer policies which took place at exclusively school related events. *See generally Engel v. Vitale*, 370 U.S. 421 (1962); *See also Lee v. Weisman*, 505 U.S. 577 (1991). Though there were events which did not take place directly at school, such as graduation or prayer before a football game, these cases still dealt with distinctly school activities. *See generally Engel v. Vitale*, 370 U.S. 421 (1962); *see also Lee v. Weisman*, 505 U.S. 577 (1991); *see also Borden v. Sch. Dist.*, 523 F. 3d 153, 159 (3rd Cir. 2008). Here, the Town

Council meeting is distinctly a non-school related event. The mere presence of school children does not transform the nature of the Town Council meeting. In this way, as the Thirteenth Circuit recognized, this case is not unlike *Galloway*. R. at 18. In *Galloway*, the town board meetings were not attended entirely by adults and despite this the court found no need to apply a school prayer analysis. *See generally Town of Greece, N.Y v. Galloway*, 134 S.Ct. 1811 (2014). Additionally, it is of note that the students in question are high school seniors. As the Thirteenth Circuit recognized citing Justice Kennedy in *Galloway*, reasonable people ought to be able to appreciate a ceremonial prayer. R. at 18.

Additionally, the fact that Council Member Green serves in a dual-role should not change the analysis here. Ms. Green may be the student's teacher but that fact and the extra credit she offers does not transform the Town Council Chamber into her classroom. The District Court suggested Ms. Green would violate the establishment clause if she were to lead her students in prayer on a trip to Washington D.C. R. at 10. A more apt analogy would be to say that Plaintiff's are demanding that because Ms. Green suggested her students go to the Capitol and observe Congress, the prayer the Congressional Chaplain leads is in violation of the establishment clause.

Ultimately, as the Thirteenth Circuit recognized, the coercion analysis here with respect to the high school students ought not be different than that with respect to the general public. R. at 18. The mere presence of the students at the council meeting does not transform the nature of the meeting itself. The students ought to be able to appreciate the ceremonial legislative prayer. The case here is no different than *Galloway* in terms of the presence of children and so the analysis ought to remain the same. *See generally Town of Greece, N.Y v. Galloway*, 134 S.Ct. 1811 (2014). That in mind, the analysis under *Galloway* as it pertains to the students is the same

as the general public and for the reasons mentioned in the above section the practice of legislative prayer is non-coercive. However, in the event the court finds this case distinguishable from *Galloway*, the practice remains non-coercive.

In the event the Court finds this case is not analogous to *Galloway* with regards to the presence of children and holds *Engel* and its progeny are relevant, the Township's prayer policy remains non-coercive. Unlike the *Engel* line of cases, here there is no risk or evidence that the high school students were subject to "subtle coercive pressure". *see also Lee v. Weisman*, 505 U.S. 577, 592 (1992). As noted above, this case is distinct in that the policy which Plaintiff claims to be coercive is an extra credit assignment in an elective course. R. at 4. The *Engel* line of cases deals with activities such as a school wide prayer and graduation ceremony held at a church. *See generally Engel v. Vitale*, 370 U.S. 421 (1962); *see also Lee v. Weisman*, 505 U.S. 577 (1991). These pressures present there, involving the entirety of the student body are distinct from the pressures here. Here, Ms. Green's students would at most receive five additional points towards a portion of their grade worth only 10% of their grade. R. at 4.

Additionally, and perhaps more notably, during the 2013-2014 academic year only 12 students took advantage of the extra credit opportunity and only two of those saw any impact to their grade. R. at 4. The "subtle coercive pressures" are apparently so subtle as to be non-existent.

The extra credit nature of the assignment ought to be highlighted as well as it distinguishes the case at hand from *Borden*. The 3rd Circuit in *Borden* found locker room prayer before a football game to be impermissibly coercive. *See Borden v. Sch. Dist.*, 523 F. 3d 153, 159 (3rd Cir. 2008). *Borden* and the case at hand are analogous only insofar as the involve extracurricular activities. *Borden* involved team-wide prayer, or rather a coach leading the entire

team in prayer. *Id.* Here, again, only a self-selecting group within another self-selecting group was exposed to the legislative prayer.

Ultimately, while courts do regard school children with more sensitivity when religious coercion is involved this case is not analogous to the *Engel* line of cases. Even if the Court were to find it appropriate to change its analytical stance from *Galloway*, it ought not find the town's legislative prayer policy coercive.

Conclusion

For the foregoing reasons, we ask that the Supreme Court of the United States affirm the decision of the Court of Appeals for the Thirteenth Circuit that under *Galloway*, Central Perk Township's practice of legislative is not an unconstitutional violation of the Establishment Clause of the First Amendment. We further ask the Court to Affirm the decision of the Court of Appeals for the Thirteenth Circuit that Central Perk Township's practice of legislative prayer is not unconstitutionally coercive to either the general public or the high school seniors.