No. 18-1308

IN THE

SUPREME COURT OF THE UNITED STATES

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 OF THE PETITIONERS

Counsel for Petitioners

Team T

Dated September 14, 2018

QUESTIONS PRESENTED

I. Does Central Perk's legislative prayer policy violate the Establishment Clause hen it exceeds the historic permissibility of legislative prayer by granting its members unrestrained power to exclude other religions from delivering the invocation and instead exclusively select clergy from a single religion?

II. Whether Central Perk Town Council's prayer policy violates the Constitution by overtly coercing its present audience to adopt a particular religion when its audience is subjected to and directed to participate in repeated dogmatic invocations and by subtly coercing high school students by subjecting them to invocations either delivered by their teacher or another member of the Council.

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The transcript of the record sets forth the unofficial and unreported opinion of the United States Court of Appeals for the Thirteenth Circuit, *Central Perk Township v. Geller*, No. 17-143 (13th Cir. Jan. 21, 2018). R. at 13-19. The transcript of the record provides the unofficial and unreported opinion of the district court granting Respondent's Motion for Summary Judgment, *Central Perk Township v. Geller*, No. 16-cv-347 (E.D.O.Y. Feb. 17, 2017). R. at 1-10.

JURISDICTION

This case arises under the Establishment Clause of the First Amendment to the United States Constitution, U.S. CONST. amend. I, and 42 U.S.C. § 1983. This Court granted certiorari on August, 1, 2018 and thus has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Central Perk Town Council Adopts Congressional Invocation

Central Perk Township, Old York, is governed by a Town Council (Council) of seven members who are elected biennially. R. at 1. The Council meets monthly to address issues of local concern. R. at 1. At the time Plaintiff Geller filed this lawsuit, the Council members were Joey Tribbiani, who was Chairman, Rachel Green, Monica Geller-Bing, Chandler Bing, Gunther Geffroy, Janice Hosenstein, and Carol Willick. *Id.* In response to the Supreme Court's decision in *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), the Council adopted a policy (the Policy) allowing Council members to begin their monthly meeting with prayer. R. at 2. Specifically, the Policy stipulated that at the beginning of each session, a Council member would be randomly selected to give a prayer for the meeting. *Id.* When a Council member's name is drawn, the member may offer the prayer, select a minister from the community to pray in his or her place, or forego the opportunity to pray. *Id.* The record does not suggest that the Council is limited in who they

may choose to give the prayer. *Id.* The only limitation that is placed on the Council members is the inability to either review or direct the selected minister's invocation. *Id.* At each meeting, whether there is a prayer and the Pledge of Allegiance, or just the Pledge, the Council member who opens the meeting requests the citizens present to stand in observance of both. *Id.*

B. Central Perk Town Council's Legislative Prayer Policy and Practice

All of the Council members names, except for that of Council member Geffroy who requested that he never be selected, were written on slips of paper and drawn by Chairman Tribbiani at each meeting. R. at 2. The person whose name was drawn was allowed to pray and lead the Pledge of Allegiance at the next meeting. *Id.* With the Policy enacted, several Council members selected clergy from the community to pray in their stead, except for Green and Willick, who chose to pray themselves. *Id.* Four religious groups were represented among the six members who participated in the prayer practice. R. at 2-3. Council members Bing and Geller-Bing attended the Church of Jesus Christ of Latter Day Saints, Chairman Tribbiani and Council member Hostenstein attended New Life Community Chapel, Council member Willick was a member of the Muslim faith, and Council member Green was a member of the Baha'i faith. *Id.*

President Minsk, the Branch President for the Church of Jesus Christ of the Latter Day Saints, was selected to pray in the stead of both Council members Bing and Geller-Bing each time either member's name was drawn. R. at 2-3. President Minsk prayed a total of nine times from October 2014 when the Policy went into effect, through July 2016 when Plaintiff Geller filed the first lawsuit. *Id.* On five occasions that President Minsk was selected to pray, he invoked the name of Christ and prayed that "all will submit to Christ's reign." R. at 3. On three other occasions, he prayed that "none in attendance would reject Jesus Christ or commit grievous sins against the Heavenly Father, so that none would be sent . . . away from the fullness of God's light." *Id.*

Additionally, whenever Council members Hosenstein and Tribbiani's names were drawn, they selected a pastor from their home church of New Life Community Chapel (New Life) to pray. R. at 3. A pastor from New Life prayed a total of four times. *Id.* The pastors prayed explicitly Christian prayers, and all ended the prayer with "in the name of our Lord and Savior, Jesus Christ." *Id.* The pastors' prayers included prayers 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." *Id.* All four prayers delivered by a New Life pastor extolled Christianity as the one true religion. *Id.* Council member Willick's name was drawn three times and all three times she prayed "peace and mercy and blessings of Allah be on you." R. at 3. Council member Green's name was drawn four times but twice she declined. R. at 3. On two of the occasions, she prayed to Buddha and acknowledged his "infinite wisdom" and asked "that the Council meeting would be conducted in harmony and peace." *Id.*

C. Central Perk High School Extra Credit Program

Council member Green is a teacher at Central Perk High School in addition to her position as a town legislator. R. at 4. She teaches courses in American history and a seminar in American Government for high school seniors. *Id.* Ms. Green encourages her students to be engaged in the political process and incites them to do so by offering extra credit opportunities. *Id.* Such opportunities have included volunteering during political campaigns and writing letters to federal or state representatives on political issues. *Id.* Once Ms. Green was elected to the Council, she was able to use her influence to allow her students to make presentations before the Council for extra school credit. *Id.* Students were not required to present, but if they did, they were awarded five extra credit points to their class participation grade, which constituted percent of the students' final grades. *Id.* In the past, this extra credit program allowed two students to materially raise their grade.

Beginning October 6, 2015, four students of Ms. Green's class participated in the extra credit program involving the Council meetings. R. at 4-5. At the first extra credit event, Petitioner's son Ben Geller was scheduled to give his presentation before the Council. R. at 4. At the Council meeting, Ms. Green's name was selected to give the invocation before the meeting commenced. R. at 4-5. Ms. Green proceeded to pray to Buddha and "acknowledge[d] his 'infinite wisdom.'" *Id.*

On November 4, 2015, and February 6, 2016, and May 8, 2016, the children of the remaining Petitioners were scheduled to give their school presentations before the Council. R. at 5. President Minsk prayed at two of the meetings, and a New Life pastor prayed at the third. *Id.*

On July 2, 2016, Geller commenced this lawsuit by filing a complaint in which he stated that Ms. Green's invocation violated the Establishment Clause as being coercive. *Id.*

SUMMARY OF THE ARGUMENT

The Central Perk Town Council's legislative prayer policy is unconstitutional because it falls outside of the parameters and purpose of legislative prayer as established through history and tradition, as the prayers. The Policy grants Council members the ability to pray in their official legislative capacity, or select a clergy from a faith of their choosing. In doing so, the Policy allows the members to both offer prayers and select clergy on behalf of the government, which in effect shows a preference toward one faith over another. The Policy further violates the Establishment Clause as interpreted by this Court in *Town of Greece v. Galloway* by setting a pattern of proselytization and denigration. The Policy is thus a direct violation of the Establishment Clause and this Court should find it to be unconstitutional.

Furthermore, the Policy is unconstitutionally coercive in violation of the Establishment Clause. The Policy allows the Council to inflict this coercion on the citizens of Central Perk in two

distinct ways: first, the Council subjects the audience as a whole to blatant coercion through the use of repetition of religious dogma, the exclusion of other religions from delivering the invocations at the beginning of the Council meetings, and the direction given to the audience present to participate in the prayers. Second, the Policy inflicts subtle coercion on the high school students in violation of the First Amendment when the members inflict undue social pressure on the students to participate in the prayers and when the student's teacher delivers the prayers within her capacity as a high school teacher responsible for the supervision of the event that she orchestrated.

STANDARD OF REVIEW

Constitutional challenges to a statute are reviewed de novo. *United States v. Carel*, 668 F.3d 1211, 1217 (10th Cir. 2011). The grant of summary judgment is also reviewed *de novo*. *E.J. Sebastian Assocs. v. Resolution Trust Corp.*, 43 F.3d 106, 108 (4th Cir. 1994). Inferences drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

ARGUMENT

I. THE CENTRAL PERK TOWN COUNCIL'S LEGISLATIVE PRAYER POLICY VIOLATES THE ESTABLISHMENT CLAUSE BY FALLING OUTSIDE THIS COURT'S RECOGNIZED HISTORICAL PARAMETERS AND PURPOSE FOR LEGISLATIVE PRAYER

It is undeniable that religion plays a role in American life, and all three branches of government have acknowledged that truth. *Bormuth v. Cty. of Jackson*, 870 F.3d 494 (2017); *see Lynch v. Donnelly*, 465 U.S. 668 (1984). Indeed, this Court has even recognized that "[w]e are a religious people whose *institutions* presuppose a Supreme Being" (*Zorach v. Clauson*, 343 U.S. 306 (1952) (emphasis in original)). The practice of legislative prayer, although being religious in nature, has long been understood to be compatible with the Establishment Clause. *Town of Greece*

v. Galloway, 134 S. Ct. 1811, 1817 (2014); *see*, *Marsh v. Chambers*, 463 U.S. 783 (1983). However, there are instances where the practice of legislative prayer exceeds the permissible historic tradition and purpose to the extent that the practice is no longer constitutional. *See Lund v. Rowan County*, 863 F.3d 268 (4th Cir. 2017), cert. denied, 138 S. Ct. 2564 (2018).

Such is the scenario in the case at bar. The Central Perk Town Council's legislative prayer policies and practices exceed the historical parameters adopted by this Court and thus violates the Establishment Clause.

A. The Policy is Unconstitutional Because it Violates the Establishment Clause of the First Amendment by Going Beyond the Parameters and Purpose of Legislative Prayer Established Though History and Tradition.

1. Legislative Prayer, While Having Roots in History and Tradition, is Limited in Purpose.

In 1983, this Court decided *Marsh v. Chambers* which interpreted the Establishment Clause in the context of legislative prayer. *Marsh*, 463 U.S. at 783. In *Marsh*, a state legislator challenged the Nebraska legislature's prayer policy which practiced opening each legislative session with a prayer delivered by a state-funded chaplain. *Id.* This Court held that that the practice was permissible under the Constitution and that the Establishment Clause must be interpreted by reference to historical and traditional practices and understanding. *Cty. of Allegheny v. ACLU*, 492 U.S. 573 (1989).

This Court held that legislative prayer has been practiced by Congress since the framing of the Constitution. "The practice lends gravity to public business, reminds lawmakers to transcend petty differences in pursuit of a higher purpose, and expresses a common aspiration to a just and peaceful society." *Galloway*, 134 S. Ct. at 1818 (citing *Lynch*, 465 U.S. at 693 (1984)). In the *Marsh* decision, the Court examined the history of the U.S. Congress and noted that the tradition of opening legislative sessions with prayers or invocations dated back to 1774. *Marsh*, 463 U.S. at

787. One of the preliminary matters of business conducted by the First Congress was to appoint and pay official chaplains for both the House and the Senate. *Id.* at 787-789. However, during the 1850's, the judiciary committees received petitions to abolish the office of chaplaincy and had to reevaluate the practice. *Galloway*, 134 S. Ct. at 1819. Ultimately, Congress determined that the office posed no threat to the Establishment Clause because lawmakers were not compelled to attend the daily prayer, and no faith was excluded by law. *Galloway*, 134 S. Ct. at 1819; (quoting S. Rep. No. 376, 32d Cong., 2d Sess., 2 (1853)). Had lawmakers been compelled to attend daily prayer, or certain faiths excluded, such a result would surely be deemed to violate the Establishment Clause. After all, the "political division along religious lines" was "one of the principal evils against which the First Amendment was intended to protect." *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

Due to its unique history and tradition, legislative prayer occupies "a field of Establishment Clause jurisprudence with its own set of boundaries and guidelines." *Simpson v. Chesterfield Cty. Bd. of Supervisors*, 404 F.3d 276 (4th Cir. 2005). *Marsh* deemed it unnecessary to define precise boundary lines of the Establishment Clause where history has shown legislative prayer to be acceptable. *Marsh*, 463 U.S. at 792. In doing so, this Court created a standard that relied on the historical nature of the practice of legislative prayer, stating that "[i]n light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society." *Id.*

Approximately thirty years later, this Court decided *Town of Greece v. Galloway*, which affirmed the *Marsh* standard and stated that the determination of the constitutionality of a policy required questioning as to whether the policy fits within the tradition long followed by Congress and the state legislatures. *Galloway*, 134 S. Ct. at 1819. Although there are no precise boundary

lines, "general principles animating the Establishment Clause remain relevant even in the context of legislative prayer." *Lund*, 863 F.3d at 275. Among these general principles, this Court recognizes that the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *See Lynch*, 465 U.S. at 673. Additionally, the government "may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'" *Lee v. Weisman*, 505 U.S. 577, 587 (1992). In *Marsh*, this Court recognized the scope of the legislative prayer exemption and explained that the purpose of legislative prayer is to "acknowledg[e] . . . beliefs widely held among the people of this country," not reflect an "official seal of approval on one religious view." *Marsh*, 463 U.S. at 792.

One of the goals of allowing legislative prayer, while recognizing the practice's historic roots, is to "unite lawmakers in their common effort." *Galloway*, 134 S. Ct. at 1823. "Prayer that is solemn and respectful in tone, that invites lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing, serves that legitimate purpose." *Id.* The tradition reflected in *Marsh* and *Galloway* was not a rule that legislative prayer must be nonsectarian in order to achieve unity, as this Court recognized that prayer that "reflects specific to only some creeds can still serve to solemnize the occasion." *Galloway*, 134 S. Ct. at 1822. However, this Court presented a qualifier: If the practice of legislative prayer over time is "exploited to proselytize or advance any one [religion], or [is used] to disparage any other . . . faith or belief" than such a practice falls outside the historical permissibility. *Marsh*, 463 U.S. at 794-95. Therefore, although this Court concluded legislative prayer is constitutional as a general matter, the *Marsh* decision recognized that the prayer opportunity may not be "exploited to proselytize or advance [a particular faith] or to disparage any other." *Id.* Although the

Establishment Clause does not require "nonsectarian or ecumenical prayer as a single, fixed standard," (*Galloway*, 134 S. Ct. at 1820), the content of the prayers is still "germane to the constitutionality of the prayer practice." *Lund*, 863 F.3d at 277.

Here, the Thirteenth Circuit Court of Appeals reversed the decision of the district court and held that this Court's legislative prayer cases did not support the district court's conclusion. *Central Perk Township v. Geller*, No. 17-143, slip op. 13, 13. (13th Cir. Jan. 21, 2018). In doing so, the Court of Appeals incorrectly held that Central Perk Town Council's legislative prayer policy was constitutional. The court erred by not recognizing the limitations under the history and tradition test as set forth in *Marsh* and *Galloway*.

2. Council Members Praying in Their Official Legislative Capacity Do So On Behalf of the Government

When a legislator is acting in his or her official capacity, he or she is acting on behalf of the government. The Fourth Circuit Court of Appeals determined that invocations delivered before a legislative body constituted as government speech because the invocations were for the benefit of the people. *Turner v. City Council*, 534 F.3d 352, 354 (4th Cir. 2008). The Fourth Circuit has adopted a four-factor test for determining when speech can be attributed to the government which considers:

> (1) the central "purpose" of the program in which the speech in question occurs; (2) the degree of "editorial control" exercised by the government or private entities over the content of the speech; (3) the identity of the "literal speaker"; and (4) whether the government or the private entity bears the "ultimate responsibility" for the content of the speech.

Turner, 534 F.3d at 354 (*see Sons of Confederate Veterans, Inc. v. Comm'r of Dep't of Motor Vehicles*, 288 F.3d 610 (2002)). After applying the factors to a case where prayer was an official part of each council meeting and the council member was praying in his official capacity for that

purpose, the court concluded that the legislative prayer was government speech. *Turner*, 534 F.3d at 354.

Here, the same conclusion can be drawn as that of the Fourth Circuit when applying the four factors to the situation in Central Perk Town Council. The first factor considers the "central purpose of the Council meeting." *Turner*, 534 F.3d at 354. The "central purpose of the Council meeting" in Central Perk Township is to "address issues of local concern." R. at 1. In so doing, the members conduct government business and thus the practice of opening a session with prayer is serving a government purpose. *Id.*

The second *Turner* factor considers the degree of "editorial control" exercised by the government over the speech. *Id.* The degree of "editorial control" in Central Perk Town Council is again similar to *Turner*. Because the Policy allows the Council members to compose and deliver their own prayers or to select *any* clergy of their choice without limitation, there is a remarkable degree of editorial control. Even though the Council members are not permitted to compose the prayers for the clergy selected, the members know with substantial certainty what the content of the prayers will be, based off of past experience or familiarity.

When analyzing the third factor, the identity of the "literal speaker" as stated in *Turner*, it is understood that when a Council member prays, he or she "is allowed to speak only by virtue of his role as a Council member." *Turner*, 534 F.3d at 354. Here, when both Council members Green and Willick prayed, they did not do so in a private capacity. They prayed as elected Council members speaking only by virtue of their roles as legislators. The reasoning in *Turner* can be extended to selected clergy. When a clergy prays, "he or she is allowed to speak only by the virtue" of a Council member being enabled by the Policy to select clergy to pray in the member's stead.

Due to the nexus between the Policy and Council member's role in selecting the clergy, the clergy is only permitted to speak by virtue of the Council member's role.

Applying the fourth factor, the Fourth Circuit stated that "given the focus of the prayers on government business at the opening of the Council's meetings," the ultimate responsibility for the content of the speech rested on the government. *Turner*, 534 F.3d at 355. Central Perk Town Council's legislative policy's preamble acknowledged that "invoking divine guidance for [the town Council's] proceedings would be helpful and beneficial to Council members." R. at 2. Thus, after application of these four factors, the evident conclusion in both the Fourth Circuit and the case at bar is that "the prayers at issue are government speech." *Turner*, 534 F.3d at 355. Therefore, the whether a Council member personally prays or selects a clergy to pray for them, the prayer is given on behalf of the government.

When prayers or invocations given on behalf of the government make explicit references to a deity one those of one faith believe, the prayers are considered to be an advancement of a particular religion and are not constitutionally acceptable prayers. The Fourth Circuit Court of Appeals addressed this issue in the case of *Wynne v. Town of Great Falls*, 376 F.3d 292 (4th Cir. 2004). The court found that,

> *Marsh* does not permit legislators to . . . engage, as part of public business and for the citizenry as a whole, in prayers that contain explicit references to a deity in whose divinity only those of one faith believe. . . . The invocations at issue here, which specifically call upon Jesus Christ, are simply not constitutionally acceptable legislative prayer like that approved in *Marsh*. Rather, they embody the precise kind of "advancement" of one particular religion that *Marsh* cautioned against.

Wynne, 376 F.3d at 301-302.

Due to the fact that the policy grants Council members the ability select a clergy member of their choice, more than 85% of the prayers delivered from October 2014 through July 2016

invoked the name of Jesus.[1] *See* R. at 2-3. According to the Fourth Circuit, such prayers are not constitutionally acceptable prayers as they embody "advancement" of one particular religion, especially as the clergy are selected to pray on behalf of the government.

3. The Policy Exceeds the Purpose of Legislative Prayer and Violates the Establishment Clause Through Council Members' Exclusive Control Over Selection of Clergy from a Single Faith.

When Central Perk Town Council's policy grants council members the option to deliver the invocation themselves or select any clergy from whatever religion that member ascribes to, the prayer is delivered on behalf of the government, and the policy in effect demonstrates a preference for a certain religion when the council member repeatedly selects clergy from one religion.

"The Establishment Clause of the First Amendment, as made applicable to the states and their political subdivisions through the Fourteenth Amendment, (*see Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947)), commands that the Government 'shall make no law respecting an establishment of religion.'" *Wynne*, 376 F.3d at 296 (quoting U.S. CONST. amend. I). "Establishment Clause questions are by their nature 'matter[s] of degree,' presupposing that some [practices are] acceptable practices and [that] others cross the line." *Lund*, 863 F.3d at 280, (quoting *Van Orden v. Perry*, 545 U.S. 667, 704 (2005)). This Court has recognized, however, that the Establishment Clause "means at the very least that government may not demonstrate a preference for one particular sect or creed." *Allegheny*, 492 U.S. at 605. While religious symbolism is important to American society, the Government's use of such symbolism is unconstitutional when it has the effect of endorsing religious beliefs. *See generally Santa Fe lndep. Sch. Dist. v. Doe*, 530 U.S. 290, 305-10 (2000); Marjorie A. Shields, Annotation, *Constitutionality of Legislative Prayer Practices*,

[1] There were fifteen prayers delivered in the seventeen months between the time the policy went into effect and the time Plaintiff Geller filed the first lawsuit. Thirteen out of the fifteen prayers invoked the name of "Jesus Christ" or "Christ." *See* R. at 2-3.

30 A.L.R. 6th 459 (2006). This Court has long made clear that the Constitution prohibits any display of "denominational preference" made by the Government. *Wynne*, 376 F.3d at 299 (quoting *Larsen v. Valente*, 456 U.S. 228, 244 (1982)). The Establishment Clause is therefore violated when the government demonstrates a preference for a particular sect. *See generally Wynne*, 376 F.3d at 292; *Allegheny*, 492 U.S. at 573.

One of the factors this Court has considered in its analysis of the constitutionality of a legislative prayer policy is the extent of the government's attempt to include and represent religions within the community. *Galloway*, 134 S. Ct. at 1824 (noting that "[t]he town made reasonable efforts to identify all of the congregations located within its borders and represented that it would welcome a prayer by any minister or layman who wished to give one"). In *Galloway*, the practice of the Town of Greece's monthly board meetings was to open the session with a prayer given by the clergy selected from the congregations in the local directory. *Galloway*, 134 S. Ct. at 1816. A town employee would call the congregations until she found a minister who was available for that month's meeting, and over time, the town compiled a list of chaplains. *Id.* Town leaders maintained that that any minister or layperson of any faith or persuasion, even an atheist, could deliver the invocation, and the town at no point excluded or denied an opportunity to a potential prayer giver. *Id.* Although most of the ministers who actually delivered prayers were Christian, the fact reflected only that the town of Greece had a predominance of Christian congregations. *Id.* at 1817. It did not reflect "an official policy or practice of discriminating against minority faiths." *Id.*

The Central Perk Town Council's policy is vastly different from other prayer practices this Court has found to be compatible with the Establishment Clause because it makes no effort whatsoever to include or represent all of the congregations within the community. In Central Perk

Township, the Council members have a central role in the prayer practice and are given exclusive control over the prayers as each member can either personally deliver the invocation or select a clergy member to pray in their stead. R. at 2. In this way, the council members are given the authority to repeatedly chose clergy from a single religion. The religions represented in the Town Council through the prayer policy is dependent solely on who is elected as a council member. At the time the lawsuit commenced, the six Council members who participated in the prayer practice represented the following religions: Mormon, evangelical Christian, Muslim, and Baha'i. R. at 3-4. Two council members attended the Church of Jesus Christ of Latter Day Saints (Mormon); two council members attended New Life Community Chapel (evangelical Christian); one council was a member of the Muslim faith; and one council member was a member of the Baha'i faith. *Id.*

Under the legislative prayer policy as adopted by the Central Perk Town Council, only members from the four aforementioned religions are granted the ability to pray or deliver an invocation. Unlike the practice in *Galloway*, where randomly-selected clergy from the community were invited to deliver a prayer or invocation, the six council members of Central Perk retain *exclusive* control over the religions represented, and in effect, over the content of the prayers. A council member who is granted unrestricted ability to repeatedly choose a clergy that ascribes to his or her own faith can know with substantial certainty that such a clergy member will pray or deliver an invocation that promotes the Council member's religious views. This fact is all the more true when the Council member selects a clergy not just from his or her own faith, but from the same house of worship that the member attends. Because the Council members possess the ability to select a clergy to pray in their stead and are able to exclusively select clergy from their own religion, the Policy allows for the government to exclude all other clergy from the community.

The case at bar is akin to *Lund v. Rowan County*, where the Fourth Circuit struck down a legislative prayer policy as unconstitutional in 2017. *Lund*, 863 F.3d at 268. In *Lund*, the prayer practice gave board members exclusive control over the prayers and the content was "at the discretion of the commissioner." *Id.* at 273. No one outside of the board was permitted to offer an invocation. *Id.* The Fourth Circuit compared the practice in *Lund* to practices deemed acceptable by this Court in *Marsh* and *Galloway*. *Id.* at 281. The Court found that the difference in *Lund* was that the board "maintain[ed] exclusive and complete control over the content of the prayers." *Id.* at 274. The court noted that "[i]n *Marsh*, the prayer-giver was paid by the state. In *Town of Greece*, the prayer-giver was invited by the state. But in Rowan County, the prayer-giver was the state itself." *Id.* (citations omitted).

The practice of Central Perk Town Council is likewise unconstitutional because the members maintain not only exclusive control of the prayers if they decide to pray, but exclusive control of the selection of clergy. When the Council members deliver prayers or invocations in their official capacity, they do so on behalf of the government. Likewise, when a Council member choses a clergy member to pray, he or she makes the selection on behalf of the government. Invocations "that have the effect of affiliating the government with any one specific faith or belief" or demonstrate "the government's allegiance to a particular sect or creed" fall outside of the category of legislative prayers justified by the "unique history" in *Marsh*. *Wynne*, 376 F.3d at 299 (quoting *Allegheny*, 492 U.S. at 603). Therefore, Central Perk Town Council's legislative policy violates the Establishment Clause.

B. The Policy Sets Forth a Pattern of Proselytization and Denigration

The Court of Appeals noted that this Court's decision in *Galloway* represented a doctrinal shift in the analytical framework for the Establishment Clause as it "repudiated the argument that

the endorsement test had any bearing on the constitutionality of legislative prayer." *Geller*, slip op. at 15. However, the original doctrinal shift in Establishment Clause jurisprudence occured when this Court decided *Marsh v. Chambers*. *Galloway* described *Marsh* as "carving out an exception" to this Court's Establishment Clause jurisprudence, because the decision sustained legislative prayer "without subjecting the practice to 'any of the formal "tests" that have traditionally structured'" the inquiry into the constitutionality of legislative prayer. *Galloway*, 134 S. Ct. at 1818 (quoting *Marsh*, 463 at 796, 813, (Brennan, J., dissenting)). This Court in *Galloway* concluded that *Marsh* "found those tests unnecessary because history supported the conclusion that legislative invocations are compatible with the Establishment Clause." *Galloway*, 134 S. Ct. at 1818. However, as previously noted, this historic tradition exception is not without its limits. Evaluating the constitutionality of a legislative prayer policy requires an "inquiry into the prayer opportunity as a whole, rather than into the contents of a single prayer." *Galloway*, 134 S. Ct. at 1824 (quoting *Marsh*, 463 U.S. at 794-795). *Galloway* further noted that "the inquiry remains a fact-sensitive one that considers both the setting in which the prayer arises and the audience to whom it is directed." *Id.* at 1825. Conducting a fact-sensitive inquiry of Central Perk Town Council's legislative prayer policy in utilizing the two-pronged test presented by *Galloway* leads to the conclusion that the Policy violates the Establishment Clause.

1. Contrary to the Policy in the Town of Greece, Central Perk Town Council Members' Authority to Pray or Select Clergy Created a Pattern of Proselytization and Denigration.

The Establishment Clause is violated "when 'the [legislative] prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.'" *Galloway*, 134 U.S. at 1824; *Marsh*, 463 U.S. at 794-95; *Joyner v. Forsyth County*, 653 F.3d 341, 350 (4th Cir. 2004); *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1233-34 (10th Cir. 1998). Since

"Establishment Clause challenges are not decided by bright-line rules, but on a case-by-case basis with the result turning on the specific facts," the facts regarding the content of the prayers delivered before the Central Perk Town Council are of utmost importance. *Pelphrey v. Cobb County*, 547 F.3d 1263, 1268-69 (11th Cir. 2008) (citing *Glassroth v. Moore*, 335 F.3d 1282, 1288 (11th Cir. 2003)).

As previously discussed, the Central Perk Town Council's legislative prayer policy calls for the random selection of one of the six members who are then granted power to choose whether to pray themselves or select a clergy to pray in their stead. R. at 2. President Minsk, the Branch President for the Church of Jesus Christ of the Latter Day Saints, was selected to pray in the stead of both Council members Bing and Geller-Bing each time either member's name was drawn. R. at 2-3. President Minsk prayed a total of nine times from October 2014 through July 2016, when the first lawsuit was filed by Plaintiff Geller. R. at 3. On five occasions that President Minsk was selected to pray, he invoked the name of Christ and prayed that "all will submit to Christ's reign." *Id.* On three other occasions, he prayed that "none in attendance would reject Jesus Christ or commit grievous sins against the Heavenly Father, so that none would be sent . . . away from the fullness of God's light." *Id.*

Additionally, whenever Council members Hosenstein and Tribbiani's names were drawn, they selected a pastor from their home church of New Life Community Chapel (New Life) to pray. R. at 3. A pastor from New Life prayed a total of four times. *Id.* The pastors prayed explicitly Christian prayers, and all ended the prayer with "in the name of our Lord and Savior, Jesus Christ." *Id.* The pastors' prayers included prayers 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." *Id.* All four prayers delivered by a New Life pastor extolled Christianity as the one true religion. *Id.*

According to the Merriam-Webster dictionary, the word "proselytize" means "to induce someone to convert to one's faith." *Proselytize*, Merriam-Webster Dictionary (2018). Both President Minsk and the pastors of New Life included language that would amount to the definition of proselytization, such as prayers for salvation, that every knee would bow, and that that none would reject Jesus Christ. Indeed, such prayers can be considered language that seeks to proselytize. Moreover, this kind of proselytizing language was used in 80% of the prayers delivered before the Central Perk Town Council, due to the ability of the members to select the prayer-giver.[2] *See* R. at 2-3.

Under a fact-specific inquiry called for in *Galloway*, this Court also considered denigration to be a part of the analysis. To denigrate means "to attack the reputation of" or "to deny the importance or validity of." *Denigrate*, Merriam-Webster Dictionary (2018). Here, President Minsk and the New Life pastors also denigrated other faiths through their prayers. While neither the pastors nor President Minsk explicitly attacked the reputation of another faith, the language of their prayers certainly denied the importance and undermined the validity of other religions by praying that "blinders [would be] removed from the eyes of all those who deny God," "that all [would] submit to Christ's reign," and by extolling Christianity as the "one true religion." R. at 3.

If such proselytization and denigration had not been present on multiple occasions, the prayer might not have been raised to an Establishment Clause violation. However, *Galloway* expressed that if there *is* an indication that the prayer opportunity has been exploited to "advance

[2] There were fifteen prayers delivered before the Town Council between the time the policy went into effect and the time Plaintiff Geller filed his original lawsuit. Twelve of those fifteen prayers contained language that sought to proselytize. *See* R. at 2-3.

any one, or to disparage any other . . . faith," then the content of the prayers is of concern to judges. *Galloway* 134 S. Ct. at 1821-22. In this case, it is evident that the prayer opportunity has been exploited to proselytize and to advance any one or to disparage any other faith.

II. CENTRAL PERK TOWN COUNCIL'S PRAYER POLICY IS OVERTLY AND SUBTLY COERCIVE TOWARD THE GENERAL PUBLIC AND THE STUDENTS PRESENT AT THE COUNCIL MEETING

Not only does the Policy exceed the historic traditions that lend support to legislative prayer, Central Perk Town Council's prayer policy is unconstitutionally coercive toward the citizens of its Township. While it is true that legislative prayer is not analyzed through the lens of coercion since adults generally are not susceptible to social pressures (*see Marsh*, 463 U.S., at 792), there are unique considerations in the case at bar that raise significant concerns that this Court warned of in *Town of Greece v. Galloway*. *Galloway*, 134 S. Ct. at 1832. Specifically, the repetition of the dogma contained in the invocations constituted both a pattern of proselytization and denigration of other faiths to an overtly coercive degree. Further, the directed audience participation constitutes overt coercion to adopt a particular religion. This overt coercion is accentuated by the subtle coercion that is inflicted on the students present at the Council meetings. Because of the unconstitutional peer pressure placed on the students when they witness their teacher pray and the social pressure placed on the students when the members of the Council pray before the meeting that the students will participate in, the Central Perk Town Council's prayer policy violates the Establishment Clause.

A. The Policy is Overtly Coercive to the General Public

The Policy that the Town Council has adopted violates the Establishment Clause of the Constitution because it reflects a pattern of proselytization, denigrates other religions, and directs the audience to participate in the prayers. As previously mentioned, the analysis of legislative

prayer policies is a fact-specific inquiry that passes judgment on a case-by-case basis. *Galloway*, 134 S. Ct. at 1825. Here, the facts presented in the Record demonstrate that the Policy adopted by the Central Perk Town Council goes beyond the scope of permissibility and has the effect of coercing the citizens of the Township by excluding clergy from religions that are not represented by members on the Council, allowing the clergy chosen to deliver dogmatic invocations, and directing the audience to participate in the invocations.

1. The Setting in which the Prayers are Delivered Present a Heightened Sense of Coercion

The Central Perk Town Council's invocations are delivered in an inherently coercive environment. This Court has held that, when analyzing the constitutionality of legislative prayer policies, both the setting and audience to whom the prayer is directed should be taken into consideration. *Galloway*, 134 S. Ct. at 1825. As discussed above, the invocations given at the Council meetings exceed the historic parameters by directing the prayers toward the audience in attendance. Not only was the prayer directed toward the audience thus overextending the permissive purpose of legislative prayer statutes, the setting in which the invocations were delivered created a heightened level of coercion toward those in attendance since the prayers were given in an intimate setting where the attendees feel compelled to participate in the prayers.

An analysis of legislative prayer policies begins with the foundational principals established in *Town of Greece v. Galloway*. In the 5–4 opinion, this Court in *Galloway* reached a majority on the ultimate outcome of the case, though the analysis regarding the standard of unconstitutional coercion divided the majority. *Galloway*, 134 S. Ct. at 1813. In instances where the majority is divided on the reasoning behind the outcome, the reasoning that led the Court to the ultimate conclusion is not necessarily a binding or controlling in future cases. *See generally Lambeth v. Bd. of Comm'rs,* 407 F.3d 266, 271 (4th Cir. 2005) ("[O]bservations by the Court,

interpreting the First Amendment and clarifying the application of its Establishment Clause jurisprudence, constitute the sort of dicta that has considerable persuasive value in the inferior courts."). Thus, the three-Justice plurality opinion written by Justice Kennedy should be construed as a doctrinal starting point for the analysis of the case at bar. *See Lund*, 863 F.3d at 276. In application to the present case, every fact must be taken into consideration as pieces of the whole despite each individual fact being insufficient to negate the Policy.

When the facts are examined in the case at bar, it is apparent that the totality of the circumstances demonstrate a pattern of overt and unconstitutional coercion of the citizens of Central Perk. To begin, the setting in which the meetings are held presents an environment of heightened susceptibility to undue coercion on those in attendance. As previously mentioned, the plurality in *Galloway* held that legislative prayer analysis is fact-centered considering both the setting in which the prayer is delivered and the audience to whom the prayer is directed. *Galloway*, 134 S. Ct. at 1825. While the plurality did not analyze the distinction between local governmental boards and larger legislative bodies, this should not foreclose an analysis in the present case. In fact, in her dissenting opinion, Justice Kagan identified the potential coercive effect that local government bodies can have on its citizens. *Id*. at 1851-52 (Kagan, J., dissenting). Specifically, Justice Kagan warned that local governments are of particular concern for coercing its citizens because the intimate setting of the local government presents a far more coercive environment for the members of the community. *Id. See also Lund*, 863 F.3d at 288. In her criticism of the majority, Justice Kagan identified the "chasm" between Congress and state legislative bodies and local government bodies. *Id.* This is due to the level of involvement that the council members still have in the community since, for many members, they maintain other avenues of employment within the community. *See id.*

While the plurality in *Galloway* refused to recognize the distinction between the levels of government, this has not discouraged the Fourth Circuit from adopting this line of reasoning. *See Lund*, 863 F.3d at 287. In *Lund v. Rowan County*, the Fourth Circuit gave special consideration to the intimacy of the five-member town council meetings when it found the prayer policy in question unconstitutionally coercive toward its citizens:

> Relative to sessions of Congress and state legislatures, the intimate setting of a municipal board meeting presents a heightened potential for coercion. Local governments possess the power to directly influence both individual and community interests. As a result, citizens attend meetings to petition for valuable rights and benefits, to advocate on behalf of cherished causes, and to keep tabs on their elected representatives—in short, to participate in democracy.

Id. Because of the tight-knit community setting and the level of involvement that each individual member had within the community beyond the board, the court held that this created an environment where those in attendance felt compelled to participate in the prayers to avoid the community's disapproval and gain favor with those sitting on the board. *Id.* at 288. These potential issues create an environment in which the audience in attendance are immersed in an inherently coercive environment.

When the above analysis is applied to the case at bar, the Central Perk Town Council meetings take place in an environment of heightened coercion. Specifically, the Council meets in an intimate setting since the Council consists of only seven members, each of whom are intimately involved with the local community. R. at 4. Ms. Green held a position on the Council and was a teacher at Central Perk High School. *Id.* Further, four of the seven members belonged to various local churches and specifically selected the pastors of their respective churches when their names were selected to give the invocation. *Id.* at 2-3. This level of involvement within the community and the intimate setting of the small Council created an environment where those in attendance would feel immense pressure to participate or risk being ostracized in the community or spurned

by the members of the Council. Therefore, this Court should adopt the distinction between local governments and larger legislative bodies and, by extension, hold that the Policy creates an environment of heightened coercion.

2. The Policy Reflects a Pattern of Proselytization and Denigration of Other Faiths by Allowing Members to Select Clergy from Only One Religion which Establishes Unconstitutional Coercion

Not only did the prayers take place in an inherently coercive setting, the prayers routinely proselytized and advanced specific faiths. A foundational principal of the Establishment Clause is that the government must not "press religious observances upon [its] citizens." *Van Orden*, 545 U.S. at 677. Thus, while a neutral prayer that does not espouse religious dogma may be acceptable for the purpose of legislative invocations, prayers that reflect a pattern of advancing a particular religion are seen as unconstitutionally coercive. *Galloway*, 134 S. Ct. at 1824. Because the Council's policy deliberately and routinely incorporates religious dogma from a narrow selection of religions and because other faiths are overtly and covertly excluded by the Council, the Policy is coercive toward its citizens in violation of the Establishment Clause.

As a general rule, the content of legislative prayer is not of concern to the Court. *Marsh*, 463 U.S. at 794. This rule is borne from the Court's disinterest in policing legislative prayers for potential "offensive" content. *Galloway*, 134 S. Ct. at 1826 ("Offense, however, does not equate to coercion"). Thus, the Court has held that adults are mature enough to handle statements that they merely find "disagreeable." *Galloway*, 134 at 1826; *see also Tilton v. Richardson*, 403 U.S. 672, 686 (1971). However, if the prayers routinely advance a particular religion to the exclusion of others, this is indicative of unconstitutional governmental coercion in violation of the Establishment Clause. *Marsh*, 463 U.S. at 794-95. This is due to the blatantly coercive nature of repeated dogma from a governmental body directed toward the members in attendance. *See Galloway*, 134 S. Ct. at 1826-27.

The case at bar differs significantly from the policy adopted in *Galloway* since the ministers selected to give the invocation were specifically chosen by individual members of the Council. As mentioned previously, the unchecked prayers that were delivered at Council meetings were not merely given for the benefit of the members themselves; instead, the invocations were directed toward the audience in attendance. When ministers from the community have been selected to give prayers, the invocations that were given have always contained some form of religious dogma.

Whenever David Minsk, the minister from the Church of Jesus Christ of Latter Day Saints, was selected to deliver the invocation, he would invoke the name of Jesus Christ and ask that "none in attendance would reject Jesus Christ . . . so that none would be sent to the Telestial Kingdom . . . ." R. at 2-3. When Council members Hosenstein and Tribbiani were selected to give the invocation before the Council meetings, they would always select pastors from New Life Community Chapel. *Id.* at 3. Every time this happened, the pastor would also invoke the name of Jesus Christ and insinuate that all other religions were false. *Id.* (Pastors would pray that those who did not know Jesus would have the "blinders . . . removed from [their] eyes" and that "every Central Perk citizen's knee [would] bend before King Jesus.") These prayers not only repeat dogma from particular religions on a regular basis, they also denigrate other religions by claiming that their own religion is the only true one. Such prayers are granted more latitude due to the fact that these are delivered by ministers from the community. *See Galloway*, 134 S. Ct. at 1832; *Lund*, 863 F.3d at 287. However, a pattern of proselytization is enough to overcome the latitude granted to the ministers in the community. *Galloway*, 134 S.Ct. at 1832. Thus, in *Galloway*, it was reasonable to not limit the ministers to the content of their prayers since the next invocation would be randomly-selected from the community. *See id.* at 1816.

In the present case, however, the combination of the dogmatic prayers and the lack of an opportunity for other faiths to be represented goes far beyond the latitude that is afforded to other ministers. The Policy in the present case goes beyond mere "offense" or speech that one may find "disagreeable." *Galloway*, 134 S. Ct. at 1826. Instead, the Policy presents the very scenario this Court warned of in *Galloway* when it made sure to clarify that legislative invocations could be taken advantage of to push one specific religion. *Id.* at 1823. In deciding *Galloway*, this Court made it clear that the constitutionality of a legislative prayer policy involves "a fact-sensitive [inquiry] that considers both the setting in which the prayer arises and the audience to whom it is directed." *Id.* at 1825.

Though the present case features more than a single faith, the only religions that would ever be represented by the Board would naturally be limited to the religions of the individual members of the Council. The members of the Council never selected a minister from a religion that they themselves did not ascribe to. *See* R. at 2-3. This is because the natural inclination of individuals is to gravitate toward dogma they personally ascribe to. Thus, if a religion were to be represented, it must first, as a practical matter, have a member of that religion on the Council. This differs significantly from the policies in *Marsh* and *Galloway* since the ministers selected were neither random or limited in the content of their invocations. *Id.* at 2. Thus, this environment of exclusivity directly proselytizes specific religions and denigrates other faiths through the verbiage of the invocations and the implicit refusal to allow other religions to be represented in its practice.

3. The Policy is Blatantly Coercive when the Council Members Direct the Audience to Participate in the Prayers

Not only do the prayers push a religious agenda on the audience present at the Council meetings, the audience is also directed to participate in the prayers. As a foundational rule, "[i]t is an elemental First Amendment principle that government may not coerce its citizens 'to support

or participate in any religion or its exercise.'" *Galloway*, 134 S. Ct. at 1825. (quoting *Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring in judgment in part and dissenting in part)). This Court has even held that, had the Council in *Galloway* "directed the public to participate in the prayers" by asking them to join in their standing for the prayers, the result would have been different. *Galloway*, 134 S. Ct. at 1826. While it is true that the audience in *Galloway* was "occasionally" asked to stand or bow their heads, the request was always made by the visiting ministers from the community and not the individual board members *Id.* Had the Council in *Galloway* directed the public to participate in the prayers with the same regularity as the Council in the case at bar, it would directly negate the very purpose of the prayer, which is the solemnization for the benefit of the members of the Council.

Here, the prayers that signal the beginning of the Council meetings are directly aimed toward the audience by directing the audience to join the legislators in prayer. Unlike the board in *Galloway*, the Council member that has been selected to begin the meeting directs the attendees to stand in participation of the prayers at the start of every meeting. R. at 2. This is highly indicative of overt coercion due to the fact that the Council member is acting within his or her legislative capacity when he or she directs audience participation. *Turner*, 534 F.3d at 354. Therefore, because the Council places unconstitutional coercion on members of the audience by directing them to participate in prayers that reflect a pattern of proselytization and denigration of other faiths, this Court should find the Central Perk Town Council's prayer policy is an unconstitutional violation of the Establishment Clause.

B. The Policy is Subtly Coercive to the Students in Attendance

Not only is the Central Perk Town Council's prayer policy overtly coercive toward the citizens of the Township, the Policy is also unconstitutionally coercive toward the students in

attendance for academic credit. Even if this Court holds that the coercive effect of the invocations does not give rise to a finding of overt coercion toward the general public, this Court should still find that the Policy amounts to subtle coercion on the students present at the meeting for school credit. In the same way that local government should be afforded special consideration in this fact-centered analysis of coercion, the fact that students from the local high school were participating in the meetings is also a relevant concern. This Court has consistently held that there are heightened concerns for protection from coercion when primary and secondary students are involved. *Weisman*, 505 U.S. 592. Thus, the subtle coercive effect that the invocations delivered by Ms. Green and other members of the Council have on the students is unconstitutional in violation of the Establishment Clause.

1. The Prayer Practice Unconstitutionally Coerced the Present Students Because the Students were Subjected to Subtle Coercion When the Prayers were Given at an Event Where They Received Academic Credit

When Ms. Green gave the meeting's invocation on October 6, 2015, the Council subjected Ben Geller to unconstitutional coercion since the he was attending the Council meetings in their capacity as students attending a school event. Respondents argue that the mere fact that children attended the Council meetings was insufficient to find the Policy unconstitutional since it is reasonably foreseeable that children may attend local government meetings. However, it is on this point that the lower court erred in its analysis. In its decision, the Thirteenth Circuit Court of Appeals found that the Policy should not be overturned based on the presence of children when the prayers were given. *Geller*, slip op. at 18. For support, the court identified the district court's analysis of *Galloway* when it held that the mere presence of children was insufficient to support a finding of coercion. *Galloway v. Town of Greece*, 732 F. Supp. 2d 195, 209 (W.D.N.Y. 2010). However, the Petitioners are not challenging the Policy simply on the grounds that the children

present will hear inherently religious prayers. Instead, the Petitioners contend that the Policy placed subtle coercion on the students present because the students attended the meeting strictly for academic purposes.

Unlike the children present at the legislative meetings in *Galloway*, the students that attended the meetings in the case at bar did so for the purpose of participating in the proceedings and gaining academic credit. R. at 4-5. Their purpose for attending the Council meeting went beyond mere attendance to observe the proceedings; their teacher, Ms. Green, sought and attained permission from the Council for her students to receive academic credit for their attendance and participation in the meetings. *Id.* at 4. This distinction marks a shift in the necessary analysis of the Council's prayer.

Furthermore, the lower court's assertion that the students present were "nearly" adults has no bearing on the inquiry. However, the fact remains that the students were still minors at the time of the presentations. If this Court were to adopt this reasoning, the Court would be forced to attempt to draw the line in every situation with each individual student and determine if each student has the mental capacity to be able to withstand the subtle coercion of prayers at school events. This type of reasoning goes beyond a reasonable factual inquiry and should be rejected by this Court.

Because the purpose behind the students' presence at the Council meetings was entirely scholastic in nature, this Court must consider the Policy in light of *Lee v. Weisman*, 505 U.S. at 577 and *Santa Fe Independent School District v. Doe*, 530 U.S. at 290.**Error! Bookmark not defined.** To begin, this Court has consistently held that the practice of praying is an inherently religious activity. *See Engel*, 370 U.S. at 425. Such activities can instill subtle coercion on the listener, especially when the audience is susceptible to peer pressure. *See id.* For this reason, this Court has consistently held that even nonsectarian prayers are impermissible during school events.

In *Weisman*, the Court held that a prayer delivered at a graduation ceremony was unconstitutionally coercive. *Weisman*, 505 U.S. at 599. This was because, despite the fact that attendance at the graduation ceremony was not required, the students felt subtle coercion to either participate in the prayer or maintain respectful silence due to the pressures based on the school's supervision and control over the ceremony as well as the public and peer pressure of those around the students. *Id.* at 593.

In a similar way, this Court also held in *Santa Fe* that the same reasoning in *Weisman* extends to extracurricular activities as well as mandatory school events. *Santa Fe*, 530 U.S. at 311. While some may argue that these extracurricular events are too far removed from official school events, this approach would adopt "extreme formalism." *Id.* Instead, this Court has recognized the integral role that extracurricular events such as sports events can play on a student's educational experience. *Id.* However, massive social pressure from the student's peers and teachers comes with those events. *Id.* at 311-12. Because of the social pressure that extracurricular school events place on students, prayers at such events would be unconstitutionally coercive. *Id.*

In the case at bar, the facts indicate that the Central Perk Town Council's prayer prior to the commencement of the meeting presents a far more coercive environment where the students are susceptible to the social pressures of the Council and their teacher. To begin, the students were present at the Council meeting for a school activity that falls within the Court's scrutiny. While this Court in *Santa Fe* held that a sporting event could classify as a school event for the purpose of the analysis, no academic credit is generally involved in such events. Here, the students were offered school credit for their attendance and participation in the Council meetings. R. at 4-5. This extra credit has the potential to materially affect the student's final grade in the class and thereby affect his or her overall grade point average. *Id.* at 4. In fact, two students in the past were able to

raise their grade in the class simply through their participation in the Council meetings. *Id.* By granting this credit, the school is implicitly supporting and sponsoring the event.

Not only were the students present at the Council meetings as part of a school-sponsored event, the prayers prior to the meeting instilled subtle coercion over the students because they were giving presentations. In *Lund*, the Fourth Circuit noted that the proximity between the prayer given by the local board and community petitions is a factor to be considered in its analysis. *Lund*, 863 F.3d at 288. However, the plurality in *Galloway* did not consider the prayers in light of the proximity between the invocation and the community petitions since the prayers always preceded the legislative function of the board rather than the adjudicative function. 134 S. Ct. at 1829 (Alito, J., concurring). The distinction between a local council's legislative and adjudicatory business was further expounded on in *Lund* where the court between the functions where the council members deliberate among themselves (legislative business) and when members of the community petition the council (adjudicatory business). *Lund*, 863 F.3d at 288. Thus, because the invocation was given immediately before the community petitions, the court in *Lund* found that there existed a heightened level of coercion instilled on those presenting before the board. *Id.*

In the case at bar, the Council instilled subtle coercion on the students giving presentations. While the record is silent as to the proximity in time between the time that the prayer was given and the time the students gave their presentations, the prayer beforehand undoubtedly set the tone for the students ready to present. This was particularly highlighted on May 8, 2016 when Frank Kudrow Jr. was scheduled to petition the Council to include the local chapter of the GLBTQ Legal Advocates and Defenders in the community parade. R. at 5. Prior to his petition, a pastor from New Life Community Chapel gave an invocation that contained explicit Christian dogma and ended with the phrase "in the name of our Lord and Savior, Jesus Christ." *Id.* at 3, 5. This subtle

coercion undoubtedly had a negative impact on Frank Kudrow Jr. since Christians traditionally believe that homosexuality is a sin. This and prayers like it inflict unconstitutional coercion on the students about to give a presentation to the Council in their capacity as both a student and a petitioner, especially when the petitioner is contrary to the dogma or the beliefs espoused by the invocation given by the Council. Therefore, the Council's Policy should be deemed unconstitutional.

2. The Prayer Practice Subjected the Students to Unconstitutional Coercion when Ms. Green Prayed for the Meeting in her Capacity as a Teacher

Even if this Court holds that the Policy is not subtly coercive when any member of the Council delivered the invocation, the Policy would still be unconstitutionally coercive since Ms. Green, while acting in her capacity as a teacher, gave an invocation while Ben Geller attended the meeting strictly for scholastic purposes. It is a well-established principal that "[t]eachers and other public school employees have no right to make the promotion of religion a part of their job description and by doing so precipitate a possible violation of the First Amendment's establishment clause . . . ." *Grossman v. S. Shore Pub. Sch. Dist.*, 507 F.3d 1097, 1099 (7th Cir. 2007) (citing *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993)). This is due to the unique role that teachers play on their students; teachers are "one of those especially respected persons chosen to teach in the high school's classroom." *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 522 (9th Cir. 1994). Thus, there is a substantial risk that the students, including high school students, will equate the teacher's views with those of the school, thereby placing undue social pressure on the students to adopt that religion. *See id.*; *Weisman*, 505 U.S. at 593-98.

In the present case, Ms. Green was acting within her capacity as a high school teacher when she prayed for the meeting. Because Ms. Green orchestrated the event that brought the students to the Council meeting in the first instance, it was also her duty to oversee it. However, in her

supervision of the students and upon the commencement of the meeting, she elected to deliver an inherently religious prayer when she prayed to Buddha and his "infinite wisdom." R. at 4-5. Ms. Green was not compelled to give an invocation on that meeting. In fact, in the past she has elected to forego the opportunity to deliver a prayer prior to the meeting. *Id.* at 3. Instead, she chose to deliver the invocation despite the knowledge that she had a student that was essentially a captive audience to the Council and her prayer. *See id.* Because of this, Ms. Green went beyond the permissible bounds she had as a teacher for the students that she brought to the meeting for scholastic purposes. Therefore, because the Policy allowed Ms. Green to subject her students to unconstitutional coercion during the Council meeting, this Court should find for the Petitioners.

CONCLUSION

Respondent respectfully requests that this Court affirm the district court's grant of summary judgment.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER