No. 18-1308

In the Supreme Court of the United States

ROSS GELLER, DR. RICHARD BURKE, LISA KUDROW, AND PHOEBE BUFFAY,

v.

CENTRAL PERK TOWNSHIP

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

TEAM B
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September 14, 2018

QUESTIONS PRESENTED

I. Under First Amendment jurisprudence, do the Central Perk Town Council's prayer policy and practices violate the Establishment Clause when the purpose of the practice is to solemnize the proceedings for the benefit of Town Council members and similar prayer practices have been upheld as constitutional throughout our Nation's history?

II. Are the invocations delivered at the Central Perk Town Council meetings unconstitutionally coercive when the prayers did not proselytize or denigrate other faiths and attendees were not forced to participate in the practice?

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OPINIONS BELOW

The decisions of the District Court for the Eastern District of Old York and the Court of Appeals for the Thirteenth Circuit have not been reported in an official or unofficial reporter at the time of filing this Brief.

JURISDICTION

The decision of the Court of Appeals for the Thirteenth Circuit was entered on January 21, 2018. The petition for Writ of Certiorari was granted on August 1, 2018. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

In September 2014, the Central Perk Town Council adopted a policy that provides for the offering of a prayer or invocation at the outset of each meeting. R. at 2. The preamble to the policy makes clear that "praying before meetings is for the primary benefit of the Town Council Members." R. at 2. Under the policy, one Town Council member is randomly selected prior to

each monthly meeting. R. at 1, 2. The Council member selected may choose one of three options: deliver an invocation, select a clergy member from the community to do so, or omit the invocation completely. R. at 2. Council members who choose to offer an invocation are free to deliver a message of any nature. R. at 2. Alternatively, if a Council member asks a religious leader to deliver the invocation, the policy expressly bars any of the Council members from controlling or directing the content of the invocation. R. at 2.

The Central Perk Town Council is composed of seven elected officials: Chairman Joey Tribbiani and Council members Gunther Geffroy, Chandler Bing, Monica Geller-Bing, Rachel Green, Janice Hosenstein, and Carol Willick. R. at 1. Council member Geffroy asked to be removed from the random selection process, and his wish was granted. R. at 2. Since the policy's enactment, each of the remaining Council members has been selected to deliver an invocation. R. at 2–3. When Council members Tribbiani and Hosenstein were selected, they chose to have the evangelical pastor from their parish, New Life Community Chapel, deliver the invocation. R. at 3. Council members Bing and Geller-Bing were randomly selected for a total of nine council meetings; both arranged for a Branch President from the Church of Jesus Christ of Latter Day Saints to offer an opening prayer in each of those instances. R. at 2–3. Council member Green was selected four times. R. at 3. Twice, she gave the invocation herself, offering a prayer to Buddha, and twice she declined to offer a prayer. R. at 3. Finally, in the three instances that Council member Willick was selected, she opened the meeting with an Islamic prayer. R. at 3.

The prayers varied in their religious affiliation and content. R. at 3, 5. The New Life pastors selected by Council members Tribbiani and Hosenstein offered Christian prayers, which sought salvation for non-believers. R. at 3. Some of these prayers asked that "blinders . . . be removed from the eyes of those who deny God," and for "every Central Perk citizen's knee to bend before

King Jesus." R. at 3. The Mormon Branch President, selected by Council members Bing and Geller-Bing, offered prayers in the name of Jesus Christ and gave praise to God's "power and mercy." R. at 3. On several occasions, the Branch President offered prayers that invoked Mormon theological principles, calling for the creation of a "New Jerusalem," so that "all will submit to Christ's reign." R. at 3. Council member Willick, in accordance with her Muslim faith, offered a prayer which translates to "Peace and mercy and blessings of Allah be upon you." R. at 3. Council member Green, who practices the Baha'i faith, prayed to Buddha that the meeting would be "conducted in peace and harmony." R. at 3.

Since her election to the Central Perk Town Council in November 2014, Council member Green has also continued to teach American History and Government classes at Central Perk High School. R. at 4. Council member Green offers a variety of extra credit opportunities to her American Government students in an effort to foster "civic engagement in the community's youth." R. at 4. One such opportunity allows Council member Green's pupils to attend Town Council meetings and give a presentation on current issues. R. at 4. Participation was "not required," but Council member Green allotted a maximum of five extra credit points toward class participation for completing the extra credit assignment. R. at 4. Class participation counted for ten percent of students' final grade. R. at 4. For the 2013–2014 academic year, twelve students were awarded extra credit points for taking part in the assignment. R. at 4. Two of those students garnered a marginal increase in their grade outcome, while the other ten students saw no change to their final grade. R. at 4.

The parents of four students who participated in Council member Green's extra credit assignment in the 2015–2016 year filed a civil rights action under 42 U.S.C. § 1983, seeking to enjoin the Town Council's prayer practice. R. at 1, 4, 5. The complaint alleges that Council

member Green's prayer, for which one of her students was present, "publicly endorsed" the Baha'i religion and placed coercive pressure on her student "to pray . . . against his conscience." R. at 5. Additionally, the Plaintiffs claim that because Council members had the ability to deliver invocations or to select clergy members to deliver the invocations, the Council members exerted "exclusive control" over the prayers, which amounted to an "official sanction" of their personal religious beliefs. R. at 5–6.

The district court decided in favor of the Plaintiffs, finding that the Town Council's practice was both "outside the historical tradition of permissible legislative prayer" and unconstitutionally coercive. R. at 8. The district court held that because Town Council members controlled the content of the prayers, the practice was outside the boundaries of what this Court has historically permitted. R. at 6–8. Because some of the prayers offered were found to be "proselytizing and denigrating" of other faiths, the prayer practice was also held to be coercive. R. at 8.

On appeal, the United States Court of Appeals for the Thirteenth Circuit reversed on both issues, finding that legislative prayers need not be sectarian to be constitutional and that the Central Perk Town Council's practice was analogous to the acceptable prayer practices in *Town of Greece v. Galloway* and *Marsh v. Chambers*. R. at 15. By focusing on the sectarian nature of the prayer practice, the district court misinterpreted the law and engaged in faulty analysis. R. at 15. The appellate court found that the Central Perk Town Council's prayer practice fit within the history and context of legislative prayer in this country and was, therefore, constitutional. R. at 16.

The appellate court also found that the Town Council's practice was not unconstitutionally coercive. R. at 17. Although some invocations might have appeared to proselytize, the policy allowed "all Council members to offer an invocation." R. at 17. The record did not show that any faith was unwelcomed; instead, the practice was consistently "ecumenical and inclusive." R. at 17.

The appellate court found that the Central Perk Town Council's practice did not show a "pattern of proselytizing." R. at 17. Therefore, the practice was not coercive. R. at 17.

SUMMARY OF THE ARGUMENT

The practice of opening legislative sessions with a brief prayer or invocation is as old as our Nation. Prayers were offered before both the Continental Congress in 1774 and the first Congress in 1789—and such prayers have continued without interruption for the last 200 years. This Court repeatedly acknowledges such historical patterns when deciding Establishment Clause cases. In spite of all of the societal changes that have occurred since the drafting of our Constitution, the drafters' intent remains at the very heart of this Court's analysis.

Legislative prayer is often sectarian—although some public bodies require all invocations to be nonreligious, the majority of legislative prayer policies permit sectarian prayers. So long as the practice is not motivated entirely by religious considerations, the practice is constitutional. Stated differently, the identification of a valid secular purpose (such as lending gravity to the occasion) is sufficient for a prayer practice to withstand First Amendment scrutiny.

The first major legislative prayer case was *Marsh v. Chambers*. In that case, this Court upheld the Nebraska Legislature's prayer practice, which involved prayers by the same minister for sixteen years. Relying on the unique history of congressional chaplaincies, this Court found no Establishment Clause violation. More recently, in *Town of Greece v. Galloway*, this Court again upheld a legislative prayer policy. Although the policy in *Galloway* resulted in almost exclusively Christian prayers, this Court focused on the nondiscriminatory nature of the policy and found it to be constitutional.

The prayer practice at issue involves invocations by both Central Perk Town Council members and clergy members. Regardless of who delivered the invocations, the Town Council policy is

constitutional because members were randomly selected to deliver an invocation without regard to their religious affiliation, the Town Council did not influence the content of the invocations, and nobody was forced to give, or excluded from giving, an invocation. While some of the language used in Town Council invocations was highly religious in nature, the appellate court correctly found that these infrequent references did not amount to a pattern of proselytization. Viewed in its entirety, the Central Perk Town Council's prayer policy is constitutional because it did not denigrate, proselytize, or betray an impermissible government purpose.

Furthermore, the rotating nature of the Council's selection process demonstrates that neither members nor attendees were coerced to participate or to align themselves with any particular religion. Council members who were selected to be in charge of the following month's invocation could give any invocation they wished or opt out of the invocation entirely. Similarly, citizens in attendance were given the option of participating in the opening prayer, and no facts suggest that any attendee was ostracized for not participating in the prayer. Although certain invocations named specific deities, the messages delivered were theologically varied. The Central Perk Town Council's practice aligns with the historical precedent of this country and did not coerce any citizens to practice an established state religion.

The Town Council's practice was also not coercive of the high school students who attended meetings. While the bar for finding a prayer practice coercive is lower in the school setting than it is in the legislative setting, the presence of students at meetings of public bodies has never changed this Court's analysis of legislative prayer. Even when students were required to attend town council meetings in order to fulfill a state mandated requirement, this Court did not find that there should be a lower bar for coercion. Instead of applying school prayer precedent, this Court applied the legal standard that is appropriate to legislative prayer practices and found the prayer practice to be

constitutional. Because the practice in question occurred in a legislative session, this Court's legislative prayer jurisprudence controls.

Applying the correct legal standard, the Town Council's practice is not coercive because alternative extra credit opportunities were available and the incentive offered for participation was statistically unlikely to affect students' grades. Finally, as the appellate court correctly found, Council member Green's status as a teacher is not central to the coercion analysis. The extra credit program served the valid purpose of encouraging students to engage with their community, and Council member Green's role as an elected official had neither the purpose nor effect of coercing students to practice an established state religion. Therefore, this Court should find that the Town Council's practice was constitutional.

ARGUMENT

I. The Central Perk Town Council's prayer policy and practices are constitutional, because regardless of who delivers the invocation, there is sufficient religious variety to demonstrate that the Town Council has neither proselytized nor denigrated any particular religion.

A. This Court has repeatedly found the practice of opening legislative sessions with prayer to be constitutional.

1. The drafters of the First Amendment approved of such legislative prayer, and their intent is relevant in spite of societal changes.

Legislative prayer existed before the Bill of Rights and has existed without break for over two centuries since its adoption. The religion clauses of the First Amendment "were not intended as an instrument of secularization, or as a weapon for the non- or anti-religious to use to suppress the effusions of the religious." Michael W. McConnell, *Religious Liberty in the Supreme Court* 499 (1993). Early American citizens, most of whom belonged to what were then minority religions, sought protections that would ensure the continuation of their religious practices and the autonomy

of their religious institutions. *Id.* During a period of American history when fears of majoritarianism abounded, the Establishment Clause came about to ensure religious liberty and to prohibit the conferral of impermissible benefits upon any religion. Daniel O. Conkle, *Constitutional Law: The Religion Clauses* 114 (2d ed. 2009). Determining whether the Establishment Clause has evolved into an instrument which prohibits sectarian prayers at sessions of public bodies, such as those delivered before the Central Perk Town Council's monthly meetings, requires courts to consider the drafters' original intent. *Marsh v. Chambers*, 463 U.S. 791, 790–94 (1983).

Courts time and again return to the history surrounding the drafting and adoption of the First Amendment in an effort to extrapolate the drafters' original intent. The text of the Establishment Clause, "passed by the first Congress assembled under the Constitution, . . . is contemporaneous and weighty evidence of its true meaning." *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888). Although historical patterns alone cannot explain our modern constitutional guarantees, the "unbroken practice" of legislative prayer "is not something to be lightly cast aside." *Walz v. Tax Comm'n*, 397 U.S. 664, 678 (1970). The Supreme Court's most recent legislative prayer case demonstrates that such historical considerations not only matter but are the very centerpiece of this Court's analysis. *Town of Greece v. Galloway*, 134 S.Ct. 1811 (2014). Thus, although Establishment Clause cases are not purely historical inquiries, when considering the constitutionality of a prayer policy, "any test must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change." *Id.* at 1819.

2. Legislative prayer, even when sectarian in nature, presents a low risk of establishment and can have a valid secular purpose.

Legislative or governmental action may be invalidated for violating the Establishment Clause only when the activity is "motivated wholly by religious considerations." *Lynch v. Donnelly*, 465

U.S. 668, 680 (1984). This Court continually upholds even overtly religious activities so long as a valid secular purpose can be identified. *See, e.g.*, *Van Orden v. Perry*, 545 U.S. 677 (2005) (displaying monument inscribed with Ten Commandments on the Texas State Capitol grounds did not violate the Establishment Clause); *Lynch*, 465 U.S. at 694 (displaying nativity scene in city's holiday exhibition did not violate the Establishment Clause); *Tilton v. Richardson*, 403 U.S. 672 (1971) (construction grants to church-sponsored colleges and universities did not violate the religion clauses); *Bd. of Educ. v. Allen*, 392 U.S. 236 (1968) (loan of textbooks to private religious schools did not violate the First Amendment); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (government reimbursement for the transportation of children to parochial schools did not violate the First Amendment). Therefore, legislative prayer is constitutional so long as it serves a valid secular purpose, such as lending gravity to the occasion or reflecting values that have become a part of the "fabric of our society." *Galloway*, 134 S.Ct. at 1823; *Marsh*, 463 U.S. at 792.

Contrary to Petitioners' argument, legislative prayers need not be non-theistic. *Galloway*, 134 S.Ct. at 1821 (stating that the constitutionality of legislative prayer does not hinge on the neutrality of its content). Prayers in theistic religions are likely to include doctrinal statements that require the naming of a particular deity in prayers, such as invoking the name of Jesus Christ. Kenneth Kluwoski, *In Whose Name We Pray: Fixing the Establishment Clause Train Wreck Involving Legislative Prayer*, 6 Geo. J. L. & Pub. Pol'y 219, 255 (2008). Creating a rule that permits only nonsectarian or non-theistic legislative prayers would effectively exclude adherents of theistic religions from delivering invocations—a direct violation of the Establishment Clause. *Id.* Thus, as this Court held in *Marsh*, legislative prayers may include sectarian and theistic references without violating the Establishment Clause. *Id.*

B. Either council members or clergy members may compose and deliver invocations without violating the Establishment Clause.

1. *Marsh* and its progeny approve of legislative prayers led by a member of the clergy.

Clergy-led legislative prayer is presumptively constitutional. *Marsh v. Chambers*, 463 U.S. 783 (1983). For sixteen years, the Nebraska Legislature opened each legislative day with a prayer by the same Presbyterian minister. *Id.* at 784–85. Ernest Chambers, a member of the Nebraska Legislature and a taxpayer of Nebraska, brought suit under 42 U.S.C. § 1983, seeking to enjoin enforcement of this practice on the basis that it violated the Establishment Clause. *Id.* at 785. The district court held that the prayers were constitutional and allowed the practice to continue. *Id.* The Court of Appeals for the Eighth Circuit, addressing the chaplaincy practice in its entirety, found that the purpose and primary effect of selecting the same minister for sixteen years and using public funds to compensate him resulted in impermissible government entanglement with religion. *Id.* at 785–86. The appellate court prohibited Nebraska from engaging in any aspect of its chaplaincy practice. *Id.* at 786.

Certiorari was granted in *Marsh* to determine whether opening state legislative sessions with a prayer by a state-employed clergyman was constitutional. *Id.* Relying on the "unique history" of congressional chaplaincies, this Court upheld the practice of the Nebraska Legislature. *Id.* at 790. Chief Justice Burger, writing for a 6-3 majority, explained that the Framers of the First Amendment would not have created legislative chaplaincies if the practice violated the amendment they had just written. *Id.* at 790–91. While conceding that historical patterns by themselves are not dispositive of constitutionality, this Court held that opening legislative sessions with a prayer by a clergy member does not violate the Establishment Clause but instead is "simply a tolerable acknowledgement of beliefs widely held among the people of this country." *Id.* at 783.

Years later, in *Simpson v. Chesterfield Cty. Bd. of Supervisors*, the Fourth Circuit extended *Marsh* to a rotating chaplaincy. 404 F.3d 276 (4th Cir. 2005). The prayer policy of the Chesterfield County Board of Supervisors, quoting *Marsh*, required that each invocation "not be used to proselytize or advance any one faith or belief or to disparage any other faith or belief." *Id.* at 278. The vast majority of invocations delivered before the board were Christian, although Islamic and Jewish clergy had also delivered invocations. *Id.* at 279. A Wiccan asked to be added to the list of religious leaders available to give an invocation and was refused. *Id.* at 279–80. In upholding the County's practice as constitutional, the Fourth Circuit focused on the fact that the County, despite its refusal to permit Wiccan invocations, had already "adopted an indisputably broad and inclusive legislative invocation practice." *Id.* at 286 n.4.

2. As the appellate court correctly found, invocations delivered by council members are not qualitatively different than clergy-led prayers.

The Central Perk Town Council's policy provided no guidelines with respect to the content of the prayers, leaving Council members free to compose their own invocation. R. at 2. The appellate court found the high level of control given to Council members over the content of their invocations "irrelevant" and noted that council member-led invocations are "not qualitatively different than paying the same Presbyterian chaplain to give invocations over the course of sixteen years, as in *Marsh*." R. at 16. The appellate court further explained that, because invocations delivered before a council meeting are for the benefit of the council members, they constitute government speech and are "subject only to the limitations set forth in *Galloway*." R. at 16. *Galloway* laid out the following limits on legislative prayer: speakers must be given access without regard to religion, those in attendance may not be coerced to participate, and the invocations may not "over time denigrate, proselytize or betray an impermissible government purpose." *Galloway*,

134 S.Ct. at 1824, 1827; R. at 16. As outlined below, the Central Perk Town Council's prayer policy and practices comply with each of *Galloway*'s requirements.

The Town Council policy of drawing names from an envelope resulted in a random selection of speakers without regard to religious affiliation. R. at 2. The Central Perk Town Council welcomed prayers of four different religions—Christianity, Mormonism, Islam, and Baha'i—and therefore it was inclusive of, not disparaging of, religious minorities. R. at 2–3.

There is no indication that the Town Council's decisions were influenced by anyone's acquiescence or refusal to participate in in the prayer opportunity. The Council members who opened each meeting requested, but did not require, those in attendance to stand for the invocations; no dissidents were ever singled out for refusing to stand. R. at. 2–6. As the district court noted, "[j]ust as no one apparently was directed to recite the Pledge, no one was directed to bow his or her head, or close his or her eyes." R. at 8. As in *Galloway*, where ministers regularly requested audience members to rise or bow their heads, the Central Perk practice of asking attendees to stand does not rise to the level of impermissible coercion because there is no evidence that citizens were treated differently depending on whether or not they joined in the invocation. *Galloway*, 134 S.Ct. at 1826; R. at 2. The invocations delivered by Council members at the Central Perk Town Council meetings complied with the limitations set forth by this Court in *Galloway* and therefore should withstand Establishment Clause scrutiny.

C. Prayer practices are constitutional so long as they have a valid secular purpose and neither proselytize nor denigrate other faiths.

1. The Central Perk Town Council's prayer practice serves the valid secular purpose of lending gravity to the proceedings.

The government violates the Establishment Clause when it "acts with the ostensible and predominant purpose of advancing religion." *McCreary v. ACLU of Kentucky*, 545 U.S. 844, 845

(2005). In *McCreary*, two county courthouses displayed copies of the Ten Commandments which were readily visible to all citizens. *Id.* at 851–52. This Court held that the display of the Commandments violated the Establishment Clause because their isolated posting in public was not a part of a larger secular scheme—specifically, although the counties claimed that the Commandments were set out to show their effect on the civil law, this alleged purpose was not publicized. *Id.* at 869. By contrast, the Central Perk Town Council's prayer policy clearly explains that its purpose is to invoke divine guidance in order to help the Council members make decisions that are in the best interest of the Town. R. at 2.

The Central Perk Town Council's prayers thus served the valid secular purposes of "lend[ing] gravity to the public business, remind[ing] lawmakers to transcend petty differences in pursuit of a higher purpose, and express[ing] a common aspiration to a just and peaceful society." *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring). Although the Council's practices were steeped in religion, the prayer practice had the valid purpose of solemnizing the meetings "for primary benefit of the Town Council Members." R. at 2, 16; *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 [a] legitimate purpose").

As this Court has cautioned, "[f]ocus[ing] exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." *Lynch*, 465 U.S. at 680. Thus, the Town Council's practice is within the acceptable bounds of the Establishment Clause because, although the prayers were sectarian, they ultimately served an acceptable nonreligious purpose.

2. The variety of invocations delivered before the Central Perk Town Council reflects a willingness to accommodate all belief systems.

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 224, 244 (1982). The question, therefore, becomes whether there was enough religious diversity at the Central Perk Town Council meetings to prove that no religion was preferred over others. Of the eighteen invocations accounted for at the Town Council meetings, two were Baha'i invocations, four were prayers by a New Life pastor, nine were Mormon prayers given by an LDS Branch President, and three invocations represented Islam. R. at 2–3. Such theological diversity quashes any suspicions that one religion was impermissibly preferred.

Norms of religious equality can be respected even when prayers of one religion grossly predominate. *Galloway*, 134 S.Ct. at 1822. From 1999 to 2007, all of the ministers who prayed before the Greece town board were Christian. *Id.* In 2008, following complaints about pervasive Christian themes in the town's prayers, two Jewish laymen, the chairman of a Baha'i temple, and a Wiccan priestess were permitted to give invocations. *Id.* at 1817. Of over 120 monthly prayers, only these four were delivered by non-Christians. *Id.* at 1839. In upholding the constitutionality of the town's prayer practice, the Supreme Court focused on the town's policy of welcoming prayer by any minister or layman, rather than on the content of particular prayers. *Id.* at 1824. The Court emphasized that "the First Amendment is not a majority rule"—even though Christian ministers almost always delivered the prayer, "[s]o long as the town maintains a policy of nondiscrimination, the Constitution does not require it to search . . . for non-Christian prayer givers in an effort to achieve religious balancing." *Id.*

When a deliberative body permits prayers of a more than one faith, such diversity of speakers is evidence that no religion is being impermissibly advanced. *Pelphrey v. Cobb Cty.*, 547 F.2d

1263, 1277 (11th Cir. 2008). Prayers at the Central Perk Town Council meetings included a variety of terms, such as "Heavenly Father," "Allah," "Lord and Savior, Jesus Christ," "Buddha," and "King Jesus." R. at 3. As this Court emphasized in *Galloway*, even where nearly all of the invocations are Christian, that "does not reflect an aversion or bias on the part of town leaders against minority faiths." 134 S.Ct. at 1824. Despite the fact that each of the different terms referring to deities were not used an equal number of times, the diversity of religious expressions at the Central Perk Town Council meetings nevertheless shows that no particular faith was advanced. *Pelphrey*, 547 F.3d at 1278.

This Court in *Galloway* did not focus on the statistical breakdown of the prayers at the town board meetings; instead, it focused on the nondiscriminatory nature of the town board's prayer policy. Like the town board in *Galloway*, the Central Perk Town Council never declined permission to someone who wished to deliver an invocation. 134 S.Ct. at 1816; R. at 2. By welcoming each speaker who wished to lead the prayer without regard to their faith or the content of their invocation, the Central Perk Town Council showed a willingness to accommodate all belief systems. R. at 2. Because this Court upheld in *Galloway* a prayer policy which resulted in over 95 percent Christian prayers it seems only logical that the Central Perk policy—which resulted in 50 percent Mormon prayers—similarly does not violate the Establishment Clause. R. at 2–3; *Galloway*, 134 S.Ct. at 1828.

II. The Central Perk Town Council's practice was not unconstitutionally coercive because the prayers did not proselytize or denigrate other faiths, attendees were not forced to participate in the practice, and, as in *Galloway*, the presence of students at legislative meetings does not change the analysis.

A. The Town Council's invocations were not coercive of citizens in attendance because no one religion was placed above any other, citizens were not made to feel obligated to participate, and the language used in the invocations did not rise to the level of denigrating other faiths.

1. A prayer practice is not coercive when several religions are represented and citizens who attend meetings are free to either participate or sit out of the prayer practice.

A legislative prayer policy is constitutional when "there is no indication that the prayer opportunity has been used to proselytize or advance any one, or denigrate any other faith or belief." *Marsh v. Chambers*, 463 U.S. at 794–95. The selection of a clergy belonging to a particular religious denomination does not necessarily serve to proselytize one religion over another. *Id.* at 793. A legislative body is coercive of its citizens when it "establish[es] a religion, and enforce[s] the legal observation of it by law, [or] compel[s] men to worship God in any manner contrary to their conscience." *ACLU of Ohio v. Capitol Square Rev. & Advisory Bd.*, 243 F.3d 289, 294 (6th Cir. 2001) (internal citation omitted). This Court has specified that "[o]ffense . . . does not equate to coercion." *Galloway*, 134 S.Ct. at 1826. In other words, the fact that some people find an invocation personally disagreeable does not mean that legal coercion, which is required to invalidate a practice under the Establishment Clause, has occurred. *Id.*

The legislative prayer exception to the Establishment Clause has been examined by several courts since the United States' founding. Before this Court's decision in *Galloway*, circuit courts disagreed about how far the exception extended and what sort of invocations were permitted during town council meetings. In *Capitol Square Review*, a city commission had a plaque installed in the heart of a community plaza with the inscription "With God, All Things Are Possible." 243 F.3d at

292. Applying the "objective observer" approach from *Marsh*, the Sixth Circuit held that simply having the word "God" in a motto will not automatically equate to legal coercion. *Id.* at 302. In reaching its conclusion, the court examined history—notably, the fact that prayer had been standard practice at legislative meetings since 1789. *Id.* at 293. The court further acknowledged that even the Supreme Court references God in its call to order: "God save the United States and this Honorable Court." *Id.* at 300.

Courts also examine what efforts have been made to include different religions and beliefs in invocations delivered before public bodies. *Pelphrey*, 547 F.3d at 1285. The county commissions whose practices were at issue in *Pelphrey* traditionally opened their meetings with a prayer; clergy members were invited on a rotating basis to give an invocation before each meeting. *Id.* at 1266. The clergy, who were not compensated by the commissions, represented a variety of faiths (including Christianity, Islam, Unitarian Universalism, Baha'i, and Judaism) and their prayers sometimes included expressions of their religious faiths. *Id.* at 1266–67. The Eleventh Circuit, citing *Marsh*, held that this practice was constitutional because there was no indication that the prayers promoted any one religion over another—not only were the clergy members selected on a rotating basis, but the county commissions did not exclude any religion from the rotation. *Id.* at 1268. The court also addressed the county commissions' previous prayer practice and noted that the categorical exclusion of certain religious groups from the list of potential invocation speakers violated the Establishment Clause. *Id.* at 1282. The commissions' revised practice, which involved rotating who chooses the clergy to give an invocation, was constitutional because it gave everyone involved an equal opportunity to have their religion represented. *Id.* at 1277. *See also*, *Bormuth v. Cty. of Jackson*, 870 F.3d 494, 519 (6th Cir. 2017) (en banc) (county board of commissioner's

practice of commencing meetings with a prayer by a board member did not violate the Establishment Clause when the commissioners were selected on a rotating basis).

A prayer practice can be unconstitutional if it allows reference to only one deity. *Wynne v. Town of Great Falls*, 376 F.3d 292 (4th Cir. 2011). In *Wynne*, a town council's meetings were always opened with prayer. *Id.* at 294. The town council's prayers "frequently referr[ed] to Jesus, Jesus Christ, Christ, or Savior" and ending with "Amen." *Id.* A Wiccan citizen felt uncomfortable with these overtly Christian invocations and began arriving late in order to avoid the prayer. *Id.* at 295. Because of her late arrival, the Wiccan citizen was not permitted to speak at the meeting. *Id.* at 295–96. After sharing her concerns with the town council, the citizen was informed that the prayer practice was "customary" and would not be changed. *Id.* at 295. The Fourth Circuit, relying on *Marsh*, defined "proselytize" as seeking to convert others to a particular belief system over any others. *Id.* at 301. The court found that the town council, which "insisted upon invoking the name 'Jesus Christ' to the exclusion of deities associated with any other particular religious faith," had coerced citizens to conform to one faith, Christianity, and thus acted in an unconstitutional manner. *Id.*

A prayer policy must be implemented in such a way that no beliefs or religions are denigrated or excluded. *Joyner v. Forsyth Cty.*, 653 F.3d 341, 343 (4th Cir. 2011). In *Joyner*, clergy members were invited by city board members to prepare invocations for the start of each meeting. *Id.* at 343. The Ninth Circuit stressed that holding brief invocations at the beginning of legislative meetings is a "basic reality." *Id.* at 345–46. Thus, infrequent mentions of specific gods (such as members referencing Jesus Christ) cannot, standing alone, support an Establishment Clause claim. *Id.* at 351. In finding a First Amendment violation, the court underscored that there must be

"broad religious tolerance" such that citizens feel comfortable taking part in community meetings. *Id.* at 354–55.

As recently as this year, courts have sought ways that governmental officials may celebrate religion without violating citizens' constitutional rights under *Marsh* and *Galloway*. *See, e.g.*, *Mayle v. United States*, 891 F.3d 680 (7th Cir. 2018) (printing "In God We Trust" on U.S. currency is so ingrained in our Nation's history as to not violate the Establishment Clause); *Newdon v. Peterson*, 753 F.3d 105 (2d Cir. 2014) (the motto on U.S. currency is different from the Ten Commandments because, while the Ten Commandments denotes a particular religion, the words on our currency do not promote any one religion over another); *Turner v. City Council of the City of Fredericksburg*, 534 F.3d 352 (4th Cir. 2008) (requiring nondenominational invocations did not violate city council member's First Amendment rights because he was not forced to pray against his own religious beliefs). When a legislative body uses religion in a way that brings a community together, it is not promoting one religion over another but simply promoting values such as peace and unity. *Marsh*, 463 U.S. at 792.

2. Though some legislative invocations include references to specific religious figures, it is not the specific content of the prayers that is examined, but the prayer practice itself.

It is this Court's decision not "to embark on a sensitive evaluation or to parse the content of particular prayer[s]." *Marsh*, 463 U.S. at 795. Though the content of invocations is not completely irrelevant, it is the prayer practice as a whole that is primarily examined, not the specific prayers. *Galloway*, 134 S.Ct. at 1824. The content of prayers will be examined only when there is evidence that one religion is being used to proselytize or denigrate. *Id.* Were that not the case, legislative bodies would become excessively entangled in religion, as legislators would be forced to monitor and censor invocations. *Id.* at 1822. In *Galloway*, this Court clarified the holding in *Marsh* as

permitting secular invocations during legislative meetings. Mary Elizabeth Wicks, *Prayer is Prologue: The Impact of Town of Greece on the Constitutionality of Deliberative Public Body Prayer at the Start of School Board Meetings*, 31 J.L. and Pol. 1, 13 (2015).

Federal courts have scrutinized several prayer practices to determine whether they comply with *Marsh* and *Galloway*. For instance, the prayer policy at issue in *Jones* permitted an invocation to be read at the beginning of each legislative meeting. *Jones v. Hamilton Cty. Gov't*, 530 F. App'x. 478, 479 (6th Cir. 2013). The person giving the invocation could choose to give a religious invocation, have a moment of silence, or deliver a short, secular message to open the meeting. *Id.* at 481. The religious groups represented were primarily Judeo-Christian, with the majority of invocations said in Jesus's name. *Id.* at 481–82. Some citizens with different beliefs felt uncomfortable and unrepresented during the meetings. *Id.* at 481. The county commission emphasized that it did not look over or approve any of the invocations before they were read. *Id.* Relying on *Marsh*, the Sixth Circuit determined that invocations that reference a specific deity and offer guidance to a legislative body fit squarely within the confines of the legislative prayer exception. *Id.* at 482.

A government action that is clearly religious in nature will be upheld if the legislative body can show that religion is not the main purpose for the action. *Am. Atheists, Inc. v. Port Auth. of New York & New Jersey*, 760 F.3d 227, 232 (2d Cir. 2014). In *American Atheists*, a group of atheist citizens filed suit in opposition to the 9/11 Memorial Museum for displaying a Latin cross that is usually associated with Christianity. *Id.* The group contested this display as a violation of the Establishment Clause because it failed to recognize their nontheistic beliefs. *Id.* The Second Circuit focused on the display in its entirety: the lives that were lost during the attacks were represented regardless of religious affiliation, and though the cross was the largest display, other artifacts were

also on display, such as the Maltese Cross and the Star of David. *Id.* at 235–36. The Second Circuit found the practice to be constitutional because basing an act in religion does not mean that the "actual purpose is necessarily religious promotion." *Id.* at 239. The court held that an objective observer looking at the display would see that the memorial is historical, not a theological promotion of one religion (Christianity) over others. *Id.* at 240–43. The display was was constitutional because its purpose was to reflect our Nation's history with religion and how people cope with tragedy. *Id.* at 241–43. *See also, ACLU Nebraska Found. v. City of Plattsmouth*, 419 F.3d 772 (8th Cir. 2005) (a monument depicting the Ten Commandments near City Hall did not violate the Establishment Clause because, although it was religious in nature, the inquiry requires an examination of the content).

By referencing a particular deity during a legislative invocation, government actors are not necessarily proselytizing a certain religion. *Rubin v. City of Lancaster*, 710 F.3d 1087, 1089 (9th Cir. 2013). During one invocation, a guest bishop referenced Christ; shortly after, suit was filed by two citizens who were "upset and offended" by the reference. *Id.* at 1090. The Ninth Circuit determined that the question to be asked in Establishment Clause cases is "whether the City itself has taken steps to affiliate itself with Christianity." *Id.* at 1097. Because multiple religions were represented, the court held that there was no Establishment Clause violation. *Id.* at 1098.

Courts also look at other religious practices when determining what qualifies as permissible government speech under the First Amendment. *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617, 618 (9th Cir. 1996) (government officials who erected and maintained a 51-foot Latin Cross impermissibly promoted and proselytized one religion); *Marrero-Mendez v. Calixto-Rodriguez*, 830 F.3d 38, 41 (1st Cir. 2016) (Establishment Clause violated where police

officer who opposed a prayer that was held at the start of his shifts was ostracized and stripped of his regular duties).

3. Viewed in its totality, the Central Perk prayer practice complies with both this Court's precedent and the interpretation of that precedent by the circuit courts.

Determining whether a government practice violates the Establishment Clause is a "fact-sensitive inquiry." *Galloway*, 134 S.Ct. at 1825. To determine whether a prayer practice is valid, courts must consider whether citizens are directed to participate in prayers, dissidents are singled out, or council members have implied that they can be influenced by acquiescence to particular prayers. *Id.* at 1826. Finally, a legislative body's prayer practice must not discriminate against any one religion or proselytize one religion above all others. *Id.* at 1824.

The facts and circumstances are different in every case and an objective observer will not view all cases in the same light. *Murray v. City of Austin*, 947 F.2d 147, 153 (5th Cir. 1991). Simply looking at a religious symbol or practice is not sufficient to determine a violation—courts must look to the context in which a practice or symbol is used. *Id.* at 154. The court in *Murray*, for example, recognized that our Nation's history and tradition is based in religion yet still found a flag bearing a cross to impermissibly proselytize because it constituted permanent support of only one religion. *Id.* at 156, 158.

While invocations of certain religions may have been more frequent than others, the random selection of Council members' names from an envelope ensures that the Central Perk Town Council members did not promote one religion over another. R. at 2; *Pelphrey*, 547 F.3d at 1267. Even though Central Perk had no explicit rotating schedule as in *Pelphrey*, the Town Council's practice is similar in that each Council member who wanted to be selected to deliver an invocation was given the same opportunity as any other Council member. R. at 2. The Town Council was not

coercing its citizens to follow a specific religion in selecting an invocation giver, it was just coincidence that some members shared the same belief or faith. R. at 2. Four different religions were represented among the six Council members who wished to be included in the prayer practice. R. at 2. Council members Bing and Gellar-Bing's names were drawn nine times, compared to Council member Willick, whose name was drawn only three times. R. at 2–3. Though the Council members' names were not chosen an equal number of times, the practice never excluded any Council member from being selected on the basis of their religious affiliation.

As in *Capitol Square Review*, several religions were represented among the Central Perk Town Council members, including the Mormonism, Islam, Baha'i, and New Life Christianity. R. at 2–3; 243 F.3d at 301. Council member Geffroy did not want his name to ever be drawn and he was not forced to partake in the prayer practice. R. at 2. No facts suggest that any of the Council members were ever forced to give an invocation or to give an invocation of a religion that they did not follow. R. at 2. Unlike the town council members in *Wynne*, the Central Perk Town Council members never prohibited someone from giving an invocation because of their beliefs. 376 F.3d at 301.

Town Council members are elected officials and are presumably representative of the Central Perk community. R. at 2–4. Thus, the Central Perk community remains free to elect officials who belong to other religions if they feel there is insufficient religious representation. *Bormuth*, 870 F.3d at 513. Though the religions currently represented by the Council members are exclusively theistic, the invocations given by the Council members and the invited clergy have not been exclusively of one religion, as was the case in *Marsh*. 463 U.S. at 785. Moreover, Council members had the option of withdrawing their names from the prayer selection process, meaning the Central Perk prayer policy did not become such an "embedded legislative custom" as to deter citizens of

non-theistic faiths from running for office. *Lund v. Rowan Cty.*, 837 F.3d 407, 436 (4th Cir. 2016) (Wilkinson, J., dissenting).

Policies that do not exclude any religions are considered facially neutral and do not impermissibly advance one religion or belief. *Jones*, 530 F. App'x at 490. The facts at issue here are different than in *Jones* because both Council members and clergy members gave invocations. R. at 2. The Council members stayed within their faith when choosing the invocation, yet the prayer policy does not state that delivering an invocation outside of one's religion is prohibited. *See*, *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (the First Amendment allows individuals to express their own religious beliefs without necessarily excluding others).

The majority of the Central Perk Town Council invocations included language that was already deemed permissible by this Court in *Marsh*, such as "In the name of Jesus Christ, Amen" and "peace and mercy and blessings of Allah be upon you." R. at 2–3. Some invocations contained slightly stronger language, such as the New Life Community pastor's invocation which requested that all in attendance "remove their blinders" and "bend their knee to Jesus." R. at 3. Though this language may seem strong, this Court in *Marsh* and *Galloway* (as well as several circuit courts) held that infrequent promotions of a particular faith are not always proselytizing. *Joyner*, 653 F.3d at 506. A New Life Community adherent did not give an invocation at every meeting. R. at 2–4. Only two council members are of the New Life belief, and during the period in question their names were drawn four times. R. at 3. Thus, although the New Life pastor's invocations were worded more strongly than others, four isolated invocations did not amount to a pattern of proselytization. R. at 2, 3.

The Central Perk Town Council prayer practice did not coerce any citizens attending the meetings because the purpose of the prayers was to promote well-being and peace and was not

centered on religion itself. *Am. Atheists*, 760 F.3d at 232. The Town Council had several different Council members as well as clergy members of different religions give invocations based on a random drawing. R. at 2. Even if one particular religion was represented more frequently, the Town Council still withstands Establishment Clause scrutiny.

B. The Central Perk Town Council's prayer policy was not coercive of high school students who attended meetings because the practice fit squarely within the tradition of legislative prayer that has been upheld as constitutional by this Court.

1. This Court has declined to apply the logic from school prayer cases to legislative prayer cases, even when students are encouraged or incentivized to attend legislative meetings in which prayers are conducted.

The legal standard for determining whether a prayer practice is unconstitutionally coercive of high school students depends on whether the practice occurs within the context of legislative or school prayer. *Lee v. Weisman*, 505 U.S. 577 (1992); *Engel v. Vitale*, 370 U.S. 421 (1962). The "bar for coercion is substantially lower" in school prayer cases because "[p]rayer exercises" in the school setting are more likely to "carry a particular risk of indirect coercion" of young minds. *Weisman*, 505 U.S. at 578 (internal citations omitted); R. at 18.

This Court has never found students' attendance at town council meetings, even where required for school credit, to justify applying a lower bar for determining whether the government coerced students by establishing a state religion. *Galloway*, 134 S.Ct. at 1827. In *Galloway*, students could attend town council meetings to fulfill a "state mandated" high school civics graduation requirement. *Galloway v. Town of Greece*, 681 F.3d 20, 23 (2d Cir. 2012). The presence and involvement of students in the meetings was noted by the district court, the appellate court, and the Supreme Court. *Galloway v. Town of Greece*, 732 F. Supp. 2d 195, 209 (W.D.N.Y. 2010); *Galloway*, 681 F.3d at 23; *Galloway*, 134 S.Ct. at 1827. Despite students attending and participating in the town council meetings, this Court applied precedent from legislative prayer

cases, not school prayer cases, in upholding the practice as constitutional. *Id.* at 1815.. Concurring in *Galloway*, Justice Alito considered the "nature" of the meeting that the prayer preceded. *Id.* at 1829. Because prayers were given at the outset of proceedings that were "essentially legislative," the town's practice fell within the "long established" tradition of legislative prayer. *Id.* at 1828–29.

Even under the school prayer analysis, this Court has upheld the constitutionality of school programs that involve religious activity, as long as those programs do not compel such activity. *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). There, a public school program permitted students to be excused from class to visit religious centers for devotional exercises or religious instruction. *Id.* at 308–09. The parents of school children in the district claimed that because school teachers participated in the program, the school had established a religion in violation of the First Amendment. *Id.* at 309. Although teachers took part in signing release forms and allowing students to leave school grounds for religious instruction, the practice was held to be constitutional. *Id.* The students' participation was never "compulsory" as the school did not "force anyone to attend church . . . or to take religious instruction." *Id.* at 314. Thus, the school's facilitation of students' religious instruction was not unconstitutionally coercive. *Id.*

In determining whether a school prayer policy is coercive, this Court has closely considered the degree to which students' attendance was either mandatory or of such great importance as to be effectively compulsory. *Weisman*, 505 U.S. at 595; Patrick Weil, *Freedom of Conscience, but Which One? In Search of Coherence in the U.S. Supreme Court's Religion Jurisprudence*, 20 U. Pa. J. Const. L. 313, 337 (2017) (explaining that leading school prayer cases in which coercion was found were not a "step towards excluding religion from all state domains, but rather . . . an effort to account for the compulsory attendance of . . . children"). The prayer practice in *Weisman*

occurred during a high school graduation ceremony, which, for many students and parents, represented "one of life's most significant occasions." *Weisman,* 505 U.S. at 595. According to the school's policy, students' attendance at the graduation ceremony was voluntary. *Id.* at 594. However, given the importance of the event, this Court found that students were "not free to absent [themselves] from the exercise in any real sense of the term 'voluntary.'" *Id.* at 595. Students who wished to not attend the ceremony because of the invocation were faced with the dilemma of either "resisting conformance to state-sponsored religious practice" by missing their own gradation or being forced to conform to a religious practice. *Id.* at 596. Therefore, the "risk of compulsion [was] especially high" at a graduation ceremony. *Id.*

The societal pressures inherent in a particular setting are critical is determining whether prayer in public schools is coercive because adolescents are often susceptible to pressure from their peers towards conformity. *Id.* at 593. Although there are some similarities between an invocation at a school graduation and an invocation at a legislative session, legislative prayer is directed primarily at adults, in a setting where people can "enter and leave" freely. *Id.* at 596–97. A graduation ceremony, in contrast, has the potential for a far more coercive effect, because it is "the one school event most important for . . . student[s] to attend." *Id.* at 597. Therefore, a stricter standard is applied to coercion at a school graduation, because the "influence and force" of the prayer practice depend heavily on the setting. *Id.*

School prayer practices that occur outside of school grounds can still be coercive if they occur in "matters of social convention." *Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290, 312 (2000) (internal citation omitted). In *Santa Fe,* the school district held a student election in which students voted on whether a student would deliver a prayer at the commencement of high school football games. *Id.* at 297–98. Relying heavily on the reasoning from *Weisman,* the Court in *Santa Fe*

stressed the cultural significance of high school students attending "home football games." *Id.* at 312. The football games were "traditional [community] gatherings" which united the students around a "common cause." *Id.* Because of the deep cultural and traditional meaning that football games carry in the lives of high school students, the prayer practice was more likely to be coercive. *Id.* at 312. Various circuit court cases, such as the one cited by the district court in this case, have similarly found prayer practices unconstitutional in the context of high school football games. *See Borden v. Sch. Dist. of Township of E. Brunswick*, 523 F.3d 153, 179 (3d Cir. 2008).

School prayer has also been found to violate the Establishment Clause when the government exerts pressure on students, or creates a formalized program, in which students are to recite prayers. *Engel*, 370 U.S. at 423; *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 225 (1963). In *Engel*, "state officials composed [a] prayer" to be recited in class each day. *Engel*, 370 U.S. at 423. Teachers would either lead the class in prayer or "select[] a student to do so." *Id.* at 438. The school did not force students to participate if either the student or their parents objected to the practice. *Id.* at 423. Nevertheless, the practice violated the Establishment Clause because state officials "compos[ed] official prayers" to be "recited[d] as part of a religious program carried on by the government." *Id.* at 425. In the school setting, those who wished not to participate in the recitation of the prayers composed by the government were subjected to "indirect coercive pressure . . . to conform" in violation of the Establishment Clause. *Id.* at 431. Similarly, in *Schempp*, the practice of students reciting the Lord's Prayer and studying the Bible in the classroom at the beginning of each day violated the First Amendment because the students were "required" to engage in "religious exercises." 374 U.S. at 225.

The level of "supervision and control" that a school exerts over the content of prayers is also central to this Court's analysis in school prayer cases. *Weisman*, 505 U.S. at 593. A public school

principal in *Weisman* asked religious clergy to deliver an invocation at the school's graduation ceremonies. *Id.* at 580. The principal advised the clergy to offer only nonsectarian prayers and provided a pamphlet that included guidance on the type of prayers that could be given. *Id.* at 581. In part because the principal "directed and controlled the content of the prayers," the practice was unconstitutionally coercive." *Id.* at 588.

2. The Central Perk Town Council's prayer policy should be analyzed as a legislative prayer practice because the setting and nature of the events at issue are factually distinguishable from those in this Court's school prayer jurisprudence.

The Central Perk Town Council's practice did not exert the type of societal pressure on students that must be present for this Court to apply the lower bar for coercion that is applicable to school prayer cases. *Weisman*, 505 U.S. at 578 (internal citations omitted). Although Council member Green's high school students could earn a few extra credit points for attending the Central Perk Town Council meeting, attendance was never "required" or "compelled." R. at 4; *Weisman*, 505 U.S. at 598. The institutional pressures for students to participate in Council member Green's extra credit assignment were low because most students who participated received either a nominal benefit or no benefit at all from their participation. R. at 4. Ten out of the twelve students who actually earned extra credit by presenting at Town Council meetings in the 2014–2015 academic year saw no material effect on their grade outcomes, while the remaining two students garnered only a slight improvement in their final grades. R. at 4. Because the students' decision to participate in the assignment was statistically unlikely to have any effect on their final grade, the "influence and force" exerted on students' behavior was quantifiably low. R. at 4; *Weisman*, 505 U.S. at 597.

Even in terms of societal and peer pressure (which affect students in a less measurable manner), the Town Council's practice was easily distinguishable from the practices in *Weisman* and *Santa Fe* that occurred during foundational high school events. *Weisman*, 505 U.S. at 583; *Santa Fe*, 530

U.S. at 312. Unlike the students in *Weisman*, the Central Perk High School students were not faced with a choice between attending an event that commences with prayer and missing the "most important" event of their high school experience. R. at 4; *Weisman*, 505 U.S. at 596. While graduation events mark a rite of passage for high school students, presenting to the Central Perk Town Council Meeting was merely an optional assignment within a class that was not even required for graduation. R. at 4; *see Weisman*, 505 U.S. at 629 (Souter, J., concurring). Moreover, the Central Perk students' presentations at Town Council meetings lack the tradition and significance in the community that was central to this Court's reasoning in *Santa Fe*. R. at 4; *Santa Fe*, 530 U.S. at 312. Whereas the "tradition" of attending high school football games was an embedded component of the high school experience, Council member Green's extra credit assignment was a relatively new initiative that impacted only a fraction of students' participation grade in an American Government class. *Id.* Therefore, the benefit students gained from presenting at the Town Council meeting was far less significant than what the Court has required to find coercion in the school setting. *Id.*

While Council member Green led the invocation at a Town Council meeting that was attended by one of her students, neither the Town Council's practice nor Council member Green's extra credit assignment were predicated upon her students' participation in the prayers of any religion. R. at 4. Council member Green's extra credit assignment did not involve the practices of which this Court has been particularly wary, such as exhorting students to "recite" the prayers of one religion "as part of a religious program carried on by the government." R. at 4; *Engel*, 370 U.S. at 425. Unlike in *Engel* or *Schempp*, wherein state officials composed Christian prayers or "required" students to engage in denominational "religious exercises," Council member Green offered extra credit for presenting at a forum in which a wide array of prayers from various religions might have

been delivered, depending on which Town Council member was "randomly selected" to control the invocation. R. at 2–3; *Engel*, 370 U.S. at 425; *Schempp*, 374 U.S. at 225.

Council member Green ultimately maintained minimal "supervision and control" over the larger practice of prayer at Town Council meetings that her students attended, which have been key factors in this Court's analysis of coercion in school prayer cases. R. at 2–3; *Weisman*, 505 U.S. at 593. While a student of Council member Green's witnessed her prayer to Buddha on October 6, 2015, other students witnessed prayers from the Church of Jesus Christ of Latter Day Saints and from an evangelical Christian church at subsequent meetings. R. at 5. As Council member Green explained to the Central Perk Town Council in late 2014, this initiative focused not on placing "coercive pressure" on students to join a religion, but on "encouraging civic engagement in the community's youth." R. at 4; *Engel*, 370 U.S. at 423. Thus, this practice was distinguishable from those that have been found coercive in a school setting.

3. Under this Court's legislative prayer precedent, the Town Council's practice was even less coercive of high school students than the practices upheld as constitutional in cases such as *Galloway*.

High school students played an even less prominent role in this case than they did in cases, such as *Galloway*, in which this Court applied legislative prayer precedent and found the practice constitutional. R. at 4; *Galloway*, 134 S.Ct. at 1828. Council member Green's students were offered only the marginal benefit of five points being added to their participation grade for attending Central Perk Town Council meetings, and the extra credit was never linked to any "state mandated" requirement. R. at 4. Therefore, there was far less incentive for Council member Green's students to attend Town Council meetings than there was for the students in *Galloway* who could fulfill a state mandated civics requirement by attending town council meetings. R. at 4; *Galloway*, 134 S.Ct. at 1846. If students' attendance was insufficient to make school prayer cases

precedential in *Galloway*, then such cases certainly should not be applied here, where the students' participation had no effect on their ability to graduate.

The district court misstated the law when it reasoned that the Central Perk Town Council's policy should be analyzed under school prayer jurisprudence because it "exposed Plaintiffs' school-age children to religious dogma." R. at 9. Students are likely to attend legislative or town council meeting at some point in time, but their presence has never altered this Court's analysis. *See, e.g.*, *Galloway*, 134 S.Ct. 1811; *Marsh*, 463 U.S. 783 (holding that the Nebraska legislature's practice of commencing sessions with a prayer did not violate the First Amendment). If Council member Green's extra credit assignment transforms the constitutional analysis of the Town Council's prayer practice, then any school teacher in the country would have the power to render an otherwise constitutional practice to be unconstitutional simply by encouraging her students to attend the session and claim that they were "exposed . . . to religious dogma." R. at 9. This Court's reasoning in *Galloway*, *Marsh*, and other legislative prayer cases has never turned on whether students were in attendance, because it is presupposed that people of all ages may be in attendance. *Galloway*, 134 S.Ct. at 1827; *Marsh*, 463 U.S. 783. Thus, the students' attendance at town council meetings should not alter the analysis in this case.

As the appellate court correctly found, Council member Green's dual role as teacher and elected official does not make the practice coercive because the students' participation in the practice was not compelled. R. at 4; *Zorach*, 343 U.S. at 314. Just as the teachers in *Zorach* were free to participate in a school program that involved religious exercise, Council member Green was also free to participate in such a program, on the condition that students' involvement in "religious instruction" was not "compulsory." *Id.* The extra credit assignment at issue in this case

was unambiguously optional, and the students were free to participate in alternative extra credit opportunities that reinforced "civic engagement" through other avenues. R. at 4.

The Central Perk Town Council's prayer practice is even farther from being coercive than the school's constitutional practice in *Zorach*, because Council member Green's assignment had the secular purpose of fostering students' "engag[ement] in the political process." R. at 4; *Zorach,* 343 U.S. at 308. The activity in this case was "essentially legislative," as it centered on students presenting their "endorse[ment] or opposi[tion]" to a particular cause. R. at 4; *Galloway,* 134 S.Ct. at 1829. There is no evidence to suggest that Council member Green awarded extra credit points based on whether students chose to participate in "religious exercises." R. at 4; *Schempp*, 374 U.S. at 225. Therefore, this Court should find the Central Perk Town Council's prayer policy and practices were not coercive of high school students and thus did not violate the Establishment Clause.

CONCLUSION

It is respectfully submitted that for the reasons stated herein the judgment of the Court of Appeals for the Thirteenth Circuit should be affirmed.

Respectfully submitted,

/s./ Team B

Counsel for Respondent

CERTIFICATE OF SERVICE

We hereby certify that on this 14th day of September 2018, we served a copy of the Respondent Brief to Petitioner.

Respectfully submitted,

/s./ Team B

Counsel for Respondent

APPENDIX "A"

UNITED STATES CONSTITUTIONAL PROVISION

U.S. Const. amend. I. Freedom of Religion, Press, Expression

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

APPENDIX "B"

PREAMBLE TO THE CENTRAL PERK TOWN COUNCIL PRAYER POLICY

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