

No. 18-1308

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2018

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

Petitioners,

v.

CENTRAL PERK TOWNSHIP,

Respondent.

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

BRIEF FOR THE PETITIONER

TEAM C

Counsel for Petitioners

QUESTION PRESENTED

First, are the Central Perk town Council's legislative prayer policy and practices constitutional when Town Council Members have the exclusive ability to either deliver the invocations themselves or to personally select their own personal clergy to do so, and when the invocations have been theologically varied but exclusively theistic?

Second, are the Central Perk Town Council's prayer policy and practices unconstitutionally coercive of (1) all citizens in attendance when several invocations included language invoking the supremacy of sectarian beliefs, or (2) high school students who were incentivized with academic credit to present at meetings where their teacher also was a Council member who gave an invocation, and where they witnessed the invocations that invoked the supremacy of certain belief systems?

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STATEMENT OF JURISDICITON

The United States Court of Appeals for the Thirteenth Circuit entered final judgment in this case on January 21, 2018. The petition for writ of certiorari was timely filed and later granted on August 1, 2018. This Court has jurisdiction under 28 U.S.C. § 1254.

STATEMENT OF THE CASE

From the outset, the facts of this case have not been in dispute. Central Perk Township is located in Old York with an approximate population of 12,645. R. at 1. The town's leadership is made up of a seven-person Town Council ("the Council"), each elected biennially. *Id.* The Council holds meetings on a monthly basis to address any and all issues of local concern. *Id.* At the outset of this action, the seven Council members were Chairman Joey Tribbiani ("Tribbiani"), Rachel Green ("Green"), Monica Geller-Bing ("Geller-Bing"), Chandler Bing ("Bing"), Gunther Geffroy ("Geffroy"), Janice Hosenstein ("Hosenstein"), and Carol Willick ("Willick"). *Id.*

The Council adopted the prayer policy now in dispute in September 2014, following this Court's decision in *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014). R. at 2. The policy dictates that Council members will be selected at random to open the monthly meeting in a prayer. Once a Council member is selected, the Council member may (1) choose to deliver the prayer, (2) select a personal clergyman to deliver the prayer, or (3) decline to have an opening prayer. *Id.* If selecting a personal clergyman, the Council member cannot pre-screen the content of the prayer. *Id.* The Pledge of Allegiance directly follows the opening prayer, and if a Council member declines to have the opening prayer, the Pledge of Allegiance will open the meeting. *Id.* Whether both a prayer and the Pledge occur, or just the Pledge, the Council member opening the meeting always requests those citizens who are present to stand for both. *Id.*

Council members' names¹ are drawn from an envelope. *Id.* Of the six council members whose names have been drawn, from October 2014 through July 2016, only two council members elected to give the invocations themselves. *Id.*

Council members Bing and Geller-Bing are members of the Church of Jesus Christ of Latter Day Saints. *Id.* Their names were drawn four and five time, respectively. Each time their names were selected, they selected their personal clergyman David Minsk ("Minsk") to offer the opening prayer on their behalf. R. at 2–3. On one occasion, Minsk prayed the following:

Heavenly Father, we thank thee for this day and all our many blessings. Thou art our sole provider, and we praise Thy power and mercy. Bless that we can remember Thy teachings and apply them in our daily lives. We thank Thee for Thy presence and guidance in this session. In the name of Jesus Christ, amen.

R. at 3. On five other occasions, Minsk prayed the following: "Heavenly Father, we pray for the literal gathering of Israel and restoration of the ten tribes. We pray that New Jerusalem will be built ere and that all will submit to Christ's reign." *Id.* On the other three occasions, Minsk asked that none in attendance would reject Jesus Christ or commit grievous sins against the Heavenly Father, so that none would be sent to the Telestial Kingdom, away from the fullness of God's light. *Id.*

Council member Willick is a member of the Muslim faith, and her name was drawn three times. *Id.* She prayed the following on all three occasions: "As salamu aleiykum wa rahmatullahi wa barakatuh," which translates to "Peace and mercy and blessings of Allah be upon you." *Id.*

Council member Green is a member of the Baha'i faith, and her name was drawn four times. *Id.* Twice, she declined the opportunity to give the opening prayer. *Id.* She prayed to

¹ All council members participated in the random selection with the exception of Council member Geffroy, who asked that he never be selected. As a result, his name was never written on a slip of paper and was never drawn from the envelope. *See* R. at 2. No reasons were offered as to why he wished to be excluded.

Buddha on the other two occasions, acknowledging his infinite wisdom and asking that the Council meeting would be conducted in harmony and peace. *Id.*

Council member Hosenstein and Chairman Tribbiani are members of the New Life Community Chapel (“New Life”), which is an evangelical Christian church with four clergypersons. *Id.* Both Hosenstein’s and Tribbiani’s names were drawn twice, and each time they requested a New Life clergyperson to deliver the prayer. *Id.* On every occasion, the pastors prayed explicitly Christian prayers that ended with “in the name of our Lord and Savior, Jesus Christ” and extolled Christianity as the one true religion. *Id.* On more than one occasion, the New Life clergy also prayed for salvation for all those “who do not yet know Jesus,” for “blindness 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.*

In addition to serving on the Town Council, Council member Green teaches American History and an American Government seminar at Central Perk High School. R. at 4. The classes she teaches are not compulsory, but many students take her classes because of Green’s reputation as a teacher. *Id.* Green encourages her students to participate in various political processes by offering various extra credit opportunities. *Id.*

After her election to the Council, Green petitioned the Council to allow her students to present at a town council meeting endorsing or opposing various issues currently before the Council. *Id.* The Council granted her petition and permitted up to three students to present at each meeting. *Id.* As incentive, Green credited each student who presented five extra participation points toward their final grade. *Id.*

The plaintiffs in this case are all parents of students of Green’s. Three are atheists, and the fourth, Geller, is a member of New Life. The atheist plaintiffs object to the prayer practices

because, they argue, the Council is officially sanctioning religious views. Geller joins the atheist plaintiffs in suit because of his opposition to Green's prayer to Buddha, whom Geller views as a "fake God."

Burke's son, Timothy, presented at the November 4, 2015 town council meeting on the town's recycling policy. At that same meeting, President Minsk prayed that none in attendance would reject the Heavenly Father. Buffay's daughter, Leslie, presented at the February 5, 2016 town council meeting on how to humanely address the town's Canadian Geese issue. At that same meeting, Minsk called for the restoration of New Jerusalem. Kudrow's son, Frank, Jr., presented at the May 8, 2016 town council meeting on whether or not the upcoming bicentennial parade should include the town's GLBTQ Legal Advocates and Defenders chapter. At that same meeting, a New Life pastor offered the invocation. Geller's son, Ben, was present at the meeting where his teacher, Green, offered a Baha'i prayer.

Burke, Buffay, and Kudrow ("the Atheist Plaintiffs") jointly complain that the Central Perk Town Council's prayer policy violates the Establishment Clause because the practice of council members either offering the prayer themselves or providing their own personal clergy to offer the prayer constitutes an official government sanction of the particular religious views offered in the prayers. Additionally, the practice is discriminatory against non-religious individuals because all of the prayers offered by the council members or their clergy were theistic.

Plaintiff Geller complains that Green's invocation in particular violated the Establishment Clause as a coercive endorsement of religion. He argues that Green either should have not coerced her students into attending a meeting that would include such a prayer or that she should have abstained from praying, knowing that her students would be present.

All plaintiffs join together for this suit, given the overlapping issues of their complaints. They collectively seek injunctive and declaratory relief. All parties filed a motion for summary judgment.

The District Court granted the plaintiffs' motion for summary judgment. R. at 10. The court held that the Council's prayer practice fell outside of the limited scope of the *Marsh* and *Town of Greece* exceptions to the proscription against government establishment of religion. R. at 8. Further, the court found that the denigrating, proselytizing nature of the prayers created a coercive effect, in violation of the legislative prayer guidelines outlined in *Marsh* and *Town of Greece*. *Id.*

Regarding the children present at the Council meetings, the District Court held that the children were compelled to attend by Green's offer of academic credit. R. at 10. Green's "obligation to avoid violation of the Establishment Clause", according to the District Court, did not cease simply because she was hosting a classroom activity outside of the classroom setting. *Id.*

The Court of Appeals for the Thirteenth Circuit reversed the District Court's ruling. R. at 19. In its decision the Court of Appeals, citing Justice Kennedy's opinion from *Town of Greece v. Galloway*, focused on the historical backdrop of legislative prayer. R. at 14. In doing so, it held that endorsement of a particular religious ideology "is not the test for evaluating the constitutionality of legislative prayer." R. at 16. It found that the prayer practices present at the Central Perk Town Council meetings did not reflect a pattern of denigration or proselytization because the nature of religious belief is often that a disciple of one religion believes that that religion is correct and that other religions are false. R. at 17.

Regarding the high school students, the Court of Appeals held that the proper analytical framework was a legislative prayer analysis, rather than the prayer in schools analysis that the district court used. The Court of Appeals cited *Galloway v. Town of Greece*, 681 F.3d 20 (2nd Cir. 2012), in which the Second Circuit held that the presence of school-aged children at a town council meeting did not affect what analytic framework applied when analyzing the council's prayer practice. R. at 18. Therefore, the court found that the coercion analysis done for the adult audience members of the town council applied to the school-aged audience members as well. The Court of Appeals dismissed the Plaintiffs' complaint and granted the Defendant's Motion for Summary Judgment. R. at 19.

Geller, Burke, Kudrow, and Buffay filed a timely petition in the Supreme Court of the United States for a Writ of Certiorari. The petition was granted and set for the October Term of 2018. R. at 20.

SUMMARY OF THE ARGUMENT

The current legislative prayer practice in Central Perk Township violates the Establishment Clause of the First Amendment of the United States Constitution. The Establishment Clause prohibits Congress from making any laws "respecting an establishment of religion." The Fourteenth Amendment of the United States Constitution incorporates this same restriction on state and local governments.

The prayer policy instituted by the Central Perk Town Council delegates the ability to give an opening invocation to a randomly selected Council member or a clergyperson of that Council member's choice. The Town Council has essentially ensured that the Council members will retain exclusive control over the content of the prayers by either delivering the invocations themselves or by personally selecting their personal clergy to deliver the invocations. Exclusive

control like this violates the Establishment Clause because the prayer constitutes unconstitutional government speech, and implicitly places a religious litmus test on candidates for public office, as religious beliefs will suddenly become a campaign and election issue.

The personal clergy as the prayer givers is also unconstitutional because the Council members have a pattern and practice of only selecting their own personal clergy, effectively excluding any religious belief which they do not share with their constituents. The personal clergy also effectively act as agents or extensions of the Council members, which reiterates the previous discussion of improper government speech.

This Court has recognized that, as a general rule, the content of legislative prayers is not of concern in an analysis under the Establishment Clause of the United States Constitution. However, the *Marsh* and *Town of Greece* courts saved one exception to this rule. They affirmed that “content of the prayer is not of concern to judges,” but limited that until any “indication that the prayer opportunity has been exploited to proselytize or advance any one or to disparage any other, faith or belief.” *Marsh*, 463 U.S. at 794–95; *Town of Greece*, 134 S. Ct. 1821–22. Thus, there are constitutional limits to legislative prayer practices.

The Central Perk Township’s prayer policy and practices cross the line of these limitations and no longer serve the intended purposes of the legislative prayer.

The prayers offered by the Central Perk Town Council members are coercive of town members in attendance at town council meetings because they constitute a pattern of denigration and proselytization. An additional analysis of the setting, the intended audience, and the "backdrop of historical practice" makes clear that the prayer practice violates the Establishment Clause and is coercive in nature. The Supreme Court's stamp of approval on legislative prayer centers on that prayer practice being a tool for creating solemnity and unity for legislators and for

encouraging them to be mindful of a higher purpose than their own self-interest. When a prayer practice fails to adhere to this tenant of legislative prayer, and instead denigrates other religions and proselytizes to audience members, it ceases to be constitutional. The prayers offered by Council members at Central Perk Town Council meetings, which both denigrate and proselytize, are thus unconstitutionally coercive for all in attendance.

They are especially coercive of the school children that are in attendance at the council meetings at the direction of their public school teacher, Council member Green. Because Green is one of the Council members offering prayers at the start of the council meetings and because their participation at the council meetings is compelled by the offer of academic credit, the school prayer analysis more accurately captures the coercion problem at hand. An application of school prayer doctrine makes clear that the town council prayer practice is especially coercive of the children and is thus unconstitutional.

The Petitioners therefore request that the Court overturn the decision of the Court of Appeals for the Thirteenth Circuit and find that the legislative prayer practices in Central Perk are unconstitutional under the Establishment Clause.

ARGUMENT

The First Amendment of the United States Constitution prohibits Congress from making any laws “respecting an establishment of religion.” U.S. Const. Amend. I. The Fourteenth Amendment of the United States Constitution incorporates this same restriction on state and local governments. U.S. Const. amend. XIV. Usually, the Supreme Court applies one of three Establishment Clause tests to evaluate government practices: the coercion test, the endorsement test, and the *Lemon* test. *See, e.g., Lee v. Weisman*, 505 U.S. 577 (1992); *City of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989); *Lemon v. Kurtzman*, 403 U.S. 602

(1971) (establishing a three-part test providing that to pass muster under the Establishment Clause, (1) a statute “must have a secular legislative purpose,” (2) the statute’s principal or primary effect must be one that neither advances nor inhibits religion,” and (3) “the statute must not foster “an excessive government entanglement with religion” (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970)). However, legislative prayer questions before the Supreme Court are determined under the *sui generis* rules of *Marsh v. Chambers*, 463 U.S. 783 (1983), and *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014). In these cases, the Supreme Court has deviated from the traditional Establishment Clause tests and adopted a historical and tradition-based analysis for determining the constitutionality of legislative prayer under the Establishment Clause. See *Marsh*, 463 U.S. at 790–91; *Town of Greece*, 134 S. Ct. at 1818; *Lund v. Rowan County, N.C.*, 863 F.3d 268, 276 (4th Cir. 2017).

The current question before the Court falls outside of the parameters of the decisions in *Marsh* and *Town of Greece*.² Nonetheless, these decisions provide helpful guideposts to direct the Court’s decision in the current action. In *Marsh*, the Court found that the Nebraska state legislature’s practice of appointing a Presbyterian minister for a sixteen-year tenure to open legislative sessions was consistent with the “unambiguous and unbroken history of more than 200 years” of legislative prayer in the United States. *Marsh*, 463 U.S. at 792. The Court discussed that the Judeo-Christian nature of the messages was of no concern when “there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.” *Id.* at 794–95. In 2014, the Court revisited legislative prayer in *Town of Greece v. Galloway*. 134 S. Ct. 1811 (2014). The Court found the practices of the

² *Marsh* and *Town of Greece* did not discuss the constitutionality or coercive effects of legislative prayer practices when the practice delegates exclusive control of the prayers to the lawmakers.

town of Greece to be Constitutional. *Id.* at 1828. The Court re-emphasized that a prayer practice will not violate the Constitution unless there is a pattern of denigration, proselytization, or impermissible purposes. *Id.* at 1824. Furthermore, the Court was careful to caution that history and tradition cannot and will not save an otherwise unconstitutional legislative prayer practice. *Id.* at 1819.

From *Marsh* and *Town of Greece*, courts have recognized at least two fundamental principles that help to direct legislative prayer analysis. First, legislative prayer is permissible only so far as it “fits within the tradition long followed in Congress and the state legislatures.” *Fields v. Speaker of the Pennsylvania House of Representatives* (“*Fields I*”), 251 F. Supp. 3d 772, 788 (M.D. Pa. 2017) (citing *Town of Greece*, 134 S. Ct. at 1819). Second, legislative prayer is presumptively permissible absent a pattern of denigration, proselytization, or impermissible government purpose. *Fields I*, 251 F. Supp. 3d at 788 (citing *Town of Greece*, 134 S. Ct. at 1819); *Marsh*, 463 U.S. at 794–95.

Establishment Clause issues are inherently fact-insensitive and absent an indication of identical issues to previous jurisprudence, must be analyzed on a case-by-case basis. The policy and practices of the Central Perk Town Council do not fall within the strict purview of these previous cases before this Court, but guideposts from these decisions will help direct the court’s ruling in the current action. The policy and practices concerning those who deliver invocations fall outside the jurisprudence of the Court and the history and traditions of the United States. The content of these prayers, as a regular pattern, denigrates, proselytizes, and excludes other religions, which under the rule of *Marsh* immediately calls the constitutionality of the prayer practices under scrutiny. The practices and policy also unconstitutionally coerce both adult citizens in attendance at these meetings and high school students in attendance for extra credit

opportunities because of the proselytization and denigration, and because the high school students are considered a “captive audience.” Thus, this Court should find that the prayer practices and policy in Central Perk are unconstitutional and overturn the ruling of the Court of Appeals.

I. The identities of the prayer-givers render the policy and practices in Central Perk Township unconstitutional

The prayer policy instituted by the Central Perk Town Council delegates the ability to give an opening invocation to a randomly selected Council member or a clergyperson of that Council member’s choice. R. at 2. By implementing this prayer policy, the Town Council has ensured that the Council members will retain exclusive control over the content of the prayers by either delivering the invocations themselves or by personally selecting their personal clergy to deliver the invocations. Regardless of whether the Town Council members deliver the invocation themselves, or the Council members select their personal clergyperson to deliver the invocation, the Town Council in effect controls the content of the prayers given, which is unconstitutional under Establishment Clause jurisprudence.

a. Town Council Board Members as the prayer-givers

The Central Perk Town Council’s policy of the Board Members delivering invocations violates the Establishment Clause of the Constitution. By granting exclusive control of the opening prayer to a selected Council member, the Town Council impermissibly violates the Establishment Clause under previous jurisprudence in this Court. Furthermore, given that establishing legislative prayer in Central Perk was a Council-driven and -controlled effort, the Council has single-handedly made religious issues, practices, and beliefs a voting issue, setting up a kind of “litmus test” for candidates running for a public office on the Town Council.

i. The Council’s exclusive control leads to unconstitutional government speech

Granting exclusive control of legislative prayer to the lawmaker is unconstitutional under the Establishment Clause, because any prayers given seem as though the government is speaking. Under Establishment Clause doctrine, the Establishment Clause is the “only clearly-acknowledged limit on government speech.” Mary Jean Dolan, *Government Identity Speech and Religion: Establishment Clause Limits After Sumnum*, 19 Wm. & Mary Bill Rts. J. 1, 4 (2010). For example, this Court held in *Lee v. Weisman* that when a school official decided that an invocation should be given, the choice was “attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur.” 505 U.S. 577, 587 (1992). In *Central Perk*, the citizens did not decide through a voting process that they wished to initiate a legislative prayer practice exclusively controlled by the Council—instead, the Council made this decision, seemingly without input from their constituents. R. at 2. Thus, as is *Lee*, this choice was “attributable to the State” and the practice was implemented as if a local ordinance “decreed that the prayers must occur.” *Lee*, 505 U.S. at 587.

To be sure, this argument does not go to say that any prayers offered by lawmakers are unconstitutional under the Establishment Clause. To the contrary, as recognized in *Marsh v. Chambers*, *Town of Greece v. Galloway*, and *Lund v. Rowan County*, lawmakers can lead and often have led opening prayers to legislative sessions since the Founding of the United States. The argument here simply is that when the lawmakers *exclusively* have the power to control content of the prayer by either delivering the prayers themselves or offering their personal clergy to do so, those lawmakers have crossed the Establishment Clause line of constitutionality laid out in *Marsh*, *Town of Greece*, and *Lund*. In *Marsh*, the prayer-giver was a chaplain, paid by the State. In *Town of Greece*, the prayer-giver was invited by the State as a volunteer. But in *Lund*, and here in *Central Perk*, the prayer-givers are the State itself. The Town Council here is “elbow-

deep in the activities banned by the Establishment Clause—selecting and prescribing sectarian prayers.” *Lund*, 863 F.3d at 281.

It is settled law that the government is “prohibited from prescribing prayers” in an effort to “promote a preferred system of belief or code of moral behavior.” *Town of Greece*, 134 S. Ct. at 1822 (citing *Engel v. Vitale*, 370 U.S. 421, 430 (1962)). While discussing opening a government-funded public school with a government-written prayer, the Supreme Court held in *Engel v. Vitale* that “government in this country should stay out of the business of writing . . . official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance.” 370 U.S. at 435. By delivering their own prayers at the beginning of the Town Council meetings, the Council members are, in fact, writing their own “official prayers.” Furthermore, by allowing prayers to be delivered that proselytize and denigrate other religions and failing to remedy that constitutional violation, the Central Perk Town Council effectively promotes this “preferred system of belief or code of moral behavior.” *Town of Greece*, 134 S. Ct. at 1822. *See also* discussion *infra* Section II.b, II.c.

ii. *The Council’s exclusive control leads to religious issues becoming an election issue*

Because Town Council delegates the ability to deliver an invocation solely to Council members and because these Council members retain the sole ability to choose to deliver an invocation or to select a clergy person to deliver the invocation, matters of personal religious beliefs will become issues at the polls for Central Perk voters. *See Lund*, 863 F.3d at 282. In *Town of Greece v. Galloway*, the Court highlighted and upheld a flexible, inclusive approach to legislative prayer by the town of Greece. Greece “welcomed adherents of all faiths, allowing any member of the public [the chance] to offer an invocation reflecting his or her own convictions.” *Town of Greece*, 134 S. Ct. at 1826; *Lund v. Rowan County, N.C.*, 863 F.3d 268, 282 (4th Cir.

2017) (en banc) (internal citations omitted). When Greece received complaints of the seeming exclusivity of their practices, they immediately remedied by inviting clergypersons of other faiths which had previously not been represented. Alternatively, as in Central Perk and as demonstrated in *Lund*, these local governments send the opposite message, creating a “closed universe of prayer-givers dependent solely on election outcomes.” *Lund*, 863 F.3d at 282. In Central Perk, the Council members have exclusive control over who speaks, and also therefore over what is said.

The *Lund* Court laid out several concerns with the constitutionality of Rowan County’s commissioners’ actions regarding the Rowan County legislative prayer practices. First, the court discussed that the commissioners effectively insulated themselves from requests to diversify prayer. *Id.* By leaving power and say over prayer solely in the hands of the commissioners, constituents had no say over whether or not prayer practices should be diversified. Similarly, the court found that the decision to restrict prayer to exclusively the commissioners was not voted on by Rowan County citizens, but instead was perpetuated by the commissioners themselves. *Id.* These same factors exist in Central Perk. By holding sole and total control over giving prayers or selecting personal clergy, the Council has effectively insulated itself from any diversity of religious beliefs.³ Furthermore, the Town Council adopted their prayer policy seemingly without any say from any of their 12,000 constituents. *See R.* at 2.

³ To be sure, the faiths of the Church of Jesus Christ of Latter Day Saints, of Muslims, of the Baha’i, and evangelical Christians are all represented by the Central Perk Town Council. However, all of these faith systems fall under the label of “sectarian,” and, as presented by the Petitioners in this case, these faith systems do not accurately reflect the diversity of Central Perk Township, and specifically excludes non-theists from representation. Further, instead of responding to the dissatisfaction of their constituents, the Town Council has continued to use this practice and appoint the same clergypersons and Council members to deliver the invocations.

The *Lund* court discussed further the impact that a religion-oriented Board has on elections. For minority religions, the court discussed, “the only recourse available was to elect a commissioner with similar religious views.” *Lund*, 863 F.3d at 282. As a result, failing to pray in a certain way, or only praying in another specific way suddenly become campaign issues or at least, “a tacit political debit, which in turn deters those of minority faiths from seeking office.” *Id.* This occurrence deviates from the Constitutional safeguards which refuse to allow those activities which would seemingly require a “de facto religious litmus test for public office.” *Id.* Surely, in Central Perk, if an atheist or Scientologist or otherwise a non-theist dared run for public office, their religious beliefs would be of contention in this particular legislative setting, where prayers seem to take precedent over inclusion and the Constitution.

b. Personal clergy of the Town Council Board Members as the prayer-givers

The Central Perk Town Council’s policy of selecting Council Members who, in turn, select their own personal clergy to deliver the opening prayer is unconstitutional because, first, the practice is an extension of the lawmaker-led prayer where the personal clergy serve as an extension of the Council member who chose them, and, second, because of the exclusivity of the practice to select only those ministers who are represented by the Council.⁴ The clergypersons essentially act as agents or extensions of their selecting Council members, given the personal connection. Thus, many of the reasons why the lawmaker-led prayer is unconstitutional also apply to this sections.

Regarding exclusivity, most Courts have held only that governments cannot intentionally exclude religious faiths from representation in legislative prayer, especially when there is a

⁴ Regarding the first argument as to the clergypersons being mere extensions of the Council members who represent them, we adopt in full the discussion *supra* Part I, with the argument that the personal clergy act as agents of the selecting Council members.

selection or volunteer practice. *See, e.g., Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014); *Pelphrey v. Cobb County*, 547 F.3d 1263 (11th Cir. 2008); *Fields v. Speaker of the Pennsylvania House of Representatives (“Fields II”)*, No. 1:16-CV-1764, 2018 U.S. Dist. LEXIS 146938 (M.D. Pa. Aug. 29, 2018); *Williamson v. Brevard County*, 276 F. Supp. 3d 1260 (M.D. Fla. 2017)

It does not matter whether the Council members have intentionally or purposefully excluded certain faiths from the ability to be represented at Town Council meetings. The issue here before the Court is whether the *practice* (regardless of intent) is unconstitutional. *See* R. at 20. When the practice of the Town Council is to deliver an invocation that aligns with their personal beliefs or to select their personal minister to deliver the invocation, the Town Council implicitly polices the content of the invocations and implicitly excludes those belief systems which do not align with their own.

Therefore, the Central Perk Town Council has impermissibly delegated total control of the legislative prayer practice in Central Perk to the Council members themselves. Under this very Court’s jurisprudence, that practice cannot stand.

II. The content of the prayers given render the policy and practices in Central Perk Township unconstitutional

This Court has recognized that, as a general rule, the content of legislative prayers is not of concern in an analysis under the Establishment Clause of the United States Constitution. However, the *Marsh* and *Town of Greece* courts saved one exception to this rule. They affirmed that “content of the prayer is not of concern to judges,” but carved out the exception of any “indication that the prayer opportunity has been exploited to proselytize or advance any one or to disparage any other, faith or belief.” *Marsh*, 463 U.S. at 794–95; *Town of Greece*, 134 S. Ct. 1821–22. Thus, there are constitutional limits to legislative prayer practices. Under this

reasoning, this Court must concern itself with the content of the prayers at the Central Perk Township Town Council meetings. On several occasions, several different prayers have been offered that have specifically proselytized and denigrated other religions. *See* R. at 2–3. Furthermore, because of the proselytization and denigration, the practice of legislative prayer in Central Perk fails to fulfill the recognized purpose of legislative prayer—that is, to solemnize the meetings. Finally, combining these factors with the exclusively sectarian content of these prayers, the practices in Central Perk as evidenced by the record are unconstitutional based on the prayers’ contents.

a. The prayers given proselytize those in attendance

According to Merriam-Webster, to proselytize means an attempt to “induce someone to convert” or to “recruit someone to join” a faith or religious belief. Under the rule of *Marsh*, legislative prayer cannot induce listeners to convert or to join a particular religion or belief system. *Marsh*, 463 U.S. at 794–95. However, the prayers offered by clergypersons at the Central Perk Town Council’s monthly meetings often encouraged those in attendance to accept one religion or another, or to turn towards a deity and reject sin. *See, e.g.*, R. at 3. These prayers happened so often to not simply present one stray remark, but rather these prayers evince a pattern of proselytization which renders the practice of the Town Council unconstitutional under the Establishment Clause. *See Town of Greece*, 134 S. Ct. at 1824.

i. The proselytization occurs not from “one stray remark” but from the Town Council’s regular practice and pattern

In *Town of Greece v. Galloway*, this Court rejected an argument by the plaintiffs who, pointing out two remarks which “strayed” from the rest of the prayers given, argued that the prayer practice in the town of Greece disparaged and denigrated other religious beliefs, and proselytized those citizens in attendance. *Town of Greece*, 134 S. Ct. at 1824. The Court

recognized that those two remarks did stray from the rationale of *Marsh*, but that those two remarks were insufficient to destroy the practice of the town of Greece which, as a whole, “reflects and embraces our tradition.” *Id.* The Court continued, stating that “[a]bsent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a prayer will not likely establish a constitutional violation.” *Id.* (citing *Marsh*, 463 U.S. at 794–95 and discussing that *Marsh* only requires an inquiry into the prayer practice as a whole rather than the contents of a single prayer).

Turning to the prayer opportunity in Central Perk, of the eighteen examples of prayers included in the record from October 2014 through July 2016, at minimum two-thirds of those prayers proselytized those in attendance. *See* R. at 3. Of the nine occasions on which Minsk prayed, on five of them, he asked that all people “submit to Christ’s reign,” and, on three other occasions, he prayed that “none in attendance would reject Jesus Christ.” *Id.* Every one of the invocations offered by New Life clergy extolled Christianity as the one true religion, and occasionally asked for salvation for those “who do not yet know Jesus,” for “blindness to be removed,” and for “every Central Perk citizen’s knee to bend.” *Id.*

ii. *A pattern of proselytization renders the practices and policy of the Town Council unconstitutional*

The rule from *Town of Greece* that interpreted the standard from *Marsh* requires a pattern of proselytization to find a legislative prayer practice unconstitutional. Two-thirds of the prayers delivered in the Central Perk Town Council’s monthly meetings proselytized those in attendance. A showing of two-thirds of the opportunities must equal a “pattern” in the eyes of this Court.⁵

⁵ *See, e.g., Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979) (discussing that a pattern of behavior requires consistency); *Boutilier v. INS*, 387 U.S. 118 (1967) (discussing that a pattern of behavior refers to consistent behavior); *Gte. Southwest v. Bruce*, 998

Thus, under the rules of *Marsh* and *Town of Greece*, the pattern of proselytization at the Central Perk Town Council’s meetings renders the practice unconstitutional.

b. The prayers given denigrate other religions

According to Merriam-Webster, to “denigrate” means to disparage or to put down. Under the rule of *Marsh*, legislative prayer cannot disparage or put down other belief systems. *Marsh*, 463 U.S. at 794–95. The Establishment Clause itself prohibits setting up one belief system over that of another. U.S. Const. amend. I. When a legislative body acts to establish one religion over another, the body is in effect denigrating that other religion. The prayers offered by clergypersons at the Central Perk Town Council’s monthly meetings often set up one religion as being “over” or better than another. *See, e.g.*, R. at 3. These prayers happened so often to not simply present one stray remark, but rather these prayers evince a pattern of denigration which renders the practice of the Town Council unconstitutional under the Establishment Clause. *See Town of Greece*, 134 S. Ct. at 1824.

i. The denigration occurs not from “one stray remark” but from the Town Council’s regular practice and pattern

This Court in *Town of Greece* rejected an argument by the plaintiffs who, pointing out two remarks which “strayed” from the rest of the prayers given, argued that the prayer practice in the town of Greece disparaged and denigrated other religious beliefs, and proselytized those citizens in attendance. *Town of Greece*, 134 S. Ct. at 1824. The Court recognized that those two remarks did stray from the rationale of *Marsh*, but that those two remarks were insufficient to destroy the practice of the town of Greece which, as a whole, “reflects and embraces our tradition.” *Id.* The Court continued, stating that “[a]bsent a pattern of prayers that over time

S.W. 2d 605 (Tex. 1999) (finding a pattern of harassment when behavior was “repeated or ongoing”).

denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a prayer will not likely establish a constitutional violation.” *Id.* (citing *Marsh*, 463 U.S. at 794–95 and discussing that *Marsh* only requires an inquiry into the prayer practice as a whole rather than the contents of a single prayer).

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ii. *A pattern of denigration renders the practices and policy of the Town Council unconstitutional*

The rule from *Town of Greece* interpreting the standard from *Marsh* requires a pattern of denigration before the Court can find a legislative prayer practice unconstitutional. Two-thirds of the prayers delivered in the Central Perk Town Council’s monthly meetings denigrated other religions to those citizens in attendance. A showing of two-thirds of the opportunities must equal a “pattern” in the eyes of this Court.⁶

⁶ *See, e.g., Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979) (discussing that a pattern of behavior requires consistency); *Boutilier v. INS*, 387 U.S. 118 (1967) (discussing that a pattern of behavior refers to consistent behavior); *Gte. Southwest v. Bruce*, 998 S.W. 2d 605 (Tex. 1999) (finding a pattern of harassment when behavior was “repeated or ongoing”).

Thus, under the rules of *Marsh* and *Town of Greece*, the pattern of denigration at the Central Perk Town Council’s meetings renders the legislative prayer practice unconstitutional.

c. The prayers given do not serve the recognized purpose of legislative prayer

As discussed previously, this Court’s jurisprudence on legislative prayer issues deviates from the normal tests under Establishment Clause questions. Usually, the Supreme Court applies one of three Establishment Clause tests to evaluate government practices: the coercion test, the endorsement test, and the *Lemon* test. *See, e.g., Lee v. Weisman*, 505 U.S. 577 (1992); *City of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989); *Lemon v. Kurtzman*, 403 U.S. 602 (1971). However, starting with *Marsh v. Chambers* and repeated in *Town of Greece v. Galloway*, the Supreme Court turned to historical and traditional practices of the United States to uphold the legislative prayer questions at issue in those cases.

In both *Marsh* and *Town of Greece*, the Court began its analysis by recognizing the importance and the use of legislative prayer to the history of the United States. “As practice by Congress since the framing of the Constitution, legislative prayer 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.” *Town of Greece*, 134 S. Ct. at 1818. The *Town of Greece* court emphasized that *Marsh* ought not to be seen as permitting an otherwise unconstitutional practice solely for its historical foundation. *Id.* at 1819. Instead, *Marsh* shows that Establishment Clause questions should be discussed and answered “by reference to historical practices and understandings.” *County of Allegheny*, 492 U.S. at 670. (Kennedy, J., concurring in judgment in part and dissenting in part). A historical analysis of the practices and traditions starting centuries ago leading through today in Central Perk is key to understanding why Central Perk’s practices are unconstitutional.

As mentioned earlier, the Court-recognized purpose of legislative prayer, among others, is to solemnize the legislative session. *See Town of Greece*, 134 S. Ct. at 1823. In both *Marsh* and *Town of Greece*, this Court heavily relied on the Founding Fathers’ views on religion to influence and direct each decisions. Petitioners ask the Court to continue to do so, but we also urge the Court to recognize not only the Founding Fathers’ views on religion but also the history of America—specifically as a colony. As laid out in *Engel v. Vitale*, the reason America is America—the reason why the colonizers came here from Europe in the first place was to escape a government that not only disrespected but also controlled their religious practices. 370 U.S. at 426–27 (discussing that the content of the Book of Prayer repeatedly threatened to disrupt the peace of the country as the accepted form of prayer, resulting in the more *en masse* colonization of what was at the time the New World). There is surely some note of warning to be taken, for if this Court will analyze the history of our country in order to determine historically and traditionally what the rule of law ought to be, the Court ought to account for the *full* history of the United States—including its colonial era.

History does not insulate the harms here in Central Perk. *See Town of Greece*, at 1823.

d. Exclusively sectarian prayer, combined with the above factors, is unconstitutional under the Establishment Clause

The petitioners recognize that exclusively sectarian prayers are not *per se* unconstitutional. In *Town of Greece v. Galloway*, the Supreme Court refused to hold that sectarian prayers were *per se* unconstitutional. 134 S. Ct. at 1823. The Court was more concerned with achieving prayer that will “lend gravity to the occasion and reflect values long part of the Nation’s heritage.” *Id.* What mattered more than the religion alluded to in the prayer, was the manner in which the prayer was delivered:

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 function. If invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion, many present may consider the prayer to fall short of the desire to elevate the purpose of the occasion and to unite lawmakers in their common effort. That circumstance would present a different case than the one presently before the Court.

Town of Greece, 134 S. Ct. at 1823.

In short, the scenario described in the second half of the *Greece* quote is the reality of Central Perk’s legislative prayer practices. As previously discussed, the Central Perk Town Council’s prayers have often led to denigrating nonbelievers and preaching conversion—enough to meet the “pattern” standard under the Court’s decision in *Town of Greece v. Galloway*. A sectarian prayer practice is insufficient to find that practice unconstitutional. But applied to the remaining content-based factors, as well as the exclusive control of the Council over the prayer practice, the sectarian prayer practices of the Central Perk Town Council is unconstitutional under the Establishment Clause.

The prayer-givers in Central Perk have rendered this practice unconstitutional, by delivering prayers that proselytize, denigrate, fail to solemnize, and otherwise alienate every purpose of the legislative prayer practice. Therefore, specifically under the rule of *Town of Greece v. Galloway*, the Central Perk Town Council’s legislative prayer practice cannot stand.

III. The coerciveness of the prayers given to those in attendance render the policy and practices in Central Perk Township unconstitutional

a. Legislative prayer is coercive when it proselytizes or denigrates

While the Supreme Court of the United States has upheld legislative prayer as constitutional, the rule of law permitting legislative prayer is not boundless. Legislative prayer is still subject to ongoing scrutiny through the lens of the Establishment and Free Exercise clauses.

The Government may not act in such a way that it establishes a government religion, nor can it impede citizens from practicing their particular faith system or choosing to practice no religion.

Legislative prayer has been found to be permissible where its purpose is to unify legislators and call their attention to a greater purpose than themselves. *See Lund v. Rowan County, N.C.*, 863 F.3d 268, 275 (4th Cir. 2017) (citing *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1818, 1825 (2014)) ("A moment of prayer or quiet reflection sets the minds of legislators to a higher purpose and thereby eases the task of governing Legislative prayer 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.") While prayer has the power to unify, it has also historically been divisive. *See Engel v. Vitale*, 370 U.S. 421, 443 (1962) (J. Douglas, conc.) ("The philosophy is that if government interferes in matters spiritual, it will be a divisive force.") Prayer that would tend to be divisive rather than unifying ceases to serve the constitutionally permissible purpose under which the question of legislative prayer was decided. A prayer practice ceases to be a constitutionally valid legislative prayer and evolves into coercion when it is "exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Town of Greece*, 134 S. Ct. at 1817 (quoting *Marsh v. Chambers*, 463 U.S. 783 (1983)).

It is an elemental First Amendment principle that government may not coerce its citizens "to support or participate in any religion or its exercise." *Town of Greece*, 134 S. Ct. at 1825 (quoting *County of Allegheny v. American Civil Liberties Union*, 492 U.S., 573, 659 (1989)). Prayer practices that denigrate and/or proselytize are by nature coercive of those forced to bear witness to the prayers. As is discussed above, the prayer practice of the Central Perk Township Town Council habitually denigrates and proselytizes.

b. The legislative prayers in this case show a pattern of proselytizing and denigration

The Supreme Court has made clear that legislative prayer is not constitutional if there is a pattern of proselytizing or denigration. In cases where the Court has held that a legislative prayer practice is constitutional, those prayers have been more about focusing and unifying a legislative body and less about using religion as a tool of division, separation, or superiority.

For example, in *Town of Greece*, the prayers, while generally sectarian in nature, focused on bringing the legislators together. 134 S. Ct. at 1816. The language of one prayer was, "We ask you to bless our elected and appointed officials so they may deliberate with wisdom and act with courage. Bless the members of our community who come here to speak before the board so they may state their cause with honesty and humility." *Id.*

In contrast, the prayers in Central Perk Township take on an entirely different tone. One prayer, prayed by council members Geller and Geller-Bing's religious leader David Minsk, called for the "literal gathering of Israel and restoration of the ten tribes." R. at 3. He also prayed that "none in attendance would reject Jesus Christ or commit grievous sins against the Heavenly Father, so that none would be sent to the Telestial Kingdom, away from the fullness of God's light." *Id.* Another prayer included "requests for salvation for all those 'who do not yet know Jesus,' for 'blindness 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.* Comparison of constitutionally acceptable prayers and the prayers that took place during the Central Perk Township council meetings makes clear that the Central Perk Township prayer practice is not in the spirit of constitutional prayer. Rather than seeking to bring solemnity to the proceeding and unify the legislators in a shared mission, the prayers are hostile towards non-Judeo-Christian belief systems and aim to convert non-believers.

Not only does denigration run afoul of the Establishment Clause, but so does attempting to convert audience members to a particular faith via the mouthpiece of a government agent. *Lund v. Rowan County, N.C.*, 863 F.3d 268, 277 (4th Cir. 2017) (citing *Marsh*, 463 U.S. 783) ("But the Establishment Clause does not countenance prayers that "denigrate nonbelievers or religious minorities, threaten damnation, or *preach conversion*" or, per *Marsh*, prayers that proselytize or advance or disparage a particular faith.") (emphasis added). In *Lund*, the Fourth Circuit held that a legislative prayer practice which included the prayer, "Father, I pray that all may be one as you, Father, are in Jesus, and He in you. I pray that they may be one in you, that the world may believe that you sent Jesus to save us from our sins," was unconstitutional because it attempted to convert those present to the Christian faith. 863 F.3d at 273.

c. The setting of the prayer, the intended audience of the prayer, and the historical backdrop that this issue is analyzed by also render the prayer practice unconstitutional

Whether or not a legislative prayer practice is coercive is a fact-sensitive inquiry that must also consider both the setting of the prayer and the audience of the prayer. *See Town of Greece*, 134 S. Ct. at 1825. Legislative prayer practice must also be "evaluated against the backdrop of historical practice." *Id.*

The setting and intended audience of the prayer both render the prayer practice at odds with the Establishment Clause. The Council meets monthly to discuss issues of local concern. R. at 1. Because the meeting agendas are driven by local interest, there is an assumption that township citizens will attend the meeting. There is nothing in the record to indicate that the Council meetings are closed to the public or invitation only. Nothing in the record indicates that the opening invocation is given prior to the Council members joining the public for the meeting. The nature of the meeting necessarily includes the public. Therefore, the intended audience of

the prayers is not simply the Council members, but also citizens of the township. The set up of the Council meeting means that those in attendance for the meeting will hear the prayer.

The prayers themselves are outward directed, addressing "all" in attendance and in some cases calling "all" in attendance to action, asserting for instance that, "none in attendance reject Jesus Christ or commit grievous sins," "all will submit to Christ," and "for every Central Perk citizen's knee to bend before King Jesus." R. at 3.

Additionally, the prayer is scheduled to be offered at the beginning of every meeting. R. at 2. By beginning each meeting with the prayer, the prayer sets the tone for the rest of the meeting. For example, on the day that Frank Kudrow, Jr., son of Council member Kudrow and a student of Council member Green, presented on whether an upcoming parade should include the Central Perk chapter of GLAD, the meeting began with an invocation by a New Life minister. R. at 5. New Life Church is staunchly anti-homosexual. *See* Bob Clanton, *Concerning the Supreme Court Decision*, New Life Community Church (July 3, 2015) <https://www.newlifesite.com/concerning-the-supreme-court-decision/> ("In a day when marriage is an increasing rarity among heterosexual couples, now the gay crowd is fighting for it. The people who SHOULD be getting married won't do it, while the people who SHOULDN'T be getting marriage are up in arms about gaining the ability to do so.")

Analysis of Central Perk Town Council's prayer practice against the historical backdrop of legislative prayer throughout American history also serves to show that the Council's prayer practice runs afoul of the Establishment Clause. As many cases discuss, opening a legislative session with prayer is a historical tradition that goes back to the founding of our country. But religion, used as a tool of control and persecution, is what sparked the pilgrimage that began our nation and shaped our country's ethos. The fear of coercion is not so much fear that someone in a

specific moment will feel forced to bow his head for a prayer. The fear of coercion is more serious than that, because it is the fear that a citizen will feel that he must participate in a religious tradition in order to maintain the "privileges and immunities" that he is entitled to. Consideration of that historical backdrop renders a prayer practice that is divisive and alienates citizens based on religion at odds with the Establishment Clause.

The above discussion of the setting, intended audience, and historical context of the Council's prayer practice clearly illustrates that the practice is coercive of all in attendance and is thus unconstitutional.

d. Even if the prayer practice is not directly coercive of the adults in question, it is indirectly coercive and thus still unconstitutional

Even if the practice of establishing a religious ideology within the city council is not coercive, Establishment Clause doctrine does not require a finding of direct coerciveness in order to find a practice unconstitutional. *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963). "When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Id.* (quoting *Engel v. Vitale*, 370 U.S. 421). In other words, coerciveness is inherent in the practice of government established or sponsored religion. In the case of the Central Perk Town Council's prayer practice, the prestige of government is placed behind theistic religious systems.

IV. The Central Perk Town Council's prayer policy and practices are especially unconstitutionally coercive of the students in attendance

a. School prayer analysis, rather than legislative prayer analysis, is the proper analytic framework for this factual scenario

While legislative prayer has been ruled constitutional, the analytic framework for legislative prayer does not apply in the context of school children being proselytized to in an

educational setting. Because the prayer giver in question is a public school teacher, the recipients of the prayer are school children, and the purpose of their gathering is for the children to have an educational experience and receive academic credit, the proper analysis for whether or not the teacher's actions are proper is a prayer in school analysis.

Legislative prayer analysis only applies in a specific factual scenario. When a prayer is being offered during a legislative session, to an intended audience of adults, the legislative prayer analytic framework applies. When analyzing coercion from the perspective of the adults present at the Central Perk Town Council meeting, the legislative prayer analytic framework applies.

The factual scenario looks entirely different from the perspective of the students who attended the Council meeting though. The students' teacher, in this case, offered the prayer. The students are present at the bequest of their teacher, and are offered academic credit for their participation. The purpose of their presence is to make a presentation and to learn about the civic process. In those regards, the factual scenario in this case much more closely resembles a school than the meeting of a legislative body.

The proper analysis for this scenario thus is more akin to the factual scenario in *Lee v. Weisman*, 505 U.S. 577 (1992) (where the Supreme Court analyzed a prayer practice at a middle school graduation), and *Freedom From Religion Foundation v. Chino Valley Unified School District Board of Education*, 869 F.3d 1132 (9th Cir. 2018) (where the Ninth Circuit analyzed a prayer practice at a school board meeting), than to the factual scenario in *Town of Greece* (where the Supreme Court analyzed a prayer practice at a town council meeting.) (134 S. Ct. 1811).

It does not ameliorate the issue that the educational experience is taking place outside of the four walls of a classroom. The teacher does not escape the proscription against prayer in school simply by relocating her classroom to a city council meeting. The same risks that are

created when prayer is performed within the walls of classroom still exist when all of the same players and power dynamics are still present, just merely in a different physical location.

Nor does it ameliorate the issue that participation in the legislative meeting is for extra credit rather than mandatory class credit. An extra credit opportunity that most all students participate in ceases to be optional in the way that, say, a field trip to the zoo would be. Something does not have to be actually compulsory to be functionally compulsory. In *Lee v. Weisman*, the Court held that a practice of prayer before a middle school graduation ceremony was unconstitutionally coercive because graduation ceremonies, while voluntary in a "legal sense," are "in a fair and real sense obligatory." 505 U.S. at 586. Similarly, in *Indian River*, the Court held that a practice of prayer before a school board meeting was unconstitutionally coercive in part because students were often present to receive awards, and those students would be forced to forgo receiving an award if they wished to abstain from attending a meeting that is opened with prayer. 653 F.3d 256.

It stands to reason that if a middle school graduation ceremony (which is in no way tied to academic credit and carries none of the gravitas of a high school or college graduation ceremony) and an awards ceremony at a school board meeting (which is also in no way tied to receiving academic credit) are considered functionally compulsory, an educational opportunity that provides academic credit to students is also "in a fair and real sense obligatory."

Additionally, the students have no meaningful alternative that would allow them to both participate in the school activity and not be subjected to the coercive prayer practice. One of the main arguments in support of legislative prayer being not coercive is that it is the prerogative of adults to leave the space where a prayer was taking place if they did not wish to be subjected to it. In this case, the students could not leave the meeting if they felt coerced or offended because

they were scheduled to make a presentation to the Council. Leaving would have potentially affected their grades if they did not make it back in time to begin their presentation or Green thought they did not plan to return and had the meeting carry on without them. Additionally, electing to not participate in the council meeting at all would render the extra credit opportunity unavailable to the student. It heightens the risk that the practice will cause divisiveness when "[a] student [has] no real alternative which would have allowed her to avoid the fact or appearance of participation. *Lee*, 505 U.S. at 588.

b. Children are much more susceptible to coercion than adults

The argument against legislative prayer being non-coercive is that a "mature adult" would not feel coerced into participation in a prayer or religious belief system simply by nature of the prayer occurring in his presence. A "mature adult" would feel free to leave the room or sit quietly while the prayer was performed. "Neither choice represents an unconstitutional imposition as to *mature adults*, who “presumably” are “not readily susceptible to religious indoctrination or peer pressure.” *Town of Greece*, 134 S. Ct. at 1827 (quoting *Marsh*, 463 U.S. at 792) (emphasis added.)

Such a rationale clearly does not preclude a finding of coerciveness when children are involved. All of the protective features of being an adult that make legislative prayer not unconstitutionally coercive are not present for children. Children are not mature. They will not necessarily feel free to leave a room if they feel uncomfortable. And, most importantly, they *are* "readily susceptible to religious indoctrination and peer pressure." *Indian River*, 653 F.3d at 275 (quoting *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) ("Students in [elementary and secondary schools] are impressionable The State exerts great authority and coercive power . . . because of . . . the children's susceptibility to peer pressure.")) In *Lee*, the Court held

that the practice of opening prayer at a public high school graduation violated the Establishment Clause because it was unconstitutionally coercive. The Court reasoned, "Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention." 505 U.S. at 593.

The Supreme Court has recognized in other areas that children are psychologically vulnerable to being labeled as "other" or "outcast" or "inferior." In *Brown v. Board of Education*, the court's rationale for its finding that separate but equal is unconstitutional was, "to separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." 347 U.S. 483, 494 (1954). Creating a dynamic in which a particular religious doctrine may be perceived as the religion of the majority or the religion of the governing class could create the same effect, making the children feel inferior within the community if they do not adhere to the same religious belief system.

In *J.D.B. v. North Carolina*, the Supreme Court held that the age of a child is a relevant factor to consider in performing a *Miranda v. Arizona* custody analysis, because, "It is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave." 564 U.S. 261, 264-65 (2011). The Court reasoned that "children 'generally are less mature and responsible than adults,'" *Id.* at 272 (citing *Eddings v. Oklahoma*, 455 U.S. 104 (1982)). Additionally, "they 'often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.'" *J.D.B.*, 564 at 272 (citing *Bellotti v. Baird*, 443 U.S. 622 (1979)). And, the Court said, children "'are more vulnerable or susceptible to . . . outside pressures' than adults." *J.D.B.*, 564 at 272 (citing *Roper*

v. Simmons, 543 U.S. 551 (1982).

In other words, all of the protective factors of maturity, free will, and independence that adults have are simply not present in children. They are much more susceptible to influence, pressure, and coercion, and do not have the life experience to help them decide how to react in a situation where they are uncomfortable with a religious practice being performed in front of them. The internal analysis that an adult would perform in that moment, weighing the cost of leaving the council meeting against the cost of hearing a religious message that he does not believe in, is beyond the cognitive ability of a child who might find himself in the same situation.

Council's prayer practice is unconstitutionally coercive of all in attendance, and is especially coercive of the students who attend and present at the Council's monthly meetings.

CONCLUSION

For the foregoing reasons, the Court ought to find that the practices and policy surrounding legislative prayer in Central Perk violate the Establishment Clause of the First Amendment of the United States Constitution and should therefore overturn the decision of the Court of Appeals for the Thirteenth Circuit.

Respectfully submitted,

/s/ Team C
Team C

Attorneys for Petitioner

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