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.

APPEAL ON WRIT OF CERTIORARI FROM THE COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT

BRIEF OF RESPONDENT

Team E

QUESTIONS PRESENTED

1. Whether Central Perk Town Council's legislative prayer policies and practices constitutional when they are delivered for the benefit of the council members themselves, are more inclusive of other religions than precedential cases, and are not denigrating or proselytizing the audience.

2. Whether the legislative prayer policy of Central Perk Township is unconstitutionally coercive when the prayers are intended for the benefit of the council members, and the audience, consisting primarily of adults, are present voluntarily.

TABLE OF CONTENTS

TABLE OF CONTENTS – CONTINUED

TABLE OF AUTHORITIES

Cases

OPINIONS BELOW

The opinion of the court of appeals (No. 17- 143) is reported on page 13 of the record.

The opinion of the district court (Civ. Action No. 16-cv-347) is reported on page 1 of the record.

STATEMENT OF JURISDICTION

This Court has jurisdiction of the appeal pursuant to 28 U.S.C. § 1291.

CONSTITUTIONAL PROVISIONS, TREATISES, STATUTES, ORDINANCES, AND REGULATIONS

Constitutional Provisions

U.S. Const. amend. I

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.

STATEMENT OF FACTS

The facts are not in dispute. Central Perk Township is a rural town, with a population of 12,645, located in Old York. R. at 1. Central Perk Township is governed by a council ("Central Perk Town Council"), consisting of seven members, that is elected biennially. R. at 1. The Central Perk Town Council holds monthly meetings in order to dress issues of local concern. R. at 1. In September 2014, the Central Perk Town Council adopted a policy that permitted prayer invocations before the commencement of business at each meeting. R. at 2. When this policy was enacted, the councilmembers were the Chairman, Joey Tribbiani (Mr. Tribbiani), Councilwoman Rachel Green (Ms. Green), Councilwoman Monica Geller-Bing (Ms. Geller-Bing), Councilman Chandler Bing (Mr. Bing), Councilman Gunther Geffroy (Mr. Geffroy), Councilwoman Janice Hosenstein (Ms. Hosenstein), and Councilwoman Carol Willick (Ms. Willick).

The prayer policy and practice that the councilmembers adopted contains the following preamble:

> 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.

R. at 2.

The policy contains a method for how invocations or prayers will be given. In order to determine who gets to give the invocation or prayer, the council members are randomly selected at each meeting by picking the name from an envelope. R. at 2. The selected council member is able to give the prayer or invocation themselves or to select a minister from the community to offer the invocation. R. at 2. Further, the Council may not review or provide any input into the outside

minister's invocation. R. at 2. However, if a council member chooses not to give an invocation then he or she has the option of omitting. R. at 2. Since October 2014 through July 2016, only two council members, Ms. Green and Ms. Willick, chose to give the invocations themselves. If the council member does omit the invocation, they will proceed to reciting the Pledge of Allegiance, which has been a standing tradition for the past sixty-two years. R. at 2. While the council member or a minister gives an invocation, or the Pledge of Allegiance is read, the citizens who are in attendance are requested to stand for both. R. at 2.

The invocations that have been given thus far are diverse and include, Church of Jesus Christ of Latter Day Saints, Islam, Baha'i, and New Life Community Chapel. R. at 3. All of the prayers include a variety of different themes such as religious and civic values. R. at 3. Some of the invocations included Ms. Green, a member of the Baha'i faith, leading an invocation herself where she acknowledged Buddha's wisdom and asked that the council meeting would be conducted in harmony and peace. R. at 3.

In November 2017, Ms. Green, who is also a teacher at the local high school, requested that her students have the opportunity to make brief presentations at council meetings. R. at 4. The Central Perk Town Council unanimously agreed that it would be a worthwhile endeavor to encourage civic engagement in the community's youth. R. at 4. Ms. Green did not require her students to participate in these meetings, but she instead used this opportunity as one of three options for her students to earn extra credit. R. at 4. The students who volunteered for this opportunity made brief presentations endorsing or opposing measures currently under consideration by the Central Perk Town Council. R. at 4. Although these presentations raised two students' grades, it did not have an effect on the other ten students' grades that also made presentations. R. at 4.

On July 2, 2016, Plaintiff Ross Geller filed a complaint alleging that an invocation given before a council meeting violated the Establishment Clause because it is a coercive endorsement of religion. R. at 5. Additionally, Plaintiffs Burke, Kudrow and Buffay, filed a separate lawsuit on August, 30, 2016, alleging that the Council's legislative prayer policy violated the Establishment Clause because it was both coercive and the invocations constituted an "official sanction" of the views expresses in the invocations or prayers. R. at 5. Further, all Plaintiffs sought injunctive and declaratory relief. R. at 5. The United States District Court for the Eastern District of Old York heard the motion for summary judgment and granted in favor of the Plaintiffs. However, the United States Court of Appeal for the Thirteenth Circuit reversed the District Court and ruled in favor of the Central Perk Town Council. Following the decision of the Court of Appeals, Plaintiffs have now appealed and petitioned this honorable Court for relief.

SUMMARY OF THE ARGUMENT

The legislative prayer policy in this case is constitutional, as it comports with this Courts prior holdings on the issue of potential Establishment Clause violations. The leading cases for legislative prayer cases, *Town of Greece v. Galloway* and *Marsh v. Chambers*, both establish that legislative prayer does not violate the Establishment Clause because it is a historically recognized practice, done for the benefit of the legislators themselves. *Marsh v. Chambers*, 463 U.S. 783 (1983); *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014). Further, this Court also stated that any test that conflicts with an established historical practice, specifically legislative prayer, the test does not apply. *Town of Greece v. Galloway*, 134 S. Ct. 1811. As such, the "lemon test" which is used to determine whether laws violate the Establishment Clause, cannot apply in this case. The lemon test does not account for historical practices, and this Court, as

well as the vast majority of circuit courts, never apply the lemon test to cases of legislative prayer.

The legislative prayer policy in this case, which allows for the prayers to be invoked by either chosen clergymen or the council members themselves, is constitutional because both of those options have established historical precedence. Furthermore, neither the clergymen chosen in this case nor the council members used their invocations to denigrate or preach conversion on the audience, and as such, abided by the restrictions this Court stated in *Town of Greece*. *Id.*

Furthermore, the prayers were not unconstitutionally coercive on the audience, as the majority of the audience was comprised of adults, and the high-school age children in attendance were there voluntarily. Due to the voluntary nature of attending the legislative session, and the fact that the audience was primarily adult, the legislative prayers were not unconstitutionally coercive. Further, in regards to the children exclusively, because their attendance was purely voluntary, and because no denigrating or proselytizing language was used, unconstitutional coercion did not exist as to them either.

Since the legislative prayer policy comports with this Court's past holdings, does not denigrate or proselytize the audience, and does not exhibit unconstitutional coercion, this Court should uphold the decision of the Court of Appeals, and find in favor of the Central Perk Township.

ARGUMENT

I. CENTRAL PERK'S LEGISLATIVE PRAYER POLICY IS CONSTITUTIONAL, AND THEREFORE, THE DECISION OF THE COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT SHOULD BE UPHELD.

Central Perk's legislative prayer policy is constitutional because it follows the precedents this Court has set in *Marsh v. Chambers* and *Town of Greece v. Galloway.* *Marsh v. Chambers*, 463 U.S. 783 (1983); *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014). Both of those cases discussed the constitutionality of legislative prayer, and held that because of the historical precedent of legislatures invoking "Divine guidance" before a legislative session, it cannot be said that it was the intent of the drafters to preclude such prayers. *Marsh v. Chambers*, 463 U.S. 783, 792.

Furthermore, this Court has found that where there does exist a historical precedent of legislative prayer, that barring some manner of proselytizing, those prayers are constitutional. *Town of Greece v. Galloway*, 134 S. Ct. 1811. As there was no attempt at proselytizing in this case, the Central Perk legislative prayer policy must be seen to comport with this Court's established acceptable practices, and be found constitutional. While almost all of the prayers in this case were theistic in nature, this Court has similarly found that such a fact does not invalidate a legislative prayer policy. *Id.* As such, the legislative prayer policy in this case should be found to be constitutional, and this Court should uphold the ruling of the Court of Appeals.

Furthermore, while this Court has used the "lemon test" in the past to determine whether the Establishment Clause has been violated, that test does not apply here. *Lemon v Kurtzman*, 403 US 602 (1971). The lemon test is not applicable because this Court held in

Town of Greece that "if there is any inconsistency between any of those tests and the historic practice of legislative prayer, the inconsistency calls into question the validity of the test, not the historic practice." *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1834. Since the historic practice of legislative prayer is well established, the lemon test cannot apply, as per this Court's holding in *Town of Greece.*

A. Central Perk's Legislative Prayer Policy Is Constitutional Because This Court Has Already Ruled That Legislative Prayers Offered By Religious Leaders Are Constitutionally Permissible.

The legislative prayer policy of Central Perk is not unconstitutional because legislative prayer is acceptable under the Establishment Clause. Although the legislative prayers in this case were delivered by clergy selected by Central Perk's council members, the prayer policy is still constitutionally sound.

This Court has dealt with the issue of legislative prayer as delivered by clergymen selected by the legislators, and found that such a policy is permissible. *Marsh v. Chambers*, 463 U.S. 783 (1983); *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014). In *Marsh*, the prayers were given for almost twenty years by a single paid chaplain, which this Court found to be permissible. 463 U.S. at 783. In reaching this determination, this Court looked to the history of the Establishment Clause, and the purpose for which legislative prayer exists. This Court pointed out that even the founders of the Constitution used a paid chaplain to deliver invocations at the start of legislative sessions, and that it could not be seen to be a violation of the Establishment Clause to have paid chaplains deliver invocations when the drafters of the Establishment Clause did just that. *Id*. at 788. This Court further emphasized this

decision in *County of Allegheny v. ACLU*, where it said that "the meaning of the [Establishment] Clause is to be determined by reference to historical practices and understandings." *County of Allegheny v. ACLU*, 492 U.S. 573, 670 (1989). Legislative prayer has long been established to be a historical practice, one that this Court has time and again accepted as valid under the Establishment Clause. *Marsh v. Chambers*, 463 U.S. 783 (1983); *County of Allegheny v. ACLU*, 492 U.S. 573, 670 (1989); *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014). Further, this Court in *Town of Greece* again reaffirmed the constitutionality of clergymen being used to deliver invocations before legislative sessions, when it held that the town's policy of selecting clergymen from the local religious institutions was constitutional, and comported with the historical tradition of legislatures invoking "Divine guidance" before legislative sessions. *Town of Greece v. Galloway,* 134 S. Ct. 1811; *Marsh v. Chambers*, 463 U.S. 783, 792. This is analogous to the case at bar, where the council members of Central Perk select clergymen from their community to deliver invocations before their meetings. R. at 2. Since the facts of this case so closely resemble those of the *Town of Greece* case, in that the Central Perk council members selected clergymen from their own community, this case should be held in the same regard as *Town of Greece*, and this Court should find that such a policy is not unconstitutional.

Moreover, the legislative prayer policy in this case is more inclusive than the ones seen in *Marsh* and *Town of Greece*, and therefore is constitutional. Here, the selection for the clergymen is done in a semi-random basis, wherein the council members choose from a hat to determine which council member is in charge of the invocation that month, and then that council member may choose to invite a religious leader from the community. R. at 2. In *Marsh*, the legislators elected a single chaplain to provide their invocations for over sixteen

years, which this Court found to be acceptable. 463 U.S. at 783. In *Town of Greece,* the legislators selected religious leaders from the community and invited them to provide the invocations, which this Court found was constitutional, even when the invited speakers were primarily of a single faith, Christianity. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1824. Here however, the Central Perk Council members take turns inviting religious leaders from various religious communities. R. at 2. Over the two year course of Central Perk's invoking Divine guidance, as permitted by this Court in *Marsh* and *Town of* Greece, there have been both Evangelist and Mormon speakers. R. at 2-3. While both of these are subsects of Christianity, this still falls within acceptable practice, as it still follows this Court's precedent in *Town of Greece,* and more inclusive than the use of a single chaplain in *Marsh*. Since this Court found that the selection process in *Marsh* was acceptable, even where it lacked inclusivity, the selection process in this case must be seen to be constitutional as well.

Furthermore, the manner in which the religious leaders are chosen in this case is akin to the selection process in *Town of Greece.* In *Town of Greece*, the legislators called local religious leaders to ask if they would be interested in speaking, and those that could spare time to do so, and voiced their willingness to do so moving forward, were allowed to speak before the sessions, and were invited to return in the future. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1816. In this case, the clergymen for any given month were selected by the council member who was chosen to be in charge of the invocation process for the month. R. at 2. Although council members Hosenstein, Tribbiani, Bing, and Geller-Bing chose a speaker from their own religious denominations, those speakers' continued participation in the legislative prayers is fundamentally the same as the continued participation by the speakers in *Town of Greece*. (R. 2-3). The willingness of the speakers in this case to

continue providing legislative prayers, and the willingness of the speakers in the *Town of Greece* case to do the same is no different. As this Court held that such a policy of inviting willing speakers back is not unconstitutional in that case, it should not be so in this case. *Town of Greece v. Galloway*, 134 S. Ct. 1811. While the selected religious leaders are from the council members' own religious denominations, the prayer policy is still constitutional because the invocations are for the benefit of the council members themselves, and are thus government speech. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1825; *Turner v. City Council of Fredericksburg*, 534 F.3d 352, 354 (4th Cir. 2008). See also *Simpson v Chesterfield County Bd. of Supervisors*, 404 F3d 276 (4th Cir 2005) (holding that legislative prayer given for the benefit of the legislature itself is permissible); *Wynne v. Town of Great Falls*, 376 F.3d 292 (4th Cir 2004). As such, as the 4th Circuit repeatedly stated, because the prayers are government speech, the council members may dictate the content of the speech, subject to the limitations set in the *Marsh* and *Town of Greece* cases.

The legislative prayers given by the clergymen in this case do not violate the limitations set in *Marsh* or *Town of Greece,* and therefore are constitutionally protected. In *Marsh*, and then reiterated again in the *Town of Greece* case, this Court prescribed limitations on what may be said in the invocations, specifically that the legislative prayers cannot be proselytizing in nature. *Marsh v. Chambers*, 463 U.S. 783, 794; *Greece v. Galloway*, 134 S. Ct. 1811, 1814-15. In this case, no such proselytizing occurred, and as such, the prayer policy is constitutional. While one pastor from the New Life Church asked that none in attendance commit grievous sin, this does not rise to the level of proselytizing. R. at 2. While to some this may seem to alienate non-believers, this Court has already ruled that that alone does not make such a prayer unconstitutionally proselytizing, but rather stated:

> Yet even seemingly general references to God or the Father might alienate nonbelievers or polytheists. *McCreary County v. American Civil Liberties Union of Ky.*, 545 U.S. 844, 893, 125 S. Ct. 2722, 162 L. Ed. 2d 729 (2005) (Scalia, J., dissenting). Because it is unlikely that prayer will be inclusive beyond dispute, it would be unwise to adopt what respondents think is the next-best option: permitting those religious words, and only those words, that are acceptable to the majority, even if they will exclude some. Torcaso v. *Watkins*, 367 U.S. 488, 495, 81 S. Ct. 1680, 6 L. Ed. 2d 982 (1961). The First Amendment is not a majority rule, and government may not seek to define permissible categories of religious speech. Once it invites prayer into the public sphere, government must permit a prayer giver to address his or her own God or gods as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian.

Town of Greece v. Galloway, 134 S. Ct. 1811, 1822-23. While asking for the salvation of all people present may seems to be proselytizing to some onlookers, such is merely a general prayer, akin to that which this Court found to be permissible in the past. *Id.* Specifically, in *Marsh*, this Court pointed out that "God save the United States and this Honorable Court" is a typical prayer used even before all proceedings in this very Court. *Marsh v. Chambers*, 463 U.S. 783, 786. The mere asking for general salvation, even where there is a reference to sin, cannot be seen to rise so far beyond the already accepted prayers of salvation that this Court has decided on already.

This Court has already deemed legislative prayer by religious leaders to be constitutional, and that such prayers are subject to the control of the legislators themselves, so long as the prayers do not attempt to convert members of the audience. The legislative prayer policy follows in the footsteps and the precedent of *Town of Greece,* and does not violate the limitations set therein. As such, this Court should find that there exists no Establishment Clause violation in the legislative prayer policy of Central Perk.

B. Central Perk's Legislative Prayer Policy is Constitutional Because Legislator-Led Prayers Are Equally Protected Under The Same Rationale This Court Ruled Allows For Clergy-Led Prayers.

As is the case with the speaker being a selected religious leader, it is constitutional for the legislative prayers to be given directly by the council members. In *Lund v. Rowan Cty*., the court examined whether legislative prayers given by the legislators themselves were constitutionally permissible. *Lund v. Rowan Cty*., N.C., 863 F.3d 268 (4th Cir. 2017). Although the court held that the legislator-led prayers in that case were unconstitutional, they acknowledged that their decision was based on factors other than that the prayers were offered by the legislators, stating that "the Establishment Clause indeed allows lawmakers to deliver invocations in appropriate circumstances. Legislator-led prayer is not inherently unconstitutional." *Id.* at 279-80.

Further, the court noted that legislator-led prayer is not uncommon, and that a survey of state legislatures revealed that the vast majority of states allow legislators to deliver invocations on occasion. *Id*. at 279. As stated previously, this Court has held that legislative prayer policies, and Establishment Clause questions arising from such policies must be viewed through the lens of historical precedence. *Marsh v. Chambers*, 463 U.S. 783. More specifically, this court stated that "the Establishment Clause must be interpreted 'by reference to historical practices and understandings.'" *Town of Greece v. Galloway,* 134 S. Ct. 1811, 1819, citing *County of Allegheny v. ACLU*, 492 U.S., at 670. As noted in *Lund*, there exists a long standing tradition of legislatures to allow the legislators themselves to deliver invocations. *Lund v. Rowan Cty*., N.C., 863 F.3d 268, 279. These invocations must still comport with the limitations discussed in *Town of Greece* and *Marsh*, but otherwise

must still be seen to be constitutional for lack of violations to those prescribed limits. Those limits, as described above, are that the legislative prayers given by the legislators may not be proselytizing in nature, which in this case, they are not. *Marsh v. Chambers*, 463 U.S. 783, 794; *Greece v. Galloway*, 134 S. Ct. 1811, 1814-15. The legislative prayers here do not denigrate or belittle other faiths, or ask the audience to convert to any given religion. As such, the prayers given by the council members cannot be seen to be proselytizing.

This legislative prayers delivered by the Central Perk council members are constitutional because they, unlike the prayers deemed to be unconstitutional in *Lund*, were not proselytizing in nature. Specifically, the court in that case found that the legislative prayer policy in Rowan County was unconstitutional because the legislators not only drafted and gave pointedly sectarian invocations, but did so extolling only a single religion, refused to allow any other speakers of differing faiths, and proselytized and denigrated members of other faiths and those holding no faith. *Id.* at 284-85. In this case however, the council members did no such thing.

Firstly, the council members, as indicated previously, were chosen at random to be in charge of the invocations. R. at 2. More often than not, the invocations were given by a chosen religious leader, which as discussed above, was permissible under this Court's past rulings, with only five instances of the council members giving an invocation themselves. R. at 2-3. This already differs from the *Lund* case where the legislators did not permit outside speakers. *Lund v. Rowan Cty*., N.C., 863 F.3d 268. Further, in this case, while the opportunity for a council member to present an invocation themselves arises every month, the council members actively choose to allow outside speakers, while council member Green

opted to omit any invocation on two occasions, rather than deliver an invocation herself. R. at 2.

Secondly, the invocations given by the council members did not extoll one religion, and moreover, were not all theistic in nature. Rather, while the invocations given by the selected religious leaders tended to follow Christianity, or some subsects of Christianity, the invocations given by council member Willick were Muslim prayers, while the invocations given by council member Green were prayers to the Buddha. R. at 2-3. While the invocations given by council member Willick were theistic, praying to Allah, those given by Green were not. As Buddhism is not a theistic religion, in that it does not worship any deity, it cannot be said that all of the prayers given by the council as a whole, or by the council members delivering the invocations themselves, extolled any one religion, or even that they were all theistic in nature. As such, the prayers in this case fall far short of the unconstitutional practices seen in *Lund*. Furthermore, Green's use of Buddhist prayers further exemplifies Central Perk's commitment to inclusivity, as Green is not herself Buddhist, but chose to deliver a non-theistic Buddhist invocation nonetheless. R. at 3.

Lastly, while the prayers delivered by the legislators in *Lund* proselytized the community, and included language meant to convert non-believers. *Lund v. Rowan Cty*., N.C., 863 F.3d 268, 285. This manner of "preach[ing] conversion" is, as this Court held in *Town of Greece*, impermissible. However, such conversionary tactics were not made by the council members in this case, as none of the invocations given by council members Willick or Green preached any sort of conversion or denigrated any other faith. As such, the legislative prayers given by Central Perk's council members should not be seen to be unconstitutional, as it does not fall

into any of the same pitfalls that rendered Rowan County's legislative prayers unconstitutional.

C. Central Perk's Legislative Prayer Policy Is Constitutional Because This Court Has Already Ruled That Purely Theistic Invocations Do Not Inherently Give Rise To Establishment Clause Violations.

This Court in *Marsh v. Chambers* and *Town of Greece v. Galloway* ruled that legislative prayers that are exclusively sectarian, and that exclusively or predominantly represent a single ideology are constitutional. *Marsh v. Chambers*, 463 U.S. 783; *Town of Greece v. Galloway*, 134 S. Ct. 1811. In *Marsh*, the invocations given were done by a single paid chaplain who delivered substantially the same invocation over the course of his then sixteen year tenure. 463 U.S., at 783. Despite his invocations being purely Christian in nature, and his extensive tenure as the chaplain giving the invocations in that case, this Court found that the Establishment Clause was not violated. *Id.* Further, in *Town of Greece*, while there were multiple religious leaders invited from the community to deliver the invocations before the legislative session, they were primarily Christian speakers. 134 S. Ct., at 1811. Yet, this Court found again that legislative prayers that are primarily representative of a single faith do not automatically give rise to an Establishment Clause violation. *Id.* This Court further went on to state that "[t]he quest to promote 'a 'diversity' of religious views' would require the town 'to make wholly inappropriate judgments about the number of religions [it] should sponsor and the relative frequency with which it should sponsor each.'" *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1824, *citing Lee v. Weisman*, 505 U.S. 577, 617.

The legislative prayers in this case exceeded the inclusivity of *Marsh* or *Town of Greece*, as prayers were given to represent not only the Christian faith, but Muslim and Buddhist prayers as

well. R. at 2-3. While the Muslim and Christian prayers are theistic in nature, the idea that wholly theistic prayers give rise to an Establishment Clause issue does not follow this Courts past decisions. This Court found that prayers that extolled even just Christianity were constitutional so long as it passed muster under the historical analysis and did not proselytize the audience. *Marsh v. Chambers*, 463 U.S. 783; *Town of Greece v. Galloway*, 134 S. Ct. 1811. As discussed above, the legislative prayer policy in this case is constitutional under those analyses, and the mere fact that the prayers in this case were primarily theistic does not detract from that.

Furthermore, while the prayers in this case were predominately theistic, they were not exclusively so, and therefore the Appellant's argument that the exclusively theistic nature of the prayers renders them unconstitutional is without merit. While it is uncontested that the Mormon, Evangelist, and Muslim prayers represent theistic ideologies, those were not the only prayers given. R. at 2-3. Council member Green, a practitioner of the Baha'i faith provided Buddhist prayers on two occasions. R. at 3. Buddhism, while still a religious dogma, is not theistic in that it does not recognize any "one true god." Theism is itself defined as the "belief in the existence of one God viewed as the creative source of the human race and the world who transcends yet is immanent in the world." *Theism,* Merriam-Webster (2018). As such, to say that the prayers were exclusively theistic is a misrepresentation of the facts, and therefore, the Appellant's argument on this issue is not valid. However, even assuming *arguendo*, that the Buddhist prayers could be considered theistic, as stated above, this Court has already decided that theism in and of itself cannot create a constitutional question.

Due to this Court's past decisions, whether or not the prayers given were exclusive, predominantly, or partly theistic makes no difference in the constitutional analysis because this Court held that such prayers were constitutional. *Marsh v. Chambers*, 463 U.S. 783; *Town of*

Greece v. Galloway, 134 S. Ct. 1811. As the legislative prayers in this case, whether presented by the religious leaders or by the council members themselves, follow the precedents and limitations set by this court in *Marsh v. Chambers* and *Town of Greece v. Galloway*, the legislative prayer policy must be seen as constitutional.

II. THE CENTRAL PERK TOWN COUNCIL'S PRAYER POLICY AND PRACTICE ARE NOT UNCONSTITUTIONALLY COERCIVE OF ALL CITIZENS IN ATTENDANCE BECAUSE THE CEREMONIAL INVOCATIONS ARE WITHIN THE LEGISLATIVE PRAYER EXCEPTION, AND THEREFORE DO NOT VIOLATE THE ESTABLISHMENT CLAUSE.

The Central Perk Town Council's prayer policy and practice does not violate the Establishment Clause because it is not coercive of the citizens or high school students that are in attendance. Despite several invocations implying the supremacy of sectarian dogma, the prayers did not exclude or deny non-adherents from omitting during the invocation. The test to determine if legislative prayer is coercive is fact-intensive and requires courts to consider both the setting in which the prayer arises and the audience to whom it is directed. According to this Court's jurisprudence in *Marsh* and *Town of Greece,* the policy has embraced the tradition of legislative prayers and has not been coercive of the attendees. Further, the high school students, who attended these meetings, were not coerced when their teacher gave an invocation because she was acting in her capacity as a councilwoman, not a teacher. This Court's jurisprudence involving prayer in school are not applicable in this case because legislative meetings are not student-centered venues. Therefore, the Central Perk Town Council's prayer policy and practice does not violate the Establishment Clause of the First Amendment.

A. The Central Perk Town Council's nondiscriminatory prayer policy and practice are not coercive of the town's citizens because it does not reflect a pattern of proselytization, nor denigrate other faiths.

The Central Perk Town Council's prayer policy and practice is in accord with historical practices and understandings. The policy to randomly choose council members to lead in the invocation ensured that there would be diversity in the invocations. Additionally, the attendees were not required to participate and non-adherents were never marginalized. Under this Court's recent precedent in *Town of Greece*, this prayer policy is constitutional because there is no coercive effect on the attendees.

This Court has reviewed the extensive history regarding the practice of legislative prayer in *Marsh v. Chambers* and found that it is constitutional because it has been a traditional procedure since colonial times. 103 S. Ct. 3330, 3334 (1983). This case was a challenge to a legislature in Nebraska that employed a chaplain to open each legislative session with a prayer. This Court held that, "…there can be no doubt that the practice of opening legislative sessions with prayer has become part of our society." *Id.* at 3337. Further, this Court held that invoking Divine guidance on a legislative body is not an establishment of religion or even a step towards establishment. *Id.* This Court did not find any evidence that the legislative prayer had been used to advance or disparage any faith. *Id.* at 3338. In this case, the prayers were only in the Judeo-Christian tradition and a Presbyterian clergyman had been selected for sixteen years. *Id.* at 3337. Despite the lack of diversity, the Court held that it could not "… perceive any suggestion that choosing a clergyman of one denomination advances the beliefs of a particular church." *Id.*

In 2014 this Court made a landmark decision in the case, *Town of Greece v. Galloway,* which established a new test used to analyze legislative prayer practices. This case was a challenge

to a town's informal policy for prayer givers to lead the monthly meetings with an invocation. 134 S. Ct. 1811, 1816 (2014). The prayer was given following a roll call and a recitation of the Pledge of Allegiance. *Id.* Although nearly all of the congregations in town were Christian, and therefore, most of the participating ministers were Christian, the leaders maintained that a minister or layperson of any persuasion, religion, or faith, could lead the invocation. *Id.* Accordingly, a Jewish layman, the chairman of the local Baha'i temple, and a Wiccan priestess had delivered invocations. *Id.* at 1817. The town leaders never reviewed the prayers in advance nor exercised any degree of control over the prayers. *Id.* at 1816. The prayers mostly displayed both civic and religious themes. *Id.* The plaintiffs brought suit seeking to limit the town to "inclusive and ecumenical" prayers that referred to a "generic God" instead of one specific faith. *Id.* at 1817.

Furthermore, this Court held that the prayer policy and practice of the town did not violate the Establishment Clause. This Court reaffirmed the decision in *Marsh*, which stated that legislative prayer is constitutional. *Id.* at 1818. Additionally, the Court reaffirmed that formal tests are incompatible with the Establishment Clause and instead must be interpreted "by reference to historical practices and understandings." *Id.* at 1819.

Accordingly, the inquiry of legislative prayers and the potential coercive nature of these prayers is fact-sensitive that "considers both the setting in which the prayer arises and the audience to whom it is directed." *Id.* at 1825. This Court was not persuaded that the legislative prayers compelled its citizens to engaged in religious observance. *Id.* This Court held that the principal audience for these invocations are the lawmakers themselves and not the public because it is for those "who may find that a moment of prayer or quiet reflection sets the mind to a higher purpose and thereby eases the task of governing." *Id.* This Court referred to the holding in *Marsh* that

described the prayers as "internal acts." *Id.* The purpose of these prayers is to accommodate the spiritual needs of lawmakers without denying the right to dissent by any non-adherents. *Id.* at 1826.

This Court acknowledged that the analysis might have diverged if the town board members "directed the public to participate in the prayers, singled out dissidents of opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity." *Id.* However, no such thing occurred in the town of Greece. *Id.* Although there were requests from the guest ministers for the audience to rise, this Court held that this was intended to be inclusive and did not rise to the level of coercion. Additionally, this prayer was given during the ceremonial portion of the town's meeting, and therefore, suggesting its purpose and effect are to "acknowledge religious leaders and the institutions they represent rather than to exclude or coerce nonbelievers." *Id.* at 1827. For those reasons, this Court found that the legislative prayer is constitutional.

Similarly, this Court should affirm the lower court's decision because the Central Perk Town Council's prayer policy and practice is nearly indistinguishable from the town's policy in *Town of Greece.* The record reflects, on page two, that the prayer policy provides a system whereby Council members will be selected at random to give the invocation or prayer. The Council member can either give it themselves, select a minister from the community, or choose to omit any invocation. R. at 2. The record does not provide any evidence that requires any attendees to participate in the prayer nor does it show any denigration of other faiths. Although the invocations of two religious groups made questionable invocations, both did not rise to a pattern of proselytizing and certainly none denigrated other faiths. The prayers being found offensive by the Petitioners is not enough to make legislative prayers unconstitutional because offense does not equate to coercion. 134 S. Ct. at 1827.

Additionally, this prayer is given in the ceremonial portion of the meeting and not during any substantive part of the legislative meeting. R. at 2. This implies that the prayer, and whomever chooses to participate in the prayer, has no effect on any governmental decisions that are to be made during the meeting. Although the attendees are requested to stand during the prayer and the Pledge of Allegiance, this Court held in *Town of Greece*, that requesting attendees to stand does not rise to the level of coercion. *Id.* Further, this Court held in *Town of* Greece and *Marsh* that legislative prayers are not made for the attendees but instead are made for the individual legislative members. Therefore, the prayers are not directed towards the audience. Since there is nothing in the record to suggest that attendance is required for the invocation, the attendees are free to omit and even free to leave while the prayer is being given.

Further, the prayer policy is nondiscriminatory and the control of the Council is irrelevant to this analysis. In both *Marsh* and *Town of Greece*, the prayers that were given were predominantly of the Christian religion, however, the practice in which the clergy were chosen was nondiscriminatory. Similarly, in this case, the Central Perk Town Council has a random method in which every councilmember has the ability to be chosen to select the invocation. R. at 2. Although it is only the Council members who may choose who leads the prayer or gives an invocation at all, the legislature in *Marsh* was in control of choosing the chaplain to lead the prayer, which was found by this Court to be constitutional.

Throughout our county's history there has been prayer before legislative meetings, which holds true to this day. The Central Perk Town Council has instituted a nondiscriminatory system to include religion in its town meetings ceremonially. When considering the setting in which the prayer arises and the audience to whom it is directed, the policy is not coercive. The prayer practice

and policy are aligned with the First Amendment jurisprudence from *Marsh* and *Town of Greece,* and therefore, it is constitutional.

B. The award of extra credit for those students who voluntarily make presentations at Town Council meetings, does not render the policy and practice coercive because these meetings are not student-centered venues and Ms. Green is not acting in the capacity of a teacher.

Since the Central Perk Town Council's meetings are purely legislative and do not take place in a school environment, this case must be analyzed under the legislative prayer exception stated in *Town of Greece*. Although there are students present for these invocations, the mere presence of students does not render this to be a school prayer case, and therefore the legislative exception applies. The ceremonial prayers and invocations that are given at these legislative meetings are not given directly to the audience, let alone the few students who are in attendance. Additionally, Ms. Green is acting in her capacity as a councilwoman when she gives an invocation, not as a teacher. The Central Perk Town Council's prayer policy and practice are not coercive of the students in attendance because of the setting in which the prayer arises and the audience to whom it is directed.

This Court has previously ruled on a number of cases that involve prayer at school events. This Court held in *Engel v. Vitale*, that a public school system may not encourage recitation of the Regents' prayer. 82 S. Ct. 126, 1263 (1962). In this case, this Court held that it is a violation of the Establishment Clause for the school to require a prayer to be said aloud by each class at the beginning of each school day. *Id.* Further, in *Lee v. Weisman*, this court held that it is unconstitutional for a school to invite members of the clergy to give an invocation during a formal graduation ceremony. 112 S. Ct. 2649, 2652 (1992). This Court was particularly concerned with the potential for divisiveness in this situation because of the overt religious exercise in a secondary

school environment. *Id.* at 2656. This Court held that "subtle coercive pressures exist and where the student had no real alternative which would have allowed her to avoid the fact or appearance of participation." *Id.* This Court specifically distinguished a public school system and a session of a state legislature, citing that there were "inherent differences" such as the atmosphere at the opening session of a legislature and a school graduation. *Id.* at 2660.

Similar to *Lee*, this Court also ruled in *Santa Fe Indep. Sch. Dist. v. Doe,* that student led prayers before a high school football game violates the Establishment Clause. 120 S. Ct. 2266 (2000). Further, the student who led the prayer was chosen by the students at the school, this Court held that this "mechanism encourages divisiveness along religious lines in a public school setting, a result at odds with the Establishment Clause." *Id.* at 2280. This Court held that students are susceptible to peer pressure towards conformity and these high school games are traditional gatherings of a school community. *Id.* at 2283.

However, the courts have distinguished between prayer in a school setting compared to prayer in a legislative meeting. *See Marsh,* 103 S. Ct. at 3330 (holding that legislative prayer has become a fabric of our society and not a step towards an establishment of religion.); *Town of Greece*, 134 S. Ct. at. 1811 (holding legislative prayer to be constitutional by considering both the setting in which the prayer arises and the audience to whom it is directed); *Turner v. Cty. Council,* 543 F.3d 352, 356 (4th Cir. 2008) (holding that legislative prayers do not have to be sectarian because the Establishment Clause does not absolutely dictate the form of legislative prayer).

Moreover, the courts that have decided cases involving prayers at school board meetings by using a fact-sensitive inquiry to determine if the policies should be considered school prayers or legislative prayers. *Freedom from Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ.*, 896 F.3d 1132, 1143 (9th Cir. 2018) (examining the audience and the timing of the

prayers); *Doe v. Indian River Sch. Dist.,* 653 F.3d 256, 275 (3d Cir. 2011) (examining the environment in which the prayers are delivered); *Coles v. Cleveland Bd. Of Educ.,* 171 F.3d 369, 371 (6th Cir. 1999) (examining the subject matter of the school board meetings).

However, the mere presence of students at a legislative or school board meeting does not transform the setting into a school environment, and therefore, it is not a school-prayer case. *Am. Humanist Ass'n v. McCarty*, 851 F.3d 521, 526 (5th Cir. 2017). A fifth circuit case, *Am. Humanist Ass'n v. McCarty*, involved a local school board practice that invited students to deliver an invocation or a student-led prayer before the meeting began. The court held that this did not violate the Establishment Clause because this practice was comparative to a legislative prayer rather than a school prayer. *Id.* The court held that the duties of a school board are "undeniably legislative." *Id.* The court stated that there was nothing in the record that suggested the attendees cannot omit or leave during the prayer, and the request that the audience stand is not coercive. *Id.* Further, the court addressed the presence of students at the meeting by acknowledging the significance but nonetheless, it "does not transform [the case] into a school-prayer case." *Id.* at 528. The court notes that children were present at the town board meetings in *Town of Greece,* but this Court still applied the legislative-prayer exception. *Id.* Additionally, like the prayers in *Town of Greece*, the prayers in *Am. Humanist Ass'n* are also delivered in the ceremonial portion of the meeting, and therefore the policy did not violate the Establishment Clause.

Moreover, students being present at the meetings do not transform the Central Perk Town Council's prayer policy and practice into a school prayer *Am. Humanist Ass'n,* 851 S. Ct. at 526; *Town of Greece*, 134 S. Ct. at. 1811. Unlike the prayer practices and policies in *Engel*, *Lee*, and *Santa Fe Indep. Sch. Dist.*, the prayers in the Central Perk Town Council's meetings occur outside of any, seemingly mandatory, school event and provide students with alternative ways to earn extra

credit. Unlike a school board, the Central Perk Town Council's meetings are wholly legislative and does not discuss subjects that involve the need of student participation, and consequently the prayers are certainly not directed at the students. Furthermore, the Central Perk Town Council's meetings do not take place in a school environment, and therefore this Court should refer to the legislative prayer exception outlined in *Marsh* and *Town of Greece.*

In order to determine that a legislative prayer is not coercive the Court must analyze the setting in which the prayer arises and the audience to whom it is directed. The prayer policy is ceremonial because it is made in the beginning of the meeting before any governmental business is discussed among the councilmembers. R. at 2. Additionally, these meetings are to address issues of local concern, and not anything specifically concerning students that would make their presence mandatory. R. at 1.

The addition of student presentations at the meetings has not changed the way the prayers and invocations are given. Despite the fact that Ms. Green on two occasions has given invocations herself, this is in her capacity as a councilwoman and not as the students' teacher. Therefore, when Ms. Green is leading an invocation it is not coercive because she is not acting in roll that would have authority over a student's grade. The record is absent of any evidence that indicates Ms. Green was ever reflecting a pattern of proselytization or denigrating other faiths.

Further, the council unanimously agreed that the students volunteering to make these presentations encourages civic engagement in the community, which is a worthwhile endeavor. R. 4. Ms. Green encourages her entire class to be involved in the political process and gives three options for them to earn extra credit by getting involved. R. 4. Alternatives do exist for students who do not wish to attend these meetings. The students can volunteer on a political campaign, write a letter to an elected representative, or make a five-minute presentation endorsing or

opposing measures being considered by the Council. R. 4. Although two of Ms. Green's students' grades were positively affected by the extra five points earned by making a presentation, there was no impact on the other ten other students' grades who had participated. R. 4.

While Ms. Green encourages participation, it is not required for students to do so. In *Lee* and *Santa Fe Indep. Sch. Dist*., this Court considered the fact that a graduation and school football game were essentially mandatory because of popularity and peer pressure. However, in this case, only three students from the class are allowed to present at each monthly Council meeting. The minimal number of the students that attended these meetings were there voluntarily and the popularity of a town council meeting is distinguishable from a graduation or football game. Additionally, the students were never required to participate in the ceremonial invocation that is given, nor was any other attendee required to do so.

Children were present at the meetings in *Marsh, Town of Greece* and *Am. Humanist Ass'n.,* and still it did not change the legislative prayer analysis. Consequently, it should not change this Court's analysis in this case. The Central Perk Town Council's policy is ceremonial and occurs at a purely legislative meeting. There is no evidence in the record to suggest that students were forced to participate in the invocations or prayers. The prayer arose in a non-educational setting and does not reflect a pattern of proselytization, and therefore it was not coercive of the students who were present.

CONCLUSION

For the foregoing reasons, Appellee respectfully requests this Court uphold the decision of the Court of Appeals for the Thirteenth Circuit, and find that the legislative prayer policy of Central Perk Township is constitutional.

Respectfully submitted,

Team E

Counsel for Appellee

9/13/2018