No. 18-1308

IN THE SUPREME COURT OF THE UNITED STATES

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

Petitioner,

v.

CENTRAL PERK TOWNSHIP,

Respondent.

On Writ of Certiorari
To The United States Court of Appeals for the Thirteenth Circuit

BRIEF OF RESPONDENT

TEAM F
Counsel for Respondent

QUESTIONS PRESENTED

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

II. Are the Central Perk Town Council's prayer policy and practices unconstitutionally coercive of
   a. All citizens in attendance when several invocations included language implying the supremacy of sectarian dogma, or
   b. High school students who were awarded academic credit for presenting at meetings where their teacher also was a Council member who gave an invocation?

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The opinion of the District Court for the Eastern District of Old York granted the Petitioner's Motions for Summary Judgement and denied the Respondent's motion for Summary Judgement. R. at 10. The opinion of the United States Court of Appeals for the Thirteenth Circuit reversed the United States District Court for the Eastern District of Old York's opinion. R. at 19.

STATEMENT OF JURISDICTION

The Court of Appeals for the Thirteenth Circuit filed its opinion on January 21, 2018. The Petitioner timely filed a petition for Writ of Certiorari to the Court of Appeals for the Thirteenth Circuit, which this Court granted on August 1, 2018. R. at 20. The jurisdiction of this Court rests in 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

I. Constitutional Provisions

In relevant part, the First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…". U.S. Const. Amend. IV.

II. Statutory Provisions

In relevant part, 28 U.S.C. § 1257(a) provides: "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution . . . of the United States."

STATEMENT OF THE CASE

I. Background Facts

Central Perk Township is a town in Old York, governed by a Town Council (Council) consisting of seven members, elected biennially. R. at 1. The Council holds monthly meetings to address issues of local concern. *Id*. The following individuals were Council Members at the time these actions arose: 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.* Tribbiani was Chairman of the Council. *Id.*

In September of 2014, a policy to allow prayer invocations at the beginning of each meeting was adopted which states in relevant part:

> 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. According to the policy, Council members are randomly selected to give the invocation. *Id*. When a Council member is selected, he or she may choose to do one of the following: (1) offer the invocation personally, (2) select a minister from the community to offer the invocation, or (3) omit the invocation. *Id*. If the selected Council member selects a minister from the community, he or she cannot review or provide input towards the minister's choice of invocation. *Id.* If the selected Council member chooses to omit the invocation, he or she then proceeds directly to the Pledge of Allegiance. *Id*. At the beginning of each meeting, whether there is just the Pledge of Allegiance or an invocation and the Pledge, the Council member opening the meeting invites the audience to stand for both. R. at 2.

The policy is implemented in the following manner: All the names of the Council members are written on slips of paper and placed into an envelope. *Id*. At each meeting, Chairman Tribbiani chooses a name from the envelope and the selected member must give the invocation and lead the Pledge of Allegiance at the following meeting. *Id*. If the selected Council member selects a minister from the community to give the invocation, the member first leads the recitation of the Pledge of Allegiance, then introduces the minister to give the invocation. *Id*. Council member Geffroy requested that his name never be selected. *Id*.

From October 2014 through July 2016, Council members Green and Willick were the only members who chose to personally give the invocations. *Id*. Council member Bing's name was drawn four times, and Council member Geller-Bing's name was drawn five times. *Id*. Both are members of the Church of Jesus Christ of Latter Day Saints, and each time their names were drawn both chose their Branch President, David Minsk, to give the invocation. R. at 2-3. Five of the times President Minsk delivered the invocation, he 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 here and that all will submit to Christ's reign." R. at 3.

On three occasions, President Minsk prayed that none in attendance would reject Jesus Christ or commit grievous sins against the Heavenly Father, so that none would be sent away from the fullness of God's light in the Telestial Kingdom. *Id*. On one occasion, President Minsk prayed: "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.

Council member Green, a member of the Baha'i faith, had her name drawn four times. *Id*. She declined twice, but prayed to Buddha on the other two occasions. *Id*. In her prayers, she acknowledged Buddha's infinite wisdom and asked that the meeting would be conducted in peace and harmony. *Id*. Council member Willick is a member of the Muslim faith, and her name was drawn three times. *Id*. Each time she prayed, "As salamu aleiykum wa rahmatullahi wa barakatuh," which translates "Peace and mercy and blessings of Allah be upon you." *Id*.

Council members Hosenstein and Tribbiani each had their names drawn twice, and both belong to the Christian church New Life Community Chapel (New Life). *Id*. Each time their names were drawn, Hosenstein and Tribbiani both asked New Life Pastors to give the invocation. *Id*. The pastors' prayers ended with the phrase, "in the name of our Lord and Savior, Jesus Christ," and typically asked for divine guidance for the Council members. *Id*. Sometimes the prayer included other requests, such as requests for salvation for all those "who do not yet know Jesus," for "blinders to be removed from the eyes of those who deny God," and for "every Central Perk citizen's knee to bend before King Jesus." *Id*.

Council member Green was elected to the Council in November of 2014, and is also a teacher at Central Perk High School. R. at 4. Green teaches two classes, including a seminar in American Government for high school seniors. *Id*. The seminar is not required, but it is very popular due to Green's reputation as an excellent teacher. *Id*. In addition to regular coursework, Green encourages her students to engage in the political process as much as possible but does not require it. *Id*. As part of this encouragement, she offers five extra credit points on the final to students who volunteer for a political candidate of their choice for a minimum of fifteen hours during an election campaign. R. at 4. If there is no ongoing election campaign, Green offers the

same amount of points to students who write a three-page letter to their elected representative that details the student's position on a current political issue. *Id*.

After Green was elected to the Council, and at her request, the Council adopted a policy to allow Green's American Government students to make five-minute presentations endorsing or opposing measures currently under consideration by the Council. *Id*. Students who made the presentations were given five extra credit points towards class participation, not their final grade. *Id*. Class participation constituted ten percent of their final grade in the class. *Id*. In the first academic year that Green was both a member of the Council and a teacher, 2014-2015, twelve of her students earned the five extra participation points by giving presentations in Council meetings. *Id*. The points did allow one student to raise her grade from a B- to a B, and another student to raise his grade from a B+ to an A-. *Id*. However, the points earned by the other ten students did not raise their final grade in Green's class. *Id.*

In the next academic year, 2015-2016, four of Green's thirteen students who chose to give presentations to the Council were the sons or daughters of the individual Petitioners. R. at 4. During the Council meeting on October 6, 2015, Petitioner Geller's son, Ben Geller, gave a presentation to the Council. *Id*. At the meeting, Green's gave the invocation and prayed to Buddha, acknowledging his "infinite wisdom." R. at 4-5. Petitioner Geller, a member of New Life, was in attendance at the meeting and became upset that his son's teacher prayed to "a fake God, and made a mockery of the purpose of legislative prayer." R. at 5.

The other three Petitioners, Dr. Burke, Lisa Kudrow, and Phoebe Buffay (hereinafter "atheist Petitioners") are all atheists and members of the Central Perk Freethinkers Society. *Id*. During the November 4, 2015 Council meeting Dr. Burke's son, Timothy, gave a presentation. R. at 5. At the meeting President Minsk prayed that none would reject the Father. *Id*. During the

February 5, 2016 Council meeting, Buffay's daughter gave a presentation and President Minsk prayed to restore New Jerusalem. *Id*. Finally, during the May 8, 2016 Council meeting, Kudrow's son, Frank Jr., gave a presentation and a New Life pastor gave the invocation. *Id.*

II. Procedural History

On July 2, 2016, Petitioner Geller filed a complaint alleging that Green's invocation was a coercive endorsement of religion and thereby violating the Establishment Clause. R. at 5. He alleged that Green's role as a teacher required her to refrain from either coercing students in her American Government class to attend Council meetings, or publicly endorsing the Baha'i religion in her invocation. *Id.* Additionally, Petitioner Geller alleged that his son felt forced to pray to a Baha'i divinity against his conscience. *Id*.

On August 30, 2016, Atheist Petitioners filed a separate lawsuit alleging that the Council members' practice of personally giving the invocations or choosing their own personal ministers to give the invocations constituted "official sanction" of the religious views expressed in the invocations, thereby violating the Establishment Clause. *Id*. Atheist Petitioners also alleged that the Council members had exclusive control over the invocations, and that the control resulted in discrimination against non-theistic faiths. R. at 5-6. Furthermore, atheist Petitioners alleged the prayers were both coercive of citizens and children. *Id.* Atheist Petitioners argued that many of the prayers given were either proselytizing or denigrating to other faiths and non-faith. *Id*. Atheist Petitioners also argued that Green required the children's attendance as part of her class curriculum. R. at 6. All Petitioners sought injunctive and declaratory relief, and consented to the District Court's consolidation of their respective claims for oral argument on the parties' cross-motions for summary judgement. *Id*.

The opinion of the District Court granted the Petitioner's Motions for Summary Judgement and denied the Respondent's motion for Summary Judgement. R. at 10. The opinion of the Court of Appeals reversed the opinion of the District Court. R. at 19. The Petitioner timely filed a petition for Writ of Certiorari to the Court of Appeals, which this Court granted on August 1, 2018. R. at 20.

SUMMARY OF THE ARGUMENT

I. Constitutionality of Council's Legislative Prayer Issue

Legislative prayer is "…deeply embedded in the history and tradition of this country." *Marsh v. Chambers*, 463 U.S. 783, 786 (1983). As recognized by this Court, the purpose of legislative prayer is "to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens." *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1818 (2014). While it is generally constitutional, this Court has found some limitations on legislative prayer under the Establishment Clause. *Id.* at 1823; *Marsh*, 463 U.S. at 794-95.

In order for legislative prayer to align with what would have been accepted by the Framers, this Court created limitations, including: (1) the prayer must be at the beginning of legislative sessions, before policy making begins and (2) the town must maintain a policy of nondiscrimination, but is not required to search beyond its borders for diverse theological groups. *Id*. at 1823-24. These limitations are, however, subject to the overall theme of the Establishment Clause which allows for a town to implement prayer policy as long as there is a general practice of non-discrimination among theologies. *Id.*

However, four Justices in the dissent of *Town of Greece*, led by Justice Kagan, believe the Endorsement Test should be utilized to examine legislative prayer. This practice asks whether a reasonable observer of the prayer policy could rationally determine the town endorses one theology

over another. *Modrovich v. Allegheny Cty.*, 385 F.3d 397, 401 (3rd Cir. 2004). Even under the Endorsement Test, the Council's policy does not violate the Establishment Clause.

While Central Perk's prayer policy is conducted well within the restraints set by this Court's most recent decision on legislative prayer in *Town of Greece*, there is a recent Circuit split that provides other analysis. The Sixth Circuit in *Bormuth* neatly followed the analysis provided in *Town of Greece*, while noting the endorsement test and other forms of analysis should not be used if they render a result that would outlaw a practice accepted by the Framers. *Bormuth v. Cty. of Jackson,* 870 F.3d 494, 503 (6th Cir. 2017). On the other hand, the Fourth Circuit in *Lund,* touted that this Court's holdings in *Marsh* and *Town of Greece*, "did not direct a particular result," and therefore required a fact sensitive analysis of the legislative prayer at issue. *Lund v. Rowan Cty., N.C.*, 863 F.3d 268, 276 (4th Cir. 2017).

Following the fact sensitive analysis of the Fourth Circuit still leads to the conclusion that the Council's prayer policy is protected by the Establishment Clause. Additionally, the theistic nature of the Council's prayers does not violate the Establishment Clause. In *Town of Greece* and *Marsh*, this Court held the town's exclusively theistic prayer was constitutional. Likewise, even exclusively theistic prayers given by the Council are constitutional.

II. Coercion of Citizens and Students Issue

This Court has also stated that the prayers cannot be coercive, which is determined through a "fact-sensitive" inquiry that considers the setting in which the prayer is given, and the audience to whom it is directed. *Town of Greece*, 134 S. Ct. at 1825. Part of the audience inquiry includes whether the audience is comprised of adults or children. Regarding adults, this Court said they "'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). The same presumption applies to the

adult citizens at the Council's meetings. The inquiry can also include consideration of the content of prayers. *Id*. at 1814. However, the courts can only look at the content of the prayers to determine if there is a pattern of proselytization, denigration of faiths, or directs citizens to participate in the prayers. *Id*.

Applying the first part of the "fact-sensitive" inquiry, the setting and audience of the prayer, to the adult citizens present at the meetings demonstrates that the Council's prayers were delivered in the appropriate setting and to the appropriate audience. The second part of the inquiry, the content of the prayers, applied to the adult citizens present at the meetings demonstrates that there is no pattern of proselytization, denigration of other faiths, or directing citizens to participate in the prayers. Therefore, the Council's prayer policies and practices are not coercive of the adult citizens present at the meetings.

The Council's prayer practices and policies are also not coercive of the students present at the meetings. There are "heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." *Lee v. Weismen*, 505 U.S. 577, 592 (1992). But, this Court also distinguished legislative prayer case law from school prayer case law through its choice to forego the use of conventional tests under the Establishment Clause in *Marsh* and *Town of Greece*, and the use of those tests in each school prayer case. *Am. Humanist Ass'n v. McCarty*, 851 F.3d 521, 526; *See Santa Fe Independent School District v. Doe*, 530 U.S. 290, (2000); *Lee*, 505 U.S. 577; *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

This Court, as well as every other court, has yet to address the issue of whether legislative prayer is coercive to high school students attending the meeting for extra credit. The closest analogous case law is that which has dealt with whether the legislative prayer exception applies to school board meetings. This case law is instructive because it has dealt with the presence of

students, both voluntarily and by school requirement, at school board meetings. The Third, Fifth, and Sixth Circuits are the only courts to address whether invocations at school board meetings fall under legislative prayer case law. *Coles ex rel. Coles v. Cleveland Board of Education*, 171 F.3d 369, 383 (6th Cir. 1999); *Doe v. Indian River School District*, 653 F.3d 256 (3d Cir. 2011); *Am. Humanist Ass'n*, 851 F.3d 521.

The Third and Sixth Circuits have held that invocations at school board meetings are governed by school prayer case law, and the Fifth Circuit has held that invocations at school board meetings are governed by legislative prayer case law. The Fifth Circuit's 2017 decision is the most recent decision of the three circuits, and is the only one decided after this Court's ruling in *Town of Greece*. Therefore, the Fifth Circuit's case provides the most guidance. Applying the Fifth Circuit's decision to the students present at the Council's meetings, it is demonstrated that the Council's prayer practices and policies are not coercive of the students. Each student attended voluntarily, was not required by course work to attend or even enroll in the class, and the Council's prayers were given in the appropriate setting and directed towards the appropriate audience.

ARGUMENT

I. THE COUNCIL'S PRAYER POLICY IS CONSTITUTIONAL, REGARDLESS OF THE THEISTIC DIVERSITY OF THE INVOCATIONS OR WHO CONDUCTS THE PRAYERS.

The United States Constitution protects Central Perk Town Council's prayer policy. The town's prayer policy allows council members, or appointed clergy members, to pray before monthly Town Council meetings. The town has successfully carried out this practice without endorsing any religion or religions. The practice of opening legislative sessions with a prayer is not exclusive to Central Perk, but "has become part of the fabric of our society." *Marsh*, 463 U.S. at 792. Due to this extensive history supporting legislative prayer stretching back to the founding

of America, "any test the Court adopts must acknowledge a practice that was accepted by the framers and has withstood the critical scrutiny of time and political change." *County of Allegheny*, 492 U.S., at 670.

Even adopting the dissenting opinion of Justice Kagan in *Town of Greece*, and setting aside more than 200 years of historical support for legislative prayer, the purpose and "clearest command of the Establishment clause … that one religious denomination cannot be officially preferred over another," supports the diverse theological prayer that takes place in Central Perk. *Id*. at 604. Some legal scholars believe history and tradition should not be used to support government prayer, and instead courts should use the Endorsement Test. *Id*. at 615. However, that is in direct contradiction with what this Court has held.

Furthermore, a recent Circuit split has arisen among the Fourth and Sixth Circuit, disputing whether legislator led prayer follows the history and tradition of legislative prayer as conducted by the Framers. *Bormuth*, 870 F.3d at 519; *Lund*, 863 F.3d at 276. While, the Council's legislators do, occasionally, conduct the Council's opening invocations, the Council also invites citizens outside the Council to conduct them. Central Perk's practice therefore, aligns with both Circuit's rulings on the constitutionality of legislative prayer. Additionally, the Council's prayer practices and policies are not exclusively theistic. However, even if this Court finds they are exclusively theistic they still comport with the Establishment Clause.

A. The History and Tradition of Opening Legislative Sessions with Prayer Validates the Council's Prayer Policy.

The Central Perk Town Council's practice of opening meetings with prayer is supported by our Nation's history, which dates back to the Founding Fathers. While history does not create an unlimited right to pray before legislative sessions, Central Perk's prayer policy conforms to the few limitations this Court has put in place to regulate this practice. *County of Alleghany*, 492 U.S.

at 603. In order for legislative prayer to comport with the First Amendment, the prayer practice and policy of the Council must comport with our Nation's history and reflect the Founding Fathers' purpose for constructing the Establishment Clause. *School Dist. of Abington Township v. Schempp,* 374 U.S. 203, 294 (1963) (Brennan, J., concurring). However, "history cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed,". *County of Alleghany,* 492 U.S at 603. This Court has adopted the following two limitations on legislative prayer: (1) the prayer must be at the beginning of legislative sessions, before policy making begins and (2) the town must maintain a policy of nondiscrimination, but is not required to search beyond its borders for diverse theological groups. *Town of Greece*, 134 S. Ct. at 1823-24. These limitations are, however, constrained by the central premise and notion that as long there is a general practice of non-discrimination among faiths there is no Establishment Clause violation. *Id*.

While legislative prayer is religious in nature, it "has long been understood as compatible with the Establishment Clause." *Town of Greece*, 134 S. Ct. at 1813. In *Town of Greece*, the defendants were a town board that chose to open its monthly meetings first with a recitation of the Pledge of Allegiance, and then a local clergy member would pray for the meeting's attendees, board members, and the town. *Town of Greece*, 134 S. Ct. at 1813. The town selected clergy members by opening the local directory and, in alphabetical order, inviting each minister to pray until one accepted the invitation. *Id*. Though this selection process gave equal opportunity to each theological community, and never denied any group an opportunity to pray at the meetings, the prayers given from 1999 to 2007 were exclusively Christian. *Id*. at 1816. Prayers typically included blessings on the community, and requests that the Lord would one day welcome the community into His kingdom. *Id*. They would close with a devotion to Jesus, followed by the word 'Amen.' *Id*.

Prayers also cited the Christian Lord as the "God of all creation," utilized scripture from the Bible, and acknowledged Jesus as having suffered and died for the people of this world. *Id*. The Plaintiffs requested an injunction that would limit the town to "'inclusive and ecumenical' prayers that referred only to a 'generic god' and would not associate the government with any one faith or belief." *Id*. at 1817. In analyzing the constitutionality of this legislative prayer practice, this Court first noted that the practice must be interpreted in light of our Nation's history. *Id*. Within this historical analysis, this Court noted that the First Congress, only a few days after writing the Establishment Clause, began the practice of legislative prayer, thereby showing support for the practice. *Id*. at 1819. This Court also noted that this issue of legislative prayer practice was re-evaluated by the Congressional Judiciary Committees in the 1850s, and the committee determined that the Establishment Clause was not violated because no faith was favored nor any excluded in their prayers. *Id*. Examples of legislative prayer were also cited with a timeline ranging from the early 1900s to the present day, showing continual National support for this practice. *Town of Greece*, 134 S. Ct. at 1819.

After outlining the long-standing history and tradition of legislative prayer policy in our Country's many legislatures, this Court conducted an inquiry to determine whether the specific practice of the Town of Greece matched the tradition long followed by American legislators. *Town of Greece*, 134 S. Ct. at 1819. This Court determined the prayer conformed with two constraints, including: (1) the prayer must be at the beginning of legislative sessions, before policy making begins, and (2) the town must maintain a policy of nondiscrimination, but is not required to search beyond its borders for diverse theological groups. *Id*. at 1823-24. This Court disagreed with "the contention that legislative prayer must be generic or nonsectarian" and that the town's prayers needed to be theologically or theistically diverse. *Id*. at 1821.

The Town of Greece only conducted legislative prayer during the opening of the town's meetings and before any legislative or policy-based decisions were made. *Town of Greece*, 134 S. Ct. at 1816. Additionally, the town maintained a policy of non-discrimination by inviting Jewish layman and the chairman of the local Baha'i temple to pray, and allowing a Wiccan priestess to give an invocation. Because the prayers were conducted before the meetings and did not discriminate, this Court concluded that the prayer policy of the Town of Greece did not violate the Establishment Clause. *Town of Greece*, 134 S. Ct. at 1816.

Like the town board in *Town of Greece*, the Council's prayer policy was conducted at the beginning of the meetings. Additionally, the Council's prayer policy not only "adheres to the clearest command of the Establishment Clause, that "one religion cannot be officially preferred over another," it acts as a prime example of how a city government should display its acceptance of all faiths through a policy of non-discrimination. R. at 7; *Larson v. Valente*, 456 U.S. 228, 244 (1982). This Court accepted the Town of Greece City Council's prayer practice as one that accepts all faiths merely because they welcomed all faiths to provide prayer, even though the prayers were nearly exclusively Christian. *Town of Greece*, 134 S. Ct. at 1816. Likewise, the Council actually welcoming a theologically diverse group of community members to conduct the invocation demonstrates a policy of non-discrimination. R. at 7.

1. The Council's Prayer Practices and Policies Are Constitutional Even Under the Dissent's Endorsement Test.

The Central Park Town Council prayer policy does not violate the Endorsement Test. The Endorsement Test is defined and suggested for use to determine the constitutionality of legislative prayer in *County of Allegheny*, and by the four dissenting Justices in the *Town of Greece*. *County of Allegheny*, 492 U.S. 573; *Town of Greece*, 134 S. Ct at 1821. The Endorsement test asks, "whether a reasonable observer familiar with the history and context of the display would perceive

the display as a governmental endorsement of religion." *Allegheny Cty.*, 385 F.3d at 401. Furthermore, dictum in *County of Alleghany*, suggests that in order for legislative prayer to exist without equating to a government endorsement of religion, the prayer must contain "no overtly Christian references." *Town of Greece*, 134 S. Ct at 1814.

While the history of the United states contains many examples of government actors endorsing religion, the endorsement test is meant to prevent such endorsement from taking root in the Establishment Clause. *County of Allegheny*, 492 U.S. at 604. In *County of Allegheny,* two holiday displays were placed on public property in Pittsburgh. *County of Allegheny*, 492 S. Ct. at 3089. A Roman Catholic group donated a display located on the Grand Staircase of the Allegheny County Courthouse, and outside of the City-County Building there was an 18-foot Chanukah menorah and a 45-foot decorated Christmas Tree. *County of Allegheny*, 492 S. Ct. at 3090. A local chapter of the American Civil Liberties Union (ACLU) and several of its members filed a lawsuit against Allegheny County to enjoin them from displaying these Holiday creches.

The Court analyzed the display of these Holiday Creches using *Marsh* and its guidance on analyzing whether a government endorses religion through legislative prayer. *County of Allegheny*, 492 U.S. at 603. The court notes that the history and tradition test cannot simply create broad sweeping rules legitimizing all practices that took place 200 years ago and instead we must determine whether the government is endorsing religion through its actions. *Id*. The Holiday displays in this case were specifically religious references presented on government property and maintained by government officials. While the dissent in this case believe even the display of these Christian symbols is constitutional, the majority notes that the dissent should be able "to distinguish between a specifically Christian symbol, like a creche, and more general religious references, like the legislative prayers in Marsh." *Id*. The court also emphasizes the fact that the

symbols displayed are all related to one GOD and may discriminate against non-Christians, due to the fact that the main premise of the establishment clause is that it does not prefer one religion over another. *Id. at 605*. And the court determined that the display of multiple symbols of different theologies could not be perceived by a reasonable observer as an endorsement or disapproval of his individual religious choices." *County of Allegheny*, 492 U.S. at 575.

The court in *County of* Allegheny, also decided to reach further than the endorsement test in its decision and created Dicta that notes the legislative prayer in *Marsh,* was only deemed constitutional due to the fact that the Chaplin who performed the invocations "'removed all references to Christ.'' *Id*. at 603. The Supreme Court in *Town of Greece* clarified this statement saying, "Dictum in *County of Allegheny* suggesting that Marsh permitted only prayer with no overtly Christian references is irreconcilable with the facts, holding, and reasoning of *Marsh.*" *Town of Greece*, 134 S. Ct at 1814. Ultimately, while the dissent of *Town of Greece* suggests the use of the Endorsement test, Justice Kennedy, writing for the majority, warns that "to hold that invocations must be nonsectarian would force the legislature that sponsor prayer s and the courts that are asked to decide these cases to act as supervisors and censors of religious speech, a rule that would involve government in religious matters to a far greater degree than is the case under the town's current practice of neither editing or approving prayer in advance nor criticizing their content after the fact." *Id*. at 1822. As long as there has been no prayer opportunity denied or pattern of faith exploited to proselytize or disparage other faiths, there has been no unconstitutional endorsement of a single faith over another. *Id*. at 1814.

Just as the Court in *County of Allegheny* ruled that a display of multiple theologies could not be confused with an endorsement of one faith, the theologically diverse prayer practice of Central Park's City Council cannot be confused with an endorsement of any faith. The Central

Park prayer policy allows for theistic, non-theistic, and theologically diverse prayer and multiple Christian denominations, a diversity of theological beliefs, and theistic abstentions from prayer have all been present in the town's short history of legislative prayer. A reasonable observer of the Central Park City Council's prayer policy, familiar with the history and context of legislative prayer would *not* perceive the display as a governmental endorsement of religion. *Allegheny Cty.*, at 401. Just a look at the complaints alleged against Central Perk would lead a reasonable observer to decide there is no display of governmental endorsement of religion. Lawsuits were brought by Christians offended by Buddhist invocations, Atheists offended by Christian prayer, and other community members offended by Baha'i divinity. R. at 5-6. A reasonable observer of Central Perk's prayer policy shows the town endorses both theological and theistic diversity in invocations held before legislative sessions.

B. Legislative Prayer Remains Constitutional Even When Led by Legislators.

While this Court has doubly confirmed the practice of legislative prayer, it has done so with what the Fourth Circuit considers a lack of definition, which has caused a recent circuit split on this issue. *Lund*, 863 F.3d at 276. In *Lund*, the Fourth Circuit concluded that the "historical principles articulated by [this] Court do not direct a particular result," so the court must, instead of following this Court's case precedent, conduct a fact-sensitive review of the prayer practice at issue. *Id*. This led the Fourth Circuit to the unique result of holding a legislative prayer practice in Rowan County, North Carolina was unconstitutional because the County's legislators were exclusively in charge of conducting the council's prayer. *Id*.

The Sixth Circuit also ruled on a legislative prayer policy following this Court's ruling in the *Town of Greece*, but came to a conclusion more closely resembling this Court's decision in *Town of Greece*. In *Bormuth*, the Sixth Circuit determined that the County of Jackson's prayer

policy was aligned with our Nation's history and traditions, and did not display a pattern of proselytization or disparagement towards other faiths, regardless of who conducted the prayer, legislators or visiting community members. *Bormuth*, 870 F.3d at 519. Below we will analyze this circuit split in detail and distinguish Central Perk's prayer practice from those of the legislatures in Rowan County and the County of Jackson, while providing support for this Court's precedent that even legislator led prayer is constitutional.

In *Bormuth*, the Sixth Circuit ruled that the Jackson County Board's practice of opening its monthly meetings with prayer did, not violate the Establishment Clause. *Id*. at 269. The monthly prayers were conducted solely by the commissioners and recorded online for others to see. *Bormuth*, 849 F.3d at 269. The commissioners offered invocations on a rotating basis, taking turns sharing short prayers before legislative sessions. *Id*. at 494. At one meeting, when there was no audience of constituents, no prayer was given. *Id*. at 284. When the Plaintiff attempted to speak about the solely Christian devotions before each meeting, commissioners made faces "expressing disgust," and one even turned his chair around refusing to look at the Plaintiff. *Id*. at 499. Yet in the face of this exclusively sectarian, solely Christian prayer practice, the Fourth Circuit ruled it was supported by our Country's history and traditions. *Id*. at 519.

The court began its analysis by noting that "we are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 434 U.S. 306, 313 (1952). The court also prefaced their decision with the fact that all three branches of our government officially acknowledge religion's role in America, that legislative prayer has been consistently present throughout our government's history, and that it "comes as no surprise that [this] Court has twice approved the practice of legislative prayer as consistent with the Framers' understanding the Establishment Clause." *Bormuth*, 870 F.3d at 503 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 674-

78 (1984)). In the analysis of historical precedent, the court found no restriction on who could deliver prayers. *Id*. at 509. The court noted that while *Marsh* focused on the importance of having chaplains pray instead of legislators, *Town of Greece* corrected this thought and specifically said our history and traditions "focus upon 'the prayer opportunity as a whole.'" *Id*. at 509 (quoting *Town of Greece*, 134 S. Ct. at 1819).

In *Bormuth* legislators themselves gave invocations, a practice the court held consistent with the fact that "'all [legislative] bodies, including those with regular chaplains, honor requests from individual legislators either to give the opening prayer or to invite a constituent minister to conduct prayer.'" *Id*. at 510 (quoting Brief of NCSL as Amicus Curiae, *Marsh*, 463 U.S. 783). These facts are parallel to the situation present in Central Perk. Legislators are able to invite community members to conduct invocations, or conduct the invocation themselves, a practice this Court notes is rooted in American history stretching to a time long before its formal founding. *Id*. at 510. Not only is it accepted, its purpose is noteworthy. This Court in *Town of Greece* commends the practice of lawmakers reflecting "upon shared ideals and common ends before they embark on the fractious business of governing." *Town of Greece*, 134 S. Ct. at 1823.

In *Bormuth*, the court also addressed an excerpt of prayer that could be seen as denigrating or disparaging of other faiths. But the court decided it did not reach the level of a "pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose. *Town of Greece*, 134 S. Ct. at 1823-24. If we fragment portions of a few of the Council's prayers, we may find conceivable instances of denigration and possibly elitist views for one deity over another. However, due to the theological and theistic diversity of the prayer practice as a whole, mostly focused on non-theistic words of encouragement, the statements do not reach the level of a pattern of denigration or proselytization. R. at 2-4. The Fourth Circuit used *Marsh* and *Town of*

Greece, the most recent precedent on the issue of legislative prayer, to protect the County of Jackson's prayer practice. Central Perk's prayer practice equally aligns with the Nation's history and tradition of legislative prayer and should receive this Court's similar approval.

The Fourth Circuit ruled that the exclusively legislator led prayer conducted in Rowan County did indeed violate the Establishment Clause. *Lund*, 863 F.3d at 272. Lawmakers on Rowan County's Board of Commissioners, composed of exclusively Christians, rotated the opportunity to conduct prayer before legislative meetings among themselves. *Id*. at 272. Only the commissioners could pray before legislative meetings. *Id*. This wholly Christian prayer practice had been conducted for many years, what the court in a previous hearing of the case determined to be a purposeful elevating of one religion above all others and a public alignment between the government and the Christian faith. *Lund*, 863 F.3d at 272. Many of the prayers specifically touted Christianity as the most superior faith and asked for forgiveness of the community's sins. *Id*. The Fourth Circuit Court interpreted the *Town of Greece,* as having ruled that "'A moment of prayer or quiet reflection sets the mind[s] [of legislators] to a higher purpose and thereby eases the task of governing,'" is constitutional, while acting in such a way as to prefer one religion over another violates the Establishment Clause. *Id*. at 275 (quoting *Town of Greece*, 134 S. Ct. at 1825 (plurality opinion)). Furthermore, the Court explains that the "Framers sought to prevent government from choosing sides on matters of faith and to protect religious minorities from exclusion or punishment at the hands of the state." *Id*. at 275. In determining whether Rowan County's Board of Commissioners met this constitutional standard, the Sixth Circuit conducted a fact-sensitive review of the prayer practice at hand. In that analysis, the court determined that the Commissioners were exploiting or advancing the Christian faith while disparaging minority faiths. *Lund*, 863 F.3d at 275.

The combination of facts leading to an unconstitutional prayer practice in Rowan County does not align with the Council's prayer practice. Most notably, the Council members had the option to conduct an invocation, invite a community member to conduct an invocation, or opt out of conducting any invocations. R. at 2. This option created by the Council's prayer policy is not a charade to thinly veil an exploitation and endorsement of Christianity. Instead it has flourished into monthly community gatherings with member led, theologically diverse invocations that involved many faith groups in the legislature. R. at 2-3. This fact alone meets the *Lund*, rationale that a "'closed-universe' of prayer givers" is not constitutionally permissible, while the diversity present in *Marsh,* and *Town of Greece* is warranted under the Establishment Clause. *Lund*, 863 F.3d at 274. The Council's prayer practice is statistically more diverse than both that present in *Town of Greece* and *Marsh* and does not create the "'closed-universe'" warned of in *Lund. Id.*; R. at 2-3. However, the court warns of intimate government involvement in administering a prayer policy. *Lund*, 863 F.3d at 278. In *Lund* the court notes that when commissioners compose each invocation "according to their personal faiths," the prayer both "identifies the government with religion more strongly than ordinary invocations and heightens the constitutional risk posed by request to participate and by sectarian risks." *Id*.

The court later compares this concept to the practice of the Councils in *Town of Greece* and *Marsh* who collectively select community members to pray, noting that because legislators were not the only eligible prayer givers, the prayer practices are acceptable. *Lund*, 863 F.3d at 278. In Central Perk, Council members do select community members to conduct invocations on their behalf. But no part of the Council's prayer policy suggests that members must choose guests to speak in line with their theological faith. R. at 2-3. In *Lund*, the court is concerned with council members exclusively promoting one faith, but in Central Perk, members have selected a diverse

group of clergy members to participate in their prayer practices. *Lund*, 863 F.3d at 278. Because the concern of a government endorsing a single faith is not present here and the Council's prayer policy does not create a "closed-universe" of commissioner-based prayer, the Council's practice is uniform with the Sixth Circuit's decision in *Lund. Id*. at 274.

C. The Establishment Clause Protects Exclusively Theistic Prayer.

While the first certified question assumes the prayer conducted by the Council is exclusively theistic, the Council's prayer policy is actually not exclusively theistic. The Council's policy provides for the non-theistic option of beginning Council meetings with no invocation, and this option has been utilized by Council members Green and Geffroy. *Id*. Green declined to provide an invocation twice, and Geffroy asked to never be selected to provide an invocation. R. at 2-3.

Those that believe in non-theistic faiths are represented by both the option to forgo any invocation, and the ability to conduct an invocation of non-theistic messages or select a representative to do so on their behalf. This option was not available for the exclusively Christian pre-legislative session prayers in *Town of Greece*, yet this Court found the Town of Greece's prayer policy constitutional, even noting that the government may not require non-theistic prayer or stifle "the most generic references to the sacred." *Town of Greece*, 134 S. Ct. at 1822. As Justice Goldberg noted in his concurrence in *Schempp*, "'untutored devotion to the concept of neutrality' must not lead to 'a brooding and pervasive devotion to the secular.'" *Schempp*, 374 U.S. at 306 (Goldberg, J., concurring).

Additionally, the invocations given at the Council meetings are a diverse mix of many theological themes and, while some extolled Christianity or Buddhism as the true religion, the majority of the invocations requested guidance for Council members and expressed other non-

theistic themes. R. at 2-4. Compared to the prayers given before board meetings in *Town of Greece*, where local clergy members prayed to "place the town board members in a solemn and deliberative frame of mind," and to "invoke divine guidance in town affairs," the predominantly Christian prayer in *Lund*, and the exclusively Christian prayer in *Bormuth*, the Council's option to have no invocation at all represents the non-theistic prayer practice requested by Petitioners. *Town of Greece*, 134 S. Ct. at 1816. The Council's diverse group of members equitably drew from the community's clergy members, and while not required to ensure equal representation of all faiths, did so, respecting each faith's individual ideas and receiving inspiration from many of the invocator's non-theistic themes throughout.

However, even if this Court were to find the prayers exclusively theistic they would still be constitutional. In both *Marsh* and *Town of Greece*, the prayers offered were exclusively theistic. In *Marsh*, the prayers were exclusively given by a Presbyterian minister for sixteen years, and each prayer was exclusively theistic. *Marsh*, 463 U.S. at 785. In *Town of Greece*, the prayers were also exclusively theistic. Each prayer was either Christian, Jewish, Baha'i, or Wiccan, all of which are theistic. *Town of Greece*, 134 S. Ct. at 1816. The exclusively theistic nature of the prayers did not give this Court any constitutional pause. Likewise, the Council's exclusively theistic prayers, excluding the options to not give a prayer, provide no constitutional violation.

II. THE COUNCIL'S PRAYER POLICY IS NOT COERCIVE OF CITIZENS OR STUDENTS.

While legislative prayer is generally constitutional, this Court has found some limitations on it under the Establishment Clause. *Id*. at 1823; *Marsh*, 463 U.S. at 794-95. The prayers cannot be coercive, which is determined through a "fact-sensitive" inquiry. *Town of Greece*, 134 S. Ct. at

1825. As this Court stated, "[i]t is an elemental First Amendment principle that government may not coerce its citizens 'to support or participate in any religion or its exercise.'" *Town of Greece*, 134 S. Ct. at 1825 (quoting *County of Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring in judgment in part and dissenting in part)). The inquiry must analyze the setting in which the prayer is given, and the audience to who it is directed. *Id*. Additionally, legislative invocations that, over time, reflect a pattern of prayers that denigrate, proselytize, or direct citizens to participate in the prayer are considered coercive. *Town of Greece*, 134 S. Ct. at 1824.

A. The Council's Prayer Policies and Practices are not Coercive of Citizens in Attendance.

Though determining whether legislative prayer is coercive is a "fact-sensitive" inquiry of both setting and audience, the inquiry can also include consideration of the content of the prayers. *Town of Greece*, 134 S. Ct. at 1814. However, when analyzing the content, the courts must be careful not to become "supervisors and censors of religious speech." *Id*. at 1822. Thus, the courts can only look at the content of the prayers to determine if there is a pattern of proselytization, denigration of other faiths, or directing citizens to participate in the prayers. *Id*. at 1814. If there is a pattern of one or more of these activities, then the practice is in violation of the Establishment Clause. An additional consideration within the audience inquiry has been whether the audience is comprised of adults or students. *Marsh*, 463 U.S. at 792. Regarding adults, this Court said they "'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). Here, the same presumption applies to the adult citizens present at the Council's meetings.

1. The Setting and Audience of the Prayers is not Coercive.

Turning to the first part of the inquiry, the setting and audience of the prayer, it is clear that the prayer was given in the required setting of legislative prayer. The prayers must be given in the

beginning of the meeting, in order to lend gravity and solemnity to the proceedings, and the tone of the prayers should serve that legitimate purpose. *Id.* at 1823. Additionally, the prayers must share a commonality of respectful themes and tones. *Id*. It is undisputed that the Council's prayers occurred at the beginning of the meetings either directly before or directly after the Pledge of Allegiance. R. at 2.

Additionally, the prayers shared respectful themes and tones. Of the eighteen prayers included in the record, half contained requests for divine guidance and peace and harmony for the meeting. R. at 3. Such themes have been accepted by this Court as a reflection of common ground and universal values among citizens. *Town of Greece*, 134 S. Ct. at 1823-24. The prayers were also directed at the permissible audience. The principle audience of legislative prayer is not the public, but rather the lawmakers. *Id.* at 1825. In addition, the adult citizens present at the meetings are presumed 'not readily susceptible to religious indoctrination or peer pressure.'" *Id*. at 1827 (quoting *Marsh*, 463 U.S. at 792). The Council's written policy explicitly states that the primary beneficiaries of the prayer are the Town Council Members. R. at 2. Therefore, the setting and audience of the prayers are permissible and did not coerce the adult citizens present at the Council's meetings.

2. The Content of the Prayers is Not Coercive.

The content of the Council's prayers also did not result in coercion of the adult citizens present at the Council meetings. As stated above, prayers that show a pattern of proselytization, denigration of other faiths, or directing citizens to participate in the prayers violate the Establishment Clause. The Fourth and Sixth Circuits have agreed that a single prayer that crosses into any one of the impermissible topics is not enough to show a pattern. *Lund*, 863 F.3d at 283; *Bormuth*, 870 F.3d at 512-14. However, the definition of "pattern" has not been addressed by

this Court or the Circuits. The term "pattern" refers to a "frequent or widespread incidence". "Pattern." MERRIAM-WEBSTER ONLINE DICTIONARY (2018), http://www.merriam-webster.com (last visited September 14, 2018).

It must first be determined whether there is a pattern of proselytization in the prayers given by the Council members. Proselytization has been characterized by the Fourth Circuit as urging others to embrace the faith of the individual praying. *Lund*, 863 F.3d at 285. Under this standard, Petitioners have failed to present evidence of a frequent or widespread incidence of proselytization among the prayers offered by the Council members. While some of the language in prayers offered by the New Life Pastors could be construed to constitute proselytization (requests for salvation for those "who do not yet know Jesus"), still less than four of the twenty prayers potentially proselytized. R. at 3. This is neither frequent nor widespread instances of potential proselytization, and therefore are not sufficient to be considered a *pattern* of proselytization.

Next it must be determined whether there is a pattern of denigrating other faiths in the prayers. The Circuits have disagreed as to whether prayers that generally espouse a sectarian faith constitute a pattern of denigration of other faiths. *Lund*, 863 F.3d at 285 (finding that a consistent suggestion that other faiths are inferior to Christianity, among predominantly Christian prayers, risks denigrating non-believers and religious minorities); *Bormuth*, 870 F.3d at 512 (finding a single questionable prayer among predominantly Christian prayers did not denigrate other faiths).

In *Bormuth*, Bormuth argued that the predominantly Christian prayers were highly offensive to his faith, Paganism, because it was "destroyed by followers of Jesus Christ." *Id.* at 498-99. However, the Sixth Circuit found that legislative prayers given by the County Board

Commissioners, and which were predominantly Christian prayers, did not show a pattern of denigration of other faiths. The Court reasoned that the prayers were solemn and respectful in tone, and permissibly sought divine guidance for the Board. *Id*. at 512. While the prayers varied in their degree of religiosity and often used words like "Jesus" and "Heavenly Father," the Sixth Circuit found that this Court explicitly embraced such universal and sectarian references in *Town of Greece*. *Id*. Additionally, the court found that the predominantly Christian nature of the prayers did not violate the Establishment Clause, because the content itself did not denigrate, proselytize, or disparage other prayer practices. *Id*. at 512. Based on a lack of a pattern of denigration, and since only one prayer potentially denigrated other faiths, the court said "this stray remark does 'not despoil a practice that on the whole reflects and embraces our tradition.'" *Id*. (quoting *Town of Greece*, 134 S. Ct. at 1824). Ultimately, the court held that there was only a showing of offense to the Christian nature of the Board's prayers, and "offense…does not equate to coercion." *Id*. at 519 (quoting *Town of Greece*, 134 S. Ct. at 1826).

Like the prayers in *Bormuth* that did not show a pattern of denigration of other faiths, the prayers by the Council do not show a pattern of denigration. Like the prayers in *Bormuth*, the Council's prayers are respectful and solemn in tone, and permissibly sought divine guidance for the Council. R. at 3. The prayers also varied in their degree of religiosity like the prayers in *Bormuth*, and their sectarian content is expressly permitted by this Court's decision in *Town of Greece*. Additionally, like the prayer in *Bormuth* where only one prayer was argued as denigrating, there are fewer than four prayers argued as denigrating here. R. at 3. The record is unclear as to exactly how many of the four prayers potentially denigrated other faiths, and it could be as few as two. *Id*.

Finally, like the plaintiff in *Bormuth* who only showed an offense to the nature of the prayers, the Petitioners here have only shown an offense to the nature of the Council's prayers. Specifically, concerning the prayer to Buddha, Petitioner Geller stated it was prayer to "a fake God, and made a mockery of the purpose of legislative prayer." R. at 5. But as this Court has emphasized, "offense…does not equate to coercion." *Town of Greece*, 134 S. Ct. at 1826.

Turning to the final portion of our inquiry, whether citizens were directed to participate in the prayers, there is no evidence in the record that citizens were directed to participate in the prayers given by the Council. While this Court has found that it is coercive to direct citizens to participate in the prayer, it is not coercion to expose citizens "to prayer they would rather not hear and in which they need not participate." *Id.* at 1827. Since this Court's decision in *Town of Greece*, the Circuits have disagreed as to whether legislators asking the citizens to rise for the prayer is "directing" citizens to participate.

The Fifth and Sixth Circuits have found that the invitation to join in the prayer does not equate to "directing" citizens to participate. *Am. Humanist Ass'n*, 851 F.3d at 526 (holding that school board meetings were more akin to legislative prayer cases rather than school prayer cases, and finding that requests from the school board leaders to stand for the invocation did not amount to coercion); *Bormuth*, 870 F.3d at 517 (finding that "soliciting adult members of the public to assist in solemnizing the meetings by rising and remaining quiet in a reverent position" is not coercive).

However, the Fourth Circuit, along with some district courts, has found that requesting citizens to stand during the invocation is "directing" participation. *Lund*, 863 F.3d at 286 (finding that requests to rise for the prayer, combined with urging others to embrace Christianity, forced citizens into religious observance); *Hudson v. Pittsylvania County*, 107 F. Supp. 3d 524, 535 (W.D.

Va. 2015) (finding that Supervisors' soliciting the standing and bowing of heads from citizens and telling citizens to leave if they did not want to participate, combined with dictating the content of the prayers, created a coercive atmosphere); *Fields v. Speaker of House of Representatives*, 251 F. Supp. 3d 772, 790 (M.D. Pa. 2017) (finding that a public official's directive to stand for the invocation is materially different from the invitations in *Town of Greece*).

The cases equating an invitation to stand for the invocation to "directing" citizens to participate are materially distinguishable from the cases that have found to the contrary. In the cases that found to the contrary, the court pointed out that there was no evidence of "single[ing] out dissidents for opprobrium," of citizens being treated differently because of their beliefs about the prayer practice, or of citizens not being free to arrive after or leave during the prayer. *Bormuth*, 870 F.3d at 518-19; *Am. Humanist Ass'n*, 851 F.3d at 526. In each of the cases that found the invitations to stand equate to "directing," the prayer policy and practice either already violated the Establishment Clause in several ways or the courts holding directly contradicts this Court's holdings in *Town of Greece* and *Marsh*.

In *Fields*, there was one occasion when the plaintiffs did not stand for the invocation and were publicly singled out by the Speaker and ordered to stand. When the plaintiffs continued to remain seated, the Speaker ordered a security officer to "pressure" them to stand. *Fields*, 251 F. Supp. 3d at 776. This was in clear violation of the holding of this Court in *Town of Greece* that "single[ing] out dissidents for opprobrium" is coercive. *Town of Greece*, 134 S. Ct. at 1826. In *Hudson*, the County Supervisors told citizens they could leave if they did not want to participate immediately before telling the audience to rise for the prayers. Because of the proximity of the statement telling citizens to leave if they did not wish to participate to the direction to stand for the

prayers, the court found that the practice came dangerously close to "singl[ing] out dissidents for opprobrium." *Hudson*, 107 F. Supp. at 535 (quoting *Town of Greece*, 134 S. Ct. at 1826).

In *Lund*, the court identified "several prayers" that suggested other faiths were inferior and preached conversion. *Lund*, 863 F.3d at 285. The actual number of prayers the majority considered in *Lund* is unclear, but the court quoted seven prayers within its decision. *Id.* at 284-87. In his dissent, Judge Agee emphasized that out of the hundreds of prayers given, the majority only considered the content of a handful. *Id.* at 313 (Agee, J. dissenting). He urged that the majority "untether[ed] *Town of Greece*'s broader analysis from the specific prayers at issue in that case which the Supreme Court necessarily found did not cross any constitutional line." *Id.* Judge Agee then compared the language of the prayers quoted by the majority to the language of the prayers found Constitutional in *Marsh* and *Town of Greece*. *Id*. at 313-16. He found that according to the majority's standard, the content of the prayers both *Marsh* and *Town of Greece* would be unconstitutional. *Id*. at 314. Judge Agee also pointed out that the majority's finding that the nature of the prayers suggested other faiths were inferior directly contradicted this Court's holding that sectarian prayers are permissible. *Id*. at 316-17.

Fields, *Hudson*, and *Lund* differ substantially from the situation at hand. Unlike the citizens in *Fields* who were singled out for their decision not to stand during the prayer, the record shows no evidence that any of the citizens were forced to stand or even remain in the room for the prayer. R. at 16. While citizens were invited to stand for the invocations, Petitioners were not required to participate in any of the prayers given by the Council. Unlike in *Hudson*, where the citizens were told to leave immediately before being told to stand for the prayers, the Council did not make any comment about the participation of the citizens in the prayer at any time. Nothing suggests that citizens were not free to arrive after the prayer had been given, that any individuals were "singled

out for opprobrium," or that there were any benefits and burdens allocated as a result of the citizens' beliefs about the prayer practice. Therefore, there has been no evidence that shows the request for citizens to stand for the invocation equated to "directing" participation in the prayers.

B. The Council's Prayer Practices and Policies are not Coercive of Students in Attendance.

This Court has recognized that there are "heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." *Lee*, 505 U.S. at 592. Additionally, this Court has recognized that prayer exercise in "public schools carry a particular risk of indirect coercion." *Id.* at 592. This Court's holdings in all of the school prayer cases are aimed at addressing the concerns about coercing the most impressionable citizens of our Country. However, this Court has also distinguished legislative prayer case law from the school prayer case law through its choice to forego the use of conventional tests under the Establishment Clause in *Marsh* and *Town of Greece*, and the use of those tests in each school prayer case. *Am. Humanist Ass'n*, 851 F.3d at 526; *See Santa Fe*, 530 U.S. 290; *Lee*, 505 U.S. 577; *County of Allegheny*, 492 U.S. 573.

But, determining whether legislative prayer is coercive to high school students attending the meeting for extra credit is a completely separate issue that this Court, and every other court, has yet to address. The closest analogous case law to the present issue is that which has dealt with whether the legislative prayer exception applies to school board meetings. This case law is instructive because it has dealt with the presence of students, both voluntarily and by school requirement, at school board meetings. The Third, Fifth, and Sixth Circuits are the only courts to address whether invocations at school board meetings fall under legislative prayer case law. *Coles*, 171 F.3d at 383; *Indian River*, 653 F.3d 256; *Am. Humanist Ass'n*, 851 F.3d 521.

The Third and Sixth Circuits have held that invocations at school board meetings are governed by school prayer case law, and the Fifth Circuit has held that invocations at school board meetings are governed by legislative prayer case law. The Fifth Circuit's 2017 decision in *Am. Humanist Ass'n* is the most recent, and distinguished its holding from the Third and Sixth Circuits. 851 F.3d at 528. Therefore, the Fifth Circuit's decision provides the most guidance in resolving the issue of legislative prayer and coercion of students.

In *Am. Humanist Ass'n*, the court found that the Birdville Independent School District's (BISD) policy "of inviting students to deliver statements…before school-board meetings" fell under the law governing legislative prayer. *Id*. at 523. BISD's policy allowed the board to invite students to give presentations and invocations, at the beginning of the school board meetings. *Id*. The monthly meetings were held off school property, including sessions open to the public, and attendees were free to leave at any time. *Id*. at 524. While attendees were usually adults, students attended frequently for several reasons, including to receive awards for performances in school activities. *Id*. Since 1997 two students opened sessions with one leading the Pledge of Allegiance and the Texas pledge, and the other giving some other statement. *Id*. The statements given by students included invocations, poems, and secular statements. *Id*. From 1997 through February 2015, the selection process for the student-led presentations were based on a student's merit. *Id*. The plaintiff's argued that BISD's policy endorsed religion in violation of the Establishment Clause. *Am. Humanist Ass'n*, 851 F.3d at 525.

Reasoning that the main question was whether the case was more a legislative prayer or school prayer matter, the court found that the school board was "more like a legislature than a school classroom or event." *Id*. at 526. The court stated "[i]n no respect is it less a deliberative legislative body than was the town board in *[Town of Greece]*." *Id*. The court analyzed BISD's

policy and practice under the standard set out by this Court in *Town of Greece*. *Id*. at 526-28. The court found that the prayers were solemn and respectful in tone, given during the ceremonial portion of the meeting, and nothing in the record suggested that attendees could not arrive late, leave early, or make protests after the fact. *Id*. at 526. Additionally, the court found that the principle audience of the invocations were the board members and not the attendees. *Am. Humanist Ass'n*, 851 F.3d at 526.

The court also found that there was sufficient history of school board prayers. *Id*. at 527. Dating back to the nineteenth century, the court found that at least eight states had some history of legislative prayer in school board meetings. *Id*.; *See* Marie Elizabeth Wicks, *Prayer Is Prologue: the Impact of* Town of Greece *on the Constitutionality of Deliberative Public Body Prayer at the Start of School Board Meetings*, 31 J.L. & POL. 1, 30-31 (Summer 2015). Regarding the presence of children at the school board meetings, the court found that it did not change its analysis because there were children present at the meetings in question in *Town of Greece*. *Am. Humanist Ass'n*, 851 F.3d at 527-28. After analyzing the setting and audience to whom the prayers were directed, the court determined that the requests by the officials to stand for invocations were not coercive of either the adults or students in the audience. *Id*. at 526.

Finally, the court held that the Third and Sixth Circuits' decisions were factually and legally distinguishable from its own. *Am. Humanist Ass'n*, 851 F.3d at 529. Both the Third and Sixth Circuits' decisions occurred before this Court's decision in *Town of Greece*, and the Sixth Circuit's case involved students who were actual members of the school board. *Id*. The Third Circuit's case involved students who attended the meetings only in their capacity as student representatives. *Id*. The fact that the students were at the school board meetings as part of their

school requirements in the Third and Sixth Circuits' decisions, rather than voluntarily, changed the level of potential coercion.

Like the Fifth Circuit's decision in *Am. Humanist Ass'n* where the court found the case to fall under legislative prayer precedents, the question of whether the Council's prayer was coercive as to the students in the audience also falls under the same precedents. Like the students in *Am. Humanist Ass'n* who were not compelled to give presentations at the meetings as school requirements, the students here are not compelled to give presentations at the Council's meeting as school requirements. While the students can receive extra credit for their presentations to the Council, the student must volunteer and the presentation is not part of the required course work. R. at 4. Each student is at the Council meeting through his or her own choice, and their school requirements do not mandate any kind of attendance. *Id*. In fact, the class that allows for the students to even have the choice to volunteer to present at the meetings is not a required course for graduation. *Id*. Additionally, the extra credit presentation option is neither the best nor the only method of improving the student's grade in Green's non-mandatory class. *Id*.

Also like the invocations delivered in *Am. Humanist Ass'n*, the invocations given by the Council were solemn and respectful in tone, and given at the beginning of its ceremonial proceedings. R. at 2. Also, the principle audience for both the prayers in *Am. Humanist Ass'n* and the Council's prayers are the members, not the attendees. R. at 2. Like the meetings in *Am. Humanist Ass'n* and *Town of Greece* that could have children present for the invocations without violating the Establishment Clause, the Council meetings here can also have students present for the invocations without violating the Establishment Clause. Additionally, like the requests to stand for the invocations in *Am. Humanist Ass'n* that were not found coercive to the students, the invitations to stand for the Council's invocations are not coercive to the students in attendance.

Looking at the setting in which the prayer was given and the audience to whom it was directed, as the court did in *Am. Humanist Ass'n*, it is clear that the Council's prayers were given in the appropriate setting at the beginning of the meeting, and directed towards the appropriate audience of the Council members. R. at 2.

Through applying the most analogous and instructive case law, it can be seen that the Council's prayers were not coercive to the students who attended the meetings. Each student attended voluntarily, was not required by course work to attend or even enroll in the class, and the Council's prayers were given in the appropriate setting and directed towards the appropriate audience. Therefore, the Council's prayer practices and policies are not coercive of the students in attendance at the meetings.

CONCLUSION

Accordingly, this Court should affirm the judgment of the Court of Appeals for the Thirteenth Circuit.

Respectfully submitted,

Team F

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