NO. 18-1308

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2018

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

Petitioners,

v.

CENTRAL PERK TOWNSHIP,

Respondent.

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

BRIEF FOR RESPONDENT

TEAM N

Attorneys for Respondent

QUESTIONS PRESENTED

I. Whether Central Perk Township's legislative prayer policy and practices are constitutional under the Establishment Clause when the Town Council Members follow the historically-accepted tradition of personally offering theistic prayers or selecting a clergy from the community to do so.

II. Whether Central Perk Township's Council's prayer policy and practice unconstitutionally coerced citizens and/or high school students present during the town hall meetings where no attendants were directed to participate in the prayers, the prayers did not reflect a pattern of proselytization, and the prayers did not denigrate other faiths.

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STATEMENT OF JURISDICTION

This Court has jurisdiction because the issues concern the constitutionality of a town's prayer policy and the analysis falls under the First Amendment of the Constitution. Respondent argues that Central Perk Township's Council's prayer policy is constitutional and falls under the legislative prayer exception to the Establishment Clause, and that the Town's prayer practices are neither coercive to the adult or high school student attendees. The judgement of the United States Court of Appeals for the Thirteenth Circuit was entered on January 21, 2018. A petition for a writ of certiorari was granted by this Court on August 1, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

This case concerns the Establishment Clause of the First Amendment to the United States Constitution. U.S. Const. amend. I.

STATEMENT OF THE CASE

I. STATEMENT OF THE FACTS

Central Perk Township (hereinafter referenced as "Town") is a small town in rural area Old York with a population of only 12,645. R. at 1. The Town is overseen by a Town Council (hereinafter referenced as "Council") made up of seven members. R. at 1. In September of 2014, the Council carefully crafted a policy to allow prayer invocation at the start of each meeting R. at 1. Following the Supreme Court's decision in Town of Greece v. Galloway the policy contained the following language:

> "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.

Of import, the policy specifies that Council Members will be selected at random to give the invocation. R. at 2. Once selected, the member may chose to either give the prayer themselves, or select an outside clergyman to deliver the prayer. R. at 2. Of course, a member may also choose to omit any invocation from the opening portion of the Town's meeting. R. at 2. The policy also states that the Council Members may not intervene with the content of the prayer in the event that an outside minister is selected. R. at 2. The prayer follows the Pledge of Allegiance, which is said regardless of whether or not an invocation is also delivered, and attendees are asked to stand for both. R. at 2. Counsel Members were selected randomly by placing those interested Council Members' names on a written slip of paper and placing them into an envelope, from which a name was picked at random. R. at 2.

Although from a small town, the Council is made up of religiously diverse members. R. at 2-3. Two of the Council Members are members of the Church of Jesus Christ of Latter Day Saints, one is a member of the Muslim faith, one a member of the Baha'i faith, and another is a member of the New Life Community Chapel (hereinafter referenced as "New Life"). R. at 3. Of note, all four of these faiths have been represented at some point during the invocation prayer between 2014 and 2016. R. at 2-3. Each time Council Member Bing and Geller-Bing were selected from the Church of Jesus Christ of Latter Day Saints, they asked their Branch President, David Minsk, to deliver the invocation, who included various prayers to the "Heavenly Father," included references to the restoration of New Jerusalem, and asked

that all accept Christ's reign. R. at 3. However, he also included more neutral themes and themes related to the legislative purpose, asking for guidance and presence during the legislative session. R. at 3. Council Member Willick, a member of the Muslim faith, also included universal themes such as praying for peace and mercy, while also asking for blessings from Allah. R at. 3. Additionally, Council Member Green, also emphasizing universal themes, prayed to Buddha, requesting that the meeting be conducted in harmony and peace. R. at 3. Council Member Hosentein and Tribbiani both belong to New Life, a Christian church with a membership of 2,100 parishioners. R. at 3. Each time selected, the council members would have New Faith pastors deliver the invocation, which sometimes included phrases associated with the Christian faith including, "in the name of our Lord and Savior, Jesus Christ" and calls to recognizing God's power. R at 3. The pastors generally always couple their acknowledgement of Christianity as the one true religion with more general requests for divine guidance for the Council Members. R. at 3.

Along with members of the community, students from Council Member Green's high school government class occasionally chose to attend the Town's meetings to earn extra academic credit. R. at 4. Green's American Government class is not a required part of the high school curriculum, but is popular among the older senior students. R at 4. While students in her class were offered extra credit for attending a town hall meeting, they also had other choices for receiving the same class credit including writing a three-page letter to their federal or state elected representative or volunteering for a campaign of their choosing. R. at 4. During the 2013-2014 academic year, out of the twelve students who chose to participate and present at a town hall meeting, only two of the student's grades were impacted. R. at 4. During the 2015-2016 academic year, only four of her thirteen students chose to attend and

make a presentation during the Town's meeting. R. at 4. Coincidently, one student, Ben Geller, son of Plaintiff Ross Geller, made a presentation to the Council on October 6, 2015, a day that Green had been drawn to give the invocation. R. at 5. The other three named Plaintiffs in this case, Dr. Burke, Lisa Kudrow, and Phoebe Buffay, are all atheists and members of the Central Perk Freethinkers Society. R. at 5. Their three children attended town meetings on various days, and were present for various invocation prayers including a prayer from President Minks and a New Life Pastor. R. at 6.

II. PROCEDURAL HISTORY

This case was originally brought before the United States District Court for the Eastern District for Old York. R. at 1. Plaintiffs initiated this action under 42 U.S.C. § 1983, seeking a permanent injunction against the Central Perk Town Council's prayer policy and practices, and parties submitted cross-motions for Summary Judgment. R. at. 1. The court granted the Plaintiffs' motion for Summary Judgment and denied Defendant's motion for Summary Judgment, concluding that the Town's policies and practices were in violation of the Establishment Clause, and stating that Defendant is permanently enjoined from continuing such practices. R. at 20. Following this judgment, the Thirteenth Circuit Court granted the appeal made by the Town and on January 21, 2018 reversed the holding of the District Court. Petitioner filed a Petition for Writ of Certiorari and this Court granted Certiorari on August 1, 2018.

SUMMARY OF THE ARGUMENT

I.

The First Amendment's Establishment Clause guards against the government favoring a particular religion. The Supreme Court has created formal tests for courts to use in Establishment Clause claims to determine the constitutionality of certain governmental policies and practices. In the context of legislative prayer, however, these tests are not dispositive of the question of

constitutionality and are inapplicable. Instead of subjecting legislative prayer to these formal tests, the Supreme Court has upheld the constitutionality of legislative prayer based on its interpretation of legislative prayer as a historically-accepted governmental practice.

In subsequent cases where courts have applied the Supreme Court's legislative prayer precedents, the legislative prayer policies and practices in question have been held constitutional. Courts have consistently held that governmental actors do not violate the Establishment Clause if their policy or practice is reflective of the historically-accepted legislative prayer practice. In applying the Supreme Court's legislative prayer decisions, courts have also differentiated between the constitutional practice of legislative prayer and other governmental practices that are in violation of the Establishment Clause. These decisions have further solidified the Supreme Court's ruling that in the context of the Establishment Clause, legislative prayer is consistent with the Constitution.

Central Perk Township's legislative prayer policy and practices remain consistent with the Supreme Court precedent and subsequent case law on legislative prayer and are therefore not in violation of the Establishment Clause. Central Perk Township allows their Council Members to either personally offer the prayers before meetings, or to select clergy from the community to offer the prayer. In executing this policy, the prayers have been religiously varied and theistic in content. The Supreme Court's legislative prayer decisions and the subsequent cases that have interpreted and applied the Court's decisions explicitly allow for the policy of permitting legislative members to choose a clergy from the community. Even if that clergy member is of the same religion as the legislative member that chose him or her, legislative prayer jurisprudence dictates that this is not an advancement of a particular religion and, as such, is not a violation of the Establishment Clause.

Further, allowing the Council Members to personally offer the prayers is also in accordance with legislative prayer decisions based on the Supreme Court's view that the identity of the speaker is not relevant. As for the practice of having religiously varied, yet theistic prayers, both the Supreme Court and other courts in their legislative prayer analysis have held that it is contrary to the history and tradition of legislative prayer to limit or control the content of the prayers. Taken together, the Supreme Court's legislative prayer decisions and the subsequent cases applying the Court's precedent uphold legislative prayer as constitutional and Central Perk Township's prayer policy and practices remain consistent with these decisions and with the Establishment Clause.

II

The United States Court of Appeals for the Thirteenth Circuit correctly held that the Town's legislative prayer practices and policy are not unduly coercive or in violation of the Establishment Clause because citizens were not compelled or directed to participate, the prayer policies and practices did not advance one religion over another or attack other faiths, and the presence of high school students at the Town's meeting was not mandatory and thus does not alter the appropriate analysis. While it is a recognizable First Amendment principle that the government may not coerce its citizens into practicing a particular faith, the First Amendment also protects the rights of government officials to speak about religion freely. The Town's Council Members and clergymen delivering invocations were not directing or forcing the citizens to participate when asking that they stand for the Pledge of Allegiance and the Invocation following directly afterwards.

In Galloway, the Supreme Court determined that legislative prayer is appropriate at a town hall meeting where children are also present if the prayer's language is not contributing to a pattern of denigrating or proselytizing. Elements that may indicate a pattern of proselytizing or

denigrating such as negative comments to nonbelievers or religious minorities were not present in this case. Additionally, as a matter of public policy, requiring screening or some other preventative measure of a government official over an invocation would further risk an Establishment Clause violation, and as such, it is important to err on the side of protection of the Council and clergymen's First Amendment Rights.

Lastly, regardless of the high school students' attendance at the Town's regularly scheduled meeting, the legislative prayer exception to the Establishment Clause still applies. This case would not be properly governed by the principles addressed in Lee v. Weisman, because of its factual similarities to the Galloway case. The high school students present at the Town's meeting were not required to take the government class, had other extra credit opportunities afforded to them, and chose to attend the Town's meeting. As high school seniors, and government students, it is assumed they would have been more aware of the history and tradition behind legislative prayer and further they had the same opportunities as adults to refuse to participate. Accordingly, applying the foregoing analysis, the high school students were not unduly coerced, and there is no Establishment Clause violation present.

ARGUMENT

I. CENTRAL PERK TOWNSHIP'S LEGISLATIVE PRAYER POLICY AND PRACTICES ARE CONSISTENT WITH THE CONSTITUTIONAL PRECEDENTS SET OUT IN MARSH, GALLOWAY, AND SUBSEQUENT LEGISLATIVE PRAYER JURISPRUDENCE

The Establishment Clause of the First Amendment ensures that "Congress shall make no law respecting an establishment of religion…" U.S. Const. amend. I. Under the Establishment Clause, "one religious denomination cannot be officially preferred over another." Pelphrey v. Cobb Cnty, 547 F.3d 1263, 1268 (11th Cir. 2008) (quoting Larson v. Valente, 456 U.S. 228, 244, 102 U.S. 1673 (1982)). Recent Supreme Court decisions have addressed whether the practice of

beginning legislative sessions with prayer is in accordance with the Establishment Clause. The Supreme Court held that given the pervasive historical use of legislative prayer, the practice is consistent with the Establishment Clause. Marsh v. Chambers, 463 U.S. 783, 788 (1983). The Court in Marsh upheld the constitutionality of the Nebraska legislature's practice of beginning each session with a prayer given by a paid chaplain. See id. at 784. The Court reasoned that the constitutionality of legislative prayer is grounded in its acceptance by the First Amendment draftsmen and its extensive historic use. See id. at 791. Legislative prayer has "become part of the fabric of society" and is "not…an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country." Id. at 792.

The Supreme Court reaffirmed the constitutionality of legislative prayer in Town of Greece v. Galloway, holding that the town of Greece did not violate the Establishment Clause through their practice of opening their board meetings with prayer offered by a minister. Town of Greece v. Galloway, 134 S. Ct. 1811, 1816 (2014), The Galloway Court upheld the history-based support for legislative prayer used in Marsh, finding that "legislative prayer, while religious in nature, has long been understood as compatible with the Establishment Clause." Id. at 1818. Here, Central Perk Township's legislative prayer policy and practices remain consistent with the holdings in Marsh and Galloway and are in accordance with the Establishment Clause.

A. The constitutionality of legislative prayer is not subject to the traditional Establishment Clause tests.

In evaluating Establishment Clause claims, the Supreme Court has implemented several tests to determine constitutionality, including the Lemon test, the endorsement test, and the coercion test. Fields v. Speaker of the Pa. House of Representatives, 251 F. Supp. 3d 772, 784 (M.D. Pa. 2017). The Supreme Court established the Lemon test in Lemon v. Kurtzman, where the Court

held that a practice or policy must "have a secular legislative purpose…its principal or primary effect must be one that neither advances nor inhibits religion, and…must not foster 'an excessive government entanglement with religion'" in order to not be a violation of the Establishment Clause. Lemon v. Kurtzman, 403 U.S. 602, 612 91 S. Ct. 2105 (1971). The endorsement test was subsequently proposed in Justice O'Connor's concurrence in Lynch v. Donnelly, where Justice O'Connor clarified the Lemon test by explaining that the government violates the Establishment Clause through "endorsement or disapproval of religion" and that "[e]ndorsement sends a message to nonadherents that they are outsiders…" Lynch v. Donnelly, 465 U.S. 668, 688 104 S. Ct. 1355 (1984). The coercion test stems from Lee v. Weisman, where the court found a school district's practice of inviting a member of the clergy to offer prayers at graduation ceremonies to be in violation of the Establishment Clause. Lee v. Weisman, 505 U.S. 577, 580 112 S. Ct. 2649 (1992). The Court held that "at minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise…" Id. at 587.

Despite the Supreme Court's use of these tests in various Establishment Clause decisions, determining whether legislative prayer violates the Establishment Clause does not depend on any of these tests. In applying the historical analysis to legislative prayer, the Court in Marsh rejected the proposition that "evidence of opposition to a measure weakens the force of the historical argument" and countered that "it infuses it with power by demonstrating that the subject was considered carefully and the action not taken thoughtlessly…" Marsh, 463 U.S. at 791. The historic practice of legislative prayer lends credence to its constitutionality, regardless of Court-created tests, because the religious content of these prayers "acknowledges our growing diversity not by proscribing sectarian content but by welcoming ministers of many creeds." Galloway, 134 S. Ct. at 1820. In Galloway the Court reinforced the history-based holding from Marsh, without

applying any of the tests, stating that "Marsh stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted." Id. at 1819. Regarding the formal tests the Court had previously used in other Establishment Clause cases, the Court in Galloway reaffirmed the finding in Marsh that because legislative prayer is compatible with the Establishment Clause based on its history, traditional tests are unnecessary. See id. at 1818.

Following the Marsh and Galloway precedents, lower courts have continued to hold that legislative prayer is not subject to Establishment Clause tests. The court in Coleman v. Hamilton Cnty, acknowledged that legislative prayer analysis does not fall within the traditional tests, stating that "[l]egislative prayer policies have previously been sustained without scrutiny under the sorts of formal tests that are typically used in the analysis of Establishment Clause claims." Coleman v. Hamilton Cnty, 104 F. Supp. 3d 877, 885 (E.D. Tenn. 2015). More recently, the court in Freedom from Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., distinguished between the appropriate tests for legislative prayers and school-based prayer policies. Freedom from Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132, 18 (9th Cir. 2018). The court reasoned that school board prayers are subject to traditional tests such as the Lemon test, while legislative prayer cases are not subject to these tests because of their historic use. See id. As such, in looking at whether the Central Perk Township's legislative prayer policy and practices are in accordance with the Establishment Clause, the precedents set by Marsh, Galloway and subsequent lower court legislative prayer cases mandate that legislative prayer is not subject to Establishment Clause tests. The Town's legislative prayer policy and practices must instead be subjected to the Marsh-Galloway precedent analysis.

B. The Town's policy of having the Council Members either select a minister to offer the prayer or to personally offer the prayer is compliant with the precedents set by Marsh and Galloway.

Neither the Marsh-Galloway precedent nor lower court legislative prayer policy decisions place restrictions on the identity of the speaker or on legislature-led prayer. Purposely choosing a prayer-giver of a particular faith does not amount to a violation of the Establishment Clause. In determining the constitutionality of the prayer policy in Marsh, the Court found no violations in the Nebraska legislature's choice to continuously employ the same chaplain for their legislative meetings. Marsh, 463 U.S. at 793. The Marsh Court opined that the chaplain's employment was a reflection of the quality of his work and rejected the idea that "choosing a clergyman of one denomination advances the beliefs of a particular church." Id. In Galloway, the Court found that the town "made reasonable efforts to identify all of the congregations located within its borders…" and "that nearly all of the congregations in town turned out to be Christian does not reflect an aversion or bias on the part of the town leaders against minority faiths." Galloway, 134 S. Ct. at 1824. Despite the purposeful selection of predominantly Christian prayer-givers, the policy did not violate the Establishment Clause. Id.

Additionally, the constitutionality of selecting ministers or clergymen to offer prayer before a legislative meeting was also upheld in Coleman v. Hamilton Cnty. In Coleman, a county legislature implemented a policy whereby a member of the clergy is selected to offer a prayer before commission meetings. See Coleman, 104 F. Supp. 3d at 880. In upholding the constitutionality of the policy, the court applied the Marsh and Galloway rulings to hold that the policy "does not advance one religion over another; it allows for invocations from a variety of faiths and allows for prayers with religious references…" Id. at 889.

Here, the Town's legislative prayer policy of selecting a minister is not only consistent with these constitutionally-accepted policies and the precedents set by Marsh and Galloway, it also surpasses the policies in their level of religious inclusivity. The prayers and invocations offered before the Town's legislative meetings have all been from a diverse set of religions, including prayers from members of the Church of Latter Day Saints, members of the Muslim faith, members of the Baha'i faith, and members of the New Life Community Chapel. R. at 2-3. No particular religion is being advanced or given preferential exposure through the prayer offers. The policy of selecting a minister from the community allows for a variety of religious prayers and invocations to be offered before the council meetings, ensuring religious diversity and that there is no religious advancement.

The policy also dictates that the Council Members are selected at random, and further provides that the Council Member could choose to omit prayers or invocations. R. at 2. These provisions reflect that the policy does not advance a particular religion since the selection process is completely random and the ability to offer a prayer or invocation is entirely optional. R. at 2. Taken together, these provisions demonstrate that no part of the Town's policy advances the beliefs of a particular religion. The Council Member selection system is random, offering prayers is discretionary, and the prayers have been religiously varied. R. at 2-3. Much like the Court in Marsh and in Galloway did not hold it unconstitutional to select ministers or chaplains from particular faiths for the prayers or invocations, the Town Council Members choosing clergy members of their own faiths does not entail a violation of the Establishment Clause.

Further, although the Supreme Court did not directly address the constitutionality of legislature-led prayer, the holdings in Marsh and Galloway demonstrate the Court's implicit acceptance of such policy. The Marsh Court upheld the constitutionality of legislative prayer

based on its historic context, without setting limitations as to the selection of the prayer-giver. Marsh, 463 U.S. at 790. The Court in Galloway also upheld the constitutionality of legislative prayer itself and the particular policy of the town without implementing any limits on the identity of the prayer-giver. See Galloway, 134 S. Ct. at 1816. The policy of allowing the Council Members to personally offer the prayer or invocation remains within the precedents set by Marsh and Galloway.

Beyond Marsh and Galloway, the constitutionality of the Town's policy of allowing the Council Members to offer the prayers is also consistent with the Sixth Circuit, which applied Marsh and Galloway to uphold the constitutionality of commissioner-led legislative prayers. See Bormuth v. Cty. of Jackson, 870 F.3d 494, 498 (6th Cir. 2017). In holding that the policy and practice of having the county commissioners lead the prayer before community town hall meetings did not violate the Establishment Clause, the court stated that the Marsh-Galloway precedent did not place restrictions on "who may give prayers in order to be consistent with historical practice." Id. at 509. Just as the Court in Marsh used history to uphold the constitutionality of legislative prayer, the court in Bormuth found that history supported the constitutionality of the county's policy because "history shows that legislator-led prayer is a long-standing tradition." Id. at 510. The policy of allowing Town Council Members to personally offer the prayer is consistent with these precedents and is constitutional.

C. The Town's practice of offering religiously varied, theistic prayers is in accordance with Galloway.

The Respondents in Galloway challenged the sectarian content of the prayers, but the Court held that "[an] insistence on nonsectarian or ecumenical prayer as a single, fixed standard is not consistent with the tradition of legislative prayer outlined in the Court's cases." Galloway, 134 S. Ct. at 1820. The Court in Galloway rejected the argument that the religious content of legislative

prayer must be limited, holding that "Marsh nowhere suggested that the constitutionality of legislative prayer turns on the neutrality of its content." Id. at 1821. The Marsh Court refused to monitor prayer where, absent an explicit proselytization, the content does not amount to a violation of the Establishment Clause. Marsh 463 U.S. at 794; see also Pelphrey v. Cobb Cnty, 547 F.3d 1263, 1271 (11th Cir. 2008) (holding that "to read Marsh as allowing only nonsectarian prayers is at odds with the clear directive by the Court…").

That the Town's prayers have all been theistic in content does not surpass the limits of accepted legislative prayer practices as decided in Supreme Court and lower court precedents. Much like the constitutionality of the legislative prayers in Marsh and Galloway were not contingent on their content, the constitutionality of the Town's legislative prayers must also not depend on their theistic content. Holding the Town's prayers unconstitutional based on their theistic content would contravene the historically accepted practice of legislative prayer. R. at 2-3. Limiting legislative prayer to a specific religious content makes "the legislature and the courts supervisors and censors of religious speech" which would go against the Establishment Clause. Galloway, 134 S. Ct. at 1822.

The policy in Galloway also did not force the town to review "the prayers in advance of the meetings nor [provide] guidance as to their content, in the belief that exercising any degree of control over the prayers would infringe both the free exercise and speech rights of the ministers." Id. at 1816. The Court in Galloway held that "government may not mandate a civic religion that stifles any but the most generic reference to the sacred any more than it may prescribe religious orthodoxy." Id. at 1822. This reasoning must extend to the Town's policy in order to prevent from limiting the theistic content of the Town's prayers. Placing these restrictions on the theistic

content of prayer would be inapposite to the Establishment Clause and to the Court's interpretation of legislative prayer.

Petitioners contend that the theistic nature of the legislative prayers violates the Establishment Clause, which is contradictory to legislative prayer precedents, and is an egregiously irrational demand. The fact that the prayers were mostly theistic does not violate the limits of Galloway and does not go beyond the acceptable historic practice in Marsh because it is reflective of the predominantly theistic religions of the Council Members and of the Town's people. R. at 2-3. Just as the Christian prayers in Galloway represented the Christian majority of the town's people and not a policy that marginalized minority faiths, the theistic prayers in the Town's practices were reflective of the Town's religions. See id. at 1817. Neither the content nor the quantity of the Town's theistic prayers trespassed the limits placed on legislative prayer under Marsh and Galloway.

In all, no part of the Town's policy and practices of selecting a clergyman from the community to offer the prayers or to personally lead the theistic prayers is unconstitutional given the context of legislative prayer. The Town's policy and practices reflect a historic, constitutionally-accepted tradition of legislative prayer. The policy conforms to the Supreme Court precedent and its subsequent lower court jurisprudence, and the execution of the policy remains consistent with these decisions. As such, legislative prayer is accepted under the Establishment Clause, and the Town's policy and practices are constitutional.

II. CENTRAL PERK TOWNSHIP'S COUNCIL'S LEGISLATIVE PRAYER PRACTICES ARE NOT UNDULY COERCIVE TOWARDS ADULT OR HIGH SCHOOL STUDENT ATENDEES SUCH THAT THE PRACTICES ARE UNCONSTIUTIONAL UNDER THE ESTABLISHMENT CLAUSE.

The United States Court of Appeals for the Thirteenth Circuit correctly held that Central Perk Township's Council's legislative prayer practices are not unduly coercive of the adult or

high school attendees at the town hall meeting. While it is an essential First Amendment principle that the government may not coerce its citizens to support or practice in any particular religious exercise or press religious observances upon its citizens, the First Amendment also protects the rights of government officials and pastors to make truth claims about their religious convictions, which are inherent to individuals' religious beliefs. See U.S. Const. amend. I. Accordingly, the Supreme Court has established that legislative prayer becomes coercive only when "legislators direct the public to participate in the prayers, the prayers reflect a patter of proselytization, or the prayers denigrate other faiths." Town of Greece v. Galloway, 134 S. Ct. 1811, 1826 (2014). As-applied, the invocation prayers delivered at the start of the town hall meetings are not coercive for two reasons. First, it is assumed that adults who are firm in their own belief system, and not forced or compelled to participate in a religious prayer, as was the case here, can tolerate, and even appreciate, ceremonial prayer that is delivered by a person of a different faith, or may chose on their own not to participate in an invocation. See Cnty of Allegheny, 492 U.S. 3086 (Kennedy, J., concurring in judgment in part and dissenting in part); see also Van Orden v. Perry, 545 U.S. 677, 683 (2005). Secondly, the prayers lacked a pattern of proselytizing and did not denigrate other faiths as the prayers did not chastise dissenters, welcomed diverse faith representation, and contained universal themes. Galloway, 134 S. Ct. at 1126.

Although high school seniors were often present at the Town's meetings, the Galloway analysis is still appropriate because these seniors were not required to attend the meeting; were government students with a higher appreciation for the history and tradition of the United States, which provides the backdrop for legislative prayer; and the Town's meeting was not centered around the promotion or support of the public school system. Id. at 1126. As such, the Town's

legislative prayer practices are not unconstitutionally coercive of the high school students and are not in violation of the Establishment Clause.

A. The Town's practice of offering a brief prayer to open its town hall meetings, for which citizens were invited to stand, did not compel or direct its attendees to engage in a religious observance, in violation of the Establishment Clause.

The Town's Council Member or clergyman delivering the invocation typically invited attendees to stand for the Pledge of Allegiance and the subsequent invocation, but when evaluating the circumstances as a whole, and against the backdrop of history and tradition, it becomes apparent that this request was by no means a direction to participate in the invocation. In both Marsh and Galloway, the Supreme Court concluded that the legislative prayers were not in violation of the Establishment Clause, and in both cases citizens were often requested to stand for the invocation. See Marsh v. Chambers, 463 U.S. 783, 788 (1983); Galloway, 134 S. Ct. at 1816. In Marsh the Court discusses that citizens who are exposed to legislative prayer have accessible options if they choose not to participate in the prayer, including standing silently or leaving the room, which demonstrates to a lack of coercion. Marsh, 463 U.S. at 784. The Court noted that standing silently would not be interpreted as an agreement to participate in the prayer being delivered or as support of the words or ideas that are being expressed. Id. Further, the Court pointed towards citizen's opportunity to leave the room for any number of reasons, and stated "their absence will not stand out as disrespectful or even noteworthy." See Galloway, 134 S. Ct. at 1816 quoting Marsh, 463 U.S. at 788. It was determined that neither standing quietly, nor leaving the room, would represent an unconstitutional imposition for mature adults, who should not be "susceptible to religious indoctrination or peer pressure." Marsh, 463 U.S. at 792.

More recently, the Supreme Court found that there was no Establishment Clause violation where citizens at a town hall meeting were occasionally requested to stand and to "pray as we

begin this evening's town meeting." Galloway 134 S. Ct. at 1847. This prayer opportunity is evaluated against the backdrop of a historic practice. Examining the invocation through this lens, although the clergyman did not outwardly declare that anyone opposed should feel welcomed not to participate, it becomes apparent that the clergyman, or chaplain, was not directing the attendees to participate, but rather initiating legislative prayer in alignment with the Country's history and tradition. Once again, the Court in Galloway similarly discussed the option that the citizens had to leave the room during the prayer, or arrive late, as the prayer was delivered during the opening ceremonial portion of the town's meeting. Id. Justice Thomas, in his dissent, provided further that "the Clause is not violated by the kind of subtle pressures respondents allegedly suffered, which do not amount to actual legal coercion." Galloway, 134 S. Ct. at 1816 (Thomas, J. dissenting). He expanded this point stating that the prayers in that case in no way resembled the coercive state establishments such as ordering exact financial support of the church, compelling religious observance, or controlling religious doctrines. Id. The Establishment Clause jurisprudence has continued to apply this line of reasoning following the Galloway decision. District Courts have followed this analysis and extended it to other alleged "coercive" requests, such as requesting citizens to bow their heads or close their eyes before prayer, holding that these requests are not actually an exercise of governmental power meant to coerce citizens to participate in a specific prayer. See Bormuth v. Cnty of Jackson, 870 F.3d 494 (6th Cir. 2017).

In this case, there is no evidence that the citizens present were directed to participate in the opening invocation or that any form of legal coercion was met. Simply requesting that attendees stand for the Pledge of Allegiance and remain standing for the subsequent invocation, in no way forced patrons to participate. R. at 2; Galloway, 134 S. Ct. at 1816. While also not

fulfilling a legal definition of coercion as described by Justice Thomas, this premise would ignore the rudimentary definition of coerce, meaning "to compel to an act or choice; to achieve by force or threat; to restrain or dominate by force."[1] As participants of a town hall meeting taking part in a democratic process, who assumedly are aware of the Country's history and tradition of legislative prayer, attendees should not have felt compelled to participate by a seemingly typical request to stand before the Pledge and the invocation following immediately afterward. R. at 2. Drawing parallels to the factual circumstances in Galloway, the attendees here also had other appropriate options, such as standing silently or leaving the room, which would not have been unduly burdensome. R. at 3. Additionally, as opposed to other cases such as Bormuth, the citizens here were not asked to bow their heads, remain silent, or close their eyes for the prayer. R. at 2. Taking all of the foregoing factors into account, there is no evidence here that the citizens were directed or instructed to participate in the invocation during the Town's hall meeting.

B. The Town's legislative prayer policies and practices do not advance one religion over another or attack other faiths, and as such, do not lead to a pattern of denigrating or proselytizing other religions.

In order for the content of legislative prayer to be brought into question, or deemed unduly coercive and thus violating the Establishment Clause, the language must lead to a pattern of denigration or proselytizing, which was not present in the town's prayer practice. See Galloway, 134 S. Ct. at 1812. By legal definition, to denigrate means, "to speak ill of or disrespectfully towards; to mock or criticize." DENIGRATE, Black's Law Dictionary (10th ed. 2014). Additionally, as used in Marsh, to proselytize refers to the advancement of one religion over another or attempting to convert citizens to a particular religion. See Marsh, 463 U.S. at 794-795.

[1] COERCE definition, Merrium-Webster Dictionary (2018), available at www.mariam-webster.com/dictionary/proselytizing.

Following the foundation set by Marsh, the Supreme Court in Galloway determined that a pattern of proselytizing and denigrating was not established where clergy from all denominations within the town were invited to offer prayers without restrictions on their content, despite the fact that the overwhelming majority of clergy selected were Christian and the prayers were often sectarian. See Galloway, 134 S. Ct. at 1812. A prayer that simply contains religious dogma or names a specific god, is not on its face proselytizing, nor is pattern of primarily Christian lead invocation prayers. See Galloway, 134, S. Ct. at 182; Pelphrey v. Cobb Cnty, Ga., 547 F.3d 1263 (11th Cir. 2008). However, as asserted by the Court in Marsh, legislative invocation should be wide-ranging and the divine appeal should be tied to a legitimate common religious ground. See Marsh at 103.

Elements that may indicate a pattern of proselytizing or denigrating include evidence of denigration towards nonbelievers or religious minorities, threatened damnation, encouragement of conversation, or aggressively advocating a specific religious creed. See Snyder v. Murray City Corp., 159 F.3d 1227 (10th Cir. 1998). Additionally, sectarian prayers, although permitted, cannot be exploited to proselytize or advance one religion over another, and the public should not be dissuaded from leaving a meeting room during prayer, arriving late, or later protesting. See Bormuth v. Cnty of Jackson, 870, F.3d 494 (6th Cir. 2017); Doe v. Tangipahoe Parish School Bd., 494 F.3d 494 (5th Cir. 2007). Of import, the Court in Marsh noted that the Establishment Clause does not scrutinize legislative prayer and invocations with the same rigor that it examines other religious activities, and the First Amendment protects the freedom of religion and asserting religious truth claims.

In this case, although invocations did include sectarian dogma, the invocations given did not contribute to a pattern of proselytizing over time. As was the case in Galloway, the Council's

legislative prayer policy welcomes invocations from members of any faith. R. at 3. The Council's policy is nondiscriminatory, and does not assert priority of one religion over another. Id. Although invocations by personnel of the Church of Latter Day Saints and New Life Church asserted their own religious truth claims, this individual language alone cannot render the policy and practice coercive, as the First Amendment clearly protects the rights of government officials to make such claims. See R. at 3; Galloway 134 S. Ct. at 1816. Additionally, these prayers did not speak ill of any other religion, even when using language requesting that all accept Christ's reign. R. at 4. Therefore, these prayers would not be considered denigrating under the well-established legal definition of the term. Similar to the Galloway case, the prayers in this case invoke the name of various deities, but also invoke universal themes, tied to legislative interests such as praying for guidance during the town hall session, and that the legislative sessions be conducted in harmony and peace. R. at 2.

As a matter of public policy, requiring legislators, town Council Members, or other persons of governmental power to alter or censor legislative prayer will only insert their involvement further and bring them closer to an Establishment Clause violation. In Galloway, this issue is discussed in detail within Justice Alito's concurrence, in which it is identified that in order to determine if a prayer given before a town or legislative meeting must be sufficiently generic, legislatures or leaders would be forced to either review the prayer ahead of time or correct the prayer being delivered on the spot. Galloway 134 S. Ct. at 1816. The primary dissent then provides that by rotating the chaplains this issue could be avoided; however, as the case at bar provides, the content of legislative prayer can still be brought into question. As such, and to avoid the extensive and excessive assertion and involvement of the Town's Council Members, it is crucial to take this inevitable result into consideration when balancing the First Amendment

Rights of the Council Members and clergymen delivering the invocation with the Town citizens' right to be free from prayer that denigrates other faiths. In a case such as this one, where the Town's prayers' language is not clearly attacking other faiths, the Court should err on the side of allowing the clergymen to include religious dogma to prevent government officials from intervening further into the prayer practice, and inadvertently violating the Establishment Clause.

C. The presence of high school students at the Town's hall meeting was not mandatory and the meeting's intent was not to promote or support the public school system, rendering the legislative prayer exception to the Establishment Clause and corresponding analysis still applicable.

Regardless of high school students' attendance at the Town's regularly scheduled meeting, the legislative prayer exception to the Establishment Clause and the foregoing analysis of the prayer's coercive properties should still apply. This case would not be properly governed by the principles addressed in Lee v. Weisman, as suggested by the United States District Court for the Eastern District of Old York, because of its factual similarities to the Galloway case and its subsequent analysis. Compare Lee v. Weisman, 505 U.S. 577 (1992) with Town of Greece v. Galloway, 134 S. Ct. 1811, 1826 (2014). Unlike the case before the Third Circuit in Doe v. Indian River School Dist., in which application of Lee v. Weisman was appropriate, this case does not involve a school board meeting, which implied coercion of students. Doe v. Indian River Sch. Dist., 653 F.3d 256 (3d Cir. 2011)(rejecting the school board's argument that its policy of beginning its meeting with a prayer was parallel to opening legislative sessions with a prayer.) In that case, the Third Circuit reasoned that because the board used its regular meetings to recognize students' accomplishments, which had the effect of ensuring student attendance at nearly all board meetings that took place, it was inherently involuntary for students to attend. Further, the Sixth Circuit established that the legislative prayer exception did not apply to a

school board meeting, because it is an integral component of the public school system, takes place on school property, and inherently encourages students to attend. See Coles v. Cleveland Bd. of Educ., 171 F.3d 369 (6th Cir. 1999).

Conversely, it has been established that the legislative prayer exception applies to town hall meetings, even when students are present as seen in Galloway, a case more factually on point to the case at bar. See Galloway, 134 S. Ct. at 1826. Of note, in Galloway the Supreme Court itself and the Second Circuit, acknowledged that both children and adults were often present during the town council meetings. The Second Circuit expanded upon this saying, "at times, children were among the residents attending town meetings, members of boy scout troops and other student groups have lead the Pledge of Allegiance and high school students may fulfill state-mandated civics requirements necessary for graduating by going to Board meetings." See Galloway v. Town of Greece 681 F. 3d 20, 23 (2d Cir. 2012). Although there is precedent holding that the standard for coercion is substantially lower when school children are subjected to a school official's religious expression, here, based on the principals of stare decisis, it is more appropriate to analyze the facts in light of the Galloway decision. Failing to do so would result in the creation of an unnecessary distinction from the factually similar Galloway case.

Applying the analysis established in Galloway to determine the coerciveness of legislative prayer, the high school seniors that were present during the Town's meeting were not unduly coerced by the invocation prayer given by their teacher, Green, or any clergyman, because they were not forced to participate in the invocation prayer, and voluntarily attended the meeting. In Galloway, the Supreme Court did not find it coercive where the students present at the Town meeting were in attendance to fulfill a state mandated civics requirement. Id. Rather, the plurality stated that the high school seniors, who are virtually adults, should "be able to tolerate and

perhaps appreciate a ceremonial prayer delivered by a person of a different faith." Id. at 1823. Here, the students attendance was not required, but only encouraged by the prospect of extra academic credit. R. at 4. Of import, students were also permitted to complete other tasks to receive the same extra credit, including volunteering for a political candidate of their choice for fifteen hours, or writing a three-page letter to their federal or state elected representative setting forth the student's position on a current political issue. R. at 4. There is no evidence that students who did not attend the town hall meetings were treated any differently than other students or received a difference in grade. In fact, out of those who did participate, the extra credit only impacted two student's final grade in Ms. Green's government class. R. at 4.

Should this Court apply the doctrine principles established in Lee v. Weisman instead of the Galloway analysis, the Town's prayer policy and practices would still not be considered coercive towards the high school seniors, in light of the factual differences in the case at bar. In Lee v. Weisman, students were coerced to stand and remain silent during the prayer, which was given by a clergyman selected by the school's principals at a school graduation. See Lee v. Weisman, 505 U.S. 577 (1992). Additionally, the prayers were primarily Christian and degraded other minority religions. Id. Differing from this factual scenario, the students in this case were exposed to, and present for, varying religion's prayers, including their teacher, Green's prayer to Buddha, and other prayers led by the New Life leaders. R. at 2. While the presiding Council Member or clergyman did request that members stand for the Pledge and invocation, there is no indication that this request equates directing a student to participate in prayer. R at 2. Although one of the students, Ben Geller, felt compelled to participate, such a feeling is not enough to equate coercion as the presence of legislative prayer does not suggest that those who disagree with a particular doctrine are compelled to join in the expression or approve of its content. See

West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624, 642 (1943); see also Galloway, 134 S. Ct. at 1826. Additionally, as students of Ms. Green's government class, their awareness of the history and tradition of legislative prayer should be greater than that of another high school senior, making them less vulnerable in the presence of a legislative invocation. R. at 3. Lastly, the same alternative options of leaving the room or standing silently that were made available to the adults present were also available to the high school seniors, differing from prayer taking place at a high school graduation as seen in the Lee case. Thus, students who were voluntarily present at the Town's meeting are not unduly coerced to participate in legislative prayer, and an Establishment Clause violation is not present.

Central Perk Township's Council's prayer practices were not unduly coercive, as they did not direct those present at the town hall meetings to participate or present any negative consequences for those who chose not to take part in the prayer. Additionally, although the prayers occasionally contained religious dogma and sectarian language, the prayers did not contribute to a trend or pattern of proselytizing or denigrating other faiths as they also contain universal themes and members of any faith are welcome to present an invocation prayer. Secondly, although high school seniors were present at many town hall meetings, their presence alone does not alter the appropriate jurisprudence to apply, as this was not a public school event, or a meeting that the students were required to attend. Thus, the same analysis that applied to the adults present is applicable. As such, the prayer practices were also not coercive of the high school students who voluntarily chose to present at the meetings.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of The United States Court of Appeals for the Thirteenth Circuit and uphold the constitutionality of the Town's Council's prayer policy and practices.

Respectfully Submitted,

Team N

Attorneys for Respondents

September 14, 2018

CERTIFICATE OF SERVICE

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

/s./_____
Counsel for Respondent

Team N

CERTIFICATE OF COMPLIANCE

Counsel for Respondent certifies that the foregoing brief complies with Rules of the United States Supreme Court, and with the most recent edition of The Bluebook: A Uniform System of Citation. This brief has been prepared in accordance with all Leroy R. Hassell, Sr. National Constitutional Law Moot Court Competition Rules.

/s./_____

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