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

Team U
Counsel for Respondent

QUESTIONS PRESENTED

1. Whether the Central Perk Town Council's legislative prayer policy is constitutional when Council Members deliver the invocations themselves or select their own personal clergy to do so, and the invocations have been theologically varied.

2. Whether the Central Perk Town Council's prayer policy is unconstitutionally coercive of meeting attendees when some invocations included language suggesting the sovereignty of sectarian religious beliefs.

3. Whether the Central Perk Town Council's prayer policy and practices are unconstitutionally coercive of high school students who received academic credit for presenting at meetings where their teacher was also a Council Member who gave an invocation.

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The transcript of the record sets forth the unofficial and unreported opinion of the United States District Court for the Eastern District of Old York granting Petitioner's Motion for Summary Judgment. *Geller v. Central Perk Township*, No. 16-cv-347 (E.D.O.Y. Feb. 17, 2017). R. at 1-11. The transcript of the record provides the unofficial and unreported opinion of the United States Court of Appeals for the Thirteenth Circuit reversing the decision of the district court, granting Respondent's Motion for Summary Judgment and dismissing Petitioner's Complaint. *Geller v. Central Perk Township*, No. 17-143 (13th Cir. Jan. 21, 2018). R. at 13-19.

STATEMENT OF JURISDICTION

The United States District Court for the Eastern District of Old York had subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343. The United States Court of Appeals for the Thirteenth Circuit had jurisdiction under 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254. This Court granted Certiorari on August 1, 2018.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The preamble of Central Perk Township's policy on legislative prayer, adopted in September 2014, is reproduced in Appendix A. The First Amendment to the United States Constitution is reproduced verbatim in Appendix B.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

In September 2014, following the decision of this Court in *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), the Town Council of Central Perk Township (the "Council") adopted a policy[1] allowing for prayer invocations before the official commencement of each town meeting. R. at 2. Central Perk Township has a population of 12,645 and is in a rural area of Old York. R. at 1. The Council governs the town and holds monthly meetings to conduct business and address local issues. R. at 1.

Central Perk Township's adopted policy allows for random selection of Council members to deliver prayer invocations. R. at 2. When a Council member is selected, that member may either offer the prayer herself, or select a member of the clergy to offer the invocation instead. R. at 2. Once the clergy member has been selected, the Council member may not provide input or in any way review the invocation delivered by the clergy member. R. at 2. Council members may also decide against offering any invocation at all. R. at 2. If a Council member omits an invocation from the meeting, that member opens the meeting by only reciting the Pledge of Allegiance. R. at 2. The Pledge has been recited at every Council meeting in Central Perk Township for the past sixty-two years. R. at 2. The Council member opening the meeting requests that citizens who are present stand for both the invocation (if one is given) and the Pledge of Allegiance. R. at 2. If a clergy member is selected to deliver the invocation in the Council member's stead, the Council member leads the audience in the Pledge and then introduces the clergy member who delivers the invocation. R. at 2.

[1] The preamble of the adopted policy is reproduced in Appendix A.

The Council consists of seven members who are elected biennially. R. at 1. At the time the issues in this action arose, the members of the Council were: Joey Tribbiani ("Tribbiani"), the Chairman of the Council; Rachel Green ("Green"); Monica Geller-Bing ("Geller-Bing"); Chandler Bing ("Bing"); Gunther Geffroy ("Geffroy"); Janice Hosenstein ("Hosenstein"); and, Carol Willick ("Willick"). R. at 1. During each meeting, Chairman Tribbiani selected the Council member who would deliver the invocation and lead the Pledge of Allegiance at the next month's meeting by drawing Council members' names from an envelope.[2] R. at 2. From October 2014 through July 2016, when petitioners filed this civil action, only two Council members chose to give invocations themselves: Council members Green and Willick. R. at 2.

The Council members are of a variety of diverse faiths. *See* R. at 2-3. The names of Council members Bing and Geller-Bing, who are members of the Church of Jesus Christ of Latter Day Saints, were drawn four and five times, respectively. R. at 2. Each time, they each picked David Minsk, president of their Branch of the Church of Jesus Christ of Latter Day Saints, to deliver the invocation. R. at 3. Of the nine total occasions on which President Minsk delivered the invocation, on five occasions, he prayed, "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, he asked that no person in attendance reject Jesus Christ or commit sins against the Heavenly Father so that no person would be sent to the Telestial Kingdom, away from the fullness of God's light. R. at 3. On one occasion, President Minsk prayed the following:

> "Heavenly Father, we thank thee for this day and all our many blessings. Thou art our sole provider, and we praise Thy power and mercy. Bless that we can remember

[2] Council member Geffroy asked that he never be selected to give the invocation, and therefore his name is not one available for selection from the envelope. R. at 2.

> 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 Willick's name was drawn three times. R. at 3. Council member Willick, who is a member of the Muslim faith, delivered the following invocation each time: "As salamu aleiykum wa rahmatullahi wa barakatuh," which translates to "Peace and mercy and blessings of Allah be upon you." R. at 3.

Council member Hosenstein's name was drawn two times, and Chairman Tribbiani's name was drawn twice. R. at 3. Both are members of New Life Community Chapel ("New Life"), an evangelical Christian church. R. at 3. All four times Hosenstein and Tribbiani's names were drawn, they asked pastors from New Life to deliver the invocation. R. at 3. Each prayer delivered by a New Life pastor ended with the phrase, "in the name of our Lord and Savior, Jesus Christ." R. at 3. Occasionally, their prayers incorporated requests for salvation for all "who do not yet know Jesus," for "blinders to be removed from the eyes of those who deny God," and for "every Central Perk's citizen's knee to bend before King Jesus." R. at 3. Typically, the prayers asked for divine guidance for the Council members. R. at 3.

The name of Council member Green, who is a member of the Baha'i faith, was drawn four times. R. at 3. On two occasions, she declined to deliver an invocation or invite a clergy member to deliver one in her stead. R. at 3. On the other two occasions, she acknowledged the infinite wisdom of Buddha, praying to him and asking that the Council meeting be conducted in harmony and peace. R. at 3.

Council member Green is also a teacher of American history and government at Central Perk High School. R. at 4. In her American government seminar, Green encourages her students to become engaged in the political process. R. at 4. For example, if a local, state or federal election campaign is underway, Green will add five extra credit points to the final test grade of any student

who volunteers for the political candidate of their choice for at least fifteen hours. R. at 4. If no campaigns are underway, students may earn five points of extra credit by writing a three-page letter asserting their position on a current political issue to their federal or state elected representative. R. at 4.

Green's seminar students may also earn extra credit points for making a five-minute presentation to the Council endorsing or opposing measures currently under the Council's consideration. R. at 4. Instead of being added to their final test grade, these extra credit points are added to a student's class participation grade, which constitutes ten percent of their final grade in the class. R. at 4. Green's students are not required to make presentations at Council meetings, and only three of Green's students may make presentations at each Council meeting. R. at 4. Twelve students in Green's class earned extra credit through their participation in Council meetings from December 2014 through May 2015. R. at 4. The final grades of only two students were affected by their participation: one raised her grade from a B- to a B; the other raised his from a B+ to an A-. R. at 4. Presenting at Council had no effect on the final grades of the other ten students who earned extra credit. R. at 4.

During the 2015-2016 academic year, thirteen students from Green's class chose to make presentations to the Council. R. at 4. Ben Geller, son of Petitioner and New Life member Ross Geller, made a presentation to the Council at the October 6, 2015 meeting. R. at 4. Green delivered the invocation at that meeting and prayed to Buddha, acknowledging his "infinite wisdom." R. at 5. Timothy Burke, son of Petitioner Dr. Richard Burke, made a presentation to the Council at the November 4, 2015 meeting. R. at 5. President Minsk delivered the invocation at that meeting and asked that no person in attendance reject the Heavenly Father. R. at 5. Leslie Buffay, daughter of petitioner Phoebe Buffay, made a presentation to the Council at the February 5, 2016 meeting. R.

at 5. President Minsk delivered the invocation at that meeting as well, in which he prayed for the restoration of New Jerusalem. R. at 5. Frank Kudrow, Jr., son of Petitioner Lisa Kudrow, made a presentation to the Council at the May 8, 2016 meeting. R. at 5. A New Life pastor delivered the invocation at that meeting. R. at 5. Petitioners Burke, Buffay and Kudrow ("Atheist Petitioners"), are all atheists and members of the Central Perk Freethinkers Society. R. at 5.

II. PROCEDURAL HISTORY

Petitioner Geller filed his Complaint on July 2, 2016, alleging that Green's invocation at the October 6, 2015 meeting was a coercive endorsement of religion that violated the Establishment Clause of the First Amendment of the United States Constitution. R. at 5. On August 30, 2016, Atheist Petitioners filed a Complaint alleging that the prayer practice of the Council constituted an "official sanction" of religion that violated the Establishment Clause. R. at 6. Petitioners consented to the consolidation of their respective claims before the United States District Court for the Eastern District of Old York due to the presence of overlapping legal issues and common facts.[3] R. at 6.

Petitioners and respondents both filed Motions for Summary Judgment in the district court. R. at 6. The district court granted Petitioners' Motions for Summary Judgment on February 17, 2017, and permanently enjoined Respondents from continuing its practice of legislative prayer before Council meetings. R. at 11. Respondents filed a timely appeal to the United States Court of Appeals for the Thirteenth Circuit on March 15, 2017. R. at 12. On January 21, 2018, the circuit court reversed the decision of the district court, granting the Respondent's Motion for Summary

[3] Parties may join in a single action as plaintiffs if a question of law or fact common to all plaintiffs will arise in the action. Fed. R. Civ. Pro. 20(a)(1)(B).

Judgment and dismissing the Complaints of Petitioners. R. at 19. This Court granted certiorari on August 1, 2018. R. at 20.

SUMMARY OF THE ARGUMENT

Legislative prayer is a tradition deeply rooted in American political and communal life. The practice is quite literally as old as our nation itself evidenced by the fact that the first meeting of the Continental Congress was opened with a prayer. This fact was recognized in *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), which held that legislative prayer was not unconstitutional under the Establishment Clause of the First Amendment to the U.S. Constitution but set limits as to the prayers contents and manner of delivery. First, an inquiry into whether a legislative prayer practice is constitutional should seek to determine whether the practice fits within the tradition long followed in Congress and the state legislatures. Here, the Council adopted its policy on opening its council meetings with a blessing or invocation following this Court's decision in *Town of Greece*, thereby reflecting the Township's desire to participate in a longstanding tradition in our nation. The policy was specifically adopted with the parameters of *Town in Greece* in mind, and thus this country's long history of legislative prayer as well. Additionally, allowing both appointed clergy and Council Members to deliver the prayer is consistent with this Court's view of legislative prayer as it has held that the identity of the prayer giver is immaterial.

Additionally, based on the framework in Town of Greece, an invocation given before a legislative session must not denigrate another religion or religion in general. Prayers that are solemn and respectful in tone that also demonstrate legislators' desire to seek guidance have been deemed permissible by this Court. References to individual religion do not designate prayers as impermissible within the bounds of the Establishment Clause. Here, there is no evidence to suggest that any prayers were made that were anything other but respectful of a variety of religions.

Furthermore, none of the prayers disparaged any individual religion or attempted to convert listeners to a particular religion and were given by members of a wide array of different faiths.

Finally, while no case at present time has directly addressed the issue of students attending legislative prayer sessions, the Supreme Court explicitly approved the practice of legislative prayer at meetings where high school aged citizens were regularly in attendance. Here, there is no material distinctions between the attendance of the high school students in Greece, and the students that regularly attended the Central Perk Town Council meetings. There was no evidence of coercive pressure to conform to any religion and the assignment to attend the council meeting had a secular educational purpose as well as a communal legislative benefit and indistinguishable alternatives should any of the students felt uncomfortable about the prayers.

Simply put, there are no material distinctions between the legislative prayers that took place in *Town of Greece* and the invocations that were delivered in the case at hand.

STANDARD OF REVIEW

Alleged violations of the Establishment Clause are reviewed *de novo*. *Fleming v. Jefferson Cty. Sch. Dist.*, 298 F.3d 918, 922-23 (10th Cir. 2002). In reviewing the decision of a lower court in a case involving the First Amendment, a court must "make an independent examination of the whole record." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984). An independent review allows courts to maintain "control of . . . the legal principles governing the factual circumstances necessary to satisfy" the protections of the Establishment Clause. *Lilly v. Virginia*, 527 U.S. 116, 136 (1999).

Challenges to decisions on motions for summary judgment are also reviewed *de novo*. *Nischan v. Stratosphere Quality, LLC*, 865 F.3d 922, 928 (7th Cir. 2017). On a motion for summary judgment, a court construes all facts and reasonable inferences in favor of the non-

moving party, granting summary judgment only when the admissible evidence shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56.

ARGUMENT

I. THE COUNCIL'S LEGISLATIVE PRAYER POLICY IS CONSTITUTIONAL BECAUSE THE PRACTICE OF LEGISLATIVE PRAYER HAS LONG BEEN HELD TO BE COMPATIBLE WITH THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

The First Amendment of the United States Constitution, incorporated against the states by the Fourteenth Amendment, provides that "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I. All of our branches of government have officially acknowledged the role of religion in American life. *See Lynch v. Donnelly*, 465 U.S. 668, 674-78 (1984) (noting that both the Founding Fathers and contemporary leaders make "official references to the value and invocation of Divine guidance.") Legislative prayer, or "[t]he opening of sessions of legislative and other deliberative public bodies with prayer[,] is deeply embedded in the history and tradition of this country." *Marsh v. Chambers*, 463 U.S. 783, 786 (1983). States and municipalities have adopted the practice of legislative prayer as well. *See Smith v. Jefferson Cty. Bd. Of Sch. Comm'rs*, 788 F.3d 580, 588 (6th Cir. 2015) ("At the state and local levels, too, legislative prayer has long been accepted." (citing *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014))). Legislative prayer "has become part of our heritage and tradition, part of our expressive idiom, similar to the Pledge of Allegiance, inaugural prayer, or the recitation of 'God save the United States and this honorable Court' at the opening of [the Supreme Court's] sessions." *Id.* at 1825. Based on the historical tradition of legislative prayer in our nation, the prayer practice

of the Central Perk Township's Council is permissible within the bounds of the Establishment Clause of the First Amendment established by this Court.

A. The Establishment Clause analysis focuses on the prayer opportunity as a whole in light of historical practices.

Based on its grounding in history and tradition and compatibility with the Framers' understanding of the Establishment Clause, this Court has twice approved the practice of legislative prayer. *See Marsh*, 463 U.S. at 794; *Town of Greece*, 134 S.Ct. at 1828. The constitutionality of legislative prayer is analyzed via a "fact-sensitive" inquiry. *Town of Greece*, 134 S.Ct. at 1825. Further, the purpose of a court's "inquiry . . . must be to determine whether the prayer practice [at issue] fits within the tradition long followed in Congress and the state legislatures." *Id.* at 1819. The opportunity to open a legislative session with a prayer "lends gravity to public business, reminds lawmakers to transcend petty differences in pursuit of a higher purpose, and expresses a common aspiration to a just and peaceful society." *Id.* at 1818. "History teaches that these solemn prayers 'strive for the idea that people of many faiths may be united in a community of tolerance and devotion.'" *Bormuth v. Cty. of Jackson*, 870 F.3d 494, 505 (6th Cir. 2017) (en banc) (quoting *Town of Greece*, 134 S.Ct. at 1823).

The Council of the Township of Central Perk adopted its policy on opening its Council meetings with a blessing or invocation following this Court's decision in *Town of Greece*, thereby reflecting the township's desire to participate in a longstanding tradition in our nation. Further, the decision of the Council to undertake the formal adoption of this policy immediately following this Court's decision underscores the township's desire to craft a prayer practice that was within the bounds of that which was deemed permissible by this Court. The preamble to the policy clearly states that the 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."[4] The stated purpose for the Council's adopted policy falls in line with what has long been understood to be the purpose of legislative prayer: transcendence of "petty differences" and "aspiration to a just and peaceful society" for legislators. *Town of Greece*, 134 S.Ct. at 1818.

1. Legislator-led prayer is a longstanding tradition of American political life.

Legislative prayer has become part of "the fabric of our society." *Marsh v. Chambers*, 463 U.S. 783, 792 (1983). In 1774, the Continental Congress adopted the procedure of opening its legislative session with prayer. *See e.g.*, 1 J. of the Continental Cong. 26 (1774); 2 J. of the Continental Cong. 12 (1775); 5 J. of the Continental Cong. 530 (1776); 6 J. of the Continental Cong. 887 (1776); 27 J. of the Continental Cong. 683 (1784). Legislator-led prayer also has a long-standing tradition in our nation. *Bormuth*, 870 F.3d at 509 (citing American Archives, Documents of the American Revolutionary Period, 1774-176, 1:1112 (documenting legislator-led prayer in South Carolina's legislature as early as 1775)). The drafters of the Establishment Clause of the First Amendment "[c]learly . . . did not view . . . opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress." *Marsh*, 463 U.S. at 788. The Framers "considered legislative prayer a *benign acknowledgment* of religion's role in society." *Town of Greece*, 134 S.Ct. at 1819 (emphasis added). Further, the Framers "did not intend to prohibit a just expression of religious devotion by the legislators of the nation, even in their public character as legislators." *Id.* at 1833 (Alito, J., concurring).

That the Council's policy, as implemented, allows for legislators to deliver the invocations themselves does not doom it within the Establishment Clause analysis. Nowhere has this Court

[4] The preamble of the adopted policy is reproduced in full in Appendix A.

stated that legislator-led prayer is *per se* unconstitutional within the bounds of the Establishment Clause: perhaps, no person has ever believed that it was outside of historical tradition. Given its longstanding history and the importance of tradition and historical practice within the Establishment Clause analysis, the practice certainly stands within permissible bounds of the Establishment Clause. Further, Council members may, of their own accord, decline to offer an invocation or invite a clergyman to offer one in their stead: nothing in the policy forces members to participate in or deliver the invocations. One Council member took advantage of the flexibility offered by the Council's adopted policy and declined to have his name be one able to be selected from the envelope. Council member Green also declined to offer an invocation or invite a clergyman to offer one in her stead on two occasions when her name was drawn.

By allowing Council members to deliver the invocation themselves, Central Perk Township is allowing its Council members to express their religious beliefs in order to begin their meetings from a place of peace and congeniality. Prohibiting this practice is akin to prohibiting citizens from freely expressing their religion: a legislator's status as a public servant should not bar her from religious expression. Such a prohibition would directly contradict the intent of the Framers and lead to results that are both unreasonable and illogical.

2. The identity of the prayer giver is inconsequential to the Establishment Clause analysis.

The "government must permit a prayer giver to address his or her own God or gods as conscience dictates." *Town of Greece*, 134 S.Ct. at 1822. There exists no "appreciable difference between legislator-led and legislator-authorized prayer." *Bormuth*, 870 F.3d at 512. Allowing a guest minister to deliver an identical invocation to that of a legislator yet barring the legislator from doing so simply because of his position would lead to "potentially absurd results." *Id.* (quoting *Bormuth v. Cty. of Jackson*, 116 F.Supp.3d 850, 859 (E.D. Mich. 2015), *rev'd*, 849 F.3d

266 (6th Cir. 2017), *rev'd*, 870 F.3d 494 (6th Cir. 2017) (en banc). The "principal audience for these invocations is . . . the lawmakers themselves." *Town of Greece*, 134 S.Ct. at 1825. Thus, "[i]t would be nonsensical to permit legislative prayers but bar the legislative officers for whom they are being primarily recited from participating in the prayers in any way." *Am. Humanist Assoc. v. McCarty*, 851 F.3d 521, 529 (5th Cir. 2017). *See also Bormuth*, 870 F.3d at 512 (asserting that the district court had correctly concluded that barring legislators from participating in prayer would be absurd).

This Court's decisions in neither *Marsh* nor *Town of Greece* focused specifically on the identity of the prayer-giver. Further, because this Court has, on numerous occasions, approved the presence of guest ministers to deliver invocations, barring a Council member from reciting a prayer with identical statements and content simply because of her status as a Council member also defies logic. Invited ministers and chaplains—similar to the invited clergymen occasionally present here—were considered to have been "deputized" to speak on behalf of the governing body in *Town of Greece*, yet such a practice was still deemed permissible by this Court. If a paid and invited officiant—approved by this Court not only in *Town of Greece* but also in *Marsh*—stands on the same ground as a legislator, it plainly follows that Council members may deliver their own prayers.

The preamble of the policy adopted by the Council of the Township of Central Perk clearly asserts that "praying before Town Council meetings is for the *primary benefit* of the Town Council members" (emphasis added). The audience for the invocations delivered by Council members is clearly the "lawmakers themselves," as asserted in *Town of Greece*. Thus, it defies logic to prohibit the legislators from participating in these invocations simply because of their status as legislators. If the invocations are being delivered for legislators while they are acting in their capacity as

legislators, to say that the legislators cannot participate in the invocations—even through their own deliverance of the invocations—is absurd.

B. Though the invocations were entirely theistic, their theological variance is compatible with the Establishment Clause analysis.

The tradition of legislative prayer includes offering prayers, even those that reflect "beliefs specific to only some creeds," that "seek peace for the Nation, wisdom for its lawmakers, and justice for its people, values that count as universal and that are embodied not only in religious traditions, but in our founding documents and laws." *Town of Greece*, 134 S.Ct. at 1823. Prayers that seek to bind legislators are consistent with historical tradition when the prayer givers "ask their own God for blessings of peace, justice and freedom that find appreciation among people of all faiths . . . [t]hese religious themes provide particular means to universal ends." *Id.* Further, the constitutionality of legislative prayer does not turn on the neutrality of its content. *See id.* at 1821 (asserting that "*Marsh* nowhere suggested" that legislative prayers must be neutral in content).

Since the Council's adoption of its legislative prayer policy in September 2014, invocations have been delivered by Council members and representatives of four different faiths, reflecting a diversity of religious views and theological variance certainly appropriate in the context of Establishment Clause analysis. The prayers have generally reflected themes in line with those that have repeatedly been established to be permissible. Thanking the "Heavenly Father" for his "presence and guidance in this session" and asking Buddha "that the Council meeting . . . be conducted in harmony and peace" are "blessings of peace, justice and freedom" that reflect historical tradition and are therefore permissible. *Town of Greece*, 134 S.Ct. at 1823. While on some occasions the prayers might fall outside of these permissible bounds, such missteps by invited clergymen do not doom the Council's prayer practice in its totality.

II. THE INVOCATIONS AT TOWN COUNCIL MEETINGS DID NOT DISPARAGE ANY OTHER FAITH.

Historically, legislative prayer has not been considered "a proselytizing activity or as [the government] symbolically placing" one religion above another. *Marsh v. Chambers*, 463 U.S. at 792. "Rather, the Founding Fathers look at invocations as 'conduct whose . . . effect . . . harmonize[d] with the tenets of some or all religions.'" *Id.* (quoting *McGowan v. Maryland*, 366 U.S. 420, 442 (1961) (alteration in original). Prayers that are solemn and respectful in tone that also demonstrate legislators' desire to seek guidance to "make good decisions that will be best for generations to come" have been deemed permissible by this Court. *Town of Greece*, 134 S.Ct. at 1823. References to religion do not designate prayers as impermissible within the bounds of the Establishment Clause. *See id.* at 1823-24 (asserting that the Framers embraced references to religion as "particular means to universal ends," even if they "invoke[d] the name of Jesus, the Heavenly Father or the Holy Spirit"). The Establishment Clause bars invocations from "denigrat[ing] nonbelievers or religious minorities, threaten[ing] damnation . . . [and] preach[ing] conversion." *Id.* at 1823. The prayer practice of the Council of Central Perk Township allows for Council members to seek guidance from the divine of a variety of faiths, and the prayers delivered do not explicitly disparage any faith.

A. Overt references to specific religions have been held to be constitutionally permissible under the Establishment Clause legislative prayer analysis.

The content of a legislative prayer is generally not of concern to judges. *See Marsh*, 463 U.S. at 792 (stating that "it is not for . . . [judges] to . . . parse the content of a particular prayer"). Prayers "given in the name of Jesus, Allah, or Jehovah, or that . . . mak[e] passing reference to religious doctrine" have been deemed permissible within the bounds of the Establishment Clause. *Town of Greece*, 134 S.Ct. at 1823. "Prayer that reflects beliefs specific to only some creeds can

still serve to solemnize the occasion, so long as the practice over time is not 'exploited to proselytize or advance any one, or to disparage any other, faith or belief.'" *Id.* (quoting *Marsh*, 463 U.S. at 794-95). Prayers that reference "Lord, God of all creation," "the saving sacrifice of Jesus Christ" and "our brother, Jesus" have been deemed permissible by this Court. *Id.* at 1816. It is essential that legislators not become "supervisors and censors of religious speech," as "involv[ing] government in religious matters" to a degree that forces them to regulate the content of the prayers is inappropriate. *Id.* at 1822.

The invocations offered at Council meetings in Central Perk Township contain permissible references to specific religions. Thanking the "Heavenly Father . . . for this day and all our many blessings" (like prayer-giver Branch President David Minsk) or asking that the "[p]eace and mercy and blessings of Allah be upon" the Council meeting attendees (as Council member Willick did) are statements that "mak[e] passing reference to religious doctrine." *Town of Greece*, 134 S.Ct. at 1823. Prayers that are explicitly Christian, such as those delivered at Council meetings by the New Life pastors "in the name of our Lord and Savior, Jesus Christ" are similar to those deemed permissible by this Court in *Marsh* and *Town of Greece*. The Council's adopted policy also bars Council members from having any input or ability to review the content of a prayer offered by their invited clergyman. Such practice is directly in line with this Court's assertion that legislators not become "supervisors and censors of religious speech." *Town of Greece*, 134 S.Ct. at 1822. The content of the prayers offered at the Council meeting should be relevant only to determine whether the prayers served to proselytize or disparage any particular faith.

B. <u>The prayer opportunity was not exploited to advance a particular faith or disparage any other religion.</u>

Legislative prayers may not demonstrate a "pattern . . . that over time denigrate[s], proselytize[s], or betray[s] an impermissible government purpose." *Town of Greece*, 134 S.Ct. at

1824. The Establishment Clause does not require that the government actively court religious balance, "so long as . . . [the legislative body] maintains a policy of nondiscrimination." *Id.* The prohibition on discrimination is aimed at barring government practices that result from a deliberate choice for a legislative body to favor one religious view and exclude others; concern arises when there is evidence of "an aversion or bias on the part of . . . leaders against minority faiths." *Id.* Legislative bodies who utilize prayer are not required to provide opportunities for persons of multiple faiths to offer invocations. *See Bormuth*, 870 F.3d at 514 (stating that neither *Marsh* nor *Town of Greece* requires that legislative bodies mandate religious diversity in legislative prayer). A single prayer giver representing a single religious tradition over a number of years does not advance a single faith or belief over another. *See Marsh*, 463 U.S. at 795 (holding permissible the practice of a single minister offering prayers to the Nebraska legislature over a period of sixteen years).

There is no indication of "aversion or bias" on the part of Council leaders in Central Perk Township: Council members invited representatives from four religions the opportunity to offer invocations. In comparison, in *Marsh*, only one religion was represented over a period of over sixteen years; in *Town of Greece*, the prayers offered were overwhelmingly Christian in nature. Yet, both prayer practices were deemed permissible by this Court. Additionally, nothing in the Council's policy bars members of any religion—let alone minority religions—from delivering invocations at Council meetings. Council members may invite a clergyman from a faith not their own to deliver an invocation. Though this did not occur over the short period of time that the policy was in place is simply irrelevant; rather, the relevant fact is that there is nothing in the Council's policy nor any fact in the record that indicates that Council members are barred from doing so.

The invocations offered at Council meetings did not serve to advance a particular faith, nor did they disparage any religion. No religion was explicitly criticized or insulted in any invocation present in the record. The invocations that have been offered have not proselytized: they have not explicitly asked meeting attendees to change beliefs, to adopt as true any principles of a specific religion or contained any language that is typically understood to suggest conversion. Hope that "all will submit to Christ's reign" (as espoused by Branch President Minsk) is not a request or demand: rather, such a statement is exactly what is stated—hope. Branch President Minsk's requests that none reject Jesus Christ or commit grievous sins against the Heavenly Father are requests made of God, not of meeting attendees. Requests made by the New Life pastors for salvation for those "who do not yet know Jesus" and for "blinders to be removed from the eyes of those who deny God" are similar. Such requests do not serve to proselytize: rather, they serve a similar function as the "hope" that one "submit to Christ's reign." These statements do not force meeting attendees to convert to a single religion, nor do they coerce attendees into adopting any religion at all.

III. THE COUNCIL'S PRAYER POLICY IS NOT UNCONSTITUTIONALLY COERCIVE OF HIGH SCHOOL STUDENTS WHO RECEIVED EXTRA ACADEMIC CREDIT FOR PRESENTING AT COUNCIL MEETINGS BECAUSE THE MEETINGS DO NOT CONSTITUTE THE STATE RECOGNIZING AN ESTABLISHMENT OF RELIGION.

It is well established that "government may not coerce anyone to support or participate in religion or its exercise." *Lee v. Weisman*, 505 U.S. 577, 587 (1992). However, attendees of town council meetings merely being exposed to legislative prayers while present at a meeting does not constitute impermissible coercion on the part of the legislative body. *See Town of Greece v. Galloway*, 134 S. Ct. 1811, 1827 (2014) ("[L]egislative bodies do not engage in impermissible coercion merely by exposing constituents to prayer they would rather not hear and in which they

need not participate.") The Court has held that the Establishment Clause is generally violated when there is a presence of "subtle coercive pressures" to engage in overt religious activity for which there is no real alternative to avoid participation in those activities. *See Lee*, 505 U.S. at 588 (discussing the dangers of over religious activities in secondary schools). However, the Court has recognized that some students — particularly older students — are less susceptible to those coercive pressures to the point where it has allowed overt religious exercises, even at official school events. *See Mellen v. Bunting*, 327 F.3d 355 (4th Cir. 2003), *cert. denied*, 541 U.S. 1019, 1021 (2004) (highlighting judicial acceptance of prayer at college graduations). Furthermore, nothing in Establishment Clause nor school prayer jurisprudence indicates that public schools and their employees may not teach about religion so long as the information is "presented objectively as part of a secular program of education . . . ." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 224 (1963).

A. The Council's prayer policy is not unconstitutionally coercive of the high school students attending the meetings because merely being in the presence of legislative prayer is not coercive, no coercive forces were present.

Legislative prayer in and of itself is not deemed to be coercive due to the fact that "[o]ur tradition assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith." *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1823 (2014). However, there are "heightened concerns" related to coerciveness when children are brought into the analysis. *Lee v. Weisman*, 505 U.S. 577, 592 (1992); *see also Chaudhuri v. Tennessee*, 130 F.3d 232, 238-39 (6th Cir. 1997), *cert. denied*, 523 U.S. 1024 (1998) (discussing the Court's emphasis on the danger of indirect coercion in the context of primary and secondary schools). This is largely due to the risk of peer pressure on younger members of society leading to coercion to participate in religious observances and a lack of real alternatives to

participation. *See Chaudhuri*, 130 F.3d at 238-239 (discussing the role of peer pressure in school prayer jurisprudence); *see also Tanford v. Brand*, 104 F.3d 982, 985-86 (7th Cir. 1997), *cert. denied*, 522 U.S. 814 (1997) (discussing alternatives to participation in a religious service at a school graduation).

While no case at present time has directly addressed the issue of students attending legislative prayer sessions, the Court in *Town of Greece* considered the potential coerciveness of legislative prayer through lens of landmark decisions on school prayer and the attendance of children was at the very least an ancillary issue. *See Town of Greece*, 134 S. Ct. at 1827 (contrasting the conclusions and holdings from *Lee v. Weisman*, 505 U.S. 577 (1992) to the prayer policy in *Town of Greece*). Most notably, the Supreme Court explicitly approved the practice of legislative prayer at meetings where high school aged citizens were regularly in attendance. *See id*. ("[T]he prayer is delivered during the ceremonial portion of the town's meeting [which includes] inducting high school athletes into the town hall of fame. . . .").

In the case at hand, there should be little debate that high school seniors merely attending the Council meeting is unconstitutionally coercive. As previously mentioned, the Court explicitly approved legislative prayers where high school aged students were in attendance in *Town of Greece*. The only difference between the attendance that was explicitly approved by the Court in *Town of Greece* and the attendance in the case at hand was the fact that the students in question attended the town council meeting for class credit. However, this fact has no effect on the coerciveness of the prayer.

The potential for coercion or proselytization through peer pressure here is virtually nonexistent. Attendance at the meetings was completely voluntary and not a class requirement as it was for extra credit. In this case, the "real alternative" to attendance was not attending or

completing one of the two other extra credit assignments: volunteering for a political campaign—if one is underway—or writing a letter to a government representative. There was no potential for coercive pressure to attend through grading as the alternatives provided a similar means of earning the same number of points and those points had no effect on the grades of the vast majority of students who attended the meetings. More importantly, and in contrast to the cases involving prayer at school graduation, the students were free to come and go as they pleased without comment from peers or school officials. The assignment simply required them to give a speech. There is nothing in the record to indicate they were required to arrive before the prayer, stay during the prayer, or not simply leave once their speech had been made. Additionally, there is nothing in the record to suggest that the students would be shamed or pressured by fellow students for failing to observe the prayers because there were often few, if any, other students in attendance at the meetings as only 12 or 13 students attended the meetings over the course of an entire academic year. Lastly, the students' age reduces the potential for subtle coercive pressures. As the students were high school seniors, many were likely adult-aged at the time of their attendance. As the Court has noted on multiple occasions that citizens become less susceptible to peer pressure and other coercive forces as they become older, the fact that some of the students were likely adults, and almost all were likely 17 years of age or older, is indicative of the fact that they were less likely to be influenced by the mere recitations of prayer in their presence.

Additionally, there is nothing in the record to suggest that the students were witness to any prayers that would be considered proselytizing or coercive under the *Town of Greece* analysis. None of the prayers disparaged any individual religion or attempted to convert students to a particular religion. In fact, the meetings that the students attended included theologically varied prayer including those from two sects of Christianity as well as the Baha'i religion.

B. The Council's prayer policy is not unconstitutionally coercive of the students attending the meetings because attendance at the meeting was part of a secular program of education with a clear non-religious purpose.

Outside of the context of legislative prayer, the Supreme Court has established a three-part analysis for analyzing whether a state action is in violation of the Establishment Clause. *See* Ian C. Bartrum, *The Curious Case of Legislative Prayer: Town of Greece v. Galloway*, 108 NW. U. L. REV. 218, 219 (2014). Under the *Lemon* test, state action must have a "secular legislative purpose", must not "advance" or "inhibit" a specific religion, and must not "excessively entangle government and religion." *Lemon v. Katzman*, 403 U.S. 602, 612-613 (1971). The inclusion of prayer in educational settings has been deemed to be coercive when school officials directly dictated the conduct and substance of the event, there were few or no alternatives to attendance, or attendees were not able to leave the event without comments from peers or those in positions of power. *See Lee*, 505 U.S. at 588; *Tanford*, 104 F.3d at 985; *see also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000). Additionally, there is a clear distinction between the practice of prayer in school, prayer during school sanctioned events, and prayer as part of school sanctioned extra-curricular activates. *Compare Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963), *with Tanford*, 104 F.3d at 985, *and Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001).

Assuming, *arguendo*, that the Court chooses to analyze this case from school prayer perspective as opposed to the legislative prayer perspective that has already been addressed, the test fashioned in *Lemon* would control. If the Court analyzes this aspect of the case under a combination of the two analyses, both the aforementioned legislative prayer analysis as well as *Lemon* test factors indicate congruence with the Establishment Clause. Here, Council member Green was in no way attempting to expose the students to religion—especially her religion—indicating a clear non-religious purpose for an assignment that fit into the larger goal of a secular

education. The assignment in question was for an American government class and the Council agreed on the policy of allowing students to give speeches before the assembly because they believed it would promote civic engagement of young people: a clear secular legislative purpose. To the extent that Councilwoman Green can be viewed as a state actor in her role as a teacher, there is a clear secular purpose to teach her students about local government.

The assignment does nothing to inhibit or advance religion. As previously mentioned, the students attended different Council meetings with different prayers representing a wide array of religions. While at least one student did attend a meeting in which Council member Green gave the invocation, at least three others attended meetings where she did not. The fact that students could attend any meeting and still receive the same amount of credit highlights that the assignment was in no way meant to promote or advance religion, but instead was being used for its stated purpose: a lesson in civics. It is also clear that Council member Green, to the extent she could be classified as a school official, did not dictate the content of the meetings nor reprimand students for failure to participate or attend, as was the case in *Lee*.

Finally, the assignment did nothing to further entangle government and religion beyond what has already been established to be constitutionally permissible in *Marsh* and *Town of Greece*. The level of entanglement present here is directly analogous to the high school athletes in *Town of Greece* that attended town council meetings in order to receive their induction into the town hall of fame. In both situations, the students were provided some benefit by attending the meeting but the Court in *Town of Greece* found no evidence of coercive pressures, or reasons why the students would be admonished for leaving the meeting or failing to participate in the prayer. Here, the entanglement of government and religion is even less apparent because of the dearth of alternatives

students had towards earning extra credit beyond simply attending the meeting, as well as the lack of effect that attendance at the meeting had on the vast majority of students' overall grade.

As the *Lemon* test was satisfied, and there was a clear lack of coercive behavior on the part of any government official, the assignment was part a secular program of education with a clear non-religious purpose.

CONCLUSION

This Court should affirm the decision of the United States Court of Appeals for the Thirteenth Circuit.

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 U

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/_____
Counsel for Respondent
Team U

APPENDIX A

CENTRAL PERK TOWNSHIP POLICY ON LEGISLATIVE PRAYER, PREAMBLE

Whereas the Supreme Court of the United States has held that legislative prayer for municipal legislative bodies is constitutional;

Whereas the Central Perk Town Council agrees that invoking divine guidance for its proceedings would be helpful and beneficial to Council members, all of whom seek to make decisions that are in the best interest of the Town of Central Perk; and,

Whereas praying before Town Council meetings is for the primary benefit of the Town Council Members, the following policy is adopted.

APPENDIX B

U.S. CONST., amend. I

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