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 J

Attorneys for Respondent

QUESTIONS PRESENTED

I. Whether the Central Perk Town Council's legislative prayer policy, which allows theologically varied but exclusively theistic invocational prayers to be occasionally delivered by council members, violated the Establishment Clause?

II. Whether the Central Perk Town Council's legislative prayer policy, as implemented, unconstitutionally coerces either the adults or high school students in attendance?

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The United States District Court for the Eastern District of Old York issued its opinion on February 17, 2017. R. at 1–11. This opinion was unreported. On January 21, 2018, the United States Court of Appeals for the Thirteenth Circuit issued its opinion. R. at 13–19. This opinion was unreported.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Thirteenth Circuit was entered on January 21, 2018. R. at 19. The petition for writ of certiorari was granted on August 1, 2018. R. at 20. This Court has appellate jurisdiction pursuant to the grant of writ of certiorari as required by 28 U.S.C. § 1254(1) (2012). This Court has subject matter jurisdiction under 28 U.S.C. § 1331(1) (2012).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution, which provides: "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." U.S. Const. amend. I.

This case also involves the statutory provision that allows a person to bring a civil action for the deprivation of his or her rights, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial

> capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (2012).

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

This dispute involves Central Perk Township (hereinafter, "Central Perk"), a town located in Old York and governed by the Town Council (hereinafter "Council"). R. at 1. The Council is a religiously diverse body and consists of seven members who are elected biennially. R. at 1. When the dispute arose, the Council members included two members of the Church of Jesus Christ of Latter Day Saints (hereinafter "Mormon(s)"), Chandler Bing (hereinafter "Bing") and Monica Geller-Bing (hereinafter "Geller-Bing"), one member of the Muslim faith, Carol Willick (hereinafter "Willick"), one member of the Baha'i faith, Rachel Green (hereinafter "Green"), two members of an evangelical Christian church called the New Life Community Chapel (hereinafter "New Life"), Janice Hosenstein (hereinafter "Hosenstein") and Joey Tribbiani (hereinafter "Tribbiani"), and Gunther Geffroy (hereinafter "Geffroy"). R. at 2–3.

Prayer Policy. In September 2014, the Council implemented a policy which allowed for a prayer or invocation to be given before the commencement of its legislative sessions. R. at 2. The policy called for Council members to be chosen at random by the Council's Chairman Tribbiani. R. at 2. Once chosen, the Council member may either deliver the invocation personally, designate a minister from the community as a guest speaker in his or her stead, or omit the prayer or invocation entirely. R. at 2. The Council is not allowed to review a guest minister's choice of invocation. R. at 2. Regardless of whether the prayer is given, the Pledge of Allegiance is recited, as has been done for the last sixty-two years. R. at 2.

Prayer Givers. During the time The Council's policy was implemented, Council members were selected, at random, on twenty occasions. R. at 2–3. Green, whose name was chosen four times, declined to give an invocation twice. R. at 3. The other two times, Green "prayed to Buddha, acknowledging his infinite wisdom and asking that the Council meeting would be conducted in harmony and peace." R. at 3.

Each time Bing, who was chosen four times, and Geller-Bing, who was chosen five times, were selected, they invited the Branch President of their Mormon church, David Minsk (hereinafter "Minsk"). R. at 2–3. On one occasion, Minsk's prayer began with "Heavenly Father," concluded with the phrase "[i]n the name of Jesus Christ, amen," and gave thanks for divine guidance. R. at 3. On five occasions, Minsk prayed for the gathering of Israel, the restoration of ten tribes, and asked that "New Jerusalem be built here and that all will submit to Christ's reign." R. at 3. Minsk's other three prayers requested that none reject Jesus Christ or commit heinous sins, for fear that they "would be sent to the Telestial Kingdom." R. at 3.

Willick, who was chosen three times, said the following Muslim prayer: "As salamu aleiykum wa rahmatullahi wa barakatuh." R. at 3. This Arabic prayer, when translated to English, means "Peace and mercy and blessings of Allah be upon you." R. at 3.

Each time Hosenstein and Tribbiani, whose names were each chosen twice, were selected, they asked a New Life pastor to deliver the invocation. R. at 3. The prayers frequently "asked for divine guidance for the Council." R. at 3. Additionally, the prayers ended "in the name of Jesus Christ," and occasionally expressed other Christian references such as a desire "for every Central Perk citizen's knee to bend before King Jesus." R. at 3.

Students' Presence at Council Meetings. In addition to her role as a Council member, Green taught both American History and a seminar in American Government at Central Perk

High School. R. at 4. Students are not required to take Green's class in order to graduate from high school. R. at 4.

Green allows her students to earn five extra credit point in three ways. R. at 4. First, three of Green's American Government students are each allowed to make a five-minute presentation during the monthly Town Council meetings "endorsing or opposing measures currently under consideration by the Council." R. at 4. Students who make a presentation would earn "five extra credit points to their class participation grade." R. at 4. Class participation is worth "ten percent of their final grade." R. at 4.

Second, if there are ongoing campaigns, students can volunteer for "the political candidate of their choice." R. at 4. Students who volunteer for a minimum of fifteen hours "are awarded five extra credit points to their final test grade." R. at 4.

Third, if there are no ongoing campaigns, students may write a "three page letter to their federal or state elected representative setting forth the students position on a current political issue." R. at 4. Students who write such letters "may earn five extra credit points." R. at 4.

Only two of the twelve students who earned extra credit in Green's class in the 2014–2015 academic year saw an increase in their letter grade. R. at 4. In the 2015–2016 academic year, four of the thirteen students who decided to earn extra credit were sons or daughters of the plaintiffs. R. at 4.

First Complaint. On October 6, 2015, Geller's son, Ben, gave a presentation to the Council regarding the construction of a statue in a city park when Green delivered the invocation. R. at 4-5. Ross Geller (hereinafter "Geller"), a member of New Life, was upset when Green's prayer recognized the existence and wisdom of Buddha. R. at 5. Geller filed suit on July 2, 2016 alleging Green's prayer was coercive under "the Establishment Clause." R. at 5.

Second Complaint. On August 30, 2016, Phoebe Buffay, Dr. Burke, and Lisa Kudrow (hereinafter "atheist plaintiffs") filed suit alleging the Council's prayer policy violated the Establishment Clause. R. at 5. Additionally, they alleged that the Council exercised exclusive control over invocations, thus, discriminating against "non-theistic faiths." R. at 6. Finally, they alleged the practice was coercive of those attending the Council meetings. R. at 6.

II. NATURE OF THE PROCEEDINGS

District Court. The plaintiffs brought an action against Central Perk under 42 U.S.C. § 1983 in the United States District Court for the Eastern District of Old York seeking a permanent injunction against the Council's prayer practice. R. at 1–2. Both parties filed motions for summary judgment. R. at 1. The district court granted the plaintiff's motion, holding the Council's prayer policy, as implemented, "fell outside the boundaries of [constitutionally] permissible legislative prayer" and was unconstitutionally coercive. R. at 10, 13.

Court of Appeals. Central Perk appealed to the United States Court of Appeals for the Thirteenth Circuit. R. at 12–13. The court of appeals reversed the district court's judgment and found in favor of Central Perk. R. at 13. The court held the Council's prayer policy operates within the limits allowed by Supreme Court's legislative prayer precedent. R. at 15–16. The court also held that the prayer policy did not coerce adults or students who attended the Council meetings to participate in religious activity. R. at 17–19. The plaintiffs filed a petition for a Writ of Certiorari, which this Court granted on August 1, 2018. R. at 20.

SUMMARY OF THE ARGUMENT

I.

The United States Court of Appeals for the Thirteenth Circuit correctly determined that Central Perk's legislative prayer policy did not violate the Establishment Clause. In finding for

Central Perk, the Thirteenth Circuit correctly applied this Court's precedent in *Town of Greece v. Galloway* and *Marsh v. Chambers*, which provide the correct method of analysis for legislative prayer cases. There is nothing in this Court's precedent which indicates a legislative prayer policy should be analyzed any differently if prayer is legislator-led. Furthermore, theistic invocations have a longstanding tradition in the United States, dating back to the Founding Fathers.

II.

The Thirteenth Circuit also correctly determined that Central Perk's legislative prayer policy was not coercive because it does not compel any person in the meetings' attendance to exercise, or otherwise adhere to any religion. Central Perk's purpose for initiating the prayer policy was simple, clear, and innocuous: to ask for divine guidance so they may act in the best interest of their community. Looking at this prayer policy, as a whole, reveals that the speakers do not seek to coerce those in the audience, but merely to provide the Council members with the guidance they seek. In carrying out this purpose, the Council developed a system that represented the various beliefs of the community. The prayers do not force those in attendance to rise, pray, or adhere to the speaker's beliefs in any way. Moreover, the presence of students does not change these conditions because of the legislative setting and absence of administrative control found in the school setting.

ARGUMENT AND AUTHORITIES

The district court resolved this case by granting summary judgment for Petitioners on both claims. R. at 1. Summary judgment is proper when no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. *See Anderson v. Liberty Lobby,*

Inc., 477 U.S. 242, 255 (1986). A reviewing court examines the grant of summary judgment de novo, applying the same standard as the district court. *Id.*

The Establishment Clause guarantees every citizen of the United States that government "shall make no law respecting an establishment of religion." U.S. Const. amend. I. This protection is applicable to all states and their political subdivisions through the Fourteenth Amendment. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947); U.S. Const. amend. XIV.

Petitioners cannot show a violation of the Establishment Clause, first, because the prayers delivered at the Council meetings amount to private speech, which cannot yield a violation. *See Bd. of Educ. of Westside Cmty. Sch. v. Mergens By & Through Mergens*, 496 U.S. 226, 250 (1990). However, even if this Court finds otherwise, the long and developed history of legislative prayer demonstrates the Founding Fathers' intent to allow such prayers. *See Marsh v. Chambers*, 463 U.S. 783 (1983); *see also Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014). This Court has recognized the moral and societal value of these practices, so long as they do not fall outside of the bounds of respect or coerciveness. *Galloway*, 134 S. Ct. at 1821–25. Central Perk's prayer policy was created in the light of these values and adheres to this Court's boundaries.

I. APPLICATION OF THE CENTRAL PERK TOWN COUNCIL'S LEGISLATIVE PRAYER POLICY DOES NOT AMOUNT TO GOVERNMENT SPEECH BECAUSE THE LEGISLATORS' PRAYERS WERE GIVEN IN A PERSONAL CAPACITY AND THE GOVERNMENT DID NOT CONTROL THE CONTENT OF THE PRAYERS.

As a threshold matter, this Court need not reach the Establishment Clause argument because the Council's legislative prayer policy, as implemented, is not government speech. Rather, the legislators' prayers were offered in their personal capacity and the government did not control the content of the prayers.

Government speech refers to speech that can be attributed to the government, *Am. Civil Liberties Union of Tenn. v. Bredesen*, 441 F.3d 370, 375 (6th Cir. 2006), or to instances when the

government speaks for itself. *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000); *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 564–65 (2005) ("*Johanns* stands for the proposition that when the government determines an overarching message and retains power to approve every word disseminated at its behest, the message must be attributed to the government . . . ."). Speech may be properly attributed to the government when spoken by a government official acting in his or her official capacity, as well as when the government exerts control over the content of the speech. *Connick v. Myers*, 461 U.S. 138, 147 (1983); *Johanns*, 544 U.S. at 564–65. On the contrary, speech when spoken by a government official in a private capacity is private speech. *See Connick*, 461 U.S. at 147. If there is no government speech, an Establishment Clause claim cannot be successful because private speech is not governed by the Establishment Clause. *See Bd. of Educ. of Westside Cmty. Sch.*, 496 U.S. at 250 ("[T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.").

When Central Perk's Council members give the invocation themselves, the members are acting outside of their official capacity as legislators. The official purpose of a town Council and its members is to conduct the business of the town and "address issues of local concern." R. at 1. All seven members of the Central Perk Council are elected to effectuate that purpose. R. at 1. Central Perk only recently adopted a policy to allow legislative prayer. R. at 2. The policy indicates that the act of offering a prayer to commence a legislative session should not be considered part of the Council member's official duty. This indication comes from the options the policy affords to the members: that he or she may nominate another to do the prayer or skip the prayer entirely. R. at 2. Furthermore, if the Council member wishes to not participate in the

prayer practice at all, he or she may opt out for the entire duration of his or her time in office. R. at 2. (Council member Geffroy asked to never be selected).

A legislator should not be able to delegate or completely deny responsibility for actions to be taken in his or her official capacity. Otherwise, a Council member could delegate his or her right to vote on a matter, or, perhaps, even inform the other Council members of his intention to never vote on a matter for the duration of his or her time in office. Allowing such options would lead to absurd results in legislatures across the country. Therefore, because Central Perk's prayer policy allows Council members to pick and choose what official government duties to fulfill, implementation of the prayer policy should be considered an act done in the Council member's private capacity. *See Connick*, 461 U.S. at 147.

The invocations of community ministers should not be attributed to Central Perk because "the council member may not review or otherwise provide input into the minster's choice of invocation." R. at 2. Stated differently, when the Council member nominates a minster from the community, the government has no control over the content of the prayer. Although two of the Council members give their own invocations, R. at 3, the majority of the Council members delegate their prayer to another, thereby voluntarily relinquishing the necessary control required by this Court in *Johanns*. 544 U.S. at 564–65. Therefore, if the government does not have control over the content of what is being said in the prayer, then the prayer cannot be speech attributed to the government.

II. THE CENTRAL PERK COUNCIL'S LEGISLATIVE PRAYER POLICY DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE CONSTITUTION, OR THIS COURT'S PRECEDENT, WHEN COUNCIL MEMBERS, OR A NOMINATED MINISTER FROM THE COMMUNITY, GIVE EXCLUSIVELY THEISTIC INVOCATIONS TO COMMENCE ITS LEGISLATIVE SESSIONS.

Central Perk Council's legislative prayer policy, as implemented, does not violate the Establishment Clause of the Constitution when Council members of different faiths either lead

the invocation, invite a minister from the community, or decline to give an invocation altogether, and the invocations given are exclusively theistic. This Court has twice held legislative prayer policies constitutional. *See Marsh*, 463 U.S. 783; *Galloway*, 134 S. Ct. 1811.

This Court has gone to great lengths to chronicle more than 200 years of legislative prayer in our Nation, stating "that the practice of opening legislative sessions with a prayer has become part of the fabric of our society." *Galloway*, 134 S. Ct. at 1819 (quoting *Marsh*, 463 U.S. at 792). However, even with these decisions, and the practices' basis in history, the prayer opportunity cannot be "exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Id.* (quoting *Marsh*, 463 U.S. at 794–95). Having produced no persuasive evidence of the Council's policy proselytizing, favoring one religion or denigrating another, Petitioners' claims buckle under the weight of the Nation's history and this Court's precedent.

A. *Marsh* and *Galloway*'s Historical Analysis Provides the Appropriate Backdrop for Understanding the Constitutionality of Legislative Prayer.

The constitutionality of a legislative prayer practice is appropriately determined using the straightforward, historical analysis employed by this Court in *Marsh* and *Galloway*. The historical analysis allows the Court to maintain uniformity in its jurisprudence when applied to a practice that pre-dates the birth of the Nation. *Bormuth v. County of Jackson*, 870 F.3d 494, 509 (6th Cir. 2017) (en banc) (citing American Archives, Documents of the American Revolutionary Period, 1774–76, v1:1112 (recounting legislator-led prayer in South Carolina's Congress in 1775)). Due to the sheer volume of legislative prayer history, *Marsh* and *Galloway*'s historical analysis is uniquely adept to handle conflicts within the confines of legislative prayer.

This practice has such a rich history in the Nation and its approval can be traced, with noteworthy accuracy, to the drafting of the First Amendment. When the First Continental Congress convened in the fall of 1774, the delegates "adopted the traditional procedure of

opening its sessions with a prayer offered by a paid chaplain." *Marsh*, 463 U.S. at 787; *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). The First Congress appointed a chaplain to open each of its congressional sessions with a prayer. *Marsh*, 463 U.S. at 787–88. Then, between April and May of 1789 elected its first chaplains, with James Madison serving on the electing committee. *Id.* at 788; *see* 1 Annals of Cong. 104–05 (1789). On September 22, 1789, Congress authorized appropriating payment for, and appointed, the chaplains. *Marsh*, 463 U.S. at 788; *see* 1 Stat. 71 (1789). "On Sept[ember] 25, 1789 . . . final agreement was reached on the language of the Bill of Rights." *Marsh*, 463 U.S. at 788. This "historical evidence sheds light on not only what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress—their actions reveal their intent." *Id.* at 790. The decisions of the First Congress "have always been regarded, as they should be regarded, as of the greatest weight in the interpretation of the [Constitution]." *Myers v. United States*, 272 U.S. 52, 174–75 (1926).

A historical analysis is not the only test that has been used to interpret the Establishment Clause.[1] The endorsement test originated in a concurring opinion to *Lynch v. Donnelly*. 465 U.S. 668, 687 (1984) (O'Connor, J., concurring). Under this test, it must be determined "whether a reasonable observer would view such longstanding practices as a disapproval of his or her particular religious choices, in light of the fact that they serve a secular purpose rather than a

[1] Neither the parties, nor the courts below, addressed the *Lemon* test from this Court's decision in *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). This test has been widely criticized as impractical, finding it "[l]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, Lemon stalks our Establishment Clause jurisprudence once again, frightening the little children . . . . [W]hen we wish to uphold a practice it forbids, we ignore it entirely." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398–99 (1993) (Scalia, J., concurring).

sectarian one and have largely lost their religious significance over time." *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 631 (1989) (O'Connor, J., concurring). However, after this Court's decision to not use the endorsement test demonstrates it should be restricted to the monuments cases where it is most appropriate. *See e.g. Van Orden v. Perry*, 545 U.S. 677, 696–98 (2005) (employing the endorsement test to determine the constitutionality of a Ten Commandments monument).

In *Allegheny*, this Court found that a government building's display of a crèche on its staircase during the Christmas season was unconstitutional under the Establishment Clause. 492 U.S. at 601–02. Justice Kennedy, dissenting in part, urged the majority of the Court to apply the historical analysis from *Marsh* to the display of the crèche. *Id.* at 669–70 (Kennedy, J., concurring in part and dissenting in part). Justice Kennedy stated that "whatever standard the Court applies to Establishment Clause claims, it must at least suggest results consistent with our precedents and the historical practices that, by tradition, have informed our First Amendment jurisprudence." *Id.* at 669 (citing *Lynch*, 465 U.S. at 673–74).

The *Galloway* Court completely dismissed this argument. 134 S. Ct. at 1822. According to this Court, allowing legislative prayers only to the extent they are nonsectarian "would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech, a rule that would involve government in religious matters to a far greater degree" than the town's current legislative prayer practice. *Id.* Furthermore, in support of a historical approach, the Court recognized that "[a]ny test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change." *Id.* at 1819 (citing *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring).

Here, Petitioners claim that the Council's legislative prayer policy violated the Establishment Clause because some of the prayers were legislator-led and were exclusively theistic in nature. R. at 13. This alleged violation of Petitioners' First Amendment right falls squarely under the historical analysis of *Marsh* and *Galloway*. Importing a different mode of analysis would merely be "[a] test that would sweep away what has so long been settled [and] would create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent." *Galloway*, 134 S. Ct. at 1819 (citing *Van Orden*, 545 U.S. at 702–04 (Breyer, J., concurring in judgment)).

Therefore, because the historical approach is so keenly able to apply to legislative prayer cases, and because the *Galloway* Court rejected the endorsement test in this context, the historical approach used by the Court in *Marsh* and *Galloway* should be applied here.

B. An Otherwise Permissible Legislative Prayer Policy Is Not Unconstitutional Because the Prayer Givers Are Either the Legislators Themselves or an Individual Nominated by the Legislator.

Invocations given by a legislator individually or by an individual nominated by the legislator do not violate the Establishment Clause for three reasons. First, the legislative prayer principles proffered in *Marsh* and *Galloway* provide no foundation for distinguishing the constitutionality of a prayer policy based on the identity of the prayer giver. Second, basing the prayer policy's constitutionality on the identity of the prayer giver violates public policy and offends the Nation's rich history of tolerance towards legislative prayer. Third, basic tenants of Establishment Clause and government speech jurisprudence suggest that analyzing legislator-led prayer differently than prayer led by a minister is inappropriate.

This issue of legislator-led prayer was not directly addressed by this Court's holdings in *Marsh* and *Galloway* but has begun to be analyzed by appellate courts. *Compare Bormuth v.*

County of Jackson from the Sixth Circuit, 870 F.3d 494 (6th Cir. 2017) (en banc), *with Lund v. Rowan County*, 863 F.3d 268 (4th Cir. 2017) (en banc). Neither *Marsh* nor *Galloway* explicitly include or exclude legislator-led prayer, but both conclude that it is the entire prayer practice that must be scrutinized. *Marsh*, 463 U.S. at 794–95; *Galloway*, 134 S. Ct. at 1824. While *Bormuth* and *Lund* reach opposite conclusions, they do so based on the same principles. Because Central Perk's prayer policy bears a strong resemblance to that of *Bormuth*, the fact that some of the invocations were legislature-led does not affect the constitutionality of the policy.

1. This Court's decisions in *Marsh* and *Galloway* provide no discernable reason for treating legislative prayers offered by legislators differently than prayers offered by paid or unpaid ministers.

The identity of the individual prayer giver—whether he or she is a legislator, an invited guest chaplain, a paid chaplain, or an individual citizen—does not affect the constitutionality of a legislative prayer policy. There can be no Establishment Clause violation so long as "there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Galloway*, 134 S. Ct. at 1822 (quoting *Marsh*, 463 U.S. at 794–95). The analysis is directed at the prayer opportunity as a whole, not any one particular aspect of the practice, such as the prayer giver's identity. *Id.* Additionally, legislator-led prayers have nearly as long and as rich of a history as the legislative prayers in *Marsh* and *Galloway*. Michigan's Senate and House of Representatives have allowed legislator-led prayers "for well over 100 years." Brief of Michigan, Kentucky, Tennessee, and Ohio et al. as Amici Curiae Supporting Appellee at 5, *Bormuth v. County of Jackson*, 870 F.3d 494 (6th Cir. 2017) (en banc) (No. 15-1869), 2017 WL 1710340, at 5. Kentucky, Tennessee, and Ohio's congressional chambers have also allowed lawmaker-led prayer since the early 1900s. *Id.* at *6–*8. Furthermore, the Establishment Clause does not require mechanical line-drawing in an effort to

produce a desired result. *Bormuth*, 870 F.3d at 512 (citing *Lynch*, 465 U.S. at 678–79) (describing the line between what is permissible under the Establishment Clause and what is not as a line which "can no more be straight and unwavering than due process can be defined in a single stroke or phrase or test.").

In *Bormuth v. County of Jackson*, the Sixth Circuit held that the legislator-led practice was constitutional under the Establishment Clause. *Id.* at 509. The Board of Commissioners consisted of nine members who met on a monthly basis. *Id.* at 498. "On a rotating basis, each elected Jackson County Commissioner, regardless of his religion (or lack thereof), is afforded an opportunity to open a [legislative] session with a short invocation based on the dictates of his own conscience." *Id.* The prayers were generally Christian, using words such as "God," "Lord," or "Heavenly Father" and ending with "in your son Jesus's name. Amen." *Id.* The plaintiff, a Pagan and an Animist, alleged the prayers made him feel like he was in church and forced to worship Jesus to participate in the county's business. *Id.* at 498–99. The district court rejected Bormuth's claim and found that the Board's prayer practice did not violate the Establishment Clause. *Id.* at 499. The court reasoned that neither *Marsh* nor *Galloway* "restricts who may give prayers in order to be consistent with historical practice." *Id.* at 509. The court compared the history and traditions of legislature-led prayers throughout the country to the prayer that was widely accepted in *Marsh* and *Galloway* and found "it insignificant that the prayer-givers . . . are publicly-elected officials." *Id.* at 512. Prayers offered by agents, such as an invited guest minister, "are not constitutionally different from prayers offered by [council members]." *Id.* at 512; *see also Turner v. City Council of City of Fredericksburg*, 534 F.3d 352, 355–56 (4th Cir. 2008) (O'Connor, J.) (holding that prayers offered only by city council members was constitutional). Therefore, because of *Marsh* and *Galloway*, the court reasoned that the identity

of the prayer giver, without more, was not a reason to find the policy unconstitutional. *Bormuth*, 870 F.3d at 512.

In *Lund v. Rowan County*, the Fourth Circuit held that Rowan County's practice of legislator-led prayer violated the Establishment Clause of the First Amendment. 863 F.3d at 272. The County was governed by a five-member board which met twice a month. *Id.* Despite having no written policy regarding invocations, the board always began each meeting with a member-led sectarian invocation which referenced only Christianity and "veered from time to time into overt proselytization." *Id.* In fact, over the five-year period preceding the suit, 97 percent (%) of the prayers made mention of "Jesus, Christ, or the Savior." *Id.* at 273 (citing *Lund v. Rowan County*, 103 F. Supp. 3d 712, 714 (M.D.N.C. 2015)) (internal quotations removed). The plaintiffs alleged the County's practice violated the Establishment Clause because it inappropriately affiliated the County with Christianity. *Id.* at 273–74. The court reasoned that although "[l]egislator-led prayer is not inherently unconstitutional," when analyzed with the other elements of the County's prayer practice, the Council's practice "threatens to blur the line between church and state to a degree unimaginable in [*Galloway*]." *Id.* at 281 (quoting *Lund v. Rowan County*, 837 F.3d 407, 435 (4th Cir. 2016) (panel dissent)). Additionally, the court emphasized that the case involved "one specific practice in one specific setting with one specific history and one specific confluence of circumstances." *Id.* at 290. Therefore, if any of the circumstances involving the County's prayer practice were different, a different result may have occurred. *Id.*

Here, the Council's prayer policy, as implemented, is notably different from the prayer policy analyzed in the Fourth Circuit. In *Lund*, Rowan County's Board members were the only people allowed to give invocations, and "[o]n occasion, the Board members appeared to implore

attendees to accept Christianity." 863 F.3d at 273. In order to find a prayer practice unconstitutional under *Marsh* and *Galloway*, a multitude of factors, considered together, over a period of time must exhibit a pattern of proselytization, or advancing or denigrating one faith. *Marsh*, 463 U.S. at 794–95. *Lund* and the present case are distinguishable not only because of the prayer giver's identity, but also because the Council members did not have to offer a prayer. R. at 2. Instead, the members could nominate a minister from the community or decide to not have a prayer given at that meeting. R. at 2. When the outside minister gave an invocation, their prayer was judged in the same manner as the legislator's. This Court's holdings in *Marsh* and *Galloway* apply to all instances of legislative prayer, and therefore, it does not matter if the prayer is given by a legislator or by a chaplain.

Although the Council's prayer policy is young, there is a longstanding history of legislator-led prayer throughout the country. *See Bormuth*, 870 F.3d at 509 (recognizing that legislative prayer practices are employed in Michigan, Kentucky, and South Carolina). In *Bormuth*, the prayers were legislator-led. *Id.* at 498. However, in *Marsh*, a single Christian chaplain gave the prayers for 16 consecutive years. 463 U.S. at 786. The analysis in both opinions was the same. In each case, the legislative prayer was not constitutional because of who gave it. The words spoken in legislative prayers do not become more or less constitutionally relevant when they come from a legislator or a chaplain. Just as the prayer policies in *Bormuth* and *Marsh* were both constitutional despite having different types of prayer givers, the fact that the Council members gave the prayers in this case should not affect the constitutionality of Central Perk's prayer policy.

2. Distinguishing prayer policies on the basis of the prayer giver's identity would produce undesirable results that were not intended by the Founding Fathers.

Finding that an otherwise constitutional legislative prayer practice violates the Establishment Clause solely because of the prayer giver's identity will produce undesirable results which do not comport with the Founders' intentions. Such a result would be directly contrary to the traditional practices throughout the country. *See Bormuth*, 870 F.3d at 509–10 (comparing legislative prayer practices in Michigan, Kentucky, and South Carolina).

Courts have recognized that there was a legitimate fear a local legislature would be perceived as favoring one religion over another. *See id.* at 510. During the five-year period preceding the suit, over 97% of the prayers offered in *Bormuth* were affiliated with Christianity. *Id.* Here, 45% of the prayers offered were Mormon, 20% were a different sect of Christianity, 20% were Baha'i, and 15% were Muslim. R. at 2–3. Here, however, less than 50% constitute prayers from a single religion and all of the Council members, and their religious affiliations, were allowed to offer the prayer if the Council member chose to do so. R. at 2–3. What might have been perceived as government favoring a particular religion in *Lund* is not present in Central Perk Township.

Establishment Clause jurisprudence, and particularly legislative prayer jurisprudence, has been developed over many years and cases at all levels of the judiciary. Different tests have developed over time, and "[a]ny test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change." *Galloway*, 134 S. Ct. at 1819. As stated above, legislator-led prayers have nearly as long and as rich of a history as the legislative prayers in *Marsh* and *Galloway*. Michigan's Congress has allowed legislator-led prayers for more than 100 years, and Kentucky, Tennessee, and Ohio's

congressional chambers have done the same since the early 1900s. Brief of Michigan, Kentucky, Tennessee, and Ohio et al. as Amici Curiae Supporting Appellee, at 5–8, *Bormuth v. County of Jackson*, 870 F.3d 494 (6th Cir. 2017) (en banc) (No. 15-1869), 2017 WL 1710340, at *5–*8. Therefore, if Central Perk Council's policy is unconstitutional because it is legislator-led, not only will the Court be invalidating the traditional prayer practices in many state legislatures, it will also essentially create a new strict liability rule in Establishment Clause jurisprudence. This result does not comport with the holdings of *Marsh* and *Galloway*, and therefore, this Court should not find that legislator-led prayer is unconstitutional.

3. Basic tenants of Establishment Clause and government speech jurisprudence suggest that analyzing legislator-led prayer differently than prayer led by a minister is inappropriate.

Prayers given by paid or unpaid chaplains of any certain secular faith are constitutional under *Marsh* and *Galloway*. *Marsh*, 463 U.S. at 794–95; *Galloway*, 134 S. Ct. at 1824. Whether paid or unpaid, chaplains conducting legislative prayers are government speakers because they are speaking in a government forum in a government session. When the first chaplains gave invocations at the First Congress, these chaplains were also government speakers. When Episcopalian Bishop William White, one of the Senate's first chaplains, began sessions with the Lord's Prayer and a prayer for "the grace of our Lord Jesus Christ," he too was considered a government speaker. Brief for Petitioner at 31, *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (No. 12-696), 2013 WL 3935899, at *31 (quoting Bird Wilson, *Memoir of the Life of the Right Reverend William White, D.D., Bishop of the Protestant Episcopal Church of the State of Pennsylvania* 322 (1839) (Letter to Rev. Henry V.D. Johns, Dec. 29, 1830)).

The message conveyed by the legislators and chaplains who give legislative prayers must both be considered government speakers and therefore, should be analyzed in the same manner.

If the chaplains who deliver invocations were not considered government speakers, no alleged Establishment Clause violation claims could be successful. *See Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009) ("[G]overnment speech must comport with the Establishment Clause."). Therefore, because the chaplains, whether paid or unpaid, and the government officials are both deemed to be government speakers and treated the same in this context, there is no reason to treat both government speakers differently for the purposes of determining the constitutionality of the legislative prayer practice as a whole.

Therefore, legislator-led prayer and chaplain-led prayer should not be analyzed differently because this Court has not provided a reason to do so, public policy indicates similar treatment is warranted, and both prayers are government speech.

C. Under *Marsh* and *Galloway*, the Exclusively Theistic Content of the Prayers Is Entirely Irrelevant in Determining the Constitutionality of the Council's Prayer Policy.

The theistic content of legislative prayer is irrelevant in determining the constitutionality of the Council's prayer policy. Respondent recognizes that in each legislative prayer case, fellow citizens of our country, including the citizens of Central Perk are fighting for some of the most important and contentious rights granted by the Bill of Rights. Whether one's religion is Christianity, Judaism, Hinduism, Muslim, Baha'i, or if one is atheist, the Council's policy sought to unite all Central Perk citizens in a "[p]rayer that is solemn and respectful in tone, that invites lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing . . . ." *Galloway*, 134 S. Ct. at 1823. The *Marsh* Court expressed a similar sentiment, "[i]t is of course true that great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real

threat and mere shadow." 463 U.S. at 795 (quoting *Schempp*, 374 U.S. at 308 (Goldberg, J., concurring)).

As this Court and various circuit courts make clear, commencing legislative sessions with prayer is constitutional because it is "deeply embedded in the history and tradition of this country." *Id.* at 786. The content of the prayer itself is not determinative of its constitutionality, so long as "there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or disparage any other, faith or belief." *Id.* at 794–95. The appropriate inquiry, therefore, requires an inspection of the prayer opportunity as a whole, rather than the contents of a few, select prayers. *Galloway*, 134 S. Ct. at 1824 (citing *Marsh*, 463 U.S. at 794–95).

This Court first held in *Marsh*, and solidified in *Galloway*, that a legislative prayer policy is violative of the Establishment Clause if, over time, it exhibits a pattern of proselytization. *Marsh*, 463 U.S. at 794–95. The Fourth Circuit found a legislative prayer policy unconstitutional because it "veered from time to time into overt proselytization." *Lund*, 863 F.3d at 272. In *Lund*, one of the invocations stated, "Father, I pray that all may be one as you . . . that the world may believe that you sent Jesus to save us from our sins." *Id.* at 285. Another prayed, "to spread His message amongst the people we know and love through the applying of the sacred words." *Id.* This was the precise preaching of conversion that this Court sought to avoid. *Galloway*, 134 S. Ct. at 1824. The *Lund* court determined that when content begins to preach conversion, it goes beyond the permissible purpose of legislative prayer intended by the Founders. 863 F.3d 286. The court did not reach this conclusion because two prayers, in isolation, tended to proselytize but because of the pattern that the county prayer policy exhibited over time. *Id.*

Although a legislative prayer policy may not, over time, exhibit a pattern of proselytization, this Court in *Galloway* recognized that it is the prayer opportunity, as a whole, that must be

analyzed. 134 S. Ct. at 1824. A small number of prayers that do not accord with the Nation's tradition, in isolation, must not result in a prayer policy that violates the Establishment Clause. *Id.* This Court did not intend to create a no tolerance, no strike policy. Bing and Geller-Bing's invited minister, Minsk, gave nine invocations at the Central Perk Council meetings. R. at 2–3. Minsk's prayers are the only prayers given that would appear to proselytize. However, the prayers do not cause the entire prayer policy to violate the Establishment Clause. On three of the occasions, Minsk "asked that none in attendance would reject Jesus Christ or commit grievous sins against the Heavenly Father." R. at 3. A portion of this prayer merely asks that no one in attendance commit grievous sins. The remainder of the prayer should not be examined in isolation. Rather, when examining the prayer, and prayer policy in its entirety, a small portion within three of Minsk's nine prayers does not render Central Perk's entire prayer opportunity violative of the Establishment Clause because a small amount of prayers taken out of context of the policy as a whole will "not despoil a practice that on the whole reflects and embraces our tradition." *Lund*, 863 F.3d at 283 (quoting *Galloway*, 134 S. Ct. at 1824) (internal quotations omitted)).

In addition to being prohibited from proselytization, legislative prayers must not affiliate the government with any one specific faith or belief. *Marsh*, 463 U.S. at 795; *Allegheny*, 492 U.S. at 603. However, opening legislative sessions with prayer which contains permissible religious content has an "unambiguous and unbroken history of more than 200 years." *Marsh*, 463 U.S. at 792. This Court concluded that the drafters of the Constitution considered legislative prayer to be conduct that harmonized "the tenants of some or all religions." *Id.* Furthermore, governments are not required to go out of their way "to achieve religious balancing" in the context of either prayer content or minister representation. *Galloway*, 134 S. Ct. at 1824. When

determining whether a legislative prayer policy has advanced a religion, "a tapestry of many faiths lessens that risk whereas invoking only one exacerbates it." *Lund*, 863 F.3d at 284.

In *Marsh*, this Court upheld a state legislature's practice of one minister giving "Judeo-Christian prayers." 463 U.S. at 793. Although the chaplain was reappointed for sixteen years, "[a]bsent proof that the chaplain's reappointment stemmed from an impermissible motive," the Court found no conflict." *Id.* at 793–94. On the other hand, in *Lund*, while the vast majority of prayers were Christian, the practice was found to be unconstitutional because the prayers themselves, over time, exhibited a pattern of proselytization. *Id.* Of the 18 prayers given by either Central Perk Council members or their nominated ministers, nine related to Mormonism, four to evangelical Christianity, three to Islam, and two to Baha'i. R. at 3. Even with many Mormon invocations, the multitude of other religions represented on the Central Perk Council "lessens the risk" this Court has traditionally been concerned with. *Galloway*, 134 S. Ct. at 1824.

No Establishment Clause violation has occurred when the prayer givers' religions resemble the "tapestry of many faiths" maintained by the Central Perk Council. *Pelphrey v. Cobb County*, 547 F.3d 1263, 1267 (11th Cir. 2008). In *Pelphrey*, the court held that even though a majority of prayers were given by a Christian minister, no single religion was advanced because other prayer givers consisted of many different faiths, including Judaism, Unitarian Universalism, Islam, and Baha'i. *Id.* This Court in *Galloway* also found a primarily Christian prayer practice that invited a Jewish layman, a Wiccan priestess, and a Baha'i to give an invocation. *Galloway*, 134 S. Ct. at 1817. The Councilmembers are also of many of those diverse religions, showing the Council's prayer practice is consistent with this Court's legislative prayer decisions.

A legislative prayer opportunity may not disparage another religion. *Galloway*, 134 S. Ct. at 1824. Whether or not a prayer policy disparages a religion is a matter of degree. This Court

has never held that a single instance of denigration would rise to the level of unconstitutionality, and such a result should not occur here. In *Galloway*, those who objected to the prayer practice were characterized as a "minority" in the community. *Id.* Instead of finding that these two remarks, in isolation, disparaging, this Court found the prayer policy as a whole comports with the type of prayer recognized by the Court as traditional, and constitutional, in our country. *Id.* On the contrary, the *Lund* court found a prayer practice was unconstitutional because the "[t]he record is replete with . . . invocations proclaiming that Christianity is exceptional and suggesting that other faiths are inferior." 863 F.3d at 285. Certain prayers described failing to "love Jesus or follow his teachings as spiritual defects." *Id.*

A single instance of a disparaging prayer is unlikely to cause the entire prayer policy to be found unconstitutional. Such a result would go against the longstanding history of legislative prayer, as well as this Court's precedent. In *Lund*, the disparaging remarks, on their own may not have been enough to violate the Establishment Clause, but when analyzed with the other elements, the County's prayer practice, "threatens to blur the line between church and state to a degree unimaginable in [*Galloway*]." 837 F.3d at 435 (panel dissent). When Hosenstein and Tribbiani's names were selected according to Central Perk Council's prayer policy, each nominated a minister from their evangelical church, New Life. R. at 3. Typically, these prayers asked for "divine guidance for the Council members." This Court found such language to be permissible in legislative prayer in *Marsh*. 463 U.S. at 792. The New Life ministers said prayers which requested salvation for those "who do not yet know Jesus," for "blinders to be removed from the eyes of those who deny God," and for "every Central Perk citizen's knee to bend before King Jesus." R. at 3. However, the Council's prayer practice, as a whole, is drastically different than in *Lund*. In Central Perk, the Council members consisted of four different faiths and the

prayers were not explicitly Christian. Additionally, even Minsk's prayers did not claim "defects" for those having other faiths. *Lund*, 863 F.3d at 285.

Serious harm can occur when government becomes impermissibly entangled with religion. However, while this potential harm caused concern to the court presented in *Lund*, is not found in Central Perk. The Christian board members in *Lund* had a stronghold on the appearance of the County's legislative prayer practice. The members were all Christian, as were the prayers, and most of the citizens. Central Perk, as well as the town in *Galloway*, have diverse prayer givers. Each is inclusive regarding who is allowed to offer prayers to commence legislative sessions, distinguishing both of them from the impermissible prayers in *Lund*.

Therefore, because Central Perk's prayer policy does not operate to proselytize, advance, or disparage any other faith or belief, this Court should find that its exclusively theistic nature is not violative of the Establishment Clause.

III. THE CENTRAL PERK TOWN COUNCIL'S LEGISLATIVE PRAYER POLICY DOES NOT UNCONSTITUTIONALLY COERCE ANY PERSON IN ATTENDANCE, REGARDLESS OF THEIR AGE.

The Thirteenth Circuit Court of Appeals correctly determined that Central Perk's prayer policy was not violative of the Establishment Clause in regards to either the high school students in attendance or the citizenship, as a whole. R. at 16–19. The Establishment Clause "guarantees at a minimum that a government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'" *Lee*, 505 U.S. at 577–78 (citing *Lynch*, 465 U.S. at 678). Nonetheless, this Court has recognized "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

On two occasions, this Court has determined that legislative prayer is consistent with the Establishment Clause and the ideas of the Founding Fathers. *See Marsh*, 463 U.S. at 792; *Galloway*, 134 S. Ct. at 1824. This Court did not find the practice in either of those cases to be coercive. *See Marsh*, 463 U.S. at 792; *Galloway*, 134 S. Ct. at 1824, 1828. In fact, the only circumstances in which this Court has found a prayer practice to be coercive have been limited to an audience of elementary or secondary school students and within the students' schools. *See Lee*, 505 U.S. at 592–94 (holding a religious invocation given before a high school graduation was coercive as to an objecting student due to the school's authority figures' close supervision over the students and content of the message); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 310 (2000) (holding student-led, student-initiated prayer before high school football games was impermissibly coercive). Instead, the Court has viewed the Founding Father's use of legislative prayer as "a benign acknowledgment of religion's role in society." *Galloway*, 134 S. Ct. at 1819.

A. The Central Perk Citizens Who Attend Council Meetings Are Not Coerced to Participate in Religious Practice.

The Central Perk citizens have not been coerced to participate in the exercise of religion. The Establishment Clause clearly prohibits such coercive government behavior. *See Lee*, 505 U.S. at 587. Determining whether prayers are coercive is "a fact-sensitive [inquiry] that considers both the setting in which the prayer arises and the audience to whom it is directed." *Galloway*, 134 S. Ct. at 1825. The Central Perk prayer policy falls well within the scope of this Court's treatment of legislative prayer. This Court has recognized that legislative prayer practices are evaluated "against the backdrop of historical practice," and due to the Nation's long history of religious involvement—for example, legislative prayer, this Court's opening recitation, or the Pledge of Allegiance—this Court has acknowledged the value of prayers as invocations and that its purpose has not been to coerce or admonish those of opposing faiths. *Id.*

In *Galloway*, Justice Kennedy, joined by Chief Justice Roberts and Justice Alito, rejected the argument that subtle "social pressures" force nonadherents "to remain in the room or even feign participation in order to avoid offending the representatives who sponsor the prayer and will vote on matters citizens bring before the board." *Id.* at 1820. Thus, Justice Kennedy found:

> [i]t is presumed that the reasonable observer is acquainted with this tradition and understands that [legislative prayer's] purposes are to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens, not to afford government an opportunity to proselytize or force truant constituents into the pews.

Id. at 1825 (citing *Salazar v. Buono*, 559 U.S. 700, 720–21 (2010) (plurality opinion)). Nonetheless, the Court recognized that the "analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity."[2] *Id.* at 1826. "No such thing occurred in the town of Greece" nor has it occurred in the Central Perk Township. *Id.*

The focus of Justice Kennedy's concern—that city councilors or legislators would unduly direct the public to participate in prayers—has not occurred with Central Perk's prayer policy. *Id.* at 1826. Petitioners cannot point to anything in the record that would demonstrate a council member, or prayer giver, is forcing the participation of council meeting attendees to adhere to the words before them, or even to stand or draw attention to the prayer at hand. *See id.* at 1832 (Alito, J., concurring) (discussing that "commonplace" and "reflexive" requests of prayer givers, which are common to different religious sects, do not mandate participation); *see also Am.*

[2] While Justice Thomas and Scalia did not join the coercion section of Justice Kennedy's opinion (Part II-B), they did not do so out of the belief the prayer process was coercive, but, instead out of the belief that any expansion to a coercion test would be too far. *Galloway*, 134 S. Ct. at 1837 (Thomas, J., concurring in part and in judgment). "The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*." *Id.* at 1837 (quoting *Lee*, 505 U.S. at 640 (Scalia, J., dissenting)).

Humanist Ass'n v. McCarty, 851 F.3d 521, 526 (5th Cir. 2017) (finding "polite requests" by governmental officials to stand for invocations "do not coerce prayer").

The district court, relying on a small sample of the numerous prayers given, determined the purpose of several City Council prayers was "conversion." R. at 8. This reasoning is misguided. Relying on such few prayers ignores the presumption that reasonable observers understand the purpose of legislative prayer. *Galloway*, 134 S. Ct. at 1825. Rather, the prayers and the prayer policy "requires an inquiry into the prayer opportunity as a whole." *Id.* at 1824 (citing *Marsh*, 463 U.S. at 794–95).

By looking at the prayer process as a whole, its permissible use becomes apparent. Over the course of twenty months, six different council members were picked to either give the invocation or choose a speaker. R. at 2–3. During that period, two meetings went without any prayer at all, five meetings consisted of short, traditional Baha'i and Muslim prayers, and the remainder were delivered by several different Christian based ministers. R. at 2–3. Most of these prayers did nothing more than simply invoke the name of the speaker's God. R. at 2–3. This Court has found that such an action, alone, to be insufficient for a finding of coercion. *See Galloway*, 134 S. Ct. at 1824 (finding that although a number of prayers invoking "the name of Jesus, the Heavenly Father, or the Holy Spirit" were, as a whole, within the bounds of the Establishment Clause).

While some of the invocations delivered by the Mormon and New Life pastors may have espoused their individualized beliefs, evidence of its coercive nature is lacking. R. at 3, 17. As a whole, the Central Perk's prayer policy was exemplified by its inclusive and uplifting nature. The foundation of the prayer selection process—its random selection—implicitly reflects the desire to represent the councilors' beliefs equitably. Moreover, even the invocations delivered by the Mormon and New Life Pastors had an independent focus on giving thanks for "guidance" or

asking for "divine guidance." R. at 3. This falls directly in line with Central Perk's prayer policy purpose of "invoking divine guidance for its proceedings" because these invocational prayers "would be helpful and beneficial to Council members, all of whom seek to make decisions in the best interest of the Town of Central Perk." R. at 2. Finding Central Perk's prayer process to be coercive would alter the "test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions" and, thus, "cannot be a proper reading of the Clause." *Lee*, 505 U.S. at 631 (Scalia, J., dissenting) (citing *Allegheny*, 492 U.S. at 657 (Kennedy, J., concurring in judgment in part and dissenting in part)).

Even if some of the prayers given during Central Perk City Council meetings were particularized to the prayer giver's religious beliefs, "legislative 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." *Galloway*, 134 S. Ct. at 1826. Adults are often subjected to "speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum." *Id.*; *see also Lund*, 863 F.3d at 320 (Agge, J., dissenting) (discussing how a plaintiff's claim, that he was coerced by being made to feel "subjectively excluded at meetings," was "a failed argument.") (internal quotations omitted).

The district court accepted Atheist Petitioner's argument that they felt "marginalized," and, thus, feared "a refusal to stand for the invocation would set them apart." R. at 7. However, this alleged threat does not rise to the level of coercion. The Sixth Circuit has addressed a similar situation, where plaintiffs claimed to fear adverse reaction from the councilors if they decided not to stand. *Bormuth*, 870 F.3d at 517. However, the court recognized that it was "not as if a Commissioner specifically ordered [the plaintiffs] to stand and remain reverent in the face of [the

plaintiffs'] protest to the contrary." *Id.*; *cf. Fields v. Speaker of the Pa. House of Representatives*, 251 F. Supp. 3d 772, 776, 788 (M.D. Pa. 2017) (holding plaintiffs plausibly pled a violation of the Establishment Clause in a legislative prayer case where the Speaker of the House "publicly singled out [objectors] and ordered them to rise for the invocation," and "[w]hen they refused, the Speaker directed a legislative security officer to 'pressure' them to stand").

The *Galloway* plurality also found this argument distinct from other instances where prayer practices were determined to be coercive. 134 S. Ct. at 1827; *cf. Lee*, 505 U.S. at 592–94 (finding that a religious invocation before a high school graduation was coercive as to an objecting student). Contrary to an audience of public-school students, in a public-school setting, nothing "suggests that members of the public are dissuaded from leaving the meeting room during the prayer, arriving late, or even, as happened here, making a later protest." *Galloway*, 134 S. Ct. at 1827. Recognizing this distinction, this Court found that adult citizens, dealing with adult council members, would not have their absence held against them, nor, "in light of our traditions" would their "quiet acquiescence . . . be interpreted as an agreement with the words or ideas expressed." *Id.* Petitioners' alleged fear of recourse, alone, cannot represent "an unconstitutional imposition as to mature adults, who 'presumably' are 'not readily susceptible to religious indoctrination or peer pressure.'" *Id.* (quoting *Marsh*, 463 U.S. at 792).

In addition to Justice Kennedy's concerns, the district court suggested that Central Perk's prayer policy was coercive because certain prayers were proselytizing and denigrating. R. at 9. This contention is not supported by the record or the prayer policy, as a whole. *See supra* § II.C.

Petitioners are not able to show that any of the impermissible constitutional limits are present within Central Perk's prayer policy. Even the district court recognized that Petitioners were not "directed to bow his or her head, or close his or her eyes" under order of council

members. R. at 8. Moreover, Petitioners' fears of adverse effects for failing to stand or remain reverent during are unfounded. R. at 7. Instead, Central Perk's prayer policy, as a whole, served its purpose to provide "divine guidance" to its council members at an appropriate stage of the council meetings, and, thus, falls within the permissible bounds of legislative prayer set out by this Court. *See Marsh*, 463 U.S. at 792; *Galloway*, 134 S. Ct. at 1824.

B. The Presence of Students at the Council Meetings to Receive Extra Credit Does Not Alter the Analysis and, Thus, the Central Perk's Town Council's Policy Is Not Coercive.

Unlike legislative prayer, school prayer practices have been found coercive due to the circumstances of the audience, students, in a public-school setting. *See Lee*, 505 U.S. at 592–94; *see also Santa Fe Indep. Sch. Dist.*, 530 U.S. at 310; *Schempp*, 374 U.S. at 227; *Engel v. Vitale*, 370 U.S. 421, 436 (1962). The Court has recognized "[t]here are heightened concerns with protecting freedom of conscience from subtle coercive pressure in elementary and secondary public schools." *Lee*, 505 U.S. at 592. However, when Petitioners' children, high school seniors, voluntarily entered Central Perk's town council meetings, there was no violation of the Establishment Clause. Neither the presence of children at the meetings, nor the extra credit they may have gained, alters the historic significance or permissibility of legislative prayer.

As observed by the *Galloway* plurality, the fact intensive inquiry of determining whether a prayer practice is coercive "considers both the setting in which the prayer arises and the audience to whom it is directed." 134 S. Ct. at 1825. The intended audience of Central Perk's prayer policy is reflected in its stated preamble: "praying before Town Council meetings is for the primary benefit of the Town Council Member." R. at 2. Additionally, this practice is conducted in the town council meetings. R. at 2. Each of these aspects was considered presumptively understood by the attending citizens in *Galloway*, and, thus, the prayer practice was not coercive.

134 S. Ct. at 1825. The voluntary presence of high school students during some of the town council meetings does not change this understanding.

Public-school prayer practices have been deemed coercive and violative of the Establishment Clause when conducted compulsorily during school, *see Schempp*, 374 U.S. at 227, voluntarily during school, *see Engel*, 370 U.S. at 422, 436, as invocation at middle and high school graduations, *see Lee*, 505 U.S. at 592–94, and as invocation at high school football games, *see Santa Fe Indep. Sch. Dist.*, 530 U.S. at 310. These decisions, however, were all based on the same consideration—the prayers were made for students "in a school setting." *Lee*, 505 U.S. at 594. The importance of the audience and setting was of the utmost importance to these decisions because "the school district's supervision and control" over the students creates a particularized "public pressure" to "maintain respectful silence during the invocation and benediction." *Id.* at 593. Because of these students' unique circumstances, in particular, their awareness of the school's authority over them, the Court has considered that this "pressure, though subtle and indirect, can be as real as any overt compulsion." *Id.*

These circumstances do not exist for the students who attended Central Perk's town council meetings. These meetings are not held solely for their benefit, like with daily class, a graduation, or a school football game. The students' school administrators are not present to cast the same shadow of subtle or indirect pressure to adhere to views or messages with which they do not agree. Moreover, the students' presence is a minute by-product of a town council meeting meant, ultimately, to address policy matters. In fact, these students were there to address those town matters for extra credit, but attended only on a voluntary basis, on their own time, and away from their school and school activities. R. at 4. Unlike the implausible function of a high-school student missing their own graduation to avoid a prayer they disagree with, these Central Perk

students truly have the autonomy to choose their own presence and even their own time of arrival, without the constraints of a school function. *Cf. Lee*, 505 U.S. at 595 ("The atmosphere at the opening of a session of a state legislature where adults are free to enter and leave with little comment and for any number of reasons cannot compare with the constraining potential of the one school event most important for the student to attend.").

Petitioners' argument—that the students' presence at a town council meeting changes the analysis of what is otherwise wholly a legislative setting—forces the Establishment Clause to reaches inconsistent with its purpose. Expanding the breadth of the coercion test beyond the school setting, and into the legislative setting, "would invalidate longstanding traditions" and, thus, "cannot be a proper reading of the Clause." *Lee*, 505 U.S. at 631 (Scalia, J., dissenting) (citing *County of Allegheny*, 492 U.S. at 657 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part)). A continued expansion could even mean "[a] fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: God save the United States and this Honorable Court." *Zorach*, 343 U.S. at 313 (internal citations omitted). The distinction of audience and setting made by this Court in schools, as opposed to in a legislative or city council setting, should not be deviated from, especially as "nothing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the school day." *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 313.

This Court had the opportunity to make that distinction in *Galloway*, and declined to do so. During the trial phase of *Galloway*, the plaintiffs claimed that the legislative prayer could "have a coercive effect on children present at Town Board meetings." *Galloway v. Town of Greece*, 732 F. Supp. 2d 195, 209 (W.D.N.Y. 2010). On appeal to the Second Circuit, the court observed

that children could commonly be present at those council meetings, and that "high school students may fulfill a state-mandated civics requirement necessary for graduation by going to Board meetings." *Galloway v. Town of Greece*, 681 F.3d 20, 23 (2d Cir. 2012). Finally, addressing the audience and setting of the council meeting extensively, this Court did not find that a presence of children would change the analysis. *Galloway*, 134 S. Ct. at 1825. Instead, the Court found the prayers were conducted in "the ceremonial portion" of the meetings for the "lawmakers themselves, who may find that a moment of prayer or quiet reflection sets the mind to a higher purpose and thereby eases the task of governing." *Id.* at 1827.

Nonetheless, Petitioners have more specifically asserted that the voluntary presence of students at town council meetings is coercive because their teacher, Rachel Green (also a town council member), offered students low level extra-credit for giving a short presentation on a local issue of their choosing during a council meeting. R. at 4, 5. This extra-credit opportunity does not change the outcome of this case either. Regardless of whether this opportunity existed or not, students had the ability to make their own decisions to participate and even whether to be a part of the invocational prayers at all, which consist of only a few minutes at the outset of the town council meetings.

Taken outside of the public-school setting, students have the ability to make choices concerning the level of their religious participation, even if there is mild incentive for the students to attend a meeting where prayer will occur. The Establishment Clause does not prevent students from making these decisions, it embraces the opportunity. In *Zorach*, this Court held a school program permitting students to be released from normal school hours to "go to religious centers for religious instruction or devotional exercises" was permissible and not coercive towards students to participate in religious practice. 343 U.S. at 308. The permissive nature of

the program was instrumental in this decision because the choice to engage "follows the best of our traditions." *Id.* at 313–14.

The town council extra-credit opportunity was not the only one Green provided for her students. Green also allowed her students to write a letter to a representative or volunteer for a political campaign of their choosing and receive the exact same value of extra-credit as they would for speaking at the town council meeting. R. at 4. For the students, and their parents, the town council extra-credit opportunity presented a unique chance to voluntarily engage in civic life—an honorable purpose the Town Council unanimously agreed with—and, for it, they could gain a few extra-credit points. R. at 4. Noble as their intentions may be, Petitioners have allowed their personal preference to be conflated with constitutionality. "Our individual preferences, however, are not the constitutional standard. The constitutional standard is the separation of Church and State." *Zorach*, 343 U.S. at 314.

CONCLUSION

For the foregoing reasons this Court should AFFIRM the judgment of the Thirteenth Circuit Court of Appeals.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT