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 K
Counsel for Respondent

QUESTIONS PRESENTED

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

2. Are the Central Perk Town Council's prayer policy and practices unconstitutionally coercive of

   a) All citizens in attendance when several invocations included language implying the supremacy of sectarian dogma, or

   b) High school students who were awarded academic credit for presenting at meetings where their teacher also was a Council member who gave an invocation?

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STATEMENT OF JURISDICTION

This court has jurisdiction over the instant case regarding Petitioner's contention that Respondent violated the Establishment Clause of the First Amendment resulting in this action, suitability to be heard before this Court pursuant to 42 U.S.C. Section 1983.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution is printed in its entirety in Appendix A. The Preamble of Respondent's legislative prayer policy is printed in Appendix B.

STATEMENT OF FACTS

Central Perk Township is governed by a Town Council ("Council") comprised of seven biennially elected members. R. at 1. The Council holds monthly meetings to address issues of local concern. R. at 1. The seven members include Joey Tribbiani ("Tribbiani"), Rachel Green ("Green"), Monica Geller-Bing (Geller-Bing), Chandler Bing ("Bing"), Gunther Geoffroy ("Geoffroy"), Janice Hosenstein ("Hosenstein"), and Carol Willick ("Willick"). R. at 1. In September 2014, the Council adopted a policy allowing prayer invocations at the opening of each meeting. The policy contained the following preamble:

> Whereas the Supreme Court of the United States has held that legislative prayer for municipal legislative bodies is constitutional; Whereas the Central Perk Town Council agrees that invoking divine guidance for its proceedings would be helpful and beneficial to Council members, all of whom seek to make decisions that are in the best interest of the Town of Central Perk; and Whereas praying before Town Council meetings is for the primary benefit of the Town Council Members, the following policy is adopted. R at. 2.

The policy provides that Council members will be randomly selected to give the invocation, or prayer. R at. 2. Upon selection, Council members may either personally give the invocation themselves or select a minister from the community to give the invocation. R at. 2. If a clergy member is selected to give the invocation, Council members may not review or otherwise

provide input as to the content of the invocation. R at. 2. Council members may also choose to omit the invocation completely. R at. 2. The policy provides that anyone who chose to omit the invocation should proceed directly to the Pledge of Allegiance. R at. 2. Whether the invocation and Pledge were offered, or only the Pledge, the Council member requested the citizens present to stand for both. R at. 2. Policy procedure dictates that each Council member's name be written on slips of paper and placed into an envelope. R at. 2. At each meeting the Chairman picked a single name and that person was permitted to give the invocation and lead the Pledge of Allegiance during the following month's meeting. R at. 2. Between October 2014 and July 2016 two of the seven Council members chose to give invocations themselves. R. at 2.

Council members Bing and Geller-Bing are members of the Church of Jesus Christ of Latter Day Saints. R at. 2. Bing's name was drawn four times, and Geller-Bing's name was drawn five times. R. at 2. Each time they selected David Minsk, their Branch President, to deliver the invocation. R. at 3. Council member Willick, a member of the Muslim faith, was selected three times and personally delivered the invocation on those occasions. R. at 3. Council members Hosenstein and Tribbiani are both members of New Life Community Chapel, an evangelical Christian Church. R. at 3. Their names were drawn two times each, and they selected New Life pastors both times. R. at 3. Council member Green, a member of the Baha'i faith, was selected four times, praying to Buddha on two occasions, and declining to offer the invocation the other two times. R. at 3.

Council member Green is also a teacher of American history and American Government to seniors at Central Perk High School. R. at 4. Although her American Government seminar is not a required course, it is very popular among the students. R. at 4. In addition to papers and tests, Green encourages her students to be as active in the legislative process as possible. R. at 4. To

promote such activity, she offers three extra credit opportunities. R. at 4. The first option for students is to volunteer for a political candidate of their choice at the local, state, or federal level for a minimum of fifteen hours. R. at 4. The second option is to write a three-page letter to their federal or state elected representative asserting their position on a current political issue. R. at 4. All three options awarded five extra credit points to the students. R. at 4. The third option became available in 2014 when the Council unanimously agreed that allowing students to make brief presentations was a "worthwhile endeavor" as it encouraged civic engagement in the community's youth. R. at 4. As a result, the students were permitted to make a five-minute presentation either endorsing or opposing measures then under consideration by the Council. R. at 4. Like the other two options, students were not required to participate but did receive five extra credit points. R. at 4.

During the 2014 - 2015 academic year, twelve students in Green's class took advantage of the opportunity to present in front of the Council. R. at 4. One student raised her letter grade from a B- to a B and a second raised his grade from a B+ to an A-. R. at 4. Participation from presentations did not have any impact on the final letter grades of the remaining ten students. R. at 4. During the 2015 - 2016 academic year, four of the thirteen students who chose to make presentations to the Council were the sons or daughters of individual Plaintiffs. R. at 4. The son of Plaintiff Ross Geller, Ben Geller, was present at the meeting held October 6, 2015, where Council member Green offered the invocation praying to Buddha and acknowledging his "infinite wisdom." R. at 4. The remaining three Plaintiffs, Dr. Burke, Lisa Kudrow, and Phoebe Buffay, are all Atheists and members of the Central Perk Freethinkers Society. R. at 5. Dr. Burke's son was present at the meeting held November 4, 2015, where President Minsk offered the invocation. R. at 5. Phoebe Buffay's daughter, Leslie, presented at the meeting held February 5, 2017, where

Minsk again delivered the invocation. R. at 5. Finally, Lisa Kudrow's son, Frank Jr., presented during the May 8, 2016 Council meeting where a New Life pastor gave the invocation. R. at 5.

STATEMENT OF CASE

On July 2, 2016, Plaintiff Geller filed a complaint alleging that Council member Green's invocation violated the Establishment Clause as coercive endorsement of religion because her son felt forced to pray to a Baha'i divinity against his conscience. R. at 5. She further alleged that Green's role as a teacher required her to abstain from either coercing students in her American Government class to attend Council meetings or offering an invocation that publicly endorsed the Baha'i religion. R. at 5. By August 30, 2016, Plaintiffs Burke, Kudrow, and Buffay filed an additional lawsuit alleging that the Council's legislative prayer policy violated the Establishment Clause because invocations constituted "official sanction" of the religious view expressed in the invocations. R. at 5. Plaintiffs also claimed that the Council member's exclusive control over the invocation ultimately resulted in discrimination against non-theistic beliefs. R. at 6. They further alleged that citizens were unconstitutionally coerced as many of the prayers were either proselytizing or denigrating to other faiths and non-faith, and that students were unconstitutionally coerced by Green's option to attend the proceeding as part of her American government class curriculum. R. at 6.

All Plaintiffs sought injunctive and declaratory relief on their respective claims, and subsequently agreed to consolidate the claims for oral argument on the parties' cross motions for summary judgment. R. at 6. The United States District Court for the Eastern District of Old York granted Plaintiffs' Motions for Summary Judgment, permanently enjoining the Council from continuing its policy permitting legislative prayer before Central Perk Town Council Meetings. R. at 11. The Defendant appealed to the United States Court of Appeals for the Thirteenth Circuit

which reversed the decision of the lower court, holding that neither the Supreme Court's legislative prayer cases nor its school prayer cases supported the district court's conclusions. Geller, Burke, Kudrow, and Buffay petitioned for and received a Writ of Certiorari from the United States Supreme Court. R. at 20.

SUMMARY OF ARGUMENT

Legislative prayer has been long upheld as constitutional and consistent with both the First Amendment and the Establishment Clause. It has been built into the framework of American society and has been continually supported by applicable case law. The Town Council's prayer policy and practices align with the characteristics of legislative prayer outlined in *Marsh v. Chambers* and *Town of Greece v. Galloway,* and therefore is not subject to typical Establishment Clause analysis. There is no requirement that legislative prayer be conducted exclusively by clergy, in fact the practice of brief invocations from public officials engaged in public business has developed alongside legislative prayer.

Applying the typical analysis of the Lemon Test under *Lemon v. Kurtzman,* the practice should still be considered constitutional. The purpose of the policy was to guide the Council in effective decision making for the benefit of the community. There was no pattern of proselytization as the Council did not seek to advance any one religion over another, or religion in general over non-religion. The policy was inclusive and tolerant of all systems of belief and was under no obligation to espouse only generic theism in order to effectuate religious balancing. The Council should not be found to have denigrated other religions solely by representing their respective religious beliefs. The inclusion of some faiths does not necessarily equate to the exclusion of others. The policy made no reference to specific religions that should be disregarded and instead implemented a policy that allowed them all to be represented equally.

The Town Council's prayer policy and practice is not unconstitutionally coercive of the students or citizens present. Similarly, there was not a pattern of proselytization that served to convert anyone in attendance. Neither did fear of disparagement or adverse repercussions pressure the students or adults into participation. The adults, in recognition of the ceremonial nature of the proceedings, would have been aware that participation was not required and that they were free to leave at any time if they felt uncomfortable due to the representation of any one of the various belief systems. Feelings associated with discomfort or social pressure do not equate to coercion. Additionally, such sentiments do not fall within the traditionally accepted coercive state establishments where government power is exercised in order to exact financial support of the church, compel religious observance, or control religious doctrine.

Although the threshold for coercion of high school students is lower, it is not satisfied simply by virtue of students' presence. Student attendance was entirely voluntary and largely for the benefit of the students' educational and practical experiences. Neither the opportunity, nor the class itself, were part of the required curriculum and did not significantly impact any of the students academically. There were ample opportunities for students to obtain extra credit, which in no way suggests that a single opportunity was any more or less coercive than the others. Furthermore, during the invocation no one was specifically directed to participate, only requested to stand for both the invocation and the Pledge of Allegiance. There was no restriction on anyone's free will as they observed a historical practice that complied with the traditional framework of legislative prayer. Therefore, the Town Council's prayer policy and practices were not in violation of the Establishment Clause nor were they unconstitutionally coercive of anyone in attendance.

STANDARD OF REVIEW

The standard of review is *de novo,* as the issue is a matter of law regarding a violation of Petitioner's First Amendment rights. Therefore, this Court owes no deference to the decision of the courts from which this case is on appeal. Establishment Clause violations raise questions of law that are reviewed de novo. *Vasquez v. L.A. Cty.,* 487 F.3d 1246, 1254 (9th Cir. 2007).

ARGUMENT

I. THE CENTRAL PERK TOWN COUNCIL'S LEGISLATIVE PRAYER POLICY AND PRACTICES ARE CONSTITUTIONAL AND CONSISTENT WITH THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT OF THE US CONSTITUTION.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. Amend I. In applying the First Amendment to the states through the Fourteenth Amendment, it would be incongruous to interpret that clause as imposing more stringent First Amendment limits on the States than the draftsmen imposed on the Federal Government." *Marsh v. Chambers*, 463 U.S. 783, 783. The Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.' *Walz v. Tax Commission,* 397 U.S. 664, 668 (1970). The Establishment Clause does not always bar a state from regulating conduct simply because it harmonizes with religious canons. *Marsh v. Chambers*, 463 U.S. 783 at 792. It simply means that government may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on basis of their religious beliefs and practices, may not delegate governmental power to religious institutions, and may not involve itself too deeply in an institution's affairs. Cty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 591 (1989). Under the *Marsh-Greece* framework, "prayer practice [that] fits within the tradition long followed in Congress and the state legislatures" is not subject to typical Establishment Clause analysis because such practice "was accepted by the Framers and has withstood the critical scrutiny of time and political change." *Town of Greece*, 134 S. Ct. 1811, 1819 (2014).

A. <u>The Town Council's prayer policy falls within the *Marsh-Greece* exception as constitutional and is not subject to typical Establishment Clause analysis.</u>

In the case of *Marsh,* the Nebraska legislature's practice of opening legislative sessions with a prayer by a chaplain paid from a public fund was found to be constitutional. *Marsh v. Chambers*, 463 U.S. 783 at 793. The court found that outside of the fact that a prayer was offered, because a clergyman of only one denomination—Presbyterian—had been selected for 16 years, he was paid at public expense, and the prayers were in the Judeo-Christian tradition, the factors did not serve to invalidate Nebraska's practice. *Id*.

In *Town of Greece*, the court held that (1) prayer opening town board meetings did not have to be non-sectarian to comply with the Establishment Clause; (2) the town did not violate the First Amendment by opening town board meetings with prayer that comported with tradition of the United States; and (3) the prayer at the opening of town board meetings did not compel its citizens to engage in a religious observance, in violation of the Establishment Clause. *Town of Greece,* 134 S. Ct. 1811. It further reasoned that "[a]n insistence on nonsectarian or ecumenical prayer as a single, fixed standard [was] not consistent with the tradition of legislative prayer outlined in the Court's cases," as "history and tradition have shown that prayer in this limited context could 'coexis[t] with the principles of disestablishment and religious freedom.'" *Town of Greece,* 134 S. Ct. 1811 at 1820*; Marsh v. Chambers,* 463 U.S. 783 at 786. It is Respondent's position that because legislative prayer has consistently been deemed constitutional and the Town Council's prayer policy falls within the definition of legislative prayer, then the Town Council's policy must be considered constitutional.

1. Legislative prayer has been long upheld as constitutional and consistent with the Establishment Clause.

Recounting back to the First Continental Congress of 1744 the traditional procedure of beginning each session with a prayer from a paid chaplain was adopted, as well as a statute enacted September 25, 1789, providing for the payment of those chaplains. *Marsh v. Chambers,* 463 U.S.

783 at 787. The court in *Marsh* found that it would not be reasonable to conclude that those same individuals responsible for authoring the First Amendment Religion Clause would view the opening of legislative session as inconsistent with the Establishment Clause. *Id.* at 788. Similarly, *Town of Greece* opined that the purpose of legislative prayer is "to lend gravity to the occasion and reflect values long part of the Nation's heritage." *Town of Greece*, 134 S. Ct. 1811 at 1814. Over the years a majority of states, including Nebraska, have enacted their own procedures incorporating the practice of legislative prayer.

In light of this history, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. "To invoke divine guidance on a public body entrusted with making the laws is not, in these circumstances, a violation of the Establishment Clause; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh v. Chambers*, 463 U.S. 783, 783. Analyzing the circumstances set forth, there is no indication of a requirement that clergy alone deliver legislative prayer when historically invocations have been given by and for the members of the legislature.

Based on the decisions of *Marsh* and *Galloway*, the "Supreme Court attached no significance to the speakers' identities in its analysis and simply confined its discussion to the facts surrounding the prayer practices before it." *Lund v. Rowan Cty, NC*, 863 F.3d 268, 307 (2017). The court's silence regarding legislator - led prayer speaks volumes as "[p]ublic officials' brief invocations of the Almighty before engaging in public business ha[s] always… been part of our Nation's heritage. *Lund v. Rowan Cty, NC,* 837 F.3d 407, 418 (2016). At inception, John Jay and John Rutledge opposed the inclusion of legislative prayer reasoning that because the delegates "were so divided in religious sentiments . . . [they] could not join in the same act of worship." *Marsh v. Chambers*, 463 U.S. 783 at 791. However, this opposition was overpowered by the

Framer's belief that adult legislatures could separate the symbolic representation of a variety of faiths through invocation and an "official seal of approval of one religious view." *Id.* at 792.

In 1983, *Marsh* established that invoking divine guidance through legislative prayer on a public body entrusted with the power to enact laws is not a violation of the Establishment Clause. *Id.* at 792. The Court did not use any test to conclude that the Nebraska legislatures prayer policy was constitutional as it found such tests unnecessary considering history supported the conclusion that legislative invocations are compatible with the Establishment Clause. *Id.* at 792. In 2014 the Court in *Town of Greece* upheld this rule of law finding that opening town meetings with a prayer did not compel participation or endorse religion in violation of the Establishment Clause. *Town of Greece*, 134 S. Ct. 1811, 1811.

The Council's policy is not significantly distinct from that of *Marsh* or *Town of Greece* and therefore falls within the *Marsh-Greece* exception to typical Establishment Clause analysis so long as it aligns with historical precedent. The Council was well within its 1st Amendment rights to enact a policy authorizing legislative prayer. The Council's policy was similar to both *Marsh* and *Town of Greece* as it also adopted a legislative prayer policy to take place at the beginning of each meeting. Central Perk Council selected clergy to present prayer each month, without any authority over the content of that prayer, and used its solemnity as a guide in decision making. If Petitioner were to argue that clergy-led prayer alone reinforced the constitutionality of the prayer practices of *Marsh* and *Town of Greece,* such a conclusion would not be supported by the Court's opinion that the identity of the prayer giver is not dispositive of constitutionality. Legislative prayer practice did not succumb to opposition over 200 years ago and should not fall in the face of opposition in the instant case. While historical pattern alone is not enough to justify the continuation of such procedure and "no one acquires a vested or protected right in violation of the

Constitution by long use . . . an unbroken practice . . . is not something to be lightly cast aside." *Marsh v. Chambers*, 463 U.S. 783 at 790.

2. The Town Council's policy and practice fall within the definition of legislative prayer as set out in *Marsh* and *Town of Greece*

In the case of *Chino*, the school board began each meeting with a closed session which included a role call as well as any public comment on closed session items. *Freedom From Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ.,* 896 F.3d 1132, 1142 (2018). Then the session opened with a report regarding the closed sessions, the Pledge of Allegiance, the presentation of colors, and a prayer from a member of Clergy or the audience. *Id*. Students from the second grade and up were present as the board highlighted the academic and extracurricular accomplishments of students of the district. *Id*. One student also sat on the board as a representative of the student perspective. *Id*. The meeting typically consisted of fundraising activities, budget approvals, and performances from elementary and high school students. *Id.* Bible recitations usually concluded the meeting. *Id*.

Under the *Marsh-Greece* framework, the court found that the school boards practices did not fall within the traditional meaning of legislative prayer as it was "not the sort of solemnizing and unifying prayer, directed at lawmakers themselves, and conducted before an audience of mature adults free from coercive pressures to participate [which] the legislative-prayer tradition contemplates." *Id.* The court used the parameters provided in both *Marsh* and *Town of Greece* to outline what constitutes legislative prayer. Opining that "prayer occurs "at the opening of legislative sessions," in order to "lend gravity to the occasion" and "invite[ ] lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing." *Town of Greece*, 134 S.Ct. at 1823. The legislative prayer itself is a "symbolic expression." *Id*. at 1818. It is not a time "to proselytize or advance any one, or to disparage any other, faith or belief."

Chino, 896 F.3d 1132 at 1144. "The Establishment Clause ensures that the government in no way acts to make belief—whether theistic or nontheistic, religious or nonreligious—relevant to an individual's membership or standing in our political community." *Lynch v. Donnelly, 465 U.S.* 668, 687. The Establishment Clause, "grounded in experiences of persecution, affirms the fundamental truth that no matter what an individual's religious beliefs, he has a valued place in the political community." *Chino*, 896 F.3d 1132 at1137.

Whereas the students in *Chino* were an integral part of the meeting and the meeting served much more than a policymaking purpose, the court found that the meetings diverged from the legislative prayer tradition and did not fall within the *Marsh-Greece* Exception. The student's presence was not considered voluntary as the meeting was as much for their benefit as the adult members of the board and interested citizens. In contrast, the Council in the instant case practiced legislative prayer at the state legislature, as opposed to a school setting, at the beginning of each meeting to guide in legislative decision-making. The audience was mostly comprised of adults as the Council members were the primary audience. The students were only present by choice to present a relevant issue before the Council and participate in civic engagement. Nothing in the record suggested that the Council or its prayers had any more authority over other religious beliefs or actions or that participation or non-participation would have any negative impact on an individual's standing within the community. Therefore, Town Central Perk's policy falls well within the definition of legislative prayer and constitutionally aligns with the Establishment Clause.

B. Even if the court finds that the Town Council's prayer falls outside the *Marsh-Greece* Exception and is subject to typical Establishment Clause analysis, the policy should still be found constitutional under the *Lemon* Test.

The Supreme Court has used the three-part *Lemon* Test of *Lemon v. Kurtzman,* as a major tool in determining whether a state action violates the Establishment Clause of the United States Constitution. *Lemon v. Kurtzman,* 403 U.S. 602 (1971). The test has not been consistently used, and the Court has stepped away from it in some cases, such as in *Lynch v. Donnelly.* In *Lynch,* the Court insisted that, though the *Lemon* test was useful, it was unwilling to bind itself "to any single test or criterion in this sensitive area." *Lynch v. Donnelly, 465* U.S. 668 (1984). However, in other instances, such as *Wallace v. Jaffree,* decided just the year after, the Court again chose to apply the *Lemon* test where Justice Powell defended it as the only coherent test adopted by a majority of the Court. *Wallace v. Jaffree, 472* U.S. 38 (1985). "Establishment Clause challenges are not decided by bright-line rules, but on a case-by-case basis with the result turning on the specific facts." *Glassroth v. Moore*, 335 F.3d 1282 at 1288;

The *Lemon* test assesses whether the applicable statute or practice (1) has a secular purpose; (2) neither advances or inhibits religion in principal or primary effect; and (3) fosters excessive government entanglement with religion. *Lemon v. Kurtzman,* 403 U.S. 602 at 612. All three prongs must be satisfied for a policy or practice to be deemed unconstitutional as it pertains to the Establishment Clause. "Secular" is defined as "wordly, as distinguished from spiritual." Black's Law Dictionary (10th ed. 2014). A finding of a secular predominant purpose serves as a threshold requirement. Therefore, if the action is determined to have been taken for the purpose of favoring, advancing, or endorsing religion, "no consideration of the second or third criteria of *Lemon* is necessary." *Doe v. Beaumont Indep. Sch. Dist.*, 240 F.3d 462, 496 (5th Cir. 2001). When applying the second prong, it is important to note the use of the words "principal or primary." That is not to say that all effects of the policy on religion are prohibited, however any effect must be incidental. In determining the impact, a court will examine "whether an objective observer, acquainted with

the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools." *Wallace v Jaffree,* 472 U.S. 73 at 76. The final prong of the *Lemon* test assesses whether the policy encourages excessive government entanglement with religion. The court in *Lemon* defined excessive entanglement "as requiring or allowing monitoring surveillance, close cooperation, involving mutual programmatic assistance, and other similar administrative initiatives; or through "divisive political potential." *Lemon v. Kurtzman,* 403 U.S. 602 at 612.

1. The Town Council's legislative prayer policy was enacted for the secular purpose of encouraging effective decision-making practices by invoking divine guidance.

The purpose of legislative prayer within the Central Perk Town Council's proceedings is clearly set out within the preamble of the policy: "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." R. at 2. To seek guidance over proceedings during which important legislative decisions are made concerning the entire community is undoubtedly a secular purpose. While this reasoning contains some religious undertones, it also promotes tradition, respect, and diligence while addressing issues and concerns that arise in the relevant community. Though not completely devoid of any theistic ideology, "a totally secular purpose is not required." *Am. Civil Liberties Union of Ohio Found., Inc. v. Ashbrook*, 375 F.3d 484, 491 (6th Cir. 2004). The policy does not intend to advance any particular religion over the other, or religion in general over non-religion. In the case of *Engel v. Vitale,* the Board of Education of Union Free School District directed the School district's principal to include prayer recitation as part of their "Statement of Moral and Spiritual Training in Schools." Each class was required to say the following prayer aloud in the presence of a teacher at the beginning of each school day:

> "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." *Engel v. Vitale*, 370 U.S. 421, 425, (1962).

The purpose of implementing this policy in *Engel* is clearly to further a religious agenda, as it was a strict directive embedded in the course curriculum. In the instant case, Council member Green, requested that the Council allow her American government students to make a brief presentation at the Council meeting. She argued that encouraging civic engagement in the community's youth was a "worthwhile endeavor," and the council unanimously agreed. R. at 4. As a result, they adopted a policy allowing the students to make a five-minute presentation endorsing or opposing decisions pending for the council. The students could potentially receive five additional extra credit points for their class participation grade. R. at 4.

"Legislative prayer, while religious in nature, has long been understood as compatible with the Establishment Clause." Since the first Continental Congress in 1774 where the procedure of opening session with a prayer from a paid chaplain was adopted, this tradition has "coexisted with the principles of disestablishment and religious freedom." *Marsh v. Chambers,* 463 U.S. 783, 792. In *Town of Greece,* residents brought suit against the town for opening legislative sessions with prayer. The prayer was considered to be delivered during the ceremonial portion of the meeting. It was during this time that swearing ins, inductions, and formal presentations were made, suggesting that the purpose was to set the scene for the proceedings as well as an atmosphere of respect and reflection for all those in attendance. It is clear the policy served to replicate and encourage the traditional and historical conditions of past centuries by including prayers in the legislative process — another secular purpose that passes the *Lemon* test in determining the constitutionality of this policy.

2. The Town Council's legislative prayer policy neither advances nor inhibits religion in principal or primary effect.

To determine whether the policy had a principal or primary effect on the advancement or inhibition of religion, the court must examine whether an objective person listening to the proceedings, such as the townspeople and high school students, would ascertain from the practice that the Council was publicly supporting one true faith, or theism in general.

As stated above, the purpose of the statute was not for the legislature to endorse one religion within the community. Although the Council members selected clergy from specific faiths, they could not have known the content of those prayers and were prohibited from influencing the clergy in any way. The objective person, knowing that the Council represents a variety of faiths represented within the community, would likely recognize the legislative purpose as the primary effect and any other impact on religion as incidental. If Petitioner were to argue that all impact on religion should be removed and the issues before the court resolved if legislative prayer was required to be non-sectarian or not refer to any specific deity, this would surely be an unconstitutional inhibition of religion. As long as a reasonable observer would understand that each ceremonial invocation serves only to represent the beliefs of each selected speaker equally and without bias towards any particular belief system, the policy will pass the *Lemon* test.

Since colonial times, invocations have been used to address groups of different creeds under the belief that those groups can come together as one community with tolerance, devotion, and respect regardless of the religious doctrine. Not only would defining what constitutes a generic or non-sectarian prayer be difficult, but it would be improper to conclude that only words permissible to the majority should be allowed, as the First Amendment is not a majority rule. It is a founding principal embedded in the fabric of society. Furthermore, forcing non-generic prayer essentially strips religion of its true meaning and would require state legislatures to become more

involved in the overlap between church and state by censoring religion. As long as the town maintains a policy of nondiscrimination, the constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing. *Town of Greece,* 134 S.Ct. 1811, 1822-23. While two or three students may have subjectively felt compelled to participate, those feelings were incidental to the true purpose of the practice. Moreover, the remedy sought by petitioner, permanent injunction, clearly contradicts the rationale behind the First Amendment and impedes on a legislative tradition that has withstood the critical scrutiny of time and modernization. *Id.* "The First Amendment is not a majority rule, and government may not seek to define permissible categories of religious speech. Once it invites prayer into the public sphere, government must permit a prayer giver to address his or her own God or gods as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian." *Id.* Therefore, the town council's legislative prayer policy passes the second prong of the *Lemon* test by neither advancing nor inhibiting religion in principal or primary effect.

3. The Town Council's legislative prayer policy does not foster excessive government entanglement with religion.

Administrative entanglement typically involves comprehensive, discriminating, and continuing state surveillance of religion. *Lemon,* 403 U.S. at 619–22. The Court in *Engel v. Vitale* reasoned that the constitutional prohibition against laws respecting an establishment of religion must, at least, mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government. *Engel v. Vitale*, 370 U.S. 421, 425, (1962). In fact, history has shown that governmental establishment of specifically composed prayers was one of the many reasons early colonists left England in search of religious freedom. *Id.* They were well aware of the impact

government endorsement of religion could have on individual freedoms. *Id.* "The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support, or influence the kinds of prayer the American people can say." *Id* at 429. It is a historical fact that the inevitable result of excessive government entanglement in the establishment of one particular form of religion is the "hatred, disrespect and even contempt of those who held contrary beliefs." *Id* at 431. Furthermore, as history shows, "governmentally established religions and religious persecutions go hand in hand." *Id* at 432.

The specific procedure of the policy was for Council members to be randomly selected to give the invocation or prayer. R. at 2. Once selected, they either personally gave the prayer or selected a minister from the community to give the invocation instead. R. at 2. If the Council member chose to omit the invocation, as the policy allowed, they would proceed directly to the Pledge of Allegiance, which has been recited at every Council meeting for the past sixty-two years. R. at 2. Whether the invocation and pledge were offered or only the pledge, the Council member always requested the citizens to stand. R. at 2. Council members were not permitted to dictate to clergy the contents of their prayers. Clergy from more than four different faiths, including the Church of Latter Day Saints, Muslim, Baha'I, and New Life Evangelical, gave invocations during the practice of this policy. R. at 2-3.

The instant case is clearly distinguished from *Vitale* as the audience was not monitored on a day-to-day basis to ensure that certain religious practices were observed, as the analysis calls for. They were not required to recite any specific language related to one religion, only requested to stand out of respect for the proceedings and various religions represented at the meeting. Whereas the school board in *Vitale* sought to enforce a moral standard based on an endorsed religion, the

citizens and students in the instant case were given the option to attend the meeting voluntarily. The policy was not embedded in their course curriculum, endorsed by the school board, or even by Council member Green herself. There are no facts in the record to suggest that there would be any consequences for leaving the proceedings if one felt uncomfortable during the invocation or that any one belief system was intentionally and consistently monitored or excluded from the Council's legislative prayer policy. To the contrary, numerous faiths were represented and acknowledged as they were randomly selected at the beginning of each meeting. Moreover, if the Council included an Atheist member, he or she would be free to give an invocation relative to his or her beliefs or omit the invocation entirely. Therefore, this case should also pass the final prong of the *Lemon* test in determining whether the policy and practices are constitutional.

II. The Center Perk Town Council's prayer policy and practices were not unconstitutionally coercive of all citizens in attendance nor the high school students who were awarded academic credit for presenting at the meeting.

"[A] moment of prayer or quiet reflection sets the mind[s] [of legislators] to a higher purpose and thereby eases the task of governing." *Town of Greece*, 134 S.Ct. at 1825. Legislative 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. Such prayer becomes unconstitutional when it strays away from its traditionally respectful and solemn purpose or where there is a real and substantial likelihood that coercion will result. The court in *Town of Greece* provided that a legislative prayer policy becomes unconstitutionally coercive under the Establishment Clause, if legislatures direct the public to participate in the prayers, the prayer reflects a pattern of proselytization, or denigrates other faiths in a manner which would indicate that board members' decisions might be influenced by a person's non-participation in the prayer opportunity. Bormuth v. Cty. of Jackson, 870 F.3d 494, 506 (6th Cir.). Such inquiry

is fact sensitive and requires consideration of both the setting in which the prayer arises and the audience to whom it is directed. *Id.* at 1825.

A. The Central Perk Town Council's legislative prayer policy and practices are not unconstitutionally coercive of all citizens.

1. The Council's prayer policy and practices did not reflect a pattern of proselytization.

"[A]bsent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a prayer will not likely establish a constitutional violation. *Marsh* ... requires an inquiry into the prayer opportunity as a whole, rather than into the contents of a single prayer." *Town of Greece* 34 S.Ct. at 1824. The court in *Lund* affirmed the district court's decision that the county board of commissioners' legislative prayer practice violated the Establishment Clause. Lund v. Rowan Cty., N. Carolina, 863 F.3d 268, 272 (4th Cir. 2017). In *Lund,* the board of commissioners began each meeting with an invocation during which each member of the board, and a majority of the audience, stood and bowed their heads for prayer. *Id.* The commissioner then asked the community to "join him in worship, using phrases such as "Let us pray," "Let's pray together," or "Please pray with me," followed by a communal "Amen."" *Id.* Examining the record of prayers given in *Lund,* the court found that 97% of the prayers referred to "Jesus," "Christ," or "Savior," with no religion other than Christianity represented. *Id.* at 273.

"Pattern" is defined as "a mode of behavior or series of acts that are recognizably consistent. Black's Law Dictionary (10th ed. 2014). While the Council's policy and procedure on its face should be considered neutral and consistent, the practice of that policy cannot be regarded as a pattern. A wide array of prayers were offered by representatives of the Church of Latter Day Saints, Muslim, Baha'I, and New Life Evangelical faiths. Council members were not permitted to

have any input as to the content of the prayer and only controlled who delivered it. Therefore, when language about Jesus Christ and Buddha were introduced, out of respect, the council members allowed the clergy to address his or her deity to commence the legislative proceedings. They continued this routine for months to come without ever suggesting either by words or conduct that any one of the five different religions was preferred or endorsed by the Council.

In sharp contrast, there is a consistently recognizable pattern in content over a specific period of time in *Lund*. This is unlike the proceedings in the instant case which more closely relate to the decisions of *Marsh* and *Town of Greece* which were largely justified because of the inclusive nature of their policies and practices. The court in *Town of Greece* rejected complainant's allegation that she was being coerced by a pattern of proselytization because the proceedings included Christian prayers exclusively. In response to the allegation, the chairman in *Town of Greece* invited representatives of the Jewish, Baha'I, and Wiccan faiths to deliver prayers during the meeting. Upon consideration, the court was unable to find a distinct pattern of advancing one particular religion when various belief systems were given the opportunity to present invocations as well. Ideally, the elected officials of Central Perk Council also represented the variety of faiths within the community. Therefore, since each representative and belief system was given equal opportunity to give an invocation and be represented within the meeting, it follows that such practice reflects neither a pattern of proselytization or any attempt to convert others to one particular religion.

2. The Council's prayer policy and practices did not denigrate other faiths.

Denigration requires actual statements or conduct which defame, disparage, or belittle a religion. Where a policy serves to put down or exclude any one religion, that policy cannot be characterized as constitutional or in accordance with First Amendment Principles and the

Establishment Clause. *Marsh* . . . "requires an inquiry into the prayer opportunity as a whole, rather than into the contents of a single prayer." *Town of Greece,* 34 S.Ct. at 1824. In the case of *Pelphrey v. Cobb County, Ga.*, the district court found that the commission categorically excluded certain faiths by striking a long and continuous line through a group of faiths found in the phone book used to compile the list of potential invocational speakers for meetings between 2003 - 2004. *Pelphrey v. Cobb County, Ga.*547 F.3d 1263, 1267-68. These faiths included Islam, Jehovah's Witnesses, Judaism, and the Church of Jesus Christ of Latter Day Saints. *Id.* At 1282 They also found that no representative of any of the excluded religions was invited as an invocational speaker between 2003 - 2004. *Id.*

The council members did not dictate to the clergy the contents of their prayers, and as a result they were widely varied. Some evoking universal themes, others paying deference to their specific deity out of respect and in alignment with both the right to freedom of religion and the Establishment Clause. If Petitioner should argue that statements such as "[w]e pray that…all will submit to Christ's reign; none would be sent to the Celestial Kingdom, away from the fullness of God's light; and that every Central Perk citizen's knee to bend before King Jesus," serve only to advance a particular religion and thereby exclude others, this is not the case. R at. 3. These statements should be viewed as a public conversation between the clergy and his or her deity. Since the statements included phrases such as "[w]e thank Thee for Thy presence and guidance in this session" and requests that all those "who do not yet know Jesus," for "blinders to be removed from the eyes of those who deny God," and for "every Central Perk citizen's knee to bend before King Jesus," it suggests that clergy were speaking directly to their God making requests they felt were wholly beneficial to the community and legislative process. R at. 3.

Compared to the instant case, the practice of *Pelphrey* more closely evidences denigration over a measurable period of time as it pertains to coercion and endorsement of specific religions. It is also distinct from *Marsh, Town of Greece,* and the instant case because none of the facts even remotely parallel that level of exclusion. To the contrary, the Council's procedure is inclusive of all faiths and religions with nothing to suggest that anyone would be shunned or reprimanded for observing their own religious beliefs. The objective of the Council in enacting this policy was not to single-out non-believers, coerce anyone to a specific belief system, or put down anyone who held beliefs different from those represented within the council. Their purpose is clear in that they seek only to engage in a constitutional practice they believe can better aid in their service to their country and community. To prevent them from doing so would be a grave injustice infringing on principles that the founding fathers built into the framework of society. If there is any change to the policy, it should be no more than to amend it to include notice to the audience that they are under no obligation to participate in the invocation and that believers of all faiths and non-believers alike have an equal opportunity within the proceeding, as the Council strives to comport with the goals of the Establishment Clause.

B. The Center Perk Town Council's legislative prayer policy and practices were not unconstitutionally coercive of citizens or high school students who were awarded academic credit for presenting at meetings.

1. The Council's prayer policy and practices did not direct anyone to participate.

The prayers during the school board meetings of *Freedom from Religion Foundation* were given in the presence of school aged children as young as seven years old, who were an integral part of the meeting. *Freedom From Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ.,* 896 F.3d 1132, 1146 (9th Cir. 2018). "Unlike legislative entities for which legislative prayer is constitutionally permissible, school districts—and by extension, school boards—exercise

control and authority over the student population." *Id.* The board was responsible for expulsions, reinstatements, graduation requirement waivers and a host of other duties that directly impacted the students and likely influenced the level of control and authority the board had in the eyes of the students. In *Bormuth v. County of Jackson,* the governing parties began each meeting with a call to order, "after which the Chairman direct[ed] those in attendance to "rise" and "assume a reverent position." *Bormuth*, 870 F.3d 494 at. 498. Then one of the Commissioners delivered a prayer. *Id.*

Here, every month the names of each of the council members, except for one who declined to participate, were written on pieces of paper and the put into an envelope. R. at 2. During the meeting the Chairman would pick a name from the envelope to designate the council member who would open the following month's meeting. R. at 2. That person was allowed to either personally give the invocation and lead the Pledge of Allegiance or select a clergy member to give the invocation in his or her place. R. at 2. If he or she chose to select clergy then during the next meeting the Council member would lead the pledge and then introduce the clergy member to give the invocation. R. at 2. Whether the meeting began with both the Pledge and invocation or only the Pledge, the Council Member always requested citizens to stand. R. at. 2. There was no indication that standing was required, as the statement was merely a request. There was no direction to close eyes, bow heads, or utter any responses to the request. Considering the atmosphere and seriousness of the situation, some of the citizens may have felt pressured to stand. That feeling of pressure may have amounted to other uncomfortable emotions like personal offense or disrespect. However, such emotions should not be given more than subjective weight as they were only in the minds of a few in attendance. Furthermore, "offense does not equate to coercion." *Town of Greece*, 134 S. Ct. 1811, 1815. As law-abiding adult citizens who enjoy the same civil

liberties as those of the Council, they should have been able to distinguish a request to stand out of respect for freedom of religion during a legislative session from an unavoidable direction to participate in such religion.

In both *Chino* and *Jackson,* there is an outright directive to the audience to participate. In *Chino*, they effectively directed them because students often performed, presented, were honored, and one student even sat on the board as a representative. The test of whether prayer policy directs those in attendance to participate was likely meant to avoid those practices, such as that of *Bormuth*, that suggest state endorsement of religion and lack of free will to participate or to decline to participate. Considering that the Town Council's policy neither expressly required participation nor was so intertwined with the students and legislature that the students felt compelled, it cannot be found to have directed participation.

2. The extra credit opportunity did not coerce the students into attendance.

According to the Court in *Lee v Weisman* regarding high school students, there are "heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." *Lee v. Weisman*, 505 U.S. 577 at. 592 (1992). The family in *Weisman* sought permanent injunction to prevent an invocation and benediction at a graduation ceremony. The court held that "including clergy who offer prayers as part of an official public school graduation ceremony is forbidden by the Establishment Clause." *Id.* This holding was supported by reasoning that "[p]rayer exercises in elementary and secondary schools carry a particular risk of indirect coercion," and that "[t]he school district's supervision and control of a high school graduation ceremony places subtle and indirect public and peer pressure on attending students to stand as a group or maintain respectful silence during the invocation and benediction. *Weisman*, 505 U.S. 577, 578.

> "[T]he [Establishment] Clause is not violated by the kind of subtle pressures . . . allegedly suffered, which do not amount to actual legal coercion. The municipal prayers in this case bear no resemblance to the coercive state establishments that existed at the founding, which exercised [governmental] power in order to exact financial support of the church, compel religious observance, or control religious doctrine." *Town of Greece*, 134 S. Ct. 1811, 1815.

The Council's prayer policy did not lend any financial support to the church. Clergy participated only in service to their community, receiving absolutely no financial gain either directly or indirectly. It did not seek to compel religious observance nor did it control religious doctrine as participation was completely voluntary and the invocations did not cater to any one specific religion or belief system. The purpose of the policy does not meet any of the criteria historically categorized as a coercive state establishment. Similarly, an extra credit opportunity offered by a teacher and legislator to promote community participation and civic engagement would most likely not be considered a coercive state establishment. The instant case is distinguishable because the students were present at the meeting completely of their own volition. The meeting took place outside of school grounds, hours, and required curriculum. The students were present for the sole purpose of participating in civic engagement by observing a legislative process which included a ceremonial prayer policy. The students were not offered the opportunity to attend to hear a prayer, but to present a relevant issue before their local legislature.

The presentation at the Council meeting was one of three opportunities to obtain extra credit for their American government class. Students could either volunteer in a local, state, or federal election, write a three-page letter to their federal or state elected representative setting forth the student's position on a current political issue, or attend the Central Perk Town Council's meeting. R. at 4. During the 2014 - 2015 academic year, twelve students voluntarily participated in the council meetings and earned the five additional points towards their grade. R. at 4. Of those twelve, only two of the students' grades were impacted by their participation and the impact was

not significant, raising it by one letter grade. R. at 4. During the 2015 - 2016 school year, thirteen students took advantage of the extra credit opportunity and of those thirteen, four are the sons and daughters of the Petitioners. R. at 4.

This court should not give undue weight to the presence of the student's teacher or her role in the legislative process when evaluating coercion. Council member Green should not be penalized in any capacity for being an elected official of the state legislature as well as an educator within the local school system. As a responsible and active member of society, this court should not give significant consideration to the overlap of her roles and their impact on the students. Green and her fellow legislators unanimously agreed to allow the students to present during the meetings to encourage and inform them about the processes and ideals of civic engagement, which includes legislative prayer. It would be a disservice to the students to censor religion and alter precedent long upheld, thereby stripping them of a true and accurate depiction of the legislative process. In the interest of authenticity and respect for tradition, it cannot be concluded that the student's voluntary participation in a true legislative process, during which they were never instructed to participate in prayer, and which had a minimal effect on their grade, was unconstitutionally coercive.

CONCLUSION

"Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." To examine constitutionality, this court must acknowledge that "[a]bsent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a prayer will not likely establish a constitutional violation. *Marsh* ... requires an inquiry into the prayer opportunity as a whole, rather than into the contents of a single prayer." *Town of Greece* 34 S.Ct. at 1824.

The purpose of the legislative prayer and practice was primarily secular and only incidentally related to religion. It was enacted to facilitate effective decision making among legislatures and promote civic engagement among the students. Furthermore, legislator - led prayer aligns with historical invocations as the identity of the prayer giver has not been deemed dispositive, nor have clergy been deemed the only constitutionally permissible givers of legislative prayer. A reasonable observer would not interpret the Council's proceedings as an official endorsement of any one religion or religion in general, realizing that America was built on the right of every citizen to freely exercise his or her religion. To do so within the confines of the legislature, moderated by legislators, with absolutely no consequence of non-participation, reflects neither a pattern of proselytization or denigration among citizens. The students were not unconstitutionally coerced as attendance was not required and ultimately served only to mirror a legislative practice that has been upheld time and time again across the nation's history.

Although historical precedent alone is not sufficient to determine constitutionality, under careful analysis it should be found that the Town Council's policy is consistent with the decisions of *Marsh*, *Town of Greece*, and the Establishment Clause of the Constitution. For these reasons, 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/Team K
Attorney for Responden

APPENDIX A

First Amendment to the U.S. Constitution:

"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

APPENDIX B

Preamble of Town Council's Legislative Prayer Policy:

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.