

No. 18-1308

IN THE  
**SUPREME COURT OF THE UNITED STATES**

---

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 OF PETITIONERS

---

Team D

*Attorneys for Petitioners*

## QUESTIONS PRESENTED

1. Whether the Central Perk Town Council's legislative prayer policy and practices are 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 by exclusively theistic.
2. Whether the Central Perk Town Council's prayer policy and practices are 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.

TABLE OF CONTENTS

QUESTIONS PRESENTED..... i

TABLE OF AUTHORITIES ..... iii

STATEMENT OF THE CASE..... 1

SUMMARY OF THE ARGUMENT ..... 6

ARGUMENT..... 6

    I.    CENTRAL PERK’S LEGISLATIVE PRAYER POLICY IS UNCONSTITUTIONAL  
    BECAUSE THE TOWN COUNCIL MEMBERS DELIVER THE INVOCATIONS OR  
    SELECT THEIR OWN PERSONAL CLERGY TO DO SO..... 6

        A.    Central Perk’s legislative prayer practice is unconstitutional because legislators have  
        control over the content of the invocations. .... 7

        B.    Central Perk’s legislative prayer practice is unconstitutional because legislator-led  
        prayer exceeds the constraints set forth in *Marsh* and *Galloway*, and it does not fit with  
        historical traditions in Congress and state legislatures. .... 10

    II.   CENTRAL PERK’S LEGISLATIVE PRAYER POLICY IS UNCONSTITUTIONAL  
    BECAUSE IT COERCES ALL CITIZENS IN ATTENDANCE, INCLUDING PUBLIC  
    SCHOOL STUDENTS, TO ENGAGE IN SECTARIAN RELIGIOUS OBSERVANCE. .... 14

        A.    Central Perk’s Legislative Prayer Policy is unconstitutional because the prayers are  
        delivered by the legislators, promote religious denominations over others, and are directed  
        to the audience, rather than the legislators. .... 15

        B.    Central Perk’s Legislative Prayer Policy is unconstitutional because it uses social  
        pressures, including academic credit, the students’ teacher’s involvement in the prayer, and  
        the formalities of the invocation and Council meeting, which constitute unconstitutional  
        state coercion. .... 21

CONCLUSION..... 24

TABLE OF AUTHORITIES

CASES

*Bormuth v. Cty. of Jackson*, 870 F.3d 494 (6th Cir. 2017) ..... 11, 13  
*Cty. of Allegheny v. Am. Civil Liberties Union of Greater Pittsburgh Chapter*, 492 U.S. 573  
(1989)..... 10, 15  
*Engel v. Vitale*, 370 U.S. 421 (1962) ..... 7, 8, 15, 21  
*Lee v. Weisman*, 505 U.S. 577 (1992)..... *passim*  
*Lund v. Rowan Cty., N.C.*, 863 F.3d 268 (4th Cir. 2017) (en banc) ..... *passim*  
*Marsh v. Chambers*, 463 U.S. 783 (1983) ..... 7, 10, 14, 19  
*Simpson v. Chesterfield Cty. Bd. of Supervisors*, 404 F.3d 276 (4th Cir. 2005)..... 12  
*Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811 (2014) ..... *passim*

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. I ..... 14

STATUTES

28 U.S.C. § 1254(1) ..... 1

OTHER AUTHORITIES

Brief of Michigan, Kentucky, Tennessee and Ohio Local and State and the Commonwealth of  
Kentucky by and through Governor Mathew G. Bevin as Amici Curiae, *Bormuth v. Cty. Of  
Jackson*. 870 F.3d 494, 510 (6th Cir. 2017) (No. 15-1869), 2017 WL 1710340. .... 11, 12

## STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Thirteenth Circuit was entered on January 21, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (stating cases in the court of appeals may be reviewed by the Supreme Court by the granting of writ of certiorari “upon the petition of any party to any civil or criminal case, before or after rendition of judgment”). This Court granted the petitioners’ petition for a Writ of Certiorari on August 1, 2018.

## STATEMENT OF THE CASE

Ross Geller, Dr. Richard Burke, Lisa Kudrow, and Phoebe Buffay, (collectively, “Plaintiffs”), are residents of Central Perk Township, Old York (“Central Perk”). R. at 1. Each plaintiff is also the parent of a student at Central Perk High. R. at 4. During the 2015–2016 academic year, Ben Geller, Timothy Burke, Frank Kudrow Jr., and Leslie Buffay, the children of the Plaintiffs, were enrolled in American Government at their school. R. at 4–5. Their class was taught by Rachel Green (“Green”), who offered students five extra credit points in her class if they made presentations at Town Council meetings. R. at 4. This practice began after Green joined the Central Perk Town Council in November 2014. R. at 4. Central Perk is governed by a Town Council consisting of seven members that are elected biennially. R. at 1. At Green’s request, the Town Council agreed to allow three of her students to make presentations at each monthly Town Council meeting, adopting a policy to that effect (the “Student Presentation Policy”). R. at 4.

The Student Presentation Policy was not the only policy the Town Council adopted in 2014. R. at 2. In September 2014, the Town Council adopted a policy allowing prayer invocations before the start of each monthly meeting (the “Legislative Prayer Policy”). R. at 1–2.

The Legislative Prayer Policy provides that each month the Town Council will randomly select the Council member in charge of organizing the prayer through a system of picking one of the Council members' names from an envelope. R. at 2. The seven members of the Town Council at the time these actions arose were Joey Tribbiani ("Tribbiani"), Green, Monica Geller-Bing ("Geller-Bing"), Chandler Bing ("Bing"), Gunther Geffroy ("Geffroy"), Janice Hosenstein ("Hosenstein"), and Carol Willick ("Willick"). R. at 1. The policy then states that the selected Council member may "either offer the prayer or invocation personally or select a minister from the community to offer the invocation in his or her stead." R. at 2. The prayer, if not omitted, is given after the Town Council members and the members of the public in attendance recite the Pledge of Allegiance together. R. at 2.

Once the Legislative Prayer Policy was implemented, Council member Geffroy requested that his name never be selected, so it was not included in the envelope. R. at 2. Council member Bing's name was drawn four times, and Geller-Bing's name was drawn five times. R. at 2. On all nine occasions that these members' names were drawn, they selected the Branch President, David Minsk ("President Minsk"), of their church, the Church of Jesus Christ of Latter Day Saints, to deliver the invocations. R. at 2–3. Once, he prayed the following prayer:

Heavenly Father, we thank thee for this day and all our many blessings. Thou art our sole provider, and we praise Thy power and mercy. Bless that we can remember Thy teachings and apply them in our daily lives. We thank Thee for Thy presence and guidance in this session. In the name of Jesus Christ, amen.

R. at 3. Five times, he delivered the prayer: "Heavenly Father, we pray for the literal gathering of Israel and restoration of the ten tribes. We pray that New Jerusalem will be built here and that all will submit to Christ's reign." R. at 3. On the other three occasions, he prayed that "none in attendance would reject Jesus Christ or commit grievous sins against the Heavenly

Father, so that none would be sent to the Telestial Kingdom, away from the fullness of God's light." R. at 3.

Other Council members also called on leaders of their faiths to deliver invocations. Council members Hosenstein and Tribbiani were members of the evangelical Christian church New Life Community Chapel ("New Life"). R. at 3. Hosenstin's name was drawn twice, as was Tribbiani's. R. at 3. On all four of these occasions, they invited New Life pastors to give the invocation. R. at 3. On all of these occasions, the New Life pastors "extolled Christianity as the one true religion," and concluded their prayers with the phrase, "in the name of our Lord and Savior, Jesus Christ." R. at 3. Some of the New Life pastors' invocations included requests for salvation for those "who do not yet know Jesus," "blindness to be removed from the eyes of those who deny God, and "every Central Perk citizen's knee to bend before King Jesus." R. at 3.

Some of the Council members decided to give the invocations themselves, with the message always representing their own faith. Council member Willick, a member of Muslim faith, was selected to give the invocation three times. R. at 3. On these occasions, she prayed "As salamu aleiykum wa rahmatullahi wa barakatuh," meaning "Peace and mercy and blessings of Allah be upon you." R. at 3. Council member Green, a member of the Baha'i faith, gave the invocation twice, deciding to omit the invocation the other two times the Town Council selected her. She prayed to Buddha, "acknowledging his infinite wisdom." R. at 3.

In the academic year following the adoption of both policies, the Student Presentation Policy and the Legislative Prayer Policy, thirteen of Green's students gave presentations to the Town Council. R. at 4. Four of these students were the children of individual Plaintiffs. R. at 5. Ben Geller, son of Mr. Geller, made a presentation to the Council on October 6, 2015. R. at 5. At this Council meeting, Green's name was selected to give the opening prayer, and Green, in

accordance with her faith, prayed to Buddha and acknowledged his “infinite wisdom.” R. at 5.

Mr. Geller attended this meeting in support of his son’s school presentation. R. at 5. Mr. Geller is a member of New Life and was upset by the invocation being directed towards Buddha. R. at 5.

Mr. Geller was not the only parent upset by the Town Council’s Legislative Prayer Policy. Plaintiffs, and parents, Dr. Burke, Ms. Kudrow, and Ms. Buffay are atheists and members of the Central Perk Freethinkers Society. R. at 5. Timothy Burke, son of Dr. Burke, gave a presentation on November 4, 2015. R. at 5. At that meeting, President Minsk gave the invocation at the meeting and prayed that none in attendance would reject the Heavenly Father. R. at 5. Leslie Buffay, daughter of Ms. Buffay, gave a presentation at the February 5, 2016 meeting. R. at 5. On this occasion, President Minsk also gave the invocation, and asked for the restoration of New Jerusalem. R. at 5. Ms. Kudrow’s son, Frank Kudrow Jr., gave a presentation at the May 8, 2016 Council meeting proposing to include the Central Perk chapter of the GLBTQ Legal Advocates and Defenders (GLAD) in the bicentennial parade. R. at 5. On this occasion, a New Life pastor gave the invocation. R. at 5.

The extra credit opportunity had an apparent effect on students’ grades in American Government. In the academic year preceding Green’s election to the Town Council and the subsequent opportunity for students to make presentations at Town Council meetings, the average grade in her American Government class was a B+ (89 out of 100). R. at 4. In the following 2014–2015 school year, the average grade rose to an A– (90 out of 100). R. at 4. That year, twelve students in Green’s class made presentations to the Town Council and earned academic credit for those presentations. R. at 4. These presentations raised two students’ final grades in the class substantially: one student raised her letter grade from a B– to B, while another student raised his grade from a B+ to A–. R. at 4.

On July 2, 2016, Mr. Geller filed a complaint alleging that Green's invocation violated the Establishment Clause of the Constitution as a coercive endorsement of religion by the Town Council, asserting that his son felt forced to pray to Buddha. R. at 5. He further stated that Green's role as a public high school teacher required her to abstain from coercing her students to attend Council meetings or offering invocations herself. R. at 5. Dr. Burke, Ms. Kudrow, and Ms. Buffay filed a separate lawsuit on August 30, 2016 asserting that the Town Council's prayer policy violated the Establishment Clause because the Council members' practice of giving the invocations themselves constituted "official sanction" of their religious views. R. at 5. Furthermore, these plaintiffs alleged that the Council members' exclusive control of the invocations resulted in discrimination against non-theistic faiths, and were unconstitutionally coercive in that they were proselytizing or denigrating other faiths and lack of faith. R. at 5-6. Finally, these plaintiffs stated that these prayers coerced their children into religious activity because Green required their attendance through her class curriculum. R. at 6.

Because of the common nucleus of operative fact underlying the two complaints, all plaintiffs consented to the court's consolidation of their respective claims for oral argument on the parties' cross-motions for summary judgment. R. 6. The United States District Court for the Eastern District of Old York granted the Plaintiff's Motion for Summary Judgment and their request for a permanent injunction of the Town Council's Legislative Prayer Policy. R. at 10-11. The District Court noted that "The Council members did not randomly selected clergy members from the community. They exclusively either gave the prayer themselves or selected clergy only from their own houses of worship," and "when members were repeatedly drawn, they invited clergy back after hearing some give seemingly inflammatory prayers. Selection of the invocation giver was de facto selection of the prayer." R. at 7.

The Defendant appealed to the United States Court of Appeals for the Thirteenth Circuit. R. at 12. Despite acknowledging, like the District Court, that “all four invocations [by New Life pastors] extolled Christianity as the one true religion,” the Thirteenth Circuit held that the invocations at the Town Council meetings were neither proselytizing nor denigrating to other faiths. R. at 3, 13, 17. The Thirteenth Circuit reversed the District Court’s judgment, granting the Defendant’s Motion for Summary Judgment and dismissing the Plaintiffs’ complaint with prejudice. R. at 19. The United States Supreme Court granted certiorari. R. at 20.

### SUMMARY OF THE ARGUMENT

While this Court has established that legislative prayer is not inherently unconstitutional, the Central Perk Legislative Prayer Policy is unconstitutional because the Town Council members have exclusive control over the content of the invocations through their power to either deliver the invocations or select a religious leader to do so. Further, the Legislative Prayer Policy is unconstitutional because it coerces all citizens in attendance by being delivered by the Town Council members, being directed at the audience, promoting denominations over others, and using social pressures that restrict the freedom of the adults and children in attendance.

### ARGUMENT

#### I. CENTRAL PERK’S LEGISLATIVE PRAYER POLICY IS UNCONSTITUTIONAL BECAUSE THE TOWN COUNCIL MEMBERS DELIVER THE INVOCATIONS OR SELECT THEIR OWN PERSONAL CLERGY TO DO SO.

The Supreme Court has not addressed the issue of legislator-led prayer in its two decisions that set the constitutional constraints for legislative prayer. *See Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811 (2014) (explaining that the town board’s practice of opening meetings with chaplain-led, clearly sectarian prayers was constitutional because it fit within the tradition that Congress and state legislatures follow); *see also Marsh v. Chambers*, 463 U.S. 783

(1983) (declaring that Nebraska’s practice of retaining the same chaplain with public funds for their legislative invocations does not violate the Constitution). Consequently, “[W]hen the historical principles articulated by the Supreme Court do not direct a particular result, a court must conduct a ‘fact-sensitive’ review of the prayer practice.” *Lund v. Rowan Cty., N.C.*, 863 F.3d 268, 276 (4th Cir. 2017) (en banc) (citing *Galloway*, 134 S. Ct. at 1825).

Nevertheless, there are still existing principles to guide the analysis. First, legislator-led prayer is not *per se* unconstitutional. *See Lund*, 863 F.3d at 280. However, “[T]he identity of the prayer giver is relevant to the constitutional inquiry.” *Id.* Perhaps most importantly, “[i]t is a cornerstone principle of our Establishment Clause jurisprudence that ‘it is of no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried out by the government.’” *Lee v. Weisman*, 505 U.S. 577, 588 (1992) (quoting *Engel v. Vitale*, 370 U.S. 421, 425 (1962)). Further, the prayer opportunity must be evaluated in a fact-sensitive inquiry in light of prevailing historical traditions. *See Galloway*, 134 S. Ct. at 1819 (“the Court’s inquiry . . . must be to determine whether the prayer practice . . . fits within the tradition long followed in Congress and state legislatures.”)

A. Central Perk’s legislative prayer practice is unconstitutional because legislators have control over the content of the invocations.

The Establishment Clause has been interpreted to mean that the government should have no role in composing or determining the content of prayers for American people to recite. *See Engel*, 370 U.S. at 425 (concluding the board of education at a public school could not continue to direct the Regent’s Prayer to be recited in the classroom). The court stated, “[t]he 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. Indeed, *Lund* made it clear that there are certainly circumstances where legislator-led prayer violates the Constitution. 863 F.3d at 280. This determination will turn on the facts of the individual prayer practice and how it is viewed in context. *See id.* (noting that the Rowan County Board of Commissioners composed their own speeches and prevented anyone else from offering invocations, which, in conjunction with the policy as a whole, violated the Constitution). Courts have repeatedly recognized that, “Our Government is prohibited from prescribing prayers to be recited in our public institutions in order to promote a preferred system of belief.” *Lund*, 863 F.3d at 281 (quoting *Galloway*, 134 S. Ct. at 1822).

Here, the Central Perk Town Council members effectively controlled the content of the invocations in violation of the Establishment Clause. Central Perk’s Legislative Prayer Policy operated to randomly select a Town Council member to “either offer the prayer or invocation personally or select a minister from the community to offer the invocation in his or her stead.” R. at 2. On five separate occasions, Council members gave the prayer themselves. R. at 3. Council member Willick gave the invocation on three occasions, and each time he limited the invocation to an exclusively Muslim prayer. R. at 3. Council member Green personally gave the invocation twice and limited it exclusively to Baha’i. R. at 3. On all five of these occasions, the Council members personally controlled the content of the prayers being delivered to community members and school children. R. at 3. Not only did the selected Council member control the content, but the invocation represented their personal faith. While it is true legislator-led prayer is not inherently unconstitutional, it is well established that the government cannot control the content of the prayers. The fact that the Town Council members who personally gave invocations controlled the prayer content, viewed in conjunction with other aspects of the prayer practice

discussed herein, certainly renders Central Perk's legislative prayer practice unconstitutional as a whole.

Furthermore, each Council member whose name could be drawn had exclusive control over the prayer content, even if they personally did not give the invocation. Council members Bing and Geller-Bing were drawn a combined nine times. Every time they selected the president of their branch of the Church of Jesus Christ of Latter Day Saints, President Minsk. R. at 2–3. President Minsk delivered exclusively Mormon prayers, asking that “none in attendance would reject Jesus Christ or commit grievous sins against the Heavenly Father ” R. at 3. He also requested that “all will submit to Christ's reign.” R. at 3. The content of President Minsk's prayers requested all in attendance to accept his faith. Even after these proselytizing invocations were given, Council members Bing and Geller-Bing continued to select President Minsk to deliver the invocations and never once invited anyone outside of their faith to deliver an invocation. As the District Court properly concluded, “when members were repeatedly drawn, they invited clergy back after hearing some give seemingly inflammatory prayers. Selection of the invocation giver was de facto selection of the prayer.” R. at 7. Thus, Council members Bing and Geller-Bing effectively controlled the prayer content to be exclusively Mormon by always choosing President Minsk to deliver the divisive invocations.

Council members Hosenstein and Tribbiani illustrated the same exact control over prayer content. Both Council members belong to New Life, an evangelical Christian church. R. at 3. Council members Hosenstein and Tribbiani were each drawn twice. R. at 3. On all four occasions the Council members selected a New Life pastor to deliver the invocation. R. at 3. Subsequently, “all four invocations thus extolled Christianity as the one true religion.” R. at 3. Council members Hosenstein and Tribbiani were able to control the content of the prayers given

at the Town Council meetings by repeatedly selecting New Life pastors to give exclusively Christian prayers.

No matter which Council member was drawn, the policy violated the “cornerstone principle of our Establishment Clause jurisprudence that ‘it is of no part of the business of government to compose official prayers for any group of the American people.’” *Lee*, 505 U.S. at 588. Even though courts have continually declared, “Our Government is prohibited from prescribing prayers to be recited in our public institutions,” that is exactly what the Central Perk Legislative Prayer Policy does. The Town Council members are in complete control of the content of the prayers, and when this is viewed in the context of the Legislative Prayer Policy as a whole it is clear that the policy is unconstitutional.

- B. Central Perk’s legislative prayer practice is unconstitutional because legislator-led prayer exceeds the constraints set forth in *Marsh* and *Galloway*, and it does not fit with historical traditions in Congress and state legislatures.

Both *Marsh* and *Galloway* represent that “the Establishment Clause must be interpreted ‘by reference to historical practices and understandings.’” *Galloway*, 134 S. Ct. at 1819 (quoting *Cty. of Allegheny v. Am. Civil Liberties Union of Greater Pittsburgh Chapter*, 492 U.S. 573, 670 (1989); see also *Marsh*, 463 U.S. at 786. In *Galloway*, this Court reasoned, “*Marsh* stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted.” 134 S. Ct. at 1819. Accordingly, the appropriate way to decide a specific practice’s constitutionality becomes to “determine whether the prayer practice . . . fits within the tradition long followed in Congress and the state legislatures.” *Id.*

The court in *Lund*, discussing the problematic nature of legislator-led prayer, stated, “this type of prayer both identifies the government with religion more strongly than ordinary

invocations and heightens the constitutional risks posed by requests to participate and by sectarian prayers.” 863 F.3d at 279. Nevertheless, there is a history of legislator-led prayer existing in the United States. *Id.* (noting that amici briefs point out that a majority of state legislatures allow lawmakers to offer invocations). However, “this phenomenon appears to be the exception to the rule” *Id.* The court pointed out that the long-standing tradition is for chaplains to lead the invocations, not for legislators to exclusively control the content of the prayers. *Id.* (recognizing that “it is a tradition for a chaplain to be selected to serve the legislative body,” and that “twenty-seven state legislative chambers designate an official chaplain”).

Additionally, there is a big difference between permitting legislators to lead prayers at least on some occasions and restricting prayer opportunity to the sole discretion of the legislator. The history of Congress and state legislatures shows a willingness to permit lawmakers to give invocations, it does not establish a tradition of lawmakers having exclusive control over the content of the prayers. *See id.* (clarifying that amicus briefs show that state legislatures allow legislators to give invocations “on at least some occasions,” or at least “permit officials to deliver invocations”). In upholding a legislator-led prayer practice, the Sixth Circuit relied on historical traditions that showed the existence of legislator-led prayer in state legislatures. *See Bormuth v. Cty. of Jackson*, 870 F.3d 494 (6th Cir. 2017). However, that court only pointed to individual examples of legislator-led prayer provided to it by Amicus briefs; there were no such historical traditions of prayer practices where the prayer content was exclusively controlled by the legislators or where the legislators exclusively gave invocations. *See* Brief of Michigan, Kentucky, Tennessee and Ohio Local and State and the Commonwealth of Kentucky by and through Governor Mathew G. Bevin as Amici Curiae, *Bormuth v. Cty. Of Jackson*. 870 F.3d 494, 510 (6th Cir. 2017) (No. 15-1869), 2017 WL 1710340. According to these briefs, it is certainly

true that, “legislators *may* offer the invocation” in a number of states. *Id.* at 4 (emphasis added). But, there is a world of difference between prayer practices where legislators “may” deliver invocations and legislative prayer practices where legislators retain complete control over the content of the prayer in every instance. *Bormuth* provides no such examples. Thus, the practice at issue in this case is not supported by the history of Congress and state legislatures.

Furthermore, Central Perk’s prayer practice is at odds with the Supreme Court-approved practice in *Galloway*. The *Lund* court noted it was especially important that, “*Greece* welcomed adherents of all faiths, allowing ‘any member of the public [the chance] to offer an invocation reflecting his or her own convictions.’” *Lund*, 863 F.3d at 282 (quoting *Galloway*, 134 S. Ct. at 1826). *Lund* further stated, “[b]y opening its prayer opportunity to all comers, the town cultivated an atmosphere of great tolerance and inclusion.” 863 F.3d at 282. In *Lund*, the Rowan County Board of Commissioners had a policy that only allowed commissioners to give the invocations at the beginning of their sessions. *Id.* The court noted that, “Instead of embracing religious pluralism and the possibility of a correspondingly diverse invocation practice, Rowan County’s commissioners created a ‘closed-universe’ of prayer-givers dependent solely on election outcomes.” *Id.* Consequently, the *Lund* court struck down the policy giving legislators the exclusive right to give the invocations. *Id.* Additionally, other courts have found the notion of inclusiveness to be an important factor. See *Simpson v. Chesterfield Cty. Bd. of Supervisors*, 404 F.3d 276, 284 (4th Cir. 2005) (recognizing the town’s attempt to foster inclusiveness in its invocations by never insisting on the invocation of Jesus Christ by name and aspiring for non-sectarian prayers to be given).

While not identical to Rowan County’s prayer policy in *Lund*, Central Perk’s Legislative Prayer Policy closely mirrors it. Here, as in *Lund*, the legislators retained exclusive control over

the prayer content and effectively restricted any outsiders from giving prayers. The Legislative Prayer Policy restricted the prayer giver to either a Town Council member or an individual of his or her choosing. R. at 2. It was not open to the public and provided no avenue for citizens to request to give the invocation. The policy essentially created the “closed-universe” that the *Lund* court was extremely skeptical of. When put into action, the practice exhibited exactly this exclusion. As the District Court noted, “The Council members did not randomly select clergy members from the community. They exclusively either gave the prayers themselves or selected clergy only from their own houses of worship.” R. at 7. The prayer policy did not foster the inclusive environment that was present in *Galloway*. Both religious faiths that the Town Council members did not belong to and non-theistic faiths were excluded. The policy eliminated the possibility for anyone besides the Town Council members, or someone of their faith, to give the invocation.

In *Bormuth*, the court seeks to reconcile the “closed-universe” issue by stating, “commissioners of different faiths, or no faith, may be elected.” 870 F.3d at 513. Further, “[w]ith each election, the people of Jackson County may elect a Commissioner who is Muslim, Buddhist, Hindu, Jewish . . . (and so on).” *Id.* This suggestion, however, is misguided. As the *Lund* court realizes, “[v]oters may wonder what kind of prayer a candidate of a minority religious persuasion would select if elected. Failure to pray in the name of the prevailing faith risks becoming a campaign issue or a tacit political debit, which in turn deters those of minority from seeking office.” 863 F.3d at 282. Simply suggesting a candidate of a minority religious affiliation does not solve the issue. It further intertwines religion with government by making a political candidate’s faith a campaign issue and in no way serves as a solution.

It is also important to note that the *Lund* court found important the fact that the “decision to restrict the prayer opportunity to the commissioners was not made by the citizens of Rowan County. . . but perpetuated by the commissioners themselves.” *Id.* Likewise, here, the Town Council members, on their own initiative, established the policy that gave them control of prayer content. The citizens of Central Perk had no say in instituting such a restrictive prayer policy.

II. CENTRAL PERK’S LEGISLATIVE PRAYER POLICY IS UNCONSTITUTIONAL BECAUSE IT COERCES ALL CITIZENS IN ATTENDANCE, INCLUDING PUBLIC SCHOOL STUDENTS, TO ENGAGE IN SECTARIAN RELIGIOUS OBSERVANCE.

The First Amendment provides that, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .” U.S. CONST. amend. I. However, in *Marsh* this Court concluded that legislative prayer is not barred by the Establishment Clause because rather than signifying religious endorsement by the state, it demonstrates how the Nation’s history and tradition “coexist[s] with the principles of disestablishment and religious freedom.” 463 U.S. at 786. America’s history of legislative prayer in local, state, and federal government since the earliest sessions of Congress, prompt us to “accept the interpretation of the First Amendment draftsmen who saw no real threat to the Establishment Clause arising from a practice of prayer similar to that now challenged.” *Id.* at 791. However, despite setting up a very permissive standard for legislative prayer, the court emphasized that legislative prayer may not attempt “to proselytize or advance any one, or to disparage any other, faith or belief.” *Id.* at 794–95. To do so would force the prayer beyond its constitutionally protected scope into the proscribed establishment of a particular faith by the state.

In *Allegheny*, the court further clarified the scope of legislative prayer, explaining that “not even the ‘unique history’ of legislative prayer can justify contemporary legislative prayers

that have the effect of affiliating the government with any one specific faith or belief.” 492 U.S. at 603. This proscribed affiliation can occur when the state takes steps to coerce citizens into participating in the legislative prayer. In *Lee* this Court noted that “[i]t is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise . . . .” 505 U.S. at 578. Thus, when a state compels conformance with a religious observance through direct or indirect pressures, this is tantamount to the state’s establishment of a religion.

- A. Central Perk’s Legislative Prayer Policy is unconstitutional because the prayers are delivered by the legislators, promote religious denominations over others, and are directed to the audience, rather than the legislators.

In *Lund*, the Fourth Circuit en banc found the Rowan County Board of Commissioners legislator-led, sectarian prayer to violate the Establishment Clause. 863 F.3d at 280. The court highlighted relevant inquiries into improper coercive effects that cross the line into unconstitutional state establishment of religion, including (1) the identity of the prayer-giver, (2) the consistent preference of one denomination over others in the prayer, and (3) the audience to whom the prayer is directed. *Id.*

While lawmakers are not prohibited from leading legislative prayer, the practice has not been reviewed by the Supreme Court. However, as previously noted, this Court has declared, “It is a cornerstone principle of our Establishment Clause jurisprudence that ‘it is no part of the business of government to compose official prayers.’” *Lee*, 505 U.S. at 588 (quoting *Engel*, 370 U.S. at 425). The *Lund* court uses the history of legislative prayer to emphasize the importance of the prayer-giver’s identity: “In *Marsh*, the prayer-giver was paid by the state. In *Galloway*, the prayer-giver was invited by the state. But in Rowan County, the prayer-giver was the state itself.” *Lund*, 863 F.3d at 281. Because the lawmakers had exclusive control over the

legislature's invocation in *Lund*, they acted as arms of the state in determining the prayer-giver as well as the content of the prayer. Similarly, the *Lee* court, addressing a public high school principal selecting a rabbi to give an invocation at a high school graduation ceremony, held that these choices, being decisions made by a public-school principal, were thus "choice[s] attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur . . . [and] chose the religious participant." *Lee* 505 U.S. at 587. When members of the public feel that the state is compelling their conformance with a prayer policy because of their involvement in and control over the practice, this has an inherently coercive effect.

Here, the Council members also had exclusive control over the prayers given at the Council meetings. Through a system of randomly selecting the Council member who directs the prayer at the monthly meeting by pulling their name from an envelope, the Legislative Prayer Policy had the same degree of legislator involvement as the prayer critiqued by *Lee*. While the legislators did not always give the invocations themselves, the alternative practice at the monthly meetings was for the selected legislator to bring their faith leader to give the prayer in their stead. For example, Council members Bing and Geller-Bing always selected President Minsk to deliver invocations when their names were selected. R. at 3. Council member Willick, a member of the Muslim faith, personally delivered an Islamic invocation when selected. R. at 3. Council member Green, a member of the Baha'i faith, also personally delivered her invocations and directed them to Buddha, in line with her faith's traditions. R. at 3. Finally, Council members Hosenstein and Tribbiani invited their New Life pastors to deliver the invocations. R. at 3. Thus, in every instance of legislative prayer offered at the Central Perk Town Council meetings, the prayer was led either by the lawmaker or by the lawmaker's minister or equivalent. This practice thus

contains the same coercive effects criticized by the courts in *Lund* and *Lee* and weighs toward Central Perk's Legislative Prayer Policy being found unconstitutional.

The *Lund* court also recognized a pattern of sectarian prayer over time that crossed the line set by precedent and “promote[] a preferred system of belief.” 863 F.3d at 284. One prayer stated, “[a]lthough you sent Jesus to be Savior of the World, we confess that we treat Him as our own personal God. Although you are one, and the body of Christ is one, we fail to display that unity in our worship, our mission, and our fellowship.” *Id.* Another prayer provided, “Holy Spirit . . . open our hearts to Christ's teachings, and enable us to spread His message amongst the people we know and love through the applying of the sacred words in our everyday lives” *Id.* at 285. The court found this pattern to “implicitly ‘signal disfavor toward’ non-Christians”, and determined it surpassed the permissible limitations *Marsh* and *Galloway* established. *Id.* The court noted that these invocations considered Christianity as ‘the one and only way to salvation.’ *Id.* Put simply, “by proclaiming the spiritual and moral supremacy of Christianity, characterizing the political community as a Christian one, and urging adherents of other religions to embrace Christianity as the sole path to salvation, the Board in its prayer practice stepped over the line.” *Id.* at 286.

In the case at hand, Central Perk's legislative prayer practice exceeded the constitutional bounds set forth in *Marsh* and displayed a pattern of proselytization identical to that in *Lund*. For example, Council members Hosenstein and Tribbiani both chose New Life pastors to give invocations on four occasions. R. at 3. Certain phrases of these invocations included requesting “blindness [] be removed from the eyes of those who deny God,” and salvation be found for all those “who do not yet know Jesus.” R. at 3. Most importantly, the pastors urged for “every Central Perk citizen's knee to bend before King Jesus.” R. at 3. These instances certainly

proselytize and strongly encourage the advancement of Christianity by requesting all those in attendance to “bend before King Jesus.” R. at 3. As both the District Court and the Court of Appeals noted, “all four invocations thus extolled Christianity as the one true religion.” R. at 3, 13. This is the exact type of persuasive and promotional content that the Constitution does not allow.

To be sure, legislative prayer does not have to be nonsectarian. *See Galloway*, 134 S. Ct. at 1814. However, referencing the “Heavenly Father” as the “sole provider” effectively promotes Christianity as “the preferred system of belief.” *Id.* at 1822. Council members Bing and Geller-Bing also selected a clergy member who exploited the opportunity to advance the Christian faith. President Minsk’s invocations included the prayer: “Heavenly Father, we thank thee for this day and all our many blessings. Thou art our sole provider, and we praise Thy power and mercy. Bless that we can remember Thy teachings and apply them in our everyday lives.” R. at 3. These prayers far exceed the boundaries of sectarian legislative prayer set by *Marsh* and *Galloway*. The prayer is also proselytizing, as it encourages others to remember the “teachings and apply them in our everyday lives.” In other words, the invocation encourages everyone to join in President Minsk’s faith.

On eight other occasions, President Minsk gave line-crossing invocations. In five invocations, he prayed, “Heavenly Father, we pray for the literal gathering of Israel and restoration of the ten tribes. We pray that New Jerusalem will be built here and that all will submit to Christ’s reign.” R. at 3. On three other occasions, he asked that, “none in attendance would reject Jesus Christ or commit grievous sins against the Heavenly Father, so that none would be sent to the Telestial Kingdom, away from the fullness of God’s light.” R. at 3. By requesting others to “submit[] to Christ’s reign” and not “reject Jesus or commit grievous sins,”

the legislative prayer has insisted that everyone in attendance accept President Minsk's faith, which clearly aims to proselytize and advance his belief system. The Court of Appeals noted "there may be a thin line between strongly espousing religious beliefs and proselytizing or denigrating other faiths." R. at 17. The legislative prayers given at Central Perk's monthly meetings obviously cross that line. Thus, the pattern of sectarian prayer given at the meetings exceeds the constitutional boundaries of legislative prayer and promotes a preferred system of belief, weighing in favor of a finding that the Legislative Prayer Policy is unconstitutional.

The final factor identified by the *Lund* court as relevant to whether legislative prayer is constitutional is the audience to whom the prayer is directed. 863 F.3d at 281. The proper beneficial purpose of legislative prayer is to "invoke divine guidance on a public body." *Marsh*, 463 U.S. at 792. The *Galloway* court identified that, while sectarian prayer can be acceptable in legislative settings, a "relevant constraint" on sectarian prayer is that its purpose is to "invite[] lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing." 134 S. Ct. at 1823. Justice Kennedy's opinion in *Galloway* states that the "principal audience" of legislative prayer should be the lawmakers, and when it is directed to the public instead, it has a tendency "to promote religious observance." *Id.* at 1826. Thus, the intended "congregation" or audience of a legislative invocation should be the legislators, not the lay people attending the meeting.

The *Lund* court identified statements the commissioners made before invocations were given that pose constitutional issues. *Lund*, 863 F.3d at 284. Using statements such as "Let's pray together," "Please pray with me," and "Let us pray," the legislators illustrated their attempt to direct the prayer to the entire audience, not just the legislators. *Id.* at 287. In "seeking audience involvement [and] not merely addressing fellow legislators," the audience was clearly the county

commissioners' intended "congregation." *Id.* The court explained that these words, when spoken by a legislator, operate like a "request on behalf of the state," further entangling the state with religious observance. *Id.* The *Lund* court also emphasizes that, while the practice in *Galloway* also invited people to join in prayer, the role that "intended audience" plays in the constitutional inquiry is impacted by the degree of proselytization the prayers involve. *Id.* Thus, the two factors work together: if the prayer is extremely proselytizing but is only directed at legislators, it has fewer constitutional issues. When, however, the prayer is both proselytizing and directed towards the general public, the practice has crossed the line into violating the Establishment Clause.

Here, many of the prayers offered at the Town Council meetings are directed towards the audience, rather than the legislators. On five occasions, President Minsk's invocations expressly urged that "all will submit to Christ's reign," and on three other occasions that he delivered the invocations, he asked that "none in attendance would reject Jesus Christ or commit grievous sins against the Heavenly Father." R. at 3. These statements are explicitly directed to the public rather than to only the legislators. The New Life pastors also engaged in much of this framing in their invocations, requesting salvation for all those "who do not yet know Jesus," for "blindness 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. Thus, these invocations are not only explicitly proselytizing, but also are directed at the audience and the public of Central Perk as a whole rather than only the legislators. Central Perk's Legislative Prayer Policy crosses the line into violating the Establishment Clause by the combination of the intended audience being the public rather than the lawmakers and the proselytizing nature of the prayers given. Thus, the Legislative Prayer Policy is unconstitutional.

- B. Central Perk’s Legislative Prayer Policy is unconstitutional because it uses social pressures, including academic credit, the students’ teacher’s involvement in the prayer, and the formalities of the invocation and Council meeting, which constitute unconstitutional state coercion.

The inquiry into whether the state has improperly coerced individuals into conformance with religious expression is important, regardless of the age of the potential victim. However, “there are heightened concerns with protecting freedom of conscious from subtle coercive pressure” among secondary school children. *Lee*, 505 U.S. at 592. In *Engle*, the court stated that, “When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.” 370 U.S. at 431. Thus, the potential for improper coercion is heightened both by the presence of students and the government’s involvement in a legislative prayer.

In *Lee*, the court considered the constitutionality of having a prayer invocation given by a rabbi at a high school graduation ceremony. 505 U.S. at 580. The court held that this violated the Establishment Clause because (1) public and peer pressure on behalf of the students and their parents make them essentially obligated to attend, (2) the principal acted on behalf of the state by selecting the rabbi, and (3) having the students stand silently as a group and maintain respectful silence is indirect coercion. *Id.* at 598. While the court in *Lee* attempts to distinguish prayer at a graduation ceremony from a legislative invocation such as in *Marsh*, their argument relies on the idea that the attendees of a legislative session are adults who feel “free to enter and leave with little comment.” *Id.* at 597. Because at least one of the attendees at many of the meetings was a public high school student encouraged to attend the meeting by his or her school teacher, and Council member, Green, and was thus less “free to leave,” this scenario is distinguishable from the legislative invocation practice at issue in *Marsh*.

The *Lee* court considered the fact that high school graduation ceremonies are technically voluntary and effective matriculation from high school does not depend on attending the ceremony. *Id.* at 594. However, the court rejects this argument as “formalistic in the extreme.” *Id.* at 595. The court reasons that a high school graduation ceremony is not truly voluntary because it is “one of life’s most significant occasions,” and one’s absence would “require forfeiture of those intangible benefits which have motivated the student” for a long period of time. *Id.* The fact that the school will excuse absent students is, in the court’s opinion, “beside the point.” *Id.*

Here, Central Perk argues that the high school students in Green’s American Government class were not required to attend the monthly meetings, but chose to voluntarily in order to earn academic extra credit. R. at 4. However, the fact that the extra credit opportunity was optional does not make the invocation’s effect on the students less coercive. In *Lee* the court recognized the “intangible benefits” of graduation as making the situation coercive, while in the present situation there are tangible benefits students would miss out on by refraining from giving a presentation at the monthly meeting. Those tangible benefits can be quantified: in the 2014–2015 academic year, which was the first year that Green offered the extra credit opportunity, twelve students earned five extra credit points for presenting at the monthly meetings, including two students who raised their letter grade. R. at 4. The opportunity to collect these benefits compelled the students’ attendance at the monthly meetings, just as the intangible benefits compelled the students to attend graduation in *Lee*. Thus, the tangible benefits derived from taking advantage of Green’s extra credit opportunity certainly weighs in favor of a finding that the Legislative Prayer Policy is unconstitutional.

The *Lee* court identified another coercive aspect of allowing a rabbi to give an invocation at the graduation ceremony as being that the principal of the school decided the ceremony should involve an invocation, and selected the individual who would deliver the invocation. *Id.* at 587. As previously discussed, this Court stated that these choices, being decisions made by a public-school principal, were thus “choice[s] attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur . . . [and] chose the religious participant.” *Id.* The court criticized the degree of involvement the school had in the invocation as coercive, “put[ting] school age children who objected in an untenable position.” *Id.* at 590. Students wishing to dissent from the invocation were placed in a challenging position in which they could feel pressured or expected by both their principal and, inherently, the state to conform to the practice.

In the case at hand, the Council members, as arms of the state, were also very involved in the planning and content of the invocations. Through the random selection system devised by the Council, at each meeting, a Council member was either giving the invocation or having their faith leader do so in their stead. *R.* at 2. Furthermore, the coercive effects of the Council members’ involvement in the invocation in this scenario was twofold, since one of their Council representatives, Green, was also their public high school teacher. *R.* at 4. One of the students, Ben Geller, even attended one of the meetings in which Green gave the invocation, which made Ben much less free to leave than any independent adult attendee. *R.* at 4. Thus, the Council members’ involvement in the invocation certainly weighs in favor of a finding that the Legislative Prayer Policy is constitutional.

In *Lee*, the court critiques the inherent coercion involved in the social pressures that compel students to conform with the formalities of an invocation. The court states that a group-

wide invocation at the start of an event “places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion.” *Id.* at 593.

Here, the students at the Council meetings faced even more subtle and indirect social pressures to conform with the formalities of the invocation because the vast majority of attendees were their elders. Furthermore, thirteen students chose to give a presentation in the 2015–2016 academic year, which was one more than in the previous year, demonstrating that the opportunity to give a presentation in exchange for extra credit was becoming more popular year-by-year. R. at 4. Students may have worried that expressing dissent during the invocations would impact their ability to obtain academic credit, or take the opportunity away from interested students in the future. Thus, the social pressure burdening the students to stand in respectful silence during the invocation weighs in favor of a finding that the Legislative Prayer Policy is unconstitutional.

Therefore, because the students in attendance at the monthly Town Council meetings had an academic incentive to attend, were subject to invocations given by their representatives and, on some occasions, their public-school teacher, and were socially pressured into standing in respectful silence during the prayer, the high school students were subject to unconstitutional coercion into religious observance.

### CONCLUSION

For the reasons stated in this Brief, the Court of Appeals’ judgment should be reversed.

Respectfully submitted,

Team D

*Attorneys for Petitioners*

September 14, 2018