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,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for all Circuits

BRIEF FOR THE RESPONDENT

REGENT SCHOOL OF LAW

LEROY R. HASSELL, SR. NATIONAL CONSTITUTIONAL LAW MOOT COURT COMPETITION

ATTORNEYS FOR THE RESPONDENT:

TEAM P

QUESTIONS PRESENTED

I. Is Central Perk Town Council's legislative prayer practice, which allows Council members to offer prayer themselves, invite local clergy to pray, or abstain from the prayer practice entirely, and which has included prayers which have been exclusively theistic, but have represented a variety of belief systems, constitutional?

II. Is Central Perk Town Council's legislative prayer practice unconstitutionally coercive of all citizens in attendance or of high school students attending to receive extra academic credit?

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STATEMENT OF THE CASE

In September 2014, the Town Council of Central Perk Township (the "Town Council") enacted a policy authorizing the use of prayer invocations at the beginning of their monthly meetings. R. at 2. The policy's preamble noted that the Supreme Court had recently upheld legislative prayer by local governments as constitutional[1], and explained the primary purpose of the legislative prayer practice: to "be helpful and beneficial to Council members, all of whom seek to make decisions that are in the best interest of the Town," and "for the primary benefit of the Town Council members." *Id.*

The Town Council is made up of seven elected Council members and holds monthly meetings on local issues. R. at 1. Under the policy, a Council member is chosen by random selection to provide the invocation each month. R. at 2. One Council member asked to never be selected, and so was not placed into the random drawing. *Id.* When a Council member is selected, he or she has three options; the member may: personally give the invocation, select a local member of the clergy to do so, or omit the invocation completely. *Id.* If the Council member decides to choose a local minister to give the invocation, the Council member is prohibited from "review[ing] or otherwise provid[ing] input into the minister's choice of invocation." *Id.* If a Council member chooses to omit the invocation from a meeting, the agenda proceeds directly to the Pledge of Allegiance. *Id.* The Council member who opens the monthly meeting always requests those in attendance stand, whether for the invocation and the Pledge, or just for the Pledge. *Id.*

[1] The Court reached this decision in *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014).

Out of the twenty meetings which occurred after this policy was instituted, the selected Council members chose to invite a local minister to give the invocation on thirteen occasions. R. at 2-3. Only five times did Council members deliver a prayer themselves, and twice a Council member opted to omit prayer entirely from the meeting. R. at 3.

The opening invocations included prayers offered by members of the Mormon, Muslim, Baha'i, and Evangelical Christian faiths. R. at 2-3. Two Council members were members of the Church of Jesus Christ of Latter Day Saints. R. at 2. Together, their names were drawn nine times, and each time they selected the Branch President of their church to deliver the invocation. R. at 3. One Council member followed the Muslim faith. *Id.* Her name was drawn three times, and each time she offered an invocation herself. *Id.* Another Council member was a member of the Baha'i faith. *Id.* Her name was drawn four times. *Id.* She omitted the invocation twice and offered an invocation herself twice. *Id.* Two Council members were members of New Life Community Chapel, an evangelical Christian church. *Id.* Together, their names were drawn four times, and they selected pastors from their church to deliver the invocation each time. *Id.*

Occasionally, the invocations included explicitly religious language. One clergyman referenced the "Heavenly Father," "Jesus Christ," the "ten tribes" of Israel, and "Christ's reign." *Id.* Other clergy routinely ended their prayer with the phrase "in the name of our Lord and Savior, Jesus Christ." *Id.* One prayer included the words "[p]eace and mercy and blessings of Allah be upon you." *Id.* Another Council member prayer was dedicated to Buddha's "infinite wisdom," and asked that the meeting "be conducted in harmony and peace." *Id.* Several clergy from multiple denominations prayed for "divine guidance for the Council members." *Id.* On some occasions, ministers made remarks expressing hopes that those in attendance would accept a certain faith, such as asking that those "who do not yet know Jesus" would be saved. *Id.*

One Council member, Council member Green, is also a teacher at Central Perk High School. R. at 4. She teaches a non-mandatory American Government seminar for high school seniors. *Id.* Grades for the course were determined based on students' written assignments and test scores. *Id.* Additionally, Green offered students several opportunities to earn extra credit. *Id.* Green offered five extra credit points to students for either: volunteering in an election campaign, writing a letter on a current political issue to their federal or state elected representative, or giving a five-minute presentation at one of the monthly Town Council meetings. *Id.* In the 2014-2015 academic year, twelve students chose to present at Town Council meetings for extra credit. *Id.* However, the extra credit points had no impact on ten out of the twelve students' final grades. *Id.*

STATEMENT OF JURISDICTION

The district court had jurisdiction over this case pursuant to 28 U.S.C. § 1331, based on Petitioner's 42 U.S.C. § 1983 suit against Respondents. Appeal was taken from the district court's order granting Petitioner's Rule 56(b) motion for summary judgment. On January 21, 2018, the circuit court reversed the district court's decision and granted Respondent's Rule 56(b) motion for summary judgment, which is a final appealable decision. *See Catlin v. United States*, 324 U.S. 229, 233 (1945) (holding that a decision that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment" is an appealable final decision). Petitioner timely petitioned this Court for a Writ of Certiorari. Accordingly, this Court has certiorari jurisdiction over this case pursuant to 28 U.S.C. § 1254.

SUMMARY OF THE ARGUMENT

I. The specific features of Central Perk Town Council's prayer practice, which allows Council members to offer a prayer personally, invite a local clergy member to conduct prayer, or to omit prayer from a Council meeting altogether, and which has included prayers with content from a variety of religious traditions, but that are exclusively theistic, are not unconstitutional. Lawmaker selection of a prayer giver is constitutional. *See Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding a legislature's appointment of a chaplain designated to give opening prayers). A legislative prayer practice does not have to achieve perfect representation of all faith traditions to be constitutional. *See Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (upholding a legislative prayer practice wherein all the prayers offered had Christian content).

a. The Central Perk Town Council's policy of allowing Council members to either deliver opening prayers themselves or select clergy from their own places of worship to offer the invocations instead is not unconstitutional, because there is no evidence the Town Council members make their clergy selections for an impermissible motive. Legislative selection of a prayer giver is not unconstitutional unless there is evidence the selection was made from an impermissible motive. *Marsh*, 463 U.S., at 792. There is no evidence the Town Council members' clergy selections are driven by impermissible motives, and the fact that such a variety of faith traditions are represented at meetings refutes that suggestion. A practice of lawmaker-led prayer may be invalid where the prayer opportunity is restricted to only lawmakers. *See Lund v. Rowan County*, 863 F.3d 268 (4th Cir. 2017) (invalidating a prayer practice in which only members of a local elected board were given the opportunity to open meetings with invocations). However, the Town Council's prayer practice is open to both Council members and local clergy.

b. The exclusively theistic content of the opening invocations delivered at the Town Council meetings does not render the prayer practice unconstitutional, because a sufficient effort at inclusivity was made and a sufficient degree of diversity of belief systems was achieved. Legislative prayer practices are not unconstitutionally exclusive as long as the government makes reasonable efforts at inclusivity and maintains a policy of nondiscrimination. *Galloway*, 134 S. Ct., at 1824. Under the Town Council's prayer practice, a random, nondiscriminatory selection is made from a group of Council members representing a variety of religious backgrounds.

II. Central Perk Town Council's practices are not unconstitutionally coercive of all citizens in attendance, nor are they unconstitutionally coercive of high school students who receive extra academic credit for attending meetings. Opening Town Council meetings with prayer is wholly constitutional. *See Marsh*, 463 U.S. (upholding the practice of legislative prayer, generally); *Galloway*, 134 S. Ct. (upholding legislative prayer in the local government context).

a. The Town Council's prayer practice is not unconstitutionally coercive of all citizens in attendance because there is no pattern of proselytizing or denigrating any particular religion. Legislative prayer practices are not unconstitutionally coercive unless there exists a pattern, over time, of proselytizing or denigrating a particular religion. *Id.* at 1825. Representatives from a variety of different religions participate in the Town Council's prayer practice, and there is no pattern of proselytizing or denigrating any particular religion.

b. The Town Council's prayer practice is not unconstitutionally coercive of high school students who receive extra academic credit for attendance because their attendance is voluntary. Prayer services at government events may be unconstitutionally coercive when attendance is mandatory, and attendees are required to be present during the prayer. *See Lee v. Weisman*, 505

U.S. 577, 592 (1992) (holding that prayers offered at a government event are unconstitutionally coercive when attendance is mandatory, and attendees do not have the opportunity to leave during the prayer). However, high school students are not required to attend Council meetings for regular course credit. Moreover, students can attend Council meetings without prayer service, and can freely leave the room during the prayer.

ARGUMENT

I. The specific features of the Central Perk Town Council's legislative prayer practice do not violate the Establishment Clause

In determining whether an Establishment Clause[2] violation has occurred, the Court must interpret the clause "by reference to historical practices and understandings." *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014) (quoting *County of Allegheny v. ACLU*, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part)). Because of the long history of opening legislative sessions with prayer, legislative prayer in general does not violate the Establishment Clause. *Marsh v. Chambers*, 463 U.S. 783, 791 (1983). In examining the constitutionality of a specific prayer practice, the determination to be made is "whether the prayer practice...fits within the tradition long followed in Congress and the state legislatures." *Galloway*, 134 S. Ct., at 1819.

While the government may not place an "official seal of approval on one religious view," lawmakers may appoint clergy to give opening prayer, so long as the appointments do not "stem[] from an impermissible motive." *Marsh*, 463 U.S., at 792 (quoting *Chambers v. Marsh*, 675 F.2d 228, 234 (8th Cir. 1982)); *Marsh*, 463 U.S., at 793. Legislative prayer may also "reflect

[2] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST., amend. I.

the values [lawmakers hold] as private citizens," particularly when the lawmakers are members of local government. *Galloway*, 134 S. Ct., at 1826. In instituting opening prayer, a government does not have to achieve a perfectly representative balance of religious views, as long as it makes "reasonable efforts" at diversity, and "maintains a policy of nondiscrimination." *Id*., at 1824.

Here, there is no evidence that the Town Council made its clergy selections based on any impermissible motive, and the variety of religious views represented further discounts the suggestion that the Town Council was attempting to promote a certain view. The prayers offered by the Council members themselves served the legitimate purpose of allowing the members to reflect their own values as private citizens. The Town Council made a reasonable effort at diversity in its invocations by providing for the random, nondiscriminatory selection of one of its religiously diverse members to either give the prayer or select a member of the clergy to do so. The Town Council's prayer practice of allowing Council members to either deliver opening prayers themselves, or select clergy from their own places of worship to offer the invocations in their place is not unconstitutional, nor is it unconstitutional that all the invocations have represented theistic belief systems.

a. The policy of Town Council members either delivering opening invocations themselves or selecting their own personal clergy to do so does not render the Town Council's prayer practice unconstitutional because there is no evidence that the clergy were selected for an impermissible purpose and the practice serves the primary purpose of benefitting the lawmakers themselves

The fact that the Town Council members may select clergy to give invocations at Council meetings is not unconstitutionally preferential towards certain religious views because it is not due to an impermissible motive. Lawmakers may select clergy to give invocations, so long as the selection does not "stem[] from an impermissible motive." *Marsh*, 463 U.S., at 793. Permissible

reasons to appoint a clergy member include approving of the clergy member's "performance and personal qualities." *Id.*

In *Town of Greece v. Galloway*, the Court upheld a local government's prayer practice in which it randomly selected local ministers to deliver opening invocations. *Galloway*, 134 S. Ct. at 1828. However, random selection of clergy is not a requirement for a prayer practice to be constitutional. *See Marsh*, 463 U.S. In *Marsh v. Chambers*, the Court upheld a Nebraskan legislative prayer practice where the Executive Board of the Nebraska Legislative Council selected one clergyman to serve as a paid chaplain and open their legislative sessions with an invocation. 463 U.S., at 784-85. The legislature selected the same clergyman to fill the role for sixteen years, and he delivered exclusively Judeo-Christian prayers. *Id.* at 786. In upholding the practice, the Court emphasized that the use of appointed chaplains has been accepted since the Continental Congress, and that the selection of a legislative chaplain was not viewed as a First Amendment violation by the drafters of the First Amendment. *Id.* at 788. Even though, having heard the chaplain's prayers before, the legislature presumably had at least some sort of general idea what religious views the chaplain would express in his prayers, the Court held that there was no evidence of any "impermissible motive" behind their choice. *Id.* at 793. Appointing a chaplain they were familiar with did not suggest that the legislators were "advance[ing] the beliefs of a particular church." *Id.* The evidence only suggested that the Legislature chose the chaplain based off his "performance and personal qualities," which were legitimate reasons to make an appointment. *Id.*

Under the court's holding in *Marsh*, rather than choosing a clergy member randomly, lawmakers may exercise control over who gives the invocation by choosing clergy members based on their knowledge of his "performance and personal qualities." *Id.* And the very fact that

lawmakers choose clergy members they are familiar with to give invocations does not suggest an "impermissible motive" for the selection. *Id.* Here, the Town Council members have exercised this choice by selecting clergy members of whom they have the best knowledge of their performance and personal qualities – clergy from their own houses of worship. Additionally, the wide variety of religious views represented here belies the suggestion that the clergy selections were made with the impermissible motive of advancing the views of one particular church.

The fact that Town Council members delivered some invocations themselves does not result in an official preference for certain religious views, either. In *Galloway*, the Court emphasized that the main purpose of legislative prayer is "largely to accommodate the spiritual needs of lawmakers." *Galloway*, 134 S. Ct. at 1826. Legislative prayer is more for the benefit of the lawmakers than it is for the public attending the meeting. *Id.* at 1825. Thus, allowing the lawmakers some control over their self-expression through the invocations is permissible, especially for lawmakers at the local level. *Id.* at 1826 ("[C]eremonial prayer may...reflect the values [members of town boards and commissions] hold as private citizens."). Legislative prayer gives them "an opportunity...to show who and what they are" as long as they do not "deny[] the right to dissent by those who disagree." *Id.*

Here, allowing randomly selected Town Council members to personally give an invocation serves the main purposes of legislative prayer as articulated by this Court: accommodating the Town Council members' spiritual needs and allowing them to reflect their values and show who and what they are. Because the prayer is meant to be for their benefit, allowing them to give the prayer themselves does not violate the Constitution, since they have not denied anyone the right to disagree with them. The Town Council has at no point prevented those who disagree with the

prayer from leaving the meeting during that portion, or remaining seated and refusing to take part in the ritual.

The Supreme Court has never explicitly decided the constitutionality of lawmaker-led prayer. In *Engel v. Vitale*, the Court invalidated governmental authorship of an official prayer. 370 U.S. 421 (1962). The State Board of Regents, a New York governmental agency given supervisory, executive, and legislative powers over New York's public school system, composed a prayer intended to be recited in public schools. *Id.* at 422-23. Parents brought suit against one school district that adopted the practice of having each class recite the prayer at the beginning of each school day. *Id.* at 423. Striking down the practice, the Court cautioned that the government should "stay out of the business of writing or sanctioning official prayers." *Id.* at 435. *Engel* does not resolve the constitutionality of lawmaker-led prayer. There is a distinct difference between a governmental body authoring or sanctioning an official prayer, which others are directed to recite, and personally offering a prayer of their own before a meeting. The Town Council members are not making anyone else recite a prayer written or sanctioned by the Town Council. The prayers offered at Town Council meetings do not constitute officially sanctioned government prayers; they merely reflect the individual views of whichever Council member was chosen to offer prayer at that meeting.

However, the issue of lawmaker-led prayer has come before a lower court. In *Lund v. Rowan County*, the Fourth Circuit held that a local elected body's practice of opening its public meetings with an invocation given by one of the board members, on a rotating basis, was unconstitutional. 863 F.3d 268, 272 (4th Cir. 2017), cert. denied sub nom. *Rowan Cty., N.C. v. Lund*, 138 S. Ct. 2564 (2018). However, the court did not hold that *all* prayer practices that incorporate lawmaker-led prayer are necessarily unconstitutional. *Id.* at 279. Instead, the Court distinguished between

situations where the opportunity to offer an invocation is *extended* to lawmakers, and those where it is *restricted* to lawmakers, as it was in Rowan County. *Id.* It noted that there is a particularly strong tendency for legislative prayer to "identif[y] the government with religion" and an especially "heighten[ed]...constitutional risk[]" in cases "where legislators are the *only* eligible prayer-givers." *Id.* at 278. When the "prayer opportunity" is "exclusively reserved for the [lawmakers]," the concern is that this "create[s] a 'closed-universe' of prayer-givers." *Id.* at 277 (quoting *Lund v. Rowan Cty., N.C.*, 103 F. Supp. 3d 712, 723 (M.D.N.C. 2015)).

In *Lund*, the Fourth Circuit articulated that constitutional problems arise when prayer opportunities lack openness. *Id.* at 278. Openness does not require that the opportunity to give the invocation be open to any member of the public interested in offering a prayer, as it was in *Galloway*. *Galloway*, 134 S. Ct., at 1816 (Under the town's policy, "a minister or layperson of any persuasion, including an atheist" could give the opening invocation.). In upholding the Nebraska Legislature's appointment of one chaplain as the primary prayer giver in *Marsh*, the Supreme Court specifically noted that the appointed chaplain was not the *only* person who gave invocations; other members of the clergy had the opportunity to do so as well. *Marsh*, 463 U.S., at 793 ("[G]uest chaplains have officiated at the request of various legislators and as substitutes during Palmer's absences.")

In this case, the Town Council's prayer practice does not result in the especially heightened constitutional risk posed by the prayer practice examined in *Lund*, because the prayer opportunity here was not closed off to Town Council members exclusively. As the policy was carried out, fewer than half of the invocations offered at Town Council meetings were offered personally by Town Council members. The rest were conducted by local ministers. The Town Council's prayer practice is not open to any member of the public who wishes to offer a prayer,

as was the case in *Galloway*. *Galloway*, 134 S. Ct., at 1816. However, it is not as restrictive as the prayer practice invalidated by the Fourth Circuit in *Lund*, because it allows individuals other than the lawmakers the opportunity to give invocations. *Lund*, 863 F.3d, at 273 ("No one outside the Board is permitted to offer an invocation."). And similar to the practice upheld by the Supreme Court in *Marsh*, it gives several members of the clergy the opportunity to give the invocation. *Marsh*, 463 U.S., at 793. Additionally, here there is less danger of the government being perceived as identifying with a specific religion. Unlike the entirely Christian prayers in *Lund*, the prayers offered (both by Town Council members and ministers) in this case reflected a variety of belief systems. *Lund*, 863 F.3d, at 273.

b. The exclusively theistic content of the invocations given at Town Council meetings does not make the Town Council's prayer practice unconstitutional because the Town Council made reasonable efforts at inclusivity and maintained a policy of nondiscrimation

The fact that opening invocations end up taking primarily similar views does not render the legislative prayer practice unconstitutional. The local government is not required to engage in a "quest to promote 'a "diversity" of religious views'" or to "achieve religious balancing," as long as it "maintains a policy of nondiscrimination." *Galloway*, 134 S. Ct., at 1819 (quoting *Lee v. Weisman*, 505 U.S., 577, 617 (1992)). A local government's prayer practice is not unconstitutional just because "its method of recruiting guest chaplains lacks the demographic exactitude that might be regarded as optimal." *Id.* at 1831 (Alito, J., with whom Scalia, J., joins, concurring).

In *Town of Greece v. Galloway*, a local government had a practice of beginning its monthly town meetings with roll call, recitation of the Pledge of Allegiance, and an invocation delivered by a local clergy member. *Id.* at 1816. The town selected clergy members by calling congregations listed in a local directory until a minister agreed to give the prayer for that

meeting. *Id.* Eventually, the town compiled a list of prayer givers who had agreed to deliver the prayer in the past, and were willing to return. *Id.* According to the town's policies, a minister or layperson of any belief system could deliver the invocation. *Id.* However, given that the majority of the town's congregations were Christian, Christian ministers delivered all the invocations between 1999 and 2007. *Id.*

In upholding the constitutionality of this practice, the Court pointed to the fact that the town made "reasonable efforts" to achieve inclusiveness. *Id*., at 1824. The Court did not require perfectly balanced religious representation. *Id.* According to the Court, if that were the standard the town had to reach, it would have to "make wholly inappropriate judgements about the number of religions [it] should sponsor and the relative frequency with which it should sponsor each," something the Court found more concerning than the approach the town actually used. *Id.* (quoting *Lee*, 505 U.S., at 617). As long as the town "maintain[ed] a policy of nondiscrimination," the Court held that it was not required to take far-reaching measures to have more diverse opening invocations. *Id.*

Here, the Town Council made a reasonable effort to represent a diverse array of religious traditions. The prayer practice provided for random selection of a Council member to be responsible for that month's invocation, either by giving the invocation him or herself, or by choosing a minister to do so. The Council members had a variety of religious backgrounds. While the Council did not achieve a state of perfect inclusivity of all religious traditions, they maintained a nondiscriminatory policy – all Council members could be selected, regardless of which faith tradition they held.

In *Marsh*, the legislative prayer practice upheld by the Supreme Court incorporated an even lesser degree of religious diversity than the practice at issue in *Galloway*. Because the same

Presbyterian clergyman opened the Nebraska State Legislature's legislative sessions for sixteen years, the opening prayers were not only exclusively theistic, but all in the Judeo-Christian tradition. *Marsh,* 463 US at 786. According to the Supreme Court, this did not suggest that the legislature was promoting the beliefs of that chaplain's particular denomination. *Id.* at 793. The Court concluded that maintaining one clergyman, who gave opening prayers exclusively in one tradition, was permissible, "absent proof that [his] reappointment stemmed from an impermissible motive." *Id.* at 793-94.

In this case, the invocations given at the town council meetings were even more theologically diverse than the invocations given at the meetings in *Marsh* and *Galloway*. In both of those cases, exclusively Christian traditions were represented in the opening prayers. However, the Central Perk Town Council meetings have been opened with prayers offered by members of the Mormon, Christian, Muslim, and Baha'i faiths. The legislative prayer in this case is even *more* inclusive and represents a greater diversity of religious views than the prayers upheld by the Supreme Court in *Marsh* and *Galloway.* And there is no evidence that the use of exclusively theistic prayers stems from an impermissible motive. Therefore, because the prayers in this case are inclusive and represent a diversity of religious views, and because there is no evidence of an impermissible motive, the fact that the Town Council's opening invocations end up taking primarily similar views does not render the legislative prayer practice unconstitutional.

II. The Town Council's prayer practice is not unconstitutionally coercive.

Central Perk Town Council's prayer practice is not unconstitutionally coercive. "It is an elemental First Amendment principle that government may not coerce its citizens 'to support or participate in any religion or its exercise.'" *Galloway,* 134 S. Ct. at 1825 (quoting *County of Allegheny v. ACLU,* 492 U.S. 573, 659 (1989) (Kennedy J., concurring in judgment in part and

dissenting in part)). In determining whether a prayer practice is coercive, "[t]he inquiry remains a fact-sensitive one that considers both the setting in which the prayer arises and the audience to whom it is directed." *Id*. The practice of opening legislative session with prayer is not unconstitutionally coercive, unless there is a "pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose." *Id*. at 1824 (citing *Marsh*, 463 U.S. at 794-95).

Here, the Town Council's prayer practice occurs in a noncoercive setting and is directed to an appropriate audience. *See Marsh*, 463 US at 795 (affirming the practice of opening legislative session with prayer); *Galloway*, 134 S. Ct. at 1825 (upholding legislative prayer directed at the citizens present at a local government meeting, including children). Moreover, over the course of the prayer practice, many different religions were represented and there was no pattern of proselytizing or denigrating any faith. Finally, attendance at Town Council meetings is not mandatory, and attendees are free to leave the room during the opening invocation. Therefore, the Town Council's prayer practice is not unconstitutionally coercive of all citizens in attendance, nor is it unconstitutionally coercive of high school students awarded academic credit for presenting at Town Council meetings.

a. The Town Council's prayer practice is not unconstitutionally coercive of all citizens in attendance because it does not amount to a pattern of proselytizing or denigrating any faith.

The Town Council's legislative prayer practice is not coercive of all citizens in attendance because it does not involve a pattern of proselytizing or denigrating any faith. The practice of legislative prayer, performed during the opening ceremony of a legislative session, is constitutional, unless the practice amounts to a "a pattern of legislative prayers that *over time* denigrate [or] proselytize a particular faith." *Galloway*, 134 S. Ct. at 1825. (emphasis added).

Absent such a pattern, "a challenge based solely on the content of a prayer will not likely establish a constitutional violation. *Marsh*, indeed, requires an inquiry into the prayer opportunity *as a whole*, rather than into the contents of a single prayer." *Id*. (emphasis added) (citing *Marsh*, 463 U.S. at 794-95).

In *Marsh*, the Court upheld the longstanding practice of opening "sessions of legislative and other deliberative public bodies with prayer." 463 US at 786. In that case, the Court rejected any argument that the Nebraska Legislature consistently and exclusively selecting a Presbyterian chaplain for sixteen years meant that the legislature promoted the beliefs of that faith, holding that "[a]bsent proof that the chaplain's reappointment stemmed from an impermissible motive . . . his long tenure [did] not in itself conflict with the Establishment Clause." *Id.* at 793. Moreover, the Court refused to evaluate the content of the particular prayers offered, determining that the content of individual prayers was irrelevant. *Id*.

In *Galloway*, the Court applied *Marsh* to hold that a local government's practice of opening its monthly meetings with prayer was not unconstitutionally coercive, even where some prayers "contain[ed] sectarian language or themes." 134 S. Ct. at 1820. In that case, while the Town of Greece used random selection to choose local ministers to give the opening invocations at its monthly town meetings, the predominately Christian demographic of the town meant that only Christian ministers ended up delivering the prayers. *Id.* at 1816. The audience at town meetings were sometimes asked to stand for the prayer[3], but were never reprimanded for declining to participate, nor was there any indication that board decisions might be "influenced by a person's acquiescence in the prayer opportunity." *Id*. at 1826. The Town did not direct or

[3] "Would you bow your heads with me as we invite the Lord's presence here tonight. . . Let us join our hearts and minds together in prayer." *Id.*, at 93.

review the content of the prayers beforehand, and some prayers contained strong sectarian language.[4] *Id.* at 1823. Members of the public brought suit, arguing that the sectarian language rendered the prayers unconstitutionally coercive. *Id.* at 1816.

The Court looked at the "pattern of prayers over time," rather than the contents of individual prayers, to conclude that the prayer practice was not unconstitutionally coercive. *Id.* at 1827 (reaffirming the *Marsh* principle that the constitutionality of legislative prayer does not depend on the content of individual prayers). A prayer practice is not "despoil[ed]" just because some prayers contain occasional "remarks" that could be construed as proselyting or denigrating another faith. *Id.* at 1824. During one prayer, a minister characterized those who did not accept the prayer practice as a "minority...ignorant of the history of our country." *Id.* Despite the occurrence of such "remarks [that] strayed from" the standard, the Court determined that, as an overall pattern, the prayers "neither chastised dissenters nor attempted lengthy disquisition on religious dogma," although some prayers had contained strong sectarian language. *Id*. at 1824, 1826.

Additionally, the Court noted that citizens were not required to remain in the room during the prayer, and that the prayer was delivered during the opening ceremonial portion of the town's meeting, which further "suggest[ed] that its purpose and effect [was] to acknowledge religious leaders and the institutions they represent rather than to exclude or coerce nonbelievers." *Id*. at 1827. Finally, the Court explained that "legislative bodies do not engage in impermissible coercion merely by exposing constituents to prayer they would rather not hear and in which they need not participate." *Id*. at 1827. In *Lee v. Weisman*, the Court drew a distinction between

[4] Referring to the "death, resurrection, and ascension of the Savior Jesus Christ," and the "saving sacrifice of Jesus Christ on the cross." *Id.*

prayers in the public-school context and prayers offered at the "opening of a session of a state legislature where adults are free to enter and leave" and emphasized that "not every state action implicating religion is invalid if one or a few citizens find it offensive." 505 U.S. at 597.

In this case, the Town Council's prayer practice is not unconstitutionally coercive because there was no pattern of proselytizing or denigrating any particular faith. Council members who participated in the prayer practice routinely either offered prayers representative of their own faiths, or invited clergy from their own houses of worship. Nonetheless, several distinct religions were represented over the course of the Town Council's prayer practice.[5] Although some individual prayers contained sectarian language and references, and some ministers occasionally made remarks that expressed hopes that those in attendance would accept a certain faith, it cannot be said that there was a *pattern* of proselytizing when such a diverse range of religions were represented. *Compare Marsh*, 463 U.S. at 786 (holding that the prayer practice did not amount to a pattern of proselytization even where a single pastor delivered the opening prayer for sixteen years). Rather, the opening prayer was an inclusive practice that properly served the purpose of "lend[ing] gravity to the occasion and reflect[ing] values long part of the Nation's heritage." Galloway, 134 S. Ct. at 1823.

Like in *Galloway*, here the opening invocations were offered during the opening ceremonial portion of Town Council meetings, not during the policy making portion. Attendees were asked to stand for both the opening invocation, and for the Pledge of Allegiance which immediately followed (and the Town Council followed this custom of asking attendees to stand regardless of whether both prayer and the Pledge, or just the Pledge, occurred at a given

[5] Mormon, Muslim, Baha'i, and Evangelical Christian.

meeting). However, nothing in the record indicates that attendees were chastised or disparaged for refusing to stand, and attendees were always free to leave the room at any point during the meeting. Therefore, the Town Council's prayer practice was not unconstitutionally coercive of all citizens in attendance.

b. The Town Council's prayer practice is not unconstitutionally coercive of high school students who receive extra academic credit for attendance because their choice to attend a town meeting where prayers are offered is truly voluntary.

The fact that students attended Town Council meetings does not render the Town Council's prayer practice unconstitutional. *See Galloway*, 134 S. Ct. at 1823. (upholding the practice of legislative prayer even when children were in attendance). However, a prayer practice offered at a government event may be unconstitutionally coercive when (1) students' attendance at the event is mandatory, and (2) students do not have the ability to freely enter and leave during the prayer portion of the event. *See Lee*, 505 US at 583. Here, the prayer practice is not unconstitutionally coercive because attendance was not mandatory, and the students were free to leave the room at any point during the Town Council meeting.

In *Lee v. Weisman*, the Court held that offering prayers at a government ceremony at which attendance was essentially mandatory, and where students were not free to enter and leave the room as they pleased, was unconstitutionally coercive. *Id.* School officials invited clergy to offer prayers at public middle and high school graduation ceremonies. *Id.* The graduations were formal ceremonies, and students were not able to freely leave the event during the prayer portion of the ceremony. The Court concluded that "a student is not free to absent herself from the graduation exercise in any real sense of the term 'voluntary,' for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years." *Id.* at 595. Therefore, student attendance at graduation was essentially

mandatory. *Id.* Considering the mandatory nature of attendance along with the fact that students could not freely leave the room during the prayer portion of the ceremony, the Court held that the prayer practice was unconstitutionally coercive. *Id.* at 599.

Here, the Town Council's prayer practice is not unconstitutionally coercive because the students' attendance is completely voluntary, and students are able to freely enter and leave the room throughout the meeting. Attendance is not required for academic credit, and it is possible for students to earn complete class credit without attending any Town Council meetings. Students who wish to earn extra academic credit have several options to choose from. Students may volunteer at a campaign, write a letter to their state or local representative, or present at a Town Council meeting. Even students who choose to attend a Town Council meeting are not required to attend Town Council meetings where prayers are offered. Rather, students could choose to attend any of the Town Council meetings where no prayer was scheduled to be delivered. Moreover, Town Council meetings take place every month, and therefore the meetings are not like the unique and socially important graduation at issue in *Lee*. Thus, student attendance at the Town Council Meetings was not mandatory.

Second, unlike the graduation ceremony at issue in *Lee*, where students were required to arrive on time and participate in the entire graduation ceremony, the students (and indeed, all audience members) at Town Council meetings have the opportunity to enter and leave the room freely at any point. Therefore, students who choose to attend Town Council meetings where prayers are offered are not obliged to be present during the opening prayer. Finally, as noted in *Lee*, the legislative setting is far less formal than a school graduation. The prayers offered during the opening ceremony of the Town Council meetings were not unconstitutionally coercive of the high school students in attendance because students were not required to attend any Town

Council meeting, students could choose to attend a meeting at which no prayer was offered, students were free to leave the room at any time and were not required to be present during the prayer, and the setting was an informal legislative session.

Thus, the Town Council's legislative prayer practice is not unconstitutionally coercive. The prayers, offered during the opening ceremony of the Town Council meetings, fit within the tradition of legislative prayers. When considered over time, there is no pattern of proselytizing or denigrating any faith. Rather, the Town Council prayer practice has represented several different faiths and denominations. Attendance at the Town Council meetings is not mandatory for anyone, and anyone present is able to freely leave and enter the room at any point. Therefore, the Town Council's legislative prayer practice is not unconstitutionally coercive.

CONCLUSION

The Town Council's legislative prayer practice is wholly constitutional and is not unconstitutionally coercive. Therefore, this Court should affirm the circuit court's order granting Respondent's motion for summary judgment and dismissing Petitioner's Complaint with prejudice.