

No. 12-696

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IN THE  
*Supreme Court of the United States*

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TOWN OF GREECE,

*Petitioners,*

v.

SUSAN GALLOWAY AND LINDA STEVENS,

*Respondents.*

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On Writ of Certiorari to the  
United States Court of Appeals  
for the Second Circuit

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BRIEF OF POLITICAL SCIENTISTS AS  
*AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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### CASES

<i>County of Allegheny v. ACLU</i> , 492 U.S. 573 (1989).....	6
<i>Lee v. Weisman</i> , 505 U.S. 577 (1992).....	3, 6, 26, 27, 28, 35
<i>Marsh v. Chambers</i> , 463 U.S. 783 (1983) .....	3, 6
<i>Santa Fe Independent School District v. Doe</i> , 530 U.S. 290 (2000) .....	3, 6

### STATUTES

Vt. Stat. Ann. Tit. 1, § 312(h) .....	14
Haw. Rev. Stat. § 92-3 .....	14
La. Rev. Stat. Ann. § 42:14 .....	14
N.J. Stat. Ann. § 10:4-12(a) .....	14

### OTHER AUTHORITIES

Brian E. Adams, <i>Citizen Lobbyists: Local Efforts to Influence Public Policy</i> (2007) .....	12
Brian E. Adams, <i>Public Meetings and the Democratic Process</i> , 64 Pub. Admin. Rev. 43 (2004).....	12, 14, 15, 16, 19, 35
Ala. Rule Sen. Proc. 4 .....	8
Solomon E. Asch, <i>Opinions and Social Pressure</i> , 193 Sci. Am. 31 (1955) .....	33

William H. Baker et al., <i>Critical Factors for Enhancing Municipal Public Hearings</i> , 65 <i>Pub. Admin. Rev.</i> 490 (2005) .....	12, 15
William Barnes & Bonnie Mann, <i>National League of Cities, Making Local Democracy Work: Municipal Officials' Views About Public Engagement</i> (2010)....	12, 13
Jeffrey M. Berry, Kent E. Portney & Ken Thomson, <i>The Rebirth of Urban Democracy</i> (1993).....	11, 19
Jeffrey M. Berry, <i>Urban Interest Groups, in The Oxford Handbook of American Political Parties and Interest Groups</i> (L. Sandy Maisel & Jeffrey M. Berry eds., 2010).....	10, 12, 15, 35
Thomas Blass, <i>Understanding Behavior in the Milgram Obedience Experiment: the Role of Personality, Situations, and Their Interactions</i> , 60 <i>J. Personality &amp; Soc. Psychol.</i> 398 (1991) .....	30
Rob Bond, <i>Group Size and Conformity</i> , 8 <i>Group Processes &amp; Intergroup Rel.</i> 331 (2005).....	33
Frank M. Bryan, <i>Real Democracy: The New England Town Meeting and How It Works</i> (2004) .....	18, 23, 28
Jerry M. Burger, <i>Replicating Milgram: Would People Still Obey Today?</i> , 64 <i>Am. Psychol.</i> 1 (2009) .....	30
Cal. Rule Sen. Proc. 55(b) .....	9

Robert B. Cialdini & Noah J. Goldstein, <i>Social Influence: Compliance and Conformity</i> , 55 Ann. Rev. Psychol. 591 (2004).....	31
City of Boston, Mass., City Council Meeting, July 10, 2013, <a href="http://meetingrecords.cityofboston.gov/sir&lt;br/&gt;epub/mtgviewer.aspx?meetid=146&amp;docty&lt;br/&gt;pe=MINUTES">http://meetingrecords.cityofboston.gov/sir epub/mtgviewer.aspx?meetid=146&amp;docty pe=MINUTES</a> .....	20
City of Troy, MI, Rules of City Council Procedure, <a href="http://www.troymi.gov/Portals/0/Files/Co&lt;br/&gt;uncil/2012-&lt;br/&gt;2013%20CouncilRules%2020130128.pdf">http://www.troymi.gov/Portals/0/Files/Co uncil/2012- 2013%20CouncilRules%2020130128.pdf</a> .....	26
Clark County, Nev., Board of Commissioners Meeting, June 18, 2013, <a href="http://clark.granicus.com/MinutesViewer.&lt;br/&gt;php?view_id=17&amp;clip_id=3199">http://clark.granicus.com/MinutesViewer. php?view_id=17&amp;clip_id=3199</a> .....	25
Conn. Rule H.R. Proc. 10.1B.1.....	9
1 Alexis de Tocqueville, <i>Democracy in America</i> (P. Bradley ed., 1945).....	4, 11, 19, 36
Dallas County, Tex., Commissioner Court, Mar. 15, 2011, <a href="http://www.dallascounty.org/department/&lt;br/&gt;comcrt/agenda/files/2011Mar15f.pdf">http://www.dallascounty.org/department/ comcrt/agenda/files/2011Mar15f.pdf</a> .....	20
East Baton Rouge Parish, La., Metropolitan Council Meeting, April 10, 2013, <a href="http://batonrougela.swagit.com/play/0516&lt;br/&gt;2013-694">http://batonrougela.swagit.com/play/0516 2013-694</a> .....	26

Heinz Eulau & Kenneth Prewitt, <i>Labyrinths of Democracy: Adaptations, Linkages, Representation, and Policies in Urban Politics</i> (1973) .....	21, 23
Fla. Rule Sen. Proc. 10.1.....	8
Martin Gilens, <i>Affluence and Influence: Economic Inequality and Political Power in America</i> (2012).....	17
Thomas A. Heberlein, <i>Some Observations on Alternative Mechanisms for Public Involvement: The Hearing, Public Opinion Poll, the Workshop and the Quasi-Experiment</i> , 16 <i>Natural Resources J.</i> 197 (1976).....	18
H.R. Rule IV(2)(a), 113th Cong. (2013), <i>available at</i> <a href="http://clerk.house.gov/legislative/house-rules.pdf">clerk.house.gov/legislative/ house-rules.pdf</a> .....	7, 8
Judith E. Innes & David E. Booher, <i>Reframing Public Participation: Strategies for the 21st Century</i> , 5 <i>Plan. Theory &amp; Prac.</i> 419 (2004).....	13, 16, 19
Chester A. Insko et al., <i>Conformity and Group Size: The Concern with Being Right and the Concern with Being Liked</i> , 11 <i>Personality &amp; Soc. Psychol. Bull.</i> 41 (1985).....	33
Lynne M. Jackson & Bruce Hunsberger, <i>An Intergroup Perspective on Religion and Prejudice</i> , 38 <i>J. Scientific Study of Religion</i> , 38(4) 509 (1999).....	33

Kan. Rule Sen. Proc. 57 .....	9
Carolyn J. Lukensmeyer & Lars Hasselblad Torres, IBM Center for Business Government Collaboration Series, <i>Public Deliberation: A Manager's Guide to Citizen Engagement</i> (2006) .....	13
Jane J. Mansbridge, <i>Beyond Adversary Democracy</i> (1980).....	11, 31, 32, 34
<i>Marsh v. Chambers</i> , 463 U.S. 783 (1983), Joint Appendix, <i>available at</i> <a href="http://voicesofamericanlaw.org/media/doc&lt;br/&gt;uments/Jointappendix.pdf">http://voicesofamericanlaw.org/media/doc uments/Jointappendix.pdf</a> .....	8, 10
Katherine McComas, John C. Besley & Laura W. Black, <i>The Rituals of Public Meetings</i> , 70 Pub. Admin. Rev. 122 (2010).....	24, 34
Katherine A. McComas, <i>Trivial Pursuits: Participant Views of Public Meetings</i> , 15 J. Pub. Relations Research 91 (2003).....	21, 23, 34
Katherine A. McComas, John C. Besley & Craig W. Trumbo, <i>Why Citizens Do and Do Not Attend Public Meetings About Local Cancer Cluster Investigations</i> , 34 Pol. Stuf. J. 671 (2006) .....	18
Stanley Milgram, <i>Behavioral Study of Obedience</i> , 67 J. Abnormal & Soc. Psychol. 371 (1963) .....	29



Stanley Milgram, <i>Some Conditions of Obedience and Disobedience to Authority</i> , 18 Hum. Rel. 57 (1965).....	30
John Stuart Mill, <i>Considerations on Representative Government</i> (1861) .....	19
Montgomery County, Md., County Council Regular Session, July 16, 2013, <a href="http://montgomerycountymd.granicus.com/MediaPlayer.php?view_id=&amp;clip_id=5509&amp;caption_id=7615446Public">http://montgomerycountymd.granicus.com/MediaPlayer.php?view_id=&amp;clip_id=5509&amp;caption_id=7615446Public</a> .....	20
Michael E. Morrell, <i>Deliberation, Democratic Decision-making, and Internal Political Efficacy</i> , 27 Pol. Behav. 49 (2005).....	36
Tina Nabatchi, IBM Center for Business Government Fostering Transparency and Democracy Series, <i>A Manager's Guide to Evaluating Citizen Participation</i> (2012).....	13
National Conference of State Legislatures, <i>Open Meetings and Notice Requirements, in Inside the Legislative Process</i> (2002), available at <a href="http://www.ncsl.org/documents/legismgt/ILP/02Tab6Pt4.pdf">http://www.ncsl.org/documents/legismgt/ILP/02Tab6Pt4.pdf</a> .....	8
National Association of Towns and Townships, <a href="http://www.natat.org">http://www.natat.org</a> (last visited Sept. 12, 2013) .....	21

National League of Cities, <i>Number of Municipal Governments &amp; Population Distribution</i> (2007), <a href="http://www.nlc.org/build-skills-and-networks/resources/cities-10/city-structures/number-of-municipal-governments-and-population-distributions">http://www.nlc.org/build-skills-and-networks/resources/cities-10/city-structures/number-of-municipal-governments-and-population-distributions</a> (last visited Sept. 12, 2013).....	22
Neb. Rule Leg. Proc. 2 §3(c).....	9
N.J. Rule Assemb. Proc. 7:2.....	9
N.H. Rule H.R. Proc. 17.....	8
Jeffrey G. Noel et al., <i>Peripheral Ingroup Membership Status and Public Negativity Towards Outgroups</i> , 68 J. Personality & Soc. Psychol. 127 (1995).....	28
Elisabeth Noelle-Neumann, <i>The Spiral of Silence: Public Opinion, Our Social Skin</i> (2d ed. 1993).....	34
Elisabeth Noelle-Neumann, <i>The Spiral of Silence: A Theory of Public Opinion</i> , 24 J. Comm. 41 (1974).....	34
N.C. Rule H.R. Proc. 12(g).....	8
N.Y. Rule Assemb. Proc. I, § 3, ¶ d.....	9
N.Y. Rule Sen. Proc. XI, § 2, ¶ h.....	9
N.Y. Mun. Home Rule § 20(5) (Consol. 2013).....	14
N.Y. Town Rule § 130 (Consol. 2013).....	14
J. Eric Oliver & Shang E. Ha, <i>Vote Choice in Suburban Elections</i> , 101 Am. Pol. Sci. Rev. 393 (Aug. 2007).....	22

J. Eric Oliver, <i>City Size and Civic Involvement in Metropolitan America</i> , 94 <i>Am. Pol. Sci. Rev.</i> 361 (2000).....	18
Carole Pateman, <i>Participation and Democratic Theory</i> (1970) .....	20
Cecilia L. Ridgeway, <i>Conformity, Group-Oriented Motivation, and Status Attainment in Small groups</i> , 41 <i>Soc. Psychol.</i> 175 (1978) .....	28
Judy B. Rosener, <i>Making Bureaucrats Responsive: A Study of the Impact of Citizen Participation and Staff Recommendations on Regulatory Decision Making</i> , 42 <i>Pub. Admin. Rev.</i> 339 (1982).....	17
S. Rule XXIII, 113th Cong. (2013), <i>available at</i> <a href="http://www.rules.senate.gov/public/index.cfm?p=RuleXXIII">www.rules.senate.gov/public/index.cfm?p=RuleXXIII</a> .....	7, 8, 9
E. E. Schattschneider, <i>The Semisovereign People: A Realist's View of Democracy in America</i> (1960) .....	16
Dietram A. Scheufele & Patricia Moy, <i>Twenty-Five Years of the Spiral of Silence: A Conceptual Review and Empirical Outlook</i> , 12 <i>Int'l J. Pub. Opinion Res.</i> 3 (2000) .....	34
Elaine B. Sharp, <i>Citizen Participation at the Local Level</i> , in <i>The State of Citizen Participation in America</i> (Hindy Lauer Schachter & Kaifeng Yang eds., 2012) .....	16, 17

Springdale City, Ark., City Council Meeting, Apr. 9, 2013, [http://www.springdalear.gov/document\\_center/Mayor/agendas/Council\\_Agenda\\_04\\_09\\_13\\_amended\\_.pdf](http://www.springdalear.gov/document_center/Mayor/agendas/Council_Agenda_04_09_13_amended_.pdf)..... 20

St. Charles County, Mo., County Council Meeting, Apr. 8, 2013, [http://council.sccmo.org/council/index.php?option=com\\_simplecalendar&view=detail&catid=139%3A2013-council-meetings&id=1907%3Ast-charles-county-council-meeting&Itemid=100159](http://council.sccmo.org/council/index.php?option=com_simplecalendar&view=detail&catid=139%3A2013-council-meetings&id=1907%3Ast-charles-county-council-meeting&Itemid=100159)..... 25

Tex. Rule H.R. Proc. 5 §11 ..... 8

Tex. Rule Sen. Proc. 2.02 ..... 8

Karen Tracy & Margaret Durfy, *Speaking Out in Public: Citizen Participation in Contentious School Board Meetings*, 1 Discourse & Comm. 223 (2007) ..... 22, 28

Tom R. Tyler, *The Psychology of Legitimacy: A Relational Perspective on Voluntary Deference to Authorities*, 1 Personality & Soc. Psychol. Rev. 323 (1997)..... 30

U.S. Census Bureau, Table 1, Annual Estimates of the Population for the United States, Regions, States, and Puerto Rico, April 1, 2010 to July 1, 2012 (2012), <http://www.census.gov/popest/data/state/totals/2012/tables/NST-EST2012-01.xls> ..... 22

U.S. Census Bureau, U.S. Dep't of Commerce & Bureau of Labor Statistics, U.S. Dep't of Labor, *Current Population Survey, November 2008: Civic Engagement Supplement* (Inter-University Consortium for Pol. and Social Res. 2011), *available at* <http://doi.org/10.3886/ICPSR29644.v1>..... 17

Va. Rule H.R. Proc. 83 ..... 9

Laura van Assendelft, *“City Council Meetings Are Cool”: Increasing Student Civic Engagement Through Service Learning*, 4 J. Pol. Sci. & Educ. 86 (2008) ..... 20

Sidney Verba et al., *Voice and Equality* (1995)..... 37

Wash. Rule H.R. Proc. 7(B)..... 8

Wis. Rule Sen. Proc. 11 ..... 9

Laura R. Woliver, *Mobilizing and Sustaining Grassroots Dissent*, 52 J. Soc. Issues 139 (1996) ..... 32

Wendy Wood, *Attitude Change: Persuasion and Social Influence*, 51 Ann. Rev. Psychol. 539 (2000) ..... 29

David Yamane, *Faith and Access: Personal Religiosity and Religious Group Advocacy in a State Legislature*, 38 J. Sci. Study Religion 543 (1999) ..... 28

Joseph F. Zimmerman, *The New England Town Meeting: Democracy in Action* (1999)..... 19

**INTERESTS OF *AMICI CURIAE*<sup>1</sup>**

*Amici* are a group of distinguished political and social science professors who have studied and published on the unique qualities of local government, intergroup dynamics, and democratic governance. Their research, knowledge, and experience show that local public meetings are fundamentally different from federal or state legislative sessions. As a result of these differences, *amici* explain, state-sponsored prayer is more coercive at the local level than at the state or federal level, and any attempt to analogize between them is misguided.

The brief is joined by the following experts:

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<sup>1</sup> Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. Petitioners' blanket letter of consent to the filing of amicus briefs has been filed with the Clerk's office. Respondents' consent to the filing of this brief is being filed with the Clerk's office together with the brief.

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### SUMMARY OF ARGUMENT

1. Petitioner and its *amici* argue that the prayer sponsored by the Town of Greece prior to town meetings is non-coercive because it is legislative prayer, which this Court found permissible in *Marsh v. Chambers*, 463 U.S. 783 (1983). They thus assume that the impact of official prayer is the same at different governmental levels. Social science research demonstrates, however, that there are fundamental differences between local public meetings and national or state legislative sessions that preclude any simple analogy between them. These differences make prayer before local public meetings more similar to the prayer that this Court found impermissible in *Lee v. Weisman*, 505 U.S. 577, 587 (1992), and *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 312 (2000), than the prayer this Court found permissible in *Marsh*.

2. In national and state legislative sessions such as those considered in *Marsh*, citizens have no role. While citizens may sometimes attend, they may not participate. And when they attend, they are



generally seated in the gallery, removed from the legislators and prayer givers. The size of the legislatures and populations they serve also distances the prayer from the citizens in attendance.

3. Unlike state or national legislative sessions, local public meetings are participatory events through which individual citizens directly seek benefits and voice opinions on matters of critical importance to them. Such meetings also serve an educative function, and have long been considered to be the primary schools of liberty. 1 Alexis de Tocqueville, *Democracy in America* 61 (P. Bradley ed., 1945.) Moreover, these meetings typically take place in intimate settings: Attendees are seated close together, and they are often personally acquainted with each other as well as the local officials whom they are trying to persuade. In such settings, the prayer giver is likely to treat citizens as worshippers rather than audience members, as exemplified in the Town of Greece. By directing prayer to citizens and asking them to participate, the prayer giver effectively immerses the citizens in the prayer.

4. The differences between local public meetings and national or state legislative sessions matter with respect to whether prayer is coercive. Participation in local public meetings is critically important to individual citizens, as it is often a required step in obtaining certain benefits such as zoning variances. Moreover, students often attend town meetings, sometimes even for school credit, as they do in the Town of Greece. Localities that include

prayer in such meetings thus effectively compel attendance at religious worship.

5. Including prayer in town meetings effectively compels not only attendance at religious worship, but also *participation* in that worship. Because the setting of public meetings generally places the public close to and facing local officials, an individual seeking to persuade local officials of a policy position is subjected to substantial pressure to join in the prayer to avoid any risk of overt or subconscious retaliatory decisions by the local officials. In the intimate setting of local public meetings, an individual faces additional pressure not to separate himself from the other members of his community in attendance because they include his neighbors, friends, and business associates. Social science research demonstrates the significance of these pressures related to issues with strong normative content, including religion.

6. Social science research also shows that many attendees at town meetings are likely to accede to those pressures and participate in the prayer by standing or remaining silent. Research on the dynamics of town meetings, as well as broader social science research, shows a significant tendency for individuals in such face-to-face settings to conform to the actions of a clear majority of their peers, and to comply with directions from authorities, even when they initially disagree.

7. A citizen should not have to give up his critical right to participate in public meetings in order to preserve his right to choose who will

minister to his spiritual needs by leading him in prayer.

### ARGUMENT

In *Marsh v. Chambers*, this Court held that prayers delivered at the beginning of a state legislative session did not violate the Establishment Clause. 463 U.S. at 795. It focused on a practice of prayer before legislative sessions in the First Congress, which showed that “the First Amendment draftsmen . . . saw no real threat to the Establishment Clause arising from a practice of prayer similar to that now challenged.” *Id.* at 791; *see also id.* at 787. The similarity of state legislative prayer to prayer in the First Congress was thus critical. The Court further noted that the practice at issue presented no greater constitutional concern than practices such as tax exemptions for religious organizations that the Court had previously approved. *Id.* at 791; *see also Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 662-63 (1989) (Kennedy, J., concurring).

Here, the social science literature shows that the converse is true. The unique features of local public meetings make prayer in such meetings meaningfully different than prayer before national or state legislatures, and at least as coercive as prayer at high school graduations and high school football games, which this Court has proscribed. *See Lee*, 505 U.S. at 597-98; *Santa Fe*, 530 U.S. at 312.

**I. The State And Federal Legislative Sessions That Were The Settings Of The Prayer Approved In *Marsh* Provide Little Role For The Public.**

In *Marsh*, this Court based its analysis of prayer before state legislatures on the practice of the First Congress. It was able to do so because of the similar features shared by state and federal legislatures. These very features, however, limit the potential coercive impact of state-sponsored prayer in federal and state legislative settings.

In the legislative sessions of both Congress and states, the citizenry at large has virtually no role. A citizen can attend a legislative session only as a passive observer—removed from the floor and relegated to the public gallery—watching his representatives act on his behalf. This isolation is by design: both the U.S. House of Representatives and the U.S. Senate explicitly prohibit citizen comment during legislative sessions. *See* H.R. Rule IV(2)(a), 113th Cong. (2013), *available at* <http://clerk.house.gov/legislative/houserules.pdf>; S. Rule XXIII, 113th Cong. (2013), *available at* <http://www.rules.senate.gov/public/index.cfm?p=RuleXXIII>. In similar fashion, no state explicitly allows for periods of public comment by citizens during a regular legislative session. Debate in Congress and state legislatures thus consists of legislators speaking directly to the other legislators assembled in the chamber.

The public is generally not even permitted on the floor during legislative sessions. In Congress, only

legislators, their staff, and an enumerated list of officials are allowed onto the floor of either legislative chamber. *See* H.R. Rule IV(2)(a); S. Rule XXIII. The situation at the state level is largely the same. Many states prohibit citizens from the floor of legislative chambers altogether. *See, e.g.*, Ala. Rule Sen. Proc. 4; Fla. Rule Sen. Proc. 10.1; N.H. Rule H.R. Proc. 17; N.C. Rule H.R. Proc. 12(g); Tex. Rule H.R. Proc. 5 §11; Tex. Rule Sen. Proc. 2.02; Wash. Rule H.R. Proc. 7(B). Even when these legislative sessions are required to be “open,” this means only that an audience may observe the proceedings from the public gallery—often physically separated from the floor of the legislature. *See* National Conference of State Legislatures, *Open Meetings and Notice Requirements, in Inside the Legislative Process* 6-65, 6-65 (2002), available at <http://www.ncsl.org/documents/legismgt/ILP/02Tab6Pt4.pdf>; Indiana Amicus Br. 14 (“[N]o one—other than (perhaps) an elected legislator—has a right to speak on the floor of an elected legislative body.”). This fact was highlighted in *Marsh*, in which Frank Lewis, Chairman of the Executive Board of the Nebraska Legislature, explained that the legislative chamber was not open to the public (only galleries were), and that the prayers were not shown on the televised portion of the proceedings. Joint Appendix at 27, *Marsh v. Chambers*, 463 U.S. at 783 (1983), available at <http://voicesofamericanlaw.org/media/documents/Jointappendix.pdf>.

Even in states that permit visitors on the floor during legislative sessions, the role of individual citizens is explicitly limited. To be permitted on the

floor, an individual has to be an invited guest of a representative or senator, and generally cannot address the legislative body at all. *See, e.g.*, Conn. Rule H.R. Proc. 10.1B.1; N.J. Rule Assemb. Proc. 7:2; Va. Rule H.R. Proc. 83; Cal. Rule Sen. Proc. 55(b); Kan. Rule Sen. Proc. 57; Wis. Rule Sen. Proc. 11. Moreover, in stark contrast to local public meetings, where individual citizens are expected to speak about issues that personally affect their lives, most states mandate that invited guests *have no interest* in the matter of discussion before the legislative body. Nebraska, for instance, prohibits invited guests “seated within the chamber” of its unicameral legislature from having “a direct interest in the matter being discussed.” Neb. Rule Leg. Proc. 2 §3(c); *accord, e.g.*, N.Y. Rule Assemb. Proc. I, § 3, ¶ d (“No person shall be admitted to the floor of the Assembly Chamber who is interested in pending or contemplated legislation . . . .”); N.Y. Rule Sen. Proc. XI, § 2, ¶ h (same); Va. Rule H.R. Proc. 83 (stating that the privilege of visiting the floor of the Virginia House “shall not be exercised by any person having business for compensation before the House or any committee thereof”); *see also* S. Rule XXIII (denying lobbyists or other interested parties from entering the Senate floor when Congress is in session).

For all of these reasons, any coercive effect of state-sponsored prayer at federal or state legislative sessions is limited. Because the public cannot comment during such sessions, there is no need for any citizen to attend in order to advance his views. And given the physical distance between the seated public and the legislators, any citizen who does

attend can refrain from participation in prayer without standing out to any legislators he seeks to influence. This distance, along with the sheer size of most federal and state legislative bodies, further removes citizens from the prayer itself. Both the legislative sessions generally, and the prayers themselves, are held specifically for the elected officials. Thus, the minister in *Marsh*, Reverend Palmer, testified that his prayers were directed at Senators and their staff, not to the public at large: “I would say that I strive to relate the Senators and their helpers to the divine.” Palmer Dep., *Marsh v. Chambers* Joint Appendix, *supra*, at 27. “My purpose is to provide an opportunity for Senators to be drawn closer to their understanding of God as they understand God.” *Id.* at 46.

**II. Local Public Meetings, Unlike State Or National Legislative Sessions, Are Participatory Events Held In Intimate Settings Among Members Of The Same Community.**

Prayer before a public session of a local government, such as that at issue here, is very different from the practice approved in *Marsh* because of the context in which it occurs. Whether citizens live in a metropolitan area or a rural town, a “striking difference” between American governance at the local level and that at the federal and state levels is the “more participatory nature of local politics.” Jeffrey M. Berry, *Urban Interest Groups, in The Oxford Handbook of American Political Parties and Interest Groups* 502, 509 (L. Sandy Maisel &

Jeffrey M. Berry eds., 2010) [hereinafter Berry, *Urban Interest Groups*]. Because local governments focus on particularized issues that impact citizens' daily lives, they are structured to acquire experiential evidence from citizens through public, participatory meetings, making it critical that many citizens attend and participate. Local public meetings thus bring cognizable communities together in intimate settings to focus on issues of local concern. As de Tocqueville explained, nowhere do citizens "exercise their power more immediately" than in the township. de Tocqueville, *supra*, at 62.

**A. Local Governments Address Discrete Issues Of Central Importance To The Lives Of Individual Citizens.**

Decisions at the local level generally deal with discrete matters that much more immediately impact the daily lives of citizens than those addressed at the state or federal level. Local governments carry out "many of the functions from education to police protection to road repair, that directly affect [citizens'] quality of life." Jeffrey M. Berry, Kent E. Portney & Ken Thomson, *The Rebirth of Urban Democracy* 236 (1993) [hereinafter Berry et al., *Urban Democracy*]. They resolve issues concerning land use, zoning, crime prevention, local budgets, garbage collection, waste disposal, school governance, the upkeep of local parks and recreational areas, and other matters that directly impact local residents. *See, e.g.*, Jane J. Mansbridge, *Beyond Adversary Democracy* 44-45 (1980). These are the issues that dominate local-government



meetings and that generate the most citizen participation at those meetings. *See* William H. Baker et al., *Critical Factors for Enhancing Municipal Public Hearings*, 65 Pub. Admin. Rev. 490, 493 (2005); William Barnes & Bonnie Mann, National League of Cities, *Making Local Democracy Work: Municipal Officials' Views About Public Engagement* 7 (2010); Brian E. Adams, *Citizen Lobbyists: Local Efforts to Influence Public Policy* 46-53 (2007).

**B. The Ability To Participate In Local Government Meetings Is Critical To Citizens.**

*1. Local Government Meetings Are Participatory.*

Because local government focuses on issues immediately relevant to citizens' day-to-day lives, it inherently depends on the experiences and information that the public brings to meetings. As Professor Jeffrey M. Berry explained in a study of local interest groups, “[o]ne great difference in the policy arguments” at the local and national level “is that in local politics the ‘data’ are often experiential.” Berry, *Urban Interest Groups*, *supra*, at 505.

To gain this experiential information from the community, virtually all local governments utilize public meetings. Baker et al., *supra*, at 490 (public meetings are the “most common form of citizen input.”); Brian E. Adams, *Public Meetings and the Democratic Process*, 64 Pub. Admin. Rev. 43, 44-45 (2004) [hereinafter Adams, *Public Meetings*] (stating that 97% of cities hold public hearings to seek citizen comment about local issues); *see also* Barnes &

Mann, *supra*, at 7 (indicating that local officials view citizen participation as very important to a successful public meeting).

The public participation phase of such meetings generally constitutes a substantial portion of the agenda. Judith E. Innes & David E. Booher, *Reframing Public Participation: Strategies for the 21st Century*, 5 *Plan. Theory & Prac.* 419, 424 (2004). Typically, a public comment period provides citizens with an opportunity—often at least two to three minutes per speaker—to share their thoughts with elected officials and other members of their community about any issues under consideration. *Id.*

The public comment period not only provides local governments with experiential data, but also adds transparency to the decision-making process, helps officials identify emerging problems, engenders new ideas, and generates buy-in from the public on tough decisions. These benefits are recognized not just in academic literature, but in guides written for local officials. *See, e.g.*, Carolyn J. Lukensmeyer & Lars Hasselblad Torres, IBM Center for Business Government Collaboration Series, *Public Deliberation: A Manager's Guide to Citizen Engagement*, at 9-10 (2006), Barnes & Mann, *supra*, at 11-16; Tina Nabatchi, IBM Center for Business Government Fostering Transparency and Democracy Series, *A Manager's Guide to Evaluating Citizen Participation*, at 37 (2012).

States recognize that public involvement is more important to local governments than to state governments because of the immediate impact that

local government has on citizens' lives. Most states thus explicitly *mandate* that for certain issues, localities provide an opportunity for public comment before taking government action. Adams, *Public Meetings, supra*, at 44. New York state law, for example, requires that Greece's five-member Town Board hold a public hearing before enacting *any* local law or ordinance. *See* N.Y. Mun. Home Rule § 20(5) (Consol. 2013); N.Y. Town Rule § 130 (Consol. 2013). Other states have similar laws. *See, e.g.*, La. Rev. Stat. Ann. § 42:14 (providing that all public bodies "shall allow a public comment period at any point in the meeting prior to action on an agenda item upon which a vote is to be taken"); Haw. Rev. Stat. § 92-3 (requiring that "[e]very meeting of all boards shall be open to the public" and that all interested persons attending such meetings shall be afforded "an opportunity to present oral testimony on any agenda item"); Vt. Stat. Ann. Tit. 1, § 312(h); N.J. Stat. Ann. § 10:4-12(a).

## *2. Participation In Local Government Matters.*

Because decisions of local governments depend on information provided at public meetings regarding the experiences of individual citizens, it is often crucial for individuals concerned about an issue to attend and participate in such meetings.

In some localities, a public meeting is the *only* opportunity to obtain certain services from the local government. For example, in the Town of Greece, citizens *must* attend a Town Board meeting to obtain certain special-use permits and zoning variances. 2d

Cir. App. at A788. Given that variances can be decisive factors in major life decisions, such as opening a business or creating room for an additional child, participation at public meetings is effectively mandatory for many individuals. *See Baker et al., supra*, at 493 n.4 (stating that local boards largely consider issues that “substantively affect individuals’ ability to use and enjoy their property”).

Even when citizens are not seeking discrete legal benefits, public meetings remain a powerful “tool that [citizens] can use to achieve political objectives.” Adams, *Public Meetings, supra*, at 43. As one set of researchers described, at the local level, “fights are often over what is going to happen to a particular place and these experiential facts are forcefully articulated by those who live or work in that particular place.” Berry, *Urban Interest Groups, supra*, at 505. Thus, “[t]he arguments that advocates make are frequently stated in the form of ‘this is what will happen to my home,’ ‘my neighborhood,’ [or] ‘my business . . . .’” *Id.* This is understandable; issues such as zoning, land development, and budgeting directly affect many individuals’ ability to use and enjoy their property, and citizens speak at meetings to defend their interests. Baker et al., *supra*, at 493.

Public meetings also serve as a forum for citizens to “express opinions that run counter to” the views expressed by officials, thereby creating a level of direct accountability unheard of in state legislatures or Congress. Adams, *Public Meetings, supra*, at 49.

In addition to the persuasiveness of information provided in public comments, the number of people commenting can have a real impact on local policy. Because there is often no polling data on local issues, public meetings provide critical information on public support. Moreover, as one researcher described, “[i]f the preponderance of public comments is on one side or another of an issue, this may sway the board members, despite their recognition that it may not represent a cross-section of the community, because they see that the group is capable of organizing and pressuring decision makers.” Innes & Booher, *supra*, at 424.

Even if attendees do not themselves provide public comments, their attendance alone can be “critical” to showing elected officials that members of the community “care about an issue.” Adams, *Public Meetings, supra*, at 46. This is because “there is [a] power in numbers, and turning out the masses at city council or school board meetings provides a political advantage by adding force to their message.” *Id.*; see also Elaine B. Sharp, *Citizen Participation at the Local Level, in The State of Citizen Participation in America* 101, 107 (Hindy Lauer Schachter & Kaifeng Yang eds., 2012).

The conclusion that participation in public meetings is often crucial is consistent with more general political science research showing that the outcome of political conflict is often determined by the extent to which citizen groups with particular views become involved. E. E. Schattschneider, *The Semisovereign People: A Realist’s View of Democracy*

*in America* 29-41 (1960); see also Martin Gilens, *Affluence and Influence: Economic Inequality and Political Power in America* 137-43 (2012) (explaining that American policymakers are more responsive to the economically advantaged because they participate more); Judy B. Rosener, *Making Bureaucrats Responsive: A Study of the Impact of Citizen Participation and Staff Recommendations on Regulatory Decision Making*, 42 *Pub. Admin. Rev.* 339, 342-45 (1982) (finding that citizen participation affected the voting behaviors of commissioners granting development permits).

*3. The Level Of Citizen Participation Evidences The Importance Of Such Participation To Citizens.*

The value of public meetings to individual citizens is highlighted by the fact that 42% of all United States citizens report attending at least one local public meeting over the course of a lifetime. See Sharp, *supra*, at 107 (citing Robert Putnam's landmark Social Capital Benchmark Survey). Moreover, according to 2008 U.S. Census data, 13% of citizens had attended a public meeting in which politics were discussed in the previous year.<sup>2</sup>

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<sup>2</sup> U.S. Census Bureau, U.S. Dep't of Commerce & Bureau of Labor Statistics, U.S. Dep't of Labor, *Current Population Survey, November 2008: Civic Engagement Supplement* at 237 (Inter-University Consortium for Pol. and Social Res. 2011), available at <http://doi.org/10.3886/ICPSR29644.v1>. Other studies also show that significant numbers of people nationwide regularly attend public meetings. See, e.g., Frank M. Bryan,

The percentages are higher in smaller communities. J. Eric Oliver, *City Size and Civic Involvement in Metropolitan America*, 94 Am. Pol. Sci. Rev. 361, 364 (2000); *see also id.* at 370-71; Frank M. Bryan, *Real Democracy: The New England Town Meeting and How it Works* 86 (2004). It is thus apparent that local public meetings are especially important to small and rural communities, which are likely to be the most removed from the state and national legislative processes.

Not surprisingly, the individuals most likely to attend a public meeting are those with the greatest concern about a topic on the agenda. Katherine A. McComas, John C. Besley & Craig W. Trumbo, *Why Citizens Do and Do Not Attend Public Meetings About Local Cancer Cluster Investigations*, 34 Pol. Stud. J. 671, 675 (2006). People often go to local public meetings because of things happening very near to their homes such as concerns over local waste management or public health. *Id.* at 690-91; Thomas A. Heberlein, *Some Observations on Alternative Mechanisms for Public Involvement: The Hearing, Public Opinion Poll, the Workshop and the Quasi-Experiment*, 16 Nat. Resources J. 197, 201 (1976). Even “the marginally active,” or those who are “not regularly active” in local meetings often participate when “they are stimulated by an issue that deeply

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*Real Democracy: The New England Town Meeting and How It Works* 57 (2004) (average of 20.5% of Vermont residents attend local public meetings); Berry et al., *Urban Democracy*, *supra*, at 293 (on average, 16% of city residents across five U.S. cities attended local neighborhood association meetings).

concerns them.” Berry et al., *Urban Democracy, supra*, at 200-01. Public meetings are thus “typically attended primarily, if not uniquely, by avid proponents and opponents of a measure affecting them personally . . . .” Innes & Booher, *supra*, at 424; *see also* Adams, *Public Meetings, supra*, at 44. These are also the individuals most likely to speak at the meetings. Innes & Booher, *supra*, at 424.

#### *4. Local Governments Serve A Critical Educative Function.*

In the early decades of our republic, Alexis de Tocqueville observed that “[t]own meetings are to liberty what primary schools are to science; they bring it within the people’s reach, they teach men how to use and how to enjoy it.” de Tocqueville, *supra*, at 61. Similarly, John Stuart Mill referred to local governments as “schools of political capacity.” John Stuart Mill, *Considerations on Representative Government* 274 (1861). De Tocqueville and Mill explained that participation in local governments provides citizens with skills and knowledge they can use to govern themselves in other contexts. This, in turn, benefits society at large. More recent scholars agree. “In face-to-face meetings, men and women can learn from each other, reason with one another, and search for common interests,” causing “[p]olitical participation [to] become[] an educative device rather than an occasionally exercised civic obligation.” Berry et al., *Urban Democracy, supra*, at 3; *see also* Joseph F. Zimmerman, *The New England Town Meeting: Democracy in Action* 188 (1999) (“[A]ssembly involves political interactions among



equals that educate and socialize the participants.”); Carole Pateman, *Participation and Democratic Theory* 24-33 (1970).

Local government has thus always provided a first-hand means for citizens to experience the virtues of democratic government. It educates students, as well as adults, in civics and the democratic process at large. *See* Laura van Assendelft, “*City Council Meetings Are Cool*”: *Increasing Student Civic Engagement Through Service Learning*, 4 J. Pol. Sci. & Educ. 86, 94-96 (2008) (finding pedagogic merit in students attending local government meetings). Throughout the country, students frequently attend town meetings.<sup>3</sup> This

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<sup>3</sup> Minutes from local public meetings around the country reflect that children often attend local meetings to receive recognition or awards and sometimes to make presentations to the meeting. For example, in Springdale City, Arkansas, children as young as eight are invited to give presentations following the invocation. *See* Springdale City, Ark., City Council Meeting, Apr. 9, 2013, [http://www.springdalear.gov/document\\_center/Mayor/agendas/Council\\_Agenda\\_04\\_09\\_13\\_amended\\_.pdf](http://www.springdalear.gov/document_center/Mayor/agendas/Council_Agenda_04_09_13_amended_.pdf) (an 8 year old makes a presentation). And in Montgomery County, Maryland, awards are given to children after the opening religious gesture. *See* Montgomery County, Md., County Council Regular Session, July 16, 2013, [http://montgomerycountymd.granicus.com/MediaPlayer.php?view\\_id=&clip\\_id=5509&caption\\_id=7615446Public](http://montgomerycountymd.granicus.com/MediaPlayer.php?view_id=&clip_id=5509&caption_id=7615446Public) (a young person is honored at 11:50). The same is true in many other localities. *See* City of Boston, Mass, City Council Meeting, July 10, 2013, <http://meetingrecords.cityofboston.gov/sirepub/mtgviewer.aspx?meetid=146&doctype=MINUTES> (children are clearly present at the meeting at 12:41); Dallas County, Tex., Commissioner Court, Mar. 15, 2011,

tradition continues in the Town of Greece; high school students attend Town Board meetings to fulfill a state-mandated civic education requirement. 2d Cir. App. A282-304, A779, A929.

**C. Local Government Meetings Are Much More Intimate Than National Or State Legislative Sessions, And Thereby Impact The Practice Of Prayer.**

Local public meetings represent the focal point of small communities. Attendees and speakers are neighbors, coworkers, parents, students, teachers, local business owners, town employees, and government leaders. “[F]amily or social ties may motivate citizens to attend public meetings,” and those who attend largely know other attendees from outside the meeting. Katherine A. McComas, *Trivial Pursuits: Participant Views of Public Meetings*, 15 J. Pub. Rel. Res. 91, 109 (2003) [hereinafter McComas, *Trivial Pursuits*]. “In this sense councils are less set apart than are state and national legislatures.” Heinz Eulau & Kenneth Prewitt, *Labyrinths of Democracy: Adaptations, Linkages, Representation, and Policies in Urban Politics* 312 (1973).<sup>4</sup>

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<http://www.dallascounty.org/department/comcrt/agenda/files/2011Mar15f.pdf> (scouts delivering invocation).

<sup>4</sup> Local governments typically serve far fewer people than state governments. For example, 85% of towns in the United States serve areas with less than 10,000 people as of 2013 (National Association of Towns and Townships, <http://www.natat.org> (last visited Sept. 12, 2013)), and over 90 percent of municipal governments serve fewer than 25,000 people. National League

The officials sitting on town councils, boards, or commissions are likewise familiar members of these communities. See J. Eric Oliver & Shang E. Ha, *Vote Choice in Suburban Elections*, 101 *Am. Pol. Sci. Rev.* 393, 397 (2007) (describing survey in which one third of respondents indicated that they personally knew a city council candidate). Officials and attendees at public meetings “frequently have ongoing relationships with each other” and are “not just unknown ‘authorities’ and ‘public audiences.’” Karen Tracy & Margaret Durfy, *Speaking Out in Public: Citizen Participation in Contentious School Board Meetings*, 1 *Discourse & Comm.* 223, 225 (2007). Citizens who stand to speak at local meetings thus address not only their elected official but also their neighbor, their child’s teacher, or their coworker. As two scholars observed based on their seminal study of eighty-two California city councils:

Councilmen, unlike state and national legislators, live and work in the community they govern. Their children are in the same

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of Cities, *Number of Municipal Governments & Population Distribution* (2007), <http://www.nlc.org/build-skills-and-networks/resources/cities-101/city-structures/number-of-municipal-governments-and-population-distribution> (last visited Sept. 12, 2013). In contrast, even the smallest state has more than 560,000 people, and the biggest has more than 37 million. U.S. Census Bureau, Table 1, Annual Estimates of the Population for the United States, Regions, States, and Puerto Rico, April 1, 2010 to July 1, 2012 (2012), <http://www.census.gov/popest/data/state/totals/2012/tables/NST-EST2012-01.xls>.

schools as are those of their constituents; their wives are in the same clubs as are those of their fellow citizens; and they themselves are involved in a network of nongovernmental activities, both of a social and a business sort, which involve citizens from throughout the community. Direct contact between governors and governed is facilitated by the life-styles, business and professional associations, and leisure-time activities of the councilmen.

Eulau & Prewitt, *supra*, at 311-12.

The physical arrangements of local public meetings also distinguish them from national and state legislative sessions. Local public meetings are held in small, intimate spaces, Bryan, *supra*, at 103, and attendees generally sit facing the panel of officials conducting the meeting. McComas, *Trivial Pursuits*, *supra*, at 95. Consequently, unlike audience members sitting in a secluded legislative gallery, attendees at a public meeting are highly visible to local officials and to members of the community whom they know.

Taken together, the public, face-to-face contact among constituents, and between constituents and elected officials they may know, adds a personal element to governing that is absent from federal and state legislative sessions. “Above all else, town meeting is public talk—common people *standing* for something.” Bryan, *supra*, at 139.

The intimacy and other features of local public meetings also affect the way prayer is practiced at such meetings and make it different from prayer before national or state legislatures. As discussed above, in federal and state legislatures, prayer sessions are for legislators, and citizens seated in the gallery are physically distanced from the prayer. In contrast, at local public meetings, citizens in attendance are participants in the decision-making process and sit near to the prayer giver. As a result, the prayer giver is likely to treat citizens as worshippers rather than audience members. Specifically, the prayer giver is likely to direct the prayer to the nearby citizens and ask them to participate. This effectively immerses the citizens in the prayer.

The practices in the Town of Greece exemplify prayer in a town meeting. Prayer is introduced by the Town Supervisor, typically described by the Supervisor as “our prayer,” and offered by a prayer-giver who is close to and facing the public, who generally directs the prayer to the public, and who frequently asks citizens to participate. Resp’s Br. at 23-24. Citizens present are thus treated more as congregants than as audience members. Indeed, this initial period of the public meeting in which “a seated audience fac[es] a podium or an expert panel” and listens to “some type of presentation” has been described as one in which a captive audience of citizens is assembled “much like a congregation sits before the clergy to listen to a sermon with various readings.” Katherine McComas, John C. Besley & Laura W. Black, *The Rituals of Public Meetings*, 70

Pub. Admin. Rev. 122, 124, 127 (2010) [hereinafter McComas et al., *Rituals of Public Meetings*].

### III. Official Prayers During Local Public Meetings Are Coercive.

The unique features of local public meetings make prayer at such meetings far more coercive than federal or state legislative prayer. Citizens cannot simply refrain from attending without losing something of great value: the opportunity to participate in policy decisions and obtain benefits that significantly impact their lives. Likewise, citizens cannot show up just for the comment period and still ensure they will be able to participate. Because local governments often do not have fixed schedules or do not adhere closely to published schedules, citizens who want to participate in a meeting generally must show up at the beginning. Moreover, in localities as different as St. Charles County, Missouri, and Clark County, Nevada, the public comment portion of the meeting occurs immediately after the invocation.<sup>5</sup> Other localities *require* that individuals be present at the beginning of a meeting in order to sign up to comment, as is true, for example, in East Baton Rouge Parish in

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<sup>5</sup>See St. Charles County, Mo., County Council Meeting, Apr. 8, 2013, [http://council.sccmo.org/council/index.php?option=com\\_simplecalendar&view=detail&catid=139%3A2013-council-meetings&id=1907%3Ast-charles-county-council-meeting&Itemid=100159](http://council.sccmo.org/council/index.php?option=com_simplecalendar&view=detail&catid=139%3A2013-council-meetings&id=1907%3Ast-charles-county-council-meeting&Itemid=100159); Clark County, Nev., Board of Commissioners Meeting, June 18, 2013, [http://clark.granicus.com/MinutesViewer.php?view\\_id=17&clip\\_id=3199](http://clark.granicus.com/MinutesViewer.php?view_id=17&clip_id=3199).

Louisiana and in Troy, Michigan<sup>6</sup>). Finally, citizens hoping to persuade officials on a policy point often may not want to carry the social stigma of showing up after the prayer.

When citizens do attend public meetings at which prayer is offered, the intimate setting of the meetings and the presence of the officials whom attendees are seeking to influence will exert substantial pressure on citizens to participate in the prayer. This is made clear in the social science research on social pressure generally and in town meetings specifically.

**A. Citizens Face Substantial Pressure To Participate In Prayers At Local Public Meetings.**

The social science literature shows that in a town meeting setting that includes prayer, adults are susceptible to the same pressures to participate in prayer that this Court described in *Lee*. In *Lee*, based in part on psychological research on the susceptibility of adolescents to conformity, this Court found that prayer at a high school graduation coerced students in attendance to participate in a religious exercise. 505 U.S. at 593-94. The Court explained that the government’s “supervision and

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<sup>6</sup> See East Baton Rouge Parish, La., Metropolitan Council Meeting, Apr. 10, 2013, <http://batonrougela.swagit.com/play/05162013-694>; City of Troy, MI, Rules of City Council Procedure, <http://www.troymi.gov/Portals/0/Files/Council/2012-2013%20CouncilRules%2020130128.pdf>.

control” of prayer as part of a high school graduation ceremony “place[d] 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.” *Id.* at 593. This pressure, in turn, constituted coerced participation. A “reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it,” because remaining silent or standing during the prayer “was an expression of participation” and “the very point of the religious exercise.” *Id.*

Similar pressures from local government authorities and other community members exist at local public meetings. Some of the attendees are themselves students attending as part of their education, as in *Town of Greece*. 2d Cir. App. A282-304, A779, A929. And social science shows that even adults in such settings face significant pressure to conform to practices endorsed by authorities and joined by a clear majority.

*1. The Nearby Presence Of Local Officials Whom Citizens Are Seeking To Influence Pressures Citizens To Conform.*

Unlike audience members sitting in a secluded legislative gallery who “are free to enter and leave with little comment and for any number of reasons,” *Lee*, 505 U.S. at 597, attendees at local public meetings cannot simply exit during prayer. When the prayer-giver asks members of the public to stand, an individual’s failure to do so is an overt act observable both by officials (generally seated nearby



on the dais facing the public) and by members of the community with whom he is likely to have “ongoing relationships.” Tracy & Durfy, *supra*, at 225. Research shows that because of the face-to-face interactions, “[t]own meeting attendance is surely more demanding . . . psychologically than nearly any form of participation in representative systems.” Bryan, *supra*, at 117.

Because the actions of public-meeting attendees are visible to local officials, attendees face significant pressure to conform. A citizen may fear that separating himself from the community and identifying himself as part of a distinct minority on religious matters will limit his ability to influence policy. That is a reasonable fear. Studies show that policymakers are more receptive to groups who adhere to their faith. *See* David Yamane, *Faith and Access: Personal Religiosity and Religious Group Advocacy in a State Legislature*, 38 J. Sci. Study Religion 543, 548-49 (1999). Studies also show that when an individual is perceived as being part of a minority or member of an “outgroup,” members of the majority, such as town council members, will be more inclined to suspect the individual’s motives. *See* Cecilia L. Ridgeway, *Conformity, Group-Oriented Motivation, and Status Attainment in Small Groups*, 41 Soc. Psychol. 175, 187 (1978) (“[Nonconformity] attracts the group’s attention, but it also predisposes the group to negatively assess the nonconformer’s motivation.”). This suspicion of perceived members of outgroups is exacerbated in public settings. Jeffrey G. Noel et al., *Peripheral Ingroup Membership*

*Status and Public Negativity Towards Outgroups*, 68 J. Personality & Soc. Psychol. 127, 134-35 (1995).

The pressure faced by public-meeting attendees to avoid actions that could negatively impact their ability to influence local officials is further heightened by the significant interests at stake. Local officials have the ability to influence whether a citizen receives a zoning variance, for example, and where a new development will be permitted. Research shows that individuals recognize this dynamic, and will often conform their actions to those they believe will best enable them to obtain or avoid losing benefits from authority figures. As one scholar explained, individuals can be motivated by normative concerns about their “relations with others” depending on the “rewards/punishments [the others] can provide.” Wendy Wood, *Attitude Change: Persuasion and Social Influence*, 51 Ann. Rev. Psychol. 539, 541 (2000).

Moreover, independent of the ability of authority figures to confer or deny benefits based on an attendee’s participation in prayer, the mere presence of authority figures puts significant pressure on attendees to conform. As Stanley Milgram concluded in his famous studies on human obedience, many people will agree to perform even extreme acts—such as inflicting pain on strangers—if directed by an authority figure. See Stanley Milgram, *Behavioral Study of Obedience*, 67 J. Abnormal & Soc. Psychol. 371 (1963). That is so even when the authority figure has “no special powers to enforce his commands” and “[t]o disobey would bring no material loss to the

subject”; the authority figure’s mere endorsement is enough to prompt the acts. *Id.* at 376. And the likelihood that individuals will follow the direction of the authority figure increases substantially when their interactions with those figures is face-to-face. Stanley Milgram, *Some Conditions of Obedience and Disobedience to Authority*, 18 *Hum. Rel.* 57, 65-66 (1965).

More recent research has confirmed that Milgram’s conclusions remain valid. Jerry M. Burger, *Replicating Milgram: Would People Still Obey Today?*, 64 *Am. Psychol.* 1, 9 (2009). One study explained, for example, that “[c]loseness of the authority to the subject also had a pronounced effect.” Thomas Blass, *Understanding Behavior in the Milgram Obedience Experiment: the Role of Personality, Situations, and Their Interactions*, 60 *J. Personality & Soc. Psychol.* 398, 399 (1991). Other research has verified that “[d]eference to authorities is linked to the social bond between group members and the group.” Tom R. Tyler, *The Psychology of Legitimacy: A Relational Perspective on Voluntary Deference to Authorities*, 1 *Personality & Soc. Psychol. Rev.* 323, 338 (1997). In town meetings, as described above, authorities are close to the citizens, have a social bond with them, and also have the ability to materially impact those citizens through their decisions.

2. *The Visibility Of The Actions Of Attendees To Their Peers Places Substantial Pressure On Them To Conform.*

Attendees also face pressure to conform from their peers. There is substantial evidence in the social science literature that when an individual publicly conducts activities in front of people he knows, the individual is especially likely to conform to the majority's views to avoid social exclusion. Robert B. Cialdini & Noah J. Goldstein, *Social Influence: Compliance and Conformity*, 55 Ann. Rev. Psychol. 591, 607-08 (2004) (reviewing literature on perceived consensus). This is especially true when the issues at stake involve normative content. *Id.* For example, Jane Mansbridge's classic study of Vermont town meetings concluded that, in the intimate environment of a town meeting, "the greater publicity of one's own act and the greater sanction of one's neighbor's visible disapproval in a face-to-face situation can stimulate conformity to the majority against one's own real interests." Mansbridge, *supra*, at 273. Mansbridge explained that "friendship as well as fear" led individuals to refrain from deviating from a clear majority and made the town appear to act with greater consensus than it might otherwise have. *Id.* at 60. Adding to this pressure, "face-to-face contact, along with exposing one publicly to being a fool, makes the disagreements people voice seem more like personal criticism," because "ideas can rarely be divorced from the personalities of their advocates." *Id.* at 63. Information provided at meetings from those who speak up is therefore

“dressed in the personality of particular human beings.” *Id.*

The intimacy of public meetings also makes citizens holding minority viewpoints “vulnerable to ostracism.” Laura R. Woliver, *Mobilizing and Sustaining Grassroots Dissent*, 52 *J. Soc. Issues* 139, 141 (1996). In some situations, neighbors and fellow citizens will go so far as to openly “resent dissenters, and tell them that their mobilization will harm property values, chase away employers, and make matters worse.” *Id.* In order “[t]o preserve an atmosphere of agreement” often valued in a small community, more powerful participants who are faced with dissent are thus “likely to withhold information and to exert subtle pressures that often work ultimately to the disadvantage of the least powerful.” Mansbridge, *supra*, at 70-71.

Given these dynamics, Mansbridge’s interviews with community members are rife with allusions to the pressures they feel in the public meeting setting. *Id.* at 60-65. “Altogether more than a quarter” of those Mansbridge interviewed “suggested without prompting that the conflictual character of the town meeting in some way upset them.” *Id.* at 65. To residents, differences of opinion cannot be “dissociated from bitter personal disputes among individuals,” and “[i]n a town [so] small, your enemies are also your neighbors for life.” *Id.* at 63, 64. Thus, “[t]he informality that lets some townspeople feel that they are part of an intimate community also emphasizes to outsiders that they are not.” *Id.* at 70.

This research on town meetings is consistent with social psychology research showing that when a majority of peers has a unified position, other individuals will feel significant pressure to conform. Specifically, once a critical number of people is reached—typically four to five—agreement among the majority will impose coercive pressure on the remaining members of the group to support the majority’s viewpoint. *See, e.g.*, Solomon E. Asch, *Opinions and Social Pressure*, 193 *Sci. Am.* 31, 35 (1955) (groups of four); Chester A. Insko et al., *Conformity and Group Size: The Concern with Being Right and the Concern with Being Liked*, 11 *Personality & Soc. Psychol. Bull.* 41 (1985) (groups of five). The pressure to “conform[] is higher in face-to-face groups” such as town meetings. Rob Bond, *Group Size and Conformity*, 8 *Group Processes & Intergroup Rel.* 331, 335 (2005); *see also* Insko et al., *supra*, at 47. And it is further elevated with respect to religion. *See* Lynne M. Jackson & Bruce Hunsberger, *An Intergroup Perspective on Religion and Prejudice*, 38 *J. Sci. Study Religion*, 509, 518-19 (1999) (indicating that, in a group setting, individuals in the religious minority are likely to be subjected to pressure and prejudice).

The pressures individuals face in local public meetings may lead attendees to conform through their silence rather than by adopting the view of the majority or of the authority figures. Mansbridge’s study showed that these pressures lead some community members, particularly the poorer and less-educated, to refrain from attending meetings at all, or to avoid speaking when they do attend. *See*

*Mansbridge, supra*, at 61. Another study of town meetings in upstate New York also found that those who believed they held minority views were less likely to participate. McComas, *Trivial Pursuits, supra*, at 106. As the survey results in that study show, the “fear of social isolation” pressures “individuals either to express or repress their opinions, depending on their perceived accordance with the climate of opinion.” *Id.* (citation omitted).

Studies in the communications field have similarly demonstrated that a “spiral of silence” often develops around a widely-held majority belief. Elisabeth Noelle-Neumann, *The Spiral of Silence: A Theory of Public Opinion*, 24 J. Comm. 43, 44-45 (1974). Practically speaking, this means that when a belief is widely held, an individual with a different view will often feel compelled to remain silent. *See generally* Elisabeth Noelle-Neumann, *The Spiral of Silence: Public Opinion, Our Social Skin* (2d ed. 1993). A comprehensive review of the studies shows that the spiral of silence effect is greater, or even “only” present, for issues with a strong moral or value-normative component. *See* Dietram A. Scheufele & Patricia Moy, *Twenty-Five Years of the Spiral of Silence: A Conceptual Review and Empirical Outlook*, 12 Int’l J. Pub. Opinion Res. 3, 10 (2000). Prayer, of course, has such a component.

Together, this research demonstrates that the intimacy of public meetings may “legitimize existing power dynamics between citizens and public officials.” McComas et al., *Rituals of Public Meetings, supra*, at 127. These dynamics are only exacerbated

for individuals who are in both a policy minority and a religious minority. If a public meeting starts with prayer, such individuals have to risk separating themselves from the community twice if they want to leave the room for the prayer and later articulate their unorthodox view on policy. In light of these risks, prayer can make the difference between an individual with a controversial view contributing to a discussion about a local issue that personally affects him, or simply sitting in silence, believing that his opinion is not welcome. Non-participation therefore hurts the basic operation of the meeting as well as the non-adherent himself. Local government *depends* on experiential input to properly function, and can provide its core functions only if a cross-section of citizens participate. Berry, *Urban Interest Groups*, *supra*, at 505; Adams, *Public Meetings*, *supra*, at 43.

And from a constitutional perspective, with respect to religion, the logic of this Court's cases dictates that the Establishment Clause forbids the government from using the power dynamics of public meetings to pressure individuals to promote a religious creed. Prayer before public meetings endorsed by local officials and joined by community members does just that. When these officials introduce a prayer-giver who asks citizens to participate, and virtually all citizens do stand, it places substantial pressure on members of religious minorities to stand or otherwise submit to the collective practice. Much like in *Lee*, “[f]inding no violation under these circumstances would place objectors in the dilemma of participating, with all that implies, or protesting.” 505 U.S. at 593.



**B. The Educative Function Of Local Public Meetings Renders Prayer Particularly Inappropriate.**

Because town meetings are primary schools for liberty, which teach citizens “how to use and how to enjoy” that liberty, the message conveyed through these meetings is critical. de Tocqueville, *supra*, at 61. John Stuart Mill emphasized that the educative effects of local democracy are diminished for those who feel excluded from “all the privileges of citizenship.” Michael E. Morrell, *Deliberation, Democratic Decision-making and Internal Political Efficacy*, 27 *Pol. Behav.* 49, 51-52 (2005) (explaining Mill’s view).

When local government engages in prayer, it conveys a message of exclusion. It leaves citizens with the impression that, notwithstanding Constitutional guarantees, the government may affiliate itself with the religious beliefs held by the majority and oblige its citizens to participate as a condition of political empowerment. This is particularly problematic when children are in attendance, and their first look at democracy in action involves state-sponsored religion in which they are asked and feel pressured to participate.

Opening a local public meeting with a prayer also immediately calls the neutrality of the forum into question. The prayer implies a common belief among all those present, and signals to those who do not share that belief that they are in the minority. In time, such prayer teaches citizens that the ability to participate effectively in local government depends

upon their willingness to accede to a religious belief they do not hold. This is deeply problematic. As one group of scholars described, “citizen participation is at the heart of democracy,” and “any system that denies equal participatory rights violates a fundamental principal of democracy.” Sidney Verba et al., *Voice and Equality* 1, 10 (1995).

### CONCLUSION

For the foregoing reasons, the judgment of the Second Circuit should be affirmed.

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