No. 07-869 DEC 28 2007

In The
Supreme Court of the United States

BEN YSURSA, in his official capacity as Idaho Secretary of State, and LAWRENCE G. WASDEN, in his official capacity as Idaho Attorney General,

Petitioners,

v.

POCATELLO EDUCATION ASSOCIATION; IDAHO EDUCATION ASSOCIATION; INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS LOCAL 743; PROFESSIONAL FIRE FIGHTERS OF IDAHO, INC.; SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 687, IDAHO STATE AFL-CIO, and MARK L. HEIDEMAN, in his official capacity as Bannock County Prosecuting Attorney,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

LAWRENCE G. WASDEN
State of Idaho
Attorney General
CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division
CLAY R. SMITH
Deputy Attorney General
Counsel of Record
NATURAL RESOURCES DIVISION
P.O. Box 83720
Boise, ID 83720-0010
(208) 334-2400

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does the First Amendment to the United States Constitution prohibit a state legislature from removing the authority of state political subdivisions to make payroll deductions for political activities under a statute that is concededly valid as applied to state government employers?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

PETITION FOR WRIT OF *CERTIORARI*

Petitioners, the Secretary of State and the Attorney General of Idaho, request that a writ of *certiorari* issue to review the judgment of the Ninth Circuit Court of Appeals.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit was issued on October 5, 2007, and is reproduced at App. 1-31. It is published at 504 F.3d 1053. The opinion of the United States District Court for the District of Idaho was issued on November 23, 2005, and is reproduced at App. 32-45. It is reported unofficially at 2005 WL 3241745. A prior unpublished decision of the court of appeals addressing petitioners' claim of immunity from suit in federal court was issued on February 3, 2005, and is reproduced at App. 49-51. It is reported unofficially at 123 Fed. Appx. 765, 2005 WL 271103. The unreported district court decision reviewed in the earlier appeal was issued on July 3, 2003, and is reproduced at App. 52-62.

JURISDICTION

The court of appeals entered judgment on October 5, 2007. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances."

Section 44-2004, Idaho Code, provides:

> (1) It shall be unlawful to deduct from the wages, earnings or compensation of an employee any union dues, fees, assessments, or other charges to be held for, transferred to, or paid over to a labor organization, unless the employee has first presented, and the employer has received, a signed written authorization of such deductions, which authorization may be revoked by the employee at any time by giving written notice of such revocation to the employer.
>
> (2) Deductions for political activities as defined in chapter 26, title 44, Idaho Code, shall not be deducted from the wages, earnings or compensation of an employee.
>
> (3) Nothing in this chapter shall prohibit an employee from personally paying contributions for political activities as defined in chapter 26, title 44, Idaho Code, to a labor organization unless such payment is prohibited by law.

Section 44-2602(e), Idaho Code, provides: "'Political activities' means electoral activities, independent expenditures, or expenditures made to any candidate, political party, political action committee or political issues committee or in support of or against any ballot measure."

Other relevant Idaho statutes appear in the Appendix.

STATEMENT

The Ninth Circuit Court of Appeals has made a striking and unprecedented incursion into the authority of state legislatures to control the employment practices of political subdivisions. The opinion below holds that the First Amendment to the United States Constitution prohibits the Idaho legislature from excluding amounts to be used for political activities from the field of permissible employee payroll deductions. The Ninth Circuit so concludes notwithstanding the unchallenged determination by the district court that the legislature may prohibit such deductions with respect to Idaho *state* employees and respondent labor organizations' concession that the several political subdivisions whose employees the unions represent for collective bargaining purposes may refuse, as matter of *their own* discretion, to make those deductions without First Amendment violation. To reach this anomalous result, the court of appeals creates out of whole cloth a "pervasive management"

standard for determining when a state legislature may direct a political subdivision to close a nonpublic forum – a standard that effectively requires the legislature to assume day-to-day administrative control over the forum – here the employee payroll systems of Idaho counties, cities and school districts. Because the Ninth Circuit's decision conflicts with settled First Amendment principles and severely compromises state legislative authority, *certiorari* review is warranted.

I. RELEVANT IDAHO LAW BACKGROUND

A. The Right To Work And Voluntary Contributions Acts

Over two decades ago, Idaho adopted the Right to Work Act which declares as state policy that "[t]he right to work shall not be infringed or restricted in any way based on membership in, affiliation with, or financial support of a labor organization or on refusal to join, affiliate with, or financially or otherwise support a labor organization." 1985 Idaho Sess. Laws ch. 2, § 1 (codified at Idaho Code § 44-2001 (Michie 2003)) (App. 63). The statute implements this policy by, *inter alia*, prohibiting any requirement for the payment of "dues, fees, assessments, or other charges of any kind or amount to a labor organization" as a condition of employment. *Id.* (codified at Idaho Code § 44-2003 (Michie 2003)) (App. 64). It expressly authorizes employers, however, to deduct from employee compensation union dues, fees, assessments or other

charges for payment to a labor organization if pursuant to a signed authorization by the employee. *Id.* (codified as amended at Idaho Code § 44-2004(1) (Michie 2003)) (App. 64). An amendment to the law ten years later clarified that its provisions apply "to all employment, private and public, including employees of the state and its political subdivisions." 1995 Idaho Sess. Laws ch. 178, § 2 (codified at Idaho Code § 44-2011 (Michie 2003)) (App. 67).

The Right to Work Act's provision related to employee compensation deductions remained unchanged until 2003 when the Voluntary Contributions Act ("VCA") was adopted. Idaho Sess. Laws chs. 97, 340 (codified at Idaho Code §§ 44-2601 to -2605 (Michie 2003)) (App. 68-72). The amendments added subsections (2) and (3) to § 44-2004 which now reads:

> (1) It shall be unlawful to deduct from the wages, earnings or compensation of an employee any union dues, fees, assessments, or other charges to be held for, transferred to, or paid over to a labor organization, unless the employee has first presented, and the employer has received, a signed written authorization of such deductions, which authorization may be revoked by the employee at any time by giving written notice of such revocation to the employer.
>
> (2) Deductions for political activities as defined in chapter 26, title 44, Idaho Code, shall not be deducted from the wages, earnings or compensation of an employee.

> (3) Nothing in this chapter shall prohibit an employee from personally paying contributions for political activities as defined in chapter 26, title 44, Idaho Code, to a labor organization unless such payment is prohibited by law.

App. 64. The term "political activities" referred to in the amendment was defined in the VCA to mean "electoral activities, independent expenditures, or expenditures made to any candidate, political party, political action committee or political issues committee or in support of or against any ballot measure." *Id.* § 44-2602(e) (App. 69).

More generally, the VCA imposed restrictions on labor organization contributions for political activities. These restrictions included establishing a separate segregated fund to finance political activities; imposing disclosure requirements on solicitations for contributions to the fund; prohibiting the use of union dues for political activities or to defray the fund's administrative costs; and, consistent with the amendment to § 44-2004, requiring all employee contributions to the fund to be made by the labor organization's members directly and not to be remitted by an employer. Separate segregated funds were further required to register as political committees and to file financial reports under Idaho's election campaign statute. Idaho Code § 44-2605 (App. 72); *see*

id. §§ 67-6601 to -6630 (Michie 2006).[1] The term "labor organization" in the VCA included "each employee association and union of employee of public and private sector employers" but excluded "organizations governed by the national labor relations act, 29 U.S.C. section 151, et seq. or the railway labor act, 45 U.S.C. section 151, et seq." *Id.* § 2602(d)(ii) & (iii) (App. 69). Finally, an uncodified provision of the session law made the VCA applicable only to contracts entered

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[1] The legislation containing the VCA also amended one provision of the campaign finance statute – Idaho Code § 67-6605 (Michie 2006) – that addresses the methods by which political committees may obtain contributions. 2003 Idaho Sess. Laws ch. 97, § 3. As modified, § 67-6605 states:

> Contributions shall not be obtained for a political committee by use of coercion or physical force, by making a contribution a condition of employment or membership, or by using or threatening to use job discrimination or financial reprisals. A political committee may solicit or obtain contributions from individuals as provided in chapter 26, title 44, Idaho Code, or as provided in section 44-2004, Idaho Code. A violation of the provisions of this section shall be punished as provided in subsection (b) of section 67-6625, Idaho Code.

App. 81-82. Section 67-6605 makes clear what a straightforward reading of § 44-2004(2) indicates: The limitation imposed under § 44-2004(2) extends to any payroll deduction for political activities and not merely those that an employee directs to a political committee associated with or created by a labor organization. *See* Idaho Code § 67-6602(p)(1) (Michie 2006) (defining "political committee" to include, *inter alia*, "any person specifically designated to support or oppose any candidate or measure"). The enforceability of § 67-6605, insofar as it refers to § 44-2004, rises or falls with the latter and therefore was not considered independently below.

into after its effective date or renewals of then-existing contracts. 2003 Idaho Sess. Laws ch. 97, § 4.

B. Legislative Control Over Political Subdivisions

No dispute exists that the Idaho legislature possesses the authority, as a matter of state law, to limit the authority of state public employers to enter into payroll deduction arrangements with employees or their bargaining representatives. That conclusion follows from the more general rule that the legislature's authority under Idaho law is plenary except to the extent limited constitutionally. *Idaho Press Club, Inc. v. State Legislature*, 132 P.3d 397, 400 (Idaho 2006) ("'[o]ur State Constitution is a limitation, not a grant of power, and the Legislature has plenary powers in all matters, except those prohibited by the Constitution'"); *Smylie v. Williams*, 341 P.2d 451, 453 (Idaho 1959) ("[i]t must be remembered that our State Constitution is an instrument of limitation and not of grant and that the legislature has plenary power in all matters of legislation except where prohibited by the constitution"). This fundamental principle extends to control over state political subdivisions – here counties, cities and school districts. *See, e.g.*, *Thompson v. Engelking*, 537 P.2d 635, 644 (Idaho 1975); *Fenton v. Bd. of Comm'rs*, 119 P. 41, 46 (Idaho 1911).

Indeed, rather than limiting legislative authority over such political subdivisions, the Idaho Constitution explicitly recognizes legislative primacy. The

legislature thus is vested with the authority and responsibility to "establish . . . a system of county governments which shall be uniform throughout the state[] and by general laws . . . provide for township or precinct organizations." Idaho Const. art. XVIII, § 5. The constitution further specifies that "[c]ounty, township, and precinct officers shall perform such duties as shall be prescribed by law." *Id.* art. XVIII, § 11. Article XII, section 1 grants power to the legislature to enact general laws for the incorporation of cities, towns and villages, and to alter, amend, or repeal such laws at any time. *See* Idaho Code § 50-201 (Michie 2000) (designating all municipal entities as "cities"). Article IX, section 1 directs the legislature to create and maintain a system of free, common public schools. Section 2 of that article commits immediate supervision of such schools to the State Board of Education whose "membership, powers and duties . . . shall be prescribed by law" – *i.e.*, by statute.[2] Insofar as it vests the legislature with virtually

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[2] A few, but presently immaterial, limitations are placed on these general allocations of authority to the legislature. *E.g.*, Idaho Const. art. XVIII, § 1 (recognizing counties in existence as of statehood); *id.* §§ 6, 10 (specifying county officers and composition of county commissions); *see also Kessler v. Fritchman*, 119 P. 692, 697 (Idaho 1911) (expressing agreement with the proposition that, by virtue of Idaho Const. art. XII, § 1, the legislature may modify charters under which cities were organized prior to the adoption of the Constitution only through special, and not general, laws). Counties and cities additionally have constitutionally conferred power to make local police, sanitary or other regulations, but exercise of this power may not be inconsistent with the general laws adopted by the legislature. Idaho Const.

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plenary authority over such subdivisions, the Idaho Constitution anticipates the need for substantial legislative discretion to address issues deemed of *statewide* concern and accordingly suited for uniform treatment.

The legislature, in turn, has exercised its plenary authority to structure the operation of state political subdivisions. A county is deemed to be "a body politic and corporate, and as such has the powers specified in this title or in other statutes, and such powers as are necessarily implied from those expressed." Idaho Code § 31-601 (Michie 2006). Cities and school districts similarly are characterized under Idaho law as "bodies corporate and politic" whose powers are specified by statute. *Id.* § 33-301 (Michie 2001) (school districts); *id.* § 50-301 (Michie 2000) (cities). Counties, cities and school districts are subject to elaborate statutory schemes that fill entire titles of the Idaho Code and address virtually every aspect of their operation. Prominent among those areas of legislative control is contracting authority – as the Idaho Supreme Court has held in various contexts.[3]

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art. XII, § 2; *see Rowe v. City of Pocatello*, 218 P.2d 695, 698 (Idaho 1950).

[3] *See, e.g., Firefighters Local 672 v. City of Boise City*, 30 P.3d 940, 944-45 (Idaho 2001) (contract entered into by city with national guard for firefighting and crash rescue services did not violate, *inter alia*, the Idaho Firefighters Collective Bargaining Act); *Gilmore v. Bonner County Sch. Dist.*, 971 P.2d 323, 326-27 (Idaho 1999) (state statutes control school district employment decisions, and building principal lacked authority to enter into

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The legislature also has spoken to public employee or contractor relations in several statutes. It has authorized, for example, cities to establish a civil service system to promote employment decision-making on the basis of merit and performance and detailing required elements of the system. *Id.* §§ 50-1601 to -1610 (Michie 2000). Of immediate relevance here, it created a right to collective bargaining for firefighters employed by any political subdivision. *Id.* §§ 44-1801 to -1812.

II. PROCEEDINGS BELOW

A. District Court Proceedings

The respondent labor organizations are five unions that represent public employees in Idaho and the Idaho State AFL-CIO.[4] Shortly before the VCA legislation was to take effect in 2003, they filed suit

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"extra duty" contract with teachers); *Coeur d'Alene Lakeshore Owners and Taxpayers, Inc. v. Kootenai County*, 661 P.2d 756, 761 (Idaho 1983) (county did not violate public bidding requirements by entering into a contract for appraisal services since they involved exercise of special skills or technical learning); *McKay Constr. Co. v. Ada County Bd.*, 580 P.2d 412, 414-17 (Idaho 1978) (invalidating county contract for failure to comply with statutory requirements); *Reynolds Constr. Co. v. Twin Falls County*, 437 P.2d 14, 19 (1968) (same).

[4] Also named as a respondent for purposes of this petition is Mark Heideman, who was sued below in his capacity as the Bannock County Prosecutor and did not appeal from the district court judgment. The term "respondents" as used in the text refers only to the respondent labor organizations.

challenging the constitutionality of various provisions of the VCA legislation, including its amendment to Idaho Code § 44-2002, and sought immediate injunctive relief. D.C. Doc. 1. The district court granted a temporary restraining order enjoining the legislation's implementation (App. 61), which was extended by later order until final disposition of the case (D.C. Doc. 28). In opposing the request for a temporary restraining order, petitioners asserted Eleventh Amendment immunity and moved to dismiss on that basis. D.C. Doc. 19. The district denied the motion in its order granting the temporary restraining order (App. 52-62), and petitioners unsuccessfully appealed that denial under the collateral order doctrine (App. 49-51).

Following completion of the first appeal, the parties filed cross-motions for summary judgment. D.C. Doc. 54, 67. Petitioners conceded the unconstitutionality under the First Amendment of various VCA provisions related to regulation of solicitations for "political activities" but not the unconstitutionality of the amendment to § 44-2004 regarding payroll deductions. D.C. Doc. 67.1. They further limited, as a matter of statutory construction, the prohibition against "political activities" deductions to employers not subject to the National Labor Relations Act or the Railway Labor Act given, most importantly, the exclusion of such employers from the definition of "labor organization" in the VCA. D.C. Doc. 76 at 2. Although petitioners recognized that private employers not covered by the federal acts were subject to § 44-2004(2), they contended

that respondents lacked standing to raise the interests of those employers' employees absent a showing that they represented any for collective bargaining purposes. D.C. Doc. 76 at 3. In petitioners' view, therefore, the case narrowed to the question whether § 44-2004(2) could be applied to the Idaho public employers consistently with the First Amendment.

The district court granted summary judgment in part to petitioners and in part to respondents. App. 46-48. It first held that respondents possessed standing to represent the interests of private sector employees by virtue of the State AFL-CIO's participation as a plaintiff. App. 36. On the merits, it reasoned that "[t]he First Amendment protects an individual's right to be free from government action, but does not create a right that the Government 'subsidize the exercise of' those First Amendment rights." App. 36 (quoting *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 549 (1983)). Applying this "subsidization" standard, the court concluded that the payroll deduction prohibition for political activities was valid with respect to state employees "where the State is incurring costs to set up and maintain the program" but could not be applied to private sector employees or those employed by local governments since the State did not bear the administrative burden attendant to making the deductions and since petitioners had not offered a rationale for the statute satisfying strict scrutiny standards. App. 36-38. In so holding, it acknowledged that "[c]ertainly any local governmental entity could decide on its own not to subsidize

speech and accordingly refuse to provide a payroll deduction program." App. 38 n.3.

B. Court of Appeals Proceedings

Petitioners appealed, challenging the district court judgment to the extent that it invalidated § 44-2004(2) as applied to political subdivisions – *i.e.*, to what the district court referred to as "local governments and school districts." App. 46. Respondents did not appeal from the judgment insofar as it upheld the statute's validity as "to employees of the State of Idaho where the State bears any part of the cost of setting up or maintaining the payroll deduction." App. 47. The Ninth Circuit affirmed.

The court of appeals examined the validity of the payroll deduction prohibition against both the "subsidization" approach used by the district court and "forum" principles. With regard to "subsidization," it stated that "[t]he nonsubsidy doctrine is premised on the rationale that the government is free to confer no benefit at all and is therefore entitled to condition the receipt of the benefit on speech or silence." App. 10-11. It observed that, although "[t]he parties appear to be in agreement" as to the district court's application of the doctrine to "payroll deductions for [state] employees[,]" the lower court correctly determined that "there is no subsidy by the State of Idaho for the payroll deduction systems of local governments." App. 11.

The Ninth Circuit's analysis of the forum doctrine was substantially more detailed. The court summarized the doctrine's basic elements and explained that, notwithstanding its roots in cases involving "public spaces" (App. 12), "[a] 'forum' does not need to be a physical place" (App. 15). Here, it deemed "the relevant forum . . . [to] be the payroll deduction programs of the local governments[,]" which petitioners argued were nonpublic forums and thus subject to the reasonableness test identified in, most notably, *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788 (1985). App. 16. Respondents countered that "forum analysis does not apply at all because neither the payroll deduction programs nor the local workplaces are 'property' of the State of Idaho in any sense." App. 17. The court then examined two "relationships" to decide which party was correct.

The first relationship considered was that "between the government entity seeking to impose a free speech relationship and the forum in which it is imposed." App. 17. The Ninth Circuit interpreted this Court's precedent as "suggest[ing] that a forum may be subject to government control where the governmental entity maintains a proprietary relationship over the relevant property." App. 18. The lower court contrasted such proprietary control by reference to *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530 (1980), which established, in its view, the proposition that "the mere possession of legal authority to regulate an entity, without more,

represents an insufficient level of control over that property to claim the forum in the name of the State." App. 19. The panel next addressed the second relationship – that "between the State of Idaho and workplaces of local governments" – and held that petitioners had "failed to establish that the State of Idaho is the proprietor of the local workplaces or of local government payroll systems" and that, instead, the relationship with political subdivisions "resembles that of a regulator who possesses broad powers over them" analogous to *Consolidated Edison*. App. 20. It therefore rejected "Appellants' assertion that the payroll deduction programs of local governments are nonpublic fora belonging to the State." App. 25.

The court of appeals concluded by considering whether *Consolidated Edison*, which involved state regulation of a private utility's mail communications with its customers, was inapposite because "the instrumentalities of local governments are necessarily the instrumentalities of the State of Idaho, regardless of who 'owns' them." App. 25. It reasoned that "some" decisional support existed "for an alternative theory of forum analysis which evaluates the forum in light of the degree of control exercised by the government entity" and that under this theory "the question is not one of ownership or proprietorship but whether the government has exercised a sufficient degree of control over the forum such that it should be granted the right to make speech-restrictive rules." App. 26. In those cases, "one can argue that the state has a sufficient managerial interest in the

resource to justify judicial deference to its rules." App. 27 (citing, *inter alia*, *USPS v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981)).

That theory, however, did not assist petitioners in the court of appeals' view, since "[i]t is clear that the State of Idaho does not pervasively manage local government workplaces or local government payroll deduction systems" and since they "cannot point to any current or previous exercise of control over local governments' administration of their payroll systems, except for the subject statute." App. 29. The court added that "[t]he unique nature of the State's intervention therefore strongly suggests that the State's purpose here is exactly that against which the First Amendment protects – the denial of payroll deductions for the purpose of stifling political speech." App. 29. Consequently, while petitioners "established generally that the State of Idaho has ultimate power of control over the units of government at issue[,]" they did not show "that the State actually operates or controls the payroll deduction systems of local units of government[,]" and, in light of this fact, "the State has a relatively weak interest in preventing Plaintiffs from exercising their First Amendment rights as compared to the actual controlling entities." App. 30. The court held that under these circumstances "[t]he public forum doctrine does not apply to Idaho's decision to prevent local government employers from granting an employee's request to make voluntary

contributions to political activities through a payroll deduction program." App. 31.[5]

REASONS FOR GRANTING THE PETITION

Decisions from this Court and every federal court of appeals or highest state appellate court uniformly hold that no First Amendment right of access to the payroll systems of governmental entities exists for purposes of employee-authorized deductions. These cases have arisen in different contexts, some involving requested access for union dues, others for contributions to nonprofit organizations with particular social policy objectives, and one for political contributions like the situation here. The explicit analytical basis for these decisions has varied, but the underlying rationale is the same: The federal government, States and state political subdivisions have no affirmative obligation to provide a means for the exercise of speech or associational rights by facilitating employee contributions through access to their payroll systems.

Even the courts below and the respondents recognize that, in the Ninth Circuit's phrasing, "local

[5] The court of appeals did not refer to litigation, now pending before the Tenth Circuit, in which a quite similar Utah statute, Utah Code § 34-32-1.1(2)(g) (2005), was invalidated under reasoning similar to that below. *Utah Educ. Ass'n v. Shurtliff*, 511 F. Supp. 2d 1106 (D. Utah 2006), *appeal docketed*, No. 06-4142 (10th Cir. June 7, 2006).

governments" – instantly Idaho counties, cities and school districts – have discretion to decline requests by employees or their collective bargaining representative for "political activities" related payroll deductions. They nonetheless draw the constitutional line at the proverbial schoolhouse gate, contending that state *statutory* constraints on that discretion are foreclosed by the First Amendment, notwithstanding the fact that the political subdivisions are subject to plenary legislative control under the Idaho Constitution. Such a rule comports with neither common sense nor the First Amendment as construed by this Court and, if allowed to stand, replaces a bright-line, long-established constitutional standard that the State may manage its political subdivisions under the same First Amendment standards that it manages itself with an inquiry into whether the State – as opposed to the involved political subdivision – "pervasively manages" the forum. The Court should exercise its *certiorari* jurisdiction and reject the Ninth Circuit's new constitutional theory to avoid further doctrinal confusion and serious impairment of legitimate state legislative prerogatives.[6]

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[6] Indeed, there may be federal government-related implications in the Ninth Circuit's reasoning. Congress arguably could be foreclosed under a "pervasive management" standard from prescribing the same standards for payroll deductions for the employees of quasi-government entities chartered by federal statute that it prescribes for employees of federal agencies. Local government entities, no less than myriad federally chartered corporations, "are (for many purposes at least) part of the

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I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH SETTLED FIRST AMENDMENT AUTHORITY

A. In *City of Charlotte v. Firefighters Local 660*, 426 U.S. 283 (1976), this Court rejected an equal protection challenge to a city's refusal to withhold dues from the paychecks of almost 65 percent of its uniformed fire department employees who were union members. The involved union claimed discrimination because the city allowed payroll deductions for various other purposes. Most important here, the Court applied "a relatively relaxed standard of reasonableness" because "it is not here asserted and this Court would reject such a contention if it were made that respondents' status as union members or their interest in obtaining a dues checkoff is such as to entitle them to special treatment under the Equal Protection Clause." *Id.* at 286. Implicit in the Court's selection of

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Government" insofar as they are created and carry out state sovereign functions assigned by state legislatures. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995). The holding below is even more problematic as to the reach of congressional power for entities that are federally chartered but not deemed "part of the Government." *See Hall v. Am. Nat'l Red Cross*, 86 F.3d 919, 922 (9th Cir. 1996) ("'functional' or 'federal action' analysis" applied in declining to find the American Red Cross subject to the Religious Freedom Restoration Act as an instrumentality of the United States); *Irwin Mem'l Blood Bank v. Am. Red Cross*, 640 F.2d 1051, 1057 (9th Cir. 1981) (Red Cross is not an agency subject to the Freedom of Information Act since while "undoubtedly a close ally of the United States government, . . . its operations are not subject to substantial federal control or supervision").

the rational basis standard was the principle that no First Amendment right to payroll deductions for union dues exists, since a fundamental right would have then been implicated requiring strict scrutiny analysis. The relationship between equal protection and First Amendment analysis in this regard was made explicit in *Perry Education Association v. Perry Local Educators Association*, 460 U.S. 37 (1983), where the Court held a school district's internal mail system to be a nonpublic forum under the First Amendment and then rejected an associated equal protection claim under rational basis review given the absence of a fundamental right. *Id.* at 54 ("We have rejected this contention when cast as a First Amendment argument, and it fares no better in equal protection garb. . . . PLEA did not have a First Amendment or other right of access to the interschool mail system. The grant of such access to [rival] PEA, therefore, does not burden a fundamental right of the PLEA").

Three years after *City of Charlotte*, this Court returned to the area of labor relations in the public sector, addressing the question whether the First Amendment imposed an affirmative obligation on a State to deal with a union over employee grievances. *Smith v. Ark. State Highway Employees Local 1315*, 441 U.S. 463 (1979) (*per curiam*). It answered the question negatively because "the First Amendment is not a substitute for the national labor relations laws" (*id.* at 464) and "does not impose any affirmative obligation on the government to listen, to respond or,

in this context, to recognize the association and bargain with it" (*id.* at 465). Shortly thereafter, the Eighth Circuit applied *Smith* in a controversy between the same parties and rejected First Amendment and equal protection claims directed to the highway commission's termination of a payroll deduction policy for union dues, drawing from the earlier decision the general rule that "the First Amendment does not impose any duty on a public employer to affirmatively assist . . . a union." *Ark. State Highway Employees Local 1315 v. Kelly*, 628 F.2d 1099, 1102 (8th Cir. 1980).

As indicated above, this Court used traditional First Amendment forum analysis in *Perry Education Association* when resolving a claim by a labor organization, a rival of the affected employees' exclusive collective bargaining representative, for access to a school district's internal mail system. It classified the mailboxes and delivery system as a nonpublic forum and thus subject to access control, including access prohibition, "as long as the regulation on speech is reasonable and not an effort to suppress expressive activity merely because public officials oppose the speaker's view." 460 U.S. at 46; *see also id.* at 49 ("[i]mplicit in the concept of a nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity").

Perry Education Association presented a mixed physical property-governmental service situation, but the Court relied upon forum analysis and that opinion in *Cornelius v. NAACP Legal Defense & Education*

Fund, Inc., 473 U.S. 788 (1985), to uphold the exclusion of various groups, whose purpose was "to influence public policy through . . . political activity, advocacy, lobbying, or litigation on behalf of others" (*id.* at 793), from the federal government's annual charity drive that was limited by executive order to "'voluntary, charitable, health and welfare agencies that provide or support direct health and welfare services to individuals or their families'" (*id.* at 795). In so holding, the Court accepted the advocacy groups' characterization of the relevant forum as the fund raising drive itself, and not the "federal workplace." *Id.* at 801. It found forum analysis appropriate because "in defining the forum we have focused on the access sought by the speaker." *Id.* at 802. The Court continued on to find the charitable drive a nonpublic forum given the facts that it was "not create[d] for purposes of providing a forum for expressive activity" and that "[t]he federal workplace, like any place of employment, exists to accomplish the business of the employer." *Id.* at 805. It then examined the government's proffered grounds for the advocacy groups' exclusion against the reasonableness standard and concluded, in part, that "avoiding the appearance of political favoritism is a valid justification for limiting speech in a nonpublic forum." *Id.* at 809.

The Ninth Circuit acknowledged *Cornelius*'s relevance, commenting that there "a restriction similar to that at issue here passed muster as a content-based restriction of speech in the context of a

nonpublic forum." App. 17 n.8. Other courts of appeal also understand *Cornelius*'s dispositive weight where payroll deduction-based First Amendment challenges are mounted. *Boy Scouts of Am. v. Wyman*, 335 F.3d 80, 91-92 (2d Cir. 2003) (exclusion of organization from participation in charitable check-off program because of its policy concerning homosexuals); *Indep. Charities of Am. v. Minnesota*, 82 F.3d 791, 796 (8th Cir. 1996) (exclusion of non-local fundraisers from campaign); *Pilsen Neighborhood Cmty. Council v. Netsch*, 960 F.2d 676, 685 (7th Cir. 1992) (challenge to Illinois Voluntary Payroll Deductions Act); *United Black Cmty. Fund, Inc. v. City of St. Louis*, 800 F.2d 758 (8th Cir. 1986) (limitation on access to charitable deduction program to organizations whose administrative and fundraising costs did not exceed 25 percent of gross contributions); *see also S.C. Educ. Ass'n v. Campbell*, 883 F.3d 1251, 1256 (4th Cir. 1989) ("[n]either party disputes that the *state* is empowered to legislate in the area of payroll deductions for public employees") (emphasis supplied). The Ninth Circuit thus fully understood that, under settled First Amendment forum jurisprudence, § 44-2004(2) may be applied without constitutional embarrassment to "state" employees and that, the statute aside, political subdivisions possess authority to impose the same condition on access to their payroll systems if they so choose.

B. The Ninth Circuit's decision, therefore, runs squarely contrary to the "black-letter law that, when

the government permits speech on government property that is a nonpublic forum, it can exclude speakers on the basis of their subject matter, so long as the distinctions drawn are viewpoint neutral and reasonable in light of the purpose served by the forum." *Davenport v. Wash. Educ. Ass'n*, 127 S. Ct. 2372, 2381 (2007) (citing *Cornelius*, 473 U.S. at 799-800). The result can be sustained only if that "black-letter law" does not apply to political subdivisions' payroll systems by virtue of the Ninth Circuit's proprietor-regulator distinction.[7] While the status of a governmental entity as the direct regulator of private speech, as opposed to its status as the manager of public property, has been central in some First

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[7] The Ninth Circuit, as discussed above, voiced suspicion that "[t]he unique nature of the State's intervention" in § 44-2004(2) embodied "exactly that against which the First Amendment protects – the denial of payroll deductions for the purpose of stifling political speech." App. 29. This observation was made notwithstanding the fact that the statute was upheld with respect to state employees and that political subdivisions admittedly can adopt the same limitation without First Amendment violation. Section 44-2004(2) in this regard easily satisfies the test against which limitations on access to public forums are measured, as the *Cornelius* Court held with respect to the comparable limitation on permissible payroll deductions. Similarly unclear is why, as the court of appeals opined, a local government prohibition on payroll deductions is less suspect than a legislative prohibition or why a legislature's "interest" in controlling a specific type of payroll deduction is entitled to less weight. Here, to illustrate, the legislature surely possessed as much interest in having *any* Idaho governmental entity divorced from the appearance of partisan political involvement as a particular political subdivision does.

Amendment cases – most notably *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 539-40 (1980) – that distinction has never been drawn previously where the "property" being "regulated" is concededly a nonpublic forum. No court, moreover, has ever suggested, much less held, that the First Amendment forbids a state legislature from constraining the authority of a political subdivision to open a nonpublic forum under the subdivision's immediate control to associational conduct where the reasonableness test otherwise is satisfied. Instead, this Court and the Sixth Circuit Court of Appeals have upheld state legislation that had precisely the same "regulatory" effect.

Last Term in *Davenport*, this Court rejected a First Amendment challenge to a Washington statute that had been adopted by referendum and allowed public employers to enter into agency shop agreements with labor organizations and to remit the associated fees through payroll deductions. However, as drafted when the litigation commenced, the law prohibited use of fees paid by nonmembers "'to influence an election or to operate a political committee unless affirmatively authorized by the individual.'" 127 S. Ct. at 2377 (quoting Wash. Rev. Code § 42.17.760 (2006)). The litigation before the Court arose from state court actions alleging the statute's violation by labor organizations representing persons employed at public primary, secondary and higher education facilities. *See, e.g.*, Pet. for Writ of Cert. for State of Wash. at 7, *Davenport v. Wash. Educ. Ass'n*,

127 S. Ct. 2372 (2007) (Nos. 05-1589 & 05-1627). This Court held that its decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), did not foreclose a State from enacting legislation that provides greater rights to nonmembers forced to contribute agency shop fees to a union than required under the federal constitution; *i.e.*, "our repeated affirmation that courts have an obligation to interfere with a union's statutory entitlement no more than is necessary to vindicate the rights of nonmembers does not imply that *legislatures* (or voters) themselves cannot limit the scope of that entitlement." *Davenport*, 127 S. Ct. at 2379 (emphasis supplied). It then considered the labor organizations' contention that the statute "amount[ed] to unconstitutional content-based discrimination" (*id.* at 2380) and found various principles – including the subsidization rationale in *Regan v. Taxation With Representation of Washington,* 461 U.S. 540 (1983), and the nonpublic forum doctrine – "equally applicable to the narrow circumstances of these cases" (127 S. Ct. at 2381). "[T]he voters of Washington [did not] impermissibly distort[ ] the marketplace of ideas," this Court reasoned, "when they placed a reasonable, viewpoint-neutral limitation on the State's general authorization allowing public-sector unions to acquire and spend the money of *government* employees." *Id.* (emphasis supplied). The Court added that the statute, "though applicable to all unions, served [its] purpose through very different means depending on the type of union involved: It *conditioned* public-sector unions' authorization to coerce fees from government employees at the same

time that it *regulated* private-sector unions' collective-bargaining agreements." *Id.* at 2382-83.

Plainly enough, if there were a "regulator"-based restriction on a legislature's control over political subdivisions of the kind created by the Ninth Circuit with regard to the exercise of their authority to confer a benefit – here access to the subdivisions' payroll systems – both the analysis and the outcome in *Davenport* would have differed. Distinctions would have had to be made between the statute's applicability to collective bargaining relationships with "state" public employers and to those with "local government" public employers – with the law upheld for one and invalidated for the other. Those distinctions were not made because the Ninth Circuit's First Amendment restriction on legislative power does not exist. Its decision thus cannot be reconciled with *Davenport*.

The decision also cannot be reconciled with *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307 (6th Cir. 1998). There, the Sixth Circuit sustained against First Amendment and equal protection attacks an Ohio statute's prohibition on payroll deduction for political purposes imposed on all public employers – a law substantially indistinguishable from § 44-2004(2). 154 F.3d at 312 (quoting statute). Rather than relying on forum analysis, the court pointed to its own circuit law, *Brown v. Alexander*, 718 F.2d 1417 (6th Cir. 1983), which concluded that "the state may condition the privilege of union dues checkoff upon an organization meeting certain requirements" (*id.* at 1423), and *South Carolina Education Association v. Campbell*,

supra, where the Fourth Circuit denied a First Amendment challenge by a union representing school teachers on the local government level to a state statute which limited the availability of payroll deductions to a rival union (883 F.2d at 1256-57). *See Toledo Area*, 154 F.3d at 320 ("*Brown* and *Campbell* are wholly consistent with Supreme Court cases acknowledging that the protections accorded to fundamental First Amendment rights do not extend to imposing a duty on government to assist the exercise of First Amendment rights no matter how much the withdrawal of such assistance undercuts the effect of exercising such rights"). There can be no reasonable dispute that, were the validity of a statute identical to § 44-2004(2) litigated in the Sixth Circuit, a three-judge panel would be obligated to find *Toledo Area* controlling precedent and to uphold the law. *E.g.*, *Dupont Dow Elastomers, L.L.C. v. NLRB*, 296 F.3d 495, 506 (6th Cir. 2002) (citing 6th Cir. R. 206(c)); *see also Oregon Dep't of Fish & Wildlife v. Klamath Tribe*, 473 U.S. 753, 764 (1985) (inter-circuit conflict warranting resolution existed where a "conflict in principle" was present).[8]

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[8] Although petitioners focus on § 44-2004(2)'s validity under traditional forum standards, *Davenport*'s and *Toledo Area*'s discussion of general First Amendment principles reflects the often interrelated nature of the subsidization line of decisions exemplified by *Regan*. That decision can, and should, be understood as meaning that the First Amendment does not prevent Congress or a state legislature from withholding affirmative support – economic or otherwise – to *facilitate* the exercise of

(Continued on following page)

II. THE NINTH CIRCUIT'S "MANAGERIAL INTEREST" TEST CAN BE SATISFIED ONLY THROUGH A LEGISLATURE ASSUMING DAY-TO-DAY CONTROL OF A POLITICAL SUBDIVISION'S PAYROLL SYSTEM AND PLACES AT RISK ANY LEGISLATIVE REGULATION OF PERMISSIBLE EMPLOYEE-AUTHORIZED DEDUCTIONS WHERE FIRST AMENDMENT RIGHTS ARE IMPLICATED

In place of long-standing First Amendment standards, the Ninth Circuit introduces an unprecedented "managerial interest" test for the purpose of assessing the constitutionality of state legislative action with respect to nonpublic forum access. Idaho failed the court of appeals' test because it "does not *pervasively* manage local government workplaces or local government . . . payroll deduction programs." App. 29 (emphasis supplied). This conclusion ignores the fact that Idaho political subdivisions carry out governmental responsibilities assigned to them by the legislature and that those responsibilities must be discharged consistently with state statute. Here, the

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free speech or associational rights so long as such denial does not embody invidious discrimination directed "at the suppression of dangerous ideas" (*id.* at 548 (internal quotation marks omitted)) – *i.e.*, so long as the legislative action is viewpoint neutral. Forum analysis nonetheless appears more apt here given, most importantly, *Cornelius*'s recognition that a programmatic benefit can constitute a forum. In any event, as *Davenport* reiterated, the same reasonableness review standard governs in a nonpublic forum and in a *Regan*-like subsidization context.

involved political subdivision denies access to *its* payroll system for the purpose of making deductions for political activities because it lacks discretion to do otherwise. Section 44-2004(2) thus "pervasively manages" the day-to-day administration of that particular labor relations decision no less than the Right to Work Act does with respect to a political subdivision's lack of authority to enter into union security arrangements. Plainly enough, much more is required to satisfy the court of appeals' new standard.

The decision below leaves state legislatures, at least in the Ninth Circuit, with no option other than to seize control of their political subdivisions' payroll systems if they wish to impose limitations on employee-authorized payroll deductions for political purposes. The decision's effect, however, is not restricted to political activity-related deductions; the new standard extends to any deduction restriction that implicates associational or speech rights. As such, the decision has immediate ramifications for other States within the Ninth Circuit. Statutes in several of them authorize payroll deductions by political subdivisions for union dues but limit the authorization to the employee's exclusive bargaining representative. Alaska Stat. § 23.40.220 (2006); Haw. Rev. Stat. § 89-4 (1993 Repl. Vol.); Mont. Code Ann. § 39-31-203 (2007); Or. Rev. Stat. §§ 243.776, 292.055 (2005). Statutes in others authorize charitable deductions but limit them to certain organizations or a specified fundraising drive. Cal. Gov't Code § 1157.2 (West 1995); Wash. Rev. Code § 41.04.036 (2004). The

precise nature of these laws aside, their mere existence reflects a settled assumption by state legislatures that they have authority to control the payroll deduction practices of political subdivisions and thus to make or modify public policy on a statewide basis as they believe appropriate.

In sum, the court of appeals' opinion cuts deeply into a state legislature's power to establish social, economic and here campaign finance policy parameters within which subordinate local government entities must operate. The very odd result below – prohibiting a legislature by virtue of the First Amendment from mandating political subdivisions to take action which the latter have discretion to engage in without violating that Amendment – injects doctrinal confusion into an area of law which has been settled for decades, balkanizes state government through judicial fiat, and merits summary reversal or plenary review.

CONCLUSION

The petition for writ of *certiorari* should be granted.

Respectfully submitted,

LAWRENCE G. WASDEN
State of Idaho
Attorney General
CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division
CLAY R. SMITH
Deputy Attorney General
Counsel of Record
Natural Resources Division
P.O. Box 83720
Boise, ID 83720-0010
(208) 334-2400

December 2007