No. 06-

IN THE
Supreme Court of the United States

RONALD KIDWELL, JULIE JOHNSON,
AND CHARLES ARNETT,

Petitioners,

v.

CITY OF UNION AND JOHN APPLEGATE,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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March 7, 2007

QUESTION PRESENTED

Whether the Sixth Circuit erred by holding that the government speech doctrine allows the government to spend public funds directly to influence the outcome of an election.

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INTRODUCTION

A sharply divided panel of the Sixth Circuit in this case extended the government speech doctrine beyond all bounds of principle and precedent. According to the panel majority, that doctrine not only entitles the government to speak, but to spend public funds directly to influence the outcome of an election. That holding is not only wrong, but dangerous. In our constitutional democracy, elections are different. Elections are the fundamental check on the government. To hold that the government is free to spend public funds directly to influence the outcome of an election, as the panel majority did here, is essentially to hold that the government is free to ensure its own perpetuation in power. As the dissent below explained, "when the government uses tax dollars to enter an electoral contest and advocate in favor of a position or candidate, it distorts the very check on governmental power so central to our constitutional design—the next election." App. 12a (Martin, J. dissenting).

Indeed, this Court has long justified the government speech doctrine by reference to the government's accountability to the electorate. To hold that the doctrine allows the government to spend public funds directly to influence the outcome of an election, needless to say, makes a mockery of that justification. Up until now, it has been taken for granted that it would be "unconstitutional for the government to give money to an organization devoted to the promotion of candidates nominated by the Republican Party," and that "it would be just as unconstitutional for the government itself to promote candidates nominated by the Republican Party." *National Endowment for the Arts v. Finley*, 524 U.S. 569, 599 n.3 (1998) (Scalia, J., joined by Thomas, J., concurring in the judgment).

The panel majority below, however, relied upon the government speech doctrine to uphold a municipal government's direct expenditure of public funds to

campaign in an election against a citizen-proposed initiative intended to curb government spending. That expenditure was constitutionally permissible, according to the panel majority below, because the government spending at issue in the election was "government spe[ech] within the scope of its governance functions." App. 9a. But that ostensible "check" is no check at all. Our law recognizes no such thing as "governance functions": if an issue were beyond the government's legitimate scope, it would not be on the ballot in the first place. Nor is there any constitutionally significant distinction between official spending on election *issues* and official spending on particular *candidates*: if the government is free to spend public funds to support an issue, then it is obviously free to spend public funds to support a candidate running on that issue. The panel majority's efforts to cloak its radical departure from settled law under a veneer of reasonableness and nuance are thus wholly illusory. As the dissent below noted, "'[i]t may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure.'" App. 12a (Martin, J., dissenting; quoting *Boyd v. United States*, 116 U.S. 616, 635 (1886)).

This Court should nip in the bud the Sixth Circuit's pernicious and destabilizing distortion of the government speech doctrine and the electoral process: this is not an issue on which percolation in the lower courts is necessary or appropriate. The many governmental entities and officials in this country, both within and beyond the Sixth Circuit, should understand that they are not entitled to spend public funds directly to campaign in an election. They are free to take positions on the most controversial issues of the day, but a commonsense bright line separates such speech from direct spending to influence an election outcome. That point is particularly compelling where, as here, the government uses public

funds to campaign against a citizen-proposed ballot initiative designed to curb the government's power. Precisely because it is a "fixed star in our constitutional constellation … that no official, high or petty, can prescribe what shall be orthodox in politics … or other matters of opinion," *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943), the government speech doctrine does not allow the government to spend public funds directly to campaign in an election. The Sixth Circuit's contrary decision requires this Court's immediate intervention. Accordingly, this Court should grant this petition and either set the case for plenary review or summarily reverse the decision below.

OPINIONS BELOW

The Sixth Circuit's decision is reported at 462 F.3d 620 and reprinted in the Appendix ("App.") at 1-31a. The district court's unreported decision granting respondents' motion for summary judgment is reprinted at App. 33-44a.

JURISDICTION

The Sixth Circuit rendered its decision on September 8, 2006, App. 1a, and denied a timely petition for rehearing on October 10, 2006, App. 32a. On December 29, 2006, Justice Stevens granted petitioner's application to extend the time within which to file a petition for a writ of certiorari to March 9, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case arises from a series of disputed ballot initiatives relating to the creation and funding of a fire department by respondent City of Union, Ohio. Before 1997, Union's fire and emergency services were provided by neighboring Randolph Township. In that year, in response to a potential merger between Randolph Township and the nearby Village of Clayton, the Union City Council passed an emergency resolution establishing

its own city fire department. App. 2a Petitioners Ronald Kidwell, Julie Johnson, and Charles Arnett, Union taxpayers, challenged the resolution via a ballot initiative. App. 2-3a.

The election was preceded by a lively campaign in which the Union City Council used public funds to oppose the initiative. App. 3a. It is undisputed that the Union City Council used city workers and city equipment to hang a "Vote No" campaign banner across Main Street, mailed campaign leaflets to residents, advertised in local newspapers, and used the town newsletter to exhort city residents to vote against the initiative. *Id.* The city manager also worked closely with members of a local Political Action Committee (PAC) that opposed the initiative to coordinate the campaign expenditures of the city and the PAC. 6th Cir. App. 188-89, 216.

The election was held in November 1997, and the City Council's decision to establish a fire department was ratified. App. 3a. In the ensuing years, the Union City Council has continued to use public funds to campaign against ballot initiatives, including campaigning in favor of a tax levy to fund the new fire department in 1998, in opposition to ballot initiatives regarding land annexation and the provision of water and sewage services to non-residents in 2000 and 2001, and to promote tax levies in anticipation of referenda in 2001. *Id.*

In response to the City's actions during the 1997 fire department initiative, petitioners brought this lawsuit under 42 U.S.C. § 1983 against, *inter alia*, respondents the City of Union and John Applegate, the city manager. The U.S. District Court for the Southern District of Ohio (Rose, J.) entered judgment in respondents' favor, holding in relevant part that the use of public funds for viewpoint-based election campaigning did not violate the United States Constitution. App. 33-44a. Petitioners appealed.

In September 2006, a sharply divided panel of the Sixth Circuit affirmed. App. 1-31a. Despite recognizing

that "elections raise unique constitutional issues because they are the very foundation of a democratic system," App. 9a, the panel majority held that the government speech doctrine entitles governmental entities to spend public funds directly to influence elections so long as the campaign topic is "within the scope of its governance functions," *id.* Specifically, the majority held that "[b]ecause Union's speech in this case was germane to its role as governor, plaintiffs have failed to show that democratic legitimacy is threatened or that Union's compelled subsidy of its speech violates the Constitution." App. 10-11a.

Judge Martin, in a vigorous dissent, contended that "governmental campaigning in elections is implicitly prohibited by our constitutional design and republican form of government." App. 12a; *see also* App. 28a ("I believe that the Constitution properly prohibits the government from having a horse in the race when it comes to elections."). Judge Martin rejected the notion that any distinction could be drawn between governmental expenditures to support specific issues, on the one hand, and specific candidates, on the other. *See id.* Judge Martin also suggested that this case would provide an appropriate vehicle "for the Supreme Court to reconsider its Guarantee Clause jurisprudence." App. 29a n.5.

Petitioners moved for panel rehearing, but the motion was denied over Judge Martin's dissent. *See* App. 32a. This petition follows.

REASON FOR GRANTING THE WRIT

The Sixth Circuit Erred, And Destabilized American Constitutional Law, By Holding That The Government May Spend Public Funds Directly To Influence The Outcome Of An Election.

The panel majority below purported to apply the so-called government speech doctrine, but actually turned

that doctrine on its head. The doctrine simply recognizes the commonsense point that the government is entitled to spend public funds "'for speech and other expression to advocate and defend its own policies.'" *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 559 (2005) (quoting *Board of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000)). The government, in other words, is not muzzled in the marketplace of ideas, and may present its perspective on an array of issues from the mundane to the controversial. *See*, *e.g.*, *Johanns*, 544 U.S. at 559; *Southworth*, 529 U.S. at 229. Given that the government cannot act without spending public funds, it necessarily follows that the government is free to spend public funds on its own speech. *See*, *e.g.*, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995); *Keller v. State Bar of Cal.*, 496 U.S. 1, 12-14 (1990). A citizen who disagrees with the government's message has no constitutional right to stop the government from speaking. *Johanns*, 544 U.S. at 559; *see also id.* at 574 (Souter, J., dissenting); *Southworth*, 529 U.S. at 229. Rather, the citizen's recourse lies in the next election. *See also Johanns*, 544 U.S. at 563; *see also id.* at 575 (Souter, J., dissenting); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541-42 (2001); *Southworth*, 529 U.S. at 235; *Keller*, 496 U.S. at 12-13.

It is implicit in the government speech doctrine, thus, that the government may not use public funds directly to influence the outcome of an election. Were the law otherwise, the dissenting citizen's one avenue of recourse would be blocked.

The Sixth Circuit panel majority, however, extended the government speech doctrine to encompass the expenditure of public funds directly to influence the outcome of an election. *See* App. 1-11a. Without any apparent irony, the panel majority simply recited the general rule that a citizen's displeasure with government speech "does not necessarily equal unconstitutional compulsion, … and in most cases the electoral process—

not First Amendment litigation—is the appropriate recourse for such displeasure." App. 11a. But of course that rule does not work where the government is spending public funds directly to influence the outcome of "the electoral process" in the first place. *Id.*

The panel majority's insistence that "Supreme Court precedent requires us to reject the dissent's position," App. 9a n.4, is manifestly incorrect. The panel majority simply identified precedents involving "a government's right to defend its own policies." *Id.* (citing *Johanns*, *Southworth*, and *Rosenberger*). But none of those cases involved an attempted defense of government policies in the context of an election. That is an obvious and constitutionally significant distinction. The government may use public funds to disseminate its views on issues of the day, but may not use public funds directly to campaign in an election.

The government speech doctrine, in short, refutes rather than supports the result below. It is fundamentally inconsistent with our democratic constitutional structure to allow the government to spend public funds directly to influence the outcome of an election.

The panel majority below, however, insisted that a more "nuanced" position, App. 9-10a n.4, was warranted. Thus, the panel majority acknowledged that democratic principles "require some limit on the government's power to advocate during elections," but purported to find such a limitation in concept of "governance functions." App. 9a. Under this view, the government is free to spend money directly to influence the outcome of elections so long as that expenditure is "reasonably related to governance functions." App. 9a n.4.

The panel majority made up that ostensible limitation out of whole cloth, and it is both unsound in theory and unworkable in practice. The panel majority suggested that "governance functions" would not justify "speech in

support of a particular candidate for office." App. 9a n.4. But that is a non sequitur. If the government is entitled to spend money in support of a particular issue (say, a new fire station), there is no rational basis for saying that the government is not entitled to spend money in support of a particular candidate who supports the government's position on that issue. Thus, in the particular framework of this case, if the City of Union could spend public funds to advocate defeat of the citizen-funded spending initiative, surely it could have spent public funds to advocate defeat of a candidate who championed the citizen-funded initiative. The Sixth Circuit panel majority may not have wished to admit that it was breaking radical new constitutional ground, but it cannot pretend otherwise.

Indeed, prior to the decision below, most courts had squarely rejected the notion that the government may spend public funds directly to influence the outcome of an election. For the most part, courts have been able to avoid the constitutional issue by holding that such expenditures were unauthorized by statute. *See*, *e.g.*, *District of Columbia Common Cause v. District of Columbia*, 858 F.2d 1, 11 (D.C. Cir. 1988); *Campbell v. Joint Dist. 28-J*, 704 F.2d 501, 503-05 (10th Cir. 1983); *Burt v. Blumenauer*, 699 P.2d 168, 172 (Or. 1985); *Miller v. Miller*, 151 Cal. Rptr. 197, 201-02 (Cal. Ct. App. 1979); *Anderson v. City of Boston*, 380 N.E.2d 628, 637 (Mass. 1978), *stay granted*, 439 U.S. 1389 (1978) (Brennan, J., in chambers), *appeal dismissed,* 439 U.S. 1060 (1979); *Stanson v. Mott*, 551 P.2d 1, 9 (Cal. 1976); *Stern v. Kramarsky*, 375 N.Y.S.2d 235, 239-40 (N.Y. Sup. Ct. 1975); *Porter v. Tiffany*, 502 P.2d 1385, 1388-89 (Or. Ct. App. 1972); *Citizens to Protect Public Funds v. Board of Educ. of Parsippany-Troy Hills Twp.*, 98 A.2d 673, 676 (N.J. 1953) (Brennan, J.); *Sims v. Moeur*, 19 P.2d 679, 681-83 (Ariz. 1933); *Elsenau v. City of Chicago*, 165 N.E. 129, 131 (Ill. 1929); *Mines v. Del Valleca*, 257 P. 530, 537 (Cal. 1927); *Washington v. Superior Court*, 160 P. 755,

757 (Wash. 1916); *Shannon v. City of Huron*, 69 N.W. 598 (S.D. 1896). But, as the California Supreme Court has explained, constitutional concerns lay just beneath the surface of these decisions:

> Underlying this uniform judicial reluctance to sanction the use of public funds for elections campaigns rests an implicit recognition that such expenditures raise potentially serious constitutional questions. A fundamental precept of this nation's democratic electoral process is that the government may not "take sides" in election contests or bestow an unfair advantage on one of several competing factions. A principal danger feared by our country's founders lay in the possibility that the holders of governmental authority would use official power improperly to perpetuate themselves, or their allies in office (see, e.g., Madison, The Federalist Papers, Nos. 52, 53; 10 J. Richardson, Messages and Papers of the Presidents (1899) pp. 98-99 (President Jefferson)); the selective use of public funds in election campaigns, of course, raises the specter of just such an improper distortion of the democratic electoral process.

Stanson, 551 P.2d at 9; *see also Anderson*, 380 N.E.2d at 637 n.14 ("Surely, the Constitution of the United States does not authorize the expenditure of public funds to promote the reelection of the President, Congressmen, and State and local officials (to the exclusion of their opponents), even though the open discussion of political candidates and elections is basic First Amendment material.").

Those courts that have squarely addressed the constitutional question, like the panel below, sharply

divided over the appropriate analysis and result. Some courts have had little trouble concluding that government cannot spend public funds directly to influence the outcome of an election. Thus, for example, in *Mountain States Legal Foundation v. Denver School District #1*, 459 F. Supp. 357 (D. Colo. 1978), the court preliminarily enjoined a school district, on both statutory and constitutional grounds, from spending public funds to defeat a proposed state constitutional amendment. As the court explained, "[a] use of the power of publicly owned resources to propagandize against a proposal made and supported by a significant number of those who were taxed to pay for such resources is an abridgment" of fundamental constitutional rights. *Id*. at 360-61. Indeed, the court warned that a government campaign against a citizen-proposed initiative "would seem so contrary to the root philosophy of a republican form of government as might cause this Court to resort to the guaranty clause in Article IV, Section 4 of the United States Constitution." *Id.* at 361.

Similarly, in *District of Columbia Common Cause v. District of Columbia*, the court held that the government's use of public funds to oppose a ballot initiative was neither authorized by statute nor permitted by the First Amendment. 1986 U.S. Dist. LEXIS 18841, at *1 (D.D.C. 1986). On the constitutional question, the court invoked the overriding principle of official neutrality with respect to the outcome of an election: "[t]he government has an obligation to remain neutral and not spend public funds advocating or opposing an initiative on the ballot." *Id*. at *6-7; *see also id.* at *9 ("[T]he government's use of public funds to influence the outcome of an initiative election … infringe[s] upon the First Amendment rights of … voters and violate[s] the fundamental tenet that the government must remain neutral in the political process."). On appeal, the D.C. Circuit affirmed on statutory grounds, and did not reach the constitutional question. *See* 858 F.2d at 11.

In sharp contrast, the court in *Alabama Libertarian Party v. City of Birmingham* held that a city government was free to use public funds to encourage a "yes" vote on a property-tax referendum and a bond issue. 694 F. Supp. 814 (N.D. Ala. 1988). According to the court, "the City leadership has determined to promote a cause consistent with *the common needs of its citizens*," and those expenditures were neither "political [n]or ideological in nature." *Id.* at 817 (emphasis added); *see also id.* ("This was not a case where municipal funds were used to support a particular candidate, doctrine or ideology. Rather, the City merely solicited its citizens to provide funds to supply perceived needs common to all."). The court purported to distinguish *Mountain States* and *Common Cause* on the ground that the elections at issue in those cases were citizen initiatives. *See id.* at 819-20. "While this court may not agree that a governmental entity can never take sides in an initiative election, it certainly cannot agree that a governmental entity cannot expend funds to even publicly endorse its own measures." *Id.* at 819.

Similarly, in *Cook v. Baca*, the court upheld the government's right to use public funds to urge a "yes" vote on a tax-increase proposal. 95 F. Supp. 2d 1215, 1227-29 (D.N.M. 2000). The court relied on *Alabama Libertarian Party* in distinguishing citizen initiatives from other elections, and held that "[i]n this case, where the mayor provided minimal advocacy of a tax initiative he created, the Court finds no First Amendment violation." *Id.* at 1229; *see also id.* ("[T]he Court finds no ominous threat to the First Amendment in Defendants' minimal action."). The Tenth Circuit affirmed, holding that "[w]here government funds are used for minimal advocacy of a government initiative, there is no ominous threat to the First Amendment and thus no violation." 12 Fed. Appx. 640, 641 (10th Cir. 2001) (*per curiam*) (unpublished).

Although most of these cases did not reach the appellate level, this Court should not allow this conflict to

fester. Like the Sixth Circuit panel majority below, the courts in *Alabama Libertarian Party* and *Cook* overread this Court's government speech cases by holding that governments may not only speak, but may spend public funds directly to influence the outcome of an election. *See* App. 7-11a; *Alabama Libertarian Party*, 694 F. Supp. at 819-20; *Cook*, 95 F. Supp. 2d at 1229. With all due respect, the asserted distinction between elections that are triggered by citizen initiative and other elections, *see Alabama Libertarian Party*, 694 F. Supp. at 819-20; *Cook*, 95 F. Supp. 2d at 1229, makes no sense: regardless of how an election was triggered, the government may not take sides.

Even more astonishing is the suggestion (echoed by the Sixth Circuit panel majority below, *see* App. 9-11a) of a dispositive distinction between government spending on elections to promote "the common needs of its citizens," as opposed to "political or ideological" causes. By definition, elections *are* political and/or ideological. What might appear to some as a civic-minded tax-increase proposal may be viewed by others as an oppressive exercise of government power. Similarly, some may believe that "the common needs of [the] citizens" would be served by financing candidates of the Democratic (or Republican) Party, but that belief would not render such financing constitutional. The fact that particular elections (*e.g.*, bond financing) may not involve *partisan* politics certainly does not mean that they are not "political or ideological." Rather, as Judge Martin noted in his dissent below, "[t]o determine that something is in the common needs of citizens is itself a *political* decision." App. 23a (dissenting opinion; emphasis in original).

Nor is it true, as both the district court and the Tenth Circuit asserted in *Cook*, that only an "ominous threat to the First Amendment," as opposed to "minimal advocacy of a government initiative," can trigger a constitutional violation. 12 Fed. Appx. at 641; *see also* 95 F. Supp. 2d at 1229. A wolf does not always come dressed as a wolf;

indeed, the district court in *Cook* itself purported to be "[m]indful that unconstitutional practices may get their 'first footing' in the 'mildest and least repulsive form.'" *Id.* at 1227 (quoting *Boyd*, 116 U.S. at 616). Even forced assessments of a few dollars, when directed into constitutionally proscribed activity, can give rise to a constitutional violation. *See, e.g.*, *Lehnert v. Ferris Faculty Ass'n,* 500 U.S. 507, 522 (1991); *id.* at 545-46 (Marshall, J. concurring in part and dissenting in part).

At bottom, it is hard to think of a more grave threat to a constitutional democracy than the expenditure of public funds directly to influence the outcome of an election. This is neither a liberal issue nor a conservative issue. Indeed, as Judge Martin explained below, "governmental campaigning in elections is implicitly prohibited by our constitutional design and republican form of government." App. 12a (dissenting opinion); *see also Coalition to End the Permanent Congress v. Runyon*, 979 F.2d 219, 225 (D.C. Cir. 1992) (statement of Silberman, J.) ("[T]he very nature of American constitutional democracy requires that voters be able to choose freely between at least two viable parties or candidates."); *see also id.* ("I dare say that even if the Bill of Rights had not been adopted, the Supreme Court of Chief Justice Marshall's time … would have seen government support for one major-party candidate against the other, or direct subsidies to incumbents for campaign purposes, as threats to republican democracy itself."). The Oregon Supreme Court has echoed that conviction:

> the principles of representative government enshrined in our [federal and state] constitutions would limit government intervention on behalf of its own candidates or against their opponents even if the First Amendment and its state equivalents had never been adopted. Federal limits against abuse even in the states already were

> implied in the guarantee of a "Republican Form of Government."

Burt, 699 P.2d at 175 (citing U.S. const. art. IV, § 4).

As Judge Martin noted below, however, this Court has essentially read the Guarantee Clause out of the Constitution by holding that it is non-justiciable. *See* App. 29a n.5 (citing *Ohio ex rel. Bryant v. Akron Metro. Park Dist.*, 281 U.S. 74, 79-80 (1930); *Luther v. Borden*, 7 How. 1, 42 (1849)). Although this Court more recently suggested that it may be appropriate to reconsider that holding, it put off the issue for another day. *See New York v. United States*, 505 U.S. 144, 183-84 (1992). "Perhaps," as Judge Martin noted below, "that day has come." App. 29-30a n.5.

By extending this Court's government speech precedents to authorize direct government spending to influence the outcome of an election, the Sixth Circuit has dramatically destabilized the law. As a result, it now falls to this Court to correct that error before it further distorts both law and politics. If the majority of a panel of the U.S. Court of Appeals for the Sixth Circuit failed to understand that the government speech doctrine does not apply in the electoral context, it is high time for this Court to clarify that doctrine. *See R.J. Reynolds Tobacco Co. v. Shewry*, 423 F.3d 906, 927-28 (9th Cir. 2004) (Trott, J., dissenting) ("Though the Supreme Court has embraced the existence of a 'government speech' doctrine in [the context of compelled assessments], the Court has not provided a clear explanation of the reach or proper application of the doctrine.") (internal citation omitted), *cert. denied*, 126 S. Ct. 1344 (2006); *Sons of Confederate Veterans, Inc. v. Commissioner of Va. Dep't. of Motor Vehicles*, 305 F.3d 241, 245 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing *en banc*) (noting "the underdevelopment of the 'government speech' doctrine").

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari, and either set the case for plenary review or summarily reverse the decision below.

Respectfully submitted,

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March 7, 2007

APPENDIX

CONTENTS

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206
File Name: 06a0346p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

RONALD KIDWELL; JULIE JOHNSON; and CHARLES ARNETT,

Plaintiffs-Appellants, No. 04-4153

v.

CITY OF UNION; and JOHN APPLEGATE,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Ohio at Dayton.
No. 02-00365—Thomas M. Rose, District Judge.

Argued: October 27, 2005

Decided and Filed: September 8, 2006
Before: MARTIN, GIBBONS, and GRIFFIN, Circuit Judges.

COUNSEL

ARGUED: Thomas W. Condit, Cincinnati, Ohio, for Appellants. Lynnette P. Ballato, SUBASHI, WILDERMUTH & BALLATO, Dayton, Ohio, for Appellees. **ON BRIEF:** Thomas W. Condit, Cincinnati, Ohio, for Appellants. Lynnette P. Ballato, Tabitha D. Justice, SUBASHI, WILDERMUTH & BALLATO, Dayton, Ohio, for Appellees.

GIBBONS, J., delivered the opinion of the court, in which GRIFFIN, J., joined. MARTIN, J. (pp. 6-14), delivered a separate dissenting opinion.

OPINION

JULIA SMITH GIBBONS, Circuit Judge. Plaintiffs-appellants, taxpayers in the City of Union, Ohio, sued the city and John Applegate, the City Manager, under 42 U.S.C. § 1983. Among other arguments, Plaintiffs claim that the defendants violated the First and Fourteenth Amendments by advertising and otherwise advocating against a citizen-sponsored ballot initiative and in favor of a tax levy. The district court granted the defendants' motion to dismiss the claims with respect to all defendants on all issues except for the improper use of funds to combat the citizen initiative. The district court subsequently granted the defendants' motion for summary judgment on the final issue. Plaintiffs appeal.

I.

This case arises from a series of disputed ballot initiatives beginning in 1997 relating to the creation and funding of a fire department in the City of Union ("Union"). In 1997, Union's fire and emergency services (along with those of other neighboring communities) were provided by the neighboring township of Randolph. The combination of the restructuring of the townships and the perceived inadequacy in Union's emergency services led to changes in the fire department structure.

The Union Council ("Council") initially negotiated for a shared fire department with another neighboring town but ultimately passed an emergency resolution establishing a town fire department. The new fire department became effective on January 1, 1998.

The resolution establishing a Union fire department was challenged by the plaintiffs via a ballot initiative requiring a referendum. The referendum was preceded by a lively campaign in which the plaintiffs organized a "Vote Yes" campaign to retain the extant fire districts. The Council supported the opposite position and used public funds to disseminate information supporting its position to citizens. The Union City Charter permits the Council to "authorize the expenditure of public funds to provide information to the members of the public in connection with elections on proposed tax levies and bond issues . . . and other issues affecting the Municipality and not involving the election of candidates for a public office . . . ." Union City Charter § 5.09. Plaintiffs, however, object to the hanging of "Vote No" banners, mailing of leaflets to residents, advertising in local newspapers, and using the town newsletter to support the Council's position.[1] The referendum occurred in November 1997, and the Council's decision was ratified. Voters funded the new fire department in a May 1998 referendum.

Plaintiffs allege that the city continued to disseminate information and advocate for causes over the next several years. The advocacy included the use of public funds in 2000 and 2001 to oppose ballot initiatives regarding land annexation and provision of water and sewage services to non-residents and to promote tax levies in anticipation of referenda in 2001. The record is silent on the extent of the advertising by the Union government during these later referenda.

In response to Union's actions during the fire department referendum, the plaintiffs and others sued

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[1] Defendants contest the factual accuracy of some of the plaintiffs' allegations. For example, they say that the "Vote No" banner was bought by a political action committee and only hung by a city employee.

Union and Applegate, its Manager. The district court dismissed the claim. *Lash v. City of Union,* 104 F. Supp. 2d 866 (S.D. Ohio 1999). After the district court issued its ruling, the parties settled the case without appeal. The settlement agreement released the defendants from some claims but preserved plaintiffs' right to seek declaratory and injunctive relief relative to the use of funds to advocate a position on the 1997 ballot initiative and the 1998 tax levy for the fire department and to bring new claims arising after May 1998. The instant lawsuit against Union, Applegate, the mayor, and the town council of Union followed. The district court dismissed the mayor and town council after finding that they qualified, respectively, for qualified and absolute immunity. The court then granted summary judgment for Union and Applegate, holding that the spending for viewpoint-based advertising for citizen initiatives and tax levies in this case did not violate the First or Fourteenth Amendment. Plaintiffs argue on appeal that the city's advocacy was unconstitutional.[2]

II.

This case presents the rare instance when public citizens seek to limit the speech of a governmental entity rather than the reverse. The scenarios in which citizens may halt a government's speech are limited. "[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes." *Rosenberger v. Rector & Visitors of Univ. of Virginia,* 515 U.S. 819, 833 (1995). The government's power to fund its speech is similarly limited, however. In

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[2] Because we hold that defendants did not violate plaintiffs' constitutional rights, we need not consider the immunity issue. Further, plaintiffs have abandoned the state law claim for injunctive relief relating to the Manager's expenditure of funds without Council authorization.

NAACP v. Hunt, 891 F.2d 1555 (11th Cir. 1990), the Eleventh Circuit identified three categories of government actions that courts have determined to be unconstitutional infringement of free speech: (1) abridgment of equality in the field of ideas by granting differential access to public for a based on viewpoint; (2) monopolization of the "marketplace of ideas"; and (3) compulsion of citizens "to support candidates, parties, ideologies, or causes that they are against." 891 F.2d at 1565-66 (internal citations and quotations omitted). Plaintiffs assert that Union's actions violated two of these categories by denying them access to a public forum (the town newsletter and town treasury) and compelling them to support causes to which they are adverse. Plaintiffs urge us to find that government speech relating to elections is a form of unconstitutional compelled speech by distinguishing between governing and campaigning. Turning first to the issue of differential access to public fora, plaintiffs argue that Union unconstitutionally denied them access to two public fora—the town newsletter and the town treasury—to which others had been granted access. A government abridges "equality in the field of ideas" when it grants "the use of a [public] forum to people whose views it finds acceptable, but [denies its] use to those wishing to express less favored or more controversial views." *Police Dept. of City of Chicago v. Mosley,* 408 U.S. 92, 96 (1972).

Plaintiffs assert that they were denied access to the town newsletter, but, as the district court noted, they provide no evidence that they asked for or were refused access to that forum, even if it was public. Plaintiffs have similarly failed to present evidence that any other private group was given access to the newsletter other than a single quote about the contested issue that was responsive to another quote advocating the contrary position. "[W]hen government property is not dedicated to open communication the government may—without further justification—restrict use to those who participate

in the forum's official business." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 53 (1983). The single quotation cannot be construed as opening the newsletter as a public forum. *See Cook v. Baca,* 95 F. Supp. 2d 1215, 1221 (D.N.M. 2000) (noting that one factor in the determination of whether a public forum existed is the "extent of use of the forum"). Further, "when the government determines an overarching message and retains power to approve every word disseminated at its behest, the message must be attributed to the government for First Amendment purposes." *ACLU of Tenn. v. Bredesen,* 441 F.3d 370, 375 (6th Cir. 2006), citing *Johanns v. Livestock Mktg. Ass'n,* 544 U.S. 550, 559-67 (2005). Here, Union approved the message delivered in the town newsletter, so its content must be considered that of the city itself, not that of the quoted private citizen. *See Int'l Soc. for Krishna Consciousness, Inc. v. Lee,* 505 U.S. 672, 686 (1992) (O'Connor, J., concurring) (agreeing that airport is not a public forum). Plaintiffs thus cannot prevail on their public forum claim relating to the newsletter.

The town treasury is not a public forum; it is not "by tradition or designation a forum for public communication." *Perry,* 460 U.S. at 46. Nor is the treasury a limited purpose public forum; Union has not opened that treasury to the public by making any town funds available to private individuals or groups. Union has used the treasury for its own speech—a use that has no effect on the treasury as a public forum. *Id.* ("As we have stated on several occasions, the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." (quotations and citations omitted)); *cf. Rosenberger,* 515 U.S. at 833 (granting the government deference to use its funds to further its own viewpoint). To hold that Union's advocacy converts its treasury to a public forum would severely limit the town's ability to self-regulate and would be tantamount to a heckler's veto,

where the government could not speak for fear of opening its treasury to the public. This argument is therefore baseless, and the plaintiffs' public forum challenge cannot succeed.

As to the plaintiffs' second claim regarding compelled speech, governments cannot compel citizens to support positions with which they disagree. *Wooley v. Maynard,* 430 U.S. 705, 715 (1977) ("The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable."). This case, however, presents a compelled subsidy—not a compelled speech—claim because the plaintiffs were not themselves required to speak in any manner. While plaintiffs cast the compelled speech argument distinguishing governing and campaigning as separate from the compelled subsidy issue, we believe that it is more appropriate to describe the speech issue as a special case of the compelled subsidy issue, as dealt with in *Johanns v. Livestock Mktg. Ass'n,* 544 U.S. 550 (2005).

The Supreme Court has held in several instances that compelled subsidies may violate the First Amendment rights of citizens. *See Abood v. Detroit Bd. of Ed.,* 431 U.S. 209 (1977) (labor union political action); *Keller v. State Bar of Cal.,* 496 U.S. 1 (1990) (bar dues for political action); *Bd. of Regents of Univ. of Wis. Sys. v. Southworth,* 529 U.S. 217 (2000) (student activities fund for extracurricular activity). All of the cases in which the Supreme Court has held a compelled subsidy to be a First Amendment violation have involved subsidies of speech by private organizations rather than by the government itself. Governmental subsidies are distinguishable from the labor union, state bar, and state university contexts because it is imperative that government be free to make unpopular decisions without opening the public fisc to opposing views. The Supreme Court recognized this distinction in *Southworth*: "The government, as a general rule, may support valid programs and policies by taxes or

other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to defend its own policies." 529 U.S. at 229. More recently, in *Johanns v. Livestock Mktg. Ass'n,* the Court addressed a compelled subsidy directly in the governmental context:

> Our compelled-subsidy cases have consistently respected the principle that "[c]ompelled support of a private association is fundamentally different from compelled support of government." "Compelled support of government"—even those programs of government one does not approve—is of course perfectly constitutional, as every taxpayer must attest. And some government programs involve, or entirely consist of, advocating a position.

544 U.S. 550, 559 (2005) (quoting *Abood,* 431 U.S. at 259 n.13 (Powell, J., concurring in judgment)).

Here, the plaintiffs have challenged the expenditure of tax dollars by a governmental entity to advocate a position—a case that the Supreme Court deemed "perfectly constitutional" in *Johanns*. *Id.* at 2062. Though the plaintiffs acknowledge that the speech in this case is attributable to the government, they argue that the power of the government to compel subsidies for its speech is not as broad as the Supreme Court suggested in *Johanns*. Because the asserted subsidy arose in the context of an election, the plaintiffs argue that this court should find Union's speech to be unconstitutionally compulsive.[3]

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[3] Neither the plaintiffs nor the dissent have identified a single case where a court relied upon such a distinction to decide a

As the dissent recognizes, elections raise unique constitutional issues because they are the very foundation of a democratic system: where the government uses its official voice in an attempt to affect the identity of the people's elected representatives, it can undermine its legitimacy as a champion of the people's will and thereby subvert one of the principles underlying democratic society. *See Stanson v. Mott*, 551 P.2d 1, 9 (Cal. 1976) (discussing importance of elections in the democratic process). Although these principles require some limit on the government's power to advocate during elections, they do not support a bright line rule barring such speech, at least where the government speaks within the scope of its governance functions.[4]

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free speech question. Several cases discussed in the dissenting opinion, notably *Dist. of Columbia Common Cause v. Dist. of Columbia,* 858 F.2d 1 (D.C. Cir. 1988), *Stanson v. Mott,* 551 P.2d 1 (Cal. 1972), *Citizens to Protect Public Funds v. Bd. of Educ.,* 98 A.2d 673 (N.J. 1953), and *Mountain States Legal Found. v. Denver Sch. Dist. No. 1,* 459 F. Supp. 357 (D. Colo. 1978), were decided on statutory or other non-constitutional grounds, so they lack direct applicability here. Moreover, they were all decided before *Southworth, Rosenberger,* and *Johanns* clarified the extent to which governments do have the right to support their own positions on contested issues. As a result, a close analysis of these cases is of limited value in this case.

[4] The dissent conclusorily rejects any distinction between permissible government speech reasonably related to governance functions and impermissible speech, for example, speech in support of a particular candidate for office. Common sense militates and Supreme Court precedent requires us to reject the dissent's position. The dissent wrongly ignores not only the Supreme Court's recent strengthening of its compelled subsidy jurisprudence in *Johanns*, but also *Southworth's* and *Rosenberger's* more generalized holdings as to a government's right to defend its own policies. A bright line rule against any governmental speech regarding any referendum would violate

Governments must serve their citizens in myriad ways, including by provision of emergency services, and these activities require funding through taxation. Union's speech related to emergency service and tax initiatives thus fits squarely within its competence as governor and was made in the context of "advocat[ing] and defend[ing] its own policies." *Southworth,* 529 U.S. at 229. The issues on which the city advocated were thus germane to the mechanics of its function, and are clearly distinguishable from the hypothetical cases of government speech in support of particular candidates suggested by the dissent. *See Rosenberger,* 515 U.S. at 833; *Southworth,* 529 U.S. at 229. Where speech is not so directed, the result may be different: in *Mountain States Legal Foundation v. Denver School District #1,* by contrast, the court ruled illegal a local school board's use of public funds for advocacy in a statewide initiative regarding education funding. 459 F. Supp. 357, 361 (D. Colo. 1978). Unlike Union's actions, the school board's advocacy in Mountain States was not directly related to its governance functions and was struck down.

In this case, Ohio's home rule system made Union's policies subject to acceptance or rejection by ballot. In this context, a limit on government speech during elections would allow hecklers to silence the government on issues in which it has an interest and expertise – and on which citizens have an interest in hearing their government's perspective. *See Ala. Libertarian Party v. City of Birmingham,* 694 F. Supp. 814, 817 (N.D. Ala. 1988) (upholding promotional campaign relating to levies where the subject of the campaign was "related to the common needs of all citizens"). Because Union's speech in this case was germane to its role as governor, plaintiffs

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these clear dictates favoring a more nuanced test for the propriety of such speech.

have failed to show that democratic legitimacy is threatened or that Union's compelled subsidy of its speech violates the Constitution.

The natural outcome of government speech is that some constituents will be displeased by the stance their government has taken. Displeasure does not necessarily equal unconstitutional compulsion, however, and in most cases the electoral process—not First Amendment litigation—is the appropriate recourse for such displeasure. *See Johanns,* 544 U.S. at 563 (noting the importance of political accountability of decisionmakers). The needs of effective governance command that the bar limiting government speech be high. The plaintiffs in this case have failed to show that the City of Union's expenditures crossed the line separating a valid compelled subsidy from an unconstitutional one, and valid advocacy from prescription of orthodoxy.

For the foregoing reasons, we affirm the district court decision.

DISSENT

BOYCE F. MARTIN, JR., Circuit Judge, dissenting. "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure." *Boyd v. United States,* 116 U.S. 616, 635 (1886). So it is in this case. Here, we confront state action that is at the same time innocuous yet threatening to our republican form of government. Although local governmental expenditures to advocate in an election may seem commonplace and uninspiring, I take the position that governmental campaigning in elections is implicitly prohibited by our constitutional design and republican form of government. "Free and honest elections are the very foundation of our republican form of government," *MacDougall v. Green,* 335 U.S. 281, 288 (1948) (Douglas, J., dissenting), and when the government uses tax dollars to enter an electoral contest and advocate in favor of a position or candidate, it distorts the very check on governmental power so central to our constitutional design—the next election—that I must conclude such activity is unconstitutional.

There are, of course, broad competing principles on both sides of the issue. On the side of the government, it can be argued that government must be permitted to speak or it will cease to be effective as a government. *ACLU v. Bredesen,* 441 F.3d 370, 381 (6th Cir. 2006) (Martin, J., concurring in part and dissenting in part) ("[T]he government may generally speak and control its own message."). On the other hand, as Thomas Jefferson wrote in 1801, "it is expected that [a government official] will not attempt to influence the votes of others nor take any part in the business of electioneering, that being deemed inconsistent with the spirit of the Constitution

and his duties to it." 1 James D. Richardson, A Compilation of the Messages and Papers of the Presidents, 1789-1897, at 98-99 (1899).

The government speech doctrine, while in the early stages of development, provides support for the proposition that government must be able to speak to function. Government must be able to adopt policies and advocate for and defend against those policies.[1] If private speech were the only permissible speech regarding governing, the role of government would drastically change and the idea that governmental policies reflect and are representative of the majority would be lost. This indicates that the government must, of course, be permitted to speak in order to govern and educate.

The taxpayers here have conceded the existence of the government speech doctrine as a general matter, but draw a distinction between government speech related to governing and speech intended to campaign or to influence an election. I think they make a good point. There are several cases both at the state and federal district court level reviewing the propriety of governmental expenditures designed to influence local elections. It is worthwhile to review these cases.

Most often these cases arise in the context of municipal bond initiatives where the local government uses taxpayer funds to campaign in favor of the proposal.

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[1] Of course, a necessary corollary to the doctrine of government speech is governmental accountability for that speech. "Otherwise there is no check whatever on government's power ..." *Johanns,* 125 S. Ct. at 2068 (Souter, J., dissenting). Thus, the government, when it speaks, ought to be required to make clear that it is in fact the government that is speaking. Government speech ought to be labeled as such to prevent confusion and subliminal governmental propaganda in the marketplace of ideas.

A prominent case from the Supreme Court of California is *Stanson v. Mott,* 551 P.2d 1 (Cal. 1976). *Stanson* involved a taxpayer's complaint that the California Department of Parks and Recreation had authorized the expenditure of more than $5,000 of public funds to promote the passage of the bond issue placed on the ballot by the state legislature. *Id.* at 3. The court held that "at least in the absence of clear and explicit legislature authorization, a public agency may not expend public funds to promote a partisan position in an election campaign; in the present case, no legislative provision accorded the Department of Parks and Recreation such authorization." *Id.* The court did find legislative authority to "disseminate 'information' to the public relating to the bond election" but the department "in fulfilling this informational role, was obligated to provide a fair presentation of the relevant facts." *Id.* The promotional materials disseminated by the department in Stanson were similar to those complained about in the instant case. *See id.* at 4.

The Supreme Court of California found that the department lacked the express legislative authority for the expenditure of funds designed to influence the bond proposal. That court cited with approval to, *Citizens to Protect Pub. Funds v. Board of Educ.,* 98 A.2d 673 (N.J. 1953), an opinion written by then New Jersey Supreme Court Justice and future United States Supreme Court Justice William Brennan, discussing the legality of a school board's expenditure of public funds on a booklet concerning a school building program which was to be the subject of an upcoming bond election. *See Stanson,* 551 P.2d at 8. The booklet in New Jersey exhorted "Vote Yes" on several pages and warned of consequences "if You Don't Vote Yes." *Id.* The New Jersey Supreme Court, through Justice Brennan concluded that

> the board made use of public funds to advocate one side only of the controversial question without affording the dissenters

> the opportunity by means of that financed medium to present their side, and this imperiled the propriety of the entire expenditure. The public funds entrusted to the board belong equally to the proponents and opponents of the proposition, and the use of the funds to finance not the presentation of facts merely but also arguments to persuade the voters that only one side has merit, gives the dissenters just cause for complaint. The expenditure then is not within the implied power and is not lawful in the absence of express authority from the legislature.

Citizens to Protect Pub. Funds, 98 A.2d at 677.

In *Stanson,* the Supreme Court of California further remarked that "[i]ndeed, every court which has addressed the issue to date has found the use of public funds for partisan campaign purposes improper, either on the ground that such use was not explicitly authorized or on the broader ground that such expenditures are never appropriate." *Stanson,* 551 P.2d at 8-9 (citations omitted). Commenting further, the court noted that

> [u]nderlying this uniform judicial reluctance to sanction the use of public funds for election campaigns rests on an implicit recognition that such expenditures raise potentially serious constitutional questions. A fundamental precept of this nation's democratic electoral process is that the government may not 'take sides' in election contests or bestow an unfair advantage on one of several competing factions. A principal danger feared by our country's founders lay in the possibility that the holders of governmental authority would use official

> power improperly to perpetuate themselves, or their allies, in office; the selective use of public funds in election campaigns, of course, raises the specter of just such an improper distortion of the democratic electoral process.

Id. at 9 (citations omitted).[2]

Notwithstanding its comments regarding the constitutional scope of the wrong, the court explicitly denied resolving the federal constitutional question. According to the court, "we need not resolve the serious constitutional question that would be posed by an explicit legislative authorization of the use of public funds for partisan campaigning, because the legislative provisions relied upon by [the department] certainly do not authorize such expenditures." *Id.* at 10.

Two additional features of the decision are relevant to my analysis of the issue. First, the Supreme Court of California refused to draw a distinction between public funds to support a particular candidate and public funds to promote a ballot measure. *Id.* at 9. According to the court, "past authorities have not drawn such a distinction between 'ballot measure' and 'candidate' campaigning; to date the judicial decisions have uniformly held that the use of public funds for campaign expenses is as improper in bond issue or other noncandidate elections as in

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[2] The court also commented on "[t]he importance of government impartiality in electoral matters," and observed that in another recent case it had stated that "[a] fundamental goal of a democratic society is to attain the free and pure expression of the voters' choice of candidates" and that "our state and federal Constitutions mandate that the government must, if possible, avoid any feature that might adulterate or, indeed, frustrate, that free and pure choice." *Stanson,* 551 P.2d at 10 (citations omitted).

candidate elections." *Id.* Second, the court noted that reasonable expenditures for *informational* purposes pose no problem, while exhortational campaign expenditures are improper. The court did concede that "[p]roblems may arise, of course, in attempting to distinguish improper 'campaign' expenditures from proper 'informational' activities." *Id.* at 11. The court instructed that "no hard and fast rule governs every case" and that "a careful consideration of such factors as the style, tenor and timing of the publication" are necessary to resolve the difficult question. *Id.* at 12.

The *Stanson* case is informative, but of course, not controlling. Additionally, although it discussed the constitutional question and expressed its concerns, the court explicitly declined to rule on it. Instead, the court's invalidation of the expenditures was based on legislative enactment (or an absence thereof) and not on the First Amendment. Moreover, in discussing the constitutional question, the court did not explicitly ground its concerns in any particular provision of the United States Constitution. Rather, as discussed above, the court stated that the expenditures "raise potentially serious constitutional questions." *Id.* at 9. These questions, it appears, relate to a "fundamental precept of this nation's democratic electoral process," to concerns over the use of governmental authority to "improperly perpetuate themselves," and finally, to concerns over the "improper distortion of the democratic *electoral* process." The concerns explicitly relate to the electoral process and make no mention of government speech in the general process of governing. Moreover, it appears that the court's expressed constitutional concerns stemmed from the structure and purpose of the Constitution and not necessarily the First Amendment (as alleged in the instant case). Finally, the court did note that (to that date) every court that had reviewed such election or campaign expenditures had found them improper, though all on statutory, and not constitutional grounds.

Another case decided several years after the *Stanson* decision is *District of Columbia Common Cause v. District of Columbia*, where the D.C. Circuit held that expenditures made by the city government in a campaign to defeat a ballot proposal were illegal. 858 F.2d 1 (D.C. Cir. 1988) ("We hold that the individual appellees have standing as municipal taxpayers to challenge expenditures by the District of Columbia government to *influence* the outcome of an initiative. On the merits, we conclude that the expenditures were illegal."). The district court found that the expenditures violated both statutory law as well as the federal constitution, ruling that the promotion of only one side of a contested election issue amounted to a content-based government subsidy. The D.C. Circuit affirmed on statutory grounds but explicitly declined to address the argument that the expenditures violated the First Amendment. *Id.* at 11.

Another case invalidating expenditures on statutory grounds is *Mountain States Legal Foundation v. Denver School District # 1,* 459 F. Supp. 357 (D. Colo. 1978). *Mountain States Legal Foundation* involved a voter proposed petition to amend the Colorado Constitution "in a manner which would affect the authority of all levels of representative government in Colorado to spend public funds." *Id.* at 358. The Board of Education of School District No. 1 adopted a Resolution declaring its opposition to the proposed state constitutional amendment and urging that it be defeated. The Resolution also authorized the use of school district "equipment, materials, supplies, facilities, funds and employees necessary to (1) Distribute campaign literature to School District employees, and the parents of children in the schools. (2) The use of telephones and facilities of the School District during non-working hours by volunteers for the purpose of contacting the public to urge the defeat of this amendment." *Id.*

The district court in *Mountain States* favorably cited to both *Stanson* and *Citizens to Protect Public Funds* and

found that the school district had exceeded its legislatively granted authority under state law. *Id.* at 359-60. The court further commented on the constitutional question, though it was not key to the resolution of the case. The court remarked that an interpretation of Colorado's state Campaign Reform Act allowing this type of "partisan use of public funds . . . would violate the First Amendment to the United States Constitution." *Id.* at 360. According to the court, "[i]t is the duty of this Court to protect the political freedom of the people of Colorado. The freedom of speech and the right of the people to petition the government for a redress of grievances are fundamental components of guaranteed liberty in the United States." *Id.* (citation omitted). Thus, the court appears to have based its ruling on both the First Amendment's freedom of speech clause as well as the right to petition the government for a redress of grievances—an apparent link to the fact that the election was over a voter initiated proposed constitutional amendment to alter the structure and powers of government.

The court further stated that "[a] use of the power of publicly owned resources to propagandize against a proposal made and supported by a significant number of those who were taxed to pay for such resources is an abridgment of those fundamental freedoms." *Id.* Expressing concern that governmental opposition to a proposed constitutional amendment would have "the effect of shifting the ultimate source of power away from the people," the court concluded that "[p]ublicly financed opposition to the exercise of that right contravenes the meaning of both the First Amendment to the United States Constitution and Article V, Section 1 of the Constitution of Colorado." *Id.* at 361. Adding an additional basis, the court stated that "the expenditure of public funds in opposition [to a citizen led effort] violates a basic precept of this nation's democratic process. Indeed, it would seem so contrary to the root philosophy

of a republican form of government as might cause this Court to resort to the guaranty clause in Article IV, Section 4 of the United States Constitution." *Id.*

In sum, the *Mountain States* court appears to have held that the expenditure of public funds violated state statutes, the state constitution, and the federal constitution. In reaching that conclusion with respect to the federal constitution, however, while the court mentioned the First Amendment, it devoted little explanation as to why citizens' free speech rights are violated in this situation. Instead, the court focused more on basic democratic principles, fundamental freedoms, and guaranteed liberties, and it did so emphatically with reference to the fact that this involved a voter initiated *constitutional* amendment and the government acted in *opposition* to it. In doing so, the court appears to have concluded that public expenditures on campaigns in this situation undermines the validity of elections and the constitutional amendment process and shifts the balance of power away from the citizens. The court's opinion demonstrates that grounding this principle in a specific constitutional provision (as opposed to the structure and democratic purpose of the constitution) proves somewhat difficult.

While the taxpayers rely on *Mountain States Legal Foundation*, the City relies on *Alabama Libertarian Party v. City of Birmingham,* 694 F. Supp. 814 (N.D. Ala. 1988). Like this Court is asked to do in the instant case, the district court in *Alabama Libertarian Party* considered only federal constitutional question and did not consider any claims arising under state law. There were two elections at issue in *Alabama Libertarian Party*. The first was an election regarding a city-proposed property tax increase for library enhancements and a levy on telephone subscribers for enhanced 911 emergency services. *Id.* at 815. Prior to the election, "the City launched a promotional campaign to encourage passage of the propositions." *Id.* The campaign included

newspaper and radio advertisements. *Id.* The second was another special election held a year later over a proposed bond issue and this time the City distributed leaflets and brochures in favor of the bond issue. *Id.* The taxpayer plaintiffs claimed that the campaigning violated their First Amendment rights.

The district court in *Alabama Libertarian Party* began by reviewing the Supreme Court's decision, *Abood v. Detroit Board of Educ.,* 431 U.S. 209 (1977). In *Abood,* the Court considered whether organizations to which dues must be paid as a mandatory condition of state employment may use those dues to advance political causes not supported by all of the members. The Court held that the exactions violated the First Amendment by allowing the funds to be used for political and ideological purposes—that is, the First Amendment generally prohibits compelled subsidies for political purposes. *Id.*

After considering *Abood*, the district court concluded that the "critical" issue is "whether a portion of plaintiffs' tax funds were expended for 'political' and 'ideological' purposes." *Alabama Libertarian Party,* 694 F. Supp. at 817. The district court then concluded that the campaigns waged by the City and the funds spent were not on "political" or "ideological" causes, but rather were "related to the common needs of all citizens." *Id.* ("The court does not believe that the City's advertising campaign was political or ideological in nature."). Rejecting the taxpayers' constitutional claims, the district court found that "the City leadership has determined to promote a cause consistent with the common needs of its citizens. It is not requiring plaintiffs to be the courier for an ideological or political message." *Id.* The court appears to have drawn a distinction between situations where funds are "used to support a particular candidate, doctrine or ideology" and the case before it where "the City merely solicited its citizens to provide funds to supply the perceived needs common to all." *Id.* In the latter situation, the court reasoned, the "City and its

officials not only have the right, but the duty, to determine the needs of its citizens and to provide funds to service those needs." *Id.*

The court also noted that the City had already passed ordinances in favor of the levies and therefore had already taken public positions on the issues—thus, spending funds to advertise was no more than publicizing the positions already taken. *Id.* at 818. Drawing distinctions between past cases, the district court noted that in *Common Cause* and *Mountain States Legal Foundation*, the issue confronted was a citizens's initiative election while in Alabama, the election was over the City's own initiative. *Id.* at 819. Thus, the district court stated that "[w]hile this court may not agree that a governmental entity can never take sides in an initiative election, it certainly cannot agree that a governmental entity cannot expend funds to even publicly endorse its own measures." *Id.* The court found further support from its ruling through the political process, noting that citizens who disapprove of the governmental election campaigning may dissent at the polls. *Id.* at 820. Moreover, the court also suggested that not permitting the government to advocate "would be violative of their own First Amendment rights." *Id.*[3] Finally, the court concluded that

> It would be a strange system indeed which would allow the City to determine its needs, allow it to adopt ordinances calling for elections to fulfill those needs, allow it to bear the expense of those elections, and then require it to stand

[3] Presumably the district court was discussing the First Amendment rights of the individual city officials rather than asserting that the First Amendment guarantees the government the freedom of speech—which it does not.

> silently by before the issues are voted on. Obviously, the City is not neutral under such circumstances and should not be required to appear so.

Id. at 821.

The district court's opinion in *Alabama Libertarian Party* is interesting for several reasons in addition to the fact that it is the only opinion to address solely the First Amendment and no questions of state law. The first point of note is the district court's conclusion that the "critical" issue is whether the funds spent are used for "political" or "ideological" purposes. More curious is the district court's conclusion that the governmental advertising campaign exhorting the citizens to "VOTE YES!" was neither political nor ideological, but rather "related to the common needs of all citizens." I do not endorse a distinction between electioneering expenditures for the common needs of citizens versus expenditures for political purposes. To determine that something is in the common needs of citizens is itself a political decision. Thus, I do not think that a principled basis for such a distinction exists, and I do not find this approach to be useful in this context.

Second, the *Alabama Libertarian Party* court, like the district court in *Mountain States Legal Foundation*, emphasized the fact that the Alabama election was for tax levies and not a constitutional amendment. The district court, however, did not explain why a different result is compelled by this distinction. And third, the district court drew another distinction between governmental *opposition* to a citizen sponsored initiative and governmental *promotion* of proposed issues. Stated another way, the court appeared to find it more constitutionally troubling for the government to say "Vote No," than for it to say "Vote Yes."

In *Cook v. Baca,* 95 F. Supp. 2d 1215 (D.N.M. 2000), a New Mexico district court confronted the First

Amendment constitutional issue posed by these cases and sided with the district court in *Alabama Libertarian Party*. At the outset, the court noted that "[a]t some threshold level, a public entity must refrain from spending public funds to promote a partisan position during an election campaign." *Id.* at 1227 (quoting *Carter v. City of Las Cruces,* 915 P.2d 336 (N.M. Ct. App. 1996)). The court was also "[m]indful that unconstitutional practices may be their 'first footing' in the 'mildest and least repulsive form.'" *Id.* (quoting *Boyd v. United States,* 116 U.S. 616, 635 (1886)). Nevertheless, the court found "no ominous threat to the First Amendment in Defendants' minimal actions," and rejected the taxpayers' claim. In doing so, the district court, like the court in *Alabama Libertarian Party* drew a distinction between opposition to a citizen proposed state constitutional amendment and the expenditure of funds "to promote a tax initiative which was proposed by the mayor himself." *Id.* at 1227 n.18 (emphasis deleted). The district court concluded by mentioning the Supreme Court's decision in *Board of Regents of the Univ. of Wisconsin System v. Southworth,* 529 U.S. 217 (2000). There the Court stated that

> It is inevitable that government will adopt and pursue programs and policies within its constitutional powers but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens. The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies.

Id. at 229. The district court, however, did not necessarily address any differences, should they exist,

between ordinary advocacy and defense of valid governmental programs and attempts to influence elections.

To recap, courts have been hostile toward the type of electioneering expenditures at issue in this case. *See e.g., District of Columbia Common Cause v. District of Columbia,* 858 F.2d 1 (D.C. Cir. 1988) (affirming district court's decision holding expenditures improper on statutory grounds, but not reaching constitutional question); *Cook*, 95 F. Supp. 2d at 1227 ("At some threshold level, a public entity must refrain from spending public funds to promote a partisan position during an election campaign."); *Mountain States Legal Foundation*, 459 F. Supp. at 360 ("[T]he expenditure of public funds in opposition [to a citizen led constitutional amendment] violates a basic precept of this nation's democratic process. Indeed, it would seem so contrary to the root philosophy of a republican form of government ..."); *Stanson*, 551 P.2d at 9 ("A fundamental precept of this nation's democratic electoral process is that the government may not 'take sides' in election contests or bestow an unfair advantage on one of several competing factions."). The vast majority of courts that have issued injunctions against governmental campaign expenditures have done so based, for the most part, on state law.[4] The

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[4] As discussed earlier, the plaintiffs' state law claim was dismissed by the district court for a failure to exhaust state remedies and the plaintiffs did not appeal this decision. We therefore have before us only a First Amendment claim. We do not know the status of any state proceedings or if they exist, but I take note of a provision of the Union Charter that states:

> Section 5.09. Public Information on Issues. The council shall have the power to appropriate and authorize the expenditure of public funds to provide information to the members of the public in connection with elections on proposed

courts finding governmental campaign expenditures to be unlawful based on state or local law have, in dicta, found additional support in various parts of the Constitution—the First Amendment, the general purpose and structure of the Constitution, the Guaranty Clause, and "democratic principles." On the other hand, the courts finding no constitutional problem with the expenditures have done so on various and inconsistent bases. Some courts have utilized traditional forum analysis in the context of viewpoint discrimination. Other courts have simply held that government has a right to speak at all times and need not remain neutral in the context of an election. The district court in this case applied a case involving a state's decision to fly the Confederate flag over the state house—basically an application of forum analysis and consideration of viewpoint discrimination.

I agree with the courts who have opined that electioneering expenditures raise serious constitutional concerns. I concede that the government may ordinarily speak to advocate and defend its own policies. The caveat, however, is always that the citizens' remedy is at the ballot box in the next election. In these cases, however, the government is distorting the *only* check on

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> tax levies and bond issues for the purposes of the Municipality, and other issues affecting the Municipality and not involving the election of candidates for a public office, or the recall of a member of the Council.

Why the plaintiffs have not more vigorously pursued their claim under state law, or why they have not argued for pendant jurisdiction, we can only speculate. Thus, the majority's decision that these specific expenditures do not run afoul of the First Amendment might prove irrelevant if Section 5.09 is interpreted to permit, as *Stanson* did, expenditures to *inform*, but not to *persuade*.

its power. I am not sure I would limit this argument to the confines of the First Amendment; rather, to me, it is more of a structural argument regarding democratic principles and the structure and purpose of the constitution. In *Burt v. Blumenauer*, the Oregon Supreme Court persuasively wrote that: "It hardly seems necessary to rely on the First Amendment, at least when government resources are devoted to promoting one side in an election on which the legitimacy of the government itself rests. The principles of representative government enshrined in our constitutions would limit government intervention on behalf of its own candidates or against their opponents even if the First Amendment and its state equivalents had never been adopted." 699 P.2d 168, 175 (Or. 1985).

The courts that have reviewed these questions have almost universally relied upon state or local law to invalidate them. In dicta, however, many courts have gone on to speculate as to the constitutional question. These courts have referenced the Framers' concerns with governmental campaigning and the expenditure of funds in that context, specifically citing the Framers' concern with attempts to perpetuate a government in office. In this case, we are faced with tax levies and fire departments. One might claim that, as at least one court did, these are issues for the common good and therefore are of little constitutional concern. Continuing down this path, one might ask whether the government could campaign and expend funds promoting a city council resolution extending the term lengths of current office holders, say for one year, for ten years, or even for life. This idea, and the idea that governmental funds could be spent in an effort to perpetuate a government in office is no doubt antithetical to the values underlying the Constitution.

There is no constitutional provision, however, that says governments may not make attempts to perpetuate themselves or spend funds pursuant thereto. And, there

is no principled way, as I see it, to distinguish between the fire department election and any other—if one is unconstitutional, the others must be as well. Another example from recent history (setting aside state laws that may prevent the practice)—could former California Governor Gray Davis have expended governmental funds to campaign, advertise, and electioneer against his recall? Yet again another scenario that appears antithetical to democratic principles. Furthermore, there appears to be nothing in the First Amendment or any other constitutional provision that would prevent the government from spending taxpayer funds or actively campaigning in support of a particular candidate. It would tear at the fabric of democracy to permit as much despite the absence of a specific constitutional provision to defeat this type of governmental abuse, and I see no relevant distinction between that abuse and the one before this Court today.

I believe that the Constitution properly prohibits the government from having a horse in the race when it comes to elections. When government advocates on one side of an issue, the ultimate source of governing power is shifted away from the people and the threat of official doctrine exists. Of course, the threat is not as omnipresent today in the United States as it is in some other countries. There is no real evidence in any of these cases on point that the government as speaker crowded out private speech. There is no evidence that the government sought to suppress or in any way discourage other speech of a contrary nature. The absence of this evidence, however, does not in my opinion cure the underlying evil—that is, ordinary democratic controls are insufficient as a remedy in situations where governmental influence threatens to undermine the

independent political process.[5] Governmental advocacy and campaign expenditures could arguably threaten to

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[5] Perhaps it is time for the Supreme Court to reconsider its Guarantee Clause jurisprudence. The Guarantee Clause, found in Article IV, Section 4 of the Constitution states: "The United States shall guarantee to every State in this Union, a Republican Form of Government, and shall protect each of them against Invasion and on Application of the Legislature or of the Executive (when the Legislature cannot be convened) against domestic Violence." When a claim is alleged under the Guarantee Clause, the Supreme Court has dismissed it stating some version of the following: "As to the guaranty to every state of a republican form of government, it is well settled that the questions arising under [this clause] are political, not judicial, in character, and thus for the consideration of the Congress and not the courts." *Ohio ex rel. Bryant v. Akron Metro. Park Dist.,* 281 U.S. 74, 79-80 (1930) (citations omitted). Prominent scholars have suggested that the Court reconsider this approach. *See* Erwin Chemerinsky, *Cases Under The Guarantee Clause Should Be Justiciable,* 65 U. Colo. L. Rev. 849 (1994). Additionally, in *New York v. United States,* 505 U.S. 144, 184 (1984), Justice O'Connor, writing for the majority, stated that: "The view that the Guarantee Clause implicates only nonjusticiable political questions has its origin in *Luther v. Borden,* 7 How. 1, 12 L. Ed. 581 (1849), in which the Court was asked to decide, in the wake of Dorr's Rebellion, which of two rival governments was the legitimate government of Rhode Island. The Court held that 'it rests with Congress,' not the judiciary, 'to decide what government is the established one in a State.' *Id.,* at 42. Over the following century, this limited holding metamorphosed into the sweeping assertion that '[v]iolation of the great guaranty of a republican form of government in States cannot be challenged in the courts.' *Colegrove v. Green,* 328 U.S. 549, 556, 66 S. Ct. 198, 1201, 90 L.Ed. 1432 (1946) (plurality opinion). This view has not always been accepted. In a group of cases decided before the holding of Luther was elevated into a general rule of nonjusticiability, the Court addressed the merits of claims founded on the Guarantee Clause without any suggestion that the claims were not justiciable. *See Attorney General of Michigan ex rel. Kies v.*

undermine free and fair elections, could be coercive, and could reasonably undermine the reliability and outcome of elections where the government acts as a participant.

Moreover, it could be argued that when the government takes sides in an election, it gives a content or viewpoint based subsidy to those advocating the position the government chooses to side with. In the ordinary case of governmental action outside of an election, political controls can remedy citizen disagreement with governmental actions. Citizens can make their voices known at the ballot box in the next

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Lowrey, 199 U.S. 233, 239, 26 S. Ct. 27, 29, 50 L. Ed. 167 (1905); *Forsyth v. Hammond,* 166 U.S. 506, 519, 17 S. Ct. 665, 670, 41 L.Ed. 1095 (1897); *In re Duncan,* 139 U.S. 449, 461-62, 11 S. Ct. 573, 577, 35 L. Ed. 219 (1891); *Minor v. Happersett*, 21 Wall. 162, 175-76, 22 L. Ed. 627 (1875). *See also Plessy v. Ferguson,* 163 U.S. 537, 563-64, 16 S. Ct. 1138, 1148, 41 L. Ed. 256 (1896) (Harlan, J., dissenting) (racial segregation "inconsistent with the guarantee given by the Constitution to each State of a republican form of government"). More recently, the Court has suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions. *See Reynolds v. Sims,* 377 U.S. 533, 582, 84 S. Ct. 1362, 1392, 12 L. Ed.2d 506 (1964) ("[S]ome questions raised under the Guarantee Clause are nonjusticiable"). Contemporary commentators have likewise suggested that courts should address the merits of such claims, at least in some circumstances. *See, e.g.,* L. Tribe, AMERICAN CONSTITUTIONAL LAW 398 (2d ed. 1988); J. Ely, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 118, and n., 122-123 (1980); W. Wiecek, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 287-289, 300 (1972); Merritt, 88 Colum. L. Rev., at 70-78; Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 Minn. L. Rev. 513, 560-565 (1962). We need not resolve this difficult question today." Perhaps that day has come.

election by voting current officeholders out. Governmental electioneering, however, diminishes the effectiveness of the political response and threatens underlying constitutional values and democratic principles. The outcome of elections ideally should reflect the pure will of the people unpolluted by government electioneering. Where the political response cannot provide an adequate remedy, it can be argued that courts must step in.

Thus, I would hold that the Constitution requires governmental neutrality in elections—that is, the Constitution permits the government to educate and inform the public, but it may not cross the line into advocacy. Thus, government could provide factual information in newsletters and other forms of communication with the electorate. As the Supreme Court of California commented in *Stanson*, it would not always be easy finding the line of demarcation between informing and advocacy, but courts should look closely at the facts of each case, including the words used, the tone of the communication, the timing, and any other relevant factors. Moreover, government may provide equal access to a forum (as it does in so many other contexts) allowing both sides of the debate to advance their positions. Thus, a governmental newsletter such as the one at issue in this case could grant equal space to competing factions to make their best case to the electorate. This position, I think, would more appropriately reflective of the balance the Framers sought to strike in our democratic structure and goes a long way to ensuring that the true power remains with the people.

For these reasons, I must respectfully dissent from today's majority opinion.

FILED
OCTOBER 10, 2006
LEONARD GREEN, CLERK

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

RONALD KIDWELL; JULIE JOHNSON; CHARLES ARNETT

Plaintiffs - Appellants

v.

CITY OF UNION, et al.

Defendant - Appellee

BEFORE: MARTIN, GIBBONS and GRIFFIN, Circuit Judges.

Upon consideration of the petition for rehearing filed by the Appellants,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

Judge Martin would grant the petition for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO WESTERN DIVISION AT DAYTON

Ronald Kidwell, et al.,

Case No. 3:02-cv-365

Plaintiffs,

Judge Thomas M. Rose

v.

City of Union, et al.,

Defendants.

ENTRY AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, (DOC. 34), DENYING PLAINTIFFS' MOTION FOR PERMANENT INJUNCTION, (DOC. 37), DENYING PLAINTIFFS' MOTION FOR DECLARATORY JUDGMENT, (DOC. 36), AND TERMINATING CASE.

This litigation has been narrowed down to an allegation that the City of Union, Ohio, the only remaining defendant, violated the First Amendment of the United States Constitution, as incorporated to prohibit certain actions by states in the Fourteenth Amendment, when the City used tax monies to advertise the Union City Council's opposition to a citizen-initiated referendum concerning whether to merge the city's fire and emergency medical services departments with those of other localities. Plaintiffs, taxpaying residents of Union, were opposed to the viewpoint so expressed, and further opposed the City's speech on a variety of other ballot issues. Defendant seeks summary judgment on

Plaintiffs' sole remaining claim, while Plaintiffs seek a permanent injunction of the conduct it denounces. Because the First Amendment forbids government action that censors or compels speech, but generally allows government speech even when opposed by taxpayers, the Court will grant Defendant's motion, while denying Plaintiffs' motions.

I. BACKGROUND

According to the amended complaint, the City of Union spent funds from the city treasury to wage a campaign in opposition to a 1997 citizen-initiated ballot issue concerning whether the City of Union would operate a joint fire and emergency medical services district with one neighboring jurisdiction or re-align itself to provide these services with another neighboring jurisdiction. Plaintiffs disagreed with the Union City Council as to which arrangement would best serve Union residents and be more cost effective. Contrary to Plaintiffs' goal of passing the referendum, the City used its funds to finance campaign activities such as the hanging of banners by city workers, mailing leaflets to city residents, and listing full-page newspaper ads. Doc. 10, ¶ 10. Plaintiffs further allege that more than three Union employees wore "Vote No" tee shirts while working inside the Union City Building in 1997.

Arguably, in expending the funds to oppose the citizen-initiated referendum, the City exceeded its authority to spend monies under its governing charter, which provides:

> Section 5.09. Public Information on Issues. The Council shall have the power to appropriate and authorize the expenditure of public funds to provide information to the members of the public in connection with elections on proposed tax levies and bond issues for the purposes of the Municipality and not

> involving the election of candidates for a public office, or the recall of a member of the Council.

Doc. 10, ¶ 12. However, the Court has previously ruled that Plaintiffs are barred from challenging a violation of the city charter by their failure to pursue adequate state court remedies. See doc. Doc. 23.

Plaintiffs assert that the City's utilization of tax dollars not only defeated the ballot issue concerning the maintenance of a joint district for fire and emergency medical services protection in November 1997, *id.*, ¶ 9-13; but also supported the passage of a tax levy in May 1998, *id.*, ¶ 14-15; and affected the results in two citizen-sponsored initiatives and two referenda in November of 2000, *id.,* ¶ 18. Plaintiffs further decry the use of tax dollars to campaign for a tax levy for street maintenance, unsuccessfully in May 2001, and successfully in August 2001. Additionally, the city council is alleged to have used tax dollars to thwart proposed city charter amendments concerning water and sewer services and emergency services in June 2001.

Plaintiffs claim that Defendant's use of tax dollars to fight citizen-sponsored initiatives violates constitutional rights under the First and Fourteenth Amendments, giving rise to a cause of action under 42 U.S.C. § 1983. Plaintiffs also seek injunctive relief. To this end, Plaintiffs have filed a motion for permanent injunctive relief, doc. 36, as well as a motion for summary judgment. Doc. 37. Defendant has moved for summary judgment on the last remaining claim.

II. STANDARD OF REVIEW

Before proceeding to analyze the motions pending before the Court, the Court will review the standards of review pertinent to the pending motions. The Court will first state the standard for reviewing a motion for

summary judgment, then that for declaratory judgment, before concluding with that for a permanent injunction.

A. Summary Judgment Standard

The standard of review applicable to motions for summary judgment is established by Federal Rule of Civil Procedure 56 and associated case law. Rule 56 provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Alternatively, summary judgment is denied "[i]f there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Hancock v. Dodson,* 958 F.2d 1367, 1374 (6th Cir. 1992) (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250, 106 S. Ct. 2505 (1986)). Thus, summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S. Ct. 2548 (1986).

The party seeking summary judgment has the initial burden of informing the court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, admissions and affidavits which it believes demonstrate the absence of a genuine issue of material fact. *Id.,* at 323. The burden then shifts to the nonmoving party who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson,* 477 U.S., at 250, 106 S. Ct. 2505 (quoting Fed. R. Civ. P. 56(e)).

Once the burden of production has shifted, the party opposing summary judgment cannot rest on its pleadings or merely reassert its previous allegations. It is not

sufficient to "simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 586 106 S. Ct. 1348 (1986). Rule 56 "requires the nonmoving party to go beyond the pleadings" and present some type of evidentiary material in support of its position. *Celotex Corp.,* 477 U.S., at 324, 106 S. Ct. 2548.

In determining whether a genuine issue of material fact exists, a court must assume as true the evidence of the nonmoving party and draw all reasonable inferences in the favor of that party. *Anderson,* 477 U.S., at 255, 106 S. Ct. 2505. If the parties present conflicting evidence, a court may not decide which evidence to believe by determining which parties' affiants are more credible. 10A Wright & Miller, *Federal Practice and Procedure,* § 2726. Rather, credibility determinations must be left to the fact-finder. *Id.*

Finally, in ruling on a motion for summary judgment, "[a] district court is not…obligated to wade through and search the entire record for some specific facts that might support the nonmoving party's claim." *InterRoyal Corp. v. Sponseller,* 889 F.2d 108, 111 (6th Cir. 1989). Thus, in determining whether a genuine issue of material fact exists on a particular issue, the court is entitled to rely upon the Rule 56 evidence specifically called to its attention by the parties.

B. Permanent Injunction Standard

In deciding whether to grant a permanent injunction, a district court must consider and balance four factors: (1) whether the plaintiff has actually succeeded on the merits; (2) whether there is a threat of irreparable harm to the plaintiff; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by granting injunctive relief. *See Parks v. Finan,* 2003 WL 23412981, *4 (S.D. Ohio 2003) (citing *Nightclubs, Inc. v. City of Paducah,* 202 F.3d 884, 888 (6th Cir. 2000), *Spingola v. Village of*

Granville, 39 Fed. Appx. 978, 980 (6th Cir. 2002), and *Amoco Production Co. v. Village of Gambell, AK,* 480 U.S. 531, 546 n.12, 107 S. Ct. 1396, 94 L. Ed. 2d 542 (1987)).

C. Declaratory Judgment Standard

The Declaratory Judgment Act, 28 U.S.C. § 2201, provides parties with the opportunity to request a declaratory judgment in federal district court. "In a case of actual controversy within its jurisdiction … any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought ...." 28 U.S.C. § 2201(a). *Hartford Fire Ins. Co. v. AutoZone, Inc.,* 312 F. Supp. 2d 1037, 1040-41 (W.D. Tenn. 2004).

III. Analysis

The Court will first consider Defendant City of Union's Motion for Summary Judgment, doc. 34, the resolution of which will prove dispositive of the other pending motions. In its motion, the City asserts that the "government speech doctrine" entitles them to summary judgment. Plaintiffs counter with a response that invites the Court first to differentiate myriad varieties of government speech one from another, and then to declare the instant case to be governed by "a narrow line of cases involving government funding/advocacy to promote only one viewpoint on ballot issues, … particularly [one] oppose[d to] citizen-sponsored initiatives which, as a matter of law, can be decided *only* by a vote of the people." Doc. 45 at 5. This path would lead the Court into territory uncharted, but for a single district court case that found in Plaintiffs' favor. See *Mountain States Legal Foundation v. Denver Sch. Dist.,* 459 F. Supp. 357 (D. Colo. 1978).

Admittedly, "the 'government speech doctrine' is still in its formative stages, and, as yet, it is neither extensively nor finely developed." *Sons of Confederate*

Veterans v. Commissioner of Virginia, 305 F.3d 241 (4th Cir. 2002) (Luttig, J., respecting denial of rehearing en banc). While this Court will hold that Plaintiffs' remedy lies in the political process, the Supreme Court recently declined to "reach the question whether traditional political controls to ensure responsible government action would be sufficient to overcome First Amendment objections [to government speech]." *Board for Regents of Univ. of Wis. System v. Southworth,* 529 U.S. 217, 229 (2000). The Court has found no clear direction on the question from the Sixth Circuit, but finds persuasive the analysis of the Eleventh Circuit in *N.A.A.C.P. v. Hunt,* 891 F.2d 1555 (11th Cir. 1990), a case with a more controversial factual background.

N.A.A.C.P. v. Hunt involved a challenge to the flying of the confederate flag over the dome of the Alabama state capital. The Eleventh Circuit rejected the argument that the flying of the flag violated the First Amendment rights of all those who were opposed to the government speech so expressed. The Eleventh Circuit reasoned that the First Amendment restricts the government more as a censor than as a speaker:

> "[f]ree speech theory has focused on the government as censor; it has had little to say about the process by which the government adds its voice to the market place." Shiffrin, *Government Speech,* 27 U.C.L.A. L. Rev. 565, 569-70 (1980). Indeed, the First Amendment protects citizens' speech only from government regulation; government speech itself is not protected by the First Amendment. *Columbia Broadcasting System, Inc. v. Democratic Nat. Comm.,* 412 U.S. 94, 139 and n.7, 93 S. Ct. 2080, 36 L. Ed. 2d 772 (1973) (Stewart, J., concurring).

Restrictions on government speech seem to spring from one ideal: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Bd. of Ed. v. Barnette,* 319 U.S. 624, 642, 63 S. Ct. 1178, 1187, 87 L. Ed. 1628 (1943). There are three ways in which the government's attempts to prescribe orthodoxy have been restricted. First, the government may not abridge "equality of status in the field of ideas" by granting the use of public forums to those whose views it finds acceptable while denying their use to those with controversial views. *Police Dep't of Chicago v. Mosley,* 408 U.S. 92, 96, 92 S. Ct. 2286, 2290, 33 L. Ed. 2d 212 (1972). This concern is especially important when the government's dedication of a forum suppresses controversial or political speech. *Cinevision Corp. v. City of Burbank,* 745 F.2d 560, 575 (9th Cir. 1984). Second, the government may not monopolize the "marketplace of ideas," thus drowning out private sources of speech. *Red Lion Broadcasting Co. v. F.C.C.,* 395 U.S. 367, 390, 89 S. Ct. 1794, 1806, 23 L. Ed. 2d 371 (1969). For example, the government may not confer radio frequency monopolies on broadcasters it prefers. *Id.* Finally, the government may not "compel persons to support candidates, parties, ideologies or

> causes that they are against." *Lathrop v. Donohue,* 367 U.S. 820, 873, 81 S. Ct. 1826, 1853, 6 L. Ed. 2d 1191 (1961) (Black, J., dissenting). For instance, state citizens may not be compelled to use car license plates carrying messages with which they disagree. *Wooley v. Maynard,* 430 U.S. 705, 717, 97 S. Ct. 1428, 1436, 51 L. Ed. 2d 752 (1977).

N.A.A.C.P. v. Hunt, 891 F.2d 1555, 1565-66 (11th Cir. 1990). The manner in which the Eleventh Circuit applies this standard is illustrative of what constitutes compulsion, the unconstitutional burden Plaintiffs in the instant case, primarily claim to have endured:

> None of these restrictions, however, is directly applicable to the present situation. The capitol dome is not public property which "by tradition or designation [is] a forum for public communication." *Perry Educ. Assn. v. Perry Local Educators' Assn.,* 460 U.S. 37, 46, 103 S. Ct. 948, 955, 74 L. Ed. 2d 794 (1983). Thus, the state may reserve the dome for its own communicative purposes as long as that reservation is reasonable and is not an effort to suppress expression because the public officials oppose the speaker's view. *Id.* There is no evidence that the dome is reserved to the state in order to suppress controversial speech. Neither does the flag represent government monopolization of the marketplace of ideas.
>
> Government communication is legitimate as long as the government does not abridge an individual's "First Amendment right to avoid becoming the courier for such message." *Wooley,* 430 U.S. at 717, 97 S. Ct. at 1436. The government of Alabama does not compel

> its citizens to carry or post the flag themselves, or to support whatever cause it may represent. It might appear problematic at first glance that the state is using the NAACP's tax dollars to raise and maintain the flag, and thus is forcing them to contribute to a cause repugnant to them. The Supreme Court has held that union members cannot be compelled to pay dues which support causes disagreeable to them. *Abood v. Detroit Bd. of Educ.,* 431 U.S. 209, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1977). *Abood* has never been applied to the government, however; if it were, taxation would become impossible …. [Normally, when citizens disagree with government speech,] the remedy for such a grievance lies within the democratic processes of the State…and the voting rights of all its citizens, "the restraints on which the people must often rely solely, in all representative governments." *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 197, 6 L. Ed. 23 (1824).

N.A.A.C.P. v. Hunt, 891 F.2d 1555, 1566 (11th Cir. 1990). Thus, the Eleventh Circuit concluded that, although "[i]t is unfortunate that the State of Alabama chooses to utilize its property in a manner that offends a large proportion of its population, …that is a political matter which is not within our province." *Id.* at 1566. This Court agrees with the Eleventh Circuit's sentiment. The Case reasoning of the case, however, is correct and this Court will adopt it, as it also declines to extend *Abood.*

As to the first consideration in determining the emerging constitutional limits on government speech, the Court notes that Union has not abridged "equality of status in the field of ideas," *N.A.A.C.P. v. Hunt,* 891 F.2d at 1565, by granting the use of public forums to those whose views it finds acceptable while denying their use to

those with controversial views, a "concern [which] is especially important when the government's dedication of a forum suppresses controversial or political speech." *Id.,* at 1566. In the instant case, Plaintiffs have not brought to the Court's attention evidence that Union turned over a public forum to any group, while denying use of that forum to Plaintiffs.

The second concern is whether the government has monopolized the "marketplace of ideas," drowning out private sources of speech. *Id.* Far from conferring radio frequency monopolies on broadcasters it prefers, Union's speech has been limited to yard signs, a street banner, full page newspapers advertising, and the city newsletter. While it is alleged that city workers wore "Vote No" shirts to work, there is no evidence that they were compelled or even encouraged to do so in a manner that would make their speech government speech. There was no evidence that the shirts were bought by the City, or that the City requested its employees to wear them. In short, there is no evidence that Plaintiffs were drowned out of the marketplace of ideas.

Finally, Union may not "compel persons to support candidates, parties, ideologies or causes that they are against." *Id.* As evidenced by the Eleventh Circuit's decision, this demands more than mere taxpayer support. The tax burden imposed upon plaintiffs in the instant case is likely greater than that imposed in the confederate flag case, whether measured by the amount of taxpayer contributions devoted to the government speech, by the percentage of the tax contributions that is devoted to the speech, or by percentage of government expenditures devoted to the speech. Nevertheless, there is no evidence that Union forced residents to display "Vote No" signs on their private property, or forced Plaintiffs to wear "Vote No" shirts. Thus, its citizens have not been compelled to carry messages with which they disagree.

IV. CONCLUSION

Because Plaintiffs have brought no evidence to the Court's attention that Union abridged the equality of status in the field of ideas, nor that it monopolized the marketplace of ideas, or that Union compelled Plaintiffs to support a cause they opposed, the Court **GRANTS** Defendant's motion for summary judgment. Doc. 34. *Ipso facto*, Plaintiffs have not prevailed on the merits of the action, and Plaintiffs' requests for permanent injunction, doc. 36, and declaratory judgment, 37, are **DENIED**. The captioned cause is hereby **TERMINATED** upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

DONE and **ORDERED** in Dayton, Ohio on Friday, August 20, 2004.

/s/ Thomas M. Rose
THOMAS M. ROSE
UNITED STATES DISTRICT JUDGE