No. 06-1226

In the Supreme Court of the United States

RONALD KIDWELL, ET AL.,
Petitioners,

v.

CITY OF UNION, OHIO, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

I. Whether Petitioners have presented compelling reasons to grant certiorari where the Sixth Circuit's decision was grounded on a traditional First Amendment analysis that does not give rise to extraordinary issues requiring review.

II. Whether Petitioners have presented compelling reasons to grant certiorari where state law already addresses Petitioners' stated fears and concerns for the future of government spending.

PARTIES TO THE PROCEEDINGS

There are no parties to the proceedings other than those listed in the caption.

RULE 29.6 STATEMENT

Respondent City of Union is a municipal corporation and political subdivision of the State of Ohio. Respondent John Applegate is a governmental official employed by the City of Union.

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SUMMARY OF REASONS TO DENY THE PETITION

In an effort to make the current case more compelling, Petitioners have greatly exaggerated the impact of the Sixth Circuit's decision on the status of constitutional law. They warn that, "[b]y 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." (Petition, p. 14). Contrary to the theatrical image Petitioners devise, the Sixth Circuit did not "authorize" direct government spending to influence anything. The only question before the Sixth Circuit, upon appeal, was whether certain governmental spending resulted in a violation of Petitioners' First Amendment rights. *Kidwell v. City of Union*, 462 F.3d 620, 623 (6th Cir. 2006).

Governmental spending in the State of Ohio is heavily regulated by the Ohio Revised Code and/or local ordinances. In fact, state law actually precludes advocacy on behalf of an election candidate or in opposition to a levy issue – the specific concerns raised by the Petition. *See* O.R.C. § 9.03, effective Sept. 5, 2001. While this statute would not apply to the State of Ohio's chartered municipalities, such as the City of Union, campaigning for particular parties or candidates would not be authorized under the local charter. In this case, the district and appellate courts were only asked to resolve Petitioners' federal constitutional claims in the context of a motion for summary judgment. Both the majority and dissent of the Sixth Circuit panel commented on the fact that Petitioners had abandoned their state law claims, should any have existed. *Kidwell*, 462 F.3d at 623, fn. 2 and 636.

The question below was not whether the City of Union was authorized to spend money opposing Petitioners' initiative petition. Such authority would be a matter of state or local law. Petitioners acknowledged as much when they explained that similar cases had generally been resolved on state law grounds. The question raised by Petitioners, below, was simply whether governmental spending to support or oppose a local election issue violated Petitioners' First Amendment right of access to public forums or freedom from compelled subsidy of speech. In the specific context of this case, both courts decided viewpoint-based government speech favoring tax levies or opposing citizen initiatives reasonably related to governance functions, did not violate the Petitioners' rights under the First Amendment.

While Petitioners contend the Sixth Circuit erred in extending the "government speech doctrine" to encompass speech when it arises in the context of a public election, the majority panel never actually mentioned the government speech doctrine when it affirmed summary judgment in favor of the City of Union and John Applegate. This case was decided on a traditional First Amendment analysis, and, under that analysis, Petitioners were unable to establish a cause of action against Respondents. Thus, Petitioners' overstated declaration that the Sixth Circuit has "destabilized" constitutional law has no reasonable foundation or merit.

Accordingly, Petitioners have failed to provide any truly compelling justification for further review of this case, and the Petition for writ of certiorari should be denied.

STATEMENT OF THE CASE

In presenting the underlying facts, Petitioners claim there was no dispute that the City of Union mailed campaign

leaflets to residents, advertised in the local newspapers, used the town newsletter to "exhort" city residents to vote against the initiative, and used city workers and equipment to hang a "Vote No" campaign banner across Main Street. (Petition, p. 4). Their petition, however, does not accurately reflect the record in this case. As the Sixth Circuit noted in its decision, "Defendants contest the factual accuracy of some of the plaintiffs' allegations." *Kidwell*, 462 F.3d 620, 622, fn.1.

The City of Union did allow city workers to assist a private organization with hanging a banner containing the words "Vote No" across Main Street because the wire on which the banner was being hung was one previously installed and maintained by the city and, of course, there are public safety concerns raised by hanging a banner across a roadway. With respect to the remaining allegations, Union officials testified that they did not deliberately advocate against any citizens' initiative petition or ballot measure when acting within the course and scope of their employment. Rather, they informed the public about the issues underlying that petition in accordance with state and local law.

However, this case came before the District Court for the Southern District of Ohio on a Rule 56(c) motion for summary judgment. Accordingly, the court was required to construe the facts in a light most favorable to the plaintiffs. *See* Fed.R.Civ.P. 56. The question, therefore, was whether the facts alleged by the plaintiffs were sufficient to demonstrate a violation of the First Amendment. The district court answered that question in the negative, and the Sixth Circuit affirmed.

REASONS FOR DENYING THE PETITION

The only issue in this case was whether Petitioners' First Amendment rights were unlawfully violated when the City of Union publicly opposed an initiative measure that would have directly affected the provision of emergency fire services to the community. Petitioners alleged that the City of Union spent public funds, collected as taxes from the general citizenry, to disseminate information and to oppose a 1997 initiative petition that opposed the creation of an independent fire department.

There is no dispute that the City of Union's speech or advocacy in this case was germane to its essential, governmental functions. There is no dispute in this case that the government did not actively suppress Petitioners' ability to speak. In fact, in their depositions, Petitioners acknowledged that the government's advocacy only propelled them to do more in support of their own position. Nevertheless, Petitioners argued Union's use of public funds to support its own policies in the context of an initiative petition as a violation of the First Amendment. They argued such expenditures compelled them, as taxpayers, to fund the City's message. Thus, they ultimately sought a ruling that the City of Union has a constitutional obligation to remain completely neutral on all election issues.

The district court concluded Petitioners were not compelled as taxpayers to carry a message with which they did not agree and that Petitioners had not been denied access to a public forum. Thus, there was no violation of their First Amendment rights. The Sixth Circuit Court of Appeals agreed. Even the dissent acknowledged that Petitioners' cause of action would not necessarily lie within the First Amendment, and suggested that the appropriate remedy may

be found in state law, in the generalized democratic principles underlying a republican form of government, or in reconsideration of this Court's Guarantee Clause jurisprudence. *Kidwell*, 462 F.3d 620, 636 (Judge Martin, dissenting). However, the issue in this appeal must necessarily be limited to whether Petitioners' have a viable First Amendment cause of action because that was the basis for the claim they chose to maintain against Respondents.

The District Court and the Sixth Circuit Court of Appeals correctly concluded that Petitioners had no First Amendment right to prohibit the City of Union from speaking on election issues that reasonably relate to the municipality's ability to govern. It has been clearly established by this Court that, "the government may speak despite citizen disagreement with the content of the message." *Keller v. State Bar of Cal.,* 496 U.S. 1, 10, (1990). By necessity and pursuant to their constitutional authority, local governments will take measures that fall within the definition of "speech" and that will be "contrary to the profound beliefs and sincere convictions of some of its citizens." *Bd. of Regents of Univ. of Wisconsin System v. Southworth*, 529 U.S. 217, 229 (2000) (citations omitted). Such actions do not give rise to a First Amendment claim against that municipality.

Because the government may support its own policies through taxes and fees that are otherwise binding on dissenters, "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*. This Court reasoned, "[w]hen the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy." *Id*. In other words, if the taxpayers do not agree with the message the government

chooses to convey, their remedy is to vote the speakers out of office, not First Amendment litigation brought under 42 U.S. C. § 1983. *Id*.

Here, the City of Union did exactly what the Supreme Court said was permissible and even "inevitable." *Southworth*, 529 U.S. at 229. Union had officially enacted legislation to create independent fire and emergency services for the community as a whole. When Petitioners challenged those services in a way in which city officials believed was detrimental to the community, Union acted to "advocate and defend its own policies." *Id*. Therefore, Union's speech-related activities did not implicate the First Amendment rights of the individual taxpayers.

Courts have refused to accept the position that requiring an individual to contribute to the general revenue through taxation constitutes compelled speech. *See, e.g., R.J. Reynolds Tobacco Co. v. Shewry*, 384 F.3d 1126, 1135 (9th Cir. 2004)(compelled speech doctrine does not apply in the context of general taxation); and *In re Washington State Apple Advertising Com'n*, 257 F. Supp. 2d 1290, 1296 (E.D.Wash. 2003) ("[W]hen speech can be characterized as government speech, the government may fund that speech without free speech concerns.").

According to Petitioners, the City of Union acts within its constitutional authority when it speaks on the "most controversial issues of the day." (Petition, p. 2) Yet, they argue there is a constitutionally significant distinction between generalized government speech and government speech that supports or opposes an issue on the ballot. (*Id*. at p.12) Neither Petitioners nor Judge Martin (dissent) could point to anything in the First Amendment that precludes government advocacy of an election issue reasonably related to the City's

ability to govern, i.e., funding of the fire department. *Kidwell*, 462 F.3d 620, 625, fn. 3. Petitioners have pointed to no provision in the First Amendment that imposes a content restriction upon the government's speech when the subject matter is a citizen-sponsored initiative. While they warn that the Sixth Circuit's decision would also permit the government to campaign on behalf of certain candidates, their argument ignores this Court's support of "issue advocacy." *See Buckley, et al. v. Valeo*, 424 U.S. 1, 20-21 (1976). In other words, this Court has made a distinction between the ability to advocate in favor of important issues on the one hand and the ability to advocate in favor of a political candidate on the other.

In *Buckley,* the Court distinguished "express advocacy," which is advocacy in favor of a specific political candidate, from "issue advocacy." *Id*. While express advocacy is only marginally protected by the First Amendment, issue advocacy is fundamental to the democratic process and is entitled to the broadest First Amendment protection. *Id.*

Here, Respondents' advocacy was not in favor of a particular candidate or party, which would express very little in the way of political ideals. *See Lash v. City of Union*, 104 F. Supp. 2d 866, 874 (S.D. Ohio 1999). Instead, the City was expressing its own position that having an independent fire department for the City of Union was in the best interest of the community as a whole. This is clearly "issue advocacy" entitled to the utmost protection by the United States Constitution. The Union City Council, individuals elected to speak on behalf of the citizenry, has just as great a First Amendment right to speak on election issues as do Petitioners. And, the fact that such speech necessarily entails the expenditure of insubstantial public funds does not

transform that right into a violation of Petitioners' competing First Amendment rights.

Petitioners admit that the City's advocacy did not suppress their point of view. Rather, the City's advocacy actually encouraged Petitioners to speak. Such participation in the political process should be encouraged, not continuously litigated. *See F.T.C. v. Freecom Communications, Inc.*, 966 F. Supp. 1066, 1070-1071 (D.Utah 1997); *Donaggio v. Arlington County, Va.*, 880 F. Supp. 446, 455-456 (E.D.Va. 1995); and *Keller*, 496 U.S. at 12-13.

While Petitioners complain that the government's entrance into the political process is a form of compelled speech, that theory has been squarely rejected by the courts. *See, e.g.*, *NAACP v. Hunt,* 891 F.2d 1555, 1566 (11th Cir.1990); and *Charter v. U.S. Dept. of Agr.*, 230 F. Supp. 2d 1121, 1133 (D.Mont. 2002). In his concurring opinion in *Abood*, Justice Powell said, "the reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people." *Abood, et al. v. Detroit Bd. of Educ., et al.*, 431 U.S. 209, 259, n.13 (1977) (Justice Powell concurring). There is a difference between those instances in which the government specifically requires a private entity, organization, or group to fund speech with which they are opposed and those instances where the government requires all citizens to do the same. *See R.J. Reynolds Tobacco Co. v. Bonta*, 272 F. Supp. 2d 1085, 1095 (E.D.Ca. 2003); *United States v. United Foods, Inc.*, 533 U.S. 405 (2001); and *Southworth*, 529 U.S. 217.

As representative of the citizens of Union, the city government voted upon and decided the city should have independent fire and emergency services. Petitioners contend

that government no longer had a right to advocate this policy once the issue was placed on the ballot. Thus, their initiative measure would effectively neutralize and silence the government's position and representative capacity. Again, this theory is not supported by any valid First Amendment precedent. *Keller*, 496 U.S. at 12-13. "If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed." *Id*.

The issues in this appeal are reasonably well-settled. This Court has already concluded that government speech does not implicate the First Amendment because, "when the government appropriates public funds to promote a particular policy of its own, it is entitled to say what it wishes." *See Rosenberger v. Rector & Visitors of the Univ. of Va.,* 515 U.S. 819, 833 (1995). The First Amendment does not require the government to remain neutral in speaking on its own behalf. *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 543 (2001). This is not to say there are no limitations upon the government's speech; but, except for the proscriptions on endorsing religion, those limitations are not contained within the First Amendment. *Southworth,* 529 U.S. 217, 235; *Griffin v. Secretary of Veterans Affairs,* 288 F.3d 1309, 1324 (Fed. Cir. 2002); and *Downs v. Los Angeles Unified School Dist.*, 228 F.3d 1003, 1011 (9th Cir. 2000).

In conclusion, nothing in this Court's First Amendment jurisprudence would support a cause of action whenever a taxpayer disagrees with the message conveyed by the government. Petitioners have provided no viable argument that the First Amendment would otherwise prohibit the government's speech in the context of an initiative petition

that would have undermined the ability of the government to administer public services on behalf of its citizens.

CONCLUSION

For the foregoing reasons, Petitioners have not established a compelling justification for this Court to grant certiorari. Therefore, Respondents respectfully request that the Petition be denied.

Respectfully submitted,

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