No. 06-1226

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

REPLY TO BRIEF IN OPPOSITION

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Respondents remarkably assert at the outset that the panel majority below did not decide this case under the government speech doctrine at all. According to respondents, "[w]hile 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 panel majority never actually mentioned the government speech doctrine when it affirmed summary judgment in favor of [respondents]." Opp. 2. But even a cursory review of the decision below shows that the panel majority relied *solely* on the government speech doctrine to reject petitioners' claims. *See* Pet. App. 4-11a (discussing *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005); *Board of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000); and *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995)); *id.* at 9a-10a n.4 (stating that *Johanns*, *Southworth*, and *Rosenberger* "require[d]" the majority to reject the dissent's position). It is thus demonstrably untrue that the panel majority decided this case under "a traditional First Amendment analysis," Opp. 2, separate and distinct from the government speech doctrine.

Respondents' efforts to draw attention away from the government speech doctrine are understandable, because that doctrine cannot sensibly be applied in the election context. Respondents contend that the doctrine is based on the Government's own free speech rights, and that the Union City Council "has just as great a First Amendment right to speak on election issues as do Petitioners." Opp. 7. That contention reveals a fundamental misunderstanding of constitutional law. The First Amendment protects private speech *from* the Government; "it confers no analogous protection *on* the Government." *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 139 (1973) (Stewart, J., concurring) (emphasis in original); *see also Ceballos v. Garcetti*, 361 F.3d 1168, 1190 (9th Cir. 2004) (O'Scannlain J., specially concurring) ("Of course, 'the Government' has no First Amendment

rights. Only individuals do."), *rev'd on other grounds*, 126 S. Ct. 1951 (2006); *NAACP v. Hunt*, 891 F.2d 1555, 1565 (11th Cir. 1990) ("[T]he First Amendment protects citizens' speech only from government regulation; government speech itself is not protected by the First Amendment."); *Muir v. Alabama Educ. Television Comm'n,* 688 F.2d 1033, 1038 n.12 (5th Cir. 1982) (*en banc*) ("Government expression [is] unprotected by the First Amendment.").

In particular, the rationale underlying the government speech doctrine is not that the government itself has a First Amendment right to speak, but that taxpayers have no First Amendment right to prevent the government from speaking. *See, e.g.*, *Johanns*, 544 U.S. at 559; *Southworth*, 529 U.S. at 229. The doctrine thus represents an exception to the general rule that citizens may not be compelled to subsidize speech with which they disagree. *See, e.g.*, *Keller v. State Bar of Cal.*, 496 U.S. 1, 10-18 (1990); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 & n.31 (1977). And the reason for that exception is simple: if citizens disagree with government speech, they have a remedy at the ballot box. *See, e.g.*, *Johanns*, 544 U.S. at 563; *Southworth*, 529 U.S. at 235.

The very justification for the government speech doctrine, in other words, shows that the doctrine cannot possibly apply in the election context. If the doctrine allowed the government to spend public funds directly to influence election outcomes, then dissenting citizens would be deprived of their one avenue of recourse. It thus makes no sense for respondents to insist (as did the panel majority below, see Pet. App. 11a) that "if the taxpayers do not agree with the message the government chooses to convey, their remedy is to vote the speakers out of office." Opp. 5-6. That "remedy" is illusory if the government is free to use public funds to promote its views, and oppose dissenting citizens' views, in the election context.

Respondents thus miss the point by insisting that "the government did not actively suppress Petitioners' ability to speak." Opp. 4; *see also id.* at 8 ("[T]he City's advocacy did not suppress [petitioners'] point of view."). The First Amendment protects against more than "active suppress[ion]" of speech; it also protects against compelled speech. *See, e.g.*, *Abood*, 431 U.S. at 234 ("The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights."); *see also id.* at 234 n.31 (quoting Thomas Jefferson's view that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.") (internal quotation omitted). Because elections are the fundamental check on the government in a democracy, it necessarily follows that a democratic government cannot be free to spend public funds to campaign in an election. That point is especially compelling where, as here, the government uses tax revenues to campaign against a citizen initiative aimed at *curbing* the government's taxing power.

Respondents try to limit the breadth of the ruling below by arguing that "[n]either 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*." Opp. 6-7 (emphasis added). But the First Amendment generally does not allow the government to compel citizens to subsidize speech with which they disagree. *See, e.g.*, *Keller*, 496 U.S. at 10-18; *Abood*, 431 U.S. at 234-35. And the limitation proposed by respondents (allowing the government to take sides on election issues, but prohibiting the government from taking sides on election candidates, *see* Opp. 7) makes no sense. To the extent that this Court has previously distinguished between spending on issues and spending on candidates, *see Buckley v. Valeo*, 424 U.S. 1, 14 (1976)

(*per curiam*), it has done so in the context of campaign finance laws directed at limiting *private* spending, not a challenge to *public* spending. If, as the Sixth Circuit held, the government speech doctrine allows respondents to spend public funds to advocate the defeat of the ballot initiative here, there is no reason in law or logic why the doctrine also would not allow respondents to spend public funds to advocate the defeat of a candidate supporting that initiative.

Respondents counter that unspecified state and local laws may limit the practical effect of the decision below. Opp. 1. If ever there were a perverse argument, it is this. Respondents argued strenuously below that state or local law did *not* bar the expenditures challenged here, which is why the lower courts reached the federal constitutional issue in the first place. Respondents are thus in no position to argue that unspecified state or local laws are likely to minimize the constitutional problem created by the decision below. And that argument fails on its own terms because, as noted in the petition, to the extent that state or local laws have been construed to prohibit governments from spending public funds directly to influence election outcomes, that construction has been based on the assumption—which the panel majority below rejected—that "such expenditures raise potentially serious constitutional questions." *Stanson v. Mott*, 551 P.2d 1, 9 (Cal. 1976). This case, as respondents concede, squarely presents those important underlying questions. *See* Opp. 1 ("[T]he district and appellate courts were only asked to resolve Petitioners' federal constitutional claims.").

Remarkably, respondents say not a word about the conflict among the lower courts that have squarely addressed the constitutional question presented in the petition. *See* Pet. 9-12. To the contrary, they blithely assert that "[t]he issues in this appeal are reasonably well-settled" under the government speech doctrine. Opp. 9. If anything, that assertion only underscores that this

Court's immediate review is warranted. To the extent that respondents are correct that it is "reasonably well-settled" in the lower courts that the government speech doctrine allows governments to spend public funds directly to influence election outcomes, then this Court's intervention is not only imperative but overdue.

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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