No. 07-869

IN THE

Supreme Court of the United States

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

v.

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

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

BRIEF OF THE UTAH TAXPAYERS ASSOCIATION, SUTHERLAND INSTITUTE AND NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTEREST OF *AMICI CURIAE* [1]

Pursuant to Rule 37 of the Supreme Court Rules of the United States, *amici curiae,* the Utah Taxpayers Association ("Taxpayers Association"), the Sutherland Institute ("Sutherland") and the National Right to Work Legal Defense Foundation, Inc. ("Foundation") hereby submit the following brief in support of the Idaho Secretary of State, Petitioner Ben Ysursa, and Idaho Attorney General, Petitioner Lawrence Wasden, Petition for Writ of Certiorari in *Ysursa et al. v. Pocatello Education Association, et al*, No. 07-869, docketed January 3, 2008.

Amicus Curiae Taxpayers Association is a statewide Utah association of approximately 2,500 Utah taxpayers, both individuals and businesses. The Taxpayers Association was one of the *amici* that submitted a brief in *Utah Education Association v.*

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[1] Pursuant to Rule 37 of the Supreme Court rules, the undersigned counsel affirms that the parties, specifically Mr. Clay Smith, Idaho Deputy Attorney General, who represents the defendants-appellants in *Pocatello Education Association et al v. Heideman et al*, 504 F.3d 1053 (9th Cir. 2007)(petitioners herein), and Mr. Jeremiah Collins of Bredhoff & Kaiser, who represents the plaintiffs-appellees in the same case (respondents herein), have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae's* intention to file this brief. Confirmatory letters from the parties' respective counsel are attached as an appendix. Further, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The brief was authored by counsel listed on the brief cover, and Maxwell Alan Miller (not counsel of record), a research analyst for the Utah Taxpayers Association.

Shurtleff, No. 06-4142 (10th Cir. 2008), 2008 U.S. App. LEXIS 497. As explained in this brief, the Taxpayers Association urges the Supreme Court to grant the Petition for Certiorari in *Ysursa, et al v. Pocatello Education Association, et al*, No. 07-869 because the Ninth Circuit decision conflicts with other circuit court decisions, and because a United States Supreme Court decision in *Ysursa* on the merits will help establish uniformity in state legislatures throughout the United States that have contemplated or may contemplate similar laws to those at issue.

Amicus Curiae Sutherland is a Utah non-profit public policy research foundation, which likewise was one of the *amici* that submitted a brief in the recently decided Tenth Circuit case, *Utah Education Association, et al v. Shurtleff.* Sutherland likewise urges the Court to grant the Petition for Certiorari in the Ninth Circuit case, *Pocatello Education Association*, for the same reasons as the Taxpayers Association.

Amicus Curiae Foundation is a charitable, legal aid organization formed to protect the right to work, freedoms of association, speech, and religion and other fundamental liberties of ordinary working men and women from infringement by compulsory unionism. The Foundation was also an *amicus curiae* in the Tenth Circuit case, *Utah Education Association.* It likewise urges this Court to resolve the conflict between the circuit court decisions on the issues raised in *Pocatello Education Association*, because prohibiting payroll deduction of contributions to union political committees makes it more likely that

such contributions are voluntarily made by public employees.[2]

SUMMARY OF ARGUMENT

The *amici curiae* urge the Court to grant Idaho's Petition for a Writ of Certiorari in *Ysuru, et al v. Pocatello Education Association, et al,* No. 07-869, and decide this case for three significant reasons:

1. Circuit Disagreement

A ruling from this Court would correct inconsistent reasoning and rulings in four separate cases, three different federal circuits and an Ohio appellate court, concerning virtually identical state statutes. While the state appellate court ruling may not qualify as a conflict under Rule 10 of the Supreme Court rules, the state appellate court decision certainly adds to the confusion on an important legal issue involving First Amendment freedom of speech—an issue of national significance that this Court ought to resolve.

In separate federal circuit court rulings, both the Ninth Circuit in *Pocatello Education Association* and

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[2] The Foundation notes that the Petition for Writ of Certiorari at 31 suggests that "with respect to a political subdivision's lack of authority to enter into [so-called] union security arrangements," a state Right to Work Act would not "satisfy the court of appeals' new standard." The Foundation does not doubt the inventiveness of union lawyers. However, the Petition's suggestion is foreclosed by this Court's decisions in *Davenport v. Washington Education Ass'n*, 127 S. Ct. 2372 (2007), and *Lincoln Federal Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949), holding that state prohibitions of forced exaction of union fees from, respectively, public- and private-sector workers do not violate the First Amendment "for the simple reason that unions have no constitutional entitlement to the fees of nonmember-employees." *Davenport*, 127 S. Ct. at 2372.

Tenth Circuit in *Utah Education Association* failed to apply an important precedent from the Sixth Circuit in *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307 (6th Cir. 1998). The Sixth Circuit arrived at a precisely opposite conclusion from the Ninth and Tenth Circuits. The Ohio statute at issue in *Pizza*, though identical in all material respects to the respective Idaho and Utah statutes at issue in *Pocatello Education Association* and *Utah Education Association*, was upheld as constitutional. A decision from this Court in *Ysursa* could be properly applied to Idaho's Voluntary Contributions Act (VCA-Idaho), Utah's Voluntary Contributions Act (VCA-Utah), Ohio's Campaign Finance Reform Act (CFRA), and other contemplated or enacted state legislation to the same effect.

2. Incorrect Application of Precedent and Erroneous Reasoning

The Tenth Circuit decision in *Utah Education Association*, not published in official reports as of this writing, was issued January 10, 2008, after the Ninth Circuit issued its decision in *Pocatello Education Association,* and after the Idaho Petition for Certiorari was docketed in this case, *Ysursa*, on January 3, 2008. Specifically, the Tenth Circuit in *Utah Education Association* held that Utah Code Ann. § 34-32-1.1(2) of VCA-Utah, which prohibits all public employees from using government payroll systems to make contributions to political entities, was unconstitutional, as a violation of First Amendment freedom of speech. Likewise the Ninth Circuit held a similar provision of the VCA-Idaho is unconstitutional. These decisions are premised on erroneous reasoning:

a. The Ninth and Tenth Circuits improperly applied contrary precedent, namely *Pizza* from the Sixth Circuit, in their respective decisions.

b. Governmental subdivisions (i.e. school districts, etc.) were improperly treated as private companies for purposes of state regulation of speech. The Ninth Circuit improperly rejected the fact that, whether from a political subdivision or the state itself, the payroll deductions proscribed under Idaho law require the use and support of government property, employees, systems and subsidies.

c. As a result in deeming political subdivisions and other government entities as private companies, as stated above, the Ninth Circuit improperly discounted the government subsidy exception to the regulation of speech and applied forum analysis improperly. Therefore, the level of scrutiny used to balance freedom of speech with a state's interest was improperly high.

3. Court Disagreement

Not only is there disagreement among three federal circuits, there is disagreement between the federal circuits and a state appellate court on the same issues raised in the Idaho Petition for Certiorari. The Sixth Circuit in *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d at 312, n. 3, expressly acknowledges its disagreement with the Ohio Court of Appeals' decision in *United Auto Workers Local Union 1112 v. Philomena*, 700 N.E.2d 936 (Ohio App. 1998) concerning the same Ohio statute at issue in *Pizza*, Ohio Rev. Code Ann. § 3599.031(H). *United Auto Workers*

held that Ohio's CFRA was unconstitutional because, "The prohibition on direct partisan political expression by labor organizations strikes at the core of the electoral process and constitutional freedom of speech." 700 N.E.2d at 954. To the contrary, the Sixth Circuit in *Pizza* held, "We agree with the State's argument that [CFRA] does not violate the constitutional rights of the plaintiffs-appellees," 154 F.3d at 312, further declaring that it is necessary for the United States Supreme Court to resolve the difference of opinion. *Id.* at n. 6. To *amici*'s knowledge, the United States Supreme Court has never resolved the difference. These two cases—*Pizza* and *Philomena*—are among the aforementioned four cases that conflict.

ARGUMENT

The "Argument" section of this brief will first provide a background on the issues to be decided. *Amici* will then compare, side by side, the four cases in question on the most significant points.

I. OVERVIEW

Ohio, Idaho and Utah all passed statutes in part targeting the mandatory collection of funds for political purposes from public employees, respectively entitled the Ohio Campaign Finance Reform Act (CFRA), Ohio Rev. Code Ann. § 3599.031(H); the Voluntary Contributions Act (VCA—Idaho), Idaho Code Ann. § 44-2004(2); and the Voluntary Contributions Act (VCA-Utah), Utah Code Ann. § 34-32-1.1. The particular statutory provision in dispute, for all three states, effectively prohibits public employers (state government, state employers, school districts, etc.) from being forced to administer payroll deduc-

tions for donations to political entities and action committees. In all three states, several unions and other political entities (Utah Education Association, Idaho Education Association, Toledo Area AFL-CIO Council, etc.) filed suit contesting the constitutionality of each state statute under (most importantly to this *amici* brief) the First Amendment to the United States Constitution (freedom of speech).

In their respective opinions, each of the three federal circuit courts and the Ohio appellate court address four important issues to determine if a state VCA or CFRA infringes the rights of free speech. These issues are:

1) Does the law actually infringe on the right to speech, or merely remove government subsidies of the right to speech?

2) Are government payrolls public or nonpublic fora?

3) Are public political subdivisions (school districts, etc.) to be considered part of the state or private entities for purposes of forum analysis?

4) What level of scrutiny ought to be applied to the law?

The Ohio appellate court in *United Auto Workers* held that the Ohio CFRA had to satisfy a "compelling state interest" to survive. 700 N.E.2d at 951. The Ninth and Tenth Circuits, respectively, well sum up the dispute over the proper standard to be applied in adjudicating the constitutionality of the statutes at issue: The Ninth Circuit in *Pocatello Education Association* held, "Strict scrutiny, however, is not applied in all circumstances involving content–based

restrictions. *See Davenport v. Wash. Educ. Ass'n,* 127 S. Ct. 2372, 2381 (2007). [The Idaho] Appellants [in *Pocatello Education Association*] contend that two excepted circumstances apply here, [government subsidized speech and the non-public forum exceptions] and it is to that argument that we now turn." 504 F.3d at 1059.

In *Utah Education Association*, the Tenth Circuit stated, "According to the state, the payroll systems are government property intended primarily for a nonspeech purpose, and as such must be considered nonpublic fora . . . strict scrutiny does not apply . . . [To the contrary, the] Unions contend that the nonpublic forum doctrine does not apply . . . because the payroll systems at issue are not property of the state government at all . . . and urge us to apply strict scrutiny. No controlling precedent squarely addresses the present situation." 2008 U.S. App. Lexis 497, *9 (emphasis added).

Despite the lack of a clear precedent, the Tenth Circuit applied "exacting scrutiny" (2008 U.S. App. LEXIS 497, *2) and held the VCA-Utah law is unconstitutional; the Ninth Circuit applied "strict scrutiny" and similarly held the VCA-Idaho law is unconstitutional. On the other hand, the Sixth Circuit applied a "rational basis" test to hold that "the wage checkoff ban of Ohio Rev. Code Ann. § 3599.031(H) simply does not impinge, in a constitutionally significant manner, any First Amendment rights. The First Amendment does not impose any duty on a public employer to affirmatively assist, or even to recognize a union." 154 F.2d at 319.

The *amici curiae* submit that the Ninth and Tenth Circuit decisions are in error, and urge this Court to grant certiorari in *Ysursa*, No. 07-869, and affirm the

Sixth Circuit decision to uphold a CFRA and VCA on this issue–specifically, that state statutes precluding government payroll systems from being used for political purposes should be upheld if they survive a rational basis test.

II. REASONS TO GRANT THE IDAHO PETITION FOR CERTIORARI

A. Contradictions in Circuit Decisions

The Ninth and Tenth Circuit holdings are an obvious contradiction to the prior Sixth Circuit decision. Besides the circuit contradictions, significant differences exist in each circuit's articulated analysis over (1) who the state statute regulates; (2) what the state statute regulates; (3) how the state statute affects speech; and (4) the proper level of scrutiny to apply in forum analysis. These differences are more than mere factual disputes. They reflect an underlying legal perspective on virtually identical statutes, resulting in disparate distinctions in the proper standard of review. A complete side-by-side comparison of each state law and each circuit's opinion is attached as Appendix A. Several significant differences are highlighted here.

1. *Whose right to speech has been violated?*

Each circuit has a different view about whose right to speech is actually being violated by the CFRA or the VCA. The Tenth Circuit reasons that the ". . . VCA limits the free expression of both the contributor and contributee only indirectly . . ." 2008 U.S. App. LEXIS 497, *27 (emphasis added). "By banning a contribution method preferred by many union members, the VCA increases the difficulty of contributing

to labor union political funds. It is thus unavoidable that, to some degree, the VCA burdens political speech." *Id.* at *7 (emphasis added). However the Tenth Circuit later argues for a lower level of scrutiny in evaluating the case "because contribution limitations have only an indirect effect on the contributor's own speech interests, and do not have a 'dramatic adverse impact' on recipients. . ." *Id.* at *26.

The Ninth Circuit perspective is that the rights of the Idaho 'recipients' are hampered and diminished by the VCA-Idaho. The Ninth Circuit relies upon the Idaho federal district court reasoning on this particular point.

> The law does not prohibit Plaintiffs from participating in political activities, but it hampers their ability to do so by making the collection of funds for that purpose more difficult . . . The district court found that the payroll deduction ban would decrease the revenues available to Plaintiffs to use for political speech. Restricted funding will, therefore, diminish Plaintiffs' ability to engage in political speech . . .

504 F.3d at 1058 (emphasis added).

The Sixth Circuit concedes the Ohio CFRA may have an effect on both recipients and donors, but concludes that "the protections accorded to fundamental First Amendment rights do not extend to imposing a duty on government to assist the exercise of First Amendment rights no matter how much the withdrawal of such assistance undercuts the effect of exercising such rights." *Id.* at 320. In fact, the Sixth Circuit, in addressing the unions' argument, refutes the opinions that its sister circuits issued years later.

> The plaintiffs reason that . . . the state's refusal to allow public employers to administer this method of fundraising significantly impairs the ability of public employees and their unions to raise funds used to promote their political agendas and favorite candidates. Thus, they contend, the state's refusal to continue to administer checkoffs for political causes unconstitutionally impairs the employees' and the unions' right to free association and political free expression.
>
> The problem with this reasoning is that it confuses what citizens and the associations they form may do to support and disseminate their views with what citizens and groups they form may *require* the government to do in this regard.

154 F.3d at 319 (emphasis in original).

The Sixth Circuit refutation of Ninth and Tenth Circuit reasoning underscores the essential point of this brief—that each circuit decision portrays different views of the First Amendment and the rights it protects. The Sixth Circuit contends that "the First Amendment protects individuals' 'negative' rights to be free from government action and does not create 'positive' rights-requirements that the government act," *id.*, which flies in the face of the Ninth and Tenth Circuit viewpoint.

The United States Supreme Court ought to reconcile these contrasting circuit disagreements on First Amendment freedom of speech.

2. *Are payrolls public or non-public fora?*

The circuit courts' distinctions in viewing First Amendment rights, and whose rights are violated

under the state VCA and CFRA, result in significantly varying constitutional theories. The Sixth Circuit rightly contends, "the First Amendment does not impose any duty on a public employer to affirmatively assist, or even to recognize a union," *id.*, suggesting that the "checkoff ban simply does not impinge, in a constitutionally significant manner, on any First Amendment rights." *Id.* Neither does government impinge on a constitutional right when it refuses to remove obstacles not of its own creation. The question of whether payrolls are public or non-public forum is irrelevant under this case theory.

Again to the contrary, the Tenth Circuit concludes that payrolls are public fora, but focuses mainly on the employees and their right to donate to unions despite the ". . . marginal, although slight expense," 2008 U.S. App. LEXIS 497, *4, to public subsidiaries (the government) in setting up and administering a payroll deduction system for the union.

In contrast to both the Sixth and Tenth Circuits, the Ninth Circuit effectively treats public payrolls as akin to a public park in which a union, or any other entity, is entitled to fundraise, notwithstanding a payroll's primary (perhaps only) use, which is to pay employees.

> . . . in *Cornelius*, the Supreme Court held that a charity drive within federal workplaces constituted a forum. 473 U.S. at 801. The Court reasoned that the relevant forum should be deter mined on the basis of the type of access sought by the speaker to the relevant property . . .
>
> Following *Cornelius*, the relevant forum in this case would be the payroll deduction programs of

> the local governments, as Plaintiffs seek access to this part of local government workplaces.

504 F.3d at 1061.

Clearly, the unions seek full, unadulterated access to the payroll systems for public employees as a free speech forum. While the government may support charitable contributions in the workplace, even through payroll deductions, it is not constitutionally obligated to provide a collection mechanism for them. As the Sixth Circuit observed, "in the absence of the public employers administering checkoffs for political causes, all political candidates and funds, regardless of their persuasion, are left with at least the same range of options in deciding how to tap this sector of the population for contributions. . ." 154 F.3d at 321. Clearly, the Ninth Circuit has a different view of payroll functions from either of the other circuits. The Ninth Circuit view has significant impact on the state legal prerogative to prohibit payroll deductions for state employees, but not political subdivisions of the state, while the Sixth Circuit does not recognize such an artificial dichotomy. Instead, the Sixth Circuit views public employers for First Amendment purposes as a uniform entity.

3. *What does the law regulate?*

The answer to the above question affects the level of scrutiny courts should use in evaluating whether or not the law justifiably, and constitutionally, regulates speech.

The Ninth Circuit applied strict scrutiny to the VCA-Idaho because it believed, "The law on its face prohibits payroll deductions only for political activities. This is a subject matter discrimination, which

is a form of content discrimination. . ." 504 F.3d at 1058. The Tenth Circuit directly refutes a district court assertion that the VCA-Utah regulates content, and therefore ought to be evaluated using strict scrutiny:

> The district court found that because the VCA restricts only deductions for political purposes, it represents a content based regulation. Accordingly, the court below applied strict scrutiny and found the provision unconstitutional. . .
>
> If the VCA restricted traditional speech rather political contributions, such scrutiny might apply here as well. But the VCA regulates political contributions . . . [we therefore] apply a lower standard of scrutiny than traditional strict scrutiny.

2008 U.S. App. LEXIS 497, *24 (emphasis added).

Once again differing from its sister circuits, the Sixth Circuit places more emphasis on the employers themselves, in contrast to regulation of union speech or employee donations:

> [Ohio Rev. Code Ann.] §3599.031(H) prohibits public employers in the state of Ohio from administering wage checkoffs for any candidate, separate segregated fund, political action committee, legislative campaign fund, political party, or ballot issue. [It] does not single out political contributions to only certain parties, candidates or issues. All Ohio public employees are denied the benefits. . .

154 F.3d at 319 (emphasis added).

The Court further explained:

> It is important to note that it is employers rather than the unions that administer the wage check-offs at issue, even if they are intended to benefit employees. This is important because the First Amendment only "protects individuals' 'negative' rights to be free from government action and does not create 'positive' rights- requirements that the government act."

Id.

4. *Are political subsidiaries considered part of the state for purposes of the First Amendment?*

This issue is particularly relevant because it affects whether the state VCAs and CFRA fall under a non-public forum exception to speech regulation. According to the Tenth Circuit, the "nonpublic forum exception applies" only "where the government is acting as a proprietor, managing its internal operations, rather than acting as a lawmaker with the power to regulate or license." 2008 U.S. App. LEXIS 497, *11.

Amici strongly contest the reasoning of the Ninth and Tenth Circuits on this point, as discussed below under point II. B.

B. Incorrect Application of Precedent and Erroneous Reasoning—Payroll Deductions are a State Subsidy

This section of the *amici* brief further underscores disagreement between the circuits, partly because the Ninth and Tenth Circuits incorrectly interpreted the Sixth Circuit decision, thinking it only applied to state employees. However, the focus of this section

further highlights erroneous reasoning of the various circuit opinions. The Sixth Circuit reasoning—that the government need not subsidize speech applied to political subsidiaries as well the state itself—should stand as the principle of law the Supreme Court ought to affirm. Again to the contrary, the Tenth and Ninth Circuits effectively treat political subsidiaries as private companies when the facts and circumstances call for a third scenario, or even more accurately, a rational basis analysis, as the Sixth Circuit applied.

The Ninth Circuit recognizes the possibility of an exception to strict scrutiny of any regulation of speech, and even acknowledges the Sixth Circuit decision:

> In general, government may refrain from paying for speech with which it disagrees . . . Applying this doctrine, the district court held that the State of Idaho could properly forbid payroll deductions of its own employees to be used for union activities, as the First Amendment imposes no obligation to subsidize union and employee speech by paying for the administration of the payroll deductions. *Pocatello Educ. Ass'n* 2005 WL 3241745, at *2; cf. *Toledo Area AFL-CIO Council v. Pizza* 154 F.3d 307, 319-20 (6th Cir. 1998); *S.C. Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1257 (4th Cir. 1989). These parties appear to be in agreement as to this point, and the holding is unchallenged on appeal . . .

504 F.3d at 1059 (emphasis added).

The Tenth Circuit likewise referenced *Pizza* in a footnote, but excuses the case, saying the "Sixth

Circuit assumed that the state was regulating its own payroll systems." 2008 U.S. App. LEXIS 497, fn. 6. We assume the Ninth Circuit would agree, as it states, "there is no subsidy by the State of Idaho for the payroll deduction systems of local governments." 504 F.3d at 1059 (emphasis added).

The Ninth Circuit claim, that the State of Idaho subsidizes nothing by implementing the VCA-Idaho, is demonstrably absurd. First and foremost, in the Sixth Circuit's decision, upholding the Ohio statute that forbids payroll deductions, no distinction is made between the state and state political subsidiaries. Knowing the statutory definition of 'public employers' included ". . . a political subdivision of the state, a school district or state institution of higher learning, a public or special district or any other public employer," the Sixth Circuit ruled ". . . it cannot be said that the state has impinged in any way on the First Amendment rights of public employees and their unions by prohibiting public employers (in effect, itself) from administering checkoffs." 154 F.2d 321 (emphasis added). The Sixth Circuit effectively equates public employers (of all kinds) and the state itself. Therefore, the Sixth Circuit decision applied to all public employers, including school districts and local government entities, and not merely state employers.

Again to the contrary, the Ninth and Tenth Circuits seem to hold that because the state itself does not directly own and control the payroll functions of local government entities, no government subsidy exists. This is a fabricated distinction between the state government and its political subdivisions and is simply not relevant. The Ninth and Tenth Circuits' reasoning is akin to saying no subsidy exists because

the money came from the right pocket instead of the left (of course after being transferred to the right from the left). The fact remains that each type or level of public employers uses public funds apportioned by the state government, collected from the taxpayers, to subsidize the political contributions, whether the payroll system is administered by the state itself or one of its political subdivisions, like a city or school district. In reality, if a school district, for example, makes payroll deductions of union political contributions, the school district uses a portion of taxpayer dollars to support the teachers' union's political agenda, an agenda that many taxpayers undoubtedly oppose. This Court should grant certiorari to reverse such inequity.

The irrelevance of the Ninth and Tenth Circuit distinctions between type or level of government is perhaps better understood from a different perspective. The First Amendment guarantees free speech. Does that right to speech change depending on the type or level of government involved? No court would rightly rule that freedom of speech, or right to equal protection, has not been violated only because the school district, rather than the city or the state was the source of constitutional deprivation. Infringement from one type or level of government is ultimately the same as infringement on another type or level of government. A subsidy from one type or level of government is the same as a subsidy from another type or level of government. Because political subsidiaries are forms of government, their employees' contributions to unions and other political entities using payroll deductions are subsidies to political speech. Therefore, because all government entities subsidize political speech when allowing political contributions, this Court should apply a rational basis

analysis to the VCA and CFRA, and should find, as the Sixth Circuit did, they are constitutional.

C. Incorrect Application of Precedent and Erroneous Reasoning—Payroll Systems are not Public Fora

The Ninth and Tenth Circuits rejected the respective state arguments about government subsidies, and, instead used a public forum analysis. The Ninth Circuit states that "a nonpublic forum has been characterized as 'any public property that is not by tradition or designation a forum for public communication.'" 504 F.3d at 1061, citing *Faith Ctr. Church Evangelistic Ministries v. Glover*, 480 F.3d 891, 907 (9th Cir. 2007). But these restrictions are allowed only when the government is acting as a proprietor, managing its internal operations, rather than acting as a lawmaker with the power to regulate or license.

Both the Ninth and Tenth Circuits "conclude that a relevant distinction for purposes of the nonpublic forum exception [exists] between property owned and controlled by the government seeking to implement the speech restrictions, and property owned and controlled primarily by independent entities." 2008 U.S. App. LEXIS 497, *13. Therefore, these circuits reasoned, "that for the government to impose speech restrictions under the nonpublic forum exception, it must do so only on its own property, and then only when it acts in a proprietary role. . . By contrast, when a government acts merely as a regulator of an independent entity, public forum analysis does not come into play." *Id.* at *12.

Such reasoning suggests that only a school district, for instance, can impose speech restrictions on a school, and the city, county, state or federal gov-

ernments are prohibited from doing so. In effect, the Tenth Circuit inaccurately treats state regulation of government subsidiaries as private companies by using case law addressing government speech restrictions on third party property, rather than on the government's own property. The Ninth Circuit goes so far as to directly compare government subsidiaries to private property. "In sum, the states broad powers of control over local government entities are solely those of a regulator, analogous to the New York Public Service Commission's regulatory powers over Consolidated Edison." 504 F.3d at 1065 (emphasis added).

Unfortunately, this reasoning is based on a flawed assumption: an enforced 'either/or.' The Ninth and Tenth Circuits assumed that the state could only act as either solely a proprietor or solely as a regulator. But if forum analysis is to predominate in this case, the state can be a regulator and a proprietor of state subsidiaries in varying degrees. For instance, state standards for class time each year, or state regulations of on-the-job training, can be seen as resulting from proprietary care. More importantly, the apportionment of funds to school districts, for example, (from which teachers are paid, and checks are produced) is much more the role of a proprietor than a regulator. Therefore a law prohibiting payroll deductions, thus eliminating the subsidy of political speech, can be seen as a proprietor's management of funds and concern for efficient, politically neutral, workplaces, as much as regulation from a distant overlord.

CONCLUSION

Because of the manifest split decisions among different circuit courts and contradictory, disparate, and erroneous reasoning among the courts, as explained above, this Court should grant the Petition for Writ of Certiorari in *Ysursa et al v. Pocatello Education Association, et al,* No. 07-869 and clarify the First Amendment law on the constitutionality of government payroll deductions so that all government entities in the United States can apply uniform constitutional principles.

Respectfully submitted,

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