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

Respondents.

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

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

The opposition brief of the respondent labor organizations ("respondents") underscores that the validity of the payroll deduction restriction in Idaho Code § 44-2004(2) (Michie 2003) turns on whether the First Amendment precludes a state legislature from directing local governmental entities to close an admittedly nonpublic forum and thereby furthering concededly reasonable public policy. They thus do not contest the validity of statute as applied to the payroll systems of "the State's own agencies and employees" or the necessary corollary – *i.e.*, Idaho counties, cities and school districts can similarly deny access to those systems for purposes of deducting "political activities" contributions. Br. of Respondents Pocatello Educ. Ass'n, *et al.* in Opp'n ("Opp'n Br.") 2 n.1. Respondents removed any doubt in this regard by recasting the Question Presented to ask whether § 44-2004(2)'s validity "should be subject to only a reasonableness test, where the State has played no role in the ownership, management, administration or control of those local government payroll systems apart from the challenged restriction on political speech." *Id.* at i. Implicit in their framing of the issue is that the "reasonableness test" would apply were the "State" the "proprietor," rather than the "regulator," of the payroll systems. *See id.* at 9; *see also id.* at 7 ("a deferential standard of review to a governmental entity's restriction of speech in a nonpublic

governmental forum" to instances where "the governmental entity [is] restricting speech *in a forum owned and managed by that governmental entity*").

Respondents' stark embrace of the unsound proprietor-regulator distinction created out of constitutional whole cloth by the Ninth Circuit strongly counsels toward this Court's review. *First*, their characterization of the "State" – here the Idaho legislature – as a regulator of the local governments' payroll systems derives from a fundamental misunderstanding of the Court's First Amendment forum decisions. They, like the court of appeals, err in distilling from the various forum cases a First Amendment-based prohibition against a legislature's directing a governmental entity, whose very authority to establish a payroll system derives from statute, to limit access to that system where speech or associational rights may be affected. *Second*, respondents err in contending that no conflict for S. Ct. R. 10(a) purposes exists between the decision below and *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307 (6th Cir. 1998). The decisions reach diametrically opposed determinations of constitutionality concerning statutory limitations on the use of any governmental employer's payroll system to deduct amounts for political activities and to remit those amounts to third parties. *Third*, respondents improperly dismiss the ramifications of the Ninth Circuit's reasoning. The decision below stands, at a minimum, for the novel and, from petitioners' perspective, unprecedented proposition that state legislatures lack

authority to control access to the payroll systems of local governmental entities where First Amendment rights may be affected unless strict scrutiny standards are met. If that is law, this Court should say so.

ARGUMENT

I. NOTHING IN THIS COURT'S FIRST AMENDMENT JURISPRUDENCE ESTABLISHES, OR EVEN SUGGESTS, THAT A STATE LEGISLATURE ACTS AS A "REGULATOR" WHEN IT DIRECTS STATE OR LOCAL GOVERNMENTAL ENTITIES TO LIMIT ACCESS TO NONPUBLIC FORUM

This Court has addressed on numerous occasions questions concerning the correct forum classification of particular governmental property, whether real and "metaphysical." *See, e.g.*, *Rosenberger v. Rectors and Visitors*, 515 U.S. 819, 830 (1995). Payroll systems and related activities fall into the latter category, as indicated by *Perry Education Association v. Perry Local Educators Association*, 460 U.S. 37 (1983), and *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788 (1985), but the governing principles do not vary. None of these decisions considered, or had need to consider, the contention that the First Amendment imposes differing standards of review with respect to limitations on forum access created, on one hand, by the forum's immediate governmental operator as a matter of its own discretion and, on the other, by a legislative body

with authority to control the *operator's* use of the forum. Respondents infer from the absence of discussion and the use of selective quotations the rule that, in the latter context, the legislating entity acts as a "regulator," not a "proprietor," and that its actions are thus subject to strict scrutiny review. *E.g.*, Opp'n Br. 8 ("where a governmental entity reaches out to restrict speech 'as a lawmaker with the power to regulate,' . . . rather than as a proprietor or manager, its restrictions on speech are not to be judged by the deferential review 'that rests on the special interests of a government in *overseeing the use of its property*' ") (citing with added emphasis *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992)).

Respondents' rule not only proves too much but also cannot be squared with this Court's decisions. It proves too much because, to the extent that the Idaho legislature acts as a "regulator" for local governments with regard to their payroll-system authority, it plays the same role for state agencies or officials when they manage the involved forums. The legislature, in other words, "regulates" Idaho's *governmental* conduct in both instances, since it no more "owns" the agencies' payroll systems than it "owns" the local governments' systems. Pertinent to this principle is article II, section 1 of the Idaho Constitution, which establishes "three distinct departments, the legislative, executive and judicial" and further mandates that "no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging

to either of the others, except as in this constitution expressly directed or permitted." The Idaho Supreme Court construes this express mandate to embody a separation-of-powers standard analogous to that implied under the United States Constitution. *E.g.*, *Sweeney v. Otter*, 804 P.2d 308, 312 (Idaho 1990). Whatever the precise nature of constraints on the legislature's powers imposed under article II, section 1, they are certainly no greater than those over local governments where legislative control is virtually plenary. *See* Pet. 8-11. Given respondents' concession that the first form of "regulation" is permissible under the First Amendment, they cannot logically argue the contrary as to the second.

Respondents' position runs counter to this Court's decisions because, if credited, a state legislature would be precluded by the First Amendment from proscribing any form of payroll deductions by local government employers for labor organizations. The Court, however, held in *City of Charlotte v. Firefighters Local 660*, 426 U.S. 283 (1976), that no constitutional right to such deductions exists (*id.* at 286) and extended the *Charlotte* holding to a First Amendment forum-access-denial claim in *Perry* (460 U.S. at 54).[1]

[1] Respondents contend that "Idaho has played no role at all with respect to [the local governments' payroll] systems apart from imposing the statutory restriction on speech that is challenged here." Opp'n Br. 8-9. This contention overlooks the fact that the authorization for public employers to make *any* payroll deductions for labor unions or affiliated organizations derives from Idaho Code § 44-2004(1) (Michie 2003).

Respondents also ignore *Perry*'s statutory background. It showed that the challenged contract provision resulted from a collective bargaining relationship formed pursuant to Indiana public employment relations law and that the provision, which denied rival unions access to teachers' mailboxes, was consistent with the responsible state board's construction of applicable unfair labor practice provisions. *Id.* at 40 n.3 (citing Indiana Education Employment Relations Board's decision that found no violation of state law when a minority union was denied access to school property for organizational purposes). The Court looked to the same state statute to find various limitations on school districts' right to deny such access. *Id.* at 41 ("under Indiana law, the preferential access of the bargaining agent may continue only while its status as exclusive representative is insulated from challenge"). Moreover, the designation of the Perry Education Association as the teachers' exclusive bargaining representative – and the state law-grounded rights and duties attending such designation – formed the very basis for the determination that a rational basis existed for the mailbox-access denial. *Id.* at 48 (rejecting relevance of minority union's equal access prior to Perry Education Association's designation as exclusive bargaining agent); *id.* at 50 ("[u]se of school mail facilities enables PEA to perform effectively its obligations as exclusive representative of *all* Perry Township teachers").

It makes no sense in light of the integral role played by state law in *Perry* to argue, as respondents

do, that the First Amendment negates the responsibility of a local government to comply with such law in "the management of its own internal affairs." Opp'n Br. 7 n.6. *Perry* instead leaves no doubt that state law-grounded constraints on how a local government may "manage" a nonpublic forum must be considered in applying the rational basis test. Implicit in this Court's analysis is the principle that the First Amendment does not grant a dispensation from compliance with those constraints insofar as they require the local government to deny access to the forum and otherwise satisfy the reasonableness standard. The local government, in short, continues to "manage" the forum but does so within the bounds of its statutory authority.

That the regulator-proprietor dichotomy advanced by respondents simply has no relevance here is reflected in *Davenport v. Washington Education Association*, 127 S. Ct. 2372 (2007), a decision which they deal with only in passing. Respondents distinguish the decision on the ground that "the state was simply placing a limit on its own prior legislative action that had granted unions a 'state-bestowed entitlement.'" Opp'n Br. 10 n.8. They ignore that, as noted above, their "entitlement" to any form of payroll deduction derives from § 44-2004(1) and that one purpose of 2003 amendments to the Right to Work Act was to restrict this "totally repealable authorization" (*Davenport*, 127 S. Ct. at 2381). In other words, the statutory modifications in both instances served to constrict local government contracting discretion. The

Davenport Court was also quite clear about the fact that the Washington state-law amendment fell outside the First Amendment "regulation" model, stressing that its holding was limited to public sector agreements, whose negotiation the amendment "*conditioned*[,]" and did not address the amendment's effect on private sector arrangements, which the initiative "*regulated*." *Id.* at 2383. The present case, in contrast to *Consolidated Edison Company v. Public Service Commission*, 447 U.S. 530 (1980), where the utility had not "asserted a right of access to public facilities" (*id.* at 539), involves control of public employment relations, not "regulation" of purely private conduct. *Davenport* makes plain that a state legislature need not be the "proprietor" of a local government forum as to "condition" access to it.[2]

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[2] Respondents challenge petitioners' reliance on *Davenport*'s statement that "black-letter law" establishes the right of the "government" to exclude speakers from a nonpublic forum on reasonable, viewpoint neutral grounds, arguing that the "statement does not suggest that 'the government' whose decisions in this regard are entitled to deference is different from 'the government' that operates or manages the property." Opp'n Br. 9 n.8. The "government" in *Davenport* presumably was the legislature and voters acting through the initiative process, not the individual public employers with which the involved unions had collective bargaining relationships, since the constitutional challenge was directed to a statute. However, even if the term "government" referred to the individual public employers, the result would not change given the statutory limitation – which this Court upheld – on their contracting authority. Either reading is fatal to respondents', and the Ninth Circuit's, importation into First Amendment forum analysis of a restriction on

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II. RESPONDENTS' EFFORT AT DISTINGUISHING *TOLEDO AREA* FOR CONFLICT PURPOSES IGNORES THE FACT THAT THE SIXTH CIRCUIT UPHELD AN OHIO STATUTE MATERIALLY INDISTINGUISHABLE FROM IDAHO CODE § 44-2004(2)

In *Toledo Area*, the Sixth Circuit Court of Appeals engaged in an extensive analysis of challenges to four newly-enacted modifications to Ohio's Campaign Finance Reform Act and eventually found three of the provisions unconstitutional. It rejected, however, the attack on Ohio Rev. Code § 3599.031(H), which then provided that "[n]o public employer shall deduct from the wages and salaries of its employees any amounts for the support of any candidate, separate segregated fund, political action committee, legislative campaign fund, political party, or ballot issue." As petitioners previously explained

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legislative power to require state political subdivisions to limit access to a nonpublic forum. It is no less fatal to the Tenth Circuit's largely identical reasoning in *Utah Education Association v. Shurtleff*, 512 F.3d 1254 (10th Cir. 2008), *pet. for reh'g filed* (Jan. 22, 2008). *See id.* at 1259 ("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"). Respondents' related suggestion that petitioners' position would give States control over federal property is extreme; not only does § 44-2004(2) apply exclusively to the state public sector, but *Davenport*'s reference to the "government" – and by necessity petitioners' – was also to federal and state governmental entities functioning within the appropriate scope of their respective legislative or regulatory spheres.

(Pet. 28-29), the court of appeals followed other federal appellate authority related to payroll deductions and found no First Amendment right to governmental assistance in the exercise of otherwise protected speech rights. 154 F.3d at 319-22.

Notwithstanding the essential identity of the statute upheld in *Toledo Area* and § 44-2004(2) both as to substance and applicability to all state public employers, respondents argue that no conflict under S. Ct. R. 10(a) exists because "the [*Toledo Area*] plaintiffs did not differentiate between Ohio's speech restriction regarding the state's own payroll system and its restriction regarding local governmental entity payroll systems" and because "the court disposed of the case without any discussion of the non-public forum doctrine." Opp'n Br. 10-11. Neither contention is persuasive. First, regardless of whether the *Toledo Area* plaintiffs couched their challenge explicitly on a payroll-system "differentiat[ion]" rationale, the Sixth Circuit characterized their claim as alleging 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." 154 F.3d at 319 (emphasis added). There is thus no question that the plaintiffs' claim was directed to the legislative intrusion on the ability of *any* public employer, including local governments, to enter into check-off arrangements related to political activities. Second, the difference in analytical approaches is hardly

dispositive, given the interrelationship between the "subsidization" approach utilized by the Sixth Circuit and the forum approach (Pet. 29 n.8) and the fact that the Ninth Circuit indicated its agreement with the district court's partial invalidation of § 44-2004(2) the former approach for precisely the same reason that is used under the latter – the availability of the subsidization rationale only to the governmental entity actually providing the subsidy (Pet. App. 10-11). These analytical differences, rather than counseling against review predicated on circuit conflict, militate toward review to resolve the fundamental issue present by the petitioners: the ability of a state legislature to control access to the payroll systems of local governments where First Amendment interests may be implicated.[3]

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[3] Respondents assert that petitioners "disclaim[] any reliance on [the subsidization] doctrine." Opp'n Br. 12. This assertion misses the key notion that access to the local government payroll system is logically an antecedent predicate for "subsidization" – *i.e.*, that the subsidization issue need not be addressed if the local governments may close the nonpublic forum as a threshold matter. As explained above, moreover, the applicability of either analytical approach is dependent upon the Idaho legislature's authority to control the actions of state local governments with respect to payroll deductions for political activities as long as it has a reasonable basis for doing so, which concededly it has.

III. THE NINTH CIRCUIT'S DECISION HAS SIGNIFICANT RAMIFICATIONS BEYOND STATUTES PROHIBITING PUBLIC EMPLOYERS FROM DEDUCTING POLITICAL ACTIVITY CONTRIBUTIONS FROM THEIR EMPLOYEES' WAGES

Respondents contend that the several statutes from other States identified by petitioners as potentially affected by the Ninth Circuit's "managerial interest" standard (Pet. 31) are inapposite, since some "do not impose content-based speech restrictions and thus would not trigger strict scrutiny" and "others would be likely to withstand strict scrutiny." Opp'n Br. 13 n.14. They do not expand upon this general statement.

Respondents' off-handed dismissal of the broad ramifications flowing from the Ninth Circuit's decision warrants only brief comment. Under the court of appeals' reasoning, the constitutional flaw in § 44-2004(2) lies not in the absence of an adequate justification for the restriction on payroll deductions but in the First Amendment-driven absence of legislative authority to preclude the use of local government payroll systems for such purposes. The logical consequence of the court's theory is that *any* state legislative restriction on local governments related to access to their payroll systems will be similarly nullified when speech or association rights may be affected. The several statutes identified by petitioners differ from § 44-2004(2) with regard to the restriction's substance but share the common, and controlling, feature of

touching upon First Amendment interests. So, for example, a minority union could argue that a statute authorizing dues deductions only to the exclusive bargaining representative of a local government employee group compromises freedom of association and that, while *Perry* permits the local government to close its payroll system for such purpose, the First Amendment prevents the legislature from requiring closure. The Ninth Circuit's rule similarly would preclude a legislature from removing the authority of local government employers to make any deductions for purposes similar to those at issue in *Cornelius*. In sum, the decision below has far-reaching First Amendment impacts.

CONCLUSION

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

Respectfully submitted,

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