No. 07-869

FILED
FEB 25 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

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

BRIEF OF RESPONDENTS POCATELLO EDUCATION ASSOCIATION, ET AL. IN OPPOSITION

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QUESTION PRESENTED

This Court's "nonpublic governmental forum" cases hold that "[w]here the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license," *International Soc'y for Krishna Consciousness, Inc., v. Lee*, 505 U.S. 672, 678 (1992), the government's content-based restriction of speech on its own property is subject to a reasonableness test and not to strict scrutiny.

The question presented in this case is whether the Court of Appeals erred in rejecting Idaho's contention that, under the "nonpublic governmental forum" doctrine, a state statute prohibiting local governments from allowing employees to use the local government's payroll system to make lawful political contributions through payroll deduction 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.

CORPORATE DISCLOSURE STATEMENT

Two of the Respondents—the Idaho Education Association and the Professional Fire Fighters of Idaho, Inc.—are organized as nonprofit corporations. They have no parent corporations, nor does any publicly held company own any stock in them.

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BRIEF OF RESPONDENTS POCATELLO EDUCATION ASSOCIATION, ET AL. IN OPPOSITION

Respondents 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, and Idaho State AFL-CIO respectfully urge the Court to deny the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Respondents are labor organizations representing employees of school districts, cities and counties in Idaho, who are subject to Idaho Code §44-2004(2). That statute, *inter alia*, makes it a crime for a local governmental entity to permit its employees to make a political contribution, including a contribution to a union political fund, by means of payroll deduction, even though the contribution is perfectly lawful and Idaho law would allow it to be transmitted by any other means, including through direct payment at the workplace.

Idaho leaves local governmental entities free to permit their employees to use payroll deduction to transmit contributions to charities or other entities, or to pay dues or fees to any organization—or indeed, to make any other lawful payment whatever. But in Section 44-2004(2), Idaho has made it unlawful to transmit political contributions in the same manner, no matter how even-handedly the local governmental entity may respond to employee requests to make payments by payroll deduction, and without regard to whether the incremental cost of making a payment through payroll deduction would be borne by the employer, or instead by the employee or the recipient of the payment.[1]

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[1] Section 44-2004(2) applies not only to local governmental entities, but also to the State, and to many private employers as well. *See* Idaho Code §§ 44-2602(d)(ii), (iii) (applying Section 44-

Section 44-2004(2) was enacted as part of Idaho's so-called Voluntary Contributions Act ("VCA"), which imposed thoroughgoing restrictions on the participation of labor organizations in political activities. *See* Pet. App. 53-54. In a challenge to the VCA in the district court, the State conceded the unconstitutionality of all provisions of the VCA "except for the ban on political payroll deductions." Pet. App. 33.

In defending Section 44-2004(2)'s constitutionality in the Court of Appeals, the State did not dispute that the provision hampers the ability of Respondents and their members to engage in political activities.[2] Pet. App. 8. And, in the Court of Appeals,

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2004(2) to "each employee association and union for employees of public and private sector employers," except those "governed by the national labor relations act [NLRA], 29 U.S.C. section 151, *et. seq.* or the railway labor act [RLA], 45 U.S.C. Section 151, *et seq.*" The RLA governs only railroads and airlines. *See* 45 U.S.C. §§ 151 First, 181. The coverage of the NLRA is much broader, but excludes agricultural and domestic workers, small employers, and a number of other categories. *See* II The Developing Labor Law 2220-23, 2252-59 (John E. Higgins, Jr. ed. 5th ed. 2006). Thus a considerable number of private employers are subject to § 44-2004(2).

The State has not attempted to defend the statute's application to the private sector, and Respondents do not challenge the statute as applied to the State's own agencies and employees.

[2] The Court of Appeals summarized the undisputed evidence on this point as follows (Pet. App. 8):

> [Section 44-2004(2)] 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 unions face substantial difficulties in collecting funds for political speech without using payroll deductions because of their members' concerns over identity theft associated with other electronic transactions, as well as the time-consuming nature

the State "proffer[ed] no compelling interest in favor of the law," and admitted "that [the law] would easily fail strict scrutiny." Pet. App. 9-10.[3] Instead, the State "argu[ed] that the proper way to view the statute is to look at the payroll deduction programs of local governments as nonpublic fora belonging to the State," such that the statute need only be shown to be viewpoint neutral and "reasonable." Pet. App. 12.

The Court of Appeals rejected Idaho's argument on the ground that the deferential review Idaho sought to invoke applies only "[w]here the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license," Pet. App. 17, quoting *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) ("*ISKCON*"); and, in imposing Section 44-2004(2) on local governments, Idaho acted as "a regulator," rather than as "the proprietor of the local workplaces or of local government payroll systems." Pet. App. 20. Indeed, "[w]hen pressed at oral argument, [Petitioners] conceded that the State of Idaho is not the proprietor of local government workplaces or their payroll deduction programs." Pet. App. 25.

In stating its conclusion on this point, the Court of Appeals acknowledged that a governmental entity that is not the actual proprietor of a facility or pro-

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of face-to-face solicitation. 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.

[3] In its Petition for Certiorari, the State fails to identify *any* purpose, compelling or otherwise, that is served by Section 44-2004(2).

gram might be entitled to deferential review of its content-based restrictions on speech if that governmental entity exercised extensive control over the facility or program. *See* Pet. App. 25-28. But the court found it "clear that the State of Idaho does not pervasively manage local government workplaces or local government payroll deduction programs." Pet. App. 29. On the contrary, the State "cannot point to any current or previous exercise of control over local governments' administration of their payroll systems, except for the subject statute, § 44-2004(2)." *Id.* Idaho thus has "failed to establish that local governments' payroll deduction programs involve Idaho's discretion and control over the management of its own internal affairs . . ., such that the programs should be considered a nonpublic forum of the State." *Id.*

Concluding for these reasons that "[t]he public forum doctrine does not apply to Idaho's decision to prevent local government employers from granting an employee's request to make voluntary contributions to political activities through a payroll deduction program," Pet. App. 31, the court applied strict scrutiny to this content-based restriction on speech. The Court determined—as the State had conceded—that, with respect to local units of government, Section 44-2004(2) cannot withstand such scrutiny. Pet. App. 9-10, 31.

ARGUMENT

The decision below is entirely sound and is directly in line with the Tenth Circuit's decision in *Utah Education Ass'n v. Shurtleff*, No. 06-4142, 2008 U.S. App. LEXIS 497 (10th Cir. Jan. 10, 2008), which is the only other appellate case that has decided the question presented here. Petitioners' claims (i) that

the Ninth Circuit's decision is inconsistent in principle with this Court's "nonpublic forum" cases, and (ii) that the decision below conflicts with the Sixth Circuit's decision in *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307 (6th Cir. 1998), are without substance. The certiorari petition should be denied.

I. THE DECISION BELOW IS CONSISTENT WITH THIS COURT'S DECISIONS

Idaho's argument in the Court of Appeals, reiterated in its certiorari petition, was that the strict scrutiny that otherwise would apply to Section 44-2004(2)[4] should not be applied in this case because the local government payroll systems in which the political speech at issue takes place are nonpublic governmental fora.[5] But, in every case in which this

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[4] *See generally Davenport v. Washington Educ. Ass'n,* 127 S. Ct. 2372, 2381 (2007) ("content-based regulations of speech are presumptively invalid"); *Consolidated Edison Co. v. Public Serv. Comm'n,* 447 U.S. 530, 537 (1980) (strict scrutiny applied to regulation prohibiting use of a public utility's billing envelopes for discussion of "controversial issues of public policy," even though the restriction "d[id] not favor either side of a political controversy"); *Burson v. Freeman*, 504 U.S. 191 (1992) (strict scrutiny applied to statute prohibiting campaigning within 100 feet of a polling place).

[5] In the district court, the State had taken a different tack, arguing that no First Amendment interests are implicated by Section 44-2004(2) in its application to local governmental entities because the First Amendment does not require the State to "subsidize" speech. Pet. App. 36. The district court rejected that argument because the State does not subsidize local governmental entities' payroll systems. Pet. App. 38. The Court of Appeals likewise found that "there is no subsidy by the State of Idaho for the payroll deduction systems of local governments." Pet. App. 11. Idaho does not question that determination, and its petition eschews reliance on a "subsidization" rationale. *See* Petition at 29-30 n. 8.

Court has applied a deferential standard of review to a governmental entity's restriction of speech in a nonpublic governmental forum, the governmental entity was restricting speech *in a forum owned and managed by that governmental entity*. *See, e.g., Perry Educ. Ass'n. v. Perry Local Educators Ass'n*, 460 U.S. 37 (1983) (school district's restriction on access to its internal mail system) (cited in Petition at 21); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788 (1985) (federal government's decision as to which organizations to include in a charitable campaign run by the federal government at federal worksites) (cited in Petition at 22-24). *See also, e.g., ISKCON* (airport authorities' decision to prohibit face-to-face solicitation in the airport); *United States v. Kokinda*, 497 U.S. 720 (1990) (Postal Service regulation prohibiting solicitation in Post Offices); *Greer v. Spock*, 424 U.S. 828 (1976) (federal government's exclusion of partisan speakers from a military base); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (municipality's ban on political advertising in a municipal transit system.)[6]

That uniformity in the caselaw reflects this Court's teaching that the nonpublic forum doctrine provides for limited review of a restriction on speech "[w]here the government is *acting as a proprietor, managing*

[6] Petitioners also cite *City of Charlotte v. Firefighters Local 660*, 426 U.S. 283 (1976), where this Court held that a city's refusal to provide dues deduction to one of the unions representing its employees did not violate the Equal Protection Clause, and *Smith v. Arkansas State Highway Employees Local 1315*, 441 U.S. 463 (1979), holding that a state agency did not violate the First Amendment by refusing to give a union a role in presenting grievances. *See* Petition at 20-22. Those cases likewise involved a governmental entity's management of its own internal affairs.

its internal operations, rather than acting as lawmaker with the power to regulate or license." *ISKCON*, 505 U.S. at 678 (emphasis added). When a governmental entity acts as a proprietor or manager, that entity necessarily must make decisions concerning who will be allowed access to property and for what purposes; and it literally comes with the territory that some of those decisions will involve subject matter distinctions relating to speech.[7] In such circumstances, that a governmental proprietor or manager has been called upon to make subject matter distinctions concerning speech activities does not, without more, "raise[] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace." *Davenport*, *supra* note 4, 127 S. Ct. at 2381. But, conversely, where a governmental entity reaches out to restrict speech "as a lawmaker with the power to regulate," *ISKCON*, 505 U.S. at 678, 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*." *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 540 (1980) (emphasis added).

The Court of Appeals found—and indeed the State conceded—that the State of Idaho is *not* the proprietor or manager of local governmental entities' payroll systems. Rather, Idaho has played no role at all with

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[7] For example, as the Court recognized in *ISKCON,* airport authorities are required to make rules regarding access to various areas of the facility, avoidance of congestion, and efficiency of transit. *See ISKCON*, 505 U.S. at 682-83. It is inevitable that airport authorities, in the course of making such rules, will have to address speech activities as well as non-speech activities.

respect to those systems apart from imposing the statutory restriction on speech that is challenged here. In reaching out to ban local governmental entities from allowing their employees to use the local governmental entity's payroll system to transmit lawful political contributions, Idaho plainly acted as a regulator, not as a proprietor. Under this Court's nonpublic governmental forum cases, the Court of Appeals therefore was correct in holding that the strict scrutiny that ordinarily applies to content-based regulations of speech, rather than the deferential review that applies "[w]here the government is acting as a proprietor, managing its internal operations," *ISKCON*, 505 U.S. at 678, must be brought to bear in determining whether Section 44-2004(2), as imposed on local governments and their employees, comports with the First Amendment.[8]

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[8] Petitioners miss the mark in citing this Court's reference in *Davenport, supra* note 4, to the "black-letter law that, when the government permits speech on government property that is a nonpublic forum, it can exclude speakers on the basis of their subject matter, so long as the distinctions drawn are viewpoint neutral and reasonable in light of the purpose severed by the forum." *See* Petition at 24-25, quoting *Davenport*, 127 S. Ct. at 2381. That 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. It certainly is *not* "black-letter law," for example, that by reason of the nonpublic governmental forum doctrine a state government would be entitled to deference if it were to purport to declare what kinds of speech will be allowed in a federal post office.

Nor are Petitioners on solid ground in attributing significance to the fact that this Court did not draw a distinction between state employees and local government employees in evaluating the statute at issue in *Davenport*, which provided that public sector unions could not, without individual consent, use for

II. THERE IS NO CIRCUIT CONFLICT

The only other case in which a court has addressed the question whether a governmental entity is entitled to deferential review when it restricts speech in *another* governmental entity's forum is *Utah Education Association v. Shurtleff*, No. 06-4142, 2008 U.S. App. LEXIS 497 (10th Cir. 2008), in which the Tenth Circuit struck down a Utah statute very similar to Section 44-2004(2), adopting an analysis consistent with that of the Ninth Circuit in this case.[9]

The Sixth Circuit's decision in *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307 (6th Cir. 1998), which rejected a challenge to an Ohio provision that prohibited all "public employers" from allowing payroll deductions of political contributions, is not on point. In *Pizza*, the plaintiffs did not differentiate

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election-related purposes the fees that nonmember employees were required by state law to pay to the unions. *See* Petition at 28. *Davenport's* holding that strict scrutiny was unwarranted in that case did not rest on the nonpublic forum doctrine, but on the fact that, in the challenged statute, the state was simply placing a limitation on its own prior legislative action that had granted unions a "state-bestowed entitlement," *Davenport*, 127 S. Ct. at 2381, in the form of a right to require nonmembers to make payments to a union. Because the "extraordinary . . . authorization" the state had bestowed on the unions was "totally repealable," *id.* at 2381, this Court held in *Davenport* that the state's placement of a limitation on that did not warrant strict scrutiny. This case does not present any comparable situation.

[9] A petition for rehearing has been filed in *Shurtleff* and has not yet been ruled upon.

Petitioners' *amici* note that a similar Ohio provision was struck down in *United Automobile Workers Local 1112 v. Philomena*, 700 N.E.2d 936 (Ohio Ct. App. 1998). However, the non-public forum doctrine was not discussed in that case. *See id.* at 943-47.

between Ohio's speech restriction regarding the state's own payroll system and its restriction regarding local governmental entity payroll systems. *Id.*[10] The Sixth Circuit therefore analyzed the case on the assumption that the Ohio statute applied only "in effect, [to the State] itself," *id.* at 321-22,[11] and the court disposed of the case without any discussion of the nonpublic governmental forum doctrine, on the ground that the plaintiffs had no cognizable claim because the First Amendment "do[es] not extend to imposing a duty on the government to assist the exercise of First Amendment rights," *id.* at 320.

The doctrine that a government does not violate the First Amendment by "simply cho[osing] not to pay for" a private party's speech activities, *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 546 (1983), is of no help to Idaho in this case, because Respondents are not seeking to force Idaho to pay for anything. Indeed, in its petition,

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[10] The complaint and briefs in *Pizza* are in the record of this case, as Exhibits A and B to Docket No. 91.

[11] Here, in contrast, the Ninth Circuit analyzed in depth the question whether local governments in Idaho constitute the State "itself," and determined that they do not. *See* Pet. App. 20-25. Although Petitioners discuss this subject at length, *see* Petition at 8-11, whether the Ninth Circuit correctly described the relationship between State and local governments under Idaho's Constitution and statutes is not a matter that warrants review by this Court. In any event, the Ninth Circuit's understanding was correct. By law, local governments in Idaho have the right to acquire, hold and convey property, including the right to decide whether or not to transfer particular property to the State. *See* Pet. App. 24. Idaho law even recognizes the right of local governments to sue the State. *See Idaho Schs. For Equal Educ. Opportunity v. State*, 97 P.3d 453, 457-58 (Idaho 2004).

Idaho disclaims reliance on that doctrine. *See supra* note 5.[12] Thus, the issue addressed and decided by the Sixth Circuit in *Pizza* is *not* the issue Petitioners are raising in this case.

III. THE DECISION BELOW DOES NOT HAVE THE IMPLICATIONS AND CONSEQUENCES POSITED BY PETITIONERS

Contrary to Idaho's rhetorical protestations, *see* Petition at 3-4, 19, 30-32, the decision in this case does not alter the states' authority to control the activities of their local governmental entities. That authority has always been subject to the First Amendment, and the decision below merely delineates the First Amendment's limits on a state's exercise of that authority to impose an *ad hoc* restriction of speech on a local governmental entity's premises. And if it is the case, as Petitioners maintain, that as a general matter Idaho law gives the

[12] The amicus brief filed in support of the petition argues nonetheless that this case should be controlled by the "subsidization" caselaw. *See* Brief of Utah Taxpayers Association, *et al.* at 10-11, 12, 13, 15, 16, 17-18. Of course, this Court should not grant certiorari to consider a question raised only by amici and disclaimed by the Petitioners. But in any event, amici's argument is without merit. For Idaho to leave local governments free to decide for themselves whether to allow political contributions to be made by payroll deduction—and if so, whether to require payment for any costs incurred—would not involve the State of Idaho in subsidizing First Amendment activities. After all, Idaho leaves local governments free to decide whether to allow the use of payroll deduction for charitable contributions and for the payment of dues or fees to membership organizations; and Idaho has never suggested that by leaving these matters to be determined by local authorities the State is somehow subsidizing charitable organizations or membership organizations.

State the right to exercise plenary control over local governmental entities, *see* Petition at 8-9, the fact that, insofar as local governmental entity payroll systems are concerned, the State has chosen not to exercise that right except with respect to political speech makes this a paradigmatic case in which to apply the normal rule that content-based regulation of speech is subject to strict scrutiny.[13]

Idaho's suggestion that the decision below will force states to "seize control" over their local governmental entity nonpublic fora in order to gain a free hand to impose speech restrictions, *see* Petition at 31, is vastly overblown. The states generally are not in the practice of dictating what speech will be allowed on local government premises, as is borne out by the fact that Petitioners and their *amici* have been unable to identify any such present practices that would be cast into doubt by the decision in this case.[14]

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[13] Under Petitioner's theory of state hegemony, Idaho apparently would have the right to seize all town halls for the State's use. That is an extravagant view of Idaho law; but if it were correct, it would *not* mean that a mere reasonableness test would apply if Idaho, while leaving town halls to local management and control in all other respects, were to make it a crime to debate a particular subject in a town hall.

[14] Petitioners cite a few statutes from other states dealing with payroll deductions, *see* Petition at 31-32, but none of them is similar to Section 44-2004(2). Some of those statutes do not impose content-based speech restrictions and thus would not trigger strict scrutiny; others would be likely to withstand strict scrutiny. *Cf. Burson, supra*, 504 U.S. at 198-210 (plurality opinion) (prohibition on campaigning within 100 feet of a polling place satisfied strict scrutiny). Petitioners' attempt to conjure up situations in which "there may be federal government-related implications in the Ninth Circuit's reasoning," Petition at 19-20, n.6, is even more hollow. What these strained efforts show is that the Ninth Circuit's reasoning does *not* call into

Furthermore, Idaho's complaints about what it characterizes as the Ninth Circuit's requirement of "pervasive [state] management," *see* Petition at 30-32, are off target. This case does not present a question as to the level of scrutiny that should be required where a state imposes a speech restriction on a local governmental entity's forum over which the state has exercised *some*, but not "pervasive," proprietorship or management. Rather, this case presents the extreme situation in which a state that has played no role whatsoever with respect to a local governmental forum reaches out to restrict speech in that forum. So far as appears, that situation is all but *sui generis*, and the decision below is correct in holding that a mere reasonableness test is not the proper way to evaluate content-based speech restrictions in this context.

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question any prevailing practices of the state or federal governments.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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