

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 Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

The respondent labor organizations fall into step with the Ninth Circuit by resting their challenge to Idaho Code § 44-2004(2) chiefly on the proposition that the state legislature has acted as a “regulator” – not a “proprietor” – in denying local government employees access to their employers’ payroll systems for political activity-related deduction and that strict scrutiny analysis therefore controls. They reason that a forum proprietor differs from a forum regulator because the former “simply declines to *facilitate* a particular speech in its own forum” while the latter “*obstruct[s]* speech that otherwise would take place in another entity’s forum.” Brief of Respondents Pocatello Educ. Ass’n *et al.* (“Br. Respondents”) at 17. Respondents go further than the court of appeals, however, by arguing that even if a reasonableness standard applies, the Idaho legislature at best “accede[d] to a ‘modified heckler’s veto’” (*id.* at 51); *i.e.*, the legislature or even a local government could not conclude rationally that the payroll deduction prohibition would advance the perception of political neutrality.

Neither ground for respondents’ claim carries the First Amendment weight placed upon it. *First*, as detailed in the Brief for Petitioners, the Ninth Circuit’s, and now respondents’, proprietor-regulator distinction finds no support in this Court’s forum jurisprudence. Respondents extract the distinction from *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992) (“*ISKCON*”). *ISKCON*, however,

does not diminish the ability of a state legislature to open or close nonpublic fora operated by state political subdivisions. Accepting their understanding of the decision would require this Court to ignore not only that Idaho local governments are political subdivisions of the State itself but also that the legislature invested those subdivisions with the very authority that respondents now assert the legislature may not take away. Respondents' strained attempt to distinguish decisions by this Court explicitly recognizing a state legislature's authority to define local government power with respect to matters that may affect public speech merely underscores the inaptness of a First Amendment-based distinction between "owning" and "regulating" where a nonpublic forum of a political subdivision is involved. *Second*, the assertion that the payroll deduction prohibition fails the reasonableness test embodies nothing more than a transparent effort to evade this Court's settled precedent finding reasonable a government's denial of access to a nonpublic forum to avoid the appearance or reality of entanglement in partisan or other political controversy.



ARGUMENT

I. THE REASONABLENESS STANDARD APPLIES TO STATE LEGISLATIVE DETERMINATIONS THAT LIMIT ACCESS TO NONPUBLIC FORA ON VIEWPOINT NEUTRAL GROUNDS

Respondents do not contest that the governmental payroll systems are nonpublic fora. *See* Brief for Petitioners (“Br. Pet’rs”) at 24-29. They also neither respond substantively to petitioners’ discussion of the Idaho legislature’s virtually plenary control over the governmental powers of counties, cities and school districts (*id.* at 8-12) nor acknowledge state “legislative authority to regulate the local government forum at issue here – *i.e.*, local government payroll systems” (Br. Respondents at 39).¹ Respondents further do not

¹ Respondents devote several paragraphs to the proposition that “Idaho law specifically recognizes the authority of local governments to acquire, hold and convey property.” Br. Respondents at 40. They nevertheless do not take the next step of acknowledging that, as a necessary incident of legislative authority to control the acquisition and disposition of local governmental property, is the ability to control its *use*. So, for example, the legislature has specified in detail how county and municipal corporation records must be classified and the periods for which they must be retained. Idaho Code § 31-871 (Michie 2006) (counties); *id.* § 50-907 (Michie 2000) (municipal corporations). It has enacted specific safety inspection requirements with respect to school facilities. *Id.* § 33-1613 (Michie 2008). State statutes also speak in broader policy terms – such as instruction in the English language (*id.* §§ 33-1601 and -1617) and concerning sexual reproduction (*id.* §§ 33-1608 to -1611) – that affect how political subdivisions deliver public services.

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challenge the principle that local governments generally, and those here, may limit access to their payroll systems to the extent that they do not differentiate on account of speaker viewpoint and have reasonable basis for the access restriction. *E.g., id.* at 17 (reasonableness test applies “[w]here the government is acting as a proprietor, managing its internal operations”). They acknowledge, if begrudgingly, the viewpoint neutrality of the payroll deduction restriction, since it applies to all public employees and without regard to identity of the deduction’s intended recipient. *Id.* at 7, 21, 23 n.5, 24, 27 n.9.²

These examples, which could be increased manyfold, teach the unremarkable lesson that the Idaho local governments have substantial discretion in how they use their facilities or otherwise discharge statutory responsibilities on a day-to-day basis but that legislature has shown no reluctance to cabin this discretion when deemed appropriate. Respondents’ assertion that “there is nothing untoward – much less legally improper – in recognizing that the force of federal constitutional provisions may differ depending on the manner in which a state has structured its relationship with its local government political subdivisions” (Br. Respondents at 43) consequently does not advance their position, since instantly the Idaho Constitution and implementing statutes confirm the legislature’s primacy in setting the reach of local government authority.

² The Idaho Supreme Court has held repeatedly that, in construing a law, it “begins with an examination of the statute’s literal words” and that “[w]here the language of a statute is plain and unambiguous, [it] must give effect to the statute as written, without engaging in statutory construction.” *In re Daniel W.*, 183 P.3d 765, 768 (Idaho 2008). While these standards of statutory construction presumably control interpretation of § 44-2004(2) through operation of the Rules of Decision

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The necessary corollary to these concessions is that the only barrier to applicability of the reasonableness standard in assessing the constitutionality of § 44-2004(2) is the characterization of the Idaho legislature as the “regulator” and not the “proprietor” of local government payroll systems. Br. Respondents at 18 (inappropriate to apply reasonableness standard “instead of strict scrutiny[] to a content restriction imposed by a state that has reached out, in the capacity of lawmaker rather than proprietor, to impose a speech restriction in *another* entity’s forum”). Respondents distill this distinction solely from *ISKCON* and the twin propositions that “when a

Act, 28 U.S.C. § 1652, this Court in any event follows the same general principles in construing federal legislation. *E.g.*, *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (“the authoritative statement is the statutory text, not the legislative history or any other extrinsic material”); *Park N’ Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985) (“[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose”). Respondents’ statement that “there is no legislative history for § 44-2004(2)” (Br. Respondents at 23 n.5) nevertheless bears clarification. Various documents – including legislative committee minutes, related committee materials, and a gubernatorial signing communication to the legislature – do exist for the two bills (H.329 and S.1176, Idaho 57th Leg. (2003)) that contained the provisions of the Voluntary Contributions Act eventually codified in Idaho Code §§ 44-2601 to -2605 (Michie 2003), the amendment to § 44-2004, and the amendment to Idaho Code § 67-6605 (Michie 2006). These documents are available from the Legislative Librarian, Idaho Legislative Services Office.

government is acting in a proprietary capacity with respect to a facility or program, it necessarily is in the business of deciding who will have access to the facility or program” and that “it comes with the territory that some of those decisions are likely to involve speech activities.” Br. Respondents at 17. They then dispute the relevance of the four decisions cited by petitioners as supporting the authority of state legislatures to open or close nonpublic fora that are under immediate local government control.³ These two points are considered in order.

A. Neither *ISKCON* Nor Respondents’ “Operational Issues” Theory Supports the Proprietor-Regulator Distinction

Petitioners addressed the Ninth Circuit’s reliance on *ISKCON* in their opening brief. Br. Pet’rs at 45-47. Respondents, like the court of appeals, extrapolate broadly and incorrectly from that case to create a First Amendment-grounded limitation of state legislative authority over local governments. Br. Respondents at 29-30, 41. Substantial importance attaches to respondents’ treatment of *ISKCON* because it

³ *City of Madison Jnt. Sch. Dist. v. Wisconsin Employment Relations Comm’n*, 429 U.S. 167 (1976); *Perry Educ. Ass’n v. Perry Local Educators Ass’n*, 460 U.S. 37 (1983); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Davenport v. Wash. Educ. Ass’n*, 127 S. Ct. 2372 (2007).

constitutes the only decisional basis that they offer for the proprietor-regulator distinction.⁴

1. *ISKCON*, according to respondents, represents “a classic example of a case in which managers of a facility who are engaged in comprehensive regulation to address operational issues that do not themselves implicate speech, decline to open their property to certain speech activities in order to serve a non-speech operational issue with which the managers are concerned.” Br. Respondents at 32. They contrast it to a hypothetical situation where “the State – which . . . had nothing to do with managing the airport or with addressing issues of congestion in the terminals – reached out to involve itself in the operation of terminals *solely* to restrict speech activities” and opine that “[t]he danger that suppression of ideas or viewpoints might be afoot is plainly much greater in that situation.” *Id.* Respondents conclude from their analysis of the hypothetical not only that

⁴ Respondents, although adhering to the proprietor-regulator distinction fashioned by the Ninth Circuit, make no effort to analogize local governments, as the lower court did (Pet. App. 19-22, 25), to the private utility subject to the speech regulation in *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530 (1980). Their reluctance to shoulder that argument is prudent. *Consolidated Edison* was not a forum case at all, as this Court emphasized in distinguishing *Greer v. Spock*, 424 U.S. 828 (1976), and *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), on the ground that government property was involved. *Consolidated Edison*, 447 U.S. at 538-39. It is unsurprising that *Consolidated Edison* was not cited, much less discussed, in *ISKCON*.

content-based restrictions generated from the “operational” concerns of a forum “proprietor” carry inherently less risk to First Amendment rights than other content-based determinations but also that where a like determination is made by the forum “proprietor’s” superintending sovereign – instantly a state legislature – the danger is so great as to warrant strict scrutiny.

Respondents’ reading of *ISKCON* plainly departs from the case’s major concern, which was whether the airport was the type of forum subject to the reasonableness test. To be sure, *ISKCON* leaves no doubt about the constitutional significance of a sovereign acting to further its interests with respect to a government property as opposed to “acting as lawmaker with the power to regulate or license” (505 U.S. at 678), but the cases cited for the distinction similarly leave no doubt about the sort of proprietary-regulatory context referred to.

This Court in *ISKCON* first pointed to *United States v. Kokinda*, 497 U.S. 720 (1990) (opinion of O’Connor, J.), where it held a sidewalk serving as the only entrance to a post office from its parking lot and not open to expressive activity generally to be a nonpublic forum. In so holding, the *Kokinda* opinion quoted from *Cafeteria and Rest. Workers Local 473 v. McElroy*, 367 U.S. 886, 896 (1961), for the “long-settled principle that governmental actions are subject to a lower level of First Amendment scrutiny when “the governmental function operating . . . [is] not the power to regulate or license, as lawmaker, . . .

but, rather, as proprietor, to manage [its] internal operation[s].” 497 U.S. at 725. *McElroy* itself was not concerned with First Amendment issues but, instead, with whether a military installation commander violated the procedural due process requirements of a worker denied access to the facility for security considerations. The Court rejected the worker’s claim, relying heavily on the fact that the case “involve[d] the Federal Government’s dispatch of its own internal affairs.” 367 U.S. at 896. *Kokinda* then quoted from *Lehman*, 418 U.S. at 303, with respect to the propriety of banning political advertisements on city-owned buses and summed up the two decisions as reflecting the rule that “[t]he Government, even when acting in its proprietary capacity, does not enjoy absolute freedom from First Amendment constraints, as does a private business, but its action is valid in these circumstances unless it is unreasonable.” *Kokinda*, 497 U.S. at 725-26. The *ISKCON* Court concluded this aspect of its analysis by citing *Lehman*, *Perry*, and *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788 (1985), as “reflect[ing], either implicitly or explicitly, a ‘forum based’ approach for assessing restrictions that the government seeks to place on the use of its property.” *ISKCON*, 505 U.S. at 768.

Respondents’ contention that *ISKCON* and the decisions which it relied upon somehow pretermit from the “‘forum based’ approach” restrictions imposed by a legislature on the use of local government property cannot be squared with this Court’s underlying analysis. What determined the cases’ outcomes

were the governmental nature of the involved property and the reasonableness of the particular restrictions. To employ another hypothetical, nothing in the decisions suggests that the analytical framework applied in *Lehman* would have differed had the Ohio legislature prohibited by a generally applicable statute political advertising on municipal-owned public transportation vehicles, since the “forum” itself – the vehicles’ advertising space – and the otherwise plausible rationale for the prohibition – not exposing passengers “to the blare of political propaganda” and avoiding controversy over favoritism in parceling out advertising space (418 U.S. at 304) – would have remained unchanged. The same “‘forum based’ approach” logically attends actions taken as a result of discretion left in the forum’s immediate operator by the legislature and actions taken because the operator lacks authority to do otherwise as a result of legislative mandate.

2. Respondents are left only with their invitation for this Court to create out of whole cloth a limitation on state legislative authority to open or close nonpublic fora whose day-to-day administration lies with local governments.⁵ The suggestion that the

⁵ Although seeking adoption of the “pervasive management” standard, respondents demur from articulating what level of “management” is required to be “pervasive” and argue that this Court also need not concern itself with line-drawing guidance because, in part, “it is not as if the law is crying out for a bright line test in this context.” Br. Respondents at 44 n.21. Two observations appear appropriate. First, “pervade” means, by

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“‘forum based’ approach” discussed in *ISKCON* has applicability only where “managers of a facility” adopt a regulation “to address operational issues that do not themselves implicate speech” for the purpose of “serv[ing] a non-speech operational issue with which the managers are concerned” (Br. Respondents at 32) is striking insofar as it rewrites the reasonableness standard.

This Court repeatedly has made clear the viewpoint-free regulation of speaker content is permissible

common definition, “to become diffused throughout every part of” (*Merriam-Webster’s Collegiate Dictionary* at 868 (10th ed. 1999)) or to “permeate” (*Webster’s II New College Dictionary* at 842 (3d ed. 2005)) and therefore connotes a substantial degree of specific legislative detail as to the “management” of the particular local government activity – here public employer payroll systems. Respondents’ reluctance to address that issue is understandable given the extraordinarily intrusive effect which the “pervasive management” requirement would have on the ability of state legislatures to deal with discrete issues in a surgical fashion. It not only would mark a sea-change in the way legislative business is conducted but also would run counter to this Court’s long-standing rule of not employing the federal constitution as a vehicle to structure relationships between States and their political subdivisions – a rule as to which respondents are silent. *See* Br. Pet’rs at 47-58. Second, the suggestion that a “pervasive management” requirement is somehow limited to payroll deductions for political activities belies the Ninth Circuit’s reasoning, which extends to *any* “forum” operated by a political subdivision. In light of the breadth that the “‘forum based’ approach” has acquired under this Court’s decisions, respondents’ effort at diminishing the requirement’s impact on legislative decision-making cannot be credited. *See, e.g.*, Br. for States of Utah *et al.* as *Amici Curiae* at 10-14.

when “they are reasonable in light of the purpose which the forum at issue serves.” *Perry*, 460 U.S. at 49; see also *Arkansas Educ. Tel. Comm’n v. Forbes*, 533 U.S. 666, 682 (1998) (“[t]o be consistent with the First Amendment, the exclusion of a speaker from a nonpublic forum must not be based on the speaker’s viewpoint and must otherwise be reasonable in light of the purpose of the property”); *Rosenberger v. Rector*, 515 U.S. 819, 829 (1995) (“[t]he necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics”); *Cornelius*, 473 U.S. at 800 (“[a]ccess to a nonpublic forum . . . can be restricted as long as the restrictions are ‘reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker’s view’”) (quoting *Perry*, 460 U.S. at 46). The *Cornelius* Court, moreover, emphasized that the rationale asserted for a nonpublic forum restriction need not be the “most reasonable or the only reasonable” method for furthering an otherwise appropriate governmental interest. *Id.* at 809. Nothing in the *Perry* formulation indicates that the reasonableness standard protects only “operational” concerns unrelated to speech. Instead, the formulation explicitly contemplates content-specific, viewpoint-neutral regulation on *any* reasonable basis.

Given this Court’s settled precedent, the reasonableness standard plainly encompasses a wide variety of governmental interests. They may range from ones

tailored narrowly by a forum operator to address forum-specific “operational” issues – such as denying access to a payroll system for any deduction unless requested by some numeric threshold of employees (see, e.g., *Pilsen Neighbors Cmty. Council v. Netsch*, 960 F.2d 676, 686-87 (7th Cir. 1992)) – to more broad, public policy-driven concerns – such as denying access to avoid the reality or appearance of entanglement in political activities by the State or its political subdivisions. As in *Lehman*, a restriction may serve multiple interests, some of which may be “operational,” such as avoiding rider irritation from being exposed to the “blare” of candidate advertisements, and others which may be more policy oriented, such as avoiding the appearance of political involvement by the advertisements’ mere presence on the buses.

The touchstone in every instance is whether the limitation is reasonable, not whether it derives from political subdivision’s own decision to limit access or from legislative directive. Respondents’ suggestion that the latter is inherently more suspect simply cannot be squared with the expansive nature of the reasonableness standard. Their approach merely repackages the Ninth Circuit’s justification for its “pervasive management” requirement – *i.e.*, “lessen[ing] the likelihood that a decision made in the course of managing an entity, which results in the exclusion of expressive activity, had as its purpose the suppression of expression” (Pet. App. 31) – which is grounded not in this Court’s jurisprudence but, rather, in a seeming distrust of state political

branches' exercise of "the science of government." *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 206 (1821); see Br. Pet'rs at 57.⁶

⁶ Respondents' claim that applying the reasonableness standard presently would open the door for States to regulate federal property or for the federal government to impose speech-related limitations on fora operated by the States and their political subdivisions serves only to distract from those issues necessary to be decided here. Br. Respondents at 30, 36-37. The relationship between States and their political subdivisions is constitutionally unique (Br. Pet'rs at 47-58) and cannot be analogized to that between the national government and the States. The United States and the States are wholly separate sovereigns – a fact reflected perhaps most vividly in the area of criminal prosecutions where successive federal and state proceedings for the same crime are permissible under the Double Jeopardy Clause of the Fifth Amendment. *E.g.*, *Abbate v. United States*, 359 U.S. 187 (1959). However, that is not true with regard to successive prosecutions by States and their political subdivisions. See *Waller v. Florida*, 397 U.S. 387, 392 (1970) (relying on *Reynolds v. Sims*, 377 U.S. 533, 575 (1964), for the principle that municipalities "are traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions" and, therefore, are not dual sovereigns for purposes of the Double Jeopardy Clause). This is so because, where state and local governments are involved, "the two prosecuting entities [do] not derive their powers to prosecute from independent sources of authority." *Heath v. Alabama*, 474 U.S. 82, 90 (1985). All authority vested in Idaho political subdivisions over their payroll systems likewise flows from a single source: state legislative grace. That, as respondents argue (Br. Respondents at 40, 43), school districts have been held by the Idaho Supreme Court to possess standing to sue the State under certain circumstances (*Idaho Sch. for Equal Educ. Opportunity v. State*, 140 Idaho 586, 590-91, 97 P.3d 453, 457-58 (2004); *Idaho Sch. for Equal Educ. Opportunity v. Evans*, 123 Idaho 573, 585, 850 P.2d

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B. Respondents Misconstrue This Court's Decisions That Recognize the Right of State Legislatures to Define Political Subdivision Authority Concerning Forum Access

According to respondents, “[t]his Court has never . . . applied a reasonableness test to judge the constitutionality of ‘state legislative control of access to fora superintended by local governments,’ nor suggested that a reasonableness test – rather than strict scrutiny – should apply to state legislative actions that restrict access to local government fora.” Br. Respondents at 35. They instead take from the Court’s decisions the rule that “a state may constitutionally enhance speech by requiring a local government to *open* a forum.” *Id.* Their analysis of the relevant cases does not establish that conclusion.

Respondents characterize this Court’s decision in *City of Madison Joint School District v. Wisconsin Employment Relations Commission*, *supra*, as holding only that the First Amendment is not abridged by a state statute directing local governments to open certain meetings for public participation and that

724, 736 (1993)) or that they and other political subdivisions may not constitute arms-of-the-State for Eleventh Amendment purposes (*Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977)) does not negate their general status as governmental entities whose powers are legislatively prescribed. No need exists, lastly, to speculate here over the ability of Congress to legislate concerning nonpublic fora operated by the States or their local governments.

Madison is immaterial to whether legislatures have the power to *restrict* access to those governments' nonpublic fora. Br. Respondents at 35. The striking asymmetry inherent in their formulation of the First Amendment's effect on legislative authority stems from respondents' ignoring the principle that statutory mandates control the lawful discretion of political subdivisions and serve as a relevant, and in *Madison* arguably dispositive, consideration in determining proper forum characterization. See *Minnesota State Bd. for Cmty. Coll. v. Knight*, 465 U.S. 273, 281 (1984) (*Madison* "upheld a claim of access to a public forum, applying standard public-forum First Amendment analysis"). Nothing in the opinion suggests that, had the legislature chosen to direct the school board to close such meetings, the First Amendment would have invalidated the legislative direction if the meeting constituted a nonpublic forum and the reasonableness standard was satisfied.

Moreover, under respondents' proprietor-regulator theory, that the open-meeting statute served to invite, rather than to discourage, public discourse would have been immaterial since the Wisconsin legislature, as a mere "regulator," could have no role in limiting the school board's discretion to allow, or not to allow, the involved teacher to speak. See Br. Pet'rs at 38. The issue under their theory instead would have been whether, *regardless* of the open meeting law, the school board possessed a defense to the union's unfair labor practice charge based, *inter alia*, on the teacher's First Amendment

right to speak at the meeting. This Court clearly did not subscribe to that theory. *See Madison*, 429 U.S. at 175 n.6 (“[t]his meeting was open to the public pursuant to a Wisconsin statute”).

Respondents’ thesis that state legislatures only have the power to constrain political subdivisions’ discretion for the purpose of enhancing First Amendment rights – *e.g.*, opening but not closing a forum – cannot survive in any event the second forum opinion, *Perry*. There, as petitioners have discussed previously (Br. Pet’rs at 38-40), this Court held a school district’s internal mail system to be a nonpublic forum and found reasonable a school district’s denying access to an organization that was not the exclusive bargaining representative of the district’s teachers. *Perry*, 460 U.S. at 48-50. Respondents discount *Perry*’s significance with the observation that “[i]t obviously is the case that a local government, in making decisions regarding access to its forum, may properly take into account laws – whether local, state, or federal – that govern its business” but that such fact “says nothing about the level of scrutiny that would apply if a state law on which the local government relied in this regard . . . was based on speech and was challenged under the First Amendment.” Br. Respondents at 36-37. Their treatment of *Perry* confounds common sense because, if the rationale for access denial had been based upon an unconstitutional statute, the school district’s action could hardly have been deemed reasonable. Instead, as *Perry* makes plain, a grant of exclusive bargaining representative status to a labor

organization pursuant to a state statutory scheme does not run afoul of the First Amendment even though it may frustrate the speech or associational activities of another union. A contrary conclusion would bring into constitutional jeopardy not only Idaho statutes under which respondents enjoy such status – Idaho Code §§ 33-1272 to -1275 (Michie 2008) and *id.* §§ 44-1801 to -1812 (Michie 2003) – but also public employment collective bargaining laws in many other States. *See* Br. of *Amici Curiae* Evergreen Freedom Found. *et al.* at 6 n.2.

Respondents argue that petitioners “mischaracterize[e] . . . what was at issue and what was decided” in *Lamb’s Chapel*, the third forum opinion. Br. Respondents at 37. This Court, they contend, “did not pass on the constitutional validity of the [New York] statute” but merely “examined the actions of *the local school district* in selectively opening its facilities to various organizations . . . – actions which the Court noted had *not* been compelled by the State.” *Id.* However, petitioners did not argue that the involved statute, as opposed to its application by the school district, was the target of the First Amendment challenge; they argued, in relevant part, that this Court “treated the statute . . . as defining the permissible scope of the limited public fora within the district with regard to public use of school property.” Br. Pet’rs at 41.

The relevance of *Lamb’s Chapel* here rests in its recognition of state law as defining the parameters within which a political subdivision was authorized to

act for forum-access purposes. Thus, while the school district “need not have permitted after-hours use of its property for any of the uses permitted” by the New York statute (508 U.S. at 391), it also could not have permitted use for purposes *not* so authorized (*id.* at 386). At the least, it would have been odd for this Court to have discussed in detail the statute’s “empowerment of local school districts” with such attention if, at the end of the day, the New York State Assembly lacked authority to cabin the districts’ discretion in opening, or not opening, nonpublic fora.

Last, respondents correctly note that “*Davenport* did rule that strict scrutiny was unwarranted, but that ruling did *not* rest on the nonpublic government forum doctrine.” Br. Respondents at 38. The significance of *Davenport* instantly derives not from the precise First Amendment rationale employed by this Court to reject the labor organizations’ First Amendment challenge; it derives from the fact that the referendum provision limiting the permissible uses of agency shop fees applied to *all* state and local governmental entities and thus, in respondents’ parlance, “regulated” the ability of political subdivisions to enter into union security agreements by prohibiting them from negotiating provisions that did not contain the limitation. Br. Pet’rs at 43-44. Respondents counter that in *Davenport* “the state had simply placed a limitation on its own prior legislative action that had granted unions a ‘state-bestowed entitlement[.]’ . . . in the form of a right to require nonmembers to make payments to a union.” Br. Respondents at 38. Their summary of the Washington law is

accurate, but they ignore the obvious import of that summary for present purposes; *i.e.*, the ability of Idaho local governments to allow access to their payroll systems for employee-requested deductions is no less the result of legislative action vesting discretion within those governments over such systems. Whether that discretion is the product of a general or specific grant of authority does not alter the inescapable fact that it originates from a legislative source and is amenable to modification. This Court’s distinction between “*condition[ing]*” local government “authorization” to negotiate agency fee arrangement and “*regulat[ing]*” private sector agreements (127 S. Ct. at 2382-83) captures precisely the distinction between the present controversy and that in *Consolidated Edison* (447 U.S. at 579-80) – one which is wholly lost upon respondents.

II. SETTLED DECISIONAL AUTHORITY SUPPORTS THE REASONABLENESS OF THE IDAHO LEGISLATURE’S DETERMINATION TO PROHIBIT THE USE OF GOVERNMENTAL PAYROLL SYSTEMS FOR THE PURPOSE OF FACILITATING PARTISAN OR OTHER POLITICAL ACTIVITIES

The Ninth Circuit signaled its recognition that the payroll deduction prohibition in § 44-2004(2) satisfies the reasonableness test given the similarity between the Idaho statute and the exclusion of public policy advocacy groups upheld in *Cornelius*. Pet. App. 17 n.8. Indeed, had the court of appeals entertained a

different view, there would have been no need to develop new First Amendment jurisprudence and to invite further review. Respondents nevertheless take a contrary position, arguing that “a local government that plays no role in advocating (much less soliciting) political contributions that its employees make but simply permits an employee to use payroll deduction as the means of making any such contributions the employee may wish to make . . . cannot be fairly said to be ‘entangling [itself] in political activities.’” Br. Respondents at 50. They then attempt to distinguish *Cornelius* and *Lehman*. *Id.* at 52-53. Neither respondents’ *ipse dixit* assertion that “simply” allowing a public employee access to his employer’s payroll system for purposes of making political contributions cannot reasonably give rise to concerns over governmental involvement in political activities nor their treatment of this Court’s decisions survives even cursory examination.

A. Respondents do not contest the notion that both the appearance and the reality of governmental neutrality in political matters are reasonable public policy objectives. They nonetheless deny a relationship between prohibiting the use of governmental payroll systems to further an employee’s involvement in political activities but cite no case law or any other independent analysis in support of that denial. Respondents, in short, challenge the reasonableness of § 44-2004(2) because they see, as a matter of law, no rational connection between a public employee’s use of payroll deductions to finance political activities and

at least the appearance of governmental entanglement in those activities.

Respondents' position cannot be squared with any accepted understanding of the reasonableness test which, as this Court explained in *Cornelius*, does not require a governmental decision-maker to show the restriction is "the most reasonable or the only reasonable [one]." 473 U.S. at 809. Here, there is no legitimate doubt that the Idaho legislature had a reasonable basis for removing state and local government employers from the political arena with respect to use of their payroll systems at the time of § 44-2004(2)'s passage. It was not writing on a *tabula rasa*. A short recitation of the directly pertinent decisional background then in place establishes that conclusion. *See Pilsen Neighbors*, 960 F.2d at 686 (Supreme Court authority provided grounds for finding reasonable a disclosure requirement concerning fund-raising and overhead expenses for charitable organizations that seek access to payroll deduction program).

This Court had recognized in *Lehman* and then in *Cornelius* the discretion of governmental entities to restrict the use of their property so as to avoid governmental entanglement in partisan or other political activities of their employees. In the former, the Court pointed to the specter of "lurking doubts about favoritism" that could accompany the city's acceptance of "short-term candidacy *or* issue-oriented advertisement" (*Lehman*, 418 U.S. at 304 (emphasis supplied)) as supporting the advertising ban. In the latter, it

reasoned that “avoiding the appearance of political favoritism is a valid justification for limiting speech in a nonpublic forum” (*Cornelius*, 473 U.S. at 809) and thereby provided a reasonable basis for excluding from the federal charitable giving campaign organizations that “seek to influence the outcomes of elections or the determination of public policy through political activity *or* advocacy, lobbying, or litigation on behalf of parties other than themselves” (*id.* at 795 (emphasis supplied)). *See also Greer*, 424 U.S. at 839 (rejecting First Amendment challenge to policy that prohibited partisan political activities on military base).

The judicial landscape in 2003 was further informed by the Sixth Circuit Court of Appeals’ decision in *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307 (6th Cir. 1998), where an Ohio statute containing a closely analogous prohibition on payroll “checkoffs for ‘any candidate, separate segregated fund, political action committee, legislative campaign fund, political party, *or* ballot issue’” was upheld. *Id.* at 311 n.2 (emphasis supplied). Although the *Toledo Area* decision was predicated on a non-forum rationale – *i.e.*, “the government does not in any constitutionally significant way impinge on a constitutional right when it refuses to remove obstacles ‘not of its own creation’ to the exercise of a constitutional right” (*id.* at 321) – it nonetheless reflected the lawmaking discretion available to state legislatures with respect to controlling access to public employer payroll

systems for “political activities” as defined in Idaho Code § 44-2602(e).

Additionally relevant to the reasonableness inquiry is the fact that § 44-2004(2) leaves untouched the ability of public employees to make contributions for political activities personally. As respondents acknowledged in a declaration filed before the district court, nothing in that provision prevents their members, or any other employee, from contributing to political or issue causes by other modes – including by cash, check, credit card or electronic transfer. J.A. 64-65. Respondents objected to the prohibition merely because, from their perspective, payroll deductions are “by far the easiest and least expensive way for members to make, and for [respondents] to collect, . . . payments to [political action committees].” J.A. 52. The Idaho legislature went out of its way in § 44-2004(3) to make that point clear with specific respect to employee contributions to labor organizations for political activity purposes. The availability of quite adequate, if arguably less convenient, methods for making political contributions strongly counsels in favor of the reasonableness of the payroll deduction restriction – a consideration that the legislature was aware by virtue of this Court’s decision in *Cornelius*. 473 U.S. at 809 (“The First Amendment does not demand unrestricted access to a nonpublic forum merely because use of that forum may be the most efficient means of delivering the speaker’s message. . . . Here, the speakers have access to alternative channels, including direct mail and inperson

solicitation outside the workplace, to solicit contributions from federal employees”); *accord Indep. Charities of Am., Inc. v. Minnesota*, 82 F.3d 791, 796-97 (8th Cir. 1996); *see also Amicus Curiae Br. of Mountain States Legal Found.* at 8-10.⁷

B. Respondents devote several paragraphs to distinguishing *Lehman* and *Cornelius* on factual grounds. This case, they argue, differs from *Lehman* because “allowing employers to make political contributions by payroll deduction does not involve the government in any ‘blare of political propaganda,’ nor does it present a captive audience problem.” Br. Respondents at 52. As for *Cornelius*, they contend that the government was making a judgment as “to

⁷ While no need exists to address the subsidy rationale discussed by the courts below as a entirely independent basis for justifying the payroll deduction prohibition, that there are costs attendant to making such a deduction vitiates respondents’ “‘modified heckler’s veto’” characterization of any objection to § 44-2004(2). Br. Respondents at 51. As one set of *amici curiae* has argued, a citizen taxpayer could be aggrieved legitimately over the use of public funds to further political interest with which the taxpayer may disagree. Br. *Amicus Curiae of Utah Taxpayer Ass’n et al.* at 19 (noting governmental interest “to protect objecting citizens/taxpayers against compelled speech”). This would be true regardless of whether the taxpayer possessed standing to sue over the tax’s use. *See Hein v. Freedom From Religion Found., Inc.*, 127 S. Ct. 2553, 2562 (2007). The taxpayer would always have potential recourse to the political branches. *E.g., Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 473-74 (1982). Part and parcel of the rationale for governmental neutrality as to partisan or other political activities is sensitivity to such concerns.

which particular charities were ‘worthwhile’” and, hence, “[a] decision to include advocacy organizations would have amounted to an endorsement by the federal officers of the proposition that the political advocacy of these organizations as ‘beneficial’ as direct aid to the needy.” Br. Respondents at 52-53.

These efforts at diminishing the reasonableness of the Idaho legislature’s or, for that matter, a local government’s determination not to open a payroll system for use in aid of political causes cannot be squared with the decisions themselves. The advertising ban in *Lehman*, as discussed above, was predicated not merely on the city’s desire to avoid annoyance to passengers from the “blare of political propaganda” but also doubts over favoritism through the selection of one candidate or issue for available advertising space. 418 U.S. at 304. Instantly, the legislative concern over favoritism is no less reasonable; the Idaho legislature desired to remove any possible appearance of favoritism by eliminating even the possibility of governmental facilitation with respect to employee political activities through payroll deductions.

Respondents’ portrayal of the “reasonableness” grounds in *Cornelius* is similarly flawed. The federal government’s exclusion of advocacy groups grew in large measure out of a desire to avoid the appearance of endorsing those group’s objectives through the simple fact of giving them access to the charitable giving campaign. 473 U.S. at 807 (“the President determined that agencies seeking to affect the

outcome of elections or the determination of public policy should be denied access . . . in order to avoid the reality and appearance of Government favoritism or entanglement with particular viewpoints”). Here, the legislature or a local government reasonably could have the same fear with respect to the appearance of endorsing the political or policy views of entities to which deductions are remitted; in both instances governmental resources are being used to facilitate advocacy of particular candidates or public policy positions.



CONCLUSION

The court of appeals' judgment should be reversed.

Respectfully submitted,
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