No. 07-869

In the
Supreme Court of the United States

BEN YSURSA,
Idaho Secretary of State, et al.,

Petitioners,

v.

POCATELLO EDUCATION ASSOCIATION, et al.,

Respondents.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

Does the First Amendment to the United States Constitution prohibit a state legislature from removing the authority of state political subdivisions to make payroll deductions for political activities under a statute that is concededly valid as applied to state government employers?

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IDENTITY AND INTEREST OF AMICUS CURIAE [1]

Pacific Legal Foundation (PLF) was founded 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. Among other matters affecting the public interest, PLF has repeatedly litigated in defense of the right of workers not to be compelled to make involuntary payments to support political or expressive purposes with which they disagree. To that end, PLF attorneys were counsel of record in *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990), *Brosterhous v. State Bar of Cal.*, 906 P.2d 1242 (Cal. 1995), and *Cumero v. Pub. Employment Relations Bd.*, 778 P.2d 174 (Cal. 1989), and PLF has participated as amicus curiae in all of the most important cases involving labor unions compelling workers to support political speech, including *Davenport v. Wash. Educ. Ass'n*, 127 S. Ct. 2372 (2007), *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991), *Comm'cns Workers of Am. v. Beck*, 487 U.S. 735 (1988); *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292 (1986), *Ellis v. Bd. of Ry., Airline & S.S. Clerks, Freight Handlers, Express & Station Employees*, 466 U.S. 435 (1984), and *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). PLF attorneys have also published articles on compelled

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

speech issues, including Deborah J. La Fetra, *Recent Developments in Mandatory Student Fee Cases*, 10 J.L. & Pol. 579 (1994).

SUMMARY OF ARGUMENT

Cases in which labor unions deduct money—whether dues or agency shop fees—from workers' paychecks and spend the money on political activities implicate important issues of free speech, freedom of association, and freedom of choice. Labor unions often complain that restricting their access to such monies diminishes their effectiveness and imposes substantial hardships on them. *See*, *e.g.*, *State ex rel. Wash. State Pub. Disclosure Comm. v. Wash. Educ. Ass'n*, 130 P.3d 352, 360 (Wash. 2006), *rev'd sub nom. Davenport v. Wash. Educ. Ass'n*, 127 S. Ct. 2372 (2007) (striking down requirement that union obtain consent from workers before taking their earnings because the requirement imposed "too heavy an administrative burden" on unions). But this Court's focus should not be on the difficulties faced by unions when the law compels them to ask permission from workers before taking their money. Instead, the focus must be on the freedom of choice of individual workers. *Cf. Davenport*, 127 S. Ct. at 2380 (emphasis added) ("For purposes of the First Amendment, it is entirely immaterial that [a law] restricts a union's use of funds only after those funds are already within the union's lawful possession . . . . What matters is . . . the union's extraordinary *state* entitlement to acquire and spend *other people's* money.").

If the provision of Idaho law challenged here imposes a severe burden on the freedom of workers to choose to devote their money to political campaigning by the union, that law may violate the First

Amendment. On the other hand, if it imposes nothing more than a reasonable restriction on these deductions in light of the legitimate purpose of preserving worker choice, it should be upheld as constitutional in light of the First Amendment. *See id.* at 2381-82 ("[C]ontent-based regulation is permissible . . . when, as here, an extraordinary and totally repealable authorization to coerce payment from government employees is at issue."). Given the substantial disadvantage dissenting workers face when dealing with the social, legal, and political institutions governing organized labor, this Court must above all act to protect dissenting individual workers from a system which exploits them and violates their rights of property, expression, and choice.

ARGUMENT

I

UNIONS HAVE A LONG HISTORY OF VIOLATING THE FIRST AMENDMENT BY COMPELLING WORKERS TO SUPPORT SPEECH WITH WHICH THEY DISAGREE

A. Workers' Freedom to Choose How Their Earnings Are Spent Should Guide This Court's Analysis of Idaho Code Section 44-2004

The most important part of freedom of expression is the right not to conform. It is relatively easy to create an enforced unity through political, legal, and social pressures, but the nonconformist must rely on the Constitution for protection. *See*, *e.g.*, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). To differ, or to refuse to support speakers or campaigns

with which one disagrees, is often a lonely and courageous act, more in need of legal security than the right to join or to support an organization or movement. Dissent is by definition counter-majoritarian, which means that dissenters need the protection of institutions that shield them from majoritarian political processes. *See*, *e.g.*, Cass R. Sunstein, *Why Societies Need Dissent* 98 (2003) ("[A]t its core, [the First Amendment] is designed to protect political disagreement and dissent.").

This Court has long recognized that the freedom of expression guaranteed by the First Amendment protects choice in "the decision of both what to say and what not to say," *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 782 (1988), and for that reason has repeatedly upheld the principle that people have the right to refrain from subsidizing messages with which they disagree. *See*, *e.g.*, *United States v. United Foods, Inc.*, 533 U.S. 405 (2001); *Wooley v. Maynard*, 430 U.S. 705 (1977). In many cases, the Court has recognized that it would violate the First Amendment for workers' earnings to be taken by the state, and transferred to labor unions for use in promoting political messages with which the workers disagree. *See Lehnert*, 500 U.S. at 522; *Beck*, 487 U.S. at 745; *Abood*, 431 U.S. at 244. *See also Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1253 (6th Cir. 1997) (citation omitted) ("[T]he right not to contribute to political causes that they do not favor is as central a First Amendment right as is the right to solicit funds. The protection of this right is certainly at least 'important or substantial,' if not compelling.").

Moreover, the judiciary has a special duty to intercede on behalf of political minorities who cannot

hope for protection from the majoritarian political process. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 486 (1982). Workers who disagree with the political views of labor unions are in precisely this situation, and this Court must therefore focus principally on protecting the right of workers to determine how their earnings—essential both to their private property as well as their expressive rights—will be spent.

This Court has routinely recognized the central importance of choice in the context of union workers free speech rights. When a state union compels its workers to make contributions for political purposes, it is "an infringement of their constitutional rights." *Abood*, 431 U.S. at 234. Given that the right at issue is the freedom of political expression, which this Court regards as a fundamental right subject to the protection of strict scrutiny, the Court should be particularly keen to preserve individual freedom of choice in cases involving the compulsory support of labor union activities. "To preserve the protection of the Bill of Rights for hard-pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights." *Glasser v. United States*, 315 U.S. 60, 70 (1942). Among other reasons for presuming against such a waiver are that the opposite presumption, or a scrutiny less than strict, could too easily blind courts to subtle coercion, or might allow workers, accidentally or through ignorance or duress, to waive vital constitutional liberties. Thus the analysis in this and all other union fees/expression cases must begin with and follow the expressive rights of individual workers.

In *Davenport*, 127 S. Ct. 2372, this Court reinforced the central place of worker choice in cases involving compulsory union support. Giving a private entity—the labor union—"the power, in essence, to tax government employees," was "unusual," the Court noted, *id.* at 2378, and the First Amendment would allow a state to "eliminate . . . entirely" the "extraordinary benefit" of allowing the union to take money from the paychecks of workers to support union activities. *Id.* Moreover, the Court repeatedly emphasized that states have broad discretion to tailor this "benefit" so long as they do so in a manner that is above the "constitutional floor" established by cases like *Beck*, *Hudson*, and *Abood*. *Id.* at 2379. In *Davenport*, the State of Washington had established a constitutionally permissible mechanism to protect individual rights, given the "the union's extraordinary *state*[-granted] entitlement to acquire and spend *other people's* money." *Id.* at 2380. Thus the constitutional validity, both of statutes allowing unions to deduct money directly from paychecks, and of statutes restricting that entitlement, is to be judged by reference to the worker's constitutional right to be free from compelled speech.

The statute in this case removes the authority of public employee unions to spend dues for political purposes. Idaho Code § 44-2004(2). And while that provision prohibits public-sector union members from having monies deducted from their paychecks for spending on political purposes, Idaho Code § 44-2004(3) ensures that workers remain free to make such contributions personally. ("Nothing in this chapter shall prohibit an employee from personally paying contributions for political activities."). The question in this case, therefore, must be whether or not these

provisions are consistent with a worker's right to exercise his or her own free choice sufficiently, or whether those provisions impose unconstitutionally severe burdens on that choice.

B. Unions Use a Variety of Legal Tactics, Personal Pressures, and Threats to Violate the Rights of Workers

Unions rely heavily on peer pressure, intimidation, coercion, and inertia to prevent dissenting members or nonmembers from opposing union political activities. *See* Murray N. Rothbard, *Man, Economy, and State* 626 (Nash ed. 1970) (1962); Friedrich A. Hayek, *The Constitution of Liberty* 274 (1960); Linda Chavez & Daniel Gray, *Betrayal: How Union Bosses Shake Down Their Members and Corrupt American Politics* 44-46 (2004). Workers often feel either compelled to join the union, or to stifle their beliefs, lest their disagreement incur retaliation by union leaders or coworkers. As this Court recognizes, it is particularly important to enforce First Amendment protections in environments where heavy peer pressure might otherwise prevent the free expression of ideas. *See*, *e.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000) (citations omitted) ("[T]he government may no more use social pressure to enforce orthodoxy than it may use more direct means.").

Dissenting workers in offices where public employee unions have substantial power to govern the terms of employment and even to deduct funds from the paychecks of nonmembers, are particularly in need of constitutional protections. Rules governing public employee unions differ from state to state, but they are usually quite distinct from the rules that govern

unions in the private sector. *See* Harvard Law Review Ass'n, *Developments in the Law: Collective Bargaining in the Public Sector*, 97 Harv. L. Rev. 1676 (1984). Given government's monopolistic status, public employee unions are in a unique position to exploit workers who have less freedom to choose alternative employers or alternative union representation. This monopoly position also means that public employee unions are likely to exert more coercion and intimidation against dissenting workers than are private sector workers, given the fact that such workers cannot readily find similar jobs in the private sector. *See*, *e.g.*, *Martel v. Dep't of Transp., FAA*, 735 F.2d 504, 509-10 (Fed. Cir. 1984) (employee of FAA was intimidated by union members into joining strike); *Ferrando v. Dep't of Transp., FAA*, 771 F.2d 489, 492-93 (Fed. Cir. 1985) (noting that FAA union would "monitor[] the work of non-participating [workers] and report[], and even invent[], infractions until the [worker] lost his job or was suspended"). Public employee unions are also in a uniquely powerful position to influence the adoption of public policies, John O. McGinnis & Michael B. Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 Wm. & Mary L. Rev. 365, 463 (1999), which means that government workers dissatisfied with the policies of a union have less ability to obtain redress in the political arena than do their counterparts in the private sector.

Most disturbing of all, public employee unions—unlike their private-sector counterparts—have for half a century enjoyed exemption from the Labor Management Reporting & Disclosure Act (LMDRA), Pub. L. No. 86-257, 73 Stat. 519 (1959), the primary federal mechanism for policing the abuses of organized

labor. Under LMDRA, unions are required to file financial reports with the government disclosing how they spend their money, but for decades the Department of Labor excluded public employee unions from this requirement since LMDRA's enactment in 1959. Although two months ago a federal district court affirmed the Department of Labor's elimination of that exemption, *Ala. Educ. Ass'n v. Chao*, 539 F. Supp. 2d 378, 379 (D.D.C. 2008), the fact remains that for half a century public employee unions have operated under special rules that allowed them to escape government oversight.

The political atmosphere of the unionized workplace puts an extremely heavy burden on workers to join the union or remain silent about their own opposition to union policies. The history of unionism is replete with examples of threats, coercion, intimidation, and violence directed at workers who do not agree with union goals, policies, or tactics. *See generally* Chavez & Gray, *supra*, at 44-46; Herbert R. Northrup, *The Teamsters' Union Attempt to Organize Overnite Transportation Company: A Study of a Major Union Failure*, 30 Transp. L.J. 127, 155-68 (2003).[2] Precise statistics are hard to come by, since much—perhaps most—union violence is not reported, *id.* at 155, but the National Institute for Labor Relations Research (NILRR) maintains a database of union violence and has counted more than 9,000 incidents since 1975—only 258 of which led to

[2] Ironically, under this Court's jurisprudence, union violence is frequently immune from prosecution under anti-racketeering laws. *United States v. Enmons*, 410 U.S. 396, 410 (1973).

convictions. *See* NILRR, *Violence Event Data File*.[3] Short of violence, unions use intimidation, peer pressure, and threats to push workers into contributing to union efforts, or at least remaining silent about their opposition to them. In fact, a search of the NLRB's own online database reveals that in just the years between 2000 and 2007, workers brought 1,325 complaints to the NLRB alleging that the unions had made threatening statements to them. Another 546 cases alleged harassment. *See* Center for Union Facts, *When Voting Isn't Private: The Union Campaign Against Secret Ballot Elections* 19 (2007).[4]

Among other things, unions routinely use high-pressure tactics to manipulate workers into contributing money for union political campaigning. In case after case, federal courts have been required to intercede to protect the rights of dissenting workers who do not want their money taken from them to support union political activities. *See*, *e.g.*, *Cummings v. Connell*, 316 F.3d 886 (9th Cir 2003); *Lutz v. Int'l Ass'n of Machinists & Aerospace Workers*, 121 F. Supp. 2d 498 (E.D. Va. 2000); *Masiello v. U.S. Airways, Inc.*, 113 F. Supp. 2d 870, 875 (W.D.N.C. 2000); *Penrod v. NLRB*, 203 F.3d 41 (D.C. Cir. 2000); *Tavernor v. Ill.*

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[3] *Available at* http://www.nilrr.org/node/54 (last visited May 15, 2008).

[4] *Available at* http://www.unionfacts.com/downloads/report.card Check.pdf (last visited May 15, 2008). The NLRB maintains no accessible index of such complaints broken down by the nature of the complaint. Instead, each individual case must be counted through an extremely time-consuming practice through the NLRB's computer database, *available at* http://mynlrb.nlrb.gov/portal/nlrb.pt?open=512&objID=204&mode=2&in_hi_userid=201&cached=true (last visited May 15, 2008).

Fed'n of Teachers, 226 F.3d 842 (7th Cir. 2000); *Shea v. Int'l Ass'n of Machinists & Aerospace Workers*, 154 F.3d 508 (5th Cir. 1998); *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir. 1987); *Damiano v. Matish*, 830 F.2d 1363 (6th Cir. 1987). Yet unions continue to drag their feet, fail to inform workers about their rights under *Beck* and other cases, and intimidate workers into paying to support political activism by the unions contrary to their actual desires. In *Davenport*, for example, after the State of Washington enacted a provision requiring a public employee union to obtain consent from workers before taking their money to pay for political activities, the union saw the amount of monies contributed for such activities drop by some 85%. Bob Williams, *WEA-PAC Donations Drying Up: Teachers Taking Their Political Dollars Elsewhere*, Evergreen Freedom Foundation, July 6, 1998. This number indicates the degree to which union members acquiesce in the violation of their expressive rights thanks to the peer pressure, intimidation, and dilatory tactics of labor unions.

Labor unions spend as much as $800 million per year on political campaigns, more than both the Republican and Democratic parties combined. Chavez & Gray, *supra*, at 29. The exact amount is hard to substantiate, however, because unions take pains to conceal the actual figures. According to one rough estimate, unions spent somewhere between $300 million and $500 million on the 1996 presidential election alone. Leo Troy, Nat'l Inst. for Labor Relations Research, *Freedom of Choice, Business Climates, and Right to Work Laws* 3 (2006).

These contributions are often made contrary to the views of the workers themselves. Although a 1996

poll revealed that 62% of union members opposed the AFL-CIO's decision to spend $35 million purchasing advertisements promoting the Democratic party, the union leadership went ahead with the plan. Chavez & Gray, *supra*, at 45. In fact, polls show that more than 40% of union members vote Republican. *See* Donald Beachler, *Race, God, and Guns: Union Voting in the 2004 Presidential Election*, 10 WorkingUSA: J. of Lab. & Soc'y. 311-25 (2007); Steven Greenhouse, *Workers United? Debating Union Dues and Don'ts*, N.Y. Times, Oct. 12, 1997, at 43, *available at* 1997 WLNR 4814951. Yet unions overwhelmingly support the Democratic party. *See* Thomas Stratmann, *How Reelection Constituencies Matter: Evidence from Political Action Committees' Contributions and Congressional Voting*, 39 J.L. & Econ. 603, 604 (1996) ("In the 1980s . . . labor PACs made almost 90 percent of their contributions to Democrats."). Typical of union attitudes toward political spending is a 1996 comment by Duke Zeller, a Teamsters official: "the union gave $56 million to Clinton . . . [despite the fact that] an independent, outside poll the union paid for showed the membership responses preferred Perot, then Bush, with Clinton in third place." F.C. Duke Zeller, *Devil's Pact: Inside the World of the Teamsters Union* 346 (1996).

This dissonance between union workers and their leadership leads to serious abuses when unions are empowered to seize workers' earnings and put them to use in political causes which the workers do not support.

C. Workers Are Being Denied the Protections Promised by This Court's Rulings in Dues and Fees Cases

In a series of clear decisions, this Court has held that labor unions may not use dues or agency shop fees to support political campaigns which workers do not wish to support. *See Abood*, 431 U.S. at 235; *Beck*, 487 U.S. at 745; *Hudson*, 475 U.S. at 301-02; *Lehnert*, 500 U.S. at 522.

Yet for decades, organized labor has engaged in a campaign of "massive resistance" against these decisions, consciously refusing to follow their mandates of these cases, or tailoring their responses to obstruct and frustrate the implementation of workers' rights. *See generally* Jeff Canfield, *What a Sham(e): The Broken Beck Rights System in the Real World Workplace*, 47 Wayne L. Rev. 1049 (2001); Brian J. Woldow, *The NLRB's (Slowly) Developing Beck Jurisprudence: Defending a Right in a Politicized Agency*, 52 Admin. L. Rev. 1075 (2000) (documenting refusal of unions and government to abide by *Beck* and similar cases). *See also Monson Trucking Inc.*, 324 N.L.R.B. 933, 935 (1997) (union failed to provide employee *Beck* rights notice); *Local 74, Serv. Employees Int'l Union*, 323 N.L.R.B. 289, 290 (1997) (same); *Chauffeurs, Teamsters, Warehousemen & Helpers Union, Local No. 377*, Case No. 8-CB-9415-1, 2004 WL 298352 (N.L.R.B. Feb. 11, 2004) ("I find that the membership application with the 'Notice' hidden on the second and third page did not serve to adequately apprise newly-hired employees of their *Beck* rights.").

> As one expert testified to Congress,
>
> > [t]he first hurdle that employees face [when asserting their rights not to subsidize union political activities] is that they are lied to by union leaders who purport to represent them. I use a stark term, and I mean it. That's right. They are lied to regularly, clearly as a matter of course.

Hearings Before the Subcommittee on Employer-Employee Relations of the Committee on Economic and Educational Opportunities, on H.R. 3580, The Worker Right to Know Act, Serial No. 104-66 (104th Cong. 2d Sess. 1996) at 111 (Statement of W. James Young).

Even the National Labor Relations Board has been criticized for participating in the unions' campaign of resistance toward worker rights established in *Beck*, *Abood*, and *Hudson*. *Cf. NLRB v. Ancor Concepts, Inc.*, 166 F.3d 55, 59 (2d Cir. 1999) ("[T]he Board stands out as a federal administrative agency which has been rebuked before for what must strike anyone as a cavalier disdain for the hardships it is causing."). The NLRB has adopted delay tactics so extreme that some cases asserting workers' rights under *Beck*, *Hudson*, and *Abood* have waited nearly a decade for resolution. *See*, *e.g.*, *Am. Fed'n of Television & Recording Artists*, 327 N.L.R.B. 474 (1999). Only in 1995 did the NLRB first apply the 1988 *Beck* decision, in *Cal. Saw & Knife Works*, 320 N.L.R.B. 224, 224 (1995), a case in which the NLRB determined that when workers demand an audit detailing how much of their money is spent on political campaigning, they are entitled only to the union's in-house audit, and not an independent audit. The District of Columbia Circuit later called this ruling inconsistent with "any rational

interpretation" of "*Hudson*'s 'basic considerations of fairness' language." *Ferriso v. NLRB*, 125 F.3d 865, 869 (D.C. Cir. 1997).

Given the politically weak positions of dissenting workers, the pervasive abuses of unions, the lack of protection in administrative agencies, and the fundamental importance of the expressive and associative rights at issue, protecting the individual's freedom to choose—and to dissent—in the environment of the unionized workplace must be the guiding principle in this case. *See also* Harry G. Hutchison, *Diversity, Tolerance, and Human Rights: The Future of Labor Unions and the Union Dues Dispute*, 49 Wayne L. Rev. 705, 717 (2003) (The "proper mooring" of "the union dues dispute" is "freedom of conscience.").

II

FREEDOM OF CHOICE OUGHT TO BE THE GUIDING PRINCIPLE IN JUDGING THE CONSTITUTIONALITY OF IDAHO CODE SECTION 44-2004

Unions throughout the country have repeatedly abused their power to suppress workers' freedom of speech by taking their wages for political purposes without their consent, failing to apprise them of their rights, establishing burdensome reimbursement procedures designed to deprive workers of their rights, and adopting other restrictive or dilatory tactics. Despite the success of Idaho's Right-to-Work laws in increasing employment and economic opportunity,[5]

[5] Idaho became a "Right-to-Work" state in 1986, *see* Idaho Code § 44-2001-2012, because the Legislature hoped to "to maximize (continued...)

Idaho legislators recognized that unions were still abusing their workers' First Amendment rights. In 2003, Idaho legislators amended section 44-2004 to establish a prophylactic to ensure security to workers' First Amendment rights. "The purpose of this legislation," explained the state Legislature in its statement of purpose,

> is to require labor organizations that engage in political activities to keep a segregated fund for political contributions. It further specifies that contributions to that fund will be on a voluntary basis and the contribution shall be made directly by the donor. It also prohibits payroll withholding of funds to be used for political purposes.

H.B. 329, 57th Leg., 1st Reg. Sess. (Idaho 2003). By prohibiting automatic deductions from government union employees' wages for political activities, section 44-2004 ensures that government unions cannot spend workers' money—whether union dues or agency fees of nonmembers—on political expression in violation of the desires of workers.

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[5] (...continued)
individual freedom of choice in the pursuit of employment and to encourage an employment climate conducive to economic growth." Idaho Code § 44-2001. The result was not only greater protection of individual rights, but also remarkable economic growth. *See* National Institute for Labor Relations Research, *Freedom to Associate of Necessity Means as Well Freedom Not to Associate*, *available at* http://www.nilrr.org/node/67 (last visited May 15, 2008). ("In the decade before its Right to Work law first took effect in 1986, Idaho's employment growth was barely more than half the national average, according to the U.S. Labor Department. But over the past two decades, Right to Work Idaho repeatedly topped the nation in job creation.").

On the other hand, the district court noted that section 44-2004(2) prohibits payroll deductions for political expenditures even if the worker at issue does consent to such deductions. *Pocatello Educ. Ass'n v. Heideman*, No. CV-03-0256-E-BLW, 2005 WL 3241745, at *1 (D. Idaho Nov. 23, 2005). While subsection 44-2004(1) allows a worker to consent to automatic deductions, subsection 44-2004(2) bars all deductions devoted to political campaigning, regardless of consent. Subsection 44-2004(3) does preserve the right of all workers to spend their money as they choose for political activities, but such a restriction might be an invalid violation of the right of consenting workers to devote their funds to the causes they choose if it places an unreasonably high obstacle in the path of such a choice. The proper application of strict scrutiny in this case therefore requires this Court to determine, not whether a labor union would find it more difficult or costly to obtain funds under section 44-2004 than in the absence of that law, but whether requiring a worker to pay funds directly to a union for political purposes as opposed to having that donation taken directly from his paycheck is an unconstitutionally severe burden.

CONCLUSION

Unions' long history of suppressing workers' First Amendment rights must not be tolerated. Where this Court has erected First Amendment protections for union members, unions attempt to chip away and erode those safeguards. In ruling on the constitutionality of section 44-2004, this Court should be guided by the principle of free choice. If that

provision imposes a severe burden on a worker's right to devote a portion of his earnings automatically to union political causes, it may violate the First Amendment; if, on the other hand, it imposes a minimal burden that is reasonable in light of the important purpose of protecting dissenting workers' rights, that provision should survive strict scrutiny. *See Davenport*, 127 S. Ct. at 2381-82 (upholding content-based restriction where closely related to protecting dissenters' rights and where there was no reasonable likelihood that opposing views would be censored). In either case, this Court must focus its analysis on protecting the right of individual workers to choose how their earnings are spent, and how their expressive rights are exercised.

DATED: May, 2008.

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