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

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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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The opinion of the United States Court of Appeals for the Ninth Circuit was issued on October 5, 2007, and is reproduced at Pet. App. 1-31. It is published at 504 F.3d 1053. The opinion of the United States District Court for the District of Idaho was issued on November 23, 2005, and is reproduced at Pet. App. 32-45. It is reported unofficially at 2005 WL 3241745. A prior unpublished decision of the court of appeals addressing petitioners' claim of immunity from suit in federal court was issued on February 3, 2005, and is reproduced at Pet. App. 49-51. It is reported unofficially at 123 Fed. Appx. 765, 2005 WL 271103. The unreported district court decision reviewed in the earlier appeal was issued on July 3, 2003, and is reproduced at Pet. App. 52-62.

JURISDICTION

The court of appeals entered judgment on October 5, 2007. Petitioners invoked this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of

speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances."

Section 44-2004, Idaho Code (Michie 2003), provides:

> (1) It shall be unlawful to deduct from the wages, earnings or compensation of an employee any union dues, fees, assessments, or other charges to be held for, transferred to, or paid over to a labor organization, unless the employee has first presented, and the employer has received, a signed written authorization of such deductions, which authorization may be revoked by the employee at any time by giving written notice of such revocation to the employer.
>
> (2) Deductions for political activities as defined in chapter 26, title 44, Idaho Code, shall not be deducted from the wages, earnings or compensation of an employee.
>
> (3) Nothing in this chapter shall prohibit an employee from personally paying contributions for political activities as defined in chapter 26, title 44, Idaho Code, to a labor organization unless such payment is prohibited by law.

Section 44-2602(e), Idaho Code (Michie 2003), provides: "'Political activities' means electoral activities, independent expenditures, or expenditures made to any candidate, political party, political action

committee or political issues committee or in support of or against any ballot measure."

Other relevant Idaho statutes appear at Pet. App. 63-82.

STATEMENT

The Idaho legislature in 2003 prohibited *all* state public employers – including political subdivisions such as counties, municipalities and school districts – from deducting contributions for political activities from their employees' earnings for transmission to a political committee or other entity authorized by the involved employee to receive the contribution. Four years later, the Ninth Circuit Court of Appeals invalidated this prohibition in part, holding that the legislature lacked authority to limit the authority of political subdivisions to make the proscribed deductions absent compliance with strict scrutiny standards. The court of appeals nevertheless acknowledged the legislation's validity as to "state" employers and, therefore, effectively held that political subdivisions themselves may close their payroll systems to political-activity deductions without violating the First Amendment. The district court had expressly reached both conclusions,

neither of which was challenged by the respondent labor organizations on appeal.[1]

This case thus presents a controversy mixed with First Amendment and federalism concerns. The Ninth Circuit strayed far afield from accepted First Amendment "forum" jurisprudence by incorporating a proprietary-regulatory distinction. That distinction is not to be found, or even remotely suggested, in this Court's forum-based decisions. The court of appeals' error in that regard derives from failing to distinguish between a state legislature's "regulation" of private and public entities. In the former, the legislature directly controls an entity possessing a First Amendment right; in the latter, the legislature defines a political subdivision's authority and thereby affects a relationship committed to the States themselves and, under the circumstances here, not subject to federal constitutional constraints. Nothing in the First Amendment precludes a state legislature from requiring its own governmental creations to take an action that, in the absence of such requirement, the political subdivision may take without infringing the Free Speech Clause.

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[1] Mark Heideman, the Bannock County Prosecutor, is also named as a respondent in this proceeding. County Prosecutor Heideman was sued below in his official capacity and did not appeal from the district court judgment. The term "respondents" as used in the text will refer only to the respondent labor organizations.

I. RELEVANT IDAHO LAW BACKGROUND

A. The Right To Work And Voluntary Contributions Acts

Over two decades ago, Idaho adopted the Right to Work Act, which declares as state policy that "[t]he right to work shall not be infringed or restricted in any way based on membership in, affiliation with, or financial support of a labor organization or on refusal to join, affiliate with, or financially or otherwise support a labor organization." 1985 Idaho Sess. Laws ch. 2, § 1 (codified at Idaho Code § 44-2001 (Michie 2003)) (Pet. App. 63). The statute implements this policy by, *inter alia*, prohibiting any requirement for the payment of "dues, fees, assessments, or other charges of any kind or amount to a labor organization" as a condition of employment. *Id.* (codified at Idaho Code § 44-2003 (Michie 2003)) (Pet. App. 64). It expressly authorizes employers, however, to deduct from employee compensation union dues, fees, assessments or other charges for payment to a labor organization if pursuant to a signed authorization by the employee. *Id.* (codified as amended at Idaho Code § 44-2004(1) (Michie 2003)) (Pet. App. 64). An amendment to the law ten years later clarified that its provisions apply "to all employment, private and public, including employees of the state and its political subdivisions." 1995 Idaho Sess. Laws ch. 178, § 2 (codified at Idaho Code § 44-2011 (Michie 2003)) (Pet. App. 67).

The Right to Work Act's provision related to employee compensation deductions remained unchanged until 2003, when the Voluntary Contributions Act ("VCA") was adopted. 2003 Idaho Sess. Laws chs. 97, 340 (codified at Idaho Code §§ 44-2601 to -2605 (Michie 2003)) (Pet. App. 68-72). The amendments added subsections (2) and (3) to § 44-2004, which now reads:

> (1) It shall be unlawful to deduct from the wages, earnings or compensation of an employee any union dues, fees, assessments, or other charges to be held for, transferred to, or paid over to a labor organization, unless the employee has first presented, and the employer has received, a signed written authorization of such deductions, which authorization may be revoked by the employee at any time by giving written notice of such revocation to the employer.
>
> (2) Deductions for political activities as defined in chapter 26, title 44, Idaho Code, shall not be deducted from the wages, earnings or compensation of an employee.
>
> (3) Nothing in this chapter shall prohibit an employee from personally paying contributions for political activities as defined in chapter 26, title 44, Idaho Code, to a labor organization unless such payment is prohibited by law.

Pet. App. 64. The term "political activities" referred to in the amendment was defined in the VCA to mean "electoral activities, independent expenditures, or

expenditures made to any candidate, political party, political action committee or political issues committee or in support of or against any ballot measure." *Id.* § 44-2602(e) (Pet. App. 69).

More generally, the VCA imposed restrictions on labor organization contributions for political activities. These restrictions included establishing a separate segregated fund to finance political activities; imposing disclosure requirements on solicitations for contributions to the fund; prohibiting the use of union dues for political activities or to defray the fund's administrative costs; and, consistent with the amendment to § 44-2004, requiring all employee contributions to the fund to be made by the labor organization's members directly and not to be remitted by an employer. Separate segregated funds were further required to register as political committees and to file financial reports under Idaho's election campaign statute. Idaho Code § 44-2605 (Pet. App. 72); *see id.* §§ 67-6601 to -6630 (Michie 2006).[2] The

[2] The legislation containing the VCA also amended one provision of the general campaign finance statute – Idaho Code § 67-6605 (Michie 2006) – that addresses the methods by which political committees may obtain contributions. 2003 Idaho Sess. Laws ch. 97, § 3. As modified, § 67-6605 states:

> Contributions shall not be obtained for a political committee by use of coercion or physical force, by making a contribution a condition of employment or membership, or by using or threatening to use job discrimination or financial reprisals. A political committee may solicit or obtain contributions from individuals as provided in chapter 26, title 44, Idaho Code, or as provided in section

(Continued on following page)

term "labor organization" in the VCA included "each employee association and union of employee of public and private sector employers" but excluded "organizations governed by the national labor relations act, 29 U.S.C. section 151, et seq. or the railway labor act, 45 U.S.C. section 151, et seq." *Id.* § 44-2602(d)(ii) & (iii) (Pet. App. 69). Finally, an uncodified provision of the session law applied the VCA only to contracts entered into after its effective date or renewals of then-existing contracts. 2003 Idaho Sess. Laws ch. 97, § 4.

B. Legislative Control Over Political Subdivisions

No dispute exists that the Idaho legislature possesses the authority, as a matter of state law, to limit the authority of state public employers to enter into payroll deduction arrangements with employees or their bargaining representatives. That conclusion

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> 44-2004, Idaho Code. A violation of the provisions of this section shall be punished as provided in subsection (b) of section 67-6625, Idaho Code.

Pet. App. 81-82. Section 67-6605 makes clear what a straightforward reading of § 44-2004(2) indicates: The limitation imposed under § 44-2004(2) extends to any payroll deduction for political activities and not merely those that an employee directs to a labor organization or a political committee associated with or created by a labor organization. *See* Idaho Code § 67-6602(p)(1) (Michie 2006) (defining "political committee" to include, *inter alia*, "any person specifically designated to support or oppose any candidate or measure"). The enforceability of § 67-6605, insofar as it refers to § 44-2004, rises or falls with the latter and therefore was not considered independently below.

follows from the more general rule that the legislature's authority under Idaho law is plenary except to the extent limited constitutionally. *Idaho Press Club, Inc. v. State Legislature*, 142 Idaho 640, 643, 132 P.3d 397, 400 (2006) ("'[o]ur State Constitution is a limitation, not a grant of power, and the Legislature has plenary powers in all matters, except those prohibited by the Constitution'"); *Smylie v. Williams*, 81 Idaho 335, 339, 341 P.2d 451, 453 (1959) ("[i]t must be remembered that our State Constitution is an instrument of limitation and not of grant and that the legislature has plenary power in all matters of legislation except where prohibited by the constitution"). This fundamental principle extends to control over state political subdivisions – here counties, cities and school districts. *See, e.g.*, *Thompson v. Engelking*, 96 Idaho 793, 802, 537 P.2d 635, 644 (1975); *Fenton v. Bd. of County Comm'rs*, 20 Idaho 392, 406, 119 P. 41, 46 (1911).

Indeed, rather than limiting legislative authority over such political subdivisions, the Idaho Constitution explicitly recognizes legislative primacy. The legislature thus is vested with the authority and responsibility to "establish . . . a system of county governments which shall be uniform throughout the state[ ] and by general laws . . . provide for township or precinct organizations." Idaho Const. art. XVIII, § 5. The constitution further specifies that "[c]ounty, township, and precinct officers shall perform such duties as shall be prescribed by law." *Id.* art. XVIII, § 11. Article XII, section 1 grants power to the legislature to enact

general laws for the incorporation of cities, towns and villages, and to alter, amend, or repeal such laws at any time. *See* Idaho Code § 50-201 (Michie 2000) (designating all municipal entities as "cities"). Article IX, section 1 directs the legislature to create and maintain a system of free, common public schools. Section 2 of that article commits immediate supervision of such schools to the State Board of Education whose "membership, powers and duties . . . shall be prescribed by law" – *i.e.*, by statute.[3] Insofar as it vests the legislature with virtually plenary authority over such subdivisions, the Idaho Constitution anticipates the need for substantial legislative discretion to address issues deemed of *statewide* concern and accordingly suited for uniform treatment.

The legislature, in turn, has exercised its plenary authority to structure the operation of state political

[3] A few, but presently immaterial, limitations are placed on these general allocations of authority to the legislature. *E.g.*, Idaho Const. art. XVIII, § 1 (recognizing counties in existence as of statehood); *id.* §§ 6, 10 (specifying county officers and composition of county commissions); *see also Kessler v. Fritchman*, 21 Idaho 30, 44-45, 119 P. 692, 697 (1911) (expressing agreement with the proposition that, by virtue of Idaho Const. art. XII, § 1, the legislature may modify charters under which cities were organized prior to the adoption of the Constitution only through special, and not general, laws). Counties and cities additionally have constitutionally conferred power to make local police, sanitary or other regulations, but exercise of this power must be consistent with the general laws adopted by the legislature. Idaho Const. art. XII, § 2; *see Rowe v. City of Pocatello*, 70 Idaho 343, 348-49, 218 P.2d 695, 698 (1950).

subdivisions. A county is deemed to be "a body politic and corporate, and as such has the powers specified in this title or in other statutes, and such powers as are necessarily implied from those expressed." Idaho Code § 31-601 (Michie 2006). Cities and school districts similarly are "bodies corporate and politic" whose powers are specified by statute. *Id.* § 33-301 (Michie 2001) (school districts); *id.* § 50-301 (Michie 2000) (cities). Counties, cities and school districts are subject to comprehensive statutory schemes that fill entire titles of the Idaho Code and address virtually every aspect of their operation. Prominent among those areas of legislative control is contracting authority – as the Idaho Supreme Court has held in various contexts.[4] The legislature also has spoken to public employee relations in several statutes. It has

[4] *See, e.g.*, *Firefighters Local 672 v. City of Boise City*, 136 Idaho 162, 166-67, 30 P.3d 940, 944-45 (2001) (contract entered into by city with national guard for firefighting and crash rescue services did not violate, *inter alia*, the Idaho Firefighters Collective Bargaining Act); *Gilmore v. Bonner County Sch. Dist.*, 132 Idaho 257, 260-61, 971 P.2d 323, 326-27 (1999) (state statutes control school district employment decisions, and building principal lacked authority to enter into "extra duty" contract with teachers); *Coeur d'Alene Lakeshore Owners and Taxpayers, Inc. v. Kootenai County*, 104 Idaho 590, 595, 661 P.2d 756, 761 (1983) (county did not violate public bidding requirements by entering into a contract for appraisal services since they involved exercise of special skills or technical learning); *McKay Constr. Co. v. Ada County Bd.*, 99 Idaho 253, 255-58, 580 P.2d 412, 414-17 (1978) (invalidating county contract for failure to comply with statutory requirements); *Reynolds Constr. Co. v. Twin Falls County*, 92 Idaho 61, 66, 437 P.2d 14, 19 (1968) (same).

authorized, for example, cities to establish a civil service system to promote employment decision-making on the basis of merit and performance and detailing required elements of the system. *Id.* §§ 50-1601 to -1610 (Michie 2000). Of immediate relevance here, it created a right to collective bargaining for firefighters employed by any political subdivision. *Id.* §§ 44-1801 to -1812 (Michie 2003).

II. PROCEEDINGS BELOW

A. District Court Proceedings

Respondents are five unions that represent public employees in Idaho and the Idaho State AFL-CIO. Shortly before the VCA-related session law was to take effect in 2003, they filed suit challenging the constitutionality of various provisions of the legislation, including its amendment to Idaho Code § 44-2002, and sought immediate injunctive relief. J.A. 17. The district court granted a temporary restraining order enjoining the legislation's implementation (Pet. App. 61), which was extended by later order until final disposition of the case (D.C. Doc. 28). In opposing the request for a temporary restraining order, the petitioner state officers asserted Eleventh Amendment immunity and moved to dismiss on that basis. D.C. Doc. 19. The district denied the motion in its order granting the temporary restraining order (Pet. App. 52), and petitioners unsuccessfully appealed that denial under the collateral order doctrine (Pet. App. 49).

Following completion of the first appeal, the parties filed cross-motions for summary judgment. D.C. Doc. 54, 67. Petitioners conceded the unconstitutionality under the First Amendment of various VCA provisions related to regulation of solicitations for "political activities" but not the unconstitutionality of the amendment to § 44-2004 regarding payroll deductions. J.A. 91. They further limited, as a matter of statutory construction, the prohibition against "political activities" deductions to employers not subject to the National Labor Relations Act or the Railway Labor Act given, most importantly, the exclusion of such employers from the definition of "labor organization" in the VCA. J.A. 91-92.[5] Although petitioners recognized that private employers not covered by the federal acts were subject to § 44-2004(2), they contended that respondents lacked standing to raise the interests of those employers' employees absent a showing that they represented any for collective bargaining purposes. J.A. 96-99. In petitioners' view, therefore, the case narrowed to the question whether § 44-2004(2) could be applied to the Idaho public employers consistently with the First Amendment. Respondents had previously submitted declarations

[5] Petitioners based their concession on the breadth of the term "political activities" as defined in the VCA, when read in light of the court of appeals' decision in *Montana Chamber of Commerce v. Argenbright*, 226 F.3d 1049 (9th Cir. 2000), and their conclusion that the definition's centrality to the statute's overall operation made severance inappropriate. J.A. 91; *see also* D.C. Doc. 67.1 at 3.

indicating that such amounts were being deducted from employee compensation for political activities. *See* J.A. 52-53, 55-56, 58, 64-65, 83-84.

The district court granted summary judgment in part to the petitioner state officers and in part to respondents. Pet. App. 46. It first held that respondents possessed standing to represent the interests of private sector employees by virtue of the State AFL-CIO's participation as a plaintiff. Pet. App. 36. On the merits, it reasoned that "[t]he First Amendment protects an individual's right to be free from government action, but does not create a right that the Government 'subsidize the exercise of' those First Amendment rights." Pet. App. 36 (quoting *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 549 (1983)). Applying this "subsidization" standard, the court concluded that the payroll deduction prohibition for political activities was valid with respect to state employees "where the State is incurring costs to set up and maintain the program" but could not be applied to private sector employees or those employed by local governments since the State did not bear the administrative burden attendant to making the deductions and since petitioners had not offered a rationale for the statute satisfying strict scrutiny standards. Pet. App. 36-38. In so holding, it acknowledged that "[c]ertainly any local governmental entity could decide on its own not to subsidize speech and accordingly refuse to provide a payroll deduction program." Pet. App. 38 n.3.

B. Court of Appeals Proceedings

The petitioner state officers appealed, challenging the district court judgment to the extent that it invalidated § 44-2004(2) as applied to political subdivisions – *i.e.*, to what the district court referred to as "local governments and school districts." Pet. App. 46. Respondents did not appeal from the judgment insofar as it upheld the statute's validity as "to employees of the State of Idaho where the State bears any part of the cost of setting up or maintaining the payroll deduction." Pet. App. 47. The Ninth Circuit affirmed.

The court of appeals examined the validity of the payroll deduction prohibition against both the "subsidization" approach used by the district court and "forum" principles. With regard to "subsidization," it stated that "[t]he nonsubsidy doctrine is premised on the rationale that the government is free to confer no benefit at all and is therefore entitled to condition the receipt of the benefit on speech or silence." Pet. App. 10-11. It observed that, although "[t]he parties appear to be in agreement" as to the district court's application of the doctrine to "payroll deductions for [state] employees[,]" the lower court correctly determined that "there is no subsidy by the State of Idaho for the payroll deduction systems of local governments." Pet. App. 11.

With regard to the forum doctrine, the Ninth Circuit began by summarizing the doctrine's basic elements and explaining that, notwithstanding its roots in cases which involved "public spaces" (Pet.

App. 12), "[a] 'forum' does not need to be a physical place" (Pet. App. 15). Here, it deemed "the relevant forum . . . [to] be the payroll deduction programs of the local governments." Pet. App. 16. The issue therefore became in the court's view whether, as petitioners contended, those programs constituted nonpublic fora subject to the reasonableness test identified in, most notably, *Cornelius v. NAACP Legal Defense & Education Fund*, *Inc.*, 473 U.S. 788 (1985), or whether, as respondents argued, "forum analysis does not apply at all because neither the payroll deduction programs nor the local workplaces are 'property' of the State of Idaho in any sense." Pet. App. 17. The court considered two "relationships" to decide which party was correct.

The first relationship identified by the court of appeals was that "between the government entity seeking to impose a free speech relationship and the forum in which it is imposed." Pet. App. 17. The Ninth Circuit interpreted this Court's precedent as "suggest[ing] that a forum may be subject to government control where the governmental entity maintains a proprietary relationship over the relevant property." Pet. App. 18. The court of appeals contrasted "proprietary" control to more general "regulatory" power by reference to *Consolidated Edison Co. of New York, Inc. v. Public Service Commission*, 447 U.S. 530 (1980), which it understood to establish the proposition that "the mere possession of legal authority to regulate an entity, without more, represents an insufficient level of control over that property to claim

the forum in the name of the State." Pet. App. 19. The court turned to the second relationship – that "between the State of Idaho and workplaces of local governments" – and held that petitioners had "failed to establish that the State of Idaho is the proprietor of the local workplaces or of local government payroll systems" and that, instead, the relationship with political subdivisions "resembles that of a regulator who possesses broad powers over them" analogous to *Consolidated Edison*. Pet. App. 20. It therefore rejected "Appellants' assertion that the payroll deduction programs of local governments are nonpublic fora belonging to the State." Pet. App. 25.

The court of appeals concluded by considering whether *Consolidated Edison*, which involved state regulation of a private utility's mail communications with its customers, was inapposite because "the instrumentalities of local governments are necessarily the instrumentalities of the State of Idaho, regardless of who 'owns' them." Pet. App. 25. It reasoned that "some" decisional support existed "for an alternative theory of forum analysis which evaluates the forum in light of the degree of control exercised by the government entity" and that under this theory "the question is not one of ownership or proprietorship but whether the government has exercised a sufficient degree of control over the forum such that it should be granted the right to make speech-restrictive rules." Pet. App. 26. In those cases, "one can argue that the state has a sufficient managerial interest in the resource to justify judicial deference to its rules."

Pet. App. 27 (citing, *inter alia*, *USPS v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981)).

The Ninth Circuit, however, found that series of cases distinguishable, since "[i]t is clear that the State of Idaho does not pervasively manage local government workplaces or local government payroll deduction systems" and since petitioner could not "point to any current or previous exercise of control over local governments' administration of their payroll systems, except for the subject statute." Pet. App. 29. The court added that "[t]he unique nature of the State's intervention therefore strongly suggests that the State's purpose here is exactly that against which the First Amendment protects – the denial of payroll deductions for the purpose of stifling political speech." Pet. App. 29. Consequently, while petitioners "established generally that the State of Idaho has ultimate power of control over the units of government at issue[,]" they did not show "that the State actually operates or controls the payroll deduction systems of local units of government[,]" and, in light of this fact, "the State has a relatively weak interest in preventing Plaintiffs from exercising their First Amendment rights as compared to the actual controlling entities." Pet. App. 30. The court thus held that, in the absence of actual "ownership" or pervasive management of political subdivisions' payroll systems, "[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.

SUMMARY OF ARGUMENT

I. Contrary to the Ninth Circuit's decision, this Court's First Amendment forum jurisprudence applies in determining the constitutionality of Idaho Code § 44-2004(2). Ordinary forum analysis is appropriate because governmental entities – here Idaho political subdivisions – control access to the relevant fora, their employee payroll systems. In discharging this gatekeeping function, they must comply with statutory constraints on their authority. One such constraint is § 44-2004(2). The court of appeals erred by fashioning a proprietary-regulatory distinction under the First Amendment that prevents a state legislature from exercising otherwise plenary control over political subdivisions to require actions that the subdivisions themselves could take without violation of the Free Speech Clause. This controversy instead must be resolved through application of well-established First Amendment forum principles.

A. The threshold inquiry is whether the payroll systems of Idaho political subdivisions are traditional public fora, designated public fora, or nonpublic fora. Traditional public fora consist of property dedicated to public use by tradition or government fiat for expressive activity. Payroll systems clearly fall outside this category because their purpose is to provide

for the accurate accounting and remittance of employee compensation; they do not now serve, and never have served, as a locus of expressive activity. For similar reasons, payroll systems are not designated public fora, which this Court has defined as nontraditional fora intentionally opened for expressive activity. The Court thus held in *Cornelius* that the federal workplace exists not to provide an arena for the exercise of First Amendment rights but to accomplish the employer's business. *Cornelius*'s reasoning, when applied to the payroll systems of Idaho political subdivisions, establishes that those systems are nonpublic fora. This result comports with decisions from various federal courts of appeals finding public-employer payroll systems nonpublic fora for charitable contribution purposes.

B. Access to a nonpublic forum may be denied or limited on grounds that are reasonable in light of the forum's purpose and otherwise viewpoint neutral. Prior decisions of this Court, including *Cornelius*, have established that it is reasonable for public entities to refrain from entangling themselves in political activities. Section 44-2004(2) falls squarely within that category of restrictions. The statute satisfies the viewpoint-neutrality requirement insofar as it imposes a categorical prohibition on the use of payroll deductions for any political activities. Public employers have no line-drawing discretion in implementing the statute. Section 44-2004(2) is therefore valid under applicable First Amendment forum standards.

C. The court of appeals' contrary conclusion derived from deeming the Idaho legislature a "regulator," not a "proprietor," of political subdivisions' payroll systems. The Ninth Circuit reached that conclusion despite this Court's precedent recognizing the authority of state legislatures to regulate access to forums managed by political subdivisions, beginning with *City of Madison Joint School District v. Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976), and continuing through *Davenport v. Washington Education Association*, 127 S. Ct. 2372 (2007). Analysis of these cases makes clear the fundamental point that a political subdivision must discharge its forum gatekeeper duties consistently with statutory directives. The Ninth Circuit erred in relying on *Consolidated Edison* and *International Society for Krishna Consciousness, Inc. v. Lee,* 505 U.S. 672 (1992) ("*ISKCON*"), for its proprietary-regulatory distinction. *Consolidated Edison* involved direct regulation of a private corporation's speech, while *ISKCON* was a straightforward application of forum principles that provides no assistance to the court of appeals' proprietary-regulatory theory.

II. The Ninth Circuit's use of the First Amend ment to vitiate state legislative control over political subdivisions cannot be reconciled with the long-standing rule that the United States Constitution ordinarily imposes no limits on how state legislatures may allocate powers and duties to political subdivisions. That core incident of federalism has received

substantial attention from this Court in contract-impairment and, most recently, equal protection contexts. These cases stand for the overarching principle that States have "extraordinarily wide latitude . . . in creating various types of political subdivisions and conferring authority on them." *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978). This principle also serves as an important consideration when construing preemption claims under federal statutes; *i.e.*, absent manifest congressional indication to the contrary, there is no restriction on state legislative prerogative to delegate the State's authority to political subdivisions.

The court of appeals' attempt to interpose the First Amendment between the Idaho legislature and local government entities that owe their existence to legislative action intrudes dramatically on the "science of government" that the Constitution leaves to the States. Under that approach, the legislature would have no alternative other than assuming pervasive control over all aspects of the operation of a political subdivision's payroll system if it desired to regulate one discrete practice. Whatever merit this approach may have from a policy perspective, it is a decision that the Constitution leaves to the States – not the federal judiciary – and that the First Amendment does not address at all.

ARGUMENT

I. FIRST AMENDMENT FORUM PRINCIPLES SUPPORT NEITHER THE EXISTENCE NOR THE CREATION OF A PROPRIETARY-REGULATORY DISTINCTION WHEN A STATE LEGISLATURE ACTS TO OPEN OR CLOSE A NONPUBLIC FORUM ADMINISTERED BY A POLITICAL SUBDIVISION

The distinction between the Idaho legislature's "proprietary" and "regulatory" status *vis-à-vis* the payroll systems of state political subdivisions drawn by the Ninth Circuit – and the concomitant conclusion that First Amendment forum principles simply do not apply – is predicated on the proposition that the local governments stand in the same relationship to the legislature, or the "State" in the court of appeals' terminology, as private actors. Nothing in this Court's forum jurisprudence suggests that conclusion. Instead, the relevant cases establish that a forum exists whenever a governmental body has gatekeeping authority over access to the forum whether physical or electronic. *Rosenberger v. Rector*, 515 U.S. 819, 830 (1995). Here, respondents do not dispute that the political subdivisions possess gatekeeper status or that the legislature possesses the power, as a matter of state law, to define the scope of their authority both generally and with respect to employee relations. This matter therefore presents a First Amendment claim governed by settled forum principles whose

application requires rejection of respondents' challenge to Idaho Code § 44-2004(2).

A. The Payroll Systems Of Idaho Political Subdivisions Constitute Nonpublic Fora

The threshold issue here is proper characterization of the relevant forum. Although the court of appeals held that First Amendment forum principles did not "apply," it recognized that the payroll systems of state political subdivisions themselves are fora. Pet. App. 16 ("[f]ollowing *Cornelius*, the relevant forum in this case would be the payroll deduction programs of local governments"). It did not determine, however, what type of forum the payroll systems embody. This Court's decisions leave no reasonable doubt that they are nonpublic fora.

The Court comprehensively reviewed the criteria controlling forum classification in *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998) ("*AETC*"). There, it rejected a First Amendment claim by an independent candidate for the House of Representatives that he had been excluded improperly from a debate sponsored by a state-run television network. The *AETC* Court quoted from *Cornelius* for the rule that three categories of fora exist: "'the traditional public forum, the public forum created by government designation, and the nonpublic forum.'" 523 U.S. at 677. "Traditional public fora[,]" it stated, "are defined by the objective characteristics of the property, such as whether, 'by long

tradition or by government fiat,' the property has been 'devoted to assembly and debate.'" *Id.* (quoting *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 45 (1983)). They "are open for expressive activity regardless of the government's intent" because "[t]he objective characteristics of these properties *require* the government to accommodate private speakers." *Id.* at 678 (emphasis added). Designated public fora do not arise by virtue of their longstanding association with expressive activities but, rather, "are created by purposeful governmental action." *Id.* at 677. A court therefore must examine "'the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum'" (*id.*) – *i.e.*, "to make the property 'generally available[ ]' . . . to a class of speakers" (*id.* at 678). The generally-available element is critical, since "[a] designated public forum is not created when the government allows selective access for individual speakers rather than general access for a class of speakers." *Id.* at 679. Remaining "governmental properties," if a forum at all, fall into the nonpublic forum category. *Id.* at 677.

Characterizing the forum status of the payroll systems at issue is straightforward under the general principles outlined in *AETC*. As this Court emphasized there, it "has rejected the view that traditional public forum status extends beyond its historic confines." 523 U.S. at 678. Respondents have never suggested that payroll systems are among such

traditional arenas for expressive activity; those systems exist instead to provide for the accounting and remittance of employee compensation and are attended by significant legal and administrative requirements. At a minimum, payroll managers must navigate through federal and state wage-and-hours laws; determine taxable income and payment of required withholding amounts to the appropriate jurisdiction; and provide guidance with respect to the selection, expense and use of various benefit plans. *See The Payroll Source* (Am. Payroll Ass'n 2007 ed.). Payroll deductions for non-tax or employee-benefit purposes increase this administrative burden. *Id.* at 9-2 ("[a]dding to the complexity of the payroll department's responsibilities, employees' paychecks are often subject to deductions other than those for federal, state, or local taxes and for the purchase of various employee benefits"). These activities are a byproduct of the sophisticated employer-employee relationship that predominates in both the private and public sectors. Payroll systems, like the workplace more generally, do not serve now, and never have served, as a locus of "expressive activity."

Respondents also did not suggest below that political subdivisions' payroll systems fall within the reach of the designated public forum category. The absence of a claim in that regard makes sense given the requirement that a governmental entity must "intentionally open[ ] a nontraditional forum for public discourse" for a designated public forum to be created. *Cornelius*, 473 U.S. at 802. Here, as with the

charitable-giving campaign at issue in *Cornelius*, payroll systems are not established "for purposes of providing a forum for expressive activity" even if it could be shown that "such activity occurs in the context of the forum" on occasion. *Id.* at 805. "The [state] workplace, like any place of employment, exists to accomplish the business of the employer." *Id.*; *see Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974) (plurality op.) (advertising card space on public-operated buses constituted nonpublic forum since "the city is engaged in commerce" and "must provide rapid, convenient, pleasant, and inexpensive service").

Consequently, as this Court reiterated in *AETC*, "the government does not create a designated public forum when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, 'obtain permission.'" 523 U.S. at 679.[6] Any other result

[6] Section 44-2004 exemplifies the permissive nature of payroll deductions. It allows, but does not compel, public employers to honor employee requests for dues or other union-related deductions. Employer permission is thus necessary to access the payroll system for the purpose of having a portion of an employee's wages paid directly to a labor organization in the form of union dues. It has never been argued successfully that First Amendment entitles an employee, or labor organization on an employee's behalf, to such access. *E.g.*, *Ark. State Highway Employees Local 1315 v. Kelly*, 628 F.2d 1099, 1102 (8th Cir. 1980) (no First Amendment-based obligation to maintain payroll deduction arrangement for union dues); *cf. City of Charlotte v. Firefighters Local 660*, 426 U.S. 283, 286 (1976) (equal protection

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would lead to disruption of "the principal function of the property" (*Cornelius*, 473 U.S. at 804) – which here is wholly divorced from "expressive activity" – and, conceivably, "an all-or-nothing choice" of entirely opening or closing the availability of employee-requested payroll deductions (*AETC*, 523 U.S. at 680). Payroll systems, for First Amendment forum-characterization purposes, are situated identically to the federal charitable-giving campaign in *Cornelius*, which the Court deemed a nonpublic forum, because of the direct connection between the opportunity for an organization to participate in the campaign and the opportunity for employees to have contributions to participating organizations paid through payroll deductions. *Cornelius*, 473 U.S. at 791 ("[c]ontributions may take the form of either a payroll deduction or a lump-sum payment made to a designated agency or to the general Campaign fund"); *see, e.g.*, *Boy Scouts of Am. v. Wyman*, 335 F.3d 80, 91 (2d Cir. 2003) (organization's challenge to its exclusion from participation

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challenge to public employer's refusal to provide payroll deductions for union dues rejected under a reasonableness standard, since "it is not here asserted and this Court would reject such a contention if it were made that respondents' status as union members or their interest in obtaining a dues checkoff is such as to entitle them to special treatment under the Equal Protection Clause"). So, too, respondents have never argued that the First Amendment entitles employees whom they represent to *mandatory* access to the payroll systems of political subdivisions for the purpose of having deductions made for political activities. The lack of such a claim directly counsels against characterization of those systems as other than nonpublic fora.

in charitable check-off program because of its policy concerning homosexuals "appears to be governed by two lines of First Amendment cases[,]" with "[t]he first deal[ing] with nonpublic forums and . . . exemplified by *Cornelius*"); *Neighborhood Cmty. Council v. Netsch*, 960 F.2d 676, 684-85 (7th Cir. 1992) (*Cornelius* was the "starting point" in characterizing the forum status of a statute regulating state government payroll deductions for charitable purposes, and the "forum" created by the challenged statute was nonpublic because, in part, "there is no indication that the Illinois legislature intended to open up state workplaces as fora available to any charitable organization" and "the fact that the Illinois statute allows only umbrella or qualified organizations to participate in the campaign provides a strong inference that the state did not intend the campaign to be open to all registered charitable institutions").[7]

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[7] The Ninth Circuit understood this Court's forum decisions to require a "balancing process" when determining the proper forum characterization of a political subdivision's payroll systems. *See* Pet. App. 30 n.13 (forum classification of payroll deduction systems "depend[s] heavily upon the nature of the government's interests in operating the payroll deduction system (as evidenced by stated, intent, policy, and practice) and whether the local government workplaces are compatible with the type of expressive activity embodied by politically-oriented payroll deductions"). That understanding is incorrect. As *AETC* makes clear, the three forum categories are separated by reasonably bright-line considerations, not by an amorphous interest-balancing standard. Governmental payroll systems plainly are not traditional public fora, and § 44-2004(2) itself

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B. The Prohibition Of Payroll Deductions By Public Employers For Political Activities Is Reasonable And Viewpoint Neutral

In its seminal First Amendment forum decision, *Lehman v. City of Shaker Heights*, *supra*, this Court held that advertising card spots on the buses operated by a municipal transportation system did not constitute a public forum. 418 U.S. at 303. It further held that the system's operator did not violate the First Amendment by declining a request by a state legislative candidate to rent a spot in conformance with a contractual provision which prohibited "political advertising" on the buses. *Id.* at 303-04. The Court recognized in connection with the latter holding that the presence of state action required "the policies and practices governing access to the transit system's advertising space . . . not be arbitrary, capricious, or invidious." *Id.* at 303. No such caprice existed in light of the possibility that "[u]sers would be subjected to the blare of political propaganda" and that "[t]here could be lurking doubts about favoritism[ ] and sticky administrative problems . . . in parceling out limited space to eager politicians." *Id.* at 304. "The city [thus] consciously . . . limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive

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negates the intent necessary to create a designated public forum.

audience" – all of which the Court deemed "reasonable legislative objectives." *Id.*

This Court crystallized the *Lehman* "reasonableness" standard in *Perry*, where it sustained against First Amendment challenge to a collective bargaining agreement provision granting the affected teachers' exclusive bargaining representative access to the school district's internal mail system and denying access to a rival union. It reasoned:

> We believe it is more accurate to characterize the access policy as based on the *status* of the respective unions rather than their views. Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves.

460 U.S. at 49; *see also id.* at 45 ("the state may reserve [a nonpublic] forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view"). The Court rejected the dissent's contention that the minority union's exclusion embodied viewpoint discrimination – *i.e.*, an attempt "to

suppress the [minority union's] views" – since "[t]he access policy applies not only to [the minority union] but to all unions other than the recognized bargaining representative" and since the dissent's approach would make it "equally imperative that any other citizen's group or community organization with a message for school personnel . . . also be permitted access to the mail system." *Id.* at 49 n.9. The dissent's approach, in short, proved too much.

Two Terms later, *Cornelius* explored the *Perry* formulation of the reasonableness standard at length. "Although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum . . . or if he is not a member of the class of speakers, for whose especial benefit the forum was created," this Court explained, "the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includable subject." *Cornelius*, 473 U.S. at 806. It found reasonable the federal officials' position that, given the objectives of the federal-employee giving campaign which prominently included providing "a means for traditional health and welfare charities to solicit contributions in the federal workplace" (*id.* at 806), denial of access to the campaign for "agencies seeking to affect the outcome of elections or the determination of public policy" was appropriate "to avoid the reality of and appearance of Government favoritism or entanglement with particular viewpoints" (*id.* at 807). In this regard, it disagreed

with the lower court that had acknowledged the legitimacy of "avoiding the appearance of federal support for partisan causes" as a basis for exclusion but had relied upon the federal tax code for the proposition that the excluded legal defense funds were not "political advocacy groups." *Id.* at 808. "The Government's decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation" (*id.*), and "avoiding the appearance of political favoritism is a valid justification for limiting speech in a nonpublic forum" (*id.* at 809). *See also Greer v. Spock*, 424 U.S. 828, 839 (1976) (policy that insulated the military "from both the reality and the appearance of acting as a handmaiden for partisan political causes or candidates" was reasonable basis for prohibiting partisan activities on Army base).

Lehman and *Cornelius* leave no doubt about the reasonableness of the prohibition in § 44-2004(2). That section separates Idaho public employers – but not public employees – from involvement in politics. It expressly disclaims any intent to limit direct contributions for "political activities" by the latter and otherwise does not purport to regulate their political activity. This Court has long distinguished between regulating a federal or state government employee's participation in partisan and non-partisan politics, but, as *Lehman* and *Cornelius* indicate, neutrality in both categories of activity by public entities themselves is a wholly legitimate objective for First Amendment purposes. *See, e.g.*, *United Pub. Workers*

v. Mitchell, 330 U.S. 75 (1947) (rejecting First Amendment challenge to Hatch Act's prohibition against federal employee's participation on political committees); *United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 556 (1973) ("unhesitatingly reaffirm[ing] the *Mitchell* holding that Congress had, and has, the power to prevent [federal employees] from holding a party office, working at the polls, and acting as party paymaster for other party workers"). This is a necessary corollary to the justification for authority to limit public employees' right to engage in partisan political activities – avoiding the public perception of lack of impartiality in the execution of those laws committed to the particular entity's implementation. *See id.* at 565 ("A major thesis of the Hatch Act is that to serve this great end of Government – the impartial execution of the laws – it is essential that federal employees, for example, not take formal positions in political parties, not undertake to play substantial roles in partisan political campaigns, and not run for office on partisan political tickets. Forbidding activities like these will reduce the hazards to fair and effective government"). It is therefore unsurprising that the Ninth Circuit acknowledged that "[i]n *Cornelius*, a restriction similar to that at issue here passed muster as a reasonable content-based restriction of speech in the context of a nonpublic forum." Pet. App. 17 n.8.

There is, as well, no question about the viewpoint neutrality of § 44-2004(2). The statute corresponds closely to the contract provision in *Lehman* – which

categorically proscribed *all* political advertising in bus card spaces. Section 44-2004(2) differs in this respect from *Cornelius* in which the Court determined that the plaintiff legal defense funds had raised a question of fact over whether their particular exclusions were the result of viewpoint discrimination. 473 U.S. at 811-13. In particular, the *Cornelius* Court held that excluding "controversial groups to avoid disruption and ensure success of the Campaign" served a "facially neutral and valid" objective but also found that the legal defense funds had offered evidence that "[o]rganizations that do not provide direct health and welfare services, such as the World Wildlife Fund, the Wilderness Society, and the United States Olympic Committee, have been permitted to participate." *Id.* at 812; *see AETC*, 523 U.S. at 680 ("just as the Government in *Cornelius* made agency-by-agency determinations as to which of the eligible agencies would participate in the [charitable-giving campaign], AETC made candidate-by-candidate determinations as to which of the eligible candidates would participate in the debate").[8] Section 44-2004(2),

[8] The dissenting opinions also addressed the viewpoint-discrimination issue with a focus on discriminating between otherwise similarly-situated speakers on the basis of their ideological perspective. *Id.* at 833 (Blackmun, J., dissenting) ("Government employees may hear only from those charities that think that charitable goals can best be achieved within the confines of existing social policy and the status quo"); *id.* at 836 (Stevens, J., dissenting) ("[t]he Government's desire to have its workers contribute to charities that directly provide food and

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in contrast, imposes a categorical prohibition against payroll deductions for *any* "political activities." No discretion exists for public employers to draw lines in executing the statute's mandate. As-applied viewpoint discrimination – the concern in *Cornelius* – accordingly is not an issue here. Section 44-2004(2), in sum, fits squarely within the permissible range of nonpublic forum restrictions.

C. The Ninth Circuit's Proprietary-Regulatory Distinction Has No Basis In This Court's Forum Jurisprudence

The Ninth Circuit's invalidation of § 44-2004(2) as to state political subdivisions, given its passing muster under ordinary First Amendment forum principles, depends on its conclusion that those principles simply do not "apply" in assessing the statute's constitutionality where local governments "control" or "manage" the payroll systems. The court of appeals therefore accepted respondents' assertion that, since state "'property'" was not involved, the state legislature "cannot assert an interest in protecting the fora." Pet. App. 17. The state legislature, in short, acted not as a "proprietor" but as a "regulator." Pet. App. 20. This Court's relevant forum precedent, however, offers no support to the proprietary-regulatory distinction drawn by the Ninth Circuit.

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shelter rather than to those that do not surely cannot justify an exclusion, of some but not other charities that do not do so").

Instead, four cases – three solely grounded in the forum doctrine and one predicated on more generalized First Amendment analysis – counsel precisely the opposite conclusion. Each reflects deference being given to state legislative control of access to fora superintended by local governments. The court of appeals' reliance on *Consolidated Edison* and *ISKCON* for its new First Amendment rule underscores the inappropriateness of introducing a proprietary-regulatory distinction into forum analysis.

1. The authority of a state legislature to open a forum for First Amendment purposes was recognized shortly after the seminal *Lehman* in *City of Madison Joint School District v. Wisconsin Employment Relations Commission*, *supra*. There, a school board was held by the state employment relations agency to have violated its obligation to negotiate exclusively with the designated collective bargaining representative of its teachers by allowing a teacher to speak at a meeting, otherwise open to the public, concerning a "fair share" proposal then part of ongoing negotiations over a new labor contract. 429 U.S. at 171-72. The agency's order eventually was affirmed by Wisconsin state courts. *Id.* at 173. This Court reversed. It declined to construe the teacher's statement as an attempt to negotiate with the board; rather, "[h]e addressed the school board [at an open public meeting] not merely as one of its employees but also as a concerned citizen, seeking to express his views on an important decision of his government." *Id.* at 174. "Where the State has opened a forum for direct

citizen involvement," the Court reasoned, "it is difficult to find justification for excluding teachers who make up the overwhelming proportion of school employees and who are most vitally concerned with the proceedings." The "State" opened the meeting pursuant to a Wisconsin statute "which requires certain governmental decisionmaking bodies to hold open meetings." *Id.* at 174 n.6. Justice Brennan, joined by Justice Marshall, wrote separately to concur in the judgment and, while finding "nothing unconstitutional about legislation commanding that in closed bargaining sessions a government body may admit, hear the views of, and respond to only the designated representatives of a union selected by the majority of its employees[,]" agreed with the principal opinion that "the First Amendment plays a crucially different role when, as here, a government body has either by its own decision or *under statutory command*, determined to open its decisionmaking processes to public view and participation." *Id.* at 178-79 (emphasis supplied). In the latter instance, "the state body has created a public forum dedicated to the expression of views by the general public." *Id.* at 179. The existence of a state open meeting law would have been irrelevant under Ninth Circuit and respondents' theory because the school district, not the State, "owned" the meeting place and conducted the meeting itself. However, that law had compelling, if not controlling, significance in *Madison*.

The second of the forum opinions is *Perry*, another labor relations dispute having state law-granted

exclusive representative status at its core. The collective bargaining relationship in *Perry* had been formed under Indiana statutes, and the challenged contract provision, which denied rival unions access to teachers' mailboxes, was consistent with the state employment relations board's construction of applicable unfair labor practice provisions. *Id.* at 40 n.3. This Court looked to the same state statute to find authorization for school districts to deny such access. *Id.* at 41 ("under Indiana law, the preferential access of the bargaining agent may continue only while its status as exclusive representative is insulated from challenge"). Moreover, the designation of the Perry Education Association as the teachers' exclusive bargaining representative – and the state law-grounded rights and duties attending such designation – formed the very basis for the determination that a rational, non-viewpoint-based ground existed for the mailbox-access denial. *Id.* at 48 (rejecting relevance of minority union's equal access prior to Perry Education Association's designation as exclusive bargaining agent); *id.* at 49 ("[w]e believe it is more accurate to characterize the access policy as based on the *status* of the respective unions rather than their views"); *id.* at 50 ("[u]se of school mail facilities enables PEA to perform effectively its obligations as exclusive representative of *all* Perry Township teachers").

It makes no sense in light of the integral role played by state law in *Perry* to argue, as respondents did in opposing *certiorari*, that the First Amendment

negates the responsibility of a local government to comply with such law in "the management of its own internal affairs." Br. of Respondents Pocatello Educ. Ass'n, *et al.* in Opp'n 7 n.6. *Perry*, like *Madison*, instead leaves no doubt that state law-grounded constraints on how a local government may "manage" a forum are directly relevant in drawing the constitutional calculus. Implicit in this Court's analysis is the principle that the First Amendment does not grant a dispensation from compliance with those constraints insofar as they require a state political subdivision to create a public forum or to deny access to a nonpublic forum. The political subdivision continues to "manage" the forum – *i.e.*, to serve as forum gatekeeper – but does so within the bounds of its statutory authority.

The third explicitly forum-grounded decision is *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993). The decision's opening sentence summarized the statute which controlled the school district action eventually challenged under the First Amendment: "New York Educ. Law § 414 (McKinney 1988 and Supp. 1993) authorizes local school boards to adopt reasonable regulations for the use of school property for 10 specified purposes when the property is not in use for school purposes." *Id.* at 386. The statute also prohibited use of school property for religious purposes. *Id.* at 387. The defendant school district exercised this statutory "empowerment" to open its facilities for two of the permitted uses, including allowing access for "social, civic and

recreational" purposes, but denied access under the religious-purpose exception to show a film series dealing with family and child-rearing concerns. *Id.* at 393. This Court found the denial violated the First Amendment because it was not viewpoint neutral; *i.e.*, it discriminated against speakers addressing "social, civic and recreational" issues from a "religious standpoint." *Id.* at 394. In reaching that determination, the Court plainly treated the statute – as had the lower courts – as defining the permissible scope of the limited public fora within the district with regard to public use of school property. *Id.* at 389-91. It further expressly held that the New York law's prohibition against the use of school facilities for religious purposes "was unconstitutionally applied in this case." *Id.* at 393. Justice Scalia, in concurrence, agreed on that point. *Id.* at 397 ("I join in the Court's conclusion that the District's refusal to allow use of school facilities for petitioners' film viewing, while generally opening the schools for community activities, violates petitioners' First Amendment rights (as does N.Y. Educ. Law § 414 (McKinney 1988 and Supp.1993), to the extent it *compelled* the District's denial") (emphasis supplied). *Lamb's Chapel* thus makes clear that ordinary forum principles "apply" to a political subdivision's opening or closing of a forum effected pursuant to legislative directive.

Finally, in *Davenport v. Washington Education Association*, *supra*, this Court rejected a First Amendment challenge to a Washington statute that had been adopted by referendum and allowed public

employers to enter into agency shop agreements with labor organizations and to remit the associated fees through payroll deductions. However, as drafted when the litigation commenced, the law prohibited use of fees paid by nonmembers "'to influence an election or to operate a political committee unless affirmatively authorized by the individual.'" 127 S. Ct. at 2377 (quoting Wash. Rev. Code § 42.17.760 (2006)). The litigation before the Court arose from state court actions alleging the statute's violation by labor organizations representing persons employed at public primary, secondary and higher education facilities. *See, e.g.*, Pet. for Writ of Cert. for State of Wash. at 7, *Davenport v. Wash. Educ. Ass'n*, 127 S. Ct. 2372 (2007) (Nos. 05-1589 & 05-1627). This Court held that its decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), did not foreclose a State from enacting legislation that provides greater rights to nonmembers forced to contribute agency shop fees to a union than required under the federal constitution; *i.e.*, "our repeated affirmation that courts have an obligation to interfere with a union's statutory entitlement no more than is necessary to vindicate the rights of nonmembers does not imply that *legislatures* (or voters) themselves cannot limit the scope of that entitlement." *Davenport*, 127 S. Ct. at 2379 (emphasis supplied). It then considered the labor organizations' contention that the statute "amount[ed] to unconstitutional content-based discrimination" (*id.* at 2380) and found various principles – including the subsidization rationale in *Regan v. Taxation With Representation of Washington,* 461

U.S. 540 (1983), and the nonpublic forum doctrine – "equally applicable to the narrow circumstances of these cases" (127 S. Ct. at 2381). "[T]he voters of Washington [did not] impermissibly distort[ ] the marketplace of ideas," this Court reasoned, "when they placed a reasonable, viewpoint-neutral limitation on the State's general authorization allowing public-sector unions to acquire and spend the money of *government* employees." *Id.* (emphasis supplied). The Court added that the statute, "though applicable to all unions, served [its] purpose through very different means depending on the type of union involved: It *conditioned* public-sector unions' authorization to coerce fees from government employees at the same time that it *regulated* private-sector unions' collective-bargaining agreements." *Id.* at 2382-83.

Plainly enough, if there were a "regulator"-based restriction on a legislature's control over political subdivisions of the kind created by the Ninth Circuit with regard to the exercise of subdivisions' authority to confer a benefit – here access to the subdivisions' payroll systems – both the analysis and the outcome in *Davenport* would have differed. This Court would have made distinctions between the statute's applicability to collective bargaining relationships with "state" public employers and to those with "local government" public employers – with the law upheld for one and invalidated for the other. Those distinctions were not made because the Ninth Circuit's First Amendment restriction on legislative power does not exist. Its attempt to import a proprietary-regulatory

distinction in the relationship between a state legislative entity and state political subdivisions cannot be reconciled with *Davenport*.

2. The Ninth Circuit cited *Consolidated Edison* for the proposition that "the generalized lawmaking power held by the legislature with respect to a state's political subdivisions does not establish that the state is acting as a proprietor with respect to the property of local governments." Pet. App. 22. It viewed *ISKCON* as supporting the related notion that First Amendment forum analysis is rooted in the metamorphosis of a governmental entity's role "from regulator to something akin to that of a private landowner, with at least some of the associated exclusionary rights." Pet. App. 17-18. The court of appeals' understanding of *Consolidated Edison* and *ISKCON*, at least in the context of this case, goes seriously awry.

Consolidated Edison was not a government forum case. It arose from direct state regulation of private speech: the proscription of a privately owned utility's right to include materials with monthly bills expressing its views "'on controversial issues of public policy'" such as the benefits of nuclear energy. *Consolidated Edison,* 447 U.S. at 533. As this Court observed, the regulation "limited the means by which [the utility] may participate in the public debate on [nuclear power issues] and other controversial issues of national interest and importance" and struck "at the heart of the freedom to speak." *Id.* at 535. It distinguished the rule before it, in response to the

lower state court's reliance on *Lehman* and *Greer*, because those cases involved situations where "the government may bar from its facilities certain speech that would disrupt the legitimate government purpose for which the property has been dedicated" (*id.* at 538) and where "the Court was asked to decide whether a *public* facility was open to all speakers" (*id.* at 539 (emphasis supplied)). The utility, however, had not asked "to use the offices of the Commission as a forum from which to promulgate its views" but instead sought "merely to utilize its own billing envelopes to promulgate its views on controversial issues of public policy." *Id.* at 539-40. The Court thus rejected "the Commission's attempt to restrict the free expression of a private party . . . by reliance upon precedent that rests on the special interests of a government in overseeing the use of its property." *Id.* at 540. *Consolidated Edison* says nothing relevant about the extent to which a state legislature may control the use of government property by political subdivisions created pursuant to statute and exercising statutory authority.

ISKCON arguably has more relevance, but not for reasons identified by the Ninth Circuit or in ways that further respondents' position. There, the constitutional grievance arose from "restrictions that the government seeks to place on the use of its property" – the terminals of three large airports. *ISKCON*, 505 U.S. at 678. As such, a critical component of this Court's analysis was the terminals' characterization for forum analysis purposes. *See id.* at 678-79

(describing the nature of and First Amendment standards associated with public, designated public and nonpublic fora). This Court agreed with the court of appeals that the terminals were nonpublic fora and, therefore, subject to content-based regulation that was viewpoint neutral and reasonable. *Id.* at 680 (relying in part on the fact that "given the lateness with which the modern air terminal has made its appearance, it hardly qualifies for the description of having 'immediately . . . time out of mind' been held in the public trust and used for purposes of expressive activity"). It then applied nonpublic forum standards to conclude that the port authority's ban on solicitation activities within the terminals was reasonable, relying in part on prior federal court decisions concerning the effect of "face-to-face solicitation" generally and the unique nature of airport usage where passengers "frequently are on tight schedules" and "unlikely to stop and formally complain to airport authorities" about solicitor overreaching. *Id.* at 684. It additionally pointed to record evidence indicating that solicitation activities on sidewalks outside the airport terminals would give "quite complete" access to the general public. *Id.* at 685.

ISKCON does not even hint at a rule that limits a legislative body from controlling, as the port authority did, access to governmental nonpublic fora established by a State and its political subdivisions. Indeed, respondents' argument proves too much, since a legislature is no more a "proprietor" of fora superintended by state agencies than it is for those "managed" by a

political subdivision. The regulating entity in *ISKCON* had been created by interstate compact to operate government property, including the airport. *See Int'l Soc'y for Krishna Consciousness, Inc. v. Lee,* 925 F.2d 576, 578 (2d Cir. 1991), *aff'd,* 505 U.S. 672 (1992). It cannot be read to mean that, had the port authority been a New Jersey political subdivision and had the state legislature directed it to prohibit interminal solicitation, the result would have differed. The port authority's action – limiting access to a nonpublic forum under its immediate supervision – would have been the same in both instances with respect to potential solicitors.

II. THE PROPRIETARY-REGULATORY DISTINCTION ADOPTED BY THE NINTH CIRCUIT CONTRAVENES THE SETTLED PRINCIPLE THAT THE FEDERAL CONSTITUTION DOES NOT REGULATE THE RELATIONSHIP BETWEEN STATE LEGISLATURES AND STATE POLITICAL SUBDIVISIONS AS AN ORDINARY MATTER

The Ninth Circuit's decision uses the First Amendment to drive a wedge between state legislatures and governmental entities whose duties and powers are subject to legislative prescription. This Court has made plain, however, that the United States Constitution typically plays no role in controlling the relationship between States and their political subdivisions. It is thus unsurprising that the

court of appeals identified no apposite authority for its expropriation of a state legislature's power to set the metes and bounds of permissible action by local governments where, as here, no dispute exists that the governments *themselves* would not be foreclosed constitutionally from taking the action – *i.e.*, where the local governments are not being directed to violate the Constitution. Consequently, even had the court of appeals been writing upon a truly clean slate of First Amendment forum law – and the preceding argument section shows that it was not – this general rule would militate directly against its incursion into the Idaho legislature's governance of state political subdivisions.

In *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court invalidated Alabama's "67-Senator Amendment" under the Equal Protection Clause. In so doing, it rejected the contention that a State could create, by analogy to the United States Senate, a legislative chamber consisting of one member from each county without regard to population districts among the counties. The Court reasoned, in essence, that counties and other political subdivisions were merely convenient allocations of the State's citizenry as a whole for purposes of providing governmental services:

> Political subdivisions of States – counties, cities, or whatever – never were and never have been considered as sovereign entities. Rather, they have been traditionally

> regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. . . . [T]hese governmental units are "created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them," and the "number, nature, and duration of the powers conferred upon (them) . . . and the territory over which they shall be exercised rests in the absolute discretion of the state." The relationship of the States to the Federal Government could hardly be less analogous.

Id. at 575 (citation omitted). This fundamental notion was not freshly coined in *Reynolds* and had been applied in various contexts previously.

Chief Justice Taney, for example, explained in *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), when affirming on political-question grounds the circuit court's refusal to consider evidence which challenged the legitimacy of Rhode Island's government, that "[n]o one, we believe, has ever doubted the proposition, that, according to the institutions of this country, the sovereignty in every State resides in the people of the State, and that they may alter and change their form of government at their own pleasure." *Id.* at 47. Almost 60 years later in *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907), the Court relied on the States' constitutionally-unimpaired discretion over their political subdivisions to sustain the consolidation of two cities against contract-impairment

and due process claims deriving from altered taxation duties:

> Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. . . . The state, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation.

Id. at 178-79. The Court adhered to this rationale when it upheld Depression-Era legislation, aimed at ameliorating the impact of municipal insolvency, against a contract-impairment claim brought by bondholders whose original debt instruments were replaced by refunded bonds. *Faitoute Iron & Steel Co. v. City of Asbury Park*, 316 U.S. 502, 509 (1942) ("so far as the federal Constitution is concerned, the taxing power of a municipality is not even within its own control – it is wholly subordinate to the unrestrained power of the state over political subdivisions of its own creation").

Subsequent to *Reynolds*, this Court declined to enlist the Equal Protection Clause to overturn state

legislative action directed to the composition or powers of political subdivision in *Sailors v. Board of Education*, 387 U.S. 105 (1967), and *Holt Civic Club v. City of Tuscaloosa*, *supra*. *Sailors* presented the question whether a State's determination to fill county school board positions through selection by delegates from local school boards rather than through ordinary elections violated the one-person-one vote doctrine. This Court held that the delegate-selection process did not, stressing a State's "vast leeway in the management of its internal affairs" and the non-legislative nature of the county boards. 387 U.S. at 109. It also found the one-person-one-vote doctrine inapplicable in *Holt*, which involved a claim directed to a statute giving extraterritorial effect to certain aspects of a municipality's law but without the simultaneous extension of the franchise, and again emphasized "the extraordinarily wide latitude that States have in creating various types of political subdivisions and conferring authority on them." 439 U.S. at 71.[9]

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[9] Several post-*Reynolds* cases have held the Equal Protection Clause violated by state law provisions that imposed limits on political subdivision authority. *Hunter v. Erickson*, 393 U.S. 385 (1969) (city charter amendment singling out for elector approval, as opposed to simple city council approval, ordinances that regulated real estate transactions on the basis of, *inter alia*, race); *Washington v. Seattle Sch. Dist.*, 458 U.S. 457 (1982) (initiative adopted for the purpose of prohibiting local school boards from bussing students to address *de facto* segregation); *Romer v. Evans*, 517 U.S. 620 (1996) (referendum that amended state constitution to prohibit any branch of government from

(Continued on following page)

The rule that the state legislatures possess the right to assign new duties to, or to withdraw existing duties from, political subdivisions also serves as an important consideration when construing federal statutes. Thus, in *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991), this Court construed the term "State" in the state authority provision of Federal Insecticide, Fungicide, and Rodenticide, 7 U.S.C. § 136v(a), to include local ordinances. It reasoned, in part, that "[t]he exclusion of political subdivisions cannot be inferred from the express authorization to the 'State[s]' because political subdivisions are components of the very entity the statute empowers" (501 U.S. at 607) and that a contrary construction would demand a "clear and manifest indication that Congress sought to supplant local authority" (*id.* at 611).

A similar conclusion was reached in *City of Columbus v. Ours Garage and Wrecker Service, Inc.*,

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protecting gay, lesbian or bisexual individuals from discrimination on the basis of sexual orientation). The common, and ultimately dispositive, factor in these cases is the imposition of a special burden on a class of individuals to obtain legislative or, in *Romer*, both legislative and judicial protection against discrimination. As Justice Blackmun later observed with respect to *Hunter v. Erickson* and *Seattle School District*, the constitutionally animating feature was, aside from specifically targeting on the basis of race, the challenged laws "working a structural change in the political *process*" and not "simply repealing the right to invoke a judicial . . . remedy." *Crawford v. Bd. of Educ.*, 458 U.S. 527 (1982) (Blackmun, J., concurring); *see also Romer*, 517 U.S. at 631 ("the amendment imposes a special disability upon [homosexuals] alone").

536 U.S. 424 (2002), where the Court interpreted the term "State" in 49 U.S.C. § 14501(c)(2)(A) – a provision of the Interstate Commerce Act which exempts from preemption "the safety regulatory authority of a State with respect to motor vehicles" – to include municipalities adopting safety-related regulations pursuant to a grant of state legislative authority. This Court acknowledged that the case was "a closer call than *Mortier*" because the general preemption provision in 49 U.S.C. § 14501(c)(1) referred to both States and their political subdivisions (*id.* at 433) but nevertheless still concluded that congressional clarity required under *Mortier* was absent. It quoted the earlier case for the principle that "'local governmental units are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion'" and reiterated that "[w]hether and how to use that discretion is a question central to state self-government." *Id.* at 437.

Most recently in *Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004), the Court held that a section of the Telecommunications Act of 1996, 47 U.S.C. § 253, which preempts state and local laws "prohibiting the ability of any entity" to provide telecommunications services, did not apply to a Missouri statute eliminating the authority of political subdivisions to offer telecommunications services for sale. It reasoned that reading the term "entity" to include political subdivisions not only would generate a "sufficient promise of futility and uncertainty to

keep us from accepting it" but also found the "complementary principle" in *Mortier* and *Columbus* to support the same conclusion. *Id.* at 140. "[T]he liberating preemption[,]" the Court observed, "would come only by interposing federal authority between a State and its municipal subdivisions." *Id.*[10]

These decisions, taken separately and in the aggregate, counsel strongly against equating Idaho

[10] The Tenth Circuit in *Utah Education Association v. Shurtleff*, 512 F.3d 1254 (10th Cir. 2008), *pet. for reh'g filed*, No. 06-4142 (Jan. 22, 2008), applied arm-of-the-State decisions, which deemed counties and other political subdivisions not entitled to invoke Eleventh Amendment immunity, to conclude "that Utah counties, cities, and school districts are independent from the state for the purposes of First Amendment analysis, and consequently, the case law addressing government speech restrictions on third party property, rather than on the government's own property, controls." *Id.* at 1263; *see also* Pet. App. 23 & n.11. The issue here, however, is not whether Idaho political subdivisions are "agents" or arms of the State for Eleventh Amendment purposes but whether the First Amendment creates a barrier between the legislature and entities subject to, for present purposes, plenary legislative control. They are distinct issues. *See Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 47 (1994) ("But ultimate control of every state-created entity resides with the State, for the State may destroy or reshape any unit it creates. '[P]olitical subdivisions exist solely at the whim and behest of their State,' . . .yet cities and counties do not enjoy Eleventh Amendment immunity") (citation omitted). The Tenth Circuit's arm-of-the-State analysis has possible force here only if one assumes that a State must "own" a nonpublic forum administered by a political subdivision before the legislature may impose access limits without satisfying some form of heightened scrutiny. That premise is incorrect for the reasons discussed above.

counties, cities and school boards to private entities as respondents' understanding of extant forum jurisprudence dictates. Just as construing the term "entity" in the Telecommunications Act's preemption provision would "interpos[e]" a federal statute between a State and its political subdivisions, so too would respondents have this Court employ federal common law to interpose the First Amendment between the Idaho legislature and political subdivisions whose very *existence* derives from statute.

Such a result is strikingly odd, since the legislature has ultimate say over the employment practices of political subdivisions and, if it so chose, could centralize control over the administration of political subdivision payroll systems in a state-wide agency. That the legislature has opted to effectuate a general policy against entanglement of payroll systems with the political process through surgical rather than broadsword means represents precisely the type of public policy judgment left to the States by the Constitution. *See Hughes v. Superior Ct.*, 339 U.S. 460 (1950) (no First Amendment violation occurred when a state court enjoined picketing which had as its object preferential hiring on the basis of race; "[r]egulation may take the form of legislation, e.g., restraint of trade statutes, or be left to the ad hoc judicial process, e.g., common law mode of dealing with restraints of trade[,]" and "[t]he form the regulation should take and its scope are surely matters of policy and, as such, within a State's choice"). The Constitution generally, and the First Amendment specifically, do not burden state legislatures with the

Hobson's choice of regulating access to a political subdivision's forum either completely or not at all.

The quintessential policy nature of the Idaho legislature's determination to proceed as it did was lost upon the Ninth Circuit. It wrote that "[t]he unique nature of the State's intervention" in § 44-2004(2) embodied "exactly that against which the First Amendment protects – the denial of payroll deductions for the purpose of stifling political speech" does not support a contrary conclusion. Pet. App. 29. The court of appeals' observation was made despite the fact that the statute was upheld with respect to state employees and that political subdivisions admittedly can adopt the same limitation without First Amendment violation.

Also unclear is why, as the court of appeals additionally suggested, a local government prohibition on payroll deductions is less suspect than a legislative prohibition or why a legislature's "interest" in controlling a specific type of payroll deduction is entitled to less weight. Here, the Idaho legislature surely possessed as much interest in having *any* Idaho governmental entity divorced from the appearance of political involvement as a particular local government does. Part and parcel of the reasonableness standard is legislative discretion to determine not only the substantive scope of a particular regulation but also whether the regulation embodies a policy judgment of sufficient importance to warrant statewide applicability. *Cf. Madison*, 429 U.S. at 178 (Brennan, J., concurring in judgment) ("[c]ertainly in the context of Wisconsin's adoption of the exclusivity

principle as a matter of state policy governing labor relations between state bodies and unions of their employees, '(t)here must be a limit to individual argument in such matters if government is to go on'").

The Ninth Circuit's judge-made vision of preferable public policy – allowing political subdivisions to make access determinations independent of legislative constraints – directly intrudes into "the science of government" (*Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 226 (1821)) reserved for the political branches. This Court rebuffed a like incursion in *Holt Civic Club* where the parties challenging the extraterritorial-effect statute "suggest[ed] a number of 'constitutionally preferable' governmental alternatives to Alabama's system of municipal police jurisdictions." 439 U.S. at 73. "From a political science standpoint," the Court responded, "appellants' suggestions may be sound, but this Court does not sit to determine whether Alabama has chosen the soundest or most practical form of internal government possible." *Id.* at 73-74. Rather, "[a]uthority to make those judgments resides in the state legislature, and Alabama citizens are free to urge their proposals to that body." *Id.* at 74.

The same is true here. Indeed, this case presents an arguably more extreme instance of judicial second-guessing because the court of appeals' approach leads to the curious result of "liberating" a political subdivision from being required to do that which, in the absence of a statutory direction, the subdivision may do as a matter of discretion without violating the

First Amendment – *i.e.*, deny access to its payroll system on reasonable, viewpoint neutral grounds.

CONCLUSION

The court of appeals' judgment should be reversed.

Respectfully submitted,

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May 2008