No. 07-869

In The Supreme Court of the United States

BEN YSURSA, in his official capacity as 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 FOR THE STATES OF UTAH, COLORADO, FLORIDA, INDIANA, IOWA, MARYLAND, NEW HAMPSHIRE, AND TEXAS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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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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INTEREST OF *AMICI*

Government has long regulated the collection of political contributions in government workplaces. As early as 1876, Congress passed legislation prohibiting executive officers and employees who were not presidential appointees "from requesting, giving to, or receiving from, any other officer or employee of the government any money or property or other thing of value for political purposes." *Ex parte Curtis*, 106 U.S. 371, 371 (1882). The Court observed that a multitude of reasons supported the constitutionality of the statute: promoting efficiency and integrity in the discharge of official duties; maintaining proper discipline in public service; protecting employees against compelled contributions through fear of dismissal; assuring that good employees are not forced out of public service, nor poor ones retained, based on their contributions; and avoiding the need for increased pay to cover compelled contributions. The concerns Congress addressed in 1876 are no less valid today, and they are no less valid as to state and local government employees than as to federal workers.

These concerns have given rise to a considerable body of law permitting governments to regulate First Amendment activity based on the nature of the government forum where the activity occurs. The question presented here is whether the First Amendment permits a state government to apply the same limitations to the fora of its political subdivisions that it can constitutionally apply to its own. The

Ninth Circuit Court of Appeals answered that question in the negative, rejecting the easily applied, bright line forum analysis in favor of a newly created "pervasive management" test.

The issue is important to the *Amici* States for two reasons. First, the Ninth Circuit's answer deprives them of an essential feature of their sovereignty: the principle that local government entities exercise only such governmental powers as their creating State, in its absolute discretion, entrusts to them. Second, if the First Amendment prevents States from restricting their political subdivisions from allowing the use of payroll deductions for political purposes, the constitutionality of numerous state statutes controlling other political activity by local government employees is called into question.

SUMMARY OF ARGUMENT

I. The First Amendment, as applied to the States through the Fourteenth Amendment, prohibits government from abridging the freedom of speech. Its focus is two-fold: freedom of speech and abridgement. Nothing in the amendment suggests that identical speech, in similar contexts, is entitled to different protection depending on whether the source of the abridgement is a State itself or a subdivision over which the State holds plenary power. Instead, precedent looks to the nature of the forum where the speech occurs: public, limited public, or nonpublic.

Applying the forum analysis ensures that identical speech is given the same protection across the range of fora that are of the same nature. To make First Amendment protection dependent on whether the State acts as proprietor or in its plenary authority to regulate the operation of its political subdivisions is a logical anomaly.

In this case, the payroll deductions concededly could be banned by the subdivisions themselves without First Amendment consequence. Yet the Ninth Circuit's decision holds that the same deductions, in the same forum, cannot be prohibited by the State because it is acting as regulator rather than proprietor. While this distinction makes sense when the State is dealing with a private entity, such as a regulated utility over which its power is limited, it makes no sense where the State is regulating the political subdivisions through which it speaks.

II. The Ninth Circuit's decision has implications beyond the context of payroll deductions. If the First Amendment is held to bar States from regulating the collection of voluntary political contributions by the States' subdivisions, the numerous state statutes that restrict other forms of political activity in subdivision workplaces cannot be distinguished. Many statutes go beyond prohibiting solicitation or receipt of political contributions to broad bans on any work for or contributions to political organizations and candidates by local government employees, and some statutes penalize violations with dismissal from government employment or even criminal sanctions.

For these statutes to be constitutional under the Ninth Circuit's rationale, the States would have to pervasively manage the personnel function of each of their political subdivisions – a requirement that is unprecedented in law and unworkable in practice.

ARGUMENT

I. BECAUSE STATES SPEAK THROUGH THEIR POLITICAL SUBDIVISIONS, THE SAME CONSTITUTIONAL STANDARDS APPLY WHETHER THEY ARE REGULATING SPEECH IN THEIR OWN OR THEIR POLITICAL SUBDIVISIONS' FORA.

This Court's precedents have long recognized that "[p]olitical 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." *Reynolds v. Sims*, 377 U.S. 533, 575 (1964); *accord City of Columbus v. Ours Garage and Wrecker Serv., Inc.*, 536 U.S. 424, 433 (2002); *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 607-08 (1991). The subdivisions' subordinate status is not altered by their ownership or management of real and personal property in pursuit of the functions the State executes through them. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907). "The number, nature, and duration of the powers conferred upon these

corporations and the territory over which they shall be exercised rests in the absolute discretion of the state." *Id.* Because its authority over its subdivisions is plenary, a State, "at its pleasure, may modify or withdraw all such powers," even to the extent of destroying the subdivision altogether. *Id.*

While State powers, including legislative control of municipalities, must be exercised within the constitution's relevant limitations, *Gomillion v. Lightfoot*, 364 U.S. 339, 344-45 (1960), *Hunter* "continues to have substantial constitutional significance in emphasizing the extraordinarily wide latitude that States have in creating various types of political subdivisions and conferring authority upon them." *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978). These precedents focus the analysis of a statute's constitutionality on the right protected by the federal constitution. If the right can be regulated consistent with the constitution, it is within the State's authority to do so – for itself and for its political subdivisions.

Contrary to *Hunter* and *Holt*, the Ninth Circuit concluded that "the State's broad powers of control over local government entities are solely those of a regulator." *Pocatello Educ. Ass'n v. Heideman*, 504 F.3d 1053, 1065 (9th Cir. 2007). The court initially focused on a factor clearly rejected in *Hunter*: the political subdivisions' ownership of property independent of the State. *Id.* Conceding "that the forum doctrine's stated roots in property rights has been subject to some criticism," *id.* at 1066, the court found

"support in the case law for an alternative theory of forum analysis which evaluates the forum in light of the degree of control exercised by the government entity." *Id.* Concluding that Idaho pervasively manages neither local government workplaces nor their payroll deduction programs, the court held the Idaho statute unconstitutional.

The Ninth Circuit's "pervasive management" test not only abrogates the essence of State sovereignty as defined by these cases, but it is also unworkable in operation. It allows for inconsistent application of constitutional criteria, invites litigation over an infinite variety of management styles, and upsets this Court's settled standards for speech in government fora.

Requiring a State to pervasively manage a political subdivision before it can impose a concededly constitutional regulation on speech shifts the focus from the right protected to factors that are irrelevant to the right itself. It renders the First Amendment a conditional protection. If a State chose to pervasively manage a small, rural school district, for example, while permitting a large, urban district to exercise a large measure of self-management, it could regulate identical speech in the first district, but not in the second – even though the second district could impose the same regulations under its own authority. The resulting balkanization of First Amendment protection leaves States unable to address state-wide problems by means of constitutionally compliant legislation, a result that disserves the First Amendment both in

theory and in practice. If States are barred from regulating First Amendment rights in their political subdivisions, they are equally barred from protecting them.

As articulated in the Ninth Circuit decision, the pervasive management standard gives little guidance on what degree of management qualifies as pervasive. Must the State pervasively manage all administrative functions of the subdivision? If the State pervasively manages, for instance, the personnel function but not the payroll, can it legislate constitutionally compliant regulations on the payroll system? Can it pervasively manage *only* the payroll system? To what extent can interdependent administrative functions be isolated for purposes of the pervasive management test? If a State has once pervasively managed a political subdivision but later ceased to do so, can it ever reclaim its authority, or is the ceding of authority a one-way rachet that forever precludes the State from exercising its sovereign powers? The endless permutations in degree and style of management will trigger an equally endless quantity of litigation to determine the boundaries of this new standard – an unnecessary burden, given that the Court has already provided clear guidance on the constitutionality of First Amendment regulation in government workplaces under forum analysis principles.

Focusing the First Amendment inquiry on the right itself also places the proprietary/regulatory distinction in proper perspective as articulated by

this Court. A State does not have sovereign power over private entities, even if it pervasively regulates them. This is the teaching of *Consolidated Edison*: heavily regulated, privately owned businesses do not lose their essentially private character simply because they are subject to State regulation. *See Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n*, 447 U.S. 530, 534 n.1 (1980). Political subdivisions do not share the essential characteristic of private ownership with regulated businesses. Placing them on equal footing for First Amendment purposes obliterates the fundamental distinction between them.

Recognizing the fundamental nature of political subdivisions as State instrumentalities resolves the question of whether a State can regulate the subdivisions' use of payroll deductions in a manner that does not offend the First Amendment. The plaintiff labor organizations have not argued that, under a forum analysis, the payroll systems of political subdivisions are anything other than nonpublic fora. A speaker's access to a nonpublic forum is subject to reasonable, content-based regulation. "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." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983). Such distinctions, while impermissible in a public forum, "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." *Id.* And the restriction "need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation." *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 808 (1985). Under *Cornelius*, "avoiding the appearance of political favoritism is a valid justification for limiting speech in a nonpublic forum." *Id.* at 809.

Here, the labor organizations agree that Idaho's statute passes constitutional scrutiny as applied to the State's own payroll. There is no basis for a contrary conclusion where the subdivisions carry out the State's functions.

II. HOLDING IDAHO'S STATUTE UNCONSTITUTIONAL WOULD RENDER OTHER STATE RESTRICTIONS ON POLITICAL ACTIVITY IN LOCAL GOVERNMENT WORKPLACES CONSTITUTIONALLY SUSPECT.

That state statutes enjoy a presumption of constitutionality is a "postulate of constitutional adjudication." *New York v. O'Neill*, 359 U.S. 1, 6 (1959). The presumption applies to the numerous state statutes restricting political activity in political subdivisions. Unless the First Amendment interest underlying those statutes can be distinguished from the First Amendment interest animating the challenged Idaho statute, there is no reason to treat them differently. No distinguishing factor is apparent on the face of the statutes; each reduces political activity and enhances

political neutrality in local government workplaces. If the Idaho statute fails for lack of pervasive management, every State will be required to validate its own statutory restrictions by showing that it pervasively manages each of its political subdivisions. Because the test relies on factors extraneous to the substance of the First Amendment, its application will result in inconsistent protection of First Amendment rights, provoking a resort to litigation by the parties affected.

The range of statutes addressing political activity in local government workplaces demonstrates the importance of this issue to the States. California, for example, prohibits school officers and employees, during working hours, from soliciting or receiving political contributions to support or defeat ballot measures that would affect their working conditions, including pay, hours, retirement, and civil service.[1] Connecticut proscribes political activity of classified municipal employees while on duty or when performing compensated services.[2] Delaware explicitly prohibits the New Castle County Auditor from engaging

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[1] Cal. Educ. Code § 7056(a) (West, Westlaw with urgency legislation through Ch. 12 of 2008 Reg. Sess. and Ch. 6 of 2007-08 Third Ex. Sess., and Props. 98 and 99).

[2] Conn. Gen Stat. Ann.§ 7-421(b) (West, Westlaw through 2008 Supplement to Conn. Gen. Stats., and amendments to, and repeals of, existing classified sections of Conn. Gen. Stats. by all Public Acts of 2008 January Special Sess.)

in the county's partisan political activities or affairs.[3] Illinois forbids classified officers and employees of Cook County from being concerned in any manner with soliciting, receiving, or paying contributions "for any party or political purposes whatever."[4] Indiana bans city managers from participating in partisan political activities that would impair their performance as professional administrators.[5] Under Kansas law, county civil service employees who work for or contribute to political organizations or candidates are subject to discharge from employment.[6] Louisiana law broadly prohibits civil service employees of cities with a population of over 100,000 from making contributions, directly or indirectly, for any political organization or purpose;[7] it further prohibits civil service employees in Rapides Parish from either contributing to any party, faction, or candidate, or participating in political activity.[8] Massachusetts law subjects certain

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[3] Del. Code Ann. tit. 9, § 1401(d) (West, Westlaw through 76 Laws 2008, ch. 214. Revisions to 2008 Acts made by Delaware Code Revisors were unavailable at time of publication).

[4] 55 Ill. Comp. Stat. Ann. 5/3-14033 (West, Westlaw through P.A. 95-718 of 2008 Reg. Sess.).

[5] Ind. Code Ann. § 36-4-12-6 (West, Westlaw through 2008 Public Laws approved and effective through 5/9/08 (except for P.L. 3-2008 and P.L. 146-2008)).

[6] Kan. Stat. Ann. § 19-4315 (West, Westlaw through End of 2007 Reg. Sess.).

[7] La. Rev. Stat. Ann. § 33:2429.B (West, Westlaw through 2008 Second Ex. Sess.).

[8] La. Rev. Stat. Ann. § 33:2454.A(1)(a) (West, Westlaw, through 2008 Second Ex. Sess.).

city employees to criminal sanctions, including prison time, for directly or indirectly soliciting, giving, or receiving contributions to political parties or candidates for city office.[9] Minnesota penalizes, by dismissal from service, the direct or indirect involvement of municipal civil service employees with solicitation or receipt of contributions for any political purpose or party.[10] Mississippi law deems participation in political activity by certain municipal civil service employees cause for removal.[11] Pennsylvania prohibits members and employees of county boards of health from participation in political conventions and other specified political activities.[12] Under Tennessee law, officers and employees of certain cities may not contribute to the campaign funds of candidates in city elections under threat of misdemeanor conviction, forfeiture of their positions, and five-year ineligibility for city employment.[13] Utah prohibits municipal officers and employees from engaging in political campaigning or solicitation during office hours and from using municipal equipment while engaging in

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[9] Mass. Gen. Laws Ann. ch. 43, § 92A (West, Westlaw through Ch. 100 of 2008 2nd Annual Sess.).

[10] Minn. Stat. Ann. § 44.15 (West, Westlaw current with laws of 2008 Reg. Sess., Chs. 151 through 164).

[11] Miss. Code Ann. § 21-31-7 (West, Westlaw through 2007 First Reg. Sess.).

[12] 16 Pa. Cons. Stat. Ann. § 2193.1 (West, Westlaw through Act 2005-96 (End)).

[13] Tenn. Code Ann. § 6-35-413(c) and (d) (West, Westlaw through 2007 First Reg. Sess.).

political activity, and applies similar restrictions to county officers and employees.[14] And in West Virginia, a county sheriff or correctional officer is forbidden from engaging "in any political activity of any kind, character or nature whatsoever, except to cast his vote at any election" and may not act as an election judge "in any municipal, county or state election."[15] The First Amendment impact of these statutes, reduction of political activity in local government workplaces, is functionally indistinguishable from the impact of the Idaho statute.

This Court has repeatedly recognized that States create political subdivisions to carry out State functions. If a State could pervasively manage those functions at the local level, it would have no need for subdivisions. By failing to recognize this reality, the Ninth Circuit's test demands the impossible, i.e., that

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[14] Utah Code Ann. §§ 10-3-1108 (municipal officers and employees) and 17-33-11 (county officers and employees) (West 2004).

[15] W. Va. Code Ann. §§ 7-14-15(a) (deputy sheriffs) and 7-14B-15(a) (correctional officers) (West, Westlaw through end of 2008 Reg. Sess.). Section 7-14-15(a) has been held constitutional when interpreted to proscribe nine specific political activities: holding party office, working at the polls, acting as a party paymaster, organizing a political party or club, actively participating in partisan fundraising, becoming or campaigning for a partisan candidate for elective office, actively managing the campaign of such a candidate, and serving as a delegate, alternate, or proxy to a political party convention. *Weaver v. Shaffer*, 170 W.Va. 107, 114, 290 S.E.2d 244, 251 (1980).

States duplicate the very functions they have delegated to the subdivisions to perform on their behalf or be barred from exercising their discretion over the number, nature, and duration of powers they delegate. It strips the States of an essential attribute of their sovereignty, introduces operational inefficiencies in State governance, and promotes inequalities in the application of constitutional safeguards. The number of statutes addressing political activity in subdivision workplaces demonstrates the States' concern that their power, as delegated, is exercised in a politically unbiased and evenhanded manner congruent with First Amendment protections. Imposing an unachievable standard thwarts that objective.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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